

MINUTES

**MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on March 23, 1995,
at 9 A.M.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

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

Committee Business Summary:

Hearing: None.
Executive Action: HB 309, HB 256
HB 345, HB 443 - Discussion only.

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EXECUTIVE ACTION ON HB 309

Discussion: **CHAIRMAN BRUCE D. CRIPPEN** asked the committee to
discuss periodic payments in relation to HB 309.

Motion: **SENATOR MIKE HALLIGAN MOVED AMENDMENTS # 3, # 4, and # 5**
of hb030902.avl as contained in (EXHIBIT 1).

Discussion: **SENATOR HALLIGAN** said these amendments would strike
the periodic payment sections of the bill. The key issue for the

insurance companies, he said, is the cap. Page 3 and Section 3 both addressed periodic payments. Section 3 deals with any claim and they had no testimony on that, he said. He represented a case in which a child lost an arm to a wolf dog. He went to an insurance person to put together an annuity to help pay for the lifetime prosthesis and other items. If they would allow an insurance company to go out and find just any annuity, they would run into the situation where someone would go bankrupt. As guardian ad litem, he had the fiduciary responsibility to find the best insurance counselor he knew and trusted. He had not seen any justification for requiring periodic payments for all claims or for the medical malpractice. **SENATOR RIC HOLDEN** asked about the concept of bankruptcy. He thought bankruptcy and the reinsurance were the least of their concerns in restructuring their claims. **SENATOR HALLIGAN** asked him to call the insurance commissioner's office to see what kinds of problems they had on an annual basis with insurance companies with financial problems. He spoke of his case again, saying at least he had a hand in that process, whereas this bill would leave it up to the insurance companies. **CHAIRMAN CRIPPEN** asked what he would do with \$500,000 as a guardian. **SENATOR HALLIGAN** said he would use the annuity option or stocks, bonds and investments. He would go to the D.A. Davidson Company, he said, to provide for the woman's lifetime. He would go to the insurance and ask what they would do, according to various payouts of 18 or 25, and the guarantee associated with each one of those. Or, he said, he would go to a bank and put it into a savings account. The **CHAIRMAN** said that he would be putting himself into the position of fiduciary, without the experience to do it. Also, he said annuities were made of exactly what he had referred to - stocks, bonds, real estate, CD's, etc. That is generally the investment portfolio of an insurance company. The difference is that a person might make a relatively small amount of money in a small pool. The major life insurance companies are registered in New York, with certain underwriting criteria. If they fell on hard times with some investments, and go into a receivership, they would probably still have enough reserves to handle their claims. He maintained that their investment pool would be much broader than the individual investor. He said periodic payments would be a better income program. Of the example of a \$500,000 settlement, a person could maybe get the principal and get 5 per cent interest, based on a value of current earnings. Safety is the key issue, along with the flexibility of picking their own investment company. **SENATOR HALLIGAN** said to take the attorneys out of it. He used an example of someone with an injury with a \$500,000 settlement. They may not know about reinsurance or be able to recognize a company with enough reserves to pay off their loans. Many times people would not have the sophistication to take care of it without an attorney. **SENATOR LARRY BAER** said he wasn't aware of how many "A" rated companies got into financial problems, but he thought it would be infrequent. It was his understanding that the components of the bill would not be against changing the term in the bill as A to A-plus to add more security to the prowess of the investment company. He believed

the many, on-hands approach of the bigger companies created far more securities and the preservation of the capital than one guardian or one conservator. An A-plus-plus company would only have an infinitesimal chance of mishandling the money. **SENATOR STEVE DOHERTY** said he was on the interim committee to address this situation. They looked carefully at periodic payments. He pointed to Page 3, and said already in statute is a law that says, "in any case in which the damage is greater than \$100,000, a party can go to the court and request that periodic payments be made, if the party requesting can demonstrate to the court that it would be in the best interests of the person." The new Section 2 changes that. It says for a \$500,000 medical malpractice claim, you HAVE to have periodic payments at anybody's request. He said it would invade the attorney-client privilege and/or usurp personal responsibility. It would assume the citizens of Montana are idiots that need the protection of the great hands of the state. The interim committee on a unanimous vote said they did not need to mandate periodic payments. They already had the demonstrated option. The value cannot be disputed, he said. In other cases, if person is given the money they deserve as the result of a jury case, and some of them have gone out and bought small businesses. Some he knew made a far greater return than they would have gotten from a mandated periodic payment program. Section 2 would change the presumption entirely around, and drop the minimum amount. It says the person is not in the best position to determine whether periodic payments are in their best interest. The insurance company is.

He said it would be government intrusion into the financial ability of Montanans to govern their own destiny. **SENATOR REINY JABS** stated that the idea of insurance was to protect the person, not to help them get established in business or some kind of a venture. **SENATOR DOHERTY** gave an example of a person receiving \$100,000 for damages. Under Section 2, if the insurance company wanted to save some money, they would invoke periodic payments, whether or not the recipient wanted them. **SENATOR BAER** stated that **SENATOR DOHERTY** had stated they were covered under the law in Section 3, but they were going to consider the **HALLIGAN** amendments which propose to strike Sections 2 and 3. **SENATOR DOHERTY** explained that it would strike Section 3 from the bill, but not from the statute. Current law would remain in effect. **Valencia Lane** stated that the bill, as drafted, contained an amendment to 25-9-403. The **HALLIGAN** amendment would strike that section from the bill, which means there would be no amendment to that section. It does not repeal the section from existing law. **SENATOR LORENTS GROSFIELD** said if a person got the \$500,000 over five or ten years, the bank would look favorably on a loan for the business they wanted to buy. In Subsection 2, Lines 8-10, he said the court "shall" but Subsection 2 says the court can structure the payments. He thought the court would listen to the parties, and he felt there was a lot of discretion in that section. **CHAIRMAN CRIPPEN** said his comments about the loan were appropriate, and the reason he was leaning toward mandatory periodic payments. He was concerned that the person would take

the lump sum to invest in a poor business, as 9 of 10 are. The person would then become a ward of someone, usually the state.

SENATOR SUE BARTLETT said the logical conclusion to that argument is that it would be preferable to have the state impose its judgement rather than to rely on the individuals involved to better understand their self-interest. She asked if they wanted to protect these people from themselves in case they had a hare-brained idea to invest in a poor business prospect. She stated that these people would be very sensitive to their own concerns and did not feel that the state should intervene. She did not think the judge should usurp that person's own best judgement.

CHAIRMAN CRIPPEN said he understood Section 2 to provide the court with the assistance, through all the parties, to fashion a settlement that would include periodic payments. If there would be substantiated need for a larger lump sum for medical purposes, for example, it could be granted. The court would have taken on the responsibility of taking care of the plaintiff, he said.

SENATOR BARTLETT asked if the scenario he described could be done under current law without the changes? **CHAIRMAN CRIPPEN** said

yes, but one would be mandatory, one permissive. He said he had come to the conclusion that mandatory would be best, knowing the temptations in business that he did. His concern was for the people that were permanently disfigured and/or injured with on-going medical problems.

SENATOR BARTLETT asked if the same principle would apply to damages incurred from causes other than medical malpractice? The chairman said it only dealt with medical malpractice. For instance, he stated that a person at 50

years old would be in prime earning capability, and would thus need a larger amount of money immediately, and a lesser amount in the years thereafter. **SENATOR BARTLETT** asked if he would make it

mandatory in all cases as well? **CHAIRMAN CRIPPEN** said probably, unless it was punitive, and there he was undecided. **SENATOR**

DOHERTY said the conversation boiled down to a burden of proof shift. Under current law, if the insurance company didn't think a person was capable of managing, they would have to demonstrate to the court that periodic payments would be in that persons' best interest. If the amendments were not adopted, the burden of proof shifts to the injured person. This would be a person that had already been injured, already been adjudged to being a victim, already been adjudged to have suffered damages. They

would now have to prove they were competent. **SENATOR HALLIGAN** stated that there was no proof of current abuses of the existing law, people investing unwisely in business, or abusing lump-sum payments. He maintained it was the plaintiff's money, not the insurance company's. If a person was 65, why would they want it structured over the next 10 years? Perhaps people would want to travel or enjoy their families.

Vote: The MOTION BY SENATOR HALLIGAN TO AMEND HB 309 FAILED, on a roll call vote of 4-7.

Discussion: **CHAIRMAN CRIPPEN** asked the committee to discuss caps.

Motion: SENATOR HOLDEN MOVED TO AMEND HB 309 BY THE AMENDMENTS AS CONTAINED IN (EXHIBIT 2), HB030903.AVL, PREPARED AT THE REQUEST OF CHAIRMAN CRIPPEN.

Discussion: CHAIRMAN CRIPPEN said he was convinced that a cap should be offered, the amount he was unsure of, but proposed \$600,000. He felt \$250,000 was not high enough for two reasons: 1) from testimony heard in the hearing, the average claims were far below. Ninety-six per cent of the medical malpractice cases were below that figure. He said they were non-economic claims such as pain, suffering and physical impairment. This may take away their ability to earn a wage, he said. 2) if the injury was so bad, physical disfigurement may prevent the person from holding any job at all. SENATOR SHARON ESTRADA agreed it was not enough. SENATOR HOLDEN asked Mona Jamison, The Doctors' Company lobbyist, about the four per cent of the cases that would be over \$250,000. He asked about the realistic amount of claims over that amount. Ms. Jamison said there were between 8 and 11 individuals in Montana, in one year, to the best of her recollection. That would also cover the claims that were over \$500,000, she said. SENATOR HOLDEN asked about the law of large numbers. In Montana, there are 800,000 people to be affected by this legislation. The premium difference between what most people carry now, which would be \$1 million per person, \$3 million per occurrence, would be increased somewhat. The purpose of the bill, he said, is to reduce the premiums. He reasoned that if they went with the amendment, nothing would be left of the bill in benefitting insurance customers. He argued that the savings for the 11 people would be paid by the other 800,000, so he could not support the cap. SENATOR BARTLETT asked if the 11 cases that exceeded \$250,000, were the awards for non-economic only? Ms. Jamison said it was the total settlement, both economic and non-economic. When the cap is \$600,000 as opposed to \$250,000, the volatility of going up to \$600,000 reduces the benefit of the bill, which was to lower the price of the premiums. The set cap would eliminate the incentive to go to court because the person could keep getting more. SENATOR LINDA NELSON quoted the chairman as saying the \$250,000 would become a target. Was he now worried about the \$600,000 becoming a target? CHAIRMAN CRIPPEN said he has posed that question to Ms. Jamison who replied that caps do not act as a target. In the hearing, he felt that separate caps would be necessary for each person in different causes of action in the accident. A husband, wife and children would be an example. SENATOR ESTRADA stated the different offered amendments were: \$500,000, \$600,000 and \$1 million. They were trying to get the premiums down, however. If the figure is changed to anything else, would the premiums change? Ms. Jamison said the closer it is to \$250,000, based on The Doctors' Company history, the bigger the deduction on the premiums for the physicians. \$1.6 million would significantly cut into that benefit which is the decreased premiums. SENATOR ESTRADA asked about the \$600,000 figure. Ms. Jamison said it would be minimal. The premiums would still come down somewhat, but very little over the years. That's why they were supportive

of the \$250,000, she said. They could look to their particular experience in the states that had enacted \$250,000, for example, California, had shown a 51 per cent reduction. Colorado had exhibited a 53 per cent reduction. OB/GYN rates would be reduced even greater. The further out the cap goes, the more benefits, she said. **CHAIRMAN CRIPPEN** asked if she followed that line, why not go a step further and not have any cause of action for non-economic damages? **Ms. Jamison** said they did not support that. She said the \$250,000 is fair to the plaintiff and brings the greatest benefit toward the underlying purposes of the bill. **CHAIRMAN CRIPPEN** said in the free-market system the plaintiff's attorney may be able to argue for a \$5 million settlement to a sympathetic jury. There would be many cases that would be worth more than \$250,000. **Ms. Jamison** said, based on statistics, there were far more that are less than that, so the \$250,000 ends up (for non-economic only) depriving very few people of what the potential is. She told the committee that a \$600,000 cap really starts to cut into the benefits of the bill. **CHAIRMAN CRIPPEN** asked the value of a \$600,000 claim at 8 per cent, over a 25-year period? **Ms. Jamison** asked them to remember they were only talking about non-economic damages. There is no cap on economics, she said. The medical and the wages are substantial and would not be affected by the cap. The initial large, lump sum could be structured to take care of immediate needs, attorney's fees and past medical and lost wages. **SENATOR DOHERTY** said he appreciated the offering of a \$600,000 cap, but he thought it was too low. He said \$1 million would be better. There is already a break on runaway non-economic damages awards. It's called a jury, or 12 Montanans, he said. The second break is the judge, if the jury goes crazy. The judge can order remittitur, to say it is too much, and as a matter of law, reduce the award. He said as a defense attorney, he would argue that everything is a non-economic loss. He maintained that the lower cap would mean loss of consortium claims in Montana. They should just flat out say the value of a husband/father is worth nothing if they are going to do that. Victims of low-paying jobs don't have an economic value, he said, such as ministers or stay-home moms. Those people don't have an earnings potential, so the insurance companies don't assess much value to their claims. The information they got from insurance commissioners point out that in the last 5 years, profits from malpractice range from 51 per cent to 10 per cent. That was a good range for public policy. **SENATOR JABS** asked about accidental death and if the children would be covered under the economic or non-economic portion? **Ms. Jamison** said the economic damage award received for lost wages and medical costs, still comes to the family.

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The first \$250,000 would be split, to the wife and husband and some to the child. What causes the non-economic or non-quantifiable damages is related to the incident, and the \$250,000 covers it all. She fully disagreed with respect to **SENATOR DOHERTY**. The profits he cited were national profits and don't

respect the loss ratio. For example, the Doctors' Company last year had a loss ratio of 102 per cent. She said the child could still get a non-economic award in a separate action that would not exceed the \$250,000. **SENATOR JABS** asked if a family would get the potential earnings for the rest of a deceased man's life? **Ms. Jamison** said yes, particularly under the periodic payments program. If they are getting those payments, all of that goes to the heirs. **SENATOR HOLDEN** wanted to know how many death claims her company had last year due to medical malpractice? **Ms. Jamison** said she did not know for the company, but two were reported to the Board of Medical Examiners. The year before it was one, zero for the year before. Maximum would be three in any given year. **SENATOR HOLDEN** asked about how many consortium claims were handled? **Ms. Jamison** did not have that information available. **SENATOR HOLDEN** asked if the higher cap had to do with the consortium. **CHAIRMAN CRIPPEN** replied there were situations where the wife and child had more than one claim that would be limited in a cause of action for the overall cap. **SENATOR HOLDEN** said that was his concern, because a loss of consortium claim was rarely experienced. To legislate for the few would not be a good practice. Death claims are few as well. He expressed a concern that if they put a \$600,000 cap on at present, the chances of future legislatures reducing it would be minimal. If they went with the \$250,000, two years from now they could increase it if claims experience should prove it too low. **SENATOR DOHERTY** answered **SENATOR JABS**. He stated that lost wages would not be covered. His point was that ministers did not make much money. So that a lost wage claim would not amount to much. The non-economic caps go to the kids for the worth of the father. If there were three claims, for the wife and two kids, it would reduce their value immediately for the loss of the father and husband. **SENATOR BARTLETT**, in response to the **SENATOR HOLDEN's** concern about the 800,000 Montanans, said that they were exposed to the risk of being among the 11 claimants at any given point in time. Caps would be significant to those 800,000 from that standpoint. **SENATOR NELSON** said they no longer paid their ministers in eggs and cheese. What dollar amount would be satisfactory? She asked if her needs were taken care of, would \$250,000 make her happy if marred for life? She asked where the end would be, and where it would become a punishment? **SENATOR ESTRADA** said she had changed her mind, because the legislation was brought forth to reduce premiums, but these awards were for pain and suffering only. **SENATOR BAER** said they had heard for years about the escalating costs of medical care in our society. In conjunction with that, they heard people clamoring for tort reform in medical malpractice, which would reduce the cost of medical care. He argued that this was a significant tort reform bill. Apparently Congress felt that \$250,000 was a feasible amount. If increased, the significantly effective bill would be an insignificant tort reform bill. It would impact the problem. **CHAIRMAN CRIPPEN** said then the only answer would be periodic payments in present value with future amounts. The capped rate of interest and the number of payments the insurance company has to part with would be less. They would have made a significant

step toward amending periodic payments. He could not see why there would not be a reduction in premiums with periodic premiums and no cap, much less \$600.000.

Vote: The MOTION FAILED on a roll call vote of 4-7.

Discussion: There was a suggestion to discuss SENATOR DOHERTY's amendment capping the award at \$1 million. He withdrew that amendment in favor of SENATOR HALLIGAN's amendment.

Motion: SENATOR HALLIGAN MOVED THAT HB 309 BE AMENDED TO INCLUDE ITEM # 2 OF HB030902.AVL.

Discussion: SENATOR AL BISHOP asked about negligence, not gross negligence, was that correct? Ms. Jamison said that was correct. In gross negligence cases where punitives are awarded, they are not capped. CHAIRMAN CRIPPEN asked about gross negligence? Would that qualify for punitive? SENATOR BARTLETT said there was no exception for gross negligence in this bill.

Vote: The MOTION FAILED on a roll call vote of 4-7.

Motion: SENATOR DOHERTY MOVED TO AMEND HB 309 BY AMENDMENTS 2, 3 AND 4 OF hb030905.avl AS CONTAINED IN (EXHIBIT 3), withdrawing Item # 1.

Discussion: He explained the second amendment would allow the cap on non-economic damages to be disclosed to the jury. The third would deal with grossly negligent malpractice claims, saying that this bill and the caps would not apply. The last amendment dealt with the fact that simply buying a court-approved annuity does not mean the judgement is satisfied. In every other case, a judgement is only satisfied when the amount is paid out in the terms of the court order. CHAIRMAN CRIPPEN re-stated the amendments. The first would say the \$250,000 limits may be disclosed to a jury. It wouldn't be mandatory, though. The second amendment said the definition of malpractice does not include a claim of grossly negligent act or omission. He said it would be into punitives and the caps would apply. He stated that in the testimony of the hearing, there were very few cases of punitive damages in medical malpractice cases. How would this amendment change that, if at all? Russell Hill, representing the Montana Trial Lawyers said that the bill would not change awards for punitive damages. They are incredibly rare. He disagreed that gross negligence qualifies for punitive damages in Montana. SENATOR HOLDEN asked SENATOR DOHERTY if he wanted the jury to fully understand what the limit is? SENATOR DOHERTY replied, yes. SENATOR HOLDEN stated that the jury should concentrate on the damages of the person that was injured. They may be great or small, but at no time should they be influenced by the possible pot of money available to draw from. It would be important from the concept of fairness that each side try their case based on the merits of the claim. When dollar figures are interjected to a jury, he said, it dilutes their real attention to what has

occurred. It would not be fair to either side. He strongly opposed the amendment. **SENATOR DOHERTY** said the jury would have made a determination. Then afterwards, thinking it had done right, they would never know that the legislature had substituted its wisdom for their wisdom. They should be told the limit for non-economic damages. **SENATOR GROSFIELD** said everything would apply just as well if it were \$1 million. He agreed with **SENATOR HOLDEN**. He did not want the jury to be driven by the thought that there is \$250,000 and they should go after it. They should be driven by the problem. He said they should resist the amendment.

Vote: The MOTION ON ITEM # 2 FAILED 8-2 on an oral vote.

Motion: SENATOR DOHERTY MOVED ITEM # 3 OF hb030905.av1.

Discussion: CHAIRMAN CRIPPEN said he was basically taking out of the definition of medical malpractice that the cause of action would not have to be gross negligence or omission. He said he would not be putting that back into ordinary negligence. If the jury found gross negligence, they would be into punitive. **SENATOR HOLDEN** asked if it would be necessary? CHAIRMAN CRIPPEN said he would probably not vote for the amendment because it would lower the standard necessary to get punitives and also to get medical malpractice. **Mr. Hill** stated that neither the bill nor the amendment would do anything to punitive damages. The amendment would lower the threshold for application of the cap on non-economic damages to negligence. The cap would not apply to jury-found gross negligence. **Ms. Jamison** said if there was an omission, and it was negligence, the cap would not apply. So this ends up cutting into caps, so she urged failure of the amendment. She agreed with **Mr. Hill** that punitives are rare and they are not affected by this bill. **SENATOR DOHERTY** told the committee that the negligence standard, "failure to meet an acceptable standard of care," is recognized by professionals in the field where medical malpractice would not be affected. If there was negligence, all of the caps, and the non-economic caps and the periodic payments would come into play. That would be a significant victory for the insurance carriers. If a grossly negligent act would take place, the caps would not take place. The policy decision would be: if there is a mistake, by their actions in the committee they would be saying the injured party is not entitled to full compensation, but they would set the limits. But, if there was a really stupid act of negligence or omission, he thought the benefits ought not to kick in. **Jerry Loendorf, representing the Montana Medical Association**, said the adoption of the amendment may change every case to a gross negligence case. It would be an allegation of negligence and gross negligence to try to circumvent the cap. He predicted an adverse affect to the bill. **SENATOR BARTLETT** asked if in the past the juries were asked to differentiate between negligence and gross negligence? **Mr. Loendorf** said because now there is no need to prove gross negligence, there is no need to allege it

unless there is a reason to believe it may increase the damages.

Vote: The MOTION FAILED on a roll call vote of 3-8.

Motion: SENATOR DOHERTY MOVED ITEM # 4 OF hb030905.avl.

Discussion: He explained the amendment saying that after a jury has determined negligence, the simple purchase of an annuity does not discharge that individual who has already been found negligent of the judgement. The judgement, as in any other civil case, would only be discharged when the order of the court is met. CHAIRMAN CRIPPEN asked if it would be considered a contingent liability on a financial statement, or perhaps a real liability? He wondered if this would diminish the financial ability of the person and if it would fly in the face of bringing finality? SENATOR DOHERTY said that as opposed to someone who had been adjudged to doing something wrong, and someone with economic damages and future lost wages, between them would be a satisfaction of judgement. If they had periodic payments to not keep the judgement debtor on the hook, but to automatically give them a satisfaction of judgement would mean that should the debtor end up, "sucking air," they cannot go after the person that damaged them. SENATOR HOLDEN said the whole idea of a structured settlement is to pay your money, to structure settlement and be done. The amendment would not create finality, nor would it be tort reform, he said. SENATOR DOHERTY said if they wanted finality, they could pay the judgement right up front. Pay the \$500,000 today and do not provide extra profits to the insurance company by allowing periodic payments. He stated that one person's version of tort reform and another person's attack on Montanans would be in the eye of the beholder. SENATOR BARTLETT pointed out that the other section of the law, which was future damages and non-malpractice claims, the language is permissive. It said the court, "may" order the judgement be satisfied or discharged. She said those claims for product liability or other action, do not have the kind of finality that was discussed. She didn't think they should provide the finality for this small group of individuals.

Vote: The MOTION FAILED on a roll call vote of 3-8.

Motion: SENATOR GROSFIELD MOVED THE AMENDMENTS AS CONTAINED IN (EXHIBIT 4), hb030901.avl. He also provided a gray bill. (EXHIBIT 5).

Discussion: SENATOR GROSFIELD said the amendments were in response to a discussion during the hearing which dealt with the language on Page 1, Line 18, the concept of the single incident. He explained that there were different answers on the questions. His understanding was the sponsors did not want to limit it to \$250,000 per incident, but per each derivative injury. As long as there are different opinions, he wanted to clarify the concept before a judge was forced to do that for them, guess at their intent. He asked to change Item # 2 where it said, "all claims

deriving," it should say, "all claims for non-economic loss deriving." He also said Item # 10 should be changed, which was technical issue. The reference should have been Section 1, Lines 19-21, not 27-6-103. **SENATOR BAER** stated his hatred of ambiguity and felt the amendments would clarify some smokey areas and would remove a mine-field in the future. **SENATOR HOLDEN** supported the amendment and felt it would make it clear that each patient is subject to the \$250,000. **Ms. Jamison** stated that her organization would totally support the amendments. She agreed that it would be a mine-field for litigation. She supported the idea that each person would have their own cause of action in a multiple-patient situation, and it would not be divided up. **Mr. Hill** agreed that the intent was not to apply a single cap to multiple patients directly affected by malpractice. He had not read the amendments, but agreed with the importance of them.

Vote: The MOTION PASSED UNANIMOUSLY on an oral vote.

Motion: SENATOR HALLIGAN MOVED TO AMEND HB 309 AS PER THE AMENDMENTS CONTAINED IN (EXHIBIT 6), hb030904.avl.

Discussion: SENATOR HALLIGAN explained that the first two amendments dealt with the same issue as the previous amendments already adopted. Item # 3 was a substitute item from Page 2, Line 26, the physical impairment or disfigurement inclusion into the non-economic loss. He said he would strike the subsection. He asked **Mr. Hill** to further define the amendment. **Mr. Hill** said the definition of non-economic loss on Page 2, defines as non-economic loss physical impairment or disfigurement. He said they were not talking about non-economic loss from those conditions. He thought it was a poorly worded provision, and not what the proponents intended. If the subsection were taken out, it would still exclude emotional distress and inconvenience, injury to reputation, loss of society, and others. It would not define as non-economic loss, physical impairment and disfigurement. He thought it was a good amendment. If the language stayed in there, there could be constructive legal arguments made that because physical impairment is in there, the bill could not mean what it says, because it says physical impairment is non-economic loss. **CHAIRMAN CRIPPEN** asked about the cap on it. **Mr. Hill** stated that if Line 26 were removed, and he wanted to demonstrate to the jury that there was non-economic loss which was subjective and non-monetary loss without a definite value, and more than \$250,000, it would still be affected by the cap. Non-economic loss from physical impairment or disfigurement would be judged by the same standards as everything else, he said. The bill, as read, defined physical impairment as non-economic loss. He asked the committee to question the proponents about the semantic and legal definition of the phrase. **SENATOR HALLIGAN** wanted clarification. He asked if in the arguments on economic loss for physical disfigurement, they would be including lack of employment and employability because of scarring, which would eventually be included in the economic portions. **CHAIRMAN CRIPPEN** stated that they were included anyway. **Mr. Hill** said if

he were a plaintiff's attorney and the bill passed as it was, if he wanted to get more than \$250,000 in non-economic losses, he would come in with the experts that can quantify what it's worth for the person to hunt, or fish. They could give "objective" information about what a non-economic loss would be. What the bill has to mean with Line 26 included, is that anything you can make objective and monetary is not going to be affected by the cap, because it defines physical impairment or disfigurement as a subjective non-monetary loss. If he had a physical impairment that had a economic component to it, the bill would denominate that as a non-economic loss. **SENATOR BAER** said he understood the concern that these things could be directly related to an economic loss in some instances. He thought they should make the distinction as impairment or disfigurement, not giving rise to economic loss. **Mr. Loendorf** said physical impairment by itself would not cause a loss of earnings. If a person would suffer a loss of wages, that would be recoverable. He said the example of a construction person having broken arm would cause loss of wages, as well as some impairment, as well as some pain. The pain and impairment are non-economic losses. The loss of wages is an economic loss. Their concern about disfigurement was that every surgery left a scar, so some disfigurement could be claimed. Workers' Compensation addressed that problem by awarding a low figure, \$2,500 for severe disfigurement for the head, neck and face. The idea of the disfigurement, unless it is excluded, would be an item that opens the door in every surgery case. **SENATOR BARTLETT** asked **Jacqueline Lenmark**, representing the American Insurance Association, for her opinion on the limitations of non-economic recoveries in the bill on the subjective items discussed. How quantifiable are impairment and disfigurement, she asked? **Ms. Lenmark** said impairment is quantifiable. They had a method of assessing it to the proportion of the whole body. In terms of dollars, it also is quantifiable in this kind of an action. It would be lost wages or ability to earn related to the impairment. Disfigurement is a more difficult one to quantify. If she were a fashion model and her face was disfigured by a surgical procedure, a jury would have the ability to put a dollar amount on that disfigurement. A scar typically covered by clothing would be a more difficult determination to make. In the Workers' Compensation they arbitrarily put a dollar amount on it because they don't compensate for non-economic losses and don't require the proof of fault. **SENATOR BARTLETT** said given that information and the fact that they are quantifiable items in most circumstance, she did not think that it came within the bill's definition of non-economic loss as subjective non-monetary loss. She supported the amendment. **SENATOR BAER** said he understood the concern and solicited modification of Item # 3 rather than strike Subsection (iv) in its entirety, by including language of non-economic or non-monetary loss. **SENATOR HALLIGAN** said because he did not practice in the area, he did not know how to draw the line in actuality to damages.

Mr. Lendorf said they could possibly add to the phrase, "to the extent that physical impairment or disfigurement do not cause economic damage." **Mr. Hill** said the cleaner way would be to say, "physical impairment or disfigurement," and then track the language in Subsection D that is not subjective and non-monetary.

Motion: SENATOR HALLIGAN WITHDREW HIS MOTION ON ITEM # 3. HE FURTHER MOVED TO AMEND HB 309 BY A NEW MOTION AT THE END OF PHYSICAL IMPAIRMENT OR DISFIGUREMENT, USING CONSISTENT LANGUAGE THAT IS NOT SUBJECTIVE OR NON-MONETARY.

Discussion: **Valencia Lane** said the original amendment to take Subsection (iv) out was a good amendment. She thought that Items 1, 2, 3, 5, 7, and 8 were apples and 4 was an orange and did not belong. The intent is that non-economic losses resulting from physical impairment and disfigurement are non-economic losses. But if they define physical impairment itself to be non-economic loss, it would create a great ambiguity. They do not mean to include actual loss of wages. The intent is not to include that in non-economic losses, but by definition they are saying in black and white that physical impairment and disfigurement is a non-economic loss. Period. She did not think it belonged in the definition. The intent is non-economic losses FLOWING from impairment and disfigurement is a non-economic loss. **CHAIRMAN CRIPPEN** asked if they could take it out, but where would it go? It would have to go into economic losses. It had to be one or the other. Or perhaps punitive. **Ms. Lane**, with due respect, disagreed. She said one kind of injury can result in more than one kind of loss. An injury to an arm could result in loss of wages, which is an economic loss. It could result in pain and suffering, which is a non-economic loss. It could result in a spouse having a claim for loss of consortium possibly. The loss would not necessarily have to be categorized as an economic or non-economic or punitive. The bill says: physical impairment is non-economic. Period. **CHAIRMAN CRIPPEN** said they could take it out, but there was no place for it. **Ms. Lane** insisted there was. It could be under physical pain and suffering, emotional distress, inconvenience, loss of society, companionship and consortium, injury to reputation. **Ms. Jamison** said the debate underscored that everyone is confused. She thought the amendment would make it clear that even though it was a mixing of apples and oranges, (and that **Ms. Lane** was the best drafter in the legislature) to use the same language that's not subjective and non-economic. That was if the person loses wages, they would get it. But if they haven't lost wages, and are trying to sue for the physical impairment, it would blow the cap off the cap. The amendment would make the distinction. **Ms. Lane** summarized the amendment: on Page 2, Line 26, after (iv), insert, "subjective, non-monetary loss arising from physical impairment or disfigurement."

Vote: The MOTION CARRIED UNANIMOUSLY on an oral vote.

Discussion: SENATOR GROSFIELD asked about the physical impairment under Subsection I. He thought the same thing might apply to physical pain. If he could not work only because of pain, doesn't the same issue apply? Mr. Loendorf said he was unsure that they needed the other amendment. If they looked at the definition, the lead-in phrase of non-economic loss meant subjective non-monetary loss, including, but not limited to these causes. If the things could also cause an economic loss, they are not included, or not covered.

Motion/Vote: SENATOR NELSON MOVED THAT HB 309 BE RECOMMENDED BE CONCURRED IN AS AMENDED. The MOTION PASSED on a roll call vote of 7-4. It was determined that SENATOR BENEDICT would carry the bill.

EXECUTIVE ACTION ON HB 345 and 256

Discussion: SENATOR HALLIGAN explained that these bills were not DUI Task Force bills, but separate bills introduced by legislators with ideas. There were a number of surcharge bills. They melded the bills into one bill. They made one bill a penalty bill. Thus, they had put a defined issue within each bill. Valencia Lane explained the amendments. She pointed to hb034502.avl, (EXHIBIT 7). She had minor changes. On Item # 7, she asked to strike out Page 2, Line 26, and Page 2, Line 29. On Item # 8, following (1) (c), strike (1) (c), and insert, "must be." Strike, "and," after Insert, then strike, "must be," and insert, "and." She said there were two Senate bills and two House bills. The Senate bills are long gone. What remained in the committee were two bills, HB 256 and HB 345. There were two major conflicts, she said. One of the Senate bills created a felony on fourth offense. The House bill also created a felony for DUI, but on the third offense. The decision to be made was: third or fourth offense felony. The amendments to HB 256 would address that conflict. (EXHIBIT 8) One the last page there is a coordination instruction, coordinating with SB 316, which is fourth offense felony. If both bills pass, HB 256 would supersede. The Senate bill fourth offense would die and they would end up with a third offense felony for DUI's. Another conflict was that both House bills contained surcharges for DUI's. The amendments had been drafted for HB 256 and HB 345 because they both contain surcharges. The amendments to HB 256 strip the surcharges out of HB 256 to eliminate that conflict. HB 345 and its surcharges would be left. One of the policy decisions that needed to be made was all the bills talked about DUI's and not per se (the refusal to take the test). The amendments would put the per se statute into the bills and make it parallel third or fourth offense felonies. Peter Funk, DUI Task Force Attorney, commented on HB 256. This would also increase the penalties for first and second offenders, as well as saying third-time offenders are felonies. He said it was a harsher bill than the one passed earlier because it not only had the felony trigger at a lower level, but also increased the

punishment for first and second time offenders, too. The House bill would also provide for deferral of sentences for DUI offenses. The Senate bill specifically prohibited deferrals. As the bill stands in its unamended form, it would allow the judge to defer the sentence. He explained the treatment would be applicable to the *per se* offense in the bills passed by the House. He said it would be desirable to have some slight differences between the offenses to aid in plea bargaining. The amendment before them would retain those differences. He told the committee that the amendment would provide for the third-offense penalty, but would not build in the increased sanctions that the bill as a whole provides for. **CHAIRMAN CRIPPEN** asked what they would be missing if they were to table HB 256? **Mr. Funk** said the DUI Task Force did not think there was anything lacking in the bill which is making its way through the House. There is nothing in HB 256 they still wanted, but instead found a couple of problems.

Motion/Vote: SENATOR HOLDEN MOVED TO TABLE HB 256. The MOTION CARRIED on an oral vote.

Discussion: The discussion was opened on HB 345. **Beth Baker, representing the Department of Justice**, addressed the committee. She said the goal of HB 256 was to get some money for the Jaws of Life equipment. **REPRESENTATIVE JOHNSON'S** goal in HB 345 was to give money to the police departments for video cameras or breathalyzers or other DUI equipment. The amendments would bring those together so that the money could be used to purchase, lease or maintain law enforcement equipment OR emergency rescue equipment used in the investigation of alcohol-related offenses or accidents. Instead of having some of the fines coming into the Department of Justice and reimbursing back the counties and cities, they would retain whatever they collect. It would be distributed much the same as fines and forfeitures are distributed in current law in Section 3-10-601. If the DUI is prosecuted in city court, the city would keep all of the money. If the fine is collected by a justice court, half of the money will go to the county and half to the state (going to the Highway Patrol). That would reflect the percentage of arrests made by each agency. Approximately 50 per cent of DUI arrests are made by city police; 25 per cent by the Highway Patrol; and 25 per cent by county sheriffs' departments.

Motion: SENATOR HOLDEN MOVED TO ADOPT THE AMENDMENTS AS SHOWN IN EXHIBIT 7.

Discussion: SENATOR ESTRADA quoted **Ms. Baker** as saying, the money "may" be used. **Ms. Baker** said the amendment Item # 8 would cover that, with the language "must be" used to purchase, lease, or maintain law enforcement or emergency rescue equipment used in the investigation of alcohol-related offenses or accidents. In the new amendment Item # 9, it provides for the disbursement of the money. The only part not controlled directly was the part coming to the state because there would have to be an

appropriation to the Department of Justice for that purpose. It would be in HB 2, similar to the license fees for DUI's.

Vote: The MOTION CARRIED UNANIMOUSLY on an oral vote.

Motion: SENATOR HALLIGAN MOVED THAT HB 345 BE RECOMMENDED CONCURRED IN AS AMENDED.

Discussion: SENATOR GROSFIELD said he voted for the amendment because it cleans up the bill, which was a mess. He said he was going to vote against the bill because they were coming up with an innovate way of financing and accounting. They were stacking fines in a way that he didn't think would be wise, for DUI's or any criminal violations. Another problem would be the earmarking of the money. There were appropriate ways of earmarking, but he was unsure if this was appropriate. He did not think it would be consistent, predictable money. He was uncomfortable with using the earmarked money, unless it was specific dollar amounts. They may end up with more money than needed, or less. He said it was like the bed tax. SENATOR HOLDEN agreed. It was a nice idea, but another appropriation, nonetheless. SENATOR HALLIGAN said he did not like the earmarking to special accounts, nor the stacking. The subcommittee gave the option to the committee as a whole, he felt.

Vote: The VOTE WAS HELD OPEN FOR SENATORS DOHERTY AND BARTLETT. SENATOR BARTLETT LATER VOTED NO - THE MOTION FAILED, 4-6 on a roll call vote.

EXECUTIVE ACTION ON HB 443

Motion: SENATOR ESTRADA MOVED THAT THE COMMITTEE RECONSIDER THEIR ACTIONS ON HB 443, SPONSORED BY SPEAKER MERCER.

Discussion: SENATOR ESTRADA reminded the committee that the bill had been heard two days earlier. They did put the amendments on the bill in committee, she said, and the sponsor wanted to see the bill taken to the floor. The bill referenced insurance companies, and advanced payments.

Motion/Vote: SENATOR ESTRADA MOVED TO TAKE HB 443 FROM THE TABLE.

Discussion: SENATOR HOLDEN spoke against the measure, citing time and saying further that they had spent plenty of time already on the bill. SENATOR BAER said he didn't think everyone was understanding the ramifications of the bill. If they killed the bill, they were sending a message to insurance companies to resist requests for medical payments incurred after liability is determined. It is a problem, he said, and was taking place. Sometime they cooperate, and sometimes not. Often people were forced to hire an attorney and seek litigation. He said there was no reason they should not front medical costs incurred by the damaged party who was insured, once liability had been

established. This bill would change the law, but enforce certain parts and makes it more demanding that insurance companies do the right thing.

Vote: The MOTION CARRIED on an oral vote.

Discussion: SENATOR ESTRADA said she thought it was a very important piece of legislation for the little guy. She would like to see it presented on the floor of the Senate.

Motion: SENATOR ESTRADA MOVED THAT HB 443 BE RECOMMENDED CONCURRED IN AS AMENDED.

Motion: SENATOR HOLDEN MADE A SUBSTITUTE MOTION THAT THE MEETING ADJOURN, AND RESCHEDULE FURTHER DISCUSSION.

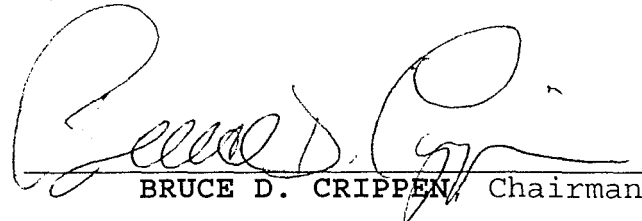
Discussion: SENATOR ESTRADA said she was sorry SENATOR HOLDEN did not want to discuss the bill, but that he was an insurance salesman. CHAIRMAN CRIPPEN agreed, but stated that he was also a member of the committee and had an opportunity to express his feelings. If any senator wishes to delay discussion on a bill, the rules demand that those wishes be respected. SENATOR HOLDEN stated they had already spent an hour on the bill, they would need more time. SENATOR BAER said it was contradictory. If they had already spent more than an hour on the bill, there was no need to go through it all again. They all knew what it was about, and about what the bill would do and not do. He said it was a delaying process by postponing their action. If it left their committee, the bill would be discussed in great detail on the floor. CHAIRMAN CRIPPEN restated that anyone on the committee wishing to delay the hearing one day, has the right to do so, merely by saying so. It was determined to meet the following day to discuss the ethics bill and HB 443.

EXECUTIVE ACTION ON HB 345

Vote: SENATOR BARTLETT returned to the hearing. She voted, "no," on the bill, causing the roll-call vote to be 4-6. The MOTION FAILED.

ADJOURNMENT

Adjournment: CHAIRMAN BRUCE D. CRIPPEN adjourned the meeting at
11:59 A.M.



BRUCE D. CRIPPEN, Chairman



JUDY FELAND, Secretary

BDC/jf

DATE 3-23-95

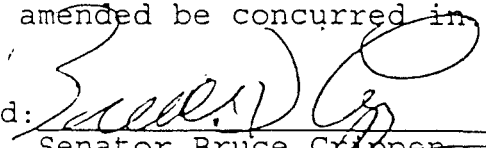
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SENATE STANDING COMMITTEE REPORT

Page 1 of 2
March 23, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration HB 309 (third reading copy -- blue), respectfully report that HB 309 be amended as follows and as so amended be concurred in

Signed: 

Senator Bruce Crippen, Chair

That such amendments read:

1. Page 1, line 19.

Following: "malpractice,"

Strike: "the combined awards"

Insert: "an award"

2. Page 1, line 20.

Following: "\$250,000"

Strike: ", "

Insert: ". All claims for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed \$250,000. This limitation applies"

3. Page 1, line 21.

Strike: subsection (i) in its entirety

Renumber: subsequent subsections

4. Page 1, line 23.

Following: "; "

Strike: "and"

Insert: "or"

5. Page 1, line 25.

Following: line 24

Insert: "(b) If a single incident of malpractice injures multiple, unrelated patients, the limitation on awards contained in subsection (1)(a) applies to each patient and all claims deriving from injuries to that patient. "

6. Page 1, line 25.


Strike: "(b) A"

Insert: "(2)(a) For purposes of the limitation on awards contained in subsection (1), a"

7. Page 2, line 2.

Strike: "(c) "

Insert: "(b) "


Amd. Coord.
Sec. of Senate

Sen. Benedict
Senator Carrying Bill

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8. Page 2, line 6.

Strike: "(2)"

Insert: "(3)"

Renumber: subsequent subsections

9. Page 2, line 26.

Following: "(iv)"

Insert: "subjective, nonmonetary loss arising from"

10. Page 2, line 30.

Following: line 29

Insert: "(e) "Patient" means a person who receives services from
a health care provider."

11. Page 3, line 2.

Following: "defined in"

Strike: "27-6-103"

Insert: "[section 1]"

-END-

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER 1

MOTION: Halligan Amend 30902

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON	/	

SEN:1995
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Failed

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. TIB 309 NUMBER (2)

MOTION: Crippen Motion - Amend - 303

By 30903

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	/	
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON		/

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MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER (3)

MOTION: Halligan 30902 # 2

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	/	
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON		/

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. 309 NUMBER (4)

MOTION: DOHERTY Amendment 30905 # 3

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON		/

SEN:1995
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Failed

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER (5)

MOTION: 30905 # 4 (DOHERTY AMENDMENT)

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON		/

SEN:1995
wp:rlclvote.man

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Failed

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER 6

MOTION: Nelson - ~~PAAA~~ BCI AA

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER	/	
SUE BARTLETT		/
AL BISHOP, VICE CHAIRMAN	/	
STEVE DOHERTY		/
SHARON ESTRADA	/	
LORENTS GROSFIELD	/	
MIKE HALLIGAN		/
RIC HOLDEN	/	
REINY JABS	/	
LINDA NELSON	/	

SEN:1995
wp:rlclvote.man

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PASSED
BCIAA

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 345 NUMBER 7

MOTION: SENATOR HALLIGAN MOVED HB 345 Be. Concurred
IN AS Amended

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER	/	
SUE BARTLETT		/
AL BISHOP, VICE CHAIRMAN	/	
STEVE DOHERTY		
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS	/	
LINDA NELSON		/

Amendments to House Bill No. 309
Third Reading Copy (blue)DATE 3-23-95BILL NO. HB 309Requested by Senator Halligan
For the Committee on JudiciaryPrepared by Valencia Lane
March 22, 1995

1. Title, lines 11 through 13.
Following: "CASES;" on line 11
Strike: remainder of line 11 through "MCA;" on line 13
2. Page 1, line 20.
Page 1, line 26 (in 2 places).
Page 1, line 29.
Page 1, line 30 (in 2 places).
Page 2, line 7.
Strike: "\$250,000"
Insert: "\$500,000"
3. Page 3, line 1 through page 4, line 18.
Strike: sections 2 and 3 in their entirety
Renumber: subsequent sections
4. Page 4, line 20.
Strike: "[Sections 1 and 2] are"
Insert: "[Section 1] is"
5. Page 4, line 22.
Strike: "sections 1 and 2"
Insert: "section 1"

Amendments to House Bill No. 309
Third Reading Copy (blue)

Requested by Senator Crippen
For the Committee on Judiciary

Prepared by Valencia Lane
March 22, 1995

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 3-23-95
REF ID HB 309

1. Page 1, line 20.
Page 1, line 26 (in 2 places).
Page 1, line 29.
Page 1, line 30 (in 2 places).
Page 2, line 7.
Strike: "\$250,000"
Insert: "\$600,000"

Amendments to House Bill No. 309
Third Reading Copy (blue)

SENATE JUDICIARY COMMITTEE
COMMITTEE NO. 3
DATE 3-23-95
FILE NO. HB 309

Requested by Senator Doherty
For the Committee on Judiciary

Prepared by Valencia Lane
March 22, 1995

1. Page 1, line 20.

Page 1, line 26 (in 2 places).

Page 1, line 29.

Page 1, line 30 (in 2 places).

Strike: "\$250,000"

Insert: "\$1 million"

2. Page 2, line 7.

Strike: subsection (3) in its entirety

Renumber: subsequent subsection

3. Page 2, line 21.

Following: "DEATH."

Insert: "Malpractice claim does not mean a claim based on a
grossly negligent act or omission by a health care provider
in the rendering of professional services."

4. Page 3, lines 19 and 20.

Following: "bond." on line 19

Strike: remainder of line 19 through "discharged." on line 20

Amendments to House Bill No. 309 DATE 3-23-95Third Reading Copy (blue) HB 309Requested by Senator Grosfield
For the Committee on JudiciaryPrepared by Valencia Lane
March 22, 1995

1. Page 1, line 19.
Following: "malpractice,"
Strike: "the combined awards"
Insert: "an award"
2. Page 1, line 20.
Following: "\$250,000"
Strike: ", "
Insert: ". All claims deriving from injuries to a patient are
subject to an award not to exceed \$250,000. This limitation
applies"
3. Page 1, line 21.
Strike: subsection (i) in its entirety
Renumber: subsequent subsections
4. Page 1, line 23.
Following: ";"
Strike: "and"
Insert: "or"
5. Page 1, line 25.
Following: line 24
Insert: "(b) If a single incident of malpractice injures
multiple, unrelated patients, the limitation on awards
contained in subsection (1)(a) applies to each patient and
all claims deriving from injuries to that patient. "
6. Page 1, line 25.
Strike: "(b) A"
Insert: "(2)(a) For purposes of the limitation on awards
contained in subsection (1), a"
7. Page 2, line 2.
Strike: "(c) "
Insert: "(b) "
8. Page 2, line 6.
Strike: "(2) "
Insert: "(3) "
Renumber: subsequent subsections
9. Page 2, line 30.
Following: line 29
Insert: "(e) "Patient" means a person who receives services from
a health care provider."

10. Page 3, line 2.
Following: "defined in"
Strike: "27-6-103"
Insert: "[section 1]"

INTRODUCED BY GRIMES, BENEDICT, BARNETT, BAER, ORR, HEAVY RUNNER, MILLS, MILLER, 5
 ANDERSON, COLE, CURTISS, EMERSON, DENNY, HARGROVE, MOLNAR, WELLS, SOFT, HERTEL, 3-23-95
 ROSE, TASH, BOHLINGER, MCGEE, SPRAGUE, HIBBARD, MOHL, MASOLO, ESTRADA, HAYNE, JABS, HB 309
 PECK, BROWN, GROSFIELD, OHS, CLARK, SIMPKINS, JACOBSON, DEVLIN, HARP, JERGESON,
 JENKINS, ZOOK, REHBÉIN, TOEWS, SWYSGOOD, KITZENBERG, STOVALL, KNOX, FOSTER,
 HARDING, L. NELSON, BURNETT, SCHWINDEN, AKLESTAD, HOLDEN, S. SMITH

BY REQUEST OF THE GOVERNOR'S OFFICE

A BILL FOR AN ACT ENTITLED: "AN ACT RELATING TO MEDICAL MALPRACTICE CLAIMS AND
 RECOVERIES; LIMITING NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES; REVISING THE
 LAW RELATING TO PERIODIC PAYMENT OF FUTURE DAMAGES IN MEDICAL MALPRACTICE CASES;
 AMENDING SECTION 25-9-403, MCA; AND PROVIDING AN APPLICABILITY DATE."

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

NEW SECTION. *for noneconomic loss* **Section 1. Medical malpractice noneconomic damages limitation.** (1) (a) In a

malpractice claim or claims against one or more health care providers based on a single incident of
 malpractice, *an award* ~~the combined awards~~ for past and future damages for noneconomic loss may not exceed
 \$250,000. *All claims deriving from injuries to a patient are subject to an*
~~award not to exceed \$250,000. This limitation applies whether:~~

~~(i) for one or more claimants in the same proceeding or separate proceedings;~~

(ii) based on the same act or a series of acts that allegedly caused the injury, injuries, death, or
 deaths on which the action or actions are based; ~~and~~ *or*

(iii) the act or series of acts were by one or more health care providers.

(b) If a single incident of malpractice injures multiple, unrelated patients,
~~(b) A claimant has the burden of proving separate injuries, each arising from a different act or series~~
~~of acts. An award or combination of awards in excess of \$250,000 must be reduced to \$250,000, after~~
 which the court shall make other reductions that are required by law. If a combination of awards for past
 and future noneconomic loss is reduced in the same action, future noneconomic loss must be reduced first
 and, if necessary to reach the \$250,000 limit, past noneconomic loss must then be reduced. If a
 combination of awards is reduced to \$250,000, a claimant's share of the \$250,000 must be the same

the limitation on awards contained in subsection (1)(a) applies to each patient and all claims deriving from injuries to that patient."

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percentage as the claimant's share of the combined awards before reduction.

~~"(b)"~~ ~~(b)~~ For each claimant, further reductions must be made in the following order:

(i) first, reductions under 27-1-702;

(ii) second, reductions under 27-1-703; and

(iii) third, setoffs and credits to which a defendant is entitled.

~~"(3)"~~ ~~(3)~~ An award of future damages for noneconomic loss may not be discounted to present value.

~~"(4)"~~ ~~(4)~~ The \$250,000 limit provided for in subsection (1) may not be disclosed to a jury.

~~"(5)"~~ ~~(5)~~ As used in this section, the following definitions apply:

(a) "Claimant" includes but is not limited to:

(i) a person suffering bodily injury;

(ii) a person making a claim as a result of bodily injury to or the death of another;

(iii) a person making a claim on behalf of someone who suffered bodily injury or death;

(iv) the representative of the estate of a person who suffered bodily injury or death; or

(v) a person bringing a wrongful death action.

(b) "Health care provider" means a physician, dentist, ~~or health care facility, as defined in~~
~~27-6-103, or a nurse licensed under Title 37, chapter 8~~ PODIATRIST, OPTOMETRIST, CHIROPRACTOR,
PHYSICAL THERAPIST, OR NURSE LICENSED UNDER TITLE 37 OR A HEALTH CARE FACILITY LICENSED
UNDER TITLE 50, CHAPTER 5.

(c) "Malpractice claim" ~~has the meaning as defined in 27-6-103~~ MEANS A CLAIM BASED ON A
NEGLIGENT ACT OR OMISSION BY A HEALTH CARE PROVIDER IN THE RENDERING OF PROFESSIONAL
SERVICES THAT IS THE PROXIMATE CAUSE OF A PERSONAL INJURY OR WRONGFUL DEATH.

(d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to:

(i) physical and mental pain or suffering;

(ii) emotional distress;

(iii) inconvenience;

(iv) physical impairment or disfigurement;

(v) loss of society, companionship, and consortium, other than household services;

(vi) injury to reputation; and

(vii) humiliation.

~~"(e)"~~ ~~(e)~~ "Patient" means a person who receives services
from a health care provider."

Amendments to House Bill No. 309
Third Reading Copy (blue)

Requested by Senator Halligan
For the Committee on Judiciary

Prepared by Valencia Lane
March 22, 1995

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 3-23-95
FILE NO. HB 309

1. Page 1, line 18.

Following: "single"

Strike: "incident of"

Insert: "injury or death caused by"

2. Page 1, lines 22 and 23.

Following: "injury" on line 22

Strike: remainder of line 22 through "deaths" on line 23

Insert: "or death"

3. Page 2, line 26.

Strike: subsection (iv) in its entirety

Renumber: subsequent subsections

Amendments to House Bill No. 345
Third Reading Copy (blue)

Requested by Senator Bishop
For the Committee on Judiciary

Prepared by Valencia Lane
March 21, 1995

1. Title, line 6.

Following: "FOR"

Strike: "DEPOSIT"

Insert: "RETENTION OF A PORTION"

Following: "MONEY"

Strike: "IN THE"

2. Title, lines 6 and 7.

Following: "REVENUE" on line 6

Strike: remainder of line 6 through "AGENCIES" on line 7

Insert: "BY LOCAL GOVERNMENTS"

3. Title, line 8.

Following: "ENFORCEMENT"

Insert: "OR EMERGENCY RESCUE"

Following: "SECTIONS"

Insert: "3-10-601,"

4. Title, line 9.

Following: "46-9-301"

Insert: ", "

5. Page 2, line 6.

Following: "(1)(b),"

Strike: "\$15"

Insert: "the lesser of \$50 or 10% of the fine levied"

6. Page 2, lines 16 and 17.

Following: "court" on line 16

Strike: remainder of line 16 through "(1)(c)" on line 17

7. Page 2, line 19.

Page 2, line 21.

Page 2, line 23.

~~Page 2, line 26.~~

~~Page 2, line 29.~~

Strike: "subsections"

Insert: "subsection"

Following: "(1)"

Strike: "(a) and (1)(b)"

8. Page 3, lines 3 through 21. *must be*

Following: "(1)(c)" on line 3

Strike: remainder of line 3 through "OFFENSES" on line 21

Insert: "and retained by a city, town, or county finance officer
or treasurer must be used to purchase, lease, or maintain

and

law enforcement equipment or emergency rescue equipment used in the investigation of alcohol-related offenses or accidents"

9. Page 3, line 22.

Insert: "Section 3. Section 3-10-601, MCA, is amended to read:

"3-10-601. Collection and disposition of fines, penalties, forfeitures, and fees. (1) Each justice of the peace shall collect the fees prescribed by law for justices' courts and shall pay them into the county treasury of the county in which the justice of the peace holds office, on or before the 10th day of each month, to be credited to the general fund of the county.

(2) All fines, penalties, and forfeitures that this code requires to be imposed, collected, or paid in a justice's court must, for each calendar month, be paid by the justice's court on or before the 5th day of the following month to the treasurer of the county in which the justice's court is situated, except that they may be distributed as provided in 44-12-206 if imposed, collected, or paid for a violation of Title 45, chapter 9 or 10.

(3) The Except as provided in subsection (5), the county treasurer shall, in the manner provided in 15-1-504, distribute money received under subsection (2) as follows:

(a) 50% to the state treasurer; and

(b) 50% to the county general fund.

(4) The state treasurer shall distribute money received under subsection (3) as follows:

(a) 44.81% to the state general fund;

(b) 9.09% to the fish and game account in the state special revenue fund;

(c) 11.76% to the state highway account in the state special revenue fund;

(d) 16.93% to the traffic education account in the state special revenue fund;

(e) 0.57% to the department of livestock account in the state special revenue fund;

(f) 15.9% to the crime victims compensation account in the state special revenue fund; and

(g) 0.94% to the department of family services special revenue account for the battered spouses and domestic violence grant program.

(5) The county treasurer shall distribute the surcharge collected under 46-18-236(1)(c) as follows:

(a) 50% to the county general fund to be used for the purchase, lease, or maintenance of law enforcement or emergency rescue equipment used in the investigation of alcohol-related offenses or accidents; and

(b) 50% to the state treasurer for deposit in the state general fund. It is intended that the money deposited under this subsection be appropriated to the department of justice for the purchase, lease, or maintenance of law enforcement or emergency rescue equipment used in the investigation of alcohol-related offenses or accidents."

Amendments to House Bill No. 256
Third Reading Copy (blue)Requested by Senator Bishop
For the Committee on JudiciaryPrepared by Valencia Lane
(as originally prepared by Brenda Nordlund of DOJ)
March 20, 1995

1. Title, line 5.
Following: "INFLUENCE"
Insert: "OR OF DRIVING WITH EXCESSIVE ALCOHOL CONCENTRATION"
2. Title, lines 6 and 8.
Following: "~~LICENSE,~~" on line 6
Strike: remainder of line 6 through "SURCHARGE;" on line 8
Insert: "PROHIBITING DEFERRAL OF SENTENCING FOR CONVICTION OF
DRIVING UNDER THE INFLUENCE OR OF DRIVING WITH EXCESSIVE
ALCOHOL CONCENTRATION; CHANGING THE MANNER IN WHICH A SECOND
OR SUBSEQUENT CONVICTION FOR THOSE OFFENSES IS DETERMINED;"
3. Title, line 9.
Following: "SECTIONS"
Strike: "3-10-601, 46-18-235, AND"
Following: "61-8-714"
Insert: "AND 61-8-722"
4. Page 1, lines 19 through 22.
Following: "well-being" on line 19
Strike: remainder of line 19 through "53-24-103" on line 22
5. Page 1, line 22.
Following: "SUSPENDED"
Strike: "OR DEFERRED"
6. Page 1, line 29 through page 2, line 2.
Following: "well-being" on line 29
Strike: remainder of line 29 through "53-24-103" on page 2, line
2
7. Page 2, line 2.
Following: "SUSPENDED"
Strike: "OR DEFERRED"
8. Page 2, line 11.
Strike: "5"
Insert: "10"
Following: "be"
Strike: "deferred or"
9. Page 2, lines 13 through 16.
Following: "SUSPENDED" on line 12
Strike: line 13 through "53-24-103" on line 16

Following: "SUSPENDED"
Strike: "OR DEFERRED"

10. Page 3, line 25.

Page 3, line 27.

Strike: "5"

Insert: "10"

11. Page 4, line 10.

Strike: "24"

Insert: "48"

Strike: "48"

Insert: "72"

12. Page 4, line 13.

Following: line 12

Insert: "(9) A court may not defer imposition of sentence under this section."

13. Page 4, line 20 through page 6, line 17.

Strike: sections 2 through 5 in their entirety

Insert: "Section 2. Section 61-8-722, MCA, is amended to read:

"61-8-722. **Penalty for driving with excessive alcohol concentration.** (1) Except as provided in subsection (7), a person convicted of a violation of 61-8-406 shall be punished by imprisonment for not more than 10 days and shall be punished by a fine of not less than \$100 or more than \$500.

(2) Except as provided in subsection (7), on a second conviction of a violation of 61-8-406, ~~he~~ the person shall be punished by imprisonment for not less than 48 consecutive hours or more than 30 days and by a fine of not less than \$300 or more than \$500.

(3) (a) ~~Except as provided in subsection (7), on~~ On a third or subsequent conviction of a violation of 61-8-406, ~~he~~ the person is guilty of a felony and shall be punished by ~~imprisonment~~ incarceration in the county jail or a state prison for a term of not less than ~~48 consecutive hours or more than 6 months~~ 1 year or more than 10 years and by a fine of not less than ~~\$500~~ \$1,000 or more than ~~\$1,000~~ \$50,000.

(b) (i) On the third or subsequent conviction, the court, in addition to any other penalty imposed by law, shall order the motor vehicle owned and operated by the person at the time of the offense to be seized and subjected to the procedure provided under 61-8-421.

(ii) A vehicle used by a person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture unless it appears that the owner or other person in charge of the vehicle consented to or was privy to the violation. A vehicle may not be forfeited under this section for any act or omission established by the owner to have been committed or omitted by a person other than the owner while the vehicle was unlawfully in the possession of a person other than the owner in violation of

the criminal laws of this state or the United States.

(iii) Forfeiture of a vehicle encumbered by a security interest is subject to the secured person's interest if the person did not know and could not have reasonably known of the unlawful possession, use, or other act on which the forfeiture is sought.

(4) The provisions of 61-5-205(2), 61-5-208(2), and 61-11-203(2)(d), relating to revocation and suspension of driver's licenses, apply to any conviction under 61-8-406.

(5) In addition to the punishment provided in this section, regardless of disposition, the defendant shall complete an alcohol information course at an alcohol treatment program approved by the department of corrections and human services, which may include alcohol or drug treatment, or both, if considered necessary by the counselor conducting the program. Each counselor providing education or treatment shall, at the commencement of the education or treatment, notify the court that the defendant has been enrolled in a course or treatment program. If the defendant fails to attend the course or the treatment program, the counselor shall notify the court of the failure.

(6) ~~For the purpose of determining the~~ The number of convictions under this section, "conviction" means a final conviction, as defined in 45-2-101, in this state or a similar statute in another state or a forfeiture of bail or collateral deposited to secure the defendant's appearance in court in this state or another state, which forfeiture has not been vacated. An offender is considered to have been previously convicted for the purposes of sentencing if less than 5 years have elapsed between the commission of the present offense and a previous conviction must be determined in accordance with the provisions of 61-8-714. If there has not been ~~no~~ an additional conviction for an offense under this section for a period of 5 10 years after a prior conviction under this section, then the prior offense ~~must be expunged from the defendant's record~~ all records and data relating to the prior conviction are confidential criminal justice information, as defined in 44-5-103, and public access to the information may be obtained only by district court order upon good cause shown.

(7) The court may order that a term of imprisonment imposed under this section be served in another facility made available by the county and approved by the sentencing court. The defendant, if financially able, shall bear the expense of the imprisonment in the facility. The court may impose restrictions on the defendant's ability to leave the premises of the facility and require that the defendant follow the rules of that facility. The facility may be, but is not required to be, a community-based prerelease center as provided for in 53-1-203. The prerelease center may accept or reject a defendant referred by the sentencing court.

(8) Except for the initial 24 48 hours on a first offense or the initial 48 72 hours on a second or subsequent offense, the court may order that a term of imprisonment

imposed under this section be served by imprisonment under home arrest as provided in Title 46, chapter 18, part 10."

NEW SECTION. **Section 3. Coordination instruction.**

(1) If both [this act] and Senate Bill No. 316 are passed and approved and if they both include a section that amends 61-8-714, then [section 8] of Senate Bill No. 316, amending 61-8-714, is void.

(2) If both [this act] and Senate Bill No. 316 are passed and approved and if they both include a section that amends 61-8-722, then [section 9] of Senate Bill No. 316, amending 61-8-722, is void."

DATE 3-23-95

SENATE COMMITTEE ON JUDICIARY

BILLS BEING HEARD TODAY: HB 309, HB 256, HB 345
(EXEC. SESSION ONLY)

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
JOHN W. McMAHON MD	MMHA	309	✓	
Brian Lipe	Nat. Medical Assn	309	X	

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