MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 11, 1987

The twenty-sixth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on February 11, 1987 by Chairman Joe Mazurek, in Room 325 of the state Capitol.

ROLL CALL: All members were present with the exception of Senator Crippen who was absent.

CONSIDERATION OF SENATE BILL 252: Senator Pat Regan, Billings, introduced SB 252, which arose out of a recommendation of the Governor's Health Care Cost Containment Advisory Council and permits health service corporations and disability insurers to use subrogation provisions in their contracts.

PROPONENTS: Steve Brown, representing Blue Cross-Blue Shield, supported the bill.

Rod Sundsted, Chief of Labor Relations and Employee Benefits Bureau, supported SB 252. (Exhibit 1)

Dennis Taylor, Governor's Health Care Cost Containment Advisory Council, supported the bill.

OPPONENTS: John Hoyt, representing himself, opposed the bill because it makes the patients pay for the health cost and also pay for litigation costs. He felt the bill only benefited the insurance companies and not the victims of health care costs.

Karl Englund, Montana Trial Lawyers Association, gave examples of what the bill would do to certain cases.

Tom Keegan, Attorney at law in Helena, believes the system works fine now.

DISCUSSION ON SENATE BILL 252: Senator Mazurek asked exactly what the insurance companies wanted out of this.

Mr. Charles Butler, insurance salesman, said the interest in the bill is to give the health insurers the ability to recover, which will help in the cost of insurance premiums.

Karl Englund gave the committee amendments for SB 252. (Exhibit 2)

Senator Regan closed by saying the bill will prevent "double dipping" into insurance policies.

CONSIDERATION OF SENATE BILL 303: Senator Mike Halligan of Missoula, introduced SB 303, which revises the procedures to be followed in prosecuting child abuse, neglect, and dependency cases. (Exhibit 3)

PROPONENTS: Carol Clemens, Child Abuse Center, Helena, agreed with the bill and the changes it will make. She felt the addition of psychological care to the definition of "harm to a child's health or welfare" was important. She explained to the committee that many times it is impossible to hear a petition within 20 days because of cases like one in which a mother flew to Germany, leaving her boyfriend at home with the kids, who put the kids on a bus for Helena, Montana, without their knowing anyone in Helena. She said a case like that takes more than 20 days to file, hear and most importantly, get the people who are responsible contacted.

John Madsen, SRS, supported the bill.

Rita Pickering, representing herself, testified in support of the bill.

Mary Peterson, representing herself, supported the bill.

OPPONENTS: There were no opponents.

DISCUSSION ON SENATE BILL 303: Senator Pinsoneault asked how one makes some of these parents understand these children might need psychological help.

Senator Halligan said not the state, or anyone, can force beliefs on people, but when there is abusive situations, this bill gives us the right to force a few ideas into people's heads for their own good.

Senator Mazurek inquired why psychological care had to be included because he felt "health" treatment would already cover the psychological care.

Ms. Clemens felt "adequate psychological" needed to stay in the bill to make sure it is a care provided.

Senators Blaylock and Pinsoneault asked how old the children were that were left in Helena at the bus depot and if the parents were ever found.

Ms. Clemens replied the children were 8 and 10 years old and the parents have never been located.

Senator Halligan closed the hearing on SB 303.

RECONSIDERATION OF SENATE BILL 51 BY THE SUBCOMMITTEE: Mr. Jim Robischon, Montana Liability Coalition, began the hearing on SB 51 by showing a chart illustrating joint and several liability illustrations. (Exhibit 4) He explained a case example of a gentleman who went into the hospital for abdominal surgery. During the surgery, a very large surgical sponge was left inside his body. He pointed out that the nurses, by hospital rule, are accountable for the sponge count, and the surgeon had nothing to do with the count. He said the head surgical nurse stated the count was correct, and the surgeon was allowed to close. He said the patient returned home and had problems in healing, so had x-rays taken. Mr. Robischon explained sponges have a radiation tag attached to them, and out of 18 x-rays, 16 showed the sponge. He explained each person's negligence in the case: 1) the nurses were "negligent per se" for conducting an incorrect sponge count; 2) the surgeon has a "presumption of negligence" because he placed the sponge, but did not remove it; 3) radiologist is negligent because he failed to see clearly the tagged sponge from the very beginning; and 4) x-ray manufacturer is strictly liable because the radioactive tag did not show as clear as it could have on the x-ray pictures and was therefore missed. He explained that the jury did decide the percentages of negligence: 1) hospital is 55%; 2) surgeon is 20% (puts him under 25%); 3) radiologist is 15%; and 4) manufacturer is 10%.

Senator Mazurek asked what does this situation look like under the 25% threshold. Any person who is found less than 25% liable is severally liable only. He asked what it would be under the 25% threshold with "parties", not "persons". He also asked what economic vs non-economic damages would do with this. Senator Mazurek said presently, the amended bill includes all persons, not just "parties".

Mr. Robischon stated, of the $400,000 pie; 1) the nurses are up to $220,000 negligent =55%; 2) the surgeon is $80,000 negligent = 20%; the radiologist is $60,000 negligent = 15%; and 4) the manufacturer is $40,000 negligent = 10%. He said the surgeon is not subject to contribution from any other party and the surgeon can't ask for contribution to any party. He said the widow of the man with the sponge in his stomach, the plaintiff, will get a settlement of $320,000 because 1) she settled with the hospital before the trial, and 2) the radiologist is bare of insurance. He pointed out this is what is under the introduced bill, but under current law, there would be no shortfall because everyone can be hit with a $400,000 suit and have to pay the whole thing.

Senator Mazurek asked if the bill converted to the comparison of the negligence of only those parties. Mr. Robischon said that takes in the consideration of the "empty chair" and it could tilt more to the absent party. He pointed out that as long as these people are in the jurisdiction of the court, either side could if they wanted, bring in any party. He said this would affect the jury's percent on negligence.

Karl Englund responded to Mr. Robischon and agreed anyone under the jurisdiction of the court can bring in as many parties as they feel necessary, but the issue of whether they will do so is the key to the calculation of percentages by the jury.

Mr. John Hoyt felt none of the parties would bring in the bare insurance radiologist. He believed all these persons will blame the radiologist for the negligence because he is not there to defend himself because he has no insurance. He stated that is not justice, and it makes the "empty chair" a "scapegoat" for the negligence of other parties. He said as the bill stands now, it brings in unfairness, for when there is a ligitimate cause to bring in the radiologist, he can be brought in. He felt "parties" should be used over "persons" because of this situation.

Mr. Englund stated even though the hospital settled for $200,000 and the jury says they owe the plaintiff $220,000, the hospital still pays the settlement of $200,000.

Mr. Robischon stated that Rule 19 becomes easier to understand under this bill than the present law.

Dan Hoven said if you leave the radiologist out of the pie, the others, like the surgeon and manufacturer have to absorb his 15% negligence. He said you could be allocating a 100% fault to less than the full amount of people involved if the radiologist is not brought in.

Mr. Hoyt said with the law today, you can point to anyone of the defendants, whether they are slightly negligent or margely negligent and say because of that negligence, I was injured, no matter how slight the negligence, and I should be fully compensated for it.

Senator Mazurek said we have to balance the blame. Mr. Hoyt felt the injured person is the one that is loosing in this bill. Mr. Hoven stated if the radiologist is not in the suit and his 15% negligence is divided up, then it might cause some of the other defendants who were below the 25% threshold that was adopted, to be thrown into joint and several liability.

Senator Mazurek stated Iowa's law doesn't allow the "empty chair" unless a defendant has been released. He said the threshold there is 50%.

Senator Mazurek said the only people we took out were the exemptions for tort immunity on the employers or the fellow employee on the tort immunity of the Workers' Compensation Act. He asked Mr. Robischon to give an example of someone that would be immune from liability and why it is appropriate to include someone that is immune. Mr. Robischon responded charitable institutions were 20 years ago, but now he can't think of anyone. Senator Mazurek asked if we even need to include this in the bill.

Valencia Lane said the problem is whether you include consideration of the liability of all persons or only of parties. This means the percentages might change. She said if you allow the jury to consider the liability of all persons who could possibly be responsible, that each slice of the pie is smaller; but if the judge only considered liability of named parties, then each slice would become larger.

Senator Mazurek said that is the problem, because you have a $400,000 settlement and only come up with $320,000 of it.

Ms. Lane said if neither, the plaintiff nor the defendant, bring the radiologist into the suit, and then not consider his liability, the percentages of the other 3 defendants will become larger.

Senator Pinsoneault asked if the radiologist is brought in and says, sue me, I have no money, and then you bring him in as a party, how does that effect strategy.

Mr. Hoven replied if both sides knew there was nothing there to get out of him, they would still not bring him in.

Mr. Hoyt stated the plaintiff has to bring him in so the "empty chair" gets a percentage.

Ms. Lane pointed out that is what the gray bill would do, but our illustration doesn't show how the bill might be changed so it considers only the negligence of the parties. She said that has not been presented to the committee. Senator Mazurek stated it has been, indirectly, because you take the 15% that is the radiologist's and it goes to one other defendant, or spread equally.

Mr. Hoyt stated they still will claim fault against the "empty chair". Senator Mazurek said they can point at the "empty chair", but they can't apportion fault to it.

Senator Halligan inquired if they settled the issue of whether if the radiologist isn't there, what happens to that "bumped up" percentage. Senator Mazurek answered if you take the 15% and split it, you make the surgeon joint and severally liability and the nurses will still be involved.

Dan Hoven asked if the surgeon could get contribution from the nurses. Mr. Robischon answered that in the most recent decision, the John Deer Case, there was no right to contribution by certain parties.

Senator Brown asked which concept, persons or parties, is used now. Mr. Hoyt said parties is over persons. However, Mr. Robischon said it is persons over parties. Randy Bishop felt it is unclear what is used more.

Senator Mazurek moved on to the question of products liability in relation to joint and several liability.

Randy Bishop of the Montana Association of Defense Counsel handed out a proposed amendment to include products liability. (Exhibit 5)

Karl Englund stated the proposal from Randy Bishop cannot be used as a defense. He said intoxicating liquor is not a defense because if one is sober and knew of the danger, and used the equipment while drunk, being drunk is not a defense. He felt a, b, and d all fall in the assumption of risk category. Mr. Englund said if the consumer discovers the defect and is aware of the danger and nevertheless proceeds to use the product, then there has been assumption of risk. He said the key is that the person has to assume the risk of the danger of which he is aware. He handed out an amendment that explained this. (Exhibit 6) He felt in order for the misuse to be a defense, it has to again be a misuse such as the plaintiff knows he put himself in danger. He said a warning that is effective keeps a product from being held as being a defective product in unreasonably dangerous condition. He said if there is an effective warning, there is no product liability case, and thus, a failure to follow a warning cannot be a defense in a product liability because it goes into a negligence type case. He felt if the committee put the original definition back in on the assumption of risk part, it would do all that the committee is looking for.

Randy Bishop felt Mr. Englund's proposal would codify the existing common law in Montana today. He said the trouble caused by fault being determined by percentages in the comparative fault area caused them to bring in a product liability amendment to make a middle ground. He said part (a) makes a person have to prove he really knew the risk. Part (b) shows where the defendant shows "crystal clear" proof of the product, but could not come up with the evidence to show the person appreciated the danger. Part (c) protects the manufacturer in some cases. Part (d) he felt it is only the intoxication that contributes to the injury. He said it seems inappropriate to burden the manufacturer with the obligation to pay, without respect to the contribution made by the user of the product with his use of alcohol. He felt it unfair. He thought subsections a, b, c, and d do help the gray areas of the bill and Mr. Englund's proposal is not reaching "middle ground" with the situation at all.

Mr. Englund commented that where a warning is given, a seller presumes it will be read and heeded, and the product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous. He said if the warning is there, then you don't have a products liability case.

Mr. Randy Bishop believes proving the assumption of risk is an objective standard, whether a reasonable person would feel one is assuming the risk. He said in the cases of Brown and Stenberg, it was pointed out by the Supreme Court that it is a subjective standard in determining assumption of the risk. He said he was just pointing out the difference between (a) and (b).

Senator Mazurek asked if a subjective test in Mr. Englund's proposal will be right. Mr. Englund responded he was looking at the restatement. Senator Mazurek said that applies to only part of it and the proposal from the Defense Counsel is out of a Washington State Statute restatement; but (a), (b), and (c) are out of the restatement. Mr. Bishop responded that is right. Mr. Englund felt these parts did not come out of the restatement. He said if one is aware of the danger and misuses the product, then it is assumption of risk. He believes if he misuses the product and is injured by the misuse, and not by the defective condition, then it is not a products liability issue.

Mr. Hoyt said misuse is often used in a products case because you don't know it is misuse until after you are hurt, and misuse is always an arguement in a products case.

Senator Mazurek thought maybe an objective test should be put into it.

Senator Halligan felt the committee should think on this subject and let it rest for right now. He asked if any committee members wanted changes in anything before discussing products liability. He asked Valencia Lane to make the changes in the gray bill and he asked the committee to make suggestions on the products liability amendment. Senator Halligan felt (a) and (b) should be incorporated into one part so that you can incorporate the defense in the restatement definition of the assumption of risk and incorporate misuse of the product where misuse causes or contributes to the injury.

Senator Bishop asked if (b) was right out of restatement. Karl Englund replied his amendment was, but not Mr. Bishop's.

Valencia Lane handed the committee a review of the situation Mr. Robischon gave of the "sponge case", with the gray bill proposals. (Exhibit 7)

Senator Mazurek suggested the Englund proposal be used with an objective test and the Defense Counsel's proposal with (a) and (b) incorporated into this bill.

Senator Brown asked if the committee was clear on what "misuse" is. Senator Mazurek replied the committee is going to have to get into the subjective vs. objective test on misuse as well. Senator Brown said there is intentional misuse in (a).

Senator Halligan thought a commonly accepted standard should be put in the bill showing what a product was made for, and manufactured to do.

Senator Mazurek explained what other states did, like Iowa, who took the whole concept of fault, while Florida uses fault, but takes in the concept of non-economic vs. economic damages. Washington takes fault and all persons and just several. He said West Virginia uses parties, and Colorado uses pure several and considers the fault percentages of each of the parties. He asked Valencia Lane to make up the changes for product liability and he asked Senator Brown if he wanted to talk about economic vs. non-economic damages. Senator Brown felt the committee had too many other things to consider.

Senator Mazurek told the subcommittee they would meet at 9:00 a.m. on February 12th to finish discussing the bill.

ADJOURNMENT: The meeting was adjourned at 12:05 p.m.

SENATOR JOE MAZUREK, Chairman

mh

DATE Feb. 11th

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Oppose
Steve Brown	Blue Cross-Blue Shield	SB 252	X	
John Hoyt	Self			X
Mary Peterson	Self	SB 303	X	
Rod Sundsted	State Pers. Div	SB 252	X	
John Madsen	SRS	SB 303	X	
Dennis M. Taylor	Gov Health Care Cost Containment Advisory Council	SB 252	X	
[illegible] Pickering	Self	SB 303	X	
Laurie [illegible]	State Personnel	252	X	

(Please leave prepared statement with Secretary)

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Feb. 11th

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman			X
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

SENATE JUDICIARY
EXHIBIT NO. 1
DATE Feb. 11th
BILL NO. SB 252

DEPARTMENT OF ADMINISTRATION
STATE PERSONNEL DIVISION

TED SCHWINDEN, GOVERNOR
ROOM 130, MITCHELL BUILDING

STATE OF MONTANA

(406) 444-3871
HELENA, MONTANA 59620

TESTIMONY OF ROD SUNDSTED, CHIEF OF THE
LABOR RELATIONS AND EMPLOYEE BENEFITS BUREAU,
IN SUPPORT OF SENATE BILL 252

Mr. Chairman, Members of the Committee, my name is Rod Sundsted, and I am Chief of the State's Labor Relations and Employee Benefits Bureau. I appear before you today in support of Senate Bill 252.

I would like to first point out that Senate Bill 252, as drafted, would allow Disability Insurance Plans subject to Title 33, Chapter 22, and Health Service Corporation Plans, subject to Title 33, Chapter 30, to include a subrogation provision. Because the State's Self-Insured Plan is exempt from Title 33, the State Plan would not be allowed to subrogate. I would like to offer an amendment for your consideration which would also allow the State Self-Insured Plan the option of including a subrogation provision.

I support Senate Bill 252 because it would allow benefit plans an additional option in their attempt to provide the greatest benefit for the dollars available.

Leg-2/ROD

publications & graphics

PROPOSED AMENDMENTS TO SENATE BILL NO. 252:

1. Page 2, line 4.
Following: "chapter 22," in both places
Insert: "and Title 2, chapter 18,"

7040b/CNCL87

PROPOSED AMENDMENTS OF SB 252 -- INTRODUCED COPY — MTLA

SENATE JUDICIARY
EXHIBIT NO. 2
DATE Feb. 11, 1987
BILL NO. SB 252

Page 1, line 14
Following: "entitled to"
Strike: "full"

Page 1, line 14
Following: "subrogation"
Insert: ", as provided for in [Section 3],"

Page 1, line 23
Following: "to"
Strike: "full"

Page 1, line 23
Following: "subrogation"
Insert: ",as provided for in [Section 3],"

Page 2, line 2
Insert: "Section 3. (1) If the insured intends to institute an action for damages against a third party, the insured shall give the insurer reasonable notice of his intention to institute the action.

(2) The insured may request that the insurer pay a proportionate share of the reasonable costs of the thrid party action, including attorneys' fees.

(3) The insurer may elect not to participate in the cost of the action. If this election is made, the insurer waives 50% of its subrogation rights granted by [Sections 1 and 2].

(4) The insurer's right of subrogation granted in [Sections 1 and 2] does not apply until the injured insured has been fully compensated for his injuries.

Renumber subsequent sections.

SENATE JUDICIARY
EXHIBIT NO. 3
DATE Feb. 11, 1987
BILL NO. SB 303

SUMMARY OF SB303 (HALLIGAN)
(Prepared by Senate Judiciary Committee staff)

SB303 revises the procedures to be followed in prosecuting child abuse, neglect, and dependency cases. This bill makes the following changes:

(1) amends the definition of "harm to a child's health or welfare" to include failure to provide adequate psychological care; [Section 1, page 2.]

(2) deletes the requirement that all petitions alleging abuse, neglect, or dependency must be heard within 20 days of the filing of the petition; [Section 2, page 6.]

(3) allows service by publication on parents or guardians who cannot be served personally; [Section 2, page 7 - Note: this change is also in SB209.]

(4) authorizes petitions for permanent legal custody with the right to consent to adoption;[Section 2, page 8 - Note: this change is also in SB209.]

(5) deletes the requirement of probable cause for granting petitions for temporary investigative authority and protective services and allows such petitions to be granted on cause; [Section 3, page 9 and Section 4, page 10.]

(6) amends the appeal procedure in Title 41, chapter 3, part 6 (Parent-Child Legal Relationship Termination) to provide that the Supreme Court may stay a district court order if suitable provision is made for the care and custody of the child [Section 5, page 11.]; and

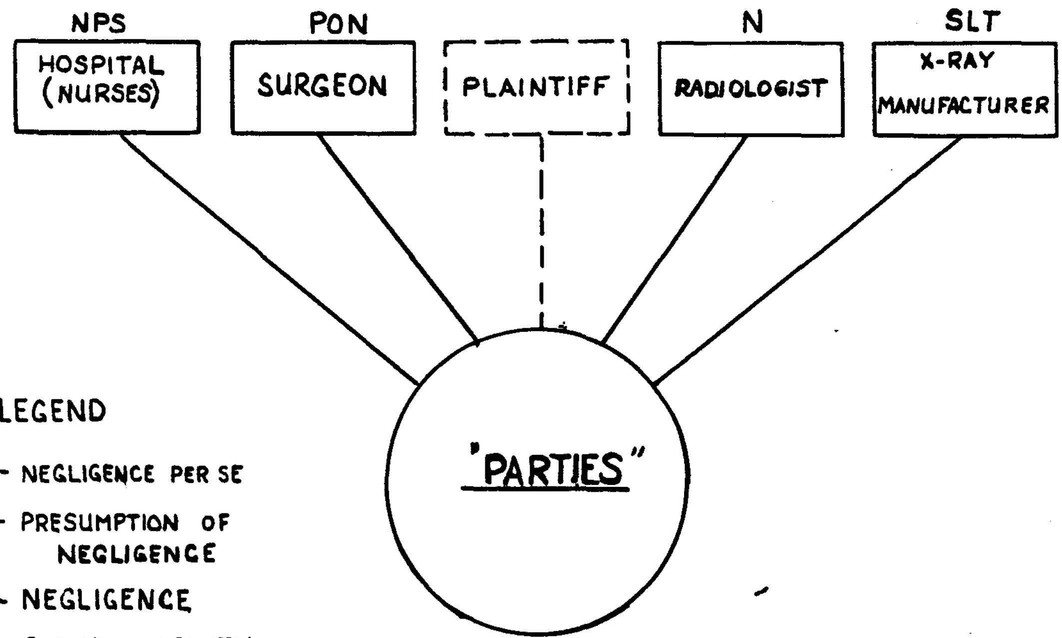
(7) establishes an appeals procedure for Title 41, chapter 3, part 4 (Abuse, Neglect, and Dependency Proceedings) that is identical to the appeal procedure for Part 6, as amended by this bill (above); [Section 6, page 11.] -- under current law, there is no appeals procedure for abuse, neglect, and dependency proceedings.

COMMENTS: None.

C:\LANE\WP\SUMSB303.

SENATE JUDICIARY
EXHIBIT NO. 4
DATE Feb 11, 1987
BILL NO. SB 51

JOINT & SEVERAL LIABILITY ILLUSTRATIONS



LEGEND

NPS - NEGLIGENCE PER SE

PON - PRESUMPTION OF NEGLIGENCE

N - NEGLIGENCE

SLT - STRICT LIABILITY IN TORT

S - SOLVENT

I - INSOLVENT

PERSONS	PARTY	% N-JURY DETERMINATION	DAMAGE RESPONSIBILITY
HOSPITAL (NURSES)			
SURGEON			
RADIOLOGIST			
X-RAY MANUFACTURER			

SENATE JUDICIARY
EXHIBIT NO. 5
DATE Feb. 11, 1987
BILL NO. SB 51

Montana Association of Defense Counsel
Proposed Amendments to SB 51

27-1-702 (2):

Proposed Product Liability Amendment to SB 51
There shall be a new subsection (2) to section 27-1-702.

New 27-1-702 (2):

Except as herein stated contributory negligence shall not be a defense to the liability of manufacturers or sellers, based on strict liability in tort, for personal injury or property damage caused by defectively manufactured or defectively designed products. A manufacturer or seller, named as a defendant, in and action based on strict liability in tort for damages to person or property caused by a defectively designed or defectively manufactured product may assert the following affirmative defenses against the user, his legal representative, or those persons claiming damages by reason of injury to the user:

(a) The fact that the user of the product discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it.

(b) Misuse of the product by the user where such misuse causes or contributes to the injury.

(c) Failure by the user to follow warnings or instructions, which are reasonably available to and reasonably understandable to the user, where the inury would have been prevented or mitigated if such warning or instructions had been followed.

(d) If the user is under the influence of intoxicating liquor or any illegal drug and such condition contributed to his or her injury. If the amount of alcohol in a persons blood is shown by chemical analysis of his or her blood, breath, or other bodily substance to have been 0.10% or more by weight of alcohol in the blood, it is conclusive proof that the person was under the influence of intoxicating liquor.

The foregoing affirmative defenses shall mitigate or bar recovery and shall be applied in accordance with the principles of comparative negligence set forth in subsection 1.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE Feb. 11, 1987
BILL NO. SB 51

Proposed Amendment to SB 51
Product Liability

New Section in 27-l-702

Except as herein provided, comparative negligence shall not be a defense in a product liability action based upon a defective condition unreasonable danagerous to the user or consumer or to his property. A manufacturer or seller in an action based on strict liability in tort for damages to person or property caused by a product in a defective condition unreasonably danagerous to the user or consumer or to his property may assert the affirmative defense of assumption of the risk. Assumption of the risk shall be applied in accordance with the principles of comparative negligence set forth in Sebsection I. For the purposes of this section, assumption of the risk exists if the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it.

SENATE JUDICIARY
EXHIBIT NO. 7
DATE Feb 11, 1987
BILL NO. SB 51

CURRENT LAW		
55%	Hosp. up to	$400,000
20	Surg. up to	400,000
15	Rad. up to	400,000
10	X-RAY up to	400,000

INTRODUCED BILL	SEVERA[illegible]	
55%	HOSP up to	$220,000
20	SURG	80,000
15	Rad	60,000
10	X-RAY	40,000

GRAY BILL		
55%	Hosp. up to	$400,000
20	Surg.	80,000
15	Rad.	60,000
10	X-RAY	40,000

GRAY BILL PERSONS			Hypot[illegible]
55%	HOSP.	220,000	($200,000)
20	SURG.	80,000	(80,000)
15	Rad.	60,000	(0)
10	X-RAY	40,000	(40,000)
			32[illegible],000

GRAY BILL
PARTIES

?% Surgeon
?% X-RAY

[Hosp. "empty chair" settled $200,000]

Rad. non-party uninsured