MINUTES OF THE MEETING
BUSINESS AND LABOR COMMITTEE
49TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

March 28, 1986

The meeting of the Business and Labor Committee was called to order by Chairman Bob Pavlovich on March 28, 1986 at 3:30 p.m. in Room 312-2 of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Kitselman and Rep. Driscoll, who were excused by the Chairman.

CONSIDERATION OF SENATE JOINT RESOLUTION NO. 1: Senator Towe of District 46 appeared as sponsor of this bill. He stated this is the one thing the Legislature can do in this special session with some impact on insurance. We will set up an interim committee, listen to trial lawyers, and see if they can come up with a solution. It is an enormously complex problem, and we have to come up with some solutions. There are fifty-three separate solutions by the Montana Medical Association, and we have to find out which ones are effective and which ones aren't, and why. This can't be done under the pressure of a special session and probably not even in a regular session. We can't even agree on language in the constitutional amendment. There are three main problems to address: insurance problems, effectiveness of various tort reforms, and general questions involving public and private liability.

PROPONENTS: Jerry Loendorf, representing the Montana Medical Association, stated they believe this resolution would address solving the problems as they see them. They believe the resolutions should be adopted. Looking at it from the standpoint of health problems, there are some limitations of insurance, especially in obstetrics, particularly in smaller areas. A lot of people have to go to larger areas for that service, requiring travel, because doctors in the smaller areas are not willing to do this service. Each provision would take time to look at, and it would have some effect on liability insurance. He presented written testimony, which is attached as Exhibit 1. The Medical Association will voluntarily give any information that they can, and they suggested the Legislature should get information from anybody who is involved.

There were no other proponents and no opponents present. Rep. Spaeth closed the hearing on behalf of Senator Towe, and stated he agreed with Senator Towe's comments.

DISCUSSION OF SENATE JOINT RESOLUTION NO. 1: Rep. Schultz asked Rep. Spaeth about the high cost of insurance, and Rep. Spaeth replied that is the problem that we are dealing with.

The committee would be working for what kind of action could be taken for the state of Montana to lower the cost. That would be one of the main actions of the committee to recommend to the Legislature in the next session. The other problem is availability.

Rep. Ellerd asked Rep. Spaeth how much is appropriated. Rep. Vincent answered that there is a feed bill in the Senate, and they haven't taken any action. It would be more than an interim study. Rep. Vincent said it could be $8,000, $10,000, $12,000 or maybe more. If there is going to be a study, it has to be done right.

Rep. Brandewie asked Rep. Spaeth if when these appointments are made, is this committee going to be made up of all attorneys, or will ordinary people also be on it. Rep. Spaeth replied that there are no ordinary people. However, he did not know who would be appointed, and that it should be at the discretion of the leadership. He hoped it would not be only attorneys.

Rep. Vincent stated that Rep. Marks and he had worked together to try to make a good balance. It will be put together very carefully.

Rep. Wallin stated they had been hearing the word Pfost a lot and he would like to get a copy of it. This is attached as Exhibit 2.

Rep. Thomas addressed Rep. Spaeth and felt that the three things are very broad and encompassing, and he wondered if it was too broad. Rep. Spaeth replied that he felt it has to be broad because the problem is not known.

Rep. Thomas asked Rep. Vincent to explain what needed to be done. Rep. Vincent said the committee itself will sit down and draw up perimeters. Someone will say this is very broad. They will have to set up a work plan.

Rep. Simon asked Rep. Spaeth about unavailability and cost issues and wondered if Rep. Spaeth thought the way this is drawn it restricts the committee. Rep. Spaeth replied that the NOW, THEREFORE clauses are broad enough to take care of those problems and it is the main portion. Paul Verdon, Counsel, questioned page 3, lines 4 and 5 regarding attorney fees for defense counsel and wondered if there would be a problem with plaintiff counsel. Rep. Spaeth replied that the theory is that in almost every instance the plaintiff counsel is contingent to arrangement.

DISPOSITION OF SENATE JOINT RESOLUTION NO. 1: Rep. Kadas made the motion of BE CONCURRED IN, question being called for, and motion PASSED unanimously.

ADJOURN: There being no further business to come before this committee, the hearing adjourned at 4:00 p.m.

Representative Bob Pavlovich
Chairman

DAILY ROLL CALL

BUSINESS AND LABOR COMMITTEE

49th LEGISLATIVE SESSION -- 1986
SECOND SPECIAL SESSION

Date 3/28/86

SJR 1

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Pavlovich, Chairman	✓		
Rep. Les Kitselman, V-Chairman			✓
Rep. Bob Bachini	✓		
Rep. Ray Brandewie	✓		
Rep. Jan Brown	✓		
Rep. Jerry Driscoll			✓
Rep. Robert Ellerd	✓		
Rep. William Glaser	✓		
Rep. Stella Jean Hansen	✓		
Rep. Marjorie Hart	✓		
Rep. Ramona Howe	✓		
Rep. Tom Jones	✓		
Rep. Mike Kadas	✓		
Rep. Vernon Keller	✓		
Rep. Lloyd McCormick	✓		
Rep. Jerry Nisbet	✓		
Rep. James Schultz	✓		
Rep. Bruce Simon	✓		
Rep. Fred Thomas	✓		
Rep. Norm Wallin	✓		

STANDING COMMITTEE REPORT

March 28, 1986

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE JOINT RESOLUTION NO. 1

☐ do pass ☒ be concurred in ☐ as amended
☐ do not pass ☐ be not concurred in ☐ statement of intent attached

Rep. Bob Pavlovich Chairman

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF INSURANCE-RELATED PROBLEMS.

THIRD reading copy (BLUE color)

Exhibit 1
March 28, 1986
SJR 1
Senator Towe

MONTANA MEDICAL ASSOCIATION POSITION ON - Interim Legislative Committee on Liability Insurance	March 27, 1986

A. Support For Interim Committee & Senate Joint Resolution 1:

Regardless of the position taken by the Legislature on the question of constitutional amendments, the Montana Medical Association strongly supports and urges the creation by this Special Session of the Legislature of:

- A bi-partisan Interim Committee of the Legislature
- Properly funded and staffed
- With powers of subpoena
- Involving legislators willing to seriously study very complex issues

for the purpose of fully investigating, reporting, and preparing legislation regarding the problems of the cost and availability of various forms of insurance throughout the State of Montana.

The Montana Medical Association urges that, because of the critical nature of such a Committee, legislators from both parties join in support of the measure.

The Association's motive for supporting such legislation is that we wish to present to you facts which we believe will show a serious reduction in available medical services -- especially in the obstetrical field -- in the face of malpractice premiums which are nearly $40,000 per year in certain specialties. We believe that you should hear any contrary evidence or conclusions which others might reach in light of our data or data which they present.

B. The Critical Nature Of Such a Committee

In a certain sense, such Committee may be of equal importance to that of any constitutional amendments. The reason lies in the value of such a Committee under all possible circumstances involving amendements.

If one or more constitutional amendments are referred to the voters, then such a Committee would provide a focal point for debate and play an instrumental role in assisting the public in reaching a decision on any ballot proposition.

If such amendments are not referred to the voters or are rejected by the voters if referred, then such a Committee would provide a critical forum for available legislative alternatives for the 1987 Session.

If such amendments are passed or rejected by the voters, such a Committee would be a critical repository for the facts which would lend support to any Legislative choices made in 1987.

Whether one believes that the legislature only need act rationally or whether one believes they must show a compelling state interest for certain legislative changes, there is no substitute, as a basis for legislation, for calm, reasoned decisions of the legislature based on a thorough investigation of the facts.

C. Suggestions Offered To This Committee.

The Montana Medical Association offers the following suggestions to this Committee for the implementation of such an Interim Committee:

- That each major element of the private sector provide -- at their own cost -- in advance of scheduled hearings, a full Report of their position on major issues associated with the liability issue and the facts as best they can gather them in support of their position, including any specific legislative proposals which the Committee should consider

- That the staff of such a Committee review such material and the Committee announce in advance some of the questions to which it wishes an answer

- That in such instances where the Committee believes certain information to be available and proper for disclosure, that subpoenas be issued to the parties having control of such information, under such terms as will be fair to those subpoened.

For example, if the question of attorney fee limitations will be an issue, it is apparent that the legal profession will be asked how much it collects from the parties on each side of a law suit. Rather than such a Committee being told during hearings that such information is not available, the legal profession should collect that information in advance of such hearings.

Or, if the medical profession claims that in fact insurance carriers are not raising premiums because of falling interest rates, let them prepare the proof and bring it forward for scrutiny. Likewise, if the trial lawyers believe the contrary, let them bring their proof forward.

D. Why The Montana Medical Association Believes Such A Committee Is Essential. The Montana Medical Association and Montana physicians believe that the insurance cost and availability problem has been and will seriously affect the delivery of medical care in Montana.

1. The Major Concerns Of Physicians. The major concerns of physicians are not unlike those of other groups and individuals in Montana.

The major concerns of physicians are the end results from the increasing high cost of medical liability insurance which renders its economical unavailable, and its shrinking availability at any price. Those end results, of concern to all in Montana, are:

> ..increased medical costs to patients where insurance is actually or economically available, because the costs of insurance are passed on to the patient
>
> ..reduced availability of medical services where insurance is not actually or economically available, because the costs of insurance cannot or should not be passed on to the patient

The Montana Medical Association has -- over a significant period of time -- attempted to come to grips with the problems of liability insurance as they pertain to physicians. Since 1976, there has been a regular on-going effort that has extended to many states in the Union.

Much data is available, but there is insufficient time to present it to you here today, even though such information would aid you in your deliberations:

- Opinion surveys of Montana citizens on liability issues and specific types of legislation
- Opinion surveys of Montana physicians on liability issues and how their practice of medicine has been adversely affected
- Economic and actuarial studies regarding the impact on the cost of insurance from various tort reform proposals
- The personal testimony, in written form, of many physicians, showing how their practice has and will be limited by ever-increasing costs of insurance
- Legislation from a wide variety of other states and suggested legislation for Montana which can have an impact on the cost and availabilty of insurance
- Specific, in-depth data on all medical liability insurance carriers operating in Montana

An example of the data you'll see is the fact that Montana obstetricians are now paying an average of $36,700 per year for $2 million/$4 million in liability coverage.

Even when purchasing from their own carriers -- carriers owned by the physicians themselves -- at lower and insufficient levels of coverage -- $1 million/$3 million -- the cost is an average of $27,800. Those costs have increased by 174% since 1982.

The result as to that specialty and others is that doctors are altering and intend to alter the way they conduct their practice.

If premiums substantially increase over the next few years

- 24% of Montana's physicians intend to retire early;
- 5% plan move to a larger community;
- 44% plan to avoid high risk procedures;
- and 11% plan to cease seeing emergency room patients.

These claims are serious, but you do not have time this week to evaluate their accuracy, nor hear from others who might disagree. Rather, an interim committee of the legislature should hear from all segments of Montana as to what the true facts are as to cost and availability of insurance.

The Montana Medical Association is prepared to lend expert assistance to such a Committee in its determination of the facts essential for sound legislative decisions.

We are providing this Committee with three examples of the type of work which the Montana Medical Association is prepared to furnish such a Committee:

- The Report Of The Professional Liability Committee Of The Montana Medical Association On Proposed Legislation

- Part One of an extensive survey of Montanans and Montana Physicians on questions involving professional liability insurance

- A Report from the Montana Medical Legal Panel on the 415 claims against 565 physicians 197 hospitals from 1977 - 1985

The Montana Medical Association believes it can contribute much from its lengthy study of these matters, which will have broad applicability to all areas of insurance, but which the press of time during this session prohibits.

A simple example of this involves some of the claims which have been made during this Special Session. Some argue that dollar limits on damage will have no impact on premiums; other urge that such dollar limits will dramatically solve everyone's problem. As with most matters, the truth is somewhere between.

The Medical Association has available to it statistical reports and techniques which make possible the computation of the dollar savings available from such legislation. We will share that with such a Committee. We will produce scientific and actuarial data which allows computation of the dollar savings, if any, from other forms of legislation.

We again urge your adoption of Senate Joint Resolution No. 1.

THE HEALTH CARE CRISIS IN MONTANA:

Our Montana Physicians And The Public Speak Out - Part One

THE HIGHER COST AND REDUCED AVAILABILITY OF MEDICAL SERVICES

G. Brian Zins, Executive Director
Montana Medical Association
2021-11th Avenue
Helena, Montana 59601

March, 1986

SUMMARY OF SURVEY RESULTS - PART ONE

A. THE GROWING CRISIS: Medical Malpractice Suits and Awards

Whatever the validity of their conclusion, an overwhelming portion of Montanans believe that there is a growing crisis with malpractice suits and awards in this country.

As to Montana citizens alone, fully 85% of Montanans so agree -- and 57% agree so strongly -- with only 8% disagreeing.

% Agreeing Malpractice Crisis - Montanans	
Agree Strongly	56.50%
Agree Somewhat	28.75%
Disagree Somewhat	5.25%
Disagree Strongly	2.75%
Not Sure	6.75%

As to Montana physicians, the balance of this Report reflects their agreement with this proposition, as shown by the alteration that has taken place in their medical practice -- and will take place to a higher degree if the trends continue.

B. CLAIMS ULTIMATELY LACKING MERIT: What Percentage Of Medical Malpractice Claims Against Physicians Involve Actual Medical Malpractice?

While incidents of medical malpractice are known to occur, it is clear that a large part of the:

- public
- physicians
- expert Panelists reviewing claims

confirm the available statistical evidence that a significantly large percentage of medical malpractice claims brought against physicians DO NOT involve medical negligence on the part of those physicians:

- Statistical indicators suggest that approximately 71% of medical malpractice claims do not involve the negligence of physicians
- Eighty-six percent (86%) of all Montana physicians believe that less than 25% of the claims against physicians involve such malpractice.
- Only twenty-six percent (26%) of the Montana public believes suits against physicians are usually justified
- During the first seven years of operation of the Montana Medical Legal Panel, 78% of the physicians with claims against them had the claims disposed of in their favor.

Montana Physician Opinion

% Of Claims Resulting From Medical Negligence

Less Than 10%	50.3%
10% - 24%	35.3%
25% - 49%	9.1%
50% - 74%	2.9%
75% - 100%	.3%
No Response	2.2%

% Suits Against Physicians Justified - Public

National	Montana
43%	26%

C. THE HARM TO PATIENTS FROM THE LEVEL OF MALPRACTICE PREMIUMS AND UNJUSTIFIED LAWSUITS: How Has And Will The Level Of Malpractice Premiums In Montana Or Physicians' Concern Over Being Sued Alter The Manner In Which They Practice Medicine?

Because of large premium increases and the fear of unjustified lawsuits within the last few years, 82% of Montana physicians have taken actions in limiting their practices -- and other steps -- which have reduced the availability of medical services in Montana and otherwise altered the medical field.

If premiums substantially increase over the next two or three years, 92% of Montana physicians intend to take further steps in the same direction:

Montana Physician Opinion

Specific Past And Future Alterations Of Practice

	Past Alteration	Future Alteration
Reduced Level of Insurance	6.1%	9.4%
Cancel Insurance	2.5%	2.6%
Referred More Cases	40.2%	30.6%
Increased Fees	41.9%	66.7%
Avoid high risk procedures	43.0%	43.8%
Order extra lab tests, x-rays, or other diagnostic procedures	63.1%	41.5%
Cease seeing emerg room patients	4.0%	11.4%
Cease seeing first time patients	1.1%	3.3%
Early retirement	7.7%	24.1%
Move to larger community	1.1%	5.0%
Other Methods Of Alteration	11.3%	12.9%

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1. INTRODUCTION

A. THE SURVEYS. In December, 1985 the Montana Medical Association sent a written opinion survey to Montana physicians concerning their beliefs and feelings concerning the problems of the cost and availability of insurance. The Association received responses from 726 of the 1151 (63%) physicians active in the practice of medicine by the cutoff date for tabulation of the survey results.

This material focuses on some of the results of that survey, with full survey results being released in three Reports because of the large amount of data involved.

Where available, other survey results on the same or similar questions are presented, including results based on surveys of public attitudes on the same questions, both nationally and as to the Montana public.

A summary of survey results is found in "SUMMARY OF SURVEY RESULTS" A discussion of the survey results and a comparison to other surveys, nationally and in Montana, is set out in "2. SURVEY RESULTS."

Various Appendices are included with these survey results. [1]

B. THE BACKGROUND OF MONTANA PHYSICIANS.

As part of the survey, certain demographic questions were asked as to the location of their practice within the community, the county in which they were located, the type and specialty of practice they have, and the number of years they were in practice, among others. [2]

Based on the survey, Montana physicians have the following characteristics: [3]

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[1] Appendix A provides background on the survey data quality and the analytic and statistical methods used in the survey. Appendix B provides the actual tabulated results of those portions of the survey included in this Report. Appendix C presents the results of other surveys involving national and Montana physician and public attitudes.

[2] For in-depth results, see Appendix B, Montana Physician Survey, December, 1985.

[3] The survey response was slightly weighted towards the rural areas of Montana, but not beyond the normal ranges of statistical deviation necessary for an accurate survey. The rural population of physicians is 23.5% of the physician population, but 29.9% of the respondents in the survey were from rural areas, i.e. rural practitioners responded 6.4 percentile points higher than their representation in the state. See Appendix A, "Analytic And Statistical Methods". The urban areas of the survey had a deviation average of 1.6 percentile points from their actual physician representation, with a range of from .5 to 2.5 percentile points.

Type Of Practice
- 80% of the physicians have just an office-based practice
- 10% of the physicians have just a hospital-based practice
- 3% of the physicians are in government employment

- 50% of the physicians are just in group practice
- 40% of the physicians are just in solo practice

Years Of Practice
- 77% of the physicians have been in practice less than 20 years
  - 49% have been in practice less than 10 years
  - 10% have been in practice more than 29 years
- 23% of the physicians have been in practice more than 20 years

Place Of Practice. Physicians in Montana are located:
- 30% in rural areas
- 70% in urban areas

Specialty Of Practice For Insurance Purposes
- 7% in obstetrics
  - 1% in family practice and obstetrics/gynecology
  - 6% in obstetrics/gynecology
- 26% in other surgery
- 27% in general practice/family practice
- 38% in other medicine
- 2% no response to question or no insurance

2. SURVEY RESULTS

A. THE GROWING CRISIS: Medical Malpractice Suits and Awards

Whatever the validity of their conclusion, Montanans generally believe that there is a growing crisis with respect to malpractice suits and awards in this country.

People nationwide and Montanans were asked to what degree they believed that a growing crisis exists. They were asked as follows:[4]

> "Please tell me if you agree strongly, agree somewhat, disagree somewhat, or disagree strongly with the following statement about medicine and health: 'There is a growing crisis with malpractice suits and awards in this country.'"

% Agreeing Malpractice Crisis - Montanans

Agree Strongly	56.50%
Agree Somewhat	28.75%
Disagree Somewhat	5.25%
Disagree Strongly	2.75%
Not Sure	6.75%

Over 85% of Montanans agreed that such a crisis exists. The level of disagreement was only 8% of Montanans.

The balance of this Report reflects the position of Montana physicians on the issue, by a look at how they have had to alter their practice of medicine, how they will continue to do so if remedies are not arrived at, at some of their feelings on certain legislative issues. Where pertinent, the feelings of Montanans on these issues are also examined.

B. CLAIMS ULTIMATELY LACKING MERIT: What Percentage Of Medical Malpractice Claims Against Physicians Involve Actual Medical Malpractice?

(1) The Key Issues.

A key issue in the debate over the pricing and availability of insurance is the extent to which malpractice claims are actually the result of medical negligence and to what extent claims are based on a result that

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[4] See Appendix D(2), V. Tarrance and Associates, nationwide random sample telephone survey of the adult American population, including 400 adults in Montana.

was not intended but which involves no bad medical care on the part of the physician. [5]

To the extent that those claims do not involve actual medical negligence on the part of the physicians involved, substantial extra costs are imposed on:

- insurance carriers, in the form of higher claim and defense costs. and passed from them to physicians and on to the patients in the form of higher medical costs.

- physicians, in the form of higher insurance premiums and necessary alterations in the practice of their medicine and added personal burdens which result because of claims being filed against them.

- patients, in the form of higher medical costs and reduced availability of medical services because of alterations in the practice of medicine.

While what Montanans and Montana Physicians "feel" about the validity of claims is not automatically indicative of how many claims are in actuality without foundation, there are valid statistical benchmarks available against which to measure those feelings. Statistical indicators suggest that 71% of medical malpractice claims do not involve the negligence of physicians.

From data available in a survey of medical malpractice claims closed nationwide and over a period of years, it is likely that the number of claims not involving malpractice on the part of the physician is approximately 71% of all medical malpractice claims:

- The National Association of Insurance Commissioners reported that 62% of all claims are ultimately disposed of in favor of the physician;
- The insurance carriers reporting to the NAIC estimated that an additional 9% of claims (all involving payment to patients) were

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[5] Various "causes" have been associated with claims being made against physicians which do not involve actual malpractice, such as: a deficient tort law system; a lawsuit-oriented public; complex cases requiring a claim to be made before it can be determined whether negligence exists; inexperienced attorneys bringing claims without merit, etc. It is not the purpose of this material to assign blame nor to suggest any willful bringing of claims without merit. Nor is it being suggested that such claims should never be brought. Rather, the focus is the significant cost in personal and dollar terms of such actions, with the question being "What steps can be taken to ensure, without violating the rights of patients, that only those claims with a higher likelihood of malpractice having occurred are brought against physicians.

"bad result" cases where the result intended was not accomplished but negligence was not a factor. [6]

From data available in surveys of medical malpractice claims originating in Montana, it is likely that the number of claims not involving malpractice on the part of the physician is approximately 75%:

- In Montana, during the first seven years of the existence of the Montana Medical Legal Panel, separate expert Panels composed of attorneys and physicians concluded that there was not sufficient evidence of medical malpractice to warrant a trial by a jury or patients withdrew their claims without any payment as to 78% of the claims brought before the Panel. [7]

- Prior to a Panel hearing, 15% of all closed claims were concluded in favor of physicians. Subsequent to a Panel hearing 54% of the results favored physicians. Thus 69% of all closed claims favored physicians. [8] If the same proportion of the claims closed in Montana in favor of the patient are claims involving "bad results", as in the NAIC study, an additional 9%

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[6] See Appendix D(3) for description of statistics taken from National Association of Insurance Commissioners, NAIC MALPRACTICE CLAIMS, Vol. 2, No. 1, December, 1978, p. 127 - 128.

[7] Montana Medical Legal Panel, "Claims Before the Montana Medical Legal Panel Through 1983", February, 1985, p. 3, Published Report Of The Montana Medical Legal Panel:

Result Favorable To Claimant	Percentage Of Physicians
At Panel	22.1 %
Subsequent To Panel	33.7%

A total of 71% of all Panel decisions were by unanimous ballot. Under Montana Law, before a malpractice claim can be brought to court, it must first be reviewed by a Panel composed of three lawyers and three physicians. They provide an opinion as to whether there is substantial evidence that malpractice occurred, sufficient to warrant the taking of a case to a jury. From 1977 - 1984, there were claims filed by 317 patients against 423 Montana physicians. Montana Medical Legal Panel, "Methods Of Closure 1977 - 1984".

[8] Montana Medical Legal Panel, "Claims Before the Montana Medical Legal Panel Through 1983", February, 1985, p. 3. Published Report Of The Montana Medical Legal Panel:

Result Favored	Closed Before Panel H	Closed After Panel H	Total
Physician	14.5%	54.0%	68.5%
Patient	4.0%	27.5%	31.5%

of total claims do not involve negligence on the part of the physicians, i.e. a total of 78% of all claims subsequent to the Panel do not involve negligence on the part of physicians.

(2) Survey Of Montana Physicians. [9]

To examine Montana physicians' views about the relationship between medical negligence and malpractice claims, they were asked:

> "In your own opinion, what percentage of medical malpractice claims against physicians are the result of medical negligence?"

Montana Physician Opinion	
% Of Claims Resulting From Medical Negligence	
Less Than 10%	50.3%
10% - 24%	35.3%
25% - 49%	9.1%
50% - 74%	2.9%
75% - 100%	.3%
No Response	2.2%

Fifty percent of Montana physicians believe that less than 10% of the claims against physicians involve medical malpractice.

Eight-six percent of Montana physicians believe that less than 25% of the claims against physicians involve such malpractice.

Three percent of Montana physicians believe that 50% or more of malpractice claims involve physicians at fault.

By comparison, fifteen percent of the nation's physicians believe that 50% or more of the claims involve medical negligence on the part of

[9] See Appendix A - C, Montana Physician Survey, December, 1985.

physicians, while 3% of Montana physicians believe that 50% or more of malpractice claims involve physicians at fault. [10]

(2) Survey Of The Montana Public. [11]

In a similar vein, adult Montanans were asked whether they think people who sue physicians for malpractice are usually justified in bringing suit, and their response was as follows:

% Suits Against Physicians Justified - Public

National	Montana
43%	26%

While 43% of the American Public believes that suits against physicians are usually justified, only 26% of Montanans believe that to be the case.

C. THE HARM TO PATIENTS FROM THE LEVEL OF MALPRACTICE PREMIUMS AND UNJUSTIFIED LAWSUITS: How Has And Will The Level Of Malpractice Premiums In Montana Or Physicians' Concern Over Being Sued Alter The Manner In Which They Practice Medicine?

(1) The Key Issues.

A key issue in the debate over the pricing and availability of insurance is the extent to which these problems and those of unfounded lawsuits directly impact upon the availability of medical services.

(2) Survey Of Montana Physicians. [12]

Montana physicians were asked how the cost of medical liability insurance and concern over being sued had an effect on their practice of

[10] See Appendix D(1), National Physician Surveys. In Freshnock, Larry J. Physician & Public Attitudes On Health Care Issues, American Medical Association, 1984, the identical question was asked in an independently-conducted research survey in 1982 and 1983, with the above results.

To examine the nation's physicians' views about the relationship between medical negligence and malpractice claims, they were asked the identical question asked of Montana physicians.

% Of Claims Resulting From Medical Negligence

	1982	1983
0 - 10%	28%	35%
10% - 49%	32%	33%
50% +	22%%	15%

[11] See Appendix D(2), V. Tarrance and Associates, nationwide random sample telephone survey of the adult American population, including 400 adults in Montana, for actual question and full results.

[12] See Appendix A - C, Montana Physician Survey, December, 1985.

medicine over the last year or two. They were also asked what would happen if those insurance rates were to increase substantially over the next two or three years.

> "In what manner, if any, has the level of medical liability insurance premiums OR your concern over being sued over the last year or two altered the manner in which you conduct the practice of medicine?"
>
> "If your premiums for medical liability insurance substantially increase over the next two or three years, in what manner, if any, will your practice of medicine be altered, if it has not been already, or further altered if it has already been altered?"

Montana Physician Opinion

Past And Future Alterations Of Practice

	Past Alteration	Future Alteration
Physicians Altering Practice	81.6%	92.1%
Physicians Not Altering Practice	17.8%	6.6%
Physicians Not Responding	.6%	1.2%

Based on the immediate past, fully 82% of Montana physicians have altered their practice of medicine in a significant way.

If current trends in premium increases continue, 92% of Montana's physicians intend to <u>further</u> alter the way they practice medicine.

The specific manner in which Montana physicians have and intend to alter their practice is indicated below:

Montana Physician Opinion

Specific Past And Future Alterations Of Practice

	Past Alteration	Future Alteration
Reduced Level of Insurance	6.1%	9.4%
Cancel Insurance	2.5%	2.6%
Referred More Cases	40.2%	30.6%
Increased Fees	41.9%	66.7%
Avoid high risk procedures	43.0%	43.8%
Order extra lab tests, x-rays, or other diagnostic procedures	63.1%	41.5%
Cease seeing emerg room patients	4.0%	11.4%
Cease seeing first time patients	1.1%	3.3%
Early retirement	7.7%	24.1%
Move to larger community	1.1%	5.0%
Other Methods Of Alteration	11.3%	12.9%

Some physicians have and would reduce their levels of insurance or cancel their insurance -- nearly 9% have so acted and 12% plan to do so under circumstances of increased premiums. To the degree that this takes place, unless the assets of those physicians are sufficient to pay for damage claims, Montanans injured who seek redress could be denied that redress.

Nearly 42% of Montana's physicians have increased their fees in the past because of the problems advanced; fully 67% intend to do so if rates continue to climb.

The availability of medical services will clearly be substantially curtailed if premium levels continue to increase. Nearly a third of Montana physicians intend to refer more of their cases to a declining base of Montana physicians handling certain problems.

Eleven percent of Montana physicians intend to cease seeing emergency room patients and 3% intend to cease seeing first time patients.

Five percent of Montana physicians intend to move to larger communities from the small communities of Montana.

More significant, a full 24% of Montana physicians intend to retire early if the trends continue.

APPENDIX A: Background On Montana Physician Survey Data And Analytic And Statistical Methods

1. Participating Physicians

The data for this survey was provided by Montana physicians in response to a written survey, set out in Appendix C.

Surveys were sent to 1309 physicians in early December, 1985. These were 1151 active and 158 retired physicians. As of the cutoff date of February 4, 1986 for tabulation of results, a total of 726 surveys from active Montana physicians were used, which is a response rate of 63.08%, a significantly high return for a mail survey. The cover letter used in the survey is available upon request from the Montana Medical Association.

A subsequent annotation to this survey will include the results of approximately 20 surveys which came in after the cutoff date for tabulation of results, as well as the results from retired physicians.

2. Analytic And Statistical Methods.

Upon receipt of each survey, it was numbered and the results of each question tabulated in a computer spreadsheet program, which compiled the total results and computed the percentage calculations set forth in Appendix B. Actual survey forms and survey results in computer form are available for review upon written request made to the Director of the Montana Medical Association, G. Brian Zins, at 2021-11th Avenue, Helena, Montana.

The following sample characteristics of active physicians versus population characteristics (known characteristics of active Montana physicians as a whole) were determined.

Questionnaires having a "no response" as to the demographic characteristics being assigned to the areas in proportion to the overall results, e.g. 32 respondents did not indicate which county they were from; as 19.3% of the respondents were from Yellowstone, that percentage of the non-responses were allocated to Yellowstone.

The results of the survey as to various demographics are charted below against the actual demographics in the active physician population in Montana.

A. COUNTY LOCATION OF PHYSICIAN'S PRACTICE

1. STATE AS A WHOLE. The survey resulted in a response from 63% of the active physicians in Montana.

- To Which Survey Sent 1151
- Responding To Survey 726
- % Response 63%

2. BY URBAN-RURAL. The survey response was slightly weighted towards the rural areas of Montana. The rural population of physicians is 24% of the physician population, but 29% of the respondents in the survey were from rural areas, i.e. rural practitioners responded 5 percentile points higher than their representation in the state.

		Survey Deviation From Actual	
		% Respon Pop	% Physician Pop
URBAN			
• To Which Survey Sent	880		
• Responding To Survey	487		
• No Response Allocation	22		
Deviation From Actual	6.4 % Pts	70.1%	76.5%
RURAL			
• To Which Survey Sent	271		
• Responding To Survey	207		
• No Response Allocation	10		
Deviation From Actual	6.4 % Pts	29.9%	23.5%
3. BY COUNTY			
Yellowstone			
• To Which Survey Sent	247		
• Responding To Survey	140		
• No Response Allocation	6		
Deviation From Actual	1.4 % Pts	20.1%	21.5%
Flathead			
• To Which Survey Sent	103		
• Responding To Survey	54		
• No Response Allocation	2		
Deviation From Actual	1.3 % Pts	7.7%	9.0%
Lewis & Clark			
• To Which Survey Sent	98		
• Responding To Survey	48		
• No Response Allocation	2		
Deviation From Actual	1.6 % Pts	6.9%	8.5%
Missoula			
• To Which Survey Sent	187		
• Responding To Survey	96		
• No Response Allocation	4		
Deviation From Actual	2.5 % Pts	13.8%	16.3%
Gallatin			
• To Which Survey Sent	79		
• Responding To Survey	52		
• No Response Allocation	2		
Deviation From Actual	.5 % Pts	7.4%	6.9%

Cascade				
• To Which Survey Sent		166		
• Responding To Survey		97		
• No Response Allocation		4		
Deviation From Actual	.5	% Pts	13.9%	14.4%
Other (Rural)				
• To Which Survey Sent		271		
• Responding To Survey		207		
• No Response Allocation		10		
Deviation From Actual	6.4	% Pts	29.9%	23.5%

APPENDIX B: Tabulated Results of Questionnaire Of Montana Medical Association To Montana Physicians, December, 1985

Below are the tabulated results of the survey as to those questions contained in the text material. The full survey results are available from the offices of the Montana Medical Association.

Question 1.0: Place of Medical Practice?

"What type of medical practice do you have?"

Practice Place	# Respond	% Respond
OFFICE	580	79.89%
GOVERNMENT	25	3.44%
HOSPITAL	74	10.19%
OTHER	47	6.47%
NO RESP	0	0.00%
TOTAL	726	100.0%

Combined Summary

OFFICE	580	79.9%
OTHER	146	20.1%
NO RESP	0	0.0%
TOTAL	726	100.0%

Question 2.0: Type Of Practice?

"Are you in group or solo practice?"

Practice Type	# Respond	% Respond
GROUP	366	50.4%
SOLO	293	40.4%
OTHER	41	5.6%
NO RESP	26	3.6%
TOTAL	726	100.0%

Question 3.0: Years Of Practice?

"How many years have you practiced medicine in Montana?"

Practice Years	# Respond	% Respond
1 - 9 Yrs	358	49.3%
10 -19 Yrs	199	27.4%
20- 29 Yrs	93	12.8%
> 29 Yrs	70	9.6%
NO RESP	6	0.8%
Total	726	100.0%

Combined Summary

< 20 Yr	557	76.7%
20 Yr Or >	163	22.5%
NO RESP	6	0.8%
Total	726	100.0%

Question 4.0: County Of Practice?

"In what county in Montana is your medical practice located?"

Practice County	# Respond	% Respond
YELLOWSTON	140	19.3%
FLATHEAD	54	7.4%
LEWIS & C	48	6.6%
MISSOULA	96	13.2%
GALLATIN	52	7.2%
CASCADE	97	13.4%
OTHER	207	28.5%
NO RESP	32	4.4%
Total	726	100.0%

Combined Summary		
URBAN	487	67.1%
RURAL	207	28.5%
NO RESP	32	4.4%
Total	726	100.0%

Question 5.0: Specialty?

"In what specialty were you included for the issuance of your current medical liability insurance policy?"

[Definition of Responses at Footnotes]

Practice Specialty	# Respond	% Respond
GP/FP+OBG [13]	6	0.8%
GP/FP [14]	199	27.4%
OBG [15]	45	6.2%
OTH SURG [16]	186	25.6%
OTH MED [17]	277	38.2%
NO RESP [18]	12	1.7%
NO INSURAN [19]	1	0.1%
Total	726	100.0%

Combined Summary		
OBG - All	51	7.0%
OTHER	663	91.3%
NO RESP	12	1.7%
Total	726	100.0%

[13] General Practice-Family Practice Plus Obstetrics/Gynecology
[14] General Practice-Family Practice Only
[15] Obstetrics/Gynecology Only
[16] Surgical Specialties Other Than Obstetrical
[17] Other Medical Specialties Other Than Those Above
[18] No Response To Question
[19] No Insurance Specifically Indicated As Reason For No Response

Question 7.0: Percent Claims Are Malpractice?

"In your own opinion, what percentage of medical malpractice claims against physicians are the result of medical negligence?"

% Claims Malprac	# Respond	% Respond
<10%	365	50.3%
10-24%	256	35.3%
25-49%	66	9.1%
50-74%	21	2.9%
75-100%	2	0.3%
NO RESP	16	2.2%
Total	726	100.0%

Combined Summary		
LT 25%	621	85.5%
25% Or >	89	12.3%
NO RESP	16	2.2%
Total	726	100.0%

Question 11.0: Past Alteration of Practice?

"In what manner, if any, has the level of medical liability insurance premiums OR your concern over being sued over the last year or two altered the manner in which you conduct the practice of medicine?"

Past Alterat	# Respond	% Respond
Reduced [20]	44	6.1%
Canceled [21]	18	2.5%
Referred [22]	292	40.2%
Increased [23]	304	41.9%
Avoid [24]	312	43.0%
Ordered [25]	458	63.1%
Cease-Em [26]	29	4.0%
Cease-1st [27]	8	1.1%
Early Ret [28]	56	7.7%
Moved [29]	8	1.1%
Other [30]	82	11.3%
No Alter [31]	129	17.8%
No Response	4	0.6%

[Explanation of Responses To Q 11 and 12 In Footnotes]

Combined Summary - By # Physician		
Alteration	593	81.6%
No Alter	129	17.8%
No Respons	4	0.6%
Total	726	100.0%

[20] Reduced Level of Insurance
[21] Cancel Insurance
[22] Referred More Cases
[23] Increased Fees
[24] Avoid high risk procedures
[25] Order extra lab tests, x-rays, or other diagnostic procedures
[26] Cease seeing emergency room patients
[27] Cease seeing first time patients
[28] Early retirement
[29] Move to larger community
[30] Other (specify). The specified "other" categories have not yet been tabulated.
[31] No alteration of practice

Question 12.0: Future Alteration of Practice?

"If your premiums for medical liability insurance substantially increase over the next two or three years, in what manner, if any, will your practice of medicine be altered, if it has not been already, or further altered if it has already been altered?"

Future Alterat	# Respond	% Respond
Reduced	68	9.4%
Canceled	19	2.6%
Referred	222	30.6%
Increased	484	66.7%
Avoid	318	43.8%
Ordered	301	41.5%
Cease-Em	83	11.4%
Cease-1st	24	3.3%
Early Ret	175	24.1%
Moved	36	5.0%
Other	94	12.9%
No Alter	48	6.6%
No Respons	9	1.2%

Combined Summary-By #Physician

Alteration	669	92.1%
No Alter	48	6.6%
No Respons	9	1.2%
Total	726	100%

APPENDIX C: Related Surveys

Below are related surveys used in the main portion of this material.

1. Freshnock, Larry J., Physician & Public Attitudes On Health Care Issues, American Medical Association, 1984. Since 1977, the American Medical Association has, through independent survey companies, conducted surveys of physicians and public opinion on health care issues. These surveys represent an extension of opinion research activities that date back to 1955. The book presents these surveys, and lists the independent research organizations that conducted the interviews. The material is available upon request of the Montana Medical Association.

2. American Medical Association Public Awareness Survey. In 1985, the American Medical Association commissioned V. Tarrance and Associates to conduct a nationwide random sample telephone survey, including 400 adults in Montana in that survey. The full questionnaires and the results of the survey are available upon request at the Montana Medical Association.

The actual questions related to the text material are as follows:

"37. As you no doubt know, there have been a lot of cases recently where people have sued doctors for malpractice. Do you think people who sue physicians for malpractice are usually justified in brining suit, or are they just looking for an easy way to make some money?

Justified.....
Easy way to make money.....
Unsure (DO NOT READ).....

The actual results as to question 37 were as follows:

Q. 37 ARE PEOPLE WHO SUE PHYSICIANS JUSTIFIED

JUSTIFIED	26.0%
EASY WAY TO MAKE MONEY	51.5%
UNSURE	21.5%
OK/NO ANSWER	1.0%

"38. Do you think the amount of money awarded to patients by juries in malpractice suits is usually too much, not enough, or about right?

Too much.....
Not enough....
About right...
Unsure (DO NOT READ)...

3. National Association Of Insurance Commissioners. NAIC MALPRACTICE CLAIMS. Vol. 2, No. 1, December, 1978. Survey of claims closed between July 1, 1975 and June 30, 1976.

The NAIC Report indicated that there were 6,275 paid claims out of 16,592 claims during the reporting period, i.e. 62.18% of the claims involved no payment to patients.

The carriers reported that 9.08% of the total claims (all involving payment to patients) did not involve negligence, which was 24% of the total paid claims:

> "It is frequently suggested that in instances where negligence is not a factor, a 'bad result' or the failure to accomplish the intended result is the cause of a malpractice claim. This issaue was reported in 24% of paid incidents [claims where money was paid out to patients]..."

Twenty-four percent of all paid claims -- bad result cases with payments to patients -- thus constitutes 9.08% of all claims.

—FOR YOUR INFORMATION—
From the Executive Office
Montana Medical Association

THE REPORT OF THE PROFESSIONAL LIABILITY COMMITTEE OF THE MONTANA MEDICAL ASSOCIATION ON PROPOSED LEGISLATION

SOLVING THE HEALTH CARE CRISIS IN MONTANA

Summary Including Legislative Detail

Professional Liability Committee

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LEGISLATIVE PROPOSALS OF THE MONTANA MEDICAL ASSOCIATION

SUMMARY

The Montana Medical Association supports legislation which provides for the following in all medical malpractice cases against physicians or professional service corporations (such as Clinics) which are owned by physicians:

A. ATTORNEY FEES LEGISLATION

- REGULATION AND DISCLOSURE OF ALL FEES
- AWARD OF ATTORNEY FEES TO SUCCESSFUL PARTIES IF LOSING PARTY ABLE TO PAY
- ADVANCE AND FULL PAYMENT OF PATIENT'S ATTORNEY FEES UNDER A VOLUNTARY PATIENT ASSURED COMPENSATION ACT

B. DUPLICATE PAYMENTS TO PATIENTS -COLLATERAL SOURCE LEGISLATION

- CASES INVOLVING MORE THAN $15,000 IN ECONOMIC DAMAGES
- MANDATORY REDUCTION OF AWARDS BY AMOUNT OF CERTAIN (BUT NOT ALL) DUPLICATE PAYMENTS
- CREDITS TO PATIENTS
- MAXIMUM REDUCTION OF AWARD OR SETTLEMENT
- COURT REDUCTION AND APPROVAL
- ABOLITION OF RIGHT OF THIRD PARTIES TO RECOVER BENEFITS FROM PATIENTS
- FUTURE DUPLICATE PAYMENTS - HEALTH POLICY FOR PATIENTS

C. PERIODIC PAYMENTS LEGISLATION

- PERIODIC PAYMENT OF FUTURE DAMAGES PAID BY INFLATION-INDEXED ANNUITY - FUTURE DAMAGES IN EXCESS OF $50,000
- PAYABLE UNTIL DEATH OR TERMINATION OF DISABILITY UNLESS ORDERED OTHERWISE BY COURT FOR THE SUPPORT OF RELATIVES

D. PATIENT ASSURED COMPENSATION ACT LEGISLATION

- ESTABLISHMENT OF PATIENT ASSURED COMPENSATION ACT
- VOLUNTARY PARTICIPATION BY PATIENTS AND PHYSICIANS
- REQUEST FOR PAYMENT OF ECONOMIC DAMAGES AND ADMISSION OF RESPONSIBILITY BY PHYSICIAN
- PAYMENT OF ECONOMIC DAMAGES OR A COURT DETERMINATION OF THE SAME
- ECONOMIC COURT DAMAGES AVAILABLE AND LIMITED NON-ECONOMIC DAMAGES AVAILABLE UNDER CERTAIN CIRCUMSTANCES
- ADVANCE AND FULL PAYMENT OF PATIENT'S ATTORNEY FEES
- USE OF SURPLUS FUNDS TO FUND MEDICAID
- CERTAIN EVENTS MAKING PATIENT ASSURED COMPENSATION ACT MANDATORY

THE REPORT OF THE PROFESSIONAL LIABILITY COMMITTEE OF THE MONTANA MEDICAL ASSOCIATION ON PROPOSED LEGISLATION	INTRODUCTION

Montana physicians have a serious medical liability insurance problem. That problem has become a problem of the public because of their extensive contact with physicians.

It is not only physicians who have this concern. The same concern is apparent for cities and other governmental units, day care centers, manufacturers, midwives, and -- yes -- even lawyers.

Because of this concern, this Report includes major recommended changes in the legal setting in Montana. Certain other areas of potential change which should be the subject of further study are included later in the body of this Report.

The recommendations for major legislative changes that are included in this Report are based on the following factually-supportable propositions:

• There is, in Montana, a diminishing availability and affordability of insurance coverage for the negligent acts and omissions of insureds, including but not limited to the medical profession. In physician terms, each year, fewer and fewer companies are selling insuran for medical malpractice or medical liability, and to some medical specialties at prices which -- simply put -- boggle ones mind.

• The result of that insurance problem is inevitably a serious concern for all Montanans. That serious concern is manifested in one of two ways, including but not limited to the medical profession:

•• Increased costs for services where insurance is available. In physician terms that means higher medical costs, because the patient in fact pays for insurance when the physician is able or willing to pass on that cost or because the physician takes "defensive" medical steps, at high cost, to reduce the likelihood of a lawsuit.

•• Shrinking availability of certain services where insurance is either not actually available or is not economically available because the insured cannot afford the insurance or is unable to pass its costs on to the consumer or taxpayer. In physician terms that means that if a doctor cannot purchase insurance to perform a specific medical procedure, the doctor must stop performing that procedure, or, if the cost per year for insurance for a procedure far exceeds the doctor's income from a procedure then the doctor probably will quite offering that service if the cost of it cannot be passed on to the patient.

FURTHER ASSUMPTIONS OF THIS REPORT

The recommendations that precede this Report are based on the following assumptions:

• Various attempts can and will be made to provide long-term solutions to the problem, with varying degrees of success likely.

• Only by the use of dramatic, untried, and different methods and proposed solutions can there be any possible immediate solution, and those methods might be unpalatable. The reason for this needed approach is that the current litigation-insurance-insured system is not capable of dealing with the complexities of the problems presented and that entire system is crumbling on our heads.

• There are a multitude of causes of the problem, too numerous for proper isolation, each contributing their own fair share to the problem, which involve the very nature of our lawsuit system, the lawyers, the insurance industry, the public itself, and the insureds, whether they be physicians or other groups or individuals.

• The attitude that the whole problem will go away if one of those groups will only do or not do certain things is simplistic, misleading, destructive, and incorrect, and merely is a device for the group or person pointing the finger to protect their current interests or to avoid their proper responsibilities in finding a solution to a problem that can be laid at everyone's door.

• Dealing with the proponents of the simplistic, finger-pointing approach can, if not handled properly, lead to a very acrimonious situation within and between interest groups and the public. That regardless of what measures are introduced or undertaken, if they at all involve any legislation or modification of the existing legal system, certain interest groups with a vested economic interest in continuing the current system can be expected to respond with vigorous opposition that is largely predictable as to its tone and content.

• It is personally irresponsible for a physician to be uninsured and that it is socially irresponsible for large numbers of physicians to be uninsured. Injured patients should be compensated for their injuries. Physicians should not be bankrupted by lawsuits.

The ideal situation from the patient's and physicians' point of view, i.e. the "solution" to the "problem", is the:

> •• prompt payment of all net economic loss to patients who are injured by Montana physicians, with a minimum of administrative cost and a charge to the physicians of Montana based only on the likely amounts to be paid out in Montana plus the minimum administrative cost;
>
> •• reduction in the numbers of injuries and the severity of injury to patients.

All legislative and non-legislative solutions are or should be variations on those two themes.

LEGISLATIVE PROPOSALS OF THE MONTANA MEDICAL ASSOCIATION

ATTORNEY FEES

A. SUMMARY - ATTORNEY FEES LEGISLATION

The Montana Medical Association supports legislation which provides for the following in all medical malpractice cases against physicians or professional service corporations (such as Clinics) which are owned by physicians:

• REGULATION AND DISCLOSURE OF ALL FEES. The statutory and court regulation and disclosure of attorney fees - both contingency fees and hourly fees - as to attorneys on all sides of cases, by a combination of reverse sliding scale contingency fee schedules and court review of the reasonableness of fees, with special provision for lower rates for minors, who are likely to have long-term economic costs

• AWARD OF ATTORNEY FEES TO SUCCESSFUL PARTIES IF LOOSING PARTY ABLE TO PAY. The awarding of attorney fees under specified, limited circumstances to parties successful in lawsuits, provided the opposing party can afford to pay for them

• ADVANCE AND FULL PAYMENT OF PATIENT'S ATTORNEY FEES. The provision for automatic advance attorney fee retainers paid on behalf of patients electing to proceed under a proposed Medical Patients Assured Compensation Act, and the full payment of such patient's attorney fees under such Act where the patient is successful in the case in an amount in excess of a required offer of settlement by the physician

B. SPECIFIC LEGISLATIVE PROPOSALS

1. CONTINGENCY FEE REGULATION

• Contingency fees limited to a maximum allowable percentage of awards, as set out in statute

•• Based on a sliding scale, where the percentage allowed decreases as the amount of the court award or settlement increases, but no so restrictive as to small or moderate recoveries that it hampers the ability of injured patients to obtain legal representation. Examples of such sliding scales would be:

40% of the first $50,000; 33 1/3% on the next $50,000; 25% of the next $100,000; 10% for awards over $200,000

or

30% of the first $ 250,000; 25% of the next $250,000; 20% of the next $500,000; 15% of the next $250,000; 10% of any amount over $1,250,000

•• With a lower percentage in each instance - by 5 percentile points - where the case involve a minor

•• Subject to the required judicial review as to reasonableness provided for all attorney fees in these proposals, with any side's attorney being able to apply to the court for approval of additional compensation where an attorney performs extraordinary services involving more than usual participation in time and effort

•• Unless the court determines that no competent counsel, after due diligence by the patient, was willing to take the case on a contingency fee basis after such counsel had determined in writing that there was substantial evidence of malpractice and the patient was otherwise unable to afford such attorney fees, in which case, the statutory limitation on attorney fees would be inapplicable but not the required review as to reasonableness

• Contingency fees prohibited under circumstances where

•• the patient opts for the protection of the proposed Medical Patient Assured Compensation Act, and hence is entitled to attorney fees to be paid from the fund of the Act

• A prohibition of the inclusion in the contingency fee calculation of

•• amounts previously paid for medical expenses by the physician

•• amounts paid to the patient from deductible collateral sources under proposed collateral source legislation, such as medical care, custodial care, rehabilitation services, loss of earned income or other economic loss, after adding back in insurance premiums paid

•• amounts previously offered by the physician or his authorized legal representative, in writing, in a binding and approved form, for the payment of future economic damages

•• future medical expenses in excess of $15,000

• A requirement that for a contingency fee contract to be enforceable, that:

•• the contract be in writing;

•• the contract state the method by which the fee is to be determined, including the percentage or percentages that accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingency fee is calculated;

•• The lawyer provides the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

•• The lawyer keeps adequate time records of the hours worked on the case to enable the court to review the time spent on the case

•• All required disclosures of available options to the client being included in such written contracts.

2. REQUIRED JUDICIAL REVIEW: ALL ATTORNEY FEES

• Required judicial review and a public record made of all payments in connection with such review, prior to the final payment of any attorney fees, whether by contingency fee or otherwise, of the reasonableness of any fee charged by the attorneys on either side of a case, whether by settlement or court award.

•• With power in the court to revise the amount of fees upward or downward for the attorneys on either side, even to the extent of being in excess of the statutory limit on contingency fees

•• With the court being required to take into account the following factors in its determination:

••• Time and labor required, novelty and difficulty of the legal questions involved, and the skill; requisite to perform the legal services properly
••• The amount involved and the results obtained;
••• The likelihood, if apparent to the client, that the acceptance of the particular employment precluded other employment by the lawyer;
••• The nature and length of the professional relationship with the client;
••• The experience, reputation, and ability of the lawyer or lawyers performing the services;
••• Time limitations imposed by the client or the circumstances;

••• The age of the client and the amount of future medical and other economic expenses which might be insufficient if attorney fees awarded are not diminished

••• Unjustified use or abuse of the discovery process by the attorney seeking fees, and the degree to which any fees should be reduced to reflect such abuse

•• With the allowance of payment of interim attorney fees by a client prior to any settlement or court award where any attorney's written contract so provides, upon the posting of an appropriate bond by the attorney, for the repayment of such fees to the client to the extent such fees are not ultimately authorized by the court.

•• With provision for court approval of interim attorney fees or retainers where an attorney is operating under a written contract on an hourly basis and statutes authorize the payment of such fees from a Medical Patient Assured Compensation Act, upon the posting of an appropriate bond by the attorney, for the repayment of such fees to the fund to the extent such fees are not ultimately authorized by the court.

3. ATTORNEY FEES TO SUCCESSFUL PARTY

• Reasonable attorney fees awarded to the prevailing party to be paid by the opposing party, in a case which goes to trial, in lieu of any contingency fee contract should one exist, regardless of which side on which the attorney appears

•• if the court determines that the losing party did not have a reasonable chance of recovery or a reasonable chance of a successful defense

•• and if the losing party proceeded to trial after a unanimous Montana Medical Legal Panel decision against it

•• and if

••• as to the losing patient, there is no recovery

••• as to the losing physician, the amount of the recovery by the patient is in excess of any offer of settlement made by the patient in the form of a formal offer of judgment allowed and pursuant to the Montana Rules of Civil Procedure, and not timely accepted by the physician

•• unless the losing party is financially unable to pay the same - even on a minimal installment basis - in which case such attorney fees are to be paid by the attorney representing such a client, pursuant to an appropriate bond posted for such purposes

•• with a prohibition on insurance carriers from excluding such fees from policy coverage or requiring the same to be included in a deductible if the policyholder lacks any control over whether the case is settled or proceeds to trial

•• any such award of attorney fees to be determined pursuant to the requirements of reasonableness as determined by the court

4. PAYMENT OF ATTORNEY FEES OVER TIME - PERIODIC PAYMENT OF DAMAGES

• A requirement that any attorney fees payable under circumstances where the case requires a structured settlement or periodic payment of damages, under separately-proposed new legislation, be

•• paid out over the required period of payment of damages to the successful claimant

•• be based on the present value of the amount of any settlement or award, rather than the future value

5. PAYMENT OF ATTORNEY FEES - ADVANCE RETAINER FOR PATIENT'S ATTORNEY - MEDICAL PATIENT ASSURED COMPENSATION ACT

• A requirement that the reasonable attorney fees of a patient be paid, over and above any award given the patient, after crediting any advance retainer paid

•• if the lawsuit is instituted under the provisions of the separately-proposed Medical Patient Assured Compensation Act, which would prohibit the use of contingency fee contracts

•• if the patient prevails in the lawsuit in an amount in excess of the larger of the offer of settlement required by the legislation to be made by a physician to qualify under the Act (an offer of payment of economic damages) or any offer of settlement made by the physician in the form of a formal offer of judgment allowed and pursuant to the Montana Rules of Civil Procedure, and not timely accepted by the patient

•• with a specified advance retainer amount of attorney fees payable to the patient's attorney upon the filing of such a claim in court, to be credited against any subsequent award of attorney fees, and not to be repaid if the client is unsuccessful at trial, unless the court determines that the patient did not have a reasonable chance of recovery, in which case the amount is to be repaid by the patient's

attorney, pursuant to an appropriate bond given by the attorney for such purposes

• Disclosure to the jury of the availability of attorney fees and the circumstances thereof

• The reasonableness of the award to be determined as with all other attorney fees pursuant to proposed legislation

6. REQUIRED ADVANCE NOTIFICATION TO CLIENTS OF CONTENTS OF LEGISLATION

• The required notification, in writing, to all clients of all attorneys covered by the above proposed legislation, of the terms of such legislation and the options available to the client, in plain english and substantially the same as the form of notice provided pursuant to legislation

C. REASONS FOR SPECIFIC LEGISLATIVE PROPOSALS ON ATTORNEY FEES

The general objectives of legislation concerning attorney fees and contingency fees in particular are:

• to protect plaintiffs from having their recoveries directly diminished by high contingency fees and indirectly diminished by high defense fees, thus increasing the amount of the premium dollar paid out to patients

• the above reason is especially important if other legislation involving medical malpractice could have the tendency to diminish the amount of compensation paid to patients; the proposal would thus cause the legal profession to bear part of the cost of medical malpractice, thus relieving some of the concerns over the high cost of medical malpractice insurance or its very unavailability

• to provide for the payment of attorney fees in special circumstances, such as the proposed Medical Patient Assured Compensation Act

• to relate attorney fees more to the amount of legal work and expense involved in handling a case, as well as the special needs of the patient - such as in the case of a minor -- and less to the fortuity of the plaintiff's economic status and degree of injury.

• to deter attorneys from either instituting frivolous suits or encouraging their clients to hold out for unrealistically high settlements

• to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage, the proper determination of legal fees being central to the efficient administration of justice and the maintenance of public confidence in the bench and the bar.

- to help insure that an attorney does not obtain a "windfall" simply because his or her client is very seriously injured and guaranteeing that the most seriously injured plaintiffs will retain the lion's share of any recovery secured on their behalf

LEGISLATIVE PROPOSALS OF THE MONTANA MEDICAL ASSOCIATION

DUPLICATE PAYMENTS TO PATIENTS

A. SUMMARY - COLLATERAL SOURCE LEGISLATION

The Montana Medical Association supports legislation which provides for the following in all medical malpractice cases against physicians or professional service corporations (such as Clinics) which are owned by physicians:

- CASES INVOLVING MORE THAN $15,000 IN ECONOMIC DAMAGES. The law to be applicable to any award or settlement involving past or future economic damages in excess of $15,000

- MANDATORY REDUCTION OF AWARDS BY AMOUNT OF CERTAIN (BUT NOT ALL) DUPLICATE PAYMENTS. The mandatory reduction by the judge of courtroom awards or settlements, to the extent the patient has already received or will in the future receive monies from a third party to cover economic damages as to any type of payments except allowing duplicate payments in the following circumstances

  - life insurance paid to the patient
  - direct payments by the patient
  - any payments by the patient's immediate family or any other party which the patient is obligated to repay

- CREDITS TO PATIENTS. With a credit back to the patient for any

  - insurance premiums paid directly by the patient or the employer of the patient within the previous 5 years

  - any other expenses paid directly by the patient, to acquire the duplicate payments, within the previous 5 years

- MAXIMUM REDUCTION OF AWARD OR SETTLEMENT. In no instance, even where duplicate payments exist, is the award or settlement to be reduced below 50% of the overall settlement or award

- COURT REDUCTION AND APPROVAL. The reduction to be accomplished by a judge after full hearing as to offsets, exclusions, and credits as to both judge and jury awards and out-of-court settlements, with the required filing and court approval of any settlement agreement subject to the terms of the legislation

- ABOLITION OF RIGHT OF THIRD PARTIES TO RECOVER BENEFITS FROM PATIENTS. The elimination of all lien and subrogation rights, and any rights to assign the same as to any third party paying benefits to the patient, i.e. elimination of the right of recovery of any benefits from the patient

• FUTURE DUPLICATE PAYMENTS - HEALTH POLICY FOR PATIENTS. Court-supervised reductions of future duplicate payments, whether by award or settlement, if the doctor or doctor's insurance carrier has provided and maintained a required health insurance policy to provid coverage for benefits the patients believed they would receive (and hence were offset) but did not in fact receive

B. SPECIFIC LEGISLATIVE PROPOSAL - PARTIAL ELIMINATION OF THE COLLATERAL SOURCE RULE

• In all medical malpractice cases against physicians or professional service corporations (such as Clinics) which are owned by physicians

• Where the amount of economic damages, past and future, awarded by a court or jury or where the amount of economic damages to be provided the patient in the future under any settlement agreement, are in excess of th amount of $15,000

• The mandatory reduction of damages awarded to a patient by a court or jury of certain specified duplicate payments already paid or to be paid t the patient, e.g. amounts from all third parties or collateral sources, and the mandatory reduction of damages awarded to a patient in settlement of certain specified duplicate payments to be paid to the patient, including

•• any federal state, or local government income, disability or aickness programs including:

••• Medicare, Medicaid, Public Assistance (with respect to services rendered prior to the award date), Social Security Retirement and Disability Income, Veterans Benefits, Workers' Compensation Benefits, and benefits to military personnel and their dependents

•• government or private health insurance covering health, sickness, or income disability (not including life insurance);

•• any contract or agreement with any group or organization to pay f any health care services;

•• any contractual or voluntary wage continuation plan intended to provide wages during a period of disability, such as an employer wage continuation program; and

•• any other sources intended to compensate the plaintiff for such medical injury, including but not limited to medical care, custodial care, rehabilitation services, loss of earned income or other economic loss, employee or service benefit programs;

• Excluding from such a duplicate payment offset, e.g. allowing duplicate payments to the patient, as to any payments received or to be received in the form of

•• life insurance paid to the patient
•• assets of the patient used in the direct payment for any such losses, apart from any premiums for such insurance
•• assets of the patient's immediate family which the patient is obligated to repay
•• any other gratuity or loan which the patient is obligated to repay

• Crediting back to the patient

•• any insurance premiums paid directly by the employer of the patient within the previous 5 year period, if such insurance is part of any employee benefit program and not a gratuity

•• any insurance premiums paid directly by the patient within the previous 5 year period

•• any other expenses paid directly by the patient to acquire the sources of payment within the previous 5 year period

• A maximum reduction under any circumstances of 50% of the present value of the settlement or award

• The reduction to be accomplished by the court after a full hearing as to the claimed offsets, exclusions, and credits

•• as part of any award made by the court acting without a jury

•• in a separate hearing held after any award by a jury or any settlement of the parties, at which hearing evidence shall be admissible for consideration on the question of whether any of the duplicate payments covered have been paid or are payable in the future, less any exemptions, plus any credits due the patient under the legislation, and taking into account the dollar limits involved

• Where public or private sources of medical benefits or income replacement coverage now permit the public or private source to place a lien on a professional liability award or permit subrogation against the professional liability tort feasor, the lien and subrogation rights must be superseded by the revised collateral source rule, e.g. no insurer or other collateral source of benefits may recover from the patient benefits paid by the doctor or his insurer, or assign any such rights of recovery, or have a lien for such a recovery

• Allowance, under court supervision, in the physician or liability insurer in offsetting the patient's future collateral source benefits (such as employer sponsored health insurance) against judgment amounts or settlement amounts awarded for future medical expenses, with

•• such collateral source benefits received in the future to be disclosed to the court, by affidavit or otherwise under oath

•• provision for such offset to be set forth in any judgment or settlement agreement between the parties

•• contingent upon the insurer or physician providing and maintaining the required health insurance policy for gaps in benefits set out below

• A requirement that the physician or liability insurer purchase or issue a health insurance policy which would provide coverage for gaps in benefits awarded by a court or agreed to in a settlement if collateral sources of those benefits are not actually available to the patient in the future, with

•• such collateral source benefits not received in the future to be disclosed to the court, by affidavit or otherwise under oath

•• provision for such coverage for gaps in benefits to be set forth in any judgment or settlement agreement between the parties

• The required filing with the court of a petition for approval of such settlement agreement, and the filing of the proposed settlement agreement, as to any settlement agreement which is covered by this legislation or the legislation concerning the award of attorney fees or the payment of damages in periodic payments

• The legislation applicable to claims upon which no lawsuit has been filed as of the effective date of the legislation. [1]

C. REASONS FOR SPECIFIC LEGISLATIVE PROPOSALS ON COLLATERAL SOURCES

The general objectives of legislation concerning duplicate payments to patients are:

• to reduce some of the amounts of duplicate payments which patients receive from third parties in addition to that which they receive in settlements and court awards, after giving credit for contributions made by the patients or their employers

• thus assuring that patients receive full compensation, but not more than full compensation in major cases, for economic damages

• thus to some degree shifting a portion of the economic losses in medical malpractice cases to the more efficient, high-volume accident and health insurers and away from the medical malpractice insurers

• thus further assuring the affordability and availability of medical malpractice insurance

[1] If the law is applicable to claims occurring on or after the effective date of the legislation, it will take two to three years longer to realize the full initial cost savings.

LEGISLATIVE PROPOSALS OF THE MONTANA MEDICAL ASSOCIATION

PERIODIC PAYMENT OF FUTURE DAMAGES TO PATIENTS

A. SUMMARY - PERIODIC PAYMENTS LEGISLATION

The Montana Medical Association supports legislation which provides for the following in all medical malpractice cases against physicians or professional service corporations (such as Clinics) which are owned by physicians:

• PERIODIC PAYMENT OF FUTURE DAMAGES PAID BY ANNUITY. After a jury or judge verdict awarding in excess of $50,000 in future damages (such a medical treatment, loss of earnings, pain and suffering, etc.), the judge shall order that an inflation-indexed annuity be purchased by the physician or insurer for payment of the future damages in installments. Depending upon circumstances, the court can authorize the use of a trust fund and an appropriate bond.

• PAYABLE UNTIL DEATH OR TERMINATION OF DISABILITY UNLESS EXTENDED BY COURT. The periodic payments would be payable until the patient's death, even if beyond the anticipated life expectancy, if an annuity be used, or upon termination of the disability involved if that be part of the court's order, whichever first occurs. If an annuity is not involved, the patient, upon expiration of the normal life expectancy, may apply to the court for additional payments of economic damages arising out of the injury. The court can authorize that payments continue if persons are dependent upon the support of a deceased.

B. SPECIFIC LEGISLATIVE PROPOSAL - PERIODIC PAYMENTS

• In all medical malpractice cases against physicians or professional service corporations (such as Clinics) which are owned by physicians

• The trial court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for any future damages of the patient

•• be paid in whole or in part by periodic payments rather than lump sum payments, by the use of inflation-indexed annuities purchased by the party responsible for payment and payable until the death of the patient even if beyond normal life expectancy, unless the court orders that the circumstances warrant the use of periodic payments direct from a financially responsible insurance carrier or by the use of a trust fund if no carrier be involved

•• as to all verdicts in excess of $50,000 in future damages

•• upon specific findings by the court as to amounts, recipients, intervals between payments, and number of payments, modifiable only upon the death of the patient or termination of the particular disability warranting the future damages by payment of the future damages for the same, whichever shall first occur, and then only to the extent that monies are separate and apart from that needed to support persons lawfully dependent upon the patient for support, as determined by the court, unless the court otherwise orders payment of economic damages on behalf of a patient outliving his normal life expectancy

•• conditioned upon an appropriate bond to assure performance of the obligation if the party paying is other than an admitted insurance carrier and if an inflation-indexed annuity is not then available or not used by the court

• Failure to timely pay said amounts shall be a basis for a finding of contempt of court and damages assessable against the offender, plus costs and attorney fees, in addition to the required payments

• Claimant's attorney fees shall be paid periodically in the same fashion as the award, and under the same statutory way as in separate attorney fee legislation which is recommended in conjunction with this legislation

• Account shall be taken of separate collateral source legislation which is recommended in conjunction with this legislation.

• Following the expiration of all obligations specified in the periodic payment judgment, any obligation of the party responsible for paying shall cease, except that if

•• an inflation-indexed annuity is not used

•• and the patient lives beyond the date of the final payment by the person responsible for paying,

the patient may apply to the court for additional payments for economic damages arising out of the injury. Any added payments will be calculated at the same annual rate at which the damages were originally calculated if an annuity not be used.

C. REASONS FOR SPECIFIC LEGISLATIVE PROPOSALS ON PERIODIC PAYMENTS

The general objectives of legislation concerning periodic payments to patients are:

• provide a guaranteed method of payment of future damages that is reflective of what will actually occur in the patient's life, rather than on a speculative basis at an earlier time, on a basis that resembles disability plus life insurance

- allow the carrier to not have to maintain as much reserves and to reduce the amount necessary for reinsurance, thus further assuring the affordability and availability of medical malpractice insurance

- eliminate, by use of the inflation-indexed annuity, numerous complex matters that are typically presented to a jury, which then makes a speculative decision as to interest rates and life expectancy, and in the process reducing significantly the cost of attorney fees and expert witness fees at the trial stage

LEGISLATIVE PROPOSALS OF THE MONTANA MEDICAL ASSOCIATION

PATIENT ASSURED COMPENSATION ACT

A. SUMMARY - PATIENT ASSURED COMPENSATION ACT LEGISLATION

The Montana Medical Association supports legislation which provides for the following in all medical malpractice cases against physicians or professional service corporations (such as Clinics) which are owned by physicians:

- ESTABLISHMENT OF PATIENT ASSURED COMPENSATION ACT. Creation of an actuarially sound fund for the purpose of payment to patients of all allowable damages in excess of required insurance coverage for participating physicians.

- VOLUNTARY PARTICIPATION. Voluntary participation by patients and physicians, provided the patient makes certain timely requests and provided the physician has sufficient levels of insurance or is otherwise financially responsible

- REQUEST FOR PAYMENT OF ECONOMIC DAMAGES AND ADMISSION OF RESPONSIBILITY. The legislation would be triggered by the patient's request that the physician timely pay for and provide an inflation-indexed annuity for the economic damages incurred by the patient, pursuant to a schedule for such damages. The physician would also be requested to allow entry of judgment against him or her on the question of fault. If the physician had a pattern of adverse claims over a period of time, there must be a hearing by the Board of Medical Examiners to determine if action should be taken against the physician.

- PAYMENT OF ECONOMIC DAMAGES OR A COURT DETERMINATION OF THE SAME. Upon proper compliance by the physician, the case would be at an end; if the physician still wished to participate, but disagreed as to the amount to the paid, the patient could then file a lawsuit before a judge sitting without a jury to determine the economic and non-economic damages to which the patient might be entitled.

- COURT DAMAGES AVAILABLE. Economic damages, pursuant to an appropriate schedule designed for such purposes, would be available to the patient. Additionally, non-economic damages would be available upon a court determination that a serious injury exists which warrants such a damage, and then only based upon the age and life expectancy of the person, the severity of injury, and the usefulness of additional funds in maintaining a reasonable quality of life, pursuant to an established schedule where possible, with a maximum award in any event of $100,000 for such damages. No punitive damages would be available and the damages would be subject to other statutes concerning collateral sources and periodic payments.

• ADVANCE AND FULL PAYMENT OF PATIENT'S ATTORNEY FEES. The provision for automatic advance attorney fee retainers paid on behalf of patients electing to proceed under a proposed Medical Patients Assured Compensation Act, and the full payment of such patient's attorney fees under such Act where the patient is successful in the case in an amount in excess of a required offer of settlement by the physician

• USE OF SURPLUS FUNDS TO FUND MEDICAID. Surplus funds in the account of the Patient Act, over and above certain levels to maintain actuarial soundness and to provide some reductions in premiums (which can be passed on in the form of lower health care costs), will be directed towards additional funding of Medicaid.

• EVENTS MAKING PATIENT ASSURED COMPENSATION ACT MANDATORY. If, in the determination of the Commissioner of Insurance, adequately funded and staffed for such purposes by separate legislative authorization, after due hearing and investigation,

•• cannot be made available for any specialty or group of physicians, or that its economic cost is such that its economic unavailability has created or is likely to create a public health emergency, or that a significant segment of the physician population will be adversely affected by the unavailability of the insurance

•• then within a specified time, there shall be mandatory participation in the Act by all physicians, and as to that specialty of physicians for which insurance is not available, and as to all patients with a claim against such physicians, during such period of time that the order of the Commissioner remains in effect.

B. SPECIFIC LEGISLATIVE PROPOSAL - PATIENT ASSURED COMPENSATION ACT

• In all medical malpractice cases against physicians or professional service corporations (such as Clinics) which are owned by physicians

• Creation of a legislative Patient Assured Compensation Act, whose purpose will be the payment of all allowable damages in excess of available required insurance coverage for participating physicians, including the attorney fees of the patient.

• Voluntary participation in the Patient Assured Compensation Act by patients with a claim against physicians by patients including such a request for participation

•• in their application before the Montana Medical Legal Panel,

•• or, if the claim has been ruled on by the Panel, including such a request in writing to the physician within 3 months of the Panel decision,

•• or alternatively, as part of and in any lawsuit filed against the physician

••• Part of the request by the patient shall include a demand, in proper form, for the physician to pay all economic damages of the patient, in a stated, itemized amount, pursuant to a schedule published for such purposes

••• During the period of time for response for a potentially-participating physician, the patient shall file no lawsuit against the physician, and all relevant statutes of limitation shall be tolled.

• Voluntary participation on the part of the physician, but for the physician to qualify for participation in the Patient Assured Compensation Act as that particular patient, the physician must, prior to any claim being made against the physician at the Panel level, or thereafter:

•• Maintain a minimum level of insurance as required by the legislation, or otherwise meet the minimum financial responsibility requirements of the legislation

•• Respond to the patient, in writing, in an approved form, within 30 days of receipt of the required notification of the patient's election to proceed with the Patient Assured Compensation Act, that the physician:

••• Has specified insurance coverage, in amounts on the order of $200,000/$600,000 or is financially responsible in at least the amount and as required by the Act

••• Will allow entry of judgment against the physician on the question of liability, for all purposes

••• Agreeing in writing to provide within 60 days thereafter, an inflation-indexed annuity providing for payment of the demanded economic damages, even if beyond the limits of insurance, or in the alternative, requesting the patient file suit for the sole purpose of a court determination of the damages to which the patient is entitled, at which point the patient is so authorized to file such a suit.

•••• The failure to timely respond on the part of the physician shall be presumed to be a request to the patient to file suit for purposes of damage determination, at which point the patient is so authorized to file suit

••• So providing such annuity within 60 days thereafter, unless the physician wishes a court to determine the amount of damages

••• Permitting disclosure from the appropriate sources, of the number of claims made against the physician with a previous

specified period of time, and if each of those claims resulted in a settlement or verdict against the physician and in favor of the patient, requesting a review by the Board of Medical Examiners to determine whether there is any basis for discipline or any other action by the Board against the physician, which review must be undertaken by the Board

• A patient's demand for, and court determination of, damages shall correspond to and include under the Patient Assured Compensation Act the following damages only, pursuant to a schedule of such damages established for purposes of the court's determination

•• Compensation for medical expenses and for support services which are essential to maintaining a reasonable quality of life

•• Compensation for wage loss up to 70 percent of pre-tax, pre-disability earnings, i.e. full replacement of after-tax earnings

•• Compensation for potential earnings or replacement of home services performed by persons not in the labor force

•• Specified standards for determining inflation, interest rates, and wage growth parameters to be used in setting the schedule, in conjunction with the requirements of periodic payment of such damages

•• Such other specified, definable economic damages which it is in the interest of all that injured patients receive

•• Non-economic damages as indicated below

• The Patient Assured Compensation Act shall additionally include, as to any court determination of damages available to the patient

•• The inclusion of all restrictions on attorney fees, as provided in separate legislation in another portion of these recommendations, plus the allowability of attorney fees as provided by the Patient Assured Compensation Act, as set out below

•• A ban on all punitive damages against the physician

•• Periodic payment of damages legislation recommended in another portion of these recommendations

•• Modification of the collateral source rule, as recommend in another portion of these recommendations

•• Elimination of non-economic damages except upon a court determination that a serious injury exists which warrants such a damage, and then only based upon the age and life expectancy of the person, the severity of injury, and the usefulness of additional funds in maintaining a reasonable quality of life, pursuant to an established schedule where possible, with a maximum award in any event of $100,000 for such damages

• A requirement that the reasonable attorney fees of a patient be paid, over and above any award given the patient, after crediting any advance retainer paid

  •• if the lawsuit is instituted under the provisions of the separately-proposed Medical Patient Assured Compensation Act, which would prohibit the use of contingency fee contracts

  •• if the patient prevails in the lawsuit in an amount in excess of the larger of the offer of settlement required by the legislation to be made by a physician to qualify under the Act (an offer of payment of economic damages) or any offer of settlement made by the physician in the form of a formal offer of judgment allowed and pursuant to the Montana Rules of Civil Procedure, and not timely accepted by the patient

  •• with a specified advance retainer amount of attorney fees payable to the patient's attorney upon the filing of such a claim in court, to be credited against any subsequent award of attorney fees, and not to be repaid if the client is unsuccessful at trial, unless the court determines that the patient did not have a reasonable chance of recovery, in which case the amount is to be repaid by the patient's attorney, pursuant to an appropriate bond given by the attorney for such purposes

• Disclosure to the jury of the availability of attorney fees and the circumstances thereof

• The reasonableness of the award to be determined as with all other attorney fees pursuant to proposed legislation

• The fund established under the Patient Assured Compensation Act shall pa all amounts in excess of the limits of insurance maintained by participating physicians, as determined by the final decree of the court assessing the amount of damages, amounts covered by the physician or the physician's insurance to be paid by the physician or insurance carrier

• The fund would be required to be actuarially sound, as determined by the Commissioner of Insurance, with a required minimum balance maintained afte payment of expenses and claims and after inclusion of reserves, and incurred but not reported set-asides.

• Financing of the Act will be either by legislative appropriation or assessments levied against Montana physicians, as a surcharge to their medical liability insurance (as determined by the Commissioner of Insurance) or an amount equivalent thereto if insured, plus amounts received from investment income earned by the fund, with the fund to be administered by

  •• The office of the Commissioner of Insurance, if public monies are used for funding the Act,

•• The Montana Medical Legal panel, if the Act is funded by assessments on physicians, with funds held in trust and all personnel bonded in connection therewith

• To the extent that the fund would be exhausted by payment in full within a six month period of all claims becoming final, then -- except as to payments for medical care and related benefits -- amounts would be prorated, until such time as the Commissioner of Insurance caused replenishment of the fund by assessments on physicians, whether legislative appropriations are made or not.

• Any patient making a claim in medical malpractice must, by their attorney if represented, or by the Montana Medical Legal Panel, be advised in writing in an approved form,

•• of the options available under the Patient Assured Compensation Act,

•• and be advised that participation in the plan involves a waiver of a jury trial on the question of damages, including limits on available damages pursuant to a schedule of the same made available to the patient

• If the patient's request to participate in the Act is included in an application before the Montana Medical Legal Panel, and if the physician timely responds thereto with a request that a court determine the amount of damages, the Panel sitting on the claim shall, in addition to its current responsibilities, prepare an appropriate report, based upon the available evidence presented, as to its recommendation of awardable damages under the Act.

• Upon a suit being filed to determine the available damages to the patient, the District Court appoint the same Panel as a special master or fact-finder in the case to make non-binding recommendations to the court on the question of damages, accepting the initial report of the Panel, in addition to any further charges it shall make to the same Panel, on its own initiative or on the initiative of the parties, for purposes of such additional fact-finding as may be necessary.

• If the patient's request for participation is made subsequent to the application to the Panel, the District Court shall order the Montana Medical Legal Panel to select a new Panel for purposes of its appointment as a special master, under the same circumstances as presented above.

• Otherwise, the District Court proceeding to be the same as in any other civil proceeding.

• If, in the determination of the Commissioner of Insurance, adequately funded and staffed for such purposes by separate legislative authorization, after due hearing and investigation, cannot be made available for any specialty or group of physicians, or that its economic cost is such that its economic unavailability has created or is likely to create a public health emergency, then within a specified time, there shall be

mandatory participation in the Act by all physicians, and as to that specialty of physicians for which insurance is not available, and as to all patients with a claim against such physicians, during such period of time that the order of the Commissioner remains in effect.

• Any such determination by the Commissioner of Insurance shall include determinations by actuarial computation from competent actuaries hired by the Commissioner of Insurance.

• Surplus funds in the account of the Patient Act, over and above certain levels to maintain actuarial soundness and to provide some reductions in premiums (which can be passed on in the form of lower health care costs), will be directed towards additional funding of Medicaid, to enable their payments to physicians for care rendered; current procedures do not compensate physicians for the actual costs involved in many procedures.

C. REASONS FOR SPECIFIC LEGISLATIVE PROPOSALS ON PATIENT ASSURED COMPENSATION ACT

The general objectives of legislation concerning the Patient Assured Compensation Act are, on a voluntary basis:

- to provide a system of damages for the patient not unlike other forms of insurance

- to provide a system of assured and prompt economic damage payments for patients without the necessity of lengthy trials and costly expert witnesses and eliminating the cost of attorney fees to the patient, or, if there is a trial, to have such determination limited to the question of economic damages pursuant to a schedule for such purposes, after an admission of liability by the physician

- to provide a system of non-economic damages in cases where they are warranted, within reasonable limits

- thus further assuring the affordability and availability of medical malpractice insurance

METHODS OF CLOSURE OF CLAIMS BEFORE THE MONTANA MEDICAL LEGAL PANEL: CLOSURE YEARS 1977-1985

Montana Medical Legal Panel
2021 11th Ave.
Helena, Montana 59601

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METHODS OF CLOSURE OF CLAIMS BEFORE THE MONTANA MEDICAL LEGAL PANEL: CLOSURE YEARS 1977-1985

1. SUMMARY OF DATA ON METHODS OF CLOSURE.

A. Cumulative 1977-1985: By Number of Claimants/Claims

Number of Claimants:			415
Number Of Claimants With No Hearings		79	
Withdrawl & Settlement To Claimant On All	24		
Withdrawl & No Settlement To Claimant On All	54		
Withdrawl: Mixture Of Settlement & No Settlement	1		
Number Of Claimants With Hearings:		336	
Hearings Just With One Or More Physicians, No Facility In Claim	174		
Hearings Just With A Facility, No Physician In Claim	28		
Hearings Involving A Facility, One Or More Physicians In Claim	122		
Hearing Facility Only	1		
Hearing Facility And Physician(s)	121		
Hearings Just With One Or More Physicians, Facilities Involved In Claim	12		
Number Of Claimants Settling With One Or More Health Care Providers	24		
Number Of Claimants With-drawing As To One or More H Care Providers W/O Settlement	76		

B. Cumulative 1977-1985: By Number of Physicians

Physicians With Claims Against		565
Hearing	442	
Withdrawn No Settlement	98	
Withdrawn Settlement	25	

C. Cumulative 1977-1985: By Number of Facilities

Facilities With Claims Against, With & Without Physicians			197
Hearing	152		
Withdrawn No Settlement	33		
Withdrawn Settlement	12		
Facilities With Claims Against, No Physicians		36	
Hearing	29		
Withdrawn No Settlement	4		
Withdrawn Settlement	3		
Facility With Claims Against, With Physicians		161	
Hearing	123		
Withdrawn No Settlement	29		
Withdrawn Settlement	9		

D. By Year Of Closure 1977-1985: Comparison Of Physicians And Facilities

Involved In Claims As Percentage Of Total Health Care Providers		
Physicians		73.95 %
Facilities		26.05 %
Hospital	25.66 %	
Nursing Homes(3)	.39 %	
Involved In Withdrawn/No Settlement Claims As Percentage Of Total Health Care Providers		
Physicians		72.95 %
Facilities		27.05 %
Hospital	26.23 %	
Nursing Homes(1)	.82 %	
Involved In Withdrawn/With Settlement Claims As Percentage Of Total Health Care Providers		
Physicians		67.57 %
Facilities		32.43 %
Hospital	27.02 %	
Nursing Homes(2)	5.41 %	
Involved In Hearings As Percentage Of Total Health Care Providers		
Physicians		74.49 %
Facilities		25.51 %
Hospital	25.51 %	
Nursing Homes(0)	.00 %	

E. Cumulative 1977-1985: By Number Of Health Care Providers

Health Care Providers With Claims Against		762
Hearing	594	
Withdrawn No Settlement	131	
Withdrawn Settlement	37	

F. By Year Of Closure 1977-1985: All Health Care Providers

Closure Year	Hearing	Claim Withdrawn No Settlement	Claim Withdrawn Settlement
1977	0	0	0
1978	0	0	0
1979	27	5	1
1980	32	7	1
1981	55	10	2
1982	74	19	7
1983	109	27	7
1984	157	25	7
1985	134	38	12
TOTAL	594	131	37

G. By Year Of Closure 1977-1985: By Number of Physicians

Closure Year	Hearing	Claim Withdrawn No Settlement	Claim Withdrawn Settlement
1977	0	0	0
1978	0	0	0
1979	18	5	1
1980	24	3	0
1981	37	8	2
1982	56	15	5
1983	84	18	4
1984	121	18	4
1985	102	31	9
TOTAL	442	98	25

H. By Year Of Closure 1977-1985: By Number of Facilities

Closure Year	Hearing	Claim Withdrawn No Settlement	Claim Withdrawn Settlement
1977	0	0	0
1978	0	0	0
1979	9	0	0
1980	8	4	1
1981	18	2	0
1982	18	4	2
1983	25	9	3
1984	36	7	3
1985	38	7	3
TOTAL	152	33	12

I. Annual And Cumulative Claims Withdrawn (Settled & Not Settled) As A Percentage Of Total Claims Closed

Closure Year	As A Percentage Of Total Claims Closed Annual	Cumulative
1977	0.00 %	0.00 %
1978	0.00 %	0.00 %
1979	25.00 %	25.00 %
1980	7.69 %	14.29 %
1981	17.50 %	15.85 %
1982	20.00 %	17.52 %
1983	20.51 %	18.60 %
1984	14.71 %	17.35 %
1985	24.49 %	19.04 %

2. RAW DATA ON METHODS OF CLOSURE:

Note: See Additional Parties Information for two claims, one involving a 7th physician and one a 2nd facility, not reflected here

1. Claims - Closure Years 1977-1985: Total Number of Closed Claims - Number of Claimants With Claims

CLAIM# Count = 415

2. Claims - Closure Years 1977-1985: Total Number of Claims Where At Least One Health Care Provider (Or More) Went To Hearing - Number Of Claimants With Hearings

a. Claims With Hearings - Physicians And/Or Facilities

CLAIM# Count = 336

b. One Or More Physicians With Hearing And No Facility In Claim

CLAIM# Count = 174

c. Facility With Hearing And No Physicians In Claim

CLAIM# Count = 28

d. Facility With Hearing And Physicians In Claim But No Hearing For Physician

CLAIM# Count = 1

3. Claims - Closure Years 1977-1985: Number of Claims Where Claimant Settled With One or More Health Care Providers

CLAIM# Count = 24

4. Claims: Closure Years 1977-1985: Number of Claims Where Claimant Withdrew As To One Or More Health Care Providers Without Settlement

CLAIM# Count = 76

5. Physicians - Closure Years 1977-1985: Method of Closure

a. TOTAL PHYSICIANS AGAINST WHOM CLAIMS CLOSED: 1977-1985

P1METHCL Count = 379
P2METHCL Count = 108
P3METHCL Count = 39
P4METHCL Count = 13
P5METHCL Count = 9
P6METHCL Count = 4

b. PHYSICIAN METHODS OF CLOSURE, WHETHER PHYSICIAN ALONE IN CLAIM OR WITH FACILITIES: 1977-1985

P1METHCL	Number of Occurrences
A	55
H	304
S	20

P2METHCL	Number of Occurrences
A	18
H	85
S	5

P3METHCL	Number of Occurrences
A	9
H	30

P4METHCL	Number of Occurrences
A	3
H	10

P5METHCL	Number of Occurrences
A	2
H	7

P6METHCL	Number of Occurrences
A	2
H	2

6. Facilities - Closure Years 1977-1985: Method Of Closure

a. TOTAL FACILITIES AGAINST WHOM CLAIMS CLOSED: 1977-1985

F1METHCL Count = 195

b. FACILITY METHODS OF CLOSURE, WHETHER FACILITY ALONE IN CLAIM OR WITH PHYSICIANS: 1977-1985

F1METHCL	Number of Occurrences
A	33
H	150
S	12

c. FACILITY METHODS OF CLOSURE, FACILITY IN CLAIM ALONE: 1977-1985

F1METHCL	Number of Occurrences
A	4
H	28
S	3

d. FACILITY METHODS OF CLOSURE, FACILITY NOT IN CLAIM ALONE: 1977-1985

F1METHCL	Number of Occurrences
A	29
H	122
S	9

BY YEAR OF CLOSURE, 1977-1985 PANEL METHOD OF CLOSURE

7. Closure Year 1977 - Physicians: Method of Closure
8. Closure Year 1978 - Physicians: Method of Closure
9. Closure Year 1979 - Physicians: Method of Closure

P1METHCL	Number of Occurrences
A	3
H	11
S	1

P2METHCL	Number of Occurrences
A	2
H	3

P3METHCL	Number of Occurrences
H	2

P4METHCL	Number of Occurrences
H	1

P5METHCL	Number of Occurrences
H	1

10. Closure Year 1980 - Physicians Method Of Closure

P1METHCL	Number of Occurrences
A	3
H	21

P2METHCL	Number of Occurrences
H	3

11. Closure Year 1981 - Physicians Method Of Closure

P1METHCL	Number of Occurrences
A	5
H	27
S	1

P2METHCL	Number of Occurrences
A	3
H	8
S	1

P3METHCL	Number of Occurrences
H	2

12. Closure Year 1982 - Physicians Method Of Closure

P1METHCL	Number of Occurrences
A	8
H	40
S	3

P2METHCL	Number of Occurrences
A	1
H	11
S	2

P3METHCL	Number of Occurrences
A	3
H	5

P4METHCL	Number of Occurrences
A	1

P5METHCL	Number of Occurrences
A	1

P6METHCL	Number of Occurrences
A	1

13. Closure Year 1983 - Physicians Method Of Closure

P1METHCL	Number of Occurrences
A	12
H	57
S	3

P2METHCL	Number of Occurrences
A	3
H	19
S	1

P3METHCL	Number of Occurrences
A	3
H	5

P4METHCL	Number of Occurrences
H	2

P5METHCL	Number of Occurrences
H	1

14. Closure Year 1984 - Physicians Method Of Closure

P1METHCL	Number of Occurrences
A	11
H	81
S	3

P2METHCL	Number of Occurrences
A	4
H	19
S	1

P3METHCL	Number of Occurrences
A	2
H	8

P4METHCL	Number of Occurrences
A	1
H	6

P5METHCL	Number of Occurrences
H	4

P6METHCL	Number of Occurrences
H	2

14a. Closure Year 1985 - Physicians Method Of Closure)

P1METHCL	Number of Occurrences
A	13
H	67
S	9

P2METHCL	Number of Occurrences
A	4
H	22
S	1

P3METHCL	Number of Occurrences
A	1
H	8

P4METHCL	Number of Occurrences
A	1
H	1

P5METHCL	Number of Occurrences
A	1
H	1

P6METHCL	Number of Occurrences
A	1

15. Closure Year 1977 - Facilities: Method of Closure
16. Closure Year 1978 - Facilities: Method of Closure
17. Closure Year 1979 - Facilities Method Of Closure

F1METHCL	Number of Occurrences
H	9

18. Closure Year 1980 - Facilities Method Of Closure

F1METHCL	Number of Occurrences
A	4
H	8
S	1

19. Closure Year 1981 - Facilities Method Of Closure

F1METHCL	Number of Occurrences
A	2
H	18

20. Closure Year 1982 - Facilities Method Of Closure

F1METHCL	Number of Occurrences
A	4
H	18
S	2

21. Closure Year 1983 - Facilities Method Of Closure

F1METHCL	Number of Occurrences
A	9
H	25
S	3

22. Closure Year 1984 - Facilities Method Of Closure

F1METHCL	Number of Occurrences
A	7
H	36
S	3

22a. Closure Year 1985 - Facilities Method Of Closure)

F1METHCL	Number of Occurrences
A	7
H	36
S	4

23. FULL DATA ON METHODS OF CLOSURE: Closure Years 1977-1985

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#7801	H	-0	-0	-0	-0	-0	H
#7802	H	H	-0	-0	-0	-0	H
#7803	H	-0	-0	-0	-0	-0	H
#7804	H	-0	-0	-0	-0	-0	H
#7805	H	-0	-0	-0	-0	-0	H
#7901	H	-0	-0	-0	-0	-0	-0
#7902	A	A	-0	-0	-0	-0	-0
#7903	A	A	-0	-0	-0	-0	-0
#7904	A	-0	-0	-0	-0	-0	-0
#7905	A	-0	-0	-0	-0	-0	S
#7907	H	-0	-0	-0	-0	-0	-0
#7908	H	-0	-0	-0	-0	-0	-0
#7909	S	-0	-0	-0	-0	-0	-0
#7910	-0	-0	-0	-0	-0	-0	H
#7912	H	H	H	-0	-0	-0	H
#7913	H	-0	-0	-0	-0	-0	H
#7914	H	H	H	H	H	-0	H
#7915	H	-0	-0	-0	-0	-0	A
#7916	H	-0	-0	-0	-0	-0	H
#7917	H	-0	-0	-0	-0	-0	-0
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#7919	H	-0	-0	-0	-0	-0	-0
#7920	H	-0	-0	-0	-0	-0	-0
#7921	H	-0	-0	-0	-0	-0	H
#7922	H	-0	-0	-0	-0	-0	-0
#7923	H	-0	-0	-0	-0	-0	-0
#7924	H	-0	-0	-0	-0	-0	-0
#7925	-0	-0	-0	-0	-0	-0	H
#7926	H	-0	-0	-0	-0	-0	H
#7927	H	H	-0	-0	-0	-0	A
#8001	H	H	-0	-0	-0	-0	-0
#8002	H	H	-0	-0	-0	-0	H
#8003	H	-0	-0	-0	-0	-0	H
#8004	-0	-0	-0	-0	-0	-0	H
#8005	A	-0	-0	-0	-0	-0	H
#8006	H	-0	-0	-0	-0	-0	-0
#8008	A	-0	-0	-0	-0	-0	A
#8009	H	-0	-0	-0	-0	-0	-0
#8010	H	-0	-0	-0	-0	-0	-0
#8011	H	-0	-0	-0	-0	-0	A
#8012	H	-0	-0	-0	-0	-0	-0

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8013	H	-0	-0	-0	-0	-0	-0
#8014	H	-0	-0	-0	-0	-0	-0
#8015	H	H	-0	-0	-0	-0	H
#8016	-0	-0	-0	-0	-0	-0	H
#8017	H	-0	-0	-0	-0	-0	H
#8018	H	-0	-0	-0	-0	-0	-0
#8019	-0	-0	-0	-0	-0	-0	A
#8020	H	-0	-0	-0	-0	-0	H
#8021	H	H	H	-0	-0	-0	-0
#8022	H	-0	-0	-0	-0	-0	-0
#8023	A	A	-0	-0	-0	-0	A
#8024	H	H	-0	-0	-0	-0	H
#8025	-0	-0	-0	-0	-0	-0	H
#8026	H	-0	-0	-0	-0	-0	-0
#8027	H	-0	-0	-0	-0	-0	-0
#8028	-0	-0	-0	-0	-0	-0	H
#8029	-0	-0	-0	-0	-0	-0	H
#8030	S	S	-0	-0	-0	-0	-0
#8031	H	-0	-0	-0	-0	-0	-0
#8032	H	-0	-0	-0	-0	-0	-0

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8101	H	-0	-0	-0	-0	-0	-0
#8102	H	-0	-0	-0	-0	-0	H
#8103	H	-0	-0	-0	-0	-0	H
#8104	H	H	H	-0	-0	-0	H
#8105	H	-0	-0	-0	-0	-0	-0
#8106	H	H	-0	-0	-0	-0	H
#8107	A	A	-0	-0	-0	-0	-0
#8108	-0	-0	-0	-0	-0	-0	H
#8109	H	-0	-0	-0	-0	-0	-0
#8110	H	-0	-0	-0	-0	-0	-0
#8111	H	-0	-0	-0	-0	-0	H
#8112	H	-0	-0	-0	-0	-0	-0
#8113	H	-0	-0	-0	-0	-0	H
#8114	A	A	-0	-0	-0	-0	-0
#8115	H	H	-0	-0	-0	-0	-0
#8116	H	-0	-0	-0	-0	-0	-0
#8117	H	H	-0	-0	-0	-0	H
#8118	-0	-0	-0	-0	-0	-0	H
#8119	H	H	-0	-0	-0	-0	-0
#8120	A	-0	-0	-0	-0	-0	-0

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8121	H	H	H	-0	-0	-0	-0
#8122	A	-0	-0	-0	-0	-0	-0
#8123	H	-0	-0	-0	-0	-0	H
#8124	A	H	A	-0	-0	-0	A
#8230	A	-0	-0	-0	-0	-0	-0
#8231	S	-0	-0	-0	-0	-0	-0
#8232	H	-0	-0	-0	-0	-0	-0
#8233	H	-0	-0	-0	-0	-0	-0
#8234	H	H	-0	-0	-0	-0	-0
#8235	H	-0	-0	-0	-0	-0	-0
#8236	H	H	H	-0	-0	-0	-0
#8237	H	-0	-0	-0	-0	-0	-0
#8238	-0	-0	-0	-0	-0	-0	S
#8239	H	H	H	-0	-0	-0	H
#8240	H	H	-0	-0	-0	-0	-0
#8241	S	S	-0	-0	-0	-0	S
#8242	-0	-0	-0	-0	-0	-0	S
#8243	H	A	A	-0	-0	-0	A
#8244	A	-0	-0	-0	-0	-0	-0
#8245	H	-0	-0	-0	-0	-0	H
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8246	H	H	-0	-0	-0	-0	H
#8247	A	-0	-0	-0	-0	-0	-0
#8248	H	H	-0	-0	-0	-0	-0
#8249	H	H	A	-0	-0	-0	H
#8250	-0	-0	-0	-0	-0	-0	H
#8251	H	H	-0	-0	-0	-0	H
#8252	-0	-0	-0	-0	-0	-0	H
#8253	H	-0	-0	-0	-0	-0	H
#8254	H	-0	-0	-0	-0	-0	-0
#8255	H	-0	-0	-0	-0	-0	-0
#8256	H	H	-0	-0	-0	-0	-0
#8257	A	-0	-0	-0	-0	-0	-0
#8258	H	H	-0	-0	-0	-0	H
#8259	H	-0	-0	-0	-0	-0	-0
#8260	H	-0	-0	-0	-0	-0	-0
#8261	H	-0	-0	-0	-0	-0	-0
#8262	H	-0	-0	-0	-0	-0	-0
#8263	H	-0	-0	-0	-0	-0	-0
#8264	H	-0	-0	-0	-0	-0	A
#8265	-0	-0	-0	-0	-0	-0	A

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8266	A	A	-0	-0	-0	-0	-0
#8267	-0	-0	-0	-0	-0	-0	H
#8268	H	H	-0	-0	-0	-0	H
#8269	A	-0	-0	-0	-0	-0	-0
#8270	H	H	H	-0	-0	-0	H
#8271	H	-0	-0	-0	-0	-0	-0
#8125	H	-0	-0	-0	-0	-0	H
#8126	H	H	H	-0	-0	-0	-0
#8127	H	-0	-0	-0	-0	-0	-0
#8128	H	-0	-0	-0	-0	-0	H
#8129	H	-0	-0	-0	-0	-0	-0
#8130	-0	-0	-0	-0	-0	-0	H
#8131	H	-0	-0	-0	-0	-0	-0
#8132	H	H	-0	-0	-0	-0	-0
#8133	H	-0	-0	-0	-0	-0	-0
#8134	H	H	H	-0	-0	-0	H
#8135	H	-0	-0	-0	-0	-0	H
#8136	H	H	H	-0	-0	-0	H
#8137	H	-0	-0	-0	-0	-0	H
#8201	A	-0	-0	-0	-0	-0	A
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8202	H	-0	-0	-0	-0	-0	-0
#8203	A	-0	-0	-0	-0	-0	A
#8204	H	-0	-0	-0	-0	-0	H
#8205	A	-0	-0	-0	-0	-0	-0
#8206	A	A	A	A	A	A	A
#8207	H	H	-0	-0	-0	-0	-0
#8208	H	-0	-0	-0	-0	-0	-0
#8209	H	-0	-0	-0	-0	-0	-0
#8210	H	-0	-0	-0	-0	-0	H
#8211	H	-0	-0	-0	-0	-0	H
#8212	A	-0	-0	-0	-0	-0	-0
#8213	H	-0	-0	-0	-0	-0	H
#8214	H	-0	-0	-0	-0	-0	-0
#8215	H	-0	-0	-0	-0	-0	H
#8216	H	-0	-0	-0	-0	-0	-0
#8217	H	H	-0	-0	-0	-0	-0
#8218	H	-0	-0	-0	-0	-0	-0
#8219	H	H	A	-0	-0	-0	-0
#8220	-0	-0	-0	-0	-0	-0	H
#8221	H	-0	-0	-0	-0	-0	H

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8222	H	-0	-0	-0	-0	-0	H
#8223	H	-0	-0	-0	-0	-0	-0
#8224	H	-0	-0	-0	-0	-0	H
#8225	H	-0	-0	-0	-0	-0	-0
#8226	-0	-0	-0	-0	-0	-0	H
#8227	H	-0	-0	-0	-0	-0	H
#8228	S	S	-0	-0	-0	-0	-0
#8229	H	-0	-0	-0	-0	-0	-0
#8272	A	H	A	-0	-0	-0	H
#8273	H	-0	-0	-0	-0	-0	A
#8274	H	-0	-0	-0	-0	-0	H
#8275	H	H	-0	-0	-0	-0	H
#8276	H	-0	-0	-0	-0	-0	-0
#8277	H	H	H	H	H	-0	H
#8278	A	-0	-0	-0	-0	-0	-0
#8301	H	H	-0	-0	-0	-0	-0
#8302	S	-0	-0	-0	-0	-0	-0
#8303	H	-0	-0	-0	-0	-0	-0
#8304	H	H	-0	-0	-0	-0	-0
#8305	A	-0	-0	-0	-0	-0	-0
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8306	H	H	H	H	-0	-0	H
#8307	H	-0	-0	-0	-0	-0	-0
#8308	H	-0	-0	-0	-0	-0	-0
#8309	H	-0	-0	-0	-0	-0	-0
#8310	H	-0	-0	-0	-0	-0	H
#8311	H	-0	-0	-0	-0	-0	-0
#8312	H	-0	-0	-0	-0	-0	H
#8314	S	-0	-0	-0	-0	-0	S
#8315	H	-0	-0	-0	-0	-0	-0
#8316	H	A	-0	-0	-0	-0	H
#8317	H	-0	-0	-0	-0	-0	A
#8318	S	-0	-0	-0	-0	-0	S
#8319	H	-0	-0	-0	-0	-0	-0
#8320	H	-0	-0	-0	-0	-0	-0
#8321	H	-0	-0	-0	-0	-0	-0
#8322	H	-0	-0	-0	-0	-0	H
#8323	H	-0	-0	-0	-0	-0	A
#8324	H	H	H	-0	-0	-0	H
#8325	H	-0	-0	-0	-0	-0	-0
#8326	H	H	-0	-0	-0	-0	-0

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8327	H	-0	-0	-0	-0	-0	-0
#8328	A	-0	-0	-0	-0	-0	-0
#8329	A	-0	-0	-0	-0	-0	A
#8330	H	H	-0	-0	-0	-0	-0
#8331	H	-0	-0	-0	-0	-0	H
#8332	H	-0	-0	-0	-0	-0	-0
#8334	A	-0	-0	-0	-0	-0	A
#8335	A	-0	-0	-0	-0	-0	A
#8336	H	H	-0	-0	-0	-0	-0
#8337	A	-0	-0	-0	-0	-0	A
#8338	-0	-0	-0	-0	-0	-0	H
#8339	H	-0	-0	-0	-0	-0	H
#8340	H	-0	-0	-0	-0	-0	H
#8341	A	A	-0	-0	-0	-0	-0
#8342	H	-0	-0	-0	-0	-0	-0
#8343	H	-0	-0	-0	-0	-0	-0
#8344	A	-0	-0	-0	-0	-0	-0
#8345	H	-0	-0	-0	-0	-0	-0
#8346	H	-0	-0	-0	-0	-0	-0
#8347	H	-0	-0	-0	-0	-0	-0
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8348	H	H	A	A	-0	-0	H
#8349	H	H	H	H	H	-0	H
#8350	H	-0	-0	-0	-0	-0	H
#8351	H	H	H	H	-0	-0	H
#8352	H	H	H	-0	-0	-0	H
#8353	A	-0	-0	-0	-0	-0	A
#8354	H	-0	-0	-0	-0	-0	-0
#8355	A	-0	-0	-0	-0	-0	-0
#8356	H	-0	-0	-0	-0	-0	-0
#8357	H	-0	-0	-0	-0	-0	-0
#8358	H	-0	-0	-0	-0	-0	-0
#8359	H	H	H	H	-0	-0	H
#8360	H	-0	-0	-0	-0	-0	H
#8361	H	-0	-0	-0	-0	-0	-0
#8362	H	H	-0	-0	-0	-0	-0
#8363	H	-0	-0	-0	-0	-0	-0
#8364	A	A	-0	-0	-0	-0	A
#8365	H	-0	-0	-0	-0	-0	-0
#8366	H	-0	-0	-0	-0	-0	H
#8367	H	-0	-0	-0	-0	-0	H

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8368	-0	-0	-0	-0	-0	-0	H
#8369	H	-0	-0	-0	-0	-0	-0
#8370	-0	-0	-0	-0	-0	-0	H
#8371	H	H	H	-0	-0	-0	H
#8372	A	A	A	-0	-0	-0	A
#8373	S	-0	-0	-0	-0	-0	S
#8374	H	-0	-0	-0	-0	-0	-0
#8375	H	H	-0	-0	-0	-0	H
#8376	H	-0	-0	-0	-0	-0	-0
#8377	H	-0	-0	-0	-0	-0	-0
#8378	H	-0	-0	-0	-0	-0	H
#8380	H	-0	-0	-0	-0	-0	-0
#8381	-0	-0	-0	-0	-0	-0	H
#8382	H	-0	-0	-0	-0	-0	-0
#8383	H	-0	-0	-0	-0	-0	-0
#8384	A	-0	-0	-0	-0	-0	A
#8385	H	-0	-0	-0	-0	-0	-0
#8386	A	-0	-0	-0	-0	-0	A
#8387	H	-0	-0	-0	-0	-0	-0
#8388	H	-0	-0	-0	-0	-0	-0
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8389	H	-0	-0	-0	-0	-0	H
#8390	H	-0	-0	-0	-0	-0	-0
#8391	H	-0	-0	-0	-0	-0	-0
#8401	H	-0	-0	-0	-0	-0	H
#8402	A	-0	-0	-0	-0	-0	-0
#8403	H	H	-0	-0	-0	-0	H
#8404	H	H	H	H	H	H	H
#8405	H	-0	-0	-0	-0	-0	-0
#8406	H	-0	-0	-0	-0	-0	-0
#8407	-0	-0	-0	-0	-0	-0	-0
#8408	H	-0	-0	-0	-0	-0	-0
#8409	-0	-0	-0	-0	-0	-0	H
#8410	H	-0	-0	-0	-0	-0	H
#8411	H	-0	-0	-0	-0	-0	H
#8412	H	-0	-0	-0	-0	-0	-0
#8413	A	-0	-0	-0	-0	-0	A
#8414	H	-0	-0	-0	-0	-0	-0
#8415	H	-0	-0	-0	-0	-0	-0
#8416	S	-0	-0	-0	-0	-0	-0
#8417	H	-0	-0	-0	-0	-0	H

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8418	H	-0	-0	-0	-0	-0	-0
#8419	H	H	-0	-0	-0	-0	-0
#8420	H	H	-0	-0	-0	-0	-0
#8421	S	S	-0	-0	-0	-0	S
#8422	H	-0	-0	-0	-0	-0	H
#8423	H	-0	-0	-0	-0	-0	-0
#8424	H	H	H	H	H	-0	H
#8425	H	H	-0	-0	-0	-0	H
#8426	-0	-0	-0	-0	-0	-0	H
#8427	H	-0	-0	-0	-0	-0	H
#8428	A	-0	-0	-0	-0	-0	-0
#8429	H	-0	-0	-0	-0	-0	H
#8430	H	-0	-0	-0	-0	-0	-0
#8431	H	-0	-0	-0	-0	-0	H
#8432	H	-0	-0	-0	-0	-0	-0
#8433	H	-0	-0	-0	-0	-0	-0
#8434	H	H	-0	-0	-0	-0	-0
#8435	A	-0	-0	-0	-0	-0	-0
#8436	H	-0	-0	-0	-0	-0	-0
#8437	H	-0	-0	-0	-0	-0	-0
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8438	H	-0	-0	-0	-0	-0	-0
#8439	H	-0	-0	-0	-0	-0	-0
#8440	-0	-0	-0	-0	-0	-0	H
#8441	H	-0	-0	-0	-0	-0	-0
#8442	H	-0	-0	-0	-0	-0	-0
#8443	H	-0	-0	-0	-0	-0	-0
#8444	H	-0	-0	-0	-0	-0	H
#8445	H	-0	-0	-0	-0	-0	H
#8446	H	A	-0	-0	-0	-0	H
#8447	H	-0	-0	-0	-0	-0	-0
#8448	H	H	H	-0	-0	-0	-0
#8449	H	-0	-0	-0	-0	-0	-0
#8450	H	-0	-0	-0	-0	-0	-0
#8451	H	-0	-0	-0	-0	-0	-0
#8410A	H	-0	-0	-0	-0	-0	-0
#8452	H	H	-0	-0	-0	-0	-0
#8453	H	A	-0	-0	-0	-0	A
#8454	H	-0	-0	-0	-0	-0	H
#8455	H	-0	-0	-0	-0	-0	-0
#8456	H	H	-0	-0	-0	-0	H

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8457	H	-0	-0	-0	-0	-0	H
#8458	-0	-0	-0	-0	-0	-0	H
#8459	H	-0	-0	-0	-0	-0	-0
#8460	H	H	H	H	H	-0	H
#8461	H	H	H	H	H	H	H
#8462	H	H	-0	-0	-0	-0	-0
#8463	S	S	-0	-0	-0	-0	S
#8464	H	-0	-0	-0	-0	-0	-0
#8465	-0	-0	-0	-0	-0	-0	H
#8466	S	-0	-0	-0	-0	-0	-0
#8467	A	H	-0	-0	-0	-0	A
#8468	A	A	-0	-0	-0	-0	-0
#8469	H	-0	-0	-0	-0	-0	H
#8470	H	-0	-0	-0	-0	-0	-0
#8471	H	-0	-0	-0	-0	-0	H
#8472	H	-0	-0	-0	-0	-0	-0
#8473	H	-0	-0	-0	-0	-0	H
#8474	S	-0	-0	-0	-0	-0	-0
#8475	H	-0	-0	-0	-0	-0	-0
#8476	H	-0	-0	-0	-0	-0	-0
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8477	A	-0	-0	-0	-0	-0	-0
#8478	H	-0	-0	-0	-0	-0	H
#8479	H	A	H	-0	-0	-0	H
#8480	H	H	H	-0	-0	-0	H
#8481	-0	-0	-0	-0	-0	-0	H
#8482	H	H	-0	-0	-0	-0	H
#8483	H	H	-0	-0	-0	-0	H
#8484	H	A	-0	-0	-0	-0	H
#8485	H	H	-0	-0	-0	-0	-0
#8486	H	-0	-0	-0	-0	-0	-0
#8487	H	-0	-0	-0	-0	-0	-0
#8488	H	-0	-0	-0	-0	-0	-0
#8489	A	-0	-0	-0	-0	-0	-0
#8490	H	-0	-0	-0	-0	-0	-0
#8491	S	-0	-0	-0	-0	-0	S
#8492	H	H	-0	-0	-0	-0	H
#8493	H	-0	-0	-0	-0	-0	H
#8494	H	-0	-0	-0	-0	-0	-0
#8495	H	-0	-0	-0	-0	-0	-0
#8496	H	-0	-0	-0	-0	-0	H

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8497	A	-0	-0	-0	-0	-0	-0
#8498	A	-0	-0	-0	-0	-0	-0
#8499	A	-0	-0	-0	-0	-0	A
#84100	S	-0	-0	-0	-0	-0	-0
#84101	H	-0	-0	-0	-0	-0	-0
#84102	H	-0	-0	-0	-0	-0	-0
#8462A	A	A	A	A	A	A	-0
#84103	H	-0	-0	-0	-0	-0	-0
#8501	-0	-0	-0	-0	-0	-0	A
#8502	H	H	-0	-0	-0	-0	H
#8503	H	H	H	-0	-0	-0	H
#8504	H	-0	-0	-0	-0	-0	H
#8505	H	H	H	-0	-0	-0	-0
#8506	H	-0	-0	-0	-0	-0	-0
#8507	H	H	H	-0	-0	-0	H
#8508	H	-0	-0	-0	-0	-0	-0
#8509	H	H	-0	-0	-0	-0	-0
#8510	H	-0	-0	-0	-0	-0	H
#8511	H	-0	-0	-0	-0	-0	H
#8366A	H	-0	-0	-0	-0	-0	-0
CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8513	H	-0	-0	-0	-0	-0	-0
#8514	H	H	-0	-0	-0	-0	H
#8516	H	-0	-0	-0	-0	-0	-0
#8517	H	-0	-0	-0	-0	-0	H
#8518	H	-0	-0	-0	-0	-0	H
#8519	H	H	-0	-0	-0	-0	H
#8520	S	-0	-0	-0	-0	-0	-0
#8521	H	-0	-0	-0	-0	-0	-0
#8522	-0	-0	-0	-0	-0	-0	H
#8523	H	-0	-0	-0	-0	-0	-0
#8524	H	-0	-0	-0	-0	-0	-0
#8525	H	H	-0	-0	-0	-0	H
#8526	S	-0	-0	-0	-0	-0	-0
#8527	H	-0	-0	-0	-0	-0	H
#8528	-0	-0	-0	-0	-0	-0	S
#8529	H	H	-0	-0	-0	-0	A
#8530	A	-0	-0	-0	-0	-0	-0
#8531	H	H	-0	-0	-0	-0	-0
#8532	A	-0	-0	-0	-0	-0	-0
#8533	H	-0	-0	-0	-0	-0	-0

CLAIM#	P1	P2	P3	P4	P5	P6	F1
#8534	H	-0	-0	-0	-0	-0	H
#8535	A	-0	-0	-0	-0	-0	A
#8536	S	-0	-0	-0	-0	-0	-0
#8537	H	-0	-0	-0	-0	-0	-0
#8539	S	-0	-0	-0	-0	-0	S
#8333	A	-0	-0	-0	-0	-0	-0
#8540	-0	-0	-0	-0	-0	-0	H
#8542	H	H	-0	-0	-0	-0	H
#8543	-0	-0	-0	-0	-0	-0	H
#8544	H	-0	-0	-0	-0	-0	-0
#8545	H	-0	-0	-0	-0	-0	-0
#8546	H	-0	-0	-0	-0	-0	-0
#8547	H	H	H	-0	-0	-0	-0
#8548	-0	-0	-0	-0	-0	-0	A
#8554	H	H	-0	-0	-0	-0	-0

APPENDIX

1. DATA CODING. The data below is coded as follows:

A=Claim Withdrawn Before Hearing By Panel, Without Settlement to Patient

S=Claim Withdrawn Before Hearing By Panel, With Settlement to Patient

H=Hearing

2. DATA LIMITATIONS. The data below pertains only to those claims required to be heard by the Panel, i.e. the data does not include certain claims occurring prior to the effective date of the Panel in 1977, which by consent of the parties were brought before the Panel. Such data is used only for purposes of costs per claim and assessment determination. The claims are limited in number.

3. DATA SOURCES. The data below is taken from the database CLAIMS, a compilation of computerized data of claims before the Panel, after running error-checking routines CLAIMSn.CHK (where "n" = 1, 2, 3, 4, & 5) and correcting any database errors.

All claims with between one and six physicians and/or a facility are contained in the relation CLCLAIMS (Closed Claims) of the CLAIMS database were accessed by the command file PMTHCL85.CMD (Panel Methods of Closure Thru 1985), with subsequent years being accessed by the command file PMTHCLxx.CMD, where "xx" is the last closure year considered. The data below is from that command file output (or arithmetic operations on it) except for the data on two claims containing more than six physicians.

Data on claims with more than six physicians are contained, as to the physicians in excess of the first six, in the COMMENTS relation of the TASKS database and are cross-referenced in the CLCLAIMS under CLMNOTES (Claim Notes), which indicates whether added comments exist.

Methods of annual update are contained in PMTHCL.UPD.

4. NURSING HOMES. All differentiation between hospitals and nursing homes was taken directly from the database and not by use of a command file, and such data is as follows: CLAIM#s #8004 and #8265 are the only claims in the database pertaining to nursing homes through claims closed through year-end 1984. The methods of closure for those two nursing homes were "H" and "A". In 1985, a third claim against a nursing home was closed, with the method of closure being "S" in claim# #8407, includable in the 1985 Reports.

5. ADDITIONAL PARTIES INFORMATION. As of the end of 1985, seven claims had in excess of the six physicians and/or 1 facility. These claims and the method of their disposition were as follows:

Claim No.	Phy7	Phy8	Phy9	Phy10	Phy11	Phy12	Phy13	Fac2
8404	H							
8467								H
8461	H	H	H	A	A			
8462A	A	A	A	A	A	A	A	
8553								H

Through 1985, there were thus 13 additional physicians and two additional hospitals. As to four of the physicians there were hearings, with a withdrawn claim without settlement as to the other nine physicians. Each of the two facilities went to hearing.

STATE REPORTER
Box 749
Helena, Montana 59624

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No. 85-07

Exhibit 2
March 28, 1985
SJR 1
Senator Towe

Art. II, § 4
§ 16
§ 18

2-9-107

RICHARD B. PFOST,

Plaintiff and Respondent,

v.

Submitted: Aug. 29, 1985
Decided: Dec. 31, 1985

THE STATE OF MONTANA, MISSOULA COUNTY, and MINERAL COUNTY, political subdivisions of the State of Montana,

Defendants and Appellants.

CONSTITUTIONAL LAW--LIABILITY, Action for personal injuries allegedly due to the negligence of the State and alleging §2-9-107, which limits the liability of the state or any political subdivision in tort actions, is unconstitutional. The Supreme Court held that section 2-9-107, MCA, is unconstitutional, insofar as it limits the liability of the State or any political subdivision in tort actions for damages suffered from an act or omission of an officer, agent, or employee of the entity to amounts not in excess of $300,000 for each claimant and $1,000,000 for each ocurrence.

Appeal from the Fourth Judicial District Court, Missoula County, Hon. James B. Wheelis, Judge

For Appellant: J. Michael Young, Dept. of Admin., Helena
Clayton Herron, Dept. of Admin., Helena
Boone, Karlberg & Haddon, Missoula
M. Shaun Donovan, Mineral County Attorney, Superior

For Respondent: Green, MacDonald & Kirscher, Missoula

For Amicus Curiae: Mike Greely, Atty. Gen., Helena
Goetz, Madden & Dunn, Bozeman
Michael W. Flanigan, for Erickson, Anchorage, Alaska
Crowley Law Firm; Randall Bishop for Oscar L. Heinrich, Jr., Billings

Mr. Young and Randy J. Cox argued the case orally for Appellant; Joan B. Newman for Respondent, and James Goetz for Leslie Erickson (amicus).

Opinion by Justice Sheehy; Justices Morrison, Harrison and Hunt concur. Justice Morrison filed a specially concurring opinion. Chief Justice Turnage and Justice Weber dissent and filed opinions in which Justice Gulbrandson joins.

Affirmed.

____Mont.____

Mr. Justice Sheehy delivered the Opinion of the court.

We hold in this case that § 2-9-107, MCA, is unconstitutional, insofar as it limits the liability of the State or any political subdivision in tort actions for damages suffered from an act or omission of an officer, agent, or employee of the entity to amounts not in excess of $300,000 for each claimant and $1,000,000 for each occurrence.

Richard B. Pfost filed his complaint in the District Court, Fourth Judicial District, Missoula County, for personal injuries that he alleged were due to the negligence of the State of Montana, Department of Highways, Montana Highway Patrol, and Missoula and Mineral Counties. Mineral County was subsequently dismissed from the suit.

Pfost alleged that on April 6, 1981, he was driving a 1977 Peterbilt tractor on Interstate 90 about 23 miles west of Missoula when he encountered a bridge on Nine Mile Hill. The bridge was extremely icy, dangerous and hazardous and had been left in such a condition for several hours. He alleged no precautions were taken by defendants despite the fact that three separate wrecks had occurred prior to Pfost's arrival. Pfost lost control of his rig, crashed through the guardrail, and plummeted over the west bank of the bridge. He sustained a broken neck and is now a quadriplegic. He seeks compensatory damages of $6 million.

On the same day as his complaint for personal injuries, Pfost filed an action for declaratory judgment in the same District Court alleging that § 2-9-107, MCA, is unconstitutional. The District Court, after holding a hearing and accepting briefs on the question of declaratory relief, granted Pfost's motion for summary judgment and declared § 2-9-107, MCA, unconstitutional. The State and Missoula County appealed that ruling to this court.

I.

A review of the history in Montana of state governmental immunity in tort actions is helpful for perspective in this case.

There was no provision in the 1889 Montana Constitution directly bearing on governmental immunity. In Art. VII, § 20 of that Constitution, it was provided that ". . . no claim against the state, except for salaries and compensation of officers fixed by law, [should] be passed upon by the legislative assembly without first having been considered and acted upon by [the Board of Examiners]," which then consisted of the Governor, the Secretary of State, and the Attorney General. 1889 Mont. Const., Art. VII, § 20. It was held that Art. VII, § 20 of the 1889 Constitution applied to unliquidated claims. State ex rel. Schneider v. Cunningham (1909), 39 Mont. 165, 172, 101 P. 962, 963.

In 1907, the legislature provided a method for presenting unsettled claims against the state. Any person having a claim the settlement of which was not otherwise provided for by law, was

required to present the same to the Board of Examiners, at least two months before the legislative assembly, accompanied by a verified statement showing the facts constituting the claim. The Board of Examiners was to examine such claims and make a report to the legislature as to the facts found and its recommendations. It was then up to the legislature, if it accepted a claim, to make an appropriation for its payment. Once the claim was rejected either by the Board or by the legislature, a demand could not be made against the State again. There was, however, an appeal from an adverse decision of the Board to the legislative assembly itself. See sections 242 to 248 inclusive, R.C.M. 1935.

The view of this court respecting state immunity was expressed in Mills v. Stewart (1926), 76 Mont. 429, 436, 247 P. 332, 333. That case involved the tort claim of George Rietz, a student at the State University at Missoula, who had stepped through a door leading to an elevator shaft instead of to a bathroom as he surmised. He received injuries which were the basis of his claim against the State.

This Court said:

"If the contention advanced by Rietz is well founded in fact, his injuries resulted proximately from the negligence of the person responsible for the care and management of the dormitory building, and against such person he has a valid, legal claim which he might enforce in an appropriate action at law. The dormitory building is the property of the state, and the state is charged with its management and control, and, while it does not have any moral right to commit a tortious act, it has the same capacity to do so as any other corporation. (Citing authority.) The maxim of the English law, 'the King can do no wrong,' does not find a place in the jurisprudence in this country. (Citing authority.) The state, like any other corporation, can act only through its agents, and if the state of Montana were a private corporation, it would be responsible to Rietz in an action at law for the damages resulting proximately from the negligence of its agent in charge of the dormitory building. But the state is a public corporation, and out of considerations of public policy the doctrine of respondeat superior does not apply to it unless assumed voluntarily. In other words, the state is not liable for the negligent acts of its agents unless through the legislative department of government it assumes such liability." 76 Mont. at 435-36, 247 P. at 333.

In Mills, this Court held that the appropriation of money to pay the Rietz's claim was an appropriation for a public and not a private purpose and therefore met the requirements of the 1889 Montana Constitution.

Under this system of acting on tort claims against the State submitted by the Board of Examiners, the legislature found itself in the unpalatable position of acting as judge, jury, and responsible party in determining and settling such tort claims. See for example, claim of Chamberlain, House Bill no. 55, at 1110, Laws of Montana (1959); claim of Jenkins, House Bill no. 458, at 901, Laws of Montana

(1965).

The sovereign immunity of the State was construed by this Court to prevent suits against officers or agents of the State individually when acting in their official capacity. In a claim and delivery action against the Fish and Game commissioners, a game warden and a deputy game warden, in their official capacities, to recover a confiscated shotgun, the suit was an ex delicto action against the State and could not be maintained where the State had not consented to be sued. Heiser v. Severy (1945), 117 Mont. 105, 158 P.2d 501.

The blanket immunity that was extended to the State, its officers, agents and employees by court decisions was not complete for counties, cities, or other entities which had authority less extensive than the State. For school districts and counties, it made a difference whether the activity of the district or county which gave rise to the tort action was considered governmental or proprietary. Cities did not enjoy immunity from suits, even if the tort arose from what would be considered governmental operations. Thus, a city could be sued for injuries resulting from its failure to exercise an active vigilance to keep all of its streets in a safe condition suitable for public use, and to avoid the accumulation of snow and ice. O'Donnell v. City of Butte (1922), 65 Mont. 463, 211 P. 190. A city's liability for keeping the streets reasonably safe could not be delegated to the abutting landowner. Headley v. Hammon Building, Inc., et al. (1934), 97 Mont. 243, 33 P.2d 574. This Court explained the historical reasons for extending immunity to counties from tort actions but not to cities in Johnson v. City of Billings, et al. (1936), 101 Mont. 462, 54 P.2d 579. Nonetheless, while the city acted in its proprietary capacity in maintaining a fire department, when firemen were actually engaged in the performance of their duties as such, they were acting in a governmental capacity and in such cases the city was not liable for their torts. State ex rel. Kern v. Arnold (1935), 100 Mont. 346, 49 P.2d 976.

The county was held liable to suit for tort on the ground that maintaining a ferry across the Missouri River was a proprietary function. Jacoby v. Chouteau County (1941), 112 Mont. 70, 112 P.2d 1068. Likewise a county, working jointly with a city in the construction of a drain ditch, was acting in a proprietary function, and liable in a tort action although the action arose from the repair of a road which might ordinarily be considered a governmental function. Johnson v. City of Billings, supra.

In Longpre v. School District No. 2 (1968), 151 Mont. 345, 443 P.2d 1, it was held that governmental immunity of a school district to tort action was waived by the legislature when it required school districts to purchase bodily injury and liability insurance in the operation of school buses to transport school children.

In 1963, the legislature adopted section 40-4402, R.C.M. 1947, which provided that when an insurer insured any political subdivision of the state, municipality, or any public body for casualty or liability insurance, neither the insured nor insurer could raise the

defense of immunity from suit in a damage action brought against the insured or insurer. This statute provided that if the defendant could have successfully raised the defense of immunity, and the verdict exceeded the limits of applicable insurance, the court had the power to reduce the amount of judgment against the defendant to a sum equal to the limits stated in the policy. In Boettger v. Employers Liability Assurance Corp. (1971), 158 Mont. 258, 490 P.2d 717, this Court stated that if the amount of liability after judgment exceeded the amount of insurance, the policy should be delivered by the claimant to the District Court to apply the limitation required by § 40-4402.

In Cassady v. City of Billings (1959), 135 Mont. 390, 340 P.2d 509, it was conceded that the operation of an ice skating rink by a city was a proprietary function, but this Court held against the plaintiff on other grounds.

Such was the state of the law when the framers met in 1972 to consider a new Montana Constitution. the state and its agents enjoyed total immunity from suit for tort action unless a policy of liability insurance existed which covered the activity giving rise to the tort. In that event the insured could not raise the defense of immunity, and the District Court after judgment could reduce the judgment to the amount of available insurance.

Counties enjoyed complete immunity for governmental functions but not for proprietary functions. Cities did not enjoy immunity. Any governmental agency whose authority was less extensive than the state could protect itself by obtaining liability insurance, and if the entity was entitled to immunity in the particular field, again the District Court could reduce any judgment to a figure within the limits of the insurance coverage.

In 1972, the constitutional framers swept aside all notions of governmental immunity, and provided in the original version of Art. II, § 18, 1972 Montana Constitution the following:

"Section 18. State Subject to Suit. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973."

If there was any doubt as to the intentions of the framers with respect to the language of Art. II, § 18, that doubt was removed by this Court in Noll and Keneady v. Bozeman (1975), 166 Mont. 504, 534 P.2d 880. There this Court said:

"A reading of the record of the 1972 Constitutional Convention clearly indicates the framers intended to provide redress for all persons, whether victims of governmental or private torts. In referring to the concept of sovereign immunity the Bill of Rights Committee reported to the Convention:

"'The committee finds this reasoning repugnant to the fundamental

premise of the American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency.'

"The chairman of that committee, speaking from the Convention floor, told the delegates:

"'We submit it's an inalienable right to have remedy when someone injures you through negligence and through wrongdoing, regardless of whether he has the status of a governmental servant or not.'" 166 Mont. at 507-08, 534 P.2d at 882.

On November 5, 1974, at its general election, the people of the State of Montana amended Art. II, § 18, by adopting proposed constitutional amendment No. 2 by a vote of 108,704 to 76,252. After the adoption of the Constitutional amendment, effective July 1, 1975, Art. II, § 18, of the 1972 Montana Constitution now reads as follows:

"Section 18. State Subject to Suit. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature."

In 1977, the legislature adopted § 2-9-104, MCA, which provided a limitation in government liability for damages and tort as follows:

"2-9-104. Limitation on governmental liability for damages in tort--petition for relief in excess of limits. (1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for:

"(a) noneconomic damages; or

"(b) economic damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each occurrence.

"(2) The legislature or the governing body of a county, municipality, taxing district, or other political subdivision of the state may, in its sole discretion, authorize payments for noneconomic damages or economic damages in excess of the sum authorized in subsection (1)(b) of this section, or both, upon petition of plaintiff following a final judgment. No insurer is liable for such noneconomic damages or excess economic damages unless specifically authorized in the contract of insurance."

The validity of § 2-9-104, MCA, came before us in White v. State of Montana (Mont. 1983), 661 P.2d 1272, 40 St.Rep. 507. This Court held that the limitations of state liability provided in § 2-9-104 were unconstitutional. We shall discuss this case later in this opinion.

Within two weeks after our opinion in White v. State, supra, the

legislature met and passed, and the Governor signed § 2-9-107, MCA, the language of which we set out hereafter. It should be mentioned that a further provision of the new law provides that § 2-9-107 is to apply retroactively "to all claims, lawsuits and causes of action arising after July 1, 1977." (Ch. 675, § 7, Laws of Montana (1983).) Section 2-9-107 became effective on April 29, 1983.

II.

The words and figures of Section 2-9-107, MCA, the statute we today find invalid, follow:

"2-9-107. Limitation on governmental liability for damages in tort. (1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each occurrence.

"(2) No insurer is liable for excess damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived."

On its face, the statute is discriminatory. That point should be beyond argument. It discriminates in that any person who sustains damages of less than $300,000 in value will be fully redressed if the tortfeasor is the State, but any person with catastrophic damages in excess of $300,000 will not have full redress. Of course, if the statute were not discriminatory, there would be no need for any further inquiry into its constitutionality. There is tacit concession on all sides, however, that because the statute prevents full redress for those persons whose damages exceed $300,000 in state tort actions, an equal protection inquiry is triggered. For that reason the State and County have principally based their contentions here on whether § 2-9-107, MCA, can be found valid either on rationality or on both rationality and compelling state interest considerations.

Art. II, § 4, of our State Constitution provides in part that "[n]o person shall be denied the equal protection of the laws." Art. II, § 4, 1972 Mont. Const. That provision of our State Constitution, though similar in wording to the last clause of the Fourteenth Amendment of the Federal Constitution provides a separate ground on which rights of persons within this state may be founded, and under accepted principles of constitutional law such rights must be at least the same as and may be greater than rights founded on the federal clause. Thus, states may interpret their own constitutions to afford greater protections than the Supreme Court of the United States has recognized in its interpretations of the federal counterparts to state constitutions. City and County of Denver v. Nielson (1977), 194 Colo. 407, 572 P.2d 484. Federal rights are considered minimal and a state constitution may be more demanding than the equivalent federal constitutional provision. Washakie Co. Sch. Dist. No. One v.

Herschler (Wyo. 1980), 606 P.2d 310, cert.den. 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28. This is true even though our state constitutional language is substantially similar to the language of the Federal Constitution. Deras v. Myers (1975), 272 Or. 47, 535 P.2d 541, 549 n.17.

This is not to say that we fear that a different result would be demanded in this case if we founded our constitutional interpretation of § 2-9-107, MCA, strictly upon the equal protection clause of the Fourteenth Amendment of the Federal Constitution. What we advance here is that we have state constitutional provisions which, properly interpreted, command the result that we reach today and that such result, founded on state constitutional interpretation, does not countervail the minimal federal rights guaranteed by the Fourteenth Amendment.

It is perfectly proper for us to use criteria developed in federal cases to determine whether our state statute passes equal protection muster under our State Constitution. Thus we determine first whether the challenged statute affects a fundamental interest, see for e.g. Dunn v. Blumstein (1972), 405 U.S. 330, 336-42, 92 S.Ct. 995, 999-1003, 31 L.Ed.2d 274, 280-84; Shapiro v. Thompson (1969), 394 U.S. 618, 629-31, 89 S.Ct. 1322, 1328-30, 22 L.Ed.2d 600, 612-13; or contains a classification based upon a suspect criterion, see, e.g., Graham v. Richardson (1971), 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534; McLaughlin v. Florida (1964), 379 U.S. 184, 191-92, 85 S.Ct. 283, 288-89, 13 L.Ed.2d 222, 228-29. If so, the state must show a compelling state interest to sustain such a statute. If instead the statute involves only a regulation of economic or commercial matters, e.g. Western and Southern Life Insurance Company v. State Board of Equalization (1981), 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514; Minnesota v. Clover Leaf Creamery Company (1981), 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659, the lenient standard of rationality is applied. Such federal criteria are routinely used to determine equal protection questions under state constitutions. For example, in Washakie Co. Sch. Dist. No. One v. Herschler, 606 P.2d at 333, it is stated:

"The reasoning which we approve of and which we have applied to the instant case involves two different tests which are designed to determine if statutory classifications meet equal protection requirements. The first test is employed where the interest affected is an ordinary one and the second where fundamental interests are at issue. When an ordinary interest is involved, then a court merely examines to determine whether there is a rational relationship between a classification made by the statute or statutes being viewed, and a legitimate state objective. When a fundamental interest is affected or if a classification is inherently suspect, then the classification must be subjected to strict scrutiny to determine if it is necessary to achieve a compelling state interest. In addition, this test requires that the state establish that there is no less onerous alternative by which its objective may be achieved."

III.

Missoula County concedes in its brief that ". . . it is established that, in Montana, the right to bring a civil action for personal injuries is a fundamental right." White v. State of Montana (1983), 661 P.2d 1272, 40 St.Rep. 507.

The State of Montana likewise concedes:

". . . that statutory denial of any right to be compensated for any component of injury, including physical pain, mental anguish, loss of enjoyment of living, would be an effect on a 'fundamental right' which would be required to be measured by a 'strict scrutiny' test in order to pass constitutional muster, and that the Karla White case so held. It may also be conceded here that in such a case, in order for the strict scrutiny test to result in a conclusion of constitutionality, there must be a demonstration that the law is necessary to promote a compelling governmental interest, and the Karla White case ruled that also."

In White we had before us the constitutionality of § 2-9-104, MCA. That statute provided that neither the state nor any political subdivision of the state was liable in tort action for noneconomic damages, nor for economic damages in excess of $300,000 for each claimant and $1 million for each occurrence. This Court struck down § 2-9-104, MCA, as unconstitutional, holding that the right to bring an action for personal injuries was a fundamental right and that any statutory abridgment of that fundamental right must pass the test of strict scrutiny. We relied on Art. II, § 16 of the 1972 Montana Constitution, and upon our decision in Corrigan v. Janney (Mont. 1981), 626 P.2d 838, 38 St.Rep 545, to hold that the right to sue for personal injuries embraced "all recognized compensable components of injury, including the right to be compensated for physical pain and mental anguish and the loss of enjoyment of living." White v. State, 661 P.2d at 1275, 40 St.Rep. at 510. We further found that the interest of the state in "insuring that sufficient public funds will be available to enable the State and local governments to provide those services which they believe benefit their citizens and which their citizens demand" was a "bare assertion" which failed to justify a discrimination which infringed upon fundamental rights. Id.

The pricking point upon which the State and County seek to distinguish White from the case at bar is that while the right to sue for personal injuries is a fundamental right, the right to recover damages is not; or as encapsulated by the State, the "lower court sustains the proposition that a monetary limitation as to amount of damage recovery is the denial of some fundamental right. This is, precisely, the point at which error is brought into being."

The State contends that there is no fundamental constitutional right to recover all amounts of damages and that we cannot create substantive constitutional rights in the name of guaranteeing equal protection of the laws. It relies for authority on the case San Antonio Independent School District v. Rodriguez (1973), 411 U.S. 1,

93 S.Ct. 1278, 36 L.Ed.2d 16. What the State failed to note, however, the San Antonio School District case was one in which the United States Supreme Court examined the Federal Constitution in the light of the Fourteenth Amendment. In San Antonio School District, the United States Supreme Court held that the right to education was not explicitly guaranteed by the Constitution of the United States. In a later California case, Serrano v. Priest (1976), 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929, (rehearing denied as modified 1977), cert.den. 432 U.S. 907, 97 S.Ct. 2951, 53 L.Ed.2d 1079, the California Court abandoned Fourteenth Amendment and other federal concepts because of the decision in San Antonio School District, and found that under the California Constitution there was a fundamental right to education which could not be discriminatorily affected on the basis of available wealth in taxing districts.

Pertinent to this case are state constitutional provisions in addition to the equal protection clause found in Art. II, § 4. The legislature, in enacting § 2-9-107, MCA, purported to act under Art. II, § 18 which states:

"The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for an injury to a person or property, except as may be specifically provided by a 2/3 vote of each house of the legislature."

However, Art. II, § 16 of the State Constitution gives a constitutional right of full legal redress for injury. That section of the state constitution provides:

"Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such an immediate employer provides coverage under Workman's Compensation Laws of this state. . ."

The use of the clause "this full legal redress" has major significance. It obviously and grammatically refers to the "speedy remedy afforded for every injury of person, property, or character." The adjective "this" means the person, thing, or idea that is present or near in place, time or thought or that has just been mentioned. Webster's New Collegiate Dictionary (1981). The constitutional framers thus construed a "speedy remedy" as comprehending "full legal redress." A state constitutional right to full legal redress was thereby created. Any state statute that restricts, limits, or modifies full legal redress for injury to person, property or character therefore affects a fundamental right and the state must show a compelling state interest if it is to sustain the constitutional validity of the statute.

In enacting § 2-9-107 the legislature made findings which the state contends establish a compelling state interest. It contends that constitutionality must be presumed, that all facts necessary to

sustain the statute must be taken as conclusively found by the legislature, that the correctness of the findings is conclusive unless an abuse of discretion can be shown and that courts do not have jurisdiction or power to reopen, correct or make new findings of fact.

We have shown above that the state constitution provides a speedy judicial remedy for every injury of person, property or character, and that such speedy remedy includes a full legal redress as a fundamental interest. Since a fundamental interest is involved, § 2-9-107, MCA, must be subjected to strict judicial scrutiny in determining whether it complies with our state equal protection provisions and other provisions of our State Constitution. Under this standard the presumption of constitutionality normally attaching to the state legislative classifications falls away and the State must shoulder the burden of establishing that the classification in question is necessary to achieve a compelling state interest. Serrano, supra, 557 P.2d at 952; Washakie Co. Sch.Dist. No. One v. Herschler, supra.

We set out here in full the legislative findings codified in § 2-9-106, MCA. On these the State relies to sustain the validity of § 2-9-107:

"2-9-106. Legislative findings. (1) The legislature recognizes and reaffirms the report of the subcommittee on judiciary, contained in the interim study on limitations on the waiver of sovereign immunity (December 1976), that unlimited liability of the state and local governments for civil damages makes it increasingly difficult if not impossible for governments to purchase adequate insurance coverage at reasonable costs.

"(2) The legislature finds that the obligations imposed upon governmental entities must be performed, even though the risks inherent in performing absolute obligations are great. The responsibility for confining, housing, and rehabilitation of persons convicted of criminal activity; the treatment and supervision of mental patients at government institutions or under government programs; the planning, construction, and maintenance of thousands of miles of highways; the operation of municipal transportation systems and airport terminals; and the operation and maintenance of schools, playgrounds, and athletic facilities are only a few of those obligations.

"(3) The legislature finds that there are many functions and services both governmental and proprietary in nature traditionally offered by the state and other governmental entities which, because of the size of government operations and the inherent nature of certain functions and services, entail a potential for civil liability for tortious conduct far beyond the potential for liability of corporations and other persons in the private sector. Despite this potential for liability unparalleled in the private sector, the legislature finds that these functions of government are necessary components of modern life and that, despite limited resources and competition for those resources between necessary programs and entities, all functions and services both governmental and proprietary

in nature are deserving of conscious and deliberate continuation or retirement by the people through their elected representatives. The legislature further finds that liability for damages resulting from tortious conduct by a government or its employees is more than a cost of doing business and has an effect upon government far beyond a simple reduction in governmental revenues. Unlimited liability would, because of the requirement for a balanced state budget contained in Article VIII, section 9, of the Montana constitution and because bankruptcy is a remedy unavailable to the state and most other governmental entities, result initially in increased taxes to pay judgments for damages and would eventually have the effect of reallocating state resources to a degree that would result in involuntary choices between critical state and local programs. The legislature finds these potential results of unlimited liability for tort damages to be unacceptable and further finds that, given the realities of modern government and the litigiousness of our society, there is no practical way of completely preventing tortious injury by and tort damages against the state and other governmental entities. The legislature therefore expressly finds that forced reduction in critical governmental services that could result from unlimited liability of the state and other governmental entities for damages resulting from tortious conduct of those governments and their employees constitutes a compelling state interest requiring the application of the limitations on liability and damages provided in parts 1 through 3 of this chapter."

Bearing in mind that in White v. State, supra, we upheld the provisions of § 2-9-105, MCA, to the effect that state and political entities are immune from awards of punitive damages, we find little more in the quoted legislative findings supporting § 2-9-107 than a legislative plea not to require the legislature and other political entities to provide the funds necessary to pay the just obligations of those entities. In White, we also stated that the payment of tort judgments by political entities was simply a cost of doing business. 661 P.2d at 1275, 40 St.Rep. 510. The legislature in its findings contends that paying a judgment is more than the cost of doing business, and would, because of the constitutional requirements of a balanced state budget "result initially in increased taxes to pay judgments for damages and would eventually have the effect of reallocating state resources to a degree that would result in involuntary choices between critical state and local programs." Section 2-9-106, MCA. That statement is so wild in speculation as to be on its face unacceptable. Having to provide funds to pay judgments is not a sufficient excuse logically or legally. The legislature would place the burden of catastrophic damages not on the State whose agent caused them, but on the unfortunate person who received them. If the state constitutional framers in 1972 were concerned with any particular subject, they were certainly concerned with the importance of the individual. They detailed important individual rights in 35 sections of Art. II of the State Constitution, being careful to provide in § 34 that the specific enumeration of rights did not "deny, impair, or disparage other rights retained by the people." The findings of the legislature denigrate the right of the individual to full legal redress in favor of not raising taxes. Such a concept does

not constitute either an acceptable or a compelling state interest.

As we analyze § 2-9-107, MCA, we find little difference between it and the statute we found invalid in White, that prohibited recovery against governmental entities for noneconomic damages. Section 2-9-107, permits some recovery from noneconomic damages, but limits the amount that can be recovered. In legal effect, § 2-9-107, is but § 2-9-104 in another guise. In each case the injured party suffers a restriction of his right to full legal redress. Our decision in White therefore controls the outcome of this case--the legislature has invaded a fundamental right granted to individuals, and it has not shown a compelling state interest for doing so.

In addition to the necessity that the State show a compelling state interest for an invasion of a fundamental right, the state, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective. Washakie County, supra. Here the state has not attempted to make any such showing.

We see no substance in the State's contention, echoed in the legislative findings, that limitations on damages against governmental entities are necessary because the functions and services of such entities "entail a potential for civil liability for tortious conduct far beyond the potential for liability of corporations and other persons in the private sector." Section 2-9-106, MCA. There is no foundation in fact for such a statement. The federal government carries on governmental functions and services immensely greater in complexity and more far flung, yet it provides redress for victims of federal government torts under the Federal Tort Claims Act. See 28 U.S.C. § 2674. Several large corporations in this state carry on their business functions and activities, and respond in full in damages, both compensatory and punitive, as part of their cost of business. It is a novel argument indeed for a party to complain that it is too big and complex, or its employees too poorly trained and unchecked, for the party to be able to respond in damages for its tortious acts.

Both the State and the County in this case centered their arguments on the proposition that there was no fundamental interest involved in this case and therefore the State had only to meet the test of a rational nexus between the legislation and the state objective in enacting the legislation. Under the record in this case, we doubt that the legislation could pass even the lenient rational basis test but we do not reach that argument here. Since a fundamental interest is involved, we have examined the case from the viewpoint that the legislation requires strict judicial scrutiny to be sustained under our State Constitution.

Further argument advanced by both the State and the county is that since the amendment to the immunity clause in the State Constitution, adopted by a referendum vote of the people, empowers the legislature to fix immunity limits by a two thirds vote of each house of the legislature, that power is in effect part of the constitution itself

and not subject to challenge.

We reject out of hand that the legislature has the power, under Art. II, § 18, as amended, to act under that amended clause without regard to other provisions of the State Constitution. We agree with the rationale of the California Supreme Court in Serrano, supra, where it said:

"It seems to be argued, however, that because article XXIII, section 21 authorizes the financing of schools by a county levy of school district taxes, the Legislature is free to structure a system based upon this mechanism in any way that it chooses. Such a notion, we hasten to point out is manifestly absurd. A constitutional provision creating the duty and power to legislate in a particular area always remains subject to general constitutional requirments governing all legislation unless the intent of the Constitution to exempt it from such requirements plainly appears." 557 P.2d at 956.

We do not reach, because it is not necessary here, whether the grant to the legislature under the amended version of Art. II, § 18, is an impermissible grant to the legislature to amend the constitution.

The grounds upon which we hold today that § 2-9-107 is unconstitutional are somewhat different from those grounds utilized by the District Court in this case. The result, however, must be the same under our examination of the statute. We therefore hold that § 2-9-107, MCA, is an unconstitutional invasion by the legislature on a fundamental right granted under the State Constitution to sue governmental entities for full legal redress.

In view of our decision, it is not necessary to discuss other issues raised by the parties. The judgment of the District Court is affirmed.

* * * * *

Mr. Justice Morrison specially concurs as follows:

I unequivocally concur in the constitutional analysis engaged by my learned brother, Justice John C. Sheehy, speaking for the majority. This specially concurring opinion is written for the purpose of addressing the dissents of Mr. Chief Justice J. A. Turnage and Mr. Justice Fred J. Weber.

The Chief Justice has filed a dissent in which he states:

"The majority opinion centers upon Article II, Section 16, of the 1972 Montana Constitution . . ."

The Chief Justice's dissent fails to grasp the constitutional issue in this case and therefore proceeds upon a faulty premise. The issue is whether the statute in question offends Art. II, Sec. 4, of our State Constitution which provides in part that "no person shall be

denied the equal protection of the laws."

Had the courthouse door been completely closed to Pfost, then Art. II, Sec. 16, which forms the core of the Chief Justice's dissent, would likely be addressed rather than equal protection. The statute here in question does not institute a State immunity but rather provides a scheme for compensating litigants where a limited recovery of $300,000 is afforded. Pfost argues that such a scheme discriminates against him and denies equal protection of the law. Pfost's argument has not been addressed by the Chief Justice's dissent.

The first step in properly analyzing the Pfost claim is to determine whether the legislation discriminates. Pfost argues that people with claims worth less than $300,000 are fully compensated but under the statutory limitation he receives practically nothing. Pfost is a quadriplegic. The $300,000 limitation will not pay the medical expenses for his lifetime. The result of the limitation is that Pfost will receive nothing for loss of income, destruction of his established course of life, or for physical pain and mental anguish.

The statute is facially neutral in that every one receives the same treatment. All tort victims are limited to $300,000 in claims against the State of Montana. However, the statute does have a disparate impact upon people such as Pfost who suffered catastrophic injuries. The tort victim who fractures a leg receives full compensation. On the other hand a quadriplegic, under the limitation imposed,would not recoup medical expenses and would be denied any compensation for the other aspects of injury.

In view of the disparate impact suffered by catastrophically injured tort victims, it seems clear that Pfost, and those similarly situated, suffer discrimination under the State limitation. However, discrimination in this case is not per se unconstitutional. The next step in equal protection analysis is to determine whether the discriminatory legislation can be sanctioned without denying equal protection of the law as it is guaranteed under our state constitution. In making that determination, we must decide what level of scrutiny attaches.

Equal protection analysis is usually accomplished by appellate courts through judging the legislative classifications using "rational basis" or "strict scrutiny." Some courts have engaged a middle tier analysis. In this case we have adopted the "strict scrutiny" test for the reason that a fundamental right is implicated in imposing a $300,000 limitation.

There is no claim in this case that the $300,000 limitation imposed by the legislature violates Art. II, Sec. 16, of the State Constitution. For that reason the dissent filed by the Chief Justice just misses the mark.

The only relevance of Art. II, Sec. 16, is in determining what level of scrutiny to attach in making an equal protection analysis.

We must determine whether the $300,000 limitation infringes upon rights addressed in Art. II, Sec. 16. If so, then in making an equal protection analysis, strict scrutiny attaches and the State must show a compelling State interest in justification of the limitation.

In White v. State of Montana (Mont. 1983), 661 P.2d 1272, 40 St.Rep. 507, this court held that Art. II, Sec. 16, afforded redress for all aspects of injury including pain and suffering and that the State Tort Claims Law, which denied compensation for pain and suffering, would be subjected to a strict scrutiny analysis.

Art. II, Sec. 16, provides in relevant part as follows:

"Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress . . ."

In White we determined that the language "every injury" included pain and suffering and that by denying any compensation for pain and suffering the State would be required to show there was a compelling State interest to justify the denial. In this case, at least arguably, there is some compensation for every injury. On the face of the statute one can recover for all legally cognizable elements of damage but there is a $300,000 cap. The majority has attempted to determine whether such a limitation affords a speedy remedy for every injury as that language was intended in Art. II, Sec. 16. We looked to the next sentence in the section which commences "no person shall be deprived of this full legal redress . . ." The word "this" clearly refers to an antecedent. When the language of the section is construed harmoniously, it appears clear that the constitutional delegates intended that "remedy afforded for every injury" provides for full legal redress. That intent is made abundantly clear by the language of delegate DaHood quoted in the Chief Justice's dissent. DaHood said:

"We say, in the first sentence, that every citizen shall have the right to full legal redress."

Montana Constitutional Convention Transcript, Vol. V at 1757.

The first sentence of Section 16 does not specifically state that full legal redress is afforded, but the language found in the next sentence, shows the full breath of the first sentence's command.

Once we have determined that the $300,000 limitation discriminates against a class including the claimant Pfost and that such discrimination implicates a fundamental right found in Art. II, Sec. 16, we then require the State to justify the limitation by showing a compelling State interest. In White v. State, supra, we clearly stated that saving money did not constitute a compelling State interest. As in White, no compelling State interest has here been shown. Therefore, the statute in question fails to pass constitutional muster and must be stricken. The Chief Justice, in not addressing the equal protection issue, leaves us in the dark about

whether he would apply a rational basis test or a middle tier analysis. He does not say if the present statute would pass either test, and if so, why.

Justice Weber argues that Art. II, Sec. 18, has application in this case. That section states:

"State subject to suit. The State, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specially provided by law by a two thirds vote of each house of the legislature."

Under this provision of the Constitution, the legislature is authorized to enact State immunity by a two thirds vote. Of course, the legislature could do that anyway. The legislature could immunize any person or group of people from tort liability. The only significance of this constitutional provision is that it requires a two thirds vote instead of a majority vote in order to immunize the State of Montana from liability.

Where Justice Weber's dissent goes astray is in failing to consider that any legislation passed by the legislature must be subjected to the other provisions of the Constitution. Certainly the legislation itself does not become a part of the constitution and therefore cannot be balanced against other constitutional provisions. If the legislation passed by the legislature violates the equal protection clause of the Constitution, it still must be stricken.

I believe the majority opinion is scholarly and constitutionally sound. However, that opinion was drafted prior to the drafting of the dissents. The purpose of this concurring opinion is to show the weaknesses in the dissents and reinforce the lucid analysis found in the majority opinion.

* * * * *

Mr. Chief Justice Turnage dissenting:

I dissent to the majority opinion. I would hold that § 2-9-107, MCA, is constitutional and reverse the District Court.

The majority opinion centers upon Article II, Section 16, of the 1972 Montana Constitution and its application as articulated in White v. State of Montana (Mont. 1983), 661 P.2d 1272, 40 St.Rep. 507.

This Court should reexamine its interpretation of Article II, Section 16.

Montana's 1889 Constitution, Article III, Section 6, provided:

"Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial,

or delay."

Montana's 1972 Constitution, Article II, Section 16, provides:

"Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay."

The first and third sentence of Article II, Section 16, with the exception of the omission of the adjective "a" in the first sentence, are identical to the 1889 Constitution, Article III, Section 6. The drafters of the 1972 Constitution added only the second sentence of Article II, Section 16:

"No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state."

A careful examination into the intent of the drafters of the 1972 Constitution is essential and critical to this Court's correct interpretation of the second sentence of Article II, Section 16. Evidence of their intent is to be found in official proceedings of the Constitutional Convention.

The second sentence of Article II, Section 16, first appeared at the 1972 Constitutional Convention as delegate proposal 133 introduced February 3, 1972, and now appears verbatim as introduced in our Constitution. The proceedings of the delegates to the 1972 Constitutional Convention relating to the amendment of the article III, Section 6, of the 1889 Constitution by the addition of the second sentence in what is now Article II, Section 16, clearly establishes that the delegates had a singular and sole purpose in this regard: To assure that no person shall be deprived of full legal redress for injury incurred in employment for which another person may be liable.

Examination of the proceedings of the Montana Constitutional Convention from January 17, 1972, to March 24, 1972, leaves no doubt as to the delegates' purpose and intent in Article II, Section 16, nor does the plain language of this Article and Section.

On February 22, 1972, the Bill of Rights Committee submitted a committee report with these comments:

"The committee voted unanimously to retain this section with one addition. The provision as it stands in the present Constitution guarantees justice and a speedy remedy for all without sale, denial or delay. The committee felt, in light of a recent interpretation of the

Workmen's Compensation Law, that this remedy needed to be explicitly guaranteed to persons who may be employed by one covered by Workmen's Compensation to work on the facilities of another. Under Montana law, as announced in the recent decision of Ashcraft v. Montana Power Co., the employee has no redress against third parties for injuries caused by them if his immediate employer is covered under the Workmen's Compensation Law. The committee feels that this violates the spirit of the guarantee of a speedy remedy for all injuries of person, property or character. It is this specific denial--and this one only--that the committee intends to alter with the following additional wording: 'No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.' In other words the committee wants to insure that the Workmen's Compensation Laws of the state will be used for their original purpose--to provide compensation to injured workmen--rather than to deprive an injured worker of redress against negligent third parties (beyond his employer and fellow employees) because his immediate employer is covered by Workmen's Compensation. The committee believes that clarifying this remedy would have a salutary effect on the conscientiousness of persons who may contract out work to be done on their premises. To permit no remedy against third parties in cases where the employer is covered by Workmen's Compensation is to encourage persons with rundown premises to contract out work without improving the quality of the premises. The committee urges that this is an abuse of the Workmen's Compensation Law and constitutes a mis-application of that law to protect persons who are negligent.

"The committee commends this provision to the convention with the belief that it is an important, if technical, aspect of the administration of justice."

Montana Constitutional Convention, Vol. II, at 636-637.

On March 8, 1972, the Convention resolved itself into a Committee of the Whole and delegate Murray in recommending Section 16 of Article II stated:

"DELEGATE MURRAY: (After reading the entirety of the above committee report.) Those are the remarks which are contained in the booklet. Let me amplify them by saying basically this: we feel that the right to third party action is a right which we should establish in our Constitution. It is a right which working men and women who are unfortunate enough to be injured have had for nearly 80 years in this state. We feel that it was wrongly taken away from these people by the Supreme Court decision which was mentioned. We feel that we perhaps are legislating in asking that this be written into our Constitution, but we of the committee really believe that we are acting in a judicial manner in asking that it be written in the Constitution for we feel that this Convention, perhaps, is the court of last resort for injured working men and women in Montana with respect to the third party lawsuit, and we recommend that the section

be adopted.

"CHAIRMAN GRAYBILL: Mrs. Bowman.

"DELEGATE BOWMAN: Mr. Chairman, I wonder if Mr. Murray would yield to a question.

"DELEGATE MURRAY: Yes, Mr. Chairman.

"DELEGATE BOWMAN: Mr. Murray, I don't understand what this means and I wonder if you would explain it, giving us a specific example of what happened so we'd know that you're talking about.

"DELEGATE MURRAY: Mrs. Bowman, in the case in question, the--one of the important utilities in this state hired a contractor to repair some of its powerlines and the employee of the contractor that was hired crawled up a power pole and, while there working on that pole, it broke and it fell with him to the ground and he was injured. In the case in question, because of the decision of the Supreme Court, the injured employee was limited to Workmen's Compensation benefits through the coverage of the contractor. Ordinarily, if it were not for this interpretation, the injured employee would be entitled to sue the important utility in this state and recover in addition to his Workmen's Compensation benefits. Those benefits or a portion of those benefits recovered under Workmen's Compensation, were the injured workman--did he--or were he to make a recovery against the important utility, would be paid back under the theory of subrogation to the Industrial Accident Fund of Montana. But does that explain basically what occurred, at least in this one instance?"

Montana Constitutional Convention, Vol. V, at 1753-1754.

Delegate Dahood stated:

"DELEGATE DAHOOD: Mr. Chairman, I had intended not to speak on this particular section simply because I was trial counsel on behalf of Charles Ashcraft, who is permanently disabled for the rest of his life and shall never work at his trade. I have heard this argument in the Supreme Court, an argument that had no basis in logic. I have heard it by several defense counsel who represent the best of corporate interests, that this is going to affect the individual property owner, and if he hires a contractor, he is going to be exposed to a liability that is unprecedented and they did not experience before. This is totally untrue. This section is doing nothing more, and the wording has been very precisely selected to make sure that it does nothing more, than place the injured working man back in the status that he enjoyed prior to 1971, a very basic constitutional right which he enjoyed for 80 years in the State of Montana. What happened in the Ashcraft case? The Montana Trial Lawyers Association, 150 members strong, to a man, without a dissent, believes that this Constitutional Convention must return this right to the injured working man. The unions, without exception, believe that a very basic right has been taken away from the injured working man in the State of Montana, and I understand that the corporate interest

that specifically are involved in this have decided that they will not ask anyone to offer opposition to it on the Convention floor. Here is what happened in the Ashcraft case. Charles Ashcraft worked for an independent contractor having no connection with the Montana Power Company. The Montana Power Company made what we call an independent contract to have a new phase placed upon their power poles. Charles Ashcraft went 35 feet into the air. He was there for 20 minutes. Without warning, without any chance to protect himself, that pole gave way below ground level and carried Charles Ashcraft 35 feet to the ground. He was 90-some days in the hospital, but he survived; but he will not work at his trade again. What were the real facts? And keep this in mind: we are only talking about a situation where someone, through negligence, through a failure to use due care, has brought about the injury. There is nothing automatic. You may still suffer injury that is not fault of anyone else--not recover. We are not talking about that. So what were the facts? Dr. Clancy Gordon, one of the environmental advocates, was retained by us. He is a professor of botany at University of Montana. He examined the pole and found several apparent things about it. One, it violated the statute of the State of Montana that's been on the statute books for more than 50 years, that power companies must construct their poles of cedar-quality or other standardized material. This was a lodgepole pine; it was not as required by statute. This was a lodgepole pine that has a useful life of from 15 to 20 years at the most. This pole had been in place for more than 23 years and had not been inspected for more than 5 years before the accident occurred. As a consequence, the rotting that took place took place below the ground level where the lineman, before climbing the pole, could not detect it, even though in this instance Charles Ashcraft did what he was trained to do--took a shovel and dug around the base of the pole. And as a consequence, through the negligence of the Montana Power Company, he suffered this permanent injury. Up until this decision by the Supreme Court, there was no question that in that situation the injured citizen, the injured working man had a right for proper redress. The Workmen's Compensation law, which is inadequate at best, has certain public reasons for its existence. It applies only between the employer and the employee. So clever legal counsel for the Montana Power Company, and very able, decided maybe there's some way to get away from this case. So they went back to 1965, when the Legislature amended the independent contractor law to provide that you no longer could defend on the ground that someone injured within your work premises was not entitled to Workmen's Compensation from you because he was employed by an independent contractor unless you insisted that that independent contractor carry Workmen's Compensation. The legislators that were behind that amendment were interviewed. They said, 'We had no intention whatsoever of bringing about the results that were brought about by this Supreme Court decision, and you have to strain the reading of that particular section to come up with that particular position.' But nevertheless, the Supreme Court--and there's a very bitter dissent on that case--a long and well-reasoned dissent--but in any event, in that case they fastened upon that as a justification and an excuse for denying this working man his remedy. When that happened--and this was after Judge Battin of the Federal Court in a similar case had ruled in Montana that this amendment does not do

that--he then had to change his mind, because under federal law, he's bound by a Montana decision. The legal community was shocked. None of us were able to explain the result to the unions, to the working people. This particular right was taken away from the working man after 80 years, so promptly legislators introduced in the Senate a bill to overcome that. It passed the Senate--and I don't want to make a bicameral or a unicameral argument here. (Laughter) Promptly the lobby of the vested corporate interests when [sic] across the hall-and we determined this to be true--and made sure that it did not pass in the House. So we're now at the court of last resort. We allowed in our Bill of Rights an amendment to a clean and healthy environment. By this provision and this amendment, we are going to provide for the working man a safe environment. How does the law stand at the moment? Let me tell you how it stands. And some of the big vested corporate interests are now using independent contractors because it's reduced their cost of operation. If you have some particular tough job that you want done on your premises where there may be some danger connected with it, what you do, you go out and you hire an independent contractor. Don't have your employees in that dangerous area, because if they're hurt or there's an accident, you have to pay them Workmen's Compensation. So here's the way you do it now that we have immunity from the Supreme Court--an immunity neither intended by the people nor intended by the Legislature. What you do, you hire someone on an independent contractor basis and their employees are in this dangerous area. You don't have to worry about safety anymore. You don't have to do anything to make your premises safe. You don't have to be concerned about a safe environment for the people that are working there to benefit your interest. If they're injured, even though it's the most blatant type of negligence and carelessness, all you have to say is, 'Well, we're sorry, but you have your Workmen's Compensation.' Maybe you have a wife and seven children, but it's $65 a week for awhile and it's 60, and now, of course, the Legislature has raised it and you can get more money, but that's it. The Workmen's Compensation people were astounded at the decision. They sent their lawyers up to petition for rehearing. I do not think that any strong legal mind could really and truly justify what had happened, which has resulted in this, that in a particular area of industry now we need not have a safe environment for the working man. The vested corporate interest has immunity without paying anything for it. Now, now does it work if we return this basic right that the injured working man had for 80 years? Simply this. Let's assume--let's take the Charles Ashcraft situation. Charles Ashcraft is injured. He proves all these factors about the negligence of the Montana Power Company. He is paid his Workmen's Compensation, so he files what the lawyers call a third party lawsuit. The Montana Power Company then is compelled to acknowledge its obligation. They make payment. He then pays back to the Workmen's Compensation carrier. We have a provision in Montana in the Workmen's Compensation Law that provides for these actions--that the working man doesn't bring it, the Industrial Accident Board does. That law has never been changed. But how about now? That law is almost useless because of this particular interpretation. So what has happened? Regardless of all this conflict, this technicality, having to use the word "Workmen's Compensation" in this particular section, which we didn't want to do, because the minute we did it we knew that

somebody would jump up and say it's legislative, but if you're going to draft something with precision and you want to make sure that all that you're doing is returning the law to what it was prior to this decision a year ago, you are compelled, sometimes, in fashioning this precise language to use language that may be seized upon by someone else as legislative. It is not. It is giving back a basic constitutional right that the citizens of Montana had prior to that particular decision. And we submit to you that by this particular provision, all that we are doing is returning that right to the working man; and how can anyone truly, justly object to doing that and only that? Now that is what happened in that particular situation. This is a constitutional provision. We say, in the first sentence, that every citizen shall have the right to full legal redress. We've taken away full legal redress in that particular area. We want to give full legal redress back in that one specific area, and that is why it is framed in that particular fashion. And we submit to you, our fellow delegates, that we are here to make sure that the rights of the citizen are protected, and this is nothing more than a step forward to make sure that they will continue to have a protection that existed for 80 years. We submit it's a constitutional matter and that the amendment is required to have a progressive Bill of Rights. Thank you, Mr. Chairman."

Montana Constitutional Convention, Vol. V, at 1755-1757.

Delegate Johnson then inquired of Delegate Dahood:

"DELEGATE JOHNSON: Wade, I'm a cattle rancher down in southeastern Montana and we live way back in the hills, off the road. We have to maintain our own road; in fact, it's 12 miles there. We built what kind of a road we have, and we try to get by on it. We have some homemade bridges there, and this and that. As a point of clarification, I wanted to ask you, where we would contract somebody to do some work on this road and perhaps one of them with a piece of heavy equipment were doing some shaving or graveling of this or that and one of these bridges would collapse and one of those men would be hurt, then I would be responsible?

"DELEGATE DAHOOD: Torrey you would not be responsible. This amendment does nothing more than return the law to what it was about a year ago. Please recall what I said. The only time that someone would be responsible, such as the Montana Power Company, is when they are negligent, they are guilty of some type of civil wrongdoing. And this other argument that's been used, that it's going to open you up or it's going to open the owner of a residence up to some type of lawsuit, is simply, absolutely not true. That's why we fashioned this language precisely as we have. We're doing nothing more than trying to return the law to what it was prior to a year ago. Your situation would be no different than it's been in all the years gone by, Torrey."

Montana Constitutional Convention, Vol. V, at 1758.

In the clear and bright light of this record, there should be no

reason for disagreement on what the intention of the Constitutional Convention delegates was and what they had in mind when they adopted Article II, Section 16, or what the citizens understood when they voted upon this provision.

The majority opinion in its interpretation of Article II, Section 18, of the Montana Constitution and of § 2-9-107, MCA, raises other, and perhaps more serious, constitutional questions.

What political power do the people have to amend their Constitution? What standing with relation to other constitutional articles does a subsequent constitutional amendment have? What power do the people have to respond to any amendment through their Legislature?

Article II, Section 1, provides:

"All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."

Article II, Section 2, provides:

"The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary."

Article III, Section 1, provides:

"The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others except as in this constitution expressly directed or permitted."

The 1972 Constitution, when adopted by the people, was an amendment to their 1889 Constitution, and there should be no dispute that amendments to the Constitution must and do have a direct effect upon any prior existing Article of the Constitution which the amendment has an obvious and intended purpose in addressing. To hold otherwise may render any attempt by the people to amend their Constitution a nullity.

In a given factual context, each Article of our Constitution must have equal and recognized standing. If such were not the case, and the document not read to harmonize each of its provisions, interpretive chaos may well result.

Amendments amend amendments and this must be recognized by the Court.

The original Article II, Section 18, of the 1972 Constitution provided:

"The state, counties, cities, towns and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973."

An amendment to this Section was presented to the people by legislative referendum and in 1974 the people amended Article II, Section 18, which now provides:

"The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature."

In 1983, the legislature in response to this Court's decision in White, adopted § 2-9-107, MCA:

"(1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an act or omission of an officer, agent or employee of that entity in excess of $300,000 for each claim and $1 million for each occurrence.

"(2) No insurer is liable for excess damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.

The majority of this Court now finds this statute invalid and unconstitutional in failing to meet a test of rationality or compelling State interest, and therefore discriminatory, and therefore a denial of equal protection under Article II, Section 4, of the Montana Constitution.

I believe § 2-9-107, MCA, meets the test of rationality and compelling State interest.

The majority opinion sets forth in full the provisions of § 2-9-106, MCA, which will not be repeated here, but I commend the reader to further consider its provisions. They are not mere bare assertions or only a legislative plea not to require government to provide funds. They are carefully considered and articulated reasons why government of the people must be protected from unlimited liability.

The result of the majority opinion not only affects the State government, which arguably may have a deep pocket, but every County, City, School District, Irrigation District, Fire District, and many other small governmental entities as well, which unarguably do not have a deep pocket. It is the people of this State, not government, who bear the cost of government, which of course is extracted from them by taxes and fees.

When the people in 1974 adopted Article II, Section 18, they

authorized the legislature to specifically provide immunity from suit to governmental entities for injury to persons or property. This is precisely what the legislature has done in 1983 by passing § 2-9-107, MCA. They did not provide for total immunity but specifically limited damages as to amount. Legal redress for injury to person or property can only be measured in money damages. Article II, Section 18, authorized the legislature to provide for this limited immunity.

The majority opinion cites White and Article II, Section 16, for the proposition that there is a fundamental right to full legal redress under the facts of this case.

A grammatical reading of Article II, § 16, does not support this interpretation.

The clear intent of the 1972 delegates to the Constitutional Convention does not support this interpretation.

In adopting the second sentence of Article II, Section 16, they intended and did provide full legal redress for injury incurred in employment for which others may be liable, except as to fellow employees and the immediate employer. There is no question as to the need for this protection for the employees in this State.

There further can be no question that our courts are open to every person and speedy remedy afforded for every injury of person, property or character; however, this does not mean that the people have been denied the right to act through their legislature in providing a system of law that may set forth the scope and extent of the remedies provided by law. For this Court to decide otherwise requires a denial of the doctrine of separation of powers in Article III, Section 1, of the Montana Constitution.

This Court should reexamine its interpretation of Article II, Section 16, articulated in White and the cases controlled by that decision.

* * * * *

Mr. Justice Weber dissents as follows:

I commend the majority for its historical analysis and careful presentation of the constitutional principles which apply in equal protection cases. However, I strongly disagree with the conclusion that, under the facts of this case, there is a fundamental right to full legal redress which has been offended. I concur in the dissent of Chief Justice Turnage and agree that this Court should re-examine its interpretation of Art. II, § 16, Mont. Const. 1972, as contained in White and the majority opinion here.

I

Article II, § 18, Mont. Const. 1972, provides:

"The state, counties, cities, towns, and all other governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by 2/3 vote of each house of the legislature." [Emphasis supplied.]

The underscored portion was added by a constitutional amendment and approved by referendum vote of the people in 1974. As pointed out in the majority opinion, prior to that amendment, the state and various governmental entities had no immunity from suit under the 1972 Constitution. The constitutional referendum added the exception.

It is apparent that the people intended that the state could make specific provisions for immunity so long as those provisions were adopted by a 2/3 vote of each house. By requiring the 2/3 vote rather than the normal majority vote, the people demonstrated their requirement for broad agreement as to any immunity adopted.

Section 2-9-107, MCA, was adopted by 2/3 vote of each house of the legislature and was also approved by the governor. The adoption of that statute appears to satisfy the requirements for immunity under Art. II, § 18, Mont. Const. 1972. However, White and Pfost hold that no such immunity exists.

White held unconstitutional § 2-9-107, MCA 1983, which limited recovery to economic damages and eliminated the right to recover other types of damages from the state. White thereby advised the people of Montana, the members of the legislature and the governor, in particular, that they could not provide for immunity under section 18 by limiting recovery to certain types of damages or components of injury.

The majority opinion in Pfost now tells the people, members of the legislature and the governor that they cannot adopt a statute that in any way limits the dollar amount of recovery from the State as legal redress for injury to person, property or character.

If limited sovereign immunity is to be granted, it requires either a limitation on the type of damages for which compensation can be paid, or a dollar limitation upon the total amount of recovery. Both of these alternatives have now been effectively eliminated by the opinions of this Court. Absolute immunity appears to be the only remaining alternative. However, whether a statute that grants total sovereign immunity would still be permissible is an unsettled question. The effect of White and Pfost appears to be an improper judicial repeal of the exception in Art. II, § 18, Mont. Const., as adopted by the people of Montana in 1974.

II

Art. III, § 6 of the 1889 Montana Constitution provided that courts of justice "shall be open to every person, and a speedy remedy afforded for every injury of person, property or character. . ." This is substantially the same provision as Art. II, §16 of the 1972 Montana Constitution.

The majority points out that prior to adoption of the 1972 constitution, the State and its agents enjoyed total immunity from suit for tort action unless a policy of liability insurance existed. If the rationale of the majority in this case were applied, such total immunity would have been constitutionally improper. In a similar manner, the statutory reference to liability insurance, under which a court could reduce any judgment to a figure within the limits of insurance coverage, would also have been improper. Certainly the reduction of a judgment to the amount of available insurance would be unconstitutional under the majority analysis in the present case.

I point briefly to our constitutional history in order to emphasize how the majority's conclusion suggests that for many years prior to White, the thinking on the part of this Court and the people of Montana was constitutionally off base. I disagree.

III

What choices do the legislature and the people of Montana have in the event they desire to adopt immunity from suit, as authorized by Art. II, § 18, Mont. Const. 1972? Unfortunately I am not able to assist by giving any sense of direction. If I understand the thinking ofthe majority correctly, legislation which in any way restricts recovery of any damages claimed by an injured party would be impermissible. That seems to leave only one alternative: the adoption by a 2/3 vote of each house of a statute which grants total immunity to the state, counties, cities, towns and all other local governmental entities. If such a statute were enacted, it apparently could not contain any limitation with regard to insurance limits because of the holding in this case. Apparently absolute immunity adopted by a 2/3 vote of each house is the only choice that has not been rejected by this Court. I regret that this is the tragic choice which remains.

IV

I find that Art. II, § 16, Mont. Const., must be compared to § 18 of that same article. The canons of constitutional construction to be applied in comparing two different provisions require that the constitution be considered as a whole, that all provisions bearing upon the same subject matter receive appropriate attention and be construed together, and that specific provisions control broad and general provisions. See Jones v. Judge (1978), 176 Mont. 251, 255, 577 P.2d 846, 849.

In construing the two constitutional provisions here, we note that the people of Montana properly adopted an exception. They amended Art. II, § 18 several years after they adopted § 16. We also note that § 16 is the broad and general provision guaranteeing access to the courts and a remedy for every injury. Section 18, on the other hand, is a specific provision allowing limitations on legal redress against the government. Section 2-9-107, MCA, was adopted in accordance with § 18. The result is that the various governmental entities became immune from damages in excess of $300,000 for each

claimant and $1,000,000 for each occurrence. I conclude that § 2-9-107, MCA, is a constitutionally authorized limitation under Art. II, § 18 of the Constitution.

V

Even if I were to accept the holding of White and apply the strict scrutiny test to the legislation as required by the majority here, I would not reach a conclusion that § 2-9-107, MCA, is unconstitutional. I find the extensive legislative findings set forth in § 2-9-106, MCA, to be compelling. The legislature recognized that unlimited liability makes it increasingly difficult, if not impossible, to purchase insurance coverage. The legislature emphasized the high risk activities which must be performed by governmental entities and pointed out that all of such functions and services entail a potential for civil liability far beyond the potential liability of corporations or other persons in the private sector. The legislature further found that these functions are necessary components of government and that despite limited resources and competition for these resources between various programs, the services should be furnished to the people of this state. The legislature found that liability for damages for tort is more than a cost of doing business, and that its effect upon government goes far beyond a simple reduction in governmental revenues. The legislature concluded that unlimited liability would precipitate severe budget problems. Of particular significance are the following:

". . . The legislature finds these potential results of unlimited liability for tort damages to be unacceptable and further finds that, given the realities of modern government and the litigiousness of our society, there is no practical way of completely preventing tortious injury by and tort damages against the state and other governmental entities. The legislature therefore expressly finds that forced reduction in critical governmental services that could result in unlimited liability of the state and other governmental entities . . . constitutes a compelling state interest requiring the application of the limitations on liability and damages provided in parts 1 through 3 of this chapter."

The governor concurred in these findings when he signed the legislation.

I find these legislative findings and statements of purpose to be a clear, understandable and cogent explanation for the conduct of the legislature and the governor in passing this bill. These findings express major policy decisions which are peculiarly within legislative competence. For example, the financial impact of abolishing the monetary limit on sovereign immunity is a matter which could be clarified by legislative hearings. That process is not available to this Court. Unlike the legislature, we have no way of studying the economic and social trade-offs which might be involved if the State is subjected to unlimited liability. I would hold that the legislative findings are sufficient to establish a compelling state interest. As a result, I would conclude that even under the equal protection

analysis of the majority, § 2-9-107, MCA, is constitutional.

* * * * *

Mr. Justice Gulbrandson:

I join in the dissents of Mr. Chief Justice Turnage and Mr. Justice Weber.

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