MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on January 5, 1995, at 8:00 AM

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: None

Members Absent: None

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

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

Committee Business Summary:

Hearing: HB 71
Executive Action: None

HEARING ON HB 71

Opening Statement by Sponsor:

REP. ROGER DEBRUYCKER, HD 89, Liberty County, Choteau County and 1 Precinct in Hill County, brought HB 71 before the committee. He described his reasoning for the bill. He believes some of the punitive damages that have been settled have been high. The word, "punitive," is derived from the word, "punishment." He believes that the state should participate in the process of collecting punitive damages. He cited several states that already have a punitive damage share in their statutes. He directed attention to the new section of the bill beginning at (8)(a) and read through (8)(g). He asked the committee to find favorably for this bill. He requested permission to close.

{Tape: 1; Side: A; Approx. Counter: 8.3}

Proponents' Testimony:

Jim Molloy, Montana Trial Lawyers Association, testifying in support of HB 71 said that they believe this bill embodies an approach that is consistent with the principles of accountability and responsibility that underlie punitive damage awards. These have a different purpose from compensatory damages as a tool for punishing wrongdoers and deterring others and, therefore, serve a societal purpose. In that way, the trial lawyers believe it is legitimate to consider whether the state, representing society, should share in the fruits of those awards.

He addressed two concerns; the first being a provision that prohibits the court from instructing or informing the jury of the consequences of its award. The second is the allocation of 60/40 between the state and the private citizen. The concept of the right to know in open government is fundamental to Montana law, therefore keeping the jury blind when it is making these decisions is inconsistent with those principles. Juries, being government at its most basic level, should be making informed decisions by being permitted to know the consequences of what they are doing. He suggests that section (8)(h) be deleted or the word "not" be deleted from that section.

On the issue of allocation of 60/40 between the state and the private citizen, he reminded the committee of changes made to Montana law in 1987 in the area of punitive damages which enacted legislation that made it more difficult to obtain and retain punitive damages. He stated that punitive damages don't settle because defendants commonly do not pay the settlement. The plaintiff is then put to the burden of a trial. To maintain the incentive and maintain the societal purpose it is recommended that the 60/40 allocation be changed to distribute the larger share to the individual. Once the individual pays the tax, attorney fees and other trial expenses, the allocation becomes much less than 40%.

{Tape: 1; Side: A; Approx. Counter: 16.2}

Opponents' Testimony:

John Alke, Montana Defense Trial Lawyers, said that philosophically the defense bar and **REP. DEBRUYCKER** are in agreement in their concern about punitive damage awards. He stated that the jury that awards punitive damages has already fully compensated the plaintiff in an award of actual damages. He distributed a sample calculation of the effects of HB 71. **EXHIBIT 1**

The defense bar opposes this bill because it removes the only effective counterbalance to the juror's prejudices and anger as motivation in awarding punitive damages. A second reason to award those damages will be generated by this bill since the jury will view themselves as a part of the state which will receive a portion of the damages. They believe this will thus encourage the awarding of punitive damages. He apologized to **REP. DEBRUYCKER** for having not prepared an amendment that would make this bill acceptable to the Montana Defense Lawyers.

{Tape: 1; Side: A; Approx. Counter: 22.6}

Informational Testimony:

Dave Woodgerd, Department of Revenue, came as neither proponent or opponent, but representing the agency that is designated to implement the bill. He stated the department's concerns which he has presented to **REP. DEBRUYCKER** and stated willingness to work with him to make the provisions of this bill more easily and more effectively implemented. Generally, the department wants more specifics in section (8)(g) concerning what exactly is covered and what isn't covered.

Questions From Committee Members and Responses:

{Tape: 1; Side: A; Approx. Counter: 24.0}

REP. LOREN SOFT asked Mr. Molloy to review the value to society of punitive awards.

Mr. Molloy replied that there is a societal value for punishment for wrong conduct that goes beyond compensatory payment. It deters others from engaging in similar wrong conduct and reinforces accountability and responsibility within our society through private action--not simply through the arm of state government. Though the behavior may not be a crime, it may be as damaging, and it can be effectively dealt with through private and civil court systems. The Supreme Court has refused to reject punitive damages statutes and thus has reinforced the concept and practice. Incentives must be there for the private party to undertake the battle which is expensive and difficult.

REP. SOFT cited the McDonald Corporation award as a case which brings in question the value of that kind of award.

Mr. Molloy distributed a *WALL STREET JOURNAL* article regarding this case to the members of the committee. In summary, the value is in making a company accountable for deliberate and calculated risks it takes in order to make money. It has caused other companies in the industry to evaluate their conduct toward the public. **EXHIBIT 2**

{Tape: 1; Side: A; Approx. Counter: 31}

REP. DIANA WYATT asked how many cases there had been in 1994 that awarded punitive damages.

Mr. Molloy stated he did not have the actual statistics, but answered that punitive damages are very, very much the exception. They typically are not awarded by juries and there is a heavy burden to convince a jury that they are justified. He believes that juries do exercise sound judgment in making decisions. He will try to get the actual statistics and is aware that the Department of Revenue is attempting to accumulate statistics that will permit a fiscal note on the legislation and to project what kind of numbers might be expected.

REP. WYATT asked if data for the last year and the previous five years could be supplied.

Mr. Molloy said that would be their attempt.

REP. WYATT said that it is her understanding that it is one or a fairly small number. She cited the DalkonShield as a good example to clarify why you may or may not want to award punitive damages and she feels that it explains why you may. She asked for an explanation of that particular incident.

Mr. Molloy said that he had a general awareness of that case. The manufacturer of the product in this case had its own medical research that showed that there was a percentage of the population that used it who would suffer serious illness as a result with serious complications and consequences to the women who used it. They did a cost benefit analysis within the company, they had the medical data and yet made a determination they could make enough money selling it and could pay damages for those who did suffer harm from using the product. They proceeded to attack the plaintiffs in those cases during testimony which angered jurors and thus the company received judgments which sent a deterrent message to corporate America. The message was that putting profits over risks and known harm to individuals would require consequences. It was the same message sent to Ford with the Pinto case through documents showing cost benefit analysis on the value of human lives which would be lost from the known risks of explosive gas tanks. Those documents were discovered by plaintiffs' lawyers pursuing those cases, introduced to juries

and understandably juries caused Ford to stop that practice by awarding punitive damages.

{Tape: 1; Side: A; Approx. Counter: 34.9}

REP. WILLIAM BOHARSKI asked **REP. DEBRUYCKER** about the language on lines 9 and 10 of page 3 regarding the distribution of the award to those two recipients.

REP. DEBRUYCKER stated that these two institutions are always in need of funds. As far as he is concerned, these were just suggestions and the money can go into the general fund or any other use the committee deems appropriate.

REP. BOHARSKI suggested perhaps putting the money in the Crime Victim Compensation Fund.

REP. DEBRUYCKER said that would be fine with him, if that is what this committee would like to do. He believes the state deserves part of the punitive damage settlement and that the is reason for bringing this bill.

REP. BOHARSKI asked Mr. Alke if, in drafting an amendment to make the concept workable, making a different part of state government the recipient would change the defense lawyers' position.

Mr. Alke stated that it would not because the defense bar's opposition to the bill flows not from awarding punitive damages, but in giving jurors an entirely different and second reason to award punitive damages. Giving the damages to the state creates the problem by giving the jury a vested interest in the punitive damages award. He addressed the section of the bill that says juries will not be instructed as to the effect of the law. In fact, the jury will know by virtue of common knowledge of the law whether the judge instructs or not. This knowledge would probably be gained through news sources at the time of enactment. He suggested to the committee that if they are concerned about punitive damage awards, they cannot pass this bill.

{Tape: 1; Side: A; Approx. Counter: 40.7}

REP. BOHARSKI asked Mr. Alke if he was saying that it would not make any difference if the jury was instructed in what could not be considered.

Mr. Alke answered that it would not. In fact the way the law is currently written, the judge could not give the jury an instruction which would indicate the existence of the law. This would be a change of a huge magnitude of public policy if this bill passes and a jury could not be impaneled that would not know the consequences of awarding punitive damages and to their own benefit.

REP. BOHARSKI asked if it would make any difference if the judge instructed the jury that they were not to consider where the distribution of the money was going.

Mr. Alke said, "No, you can say that, but you can't change human nature."

{Tape: 1; Side: A; Approx. Counter: 42.4}

REP. DUANE GRIMES asked about Mr. Molloy's testimony that there were two trials that would take place. He asked Mr. Alke to explain that.

Mr. Molloy answered that there aren't two trials per se, but is a bifurcated procedure. The jury first hears all of the evidence and then determines whether actual damages should be awarded, determines the amount of actual damages and determines whether punitive damages should be awarded and stops at that point to give the verdict. If the verdict includes punitive damages, then essentially the attorneys reargue to the same jury; the same jury goes back out and assesses the punitive damages. In bifurcation, the net worth of the defendant and how much is to be given in punitive damages is held until last.

{Tape: 1; Side: B}

REP. GRIMES spoke to the inference that the second motivation for the jury to award punitive damages would increase the awards as well as the frequency of those awards whether the jury is informed or not.

Mr. Alke replied that he firmly believes that to be true.

REP. GRIMES asked about the impact of the allocation on that same jury's allocation.

Mr. Alke said, "Yes and no." In not instructing the jury, precise percentages will not be known. The jury will know that a part of the award will benefit themselves by benefitting the state. Adjusting the percentages would not solve the ultimate problem. This bill would make the jury the beneficiary of its own work.

REP. DANIEL MC GEE asked for clarification about Mr. Alke's argument that the jury will know that punitive damages will go to the states and somehow compensate the jurors in an indirect way. He felt they would be saying, that one cannot have fair juries.

Mr. Alke said he would not say the juries would not be fair, but that they would have inherent bias.

REP. MC GEE recounted his experience as a juror that instructions given by the judge to disregard testimony in fact reinforced the memory of what they are not to consider.

Mr. Alke agreed that was the usual result.

{Tape: 1; Side: B; Approx. Counter: 3.5}

REP. LIZ SMITH commented about what she considered to be Mr. Alke's predisposed attitude about what comprises the jury which gives rise to the view that they are representing the state.

Mr. Alke replied that when he says a jury becomes its own creature, he means that he has found that a primary determinate in the jury deliberation process is the juror's own internal beliefs and internal prejudices, and it is his view that if this bill becomes law, every jury will know that punitive damages will benefit the state. If the state benefits, the jury benefits. That aspect of the bill will drive juries, he believes, to more and larger punitive damage awards.

REP. SMITH believes that Mr. Alke's statements reveal his own biases and that juries are screened to not represent either position. If his statement is correct, she felt, then no one would be qualified to sit as a juror. It seems to her to be an economically driven concept.

Mr. Alke said that he agrees with **REP. SMITH** in the sense that if the bill becomes law, the economics of the jury deliberation process will be that the state will benefit economically if the jury awards punitive damages and that then becomes an entirely separate and new reason for awarding punitives rather than simply to punish the defendant. This will mean that instead of limiting punitive damages, they will become greater.

{Tape: 1; Side: B; Approx. Counter: 6.5}

REP. BRAD MOLNAR asked if in the states where similar legislation has been adopted, had there been a perceptible bona fide rise in the number of settlements, lawsuits, or punitives requested.

Mr. Alke said he had absolutely no data on that. If the bill lasts, he will probably get data from the American Tort Reform Movement organization.

REP. MOLNAR asked for that data before the committee takes executive action. He said he thinks the general public doesn't like punitives even though the Montana Trial Lawyers Association believes this is a positive influence on society. Using the 60% factor might be an attempt to limit it by removing some of the economic incentive. He asked what would be preferred, to give the money non-government entity or in some other way take out some of the incentives.

Mr. Alke said he has no opinion regarding to whom the money should be given. His opinion is that it cannot be given to anybody without making it worse.

REP. DEB KOTTEL addressed Mr. Molloy with questions in follow-up. She asked if he is asking the committee to eliminate subsection (h) and actually inform the jury.

Mr. Molloy answered that was correct.

REP. KOTTEL asked him to respond to Mr. Alke's concerns about the bill resulting in larger punitive damages.

Mr. Molloy said he would echo what Mr. Alke said in that the best indicator of that would be from those states where they have experience with it. He is a member of the bar in Oregon where it is a 50/50 split and he practiced there for six years. His anecdotal answer would be that it does not. Frankly the notion of the state's involvement and participation of that award didn't ever come up in litigation or in the way it was approached until the award was rendered and then it became a practical matter. Unlike this legislation, in Oregon it is unclear how the state is to participate and at bargaining it shifts back and forth. He would not anticipate seeing an increase in either frequency or magnitude of punitive damage awards when the experience of other states is examined. He suggested getting the data and stated that he has an inherent faith that a jury does the job it is charged with doing and exercises sound judgment.

REP. KOTTEL asked if Mr. Molloy supports the collateral source rule and if it would not be inconsistent with our policy with the collateral source rule.

Mr. Molloy spoke for himself, but without authority to speak for the Trial Lawyers Association. He does support it. He asked **REP. KOTTEL** to explain the rest of her question.

REP. KOTTEL said the collateral source rule says the jury is not informed that the defendant's insurance company will pay any portion of the bill. The jury is purposely kept ignorant of that fact with the belief that, should the jury know that insurance is behind the defendant, the jury would award a higher sum. She wondered if this were not similar.

Mr. Molloy replied that it is similar; it is just the flip side of the same coin. Plaintiffs cannot say that the defendant will not pay the award out of pocket because of insurance. In this case, if the jury is not informed of the consequences, they are not acting fully informed.

REP. KOTTEL asked what percentage of punitive damage cases are appealed.

Mr. Molloy replied that he would guess well over 90% would be appealed; in fact, he would not be surprised if it isn't closer to 100%. Often those will settle before it reaches the supreme courts or federal court appellate system. In virtually every case involving punitive damages the trial judge will exercise

close scrutiny and has independent decision-making authority that can second guess the mood of the jury's decision and that award is subject to de novo review on appeal which means that the court of appeals or the supreme court itself can look at the record and decide if it was right, just and proper in support of the evidence.

REP. KOTTEL asked what additional burden is placed on the court system for bifurcation of the trial because of punitive damage.

Mr. Molloy said that it is not technically the impaneling of a second jury and an entirely new trial. However, depending upon the magnitude of the case, the nature of what is at issue, and the defendant, the punitive aspect of the trial will be as long and as complicated as the compensatory aspect of the trial.

REP. KOTTEL asked how costs be allocated; i.e., if all costs would come out of compensatory damages, or would costs be allocated in a prorate between compensatory and punitive?

Mr. Molloy shares that confusion. It was one of the things they wanted to focus on before executive action. He thinks that section (8)(f) and (g) create potential confusion for trial courts. It is unclear how that award is to allocated once rendered. It should be clarified.

{Tape: 1; Side: B; Approx. Counter: 16.4}

REP. SOFT asked that both **Mr. Molloy** and **Mr. Alke** answer the same questions. He stated that he believes that deliberately caused damage requires a method of retribution. But, his question concerns what would happen to our system of justice and right and wrong in this country if punitive damages were simply eliminated.

Mr. Molloy stated that in his opinion part of the value of the civil justice would be lost and an aspect of it that has existed for centuries. He did not think society would crumble or automatically unleash the worst instincts in businesses or in individuals. It would lose the value of permitting the civil justice system through the action of common people to hold people accountable (beyond compensation to the victim) who have harmed an individual or a set of individuals by deliberate misconduct and to deter that kind of misconduct. He believes that with increased criminalization of many kinds of activities and expansion in the criminal dockets, elimination of punitive damages would cause the loss of the opportunity to hold those accountable wrongdoers who are often inflicting just as much harm as in criminal cases.

REP. SOFT said that in those instances of crime people don't have the same deep pockets for punitive damage awards as insurance companies and the big corporations might have. In getting back to a sense of right and wrong, he did not see where punitive damages are going to punish the criminal.

Mr. Molloy clarified that he did not mean that the drug dealer, or the child abuser who would be criminally prosecuted would be punished through an award of punitive damages. But in terms of holding people in this society accountable and responsible for their conduct, the civil justice system, apart from the criminal justice system, also performs a valuable function. The criminal side (state and county prosecutor and U.S. attorneys) has the books full of drug dealers and those kinds of crimes. Many types of conduct in our society that may not be criminal under the code are equally harmful or reprehensible. It is not only the giant major businesses and corporations that get hit. Punitive damages also are awarded in drunk driving cases. In most cases, not a dime is recovered by the victim, but the punitive damage award nevertheless performs a societal purpose when it appears in the papers and is talked about. Eliminating them from the civil justice system would lose that function in society.

{Tape: 1; Side: B; Approx. Counter: 23.1}

REP. SOFT asked for Mr. Alke's response to the same questions; i.e., what would happen to our society if punitive damages were eliminated altogether.

Mr. Alke said he thought the system would survive quite nicely. A number of states are abolishing punitive damages. He gave an example of a case that was rendered in Helena recently involving a drunk driver that he felt supported his point of view about the lack of necessity for awarding of punitive damages.

REP. SHIELL ANDERSON asked the sponsor if he would object to clarification of language that would allow for the deduction of costs prior to allocating 60/40 of the remainder of the punitive damages.

REP. DEBRUYCKER said he would have no objection.

REP. ANDERSON asked for Mr. Alke's opinion about the ability of juries to know that the state would receive some of the punitive damages in the way of income tax.

Mr. Alke said he thought that part might be too esoteric for a jury to know unless there was an accountant on the jury. In the absence of an instruction, he believed most people would not know that punitive damages awards are taxable.

{Tape: 1; Side: B; Approx. Counter: 26.6}

REP. BILL CAREY asked for Mr. Molloy's response to Mr. Alke's description of the punitive damage award in the example he gave in the recent case involving the liquor business.

Mr. Molloy prefaced his remarks by stating that that is pending litigation and though it might illustrate his points, he felt uncomfortable in discussing it in detail as a judge is

considering it at this time. He stated generally that the committee can be assured that from the known facts if that verdict would bankrupt the company, and if the defense attorneys in that case are able to show that to the judge, he suspects that the jury's verdict would be reduced--if it is a fact. If bankruptcy would not be a consequence but an idle threat, then it won't happen and shouldn't. He answered that this is a case that illustrates that there are facts which the jury heard and they exercised judgment and did not go in to do something wacky or crazy in rendering a judgment. In terms of the consequences to the individual company that is at issue, the attorneys will be advocating a post trial appeal and if those arguments have merit, his hunch is that a judge is going to listen to them or the Supreme Court will.

REP. SOFT asked what **Mr. Molloy** what would happen if the bill eliminated any and all attorney fees that were awarded at the time of punitive damage award.

Mr. Molloy said that he thought it would be unlikely that attorneys would prosecute aggressively cases on behalf of individuals if compensation were eliminated. In the plaintiff's case, the attorney is advancing the costs out of pocket in order to give the person the right to enter the courtroom and hold the defendant accountable. Without compensation, it is unrealistic to think it is going to happen.

{Tape: 1; Side: B; Approx. Counter: 31}

CHAIRMAN CLARK asked the sponsor if this bill would affect any settlement that would come out of federal civil court or just the state courts.

REP. DEBRUYCKER said it would just apply to state courts.

Closing by Sponsor:

REP. DEBRUYCKER in closing felt that the statements of both the opposition and the proponents had cleared up several matters. When he brought the bill, he did not intend to hinder or help either the trial lawyers or the defense lawyers. He honestly believed the state should share in whatever punitive damages come out of a trial which is why they left the uninformed jury as part of the bill to give some protection so that it would not become a way to balance the budget. He believes there is a way for the committee to find a way to accomplish the intent and he is open to any amendments percentage-wise and also is open to a change in where the money is to be distributed. He does not believe it is true that the state would benefit because juries would award damages based on their gain. He would be anxious to see the result of studies of other states' experience in this. He submitted a book which included his investigation of other states' legislation of a similar nature. **EXHIBIT 3**

CHAIRMAN CLARK declared the hearing on HB 71 closed.

REP. BILL TASH MOVED THE MEETING BE ADJOURNED.

ADJOURNMENT

Adjournment: The meeting was adjourned at 9:30 AM.

{Tape: 1; Side: b; Approx. Counter: 36.5; Comments: THIS SESSION IS RECORDED ON ONE 90-MINUTE TAPE..}

Bob Clark

REP. BOB CLARK, Chair

Joanne Gunderson

JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 1/5/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓ late	~~✓~~	
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓ late	~~✓~~	
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		~~✓~~
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

EXHIBIT 1
DATE 1/5/95
SB 21

SAMPLE CALCULATIONS

Award		
Actual Damages	$ 250,000	
Punitive Damages	2,500,000	
TOTAL DAMAGES		$2,750,000
Deductions		
Plaintiff's Attorney's Fees [Assumes Standard Contingent Fee Agreement]	$ 967,000	
Plaintiff's Actual Damages	250,000	
TOTAL DEDUCTIONS		<$1,217,000>
Subtotal Available for Allocation		$1,533,000
State's Share [60%]		$931,800

THE WALL STREET JOURNAL A1
September 1, 1994

EXHIBIT 3
DATE 1/5/95
HB 71

A Matter of Degree

How a Jury Decided That a Coffee Spill Is Worth $2.9 Million

McDonald's Callousness Was Real Issue, Jurors Say, In Case of Burned Woman

How Hot Do You Like It?

By Andrea Gerlin
Staff Reporter of The Wall Street Journal

ALBUQUERQUE, N.M. – When a law firm here found itself defending McDonald's Corp. in a suit last year that claimed the company served dangerously hot coffee, it hired a law student to take temperatures at other local restaurants for comparison.

After dutifully slipping a thermometer into steaming cups and mugs all over the city, Danny Jarrett found that none came closer than about 20 degrees to the temperature at which McDonald's coffee is poured, about 180 degrees.

It should have been a warning.

But McDonald's lawyers went on to dismiss several opportunities to settle out of court, apparently convinced that no jury would punish a company for serving coffee the way customers like it. After all, its coffee's temperature helps explain why McDonald's sells a billion cups a year.


Stella Liebeck

But now – days after a jury here awarded $2.9 million to an 81-year-old woman scalded by McDonald's coffee – some observers say the defense was naive. "I drink McDonald's coffee because it's hot, the hottest coffee around," says Robert Gregg, a Dallas defense attorney who consumes it during morning drives to the office. "But I've predicted for years that someone's going to win a suit, because I've spilled it on myself. And unlike the coffee I make at home, it's really hot. I mean, man, it hurts."

McDonald's, known for its fastidious control over franchisees, requires that its coffee be prepared at very high temperatures, based on recommendations of coffee consultants and industry groups that say hot temperatures are necessary to fully extract the flavor during brewing. Before trial, McDonald's gave the opposing lawyer its operations and training manual, which says its coffee must be brewed at 195 to 205 degrees and held at 180 to 190 degrees for optimal taste. Since the verdict, McDonald's has declined to offer any comment, as have their attorneys. It is unclear if the company, whose coffee cups warn drinkers that the contents are hot, plans to change its preparation procedures.

Coffee temperature is suddenly a hot topic in the industry. The Specialty Coffee Association of America has put coffee safety on the agenda of its quarterly board meeting this month. And a spokesman for Dunkin' Donuts Inc., which sells about 500 million cups of coffee a year, says the company is looking at the verdict to see if it needs to make any changes to the way it makes coffee.


Reed Morgan

Others call it a tempest in a coffeepot. A spokesman for the National Coffee Association says McDonald's coffee conforms to industry temperature standards. And a spokesman for Mr. Coffee Inc., the coffee-machine maker, says that if customer complaints are any indication, industry settings may be too low – some customers like it hotter. A spokeswoman for Starbucks Coffee Co. adds, "Coffee is traditionally a hot beverage and is served hot and I would hope that this is an isolated incident."

Coffee connoisseur William McAlpin, an importer and wholesaler in Bar Harbor, Maine, who owns a coffee plantation in Costa Rica, says 175 degrees is "probably the optimum temperature, because that's when aromatics are being released. Once the aromas get in your palate, that is a large part of what makes the coffee a pleasure to drink."

The Polls Speak

Public opinion is squarely on the side of McDonald's. Polls have shown a large majority of Americans – including many who typically support the little guy – to be outraged at the verdict. And radio talk-show hosts around the country have lambasted the plaintiff, her attorneys and the jurors on air. Declining to be interviewed for this story, one juror explained that he already had received angry calls from citizens around the country.

It's a reaction that many of the jurors could have understood – before they heard the evidence. At the beginning of the trial, jury foreman Jerry Goens says he "wasn't convinced as to why I needed to be there to settle a coffee spill."

At that point, Mr. Goens and the other jurors knew only the basic facts: that two years earlier, Stella Liebeck had bought a 49-cent cup of coffee at the drive-in window of an Albuquerque McDonald's, and while removing the lid to add cream and sugar had spilled it, causing third-degree burns of the groin, inner thighs and buttocks. Her suit, filed in state court in Albuquerque, claimed the coffee was "defective" because it was so hot.

What the jury didn't realize initially was the severity of her burns. Told during the trial of Mrs. Liebeck's seven days in the hospital and of her skin grafts, and shown gruesome photographs, jurors began taking the matter more seriously. "It made me come home and tell my wife and daughters don't drink coffee in the car, at least not hot," says juror Jack Elliott.

Even more eye-opening was the revelation that McDonald's had seen such injuries many times before. Company documents showed that in the past decade McDonald's had received at least 700 reports of coffee burns ranging from mild to third degree, and had settled claims arising from scalding injuries for more than $500,000.

Some observers wonder why McDonald's, after years of settling coffee-burn cases, chose to take this one to trial. After all, the plaintiff was a sympathetic figure – an articulate, 81-year-old former department store clerk who said under oath that she had never filed suit before. In fact, she said, she never would have filed this one if McDonald's hadn't dismissed her request for compensation for pain and medical bills with an offer of $800.

Then there was the matter of Mrs. Liebeck's attorney. While recuperating from her injuries in the Santa Fe home of her daughter, Mrs. Liebeck happened to meet a pair of Texas transplants familiar with a Houston attorney who had handled a 1986 hot-coffee lawsuit against McDonald's. His name was Reed Morgan, and ever since he had deeply believed that McDonald's coffee is too hot.

For that case, involving a Houston woman with third-degree burns, Mr. Morgan had the temperature of coffee taken at 18 restaurants such as Dairy Queen, Wendy's and Dunkin' Donuts, and at 20 McDonald's restaurants. McDonald's, his investigator found, accounted for nine of the 12 hottest readings. Also for that case, Mr. Morgan deposed Christopher Apple-

ton, a McDonald's quality assurance manager, who said "he was aware of this risk . . . and had no plans to turn down the heat," according to Mr. Morgan. McDonald's settled that case for $27,500.

Now, plotting Mrs. Liebeck's case, Mr. Morgan planned to introduce photographs of his previous client's injuries and those of a California woman who suffered second- and third-degree burns after a McDonald's employee spilled hot coffee into her vehicle in 1990, a case that was settled out of court for $230,000.

Tracy McGee of Rodey, Dickason, Sloan, Akin & Robb, the lawyers for McDonald's, strenuously objected. "First-person accounts by sundry women whose nether regions have been scorched by McDonald's coffee might well be worthy of Oprah," she wrote in a motion to state court Judge Robert Scott. "But they have no place in a court of law." Judge Scott did not allow the photographs nor the women's testimony into evidence, but said Mr. Morgan could mention the cases.

As the trial date approached, McDonald's declined to settle. At one point, Mr. Morgan says he offered to drop the case for $300,000, and was willing to accept half that amount. But McDonald's didn't bite.

Only days before the trial, Judge Scott ordered both sides to attend a mediation session. The mediator, a retired judge, recommended that McDonald's settle for $225,000, saying a jury would be likely to award that amount. The company didn't follow his recommendation.

Instead, McDonald's continued denying any liability for Mrs. Liebeck's burns. The company suggested that she may have contributed to her injuries by holding the cup between her legs and not removing her clothing immediately. And it also argued that "Mrs. Liebeck's age may have caused her injuries to have been worse than they might have been in a younger individual," since older skin is thinner and more vulnerable to injury.

The trial lasted seven sometimes mind-numbing days. Experts dueled over the temperature at which coffee causes burns. A scientist testifying for McDonald's argued that any coffee hotter than 130 degrees could produce third-degree burns, so it didn't matter whether McDonald's coffee was hotter. But a doctor testifying on behalf of Mrs. Liebeck argued that lowering the serving temperature to about 160 degrees could make a big difference, because it takes less than three seconds to produce a third-degree burn at 190 degrees, about 12 to 15 seconds at 180 degrees and about 20 seconds at 160 degrees.

The testimony of Mr. Appleton, the McDonald's executive, didn't help the company, jurors said later. He testified that McDonald's knew its coffee sometimes caused serious burns, but hadn't consulted burn experts about it. He also testified that McDonald's had decided not to warn customers about the possibility of severe burns, even though most people wouldn't think it possible. Finally, he testified that McDonald's didn't intend to change any of its coffee policies or procedures, saying, "There are more serious dangers in restaurants."

Mr. Elliott, the juror, says he began to realize that the case was about "callous disregard for the safety of the people."

Next for the defense came P. Robert Knaff, a human-factors engineer who earned $15,000 in fees from the case and who, several jurors said later, didn't help McDonald's either. Dr. Knaff told the jury that hot-coffee burns were statistically insignificant when compared to the billion cups of coffee McDonald's sells annually.

To jurors, Dr. Knaff seemed to be saying that the graphic photos they had seen of Mrs. Liebeck's burns didn't matter because they were rare. "There was a person behind every number and I don't think the corporation was attaching enough importance to that," says juror Betty Farnham.

When the panel reached the jury room, it swiftly arrived at the conclusion that McDonald's was liable. "The facts were so overwhelmingly against the company," says Ms. Farnham. "They were not taking care of their consumers."

Then the six men and six women decided on compensatory damages of $200,000, which they reduced to $160,000 after determining that 20% of the fault belonged with Mrs. Liebeck for spilling the coffee.

The jury then found that McDonald's had engaged in willful, reckless, malicious or wanton conduct, the basis for punitive damages. Mr. Morgan had suggested penalizing McDonald's the equivalent of one to two days of companywide coffee sales, which he estimated at $1.35 million a day. During the four-hour deliberation, a few jurors unsuccessfully argued for as much as $9.6 million in punitive damages. But in the end, the jury settled on $2.7 million. McDonald's has since asked the judge for a new trial. Judge Scott has asked both sides to meet with a mediator to discuss settling the case before he rules on McDonald's request. The judge also has the authority to disregard the jury's finding or decrease the amount of damages.

One day after the verdict, a local reporter tested the coffee at the McDonald's that had served Mrs. Liebeck and found it to be a comparatively cool 155 degrees. But industry officials say they doubt that this signals any companywide change. After all, in a series of focus groups last year, customers who buy McDonald's coffee at least weekly say that "morning coffee has minimal taste requirements, but must be hot," to the point of steaming.

The Wall Street Journal, November 23, 1994

Wendy's to Interrupt Hot Chocolate Sales To Cool Temperature

By a WALL STREET JOURNAL Staff Reporter

DUBLIN, Ohio—Wendy's International Inc. said it would temporarily halt the sale of hot chocolate in its restaurants because the drink might be too hot for children.

The company hopes to resume sales within 30 days, with a slightly cooler temperature. The chain, which has 4,000 U.S. restaurants, currently brews the drink in the same way as its coffee and tea. But the temperature of all three drinks—180 degrees — is hotter than necessary to make the hot chocolate, a company spokeswoman said.

The company said it was re-evaluating how it made the drink as part of regular efforts to review operations.

"As we began to look into it, we found that we really don't need that high a temperature in order to serve a quality hot-chocolate product," the spokeswoman said. "We just need it warm enough to dissolve the powder."

The spokeswoman said a recent judgment against McDonald's Corp. for serving coffee that was too hot was "a wake-up call for the entire industry." Wendy's serves an average of two cups of hot chocolate each day per restaurant.

EXHIBIT 3
DATE 1/5/95
HB 71

DEPARTMENT OF ADMINISTRATION
RISK MANAGEMENT AND TORT DEFENSE DIVISION

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M E M O R A N D U M

TO: Lois Menzies, Director
Dave Ashley, Deputy Director

FROM: Bill Gianoulias, Chief Defense Counsel
Risk Management and Tort Defense Division

RE: Punitive Damages

DATE: August 11, 1993

Attached is information compiled by Matt Clifford pursuant to your request regarding proposed legislation assigning the State of Montana a percentage of punitive damage awards. If you would like more information or have questions please let us know.

In addition, Mr. Clifford would be happy to prepare an oral presentation for the Governor.

The original of this document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

(binder)

cc: Matt Clifford, Legal Intern
Risk Management and Tort Defense Division

HOUSE OF REPRESENTATIVES
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JUDICIARY COMMITTEE DATE 1-5-95

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Jaqueline Lenmarks	Am. Insurance Assoc.		✓
Dave Woodgerd	Dept. of Revenue	—	—
Jim Molloy		✓	
Mona Jamison	Doctors' Co.		✓
Michael McKee	MSBA		
Jim Jensen	MEIC	✓	
John Alke	Mont. Defense Trial Lawyers		
			✓
Steve Weinberger	MT Defense Trial Lawyers		✓

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