MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE CRIPPEN**, on March 20, 1997, at 9:07 A.M., in Senate Judiciary Room, Room 325.

ROLL CALL

Members Present:

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

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Judy Keintz, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 571, 3/4/97
HB 572, 3/4/97
HB 264, 3/4/97
Executive Action: None

HEARING ON HB 571

Sponsor: **REP. HALEY BEAUDRY, HD 35, Butte**

Proponents: **Chris Gallus, Montana Chamber of Commerce and Montana Liability Coalition**
Page Dringman, Montana Municipal Insurance Authority
Alec Hanson, Montana League of Cities and Towns and MMIA
Carl Sweitzer, Montana Contractors Association
Brad Griffin, Montana Retail Association and the Montana Hardware and Implement Association
Jim Kimball, City of Billings

Greg Jackson, Montana Association of Counties
Barbara Ranf, U. S. West Communications
Russ Ritter, Washington Corporation
John Schontz, Montana Association Realtors

Opponents: **Robert Cameron, Attorney**
Russell Hill, MTLA

Opening Statement by Sponsor:

{Tape: 1; Side: a; Approx. Time Count: 9:07}

REP. HALEY BEAUDRY, HD 35, Butte, introduced HB 571. This bill is an act to revise Montana's comparative negligence statute. House Bill 571 provides a fair means to divide damages among at least some of those who are responsible for someone else's injuries. House Bill 571 protects schools, local governments, businesses and other deep pockets defendants from assuming a disproportionate share of damages. This bill applies to settled and released parties only. It allows consideration of the liability of those settled or released parties and it provides additional safeguards for participants in the suit. It allows a more fair allocation of liability among the parties deemed to be at fault in an injury case.

Proponents' Testimony:

Chris Gallus, Montana Chamber of Commerce and Montana Liability Coalition, rose in support of HB 571. In 1987, Montana law provided for the "empty chair" non-party defense. That was where a defendant in an action could bring up the fault of a non-party. That was thrown out in 1994 in a case called Newville. It lacked procedural safeguards necessary to insure due process. In 1995 this legislature passed SB 212. That initiated those procedural safeguards and reinstated the non-party defense in Montana. In 1996 in a case called Plumb, SB 212 was thrown out as well. This bill allows the situation wherein the plaintiff has taken some considered and voluntary action, the remaining defendant is not the only one left in the lawsuit. **EXHIBIT 1**

Page Dringman, Montana Municipal Insurance Authority, stated the MMIA is the self-insurance entity for the cities and towns in the state. They have a number of cases which involve third party situations. In the last three years there have been approximately 87 claims filed against a city or town which involve a third-party situation. Currently, if three parties are involved in an accident and the plaintiff settles with one of those parties, that party can then not be a party to the lawsuit. The fault of that party cannot be considered. She explained her handouts, **EXHIBIT 2.** She presented the scenario where there are three parties involved in an automobile accident. Person A is the driver of vehicle no. 1, B is the passenger of that vehicle, and C is the driver of vehicle no. 2. Assume that there are the following percentages of liability for each person involved in

the lawsuit. Driver A is 70% at fault. Passenger B is 0 percent at fault and driver C is 30% at fault. Total damages are $100,000. Passenger B is the claimant and the two drivers of the vehicles are defendants. We are supposed to have a modified system of joint and several liability where parties that are 50% or less at fault, only pay their percentage of liability and parties that are greater than 50% at fault could be held liable for 100% of the damages. Example no. 1 addresses modified joint and several cases. All parties are involved in the lawsuit. Passenger B is 0% at fault. A is 70% at fault and will pay $70,000. C is 30% at fault and will pay $30,000. B recovers $100,000 which is the total amount of damages. C is less than 50% liable and that is all C can be held liable for. A is greater than 50% liable and could be held liable for 100% and then seek contribution from C.

The second part of that is modified joint and several after the recent Supreme Court decision in Plumb. B has settled with the driver for $10,000. The Supreme Court has said settlements are addressed by giving a dollar offset. In that case A has paid $10,000, the amount of settlement. C will have to pay $90,000 for 30% of the liability and B recovers 100%. C is the only defendant in the lawsuit and then is liable for 100% of the damages. C gets a dollar for dollar offset. The $100,000 is offset by the amount of settlement. Despite the fact that A was 70% liable, A only pays $10,000. Despite the fact that C is only 30% liable, C pays $90,000.

The third example shows the situation wherein the two parties in the vehicle are related, B releases A from liability. In that situation C will pay 100% of damages for 30% of the liability. The next page shows the dollar offset rule if B settles with A for $80,000. A is only 70% liable. B can then recover $20,000 from C, despite the fact that C is 30% liable. The dollar offset rule does not correlate liability or fault with the amount of money paid. All the dollar offset does is insure that a plaintiff recovers 100%. HB 571, in the case where B has settled with A for $10,000, states that C is the only defendant in the lawsuit but the judge or the jury can consider the percentage of liability attributable to A. B's total damages of $100,000 will be reduced by the liability of A. It will be reduced by 70% and C will have to pay $30,000. The dollar amount of the settlement has no effect on Cs liability. C pays in direct proportion to Cs liability. In this instance B would recover $40,000 which would be the $30,000 from C and $10,000 which is the amount of settlement from A. This does not allow a plaintiff to recover 100% but it does tie fault for an accident to financial responsibility.

Under HB 571, plaintiffs do have an opportunity to recover more than their damages. That is example 6. B settles with A for $80,000 and sues C. C is the only defendant in the lawsuit and is liable for 100% less the liability associated with A which is 70%. C will have to pay $30,000 for 30 percent of the liability.

Person B will recover $110,000 because Person C always has to pay their percent of liability.

When there is a settled or released party, the defendant will not have to pay the additional liability attributable to the settled or released party. The plaintiff has entered into a settlement voluntarily. They chose to settle with the party. They could have brought the party into the lawsuit and had the trier of fact allocate liability amongst all parties. It is not fair for the remaining defendant in the lawsuit to have to bear, in addition to their share of liability, any liability associated with a settled party.

Alec Hanson, Montana League of Cities and Towns and MMIA, rose in support of the bill. He stated that about 10 years ago they had four or five of the largest cities in Montana which couldn't buy liability insurance at any price. The MMIA premiums are paid by the taxpayers of the State of Montana. The city or town would be a deep-pocket defendant in many lawsuits. Public agencies need some protection. House Bill 571 allows the court or the jury to hear the full facts about the incident. If a person settles, that person's responsibility cannot be presented to the court or the jury.

Carl Sweitzer, Montana Contractors Association, stated that the full incident needs to be examined and the determination made as to who is at fault and the percentages involved.

Brad Griffin, Montana Retail Association and the Montana Hardware and Implement Association, rose in support of the bill.

Jim Kimball, City of Billings, rose in support of the bill.

Greg Jackson, Montana Association of Counties, rose in support of HB 571.

Barbara Ranf, U. S. West Communications, stated they are also a member of the Montana Liability Coalition, and are in support of the bill.

Russ Ritter, Washington Corporation, rose in support of the bill.

John Schontz, Montana Association Realtors, rose in support of the bill.

Opponents' Testimony:

{Tape: 1; Side: a; Approx. Time Count: 9:27}

Robert Cameron, Attorney, explained he represented the Plumbs in the Supreme Court case, Plumb v. District Court. The Supreme Court declared it unconstitutional, a violation of substantive due process, to adopt a system that involves the "empty chair". That is to apportion a percentage of fault or liability to

someone who is not there to defend himself. If you are an employer and you get phone calls from disgruntled customers, you would go into work the next day and ask that employee's side of things. If employee number 1 is pointing a finger at absent employee no. 2 and saying he is at fault, what would you do? You would hear from employee no. 2. House Bill 571 provides the opportunity to the remaining defendant to point the finger at the empty chair and say that he is at fault. House Bill 571 allows the settled-out party to come back into the lawsuit to defend themselves. That cures some of the problems. The Supreme Court also stated that it is unconstitutional for the remaining plaintiff in the case.
The dollar credit rule is a system whereby any settlement paid results in the remaining defendant's judgment being offset dollar for dollar. That amply protects the remaining defendant's interest. If the defendant has to come back to court to defend his name and reputation and incur tens of thousands of dollars in lawyers fees, what incentive does that defendant have to settle? With the plaintiff having the threat of the disproportionate share of liability being shuffled off onto the empty chair, it is a substantial disincentive for plaintiffs to settle. There is a strong public policy favoring anything that promotes settlement.

Russell Hill, MTLA, rose in opposition to HB 571. These bills are unconstitutional. The court did not only strike the language referring to non-settling, non-parties. They explicitly struck the language that included settling non-parties. If the proponents are interested in making sure that no one hides their percentage of liability behind a settlement, they can prohibit settlements. Everything rides on the settlement. Most of the time, settlements favor defendants. Plaintiffs do not dictate settlements. It is better to have parties voluntarily negotiate a settlement than to go into court. **EXHIBIT 3** In the Washington Legislature there is a proposal to allow the legislature to overrule Supreme Court decisions with which they disagree. He commented on **Dave Owen's** radio program. **EXHIBIT 4** It is terrible to discourage settlements for a narrow set of instances. This increases costs. Insurance companies will find it harder to settle a case and, even if they do settle for policy limits, they still have exposure. They have to defend. The non-party defendant under HB 571 has the right to come back into the case to intervene and defend its name. Page 1, line 17, states that whereas the legislature believes the policy of the state is that claimants should be held responsible to the extent of individual fault. Page 2, line 24 ignores the whereas clause. A claimant can recover absolutely nothing if they were 51% or more negligent. The House Judiciary Committee corrected that in HB 572 by adjusting the modified comparative negligence statute to a pure comparative negligence statute. **REP. BOHARSKI** drives a specially equipped van. He made a left turn in front of oncoming traffic. He was about 60% at fault. The oncoming car had plenty of time to stop. It was 40% at fault. **REP. BOHARSKI** was completely barred from collecting for his injuries because he was more than 51% at fault. On page 4, line 13, it states that a

release of settlement entered into by a claimant, constitutes an assumption of the liability, if any, allocated to the settled or released person. Does that mean that a plaintiff who is 25% at fault who settles with a defendant who is 26% at fault is thereby barred from all recovery? Has he assumed that liability?

Questions From Committee Members and Responses:

{Tape: 1; Side: b; Approx. Time Count: 9:47}

SEN. STEVE DOHERTY asked **Ms. Dringman** why he, as a lawyer who represents deep-pocketed defendants, would recommend to any of them that they ever settle any tort action again in which there are multiple defendants? If he settles, he will get paid to defend them. Why should he tell them to pay "x" amount instead of getting a release?

Ms. Dringman stated the bill encourages fair settlement. This provision is to give the defendant, the settled party, an opportunity to come back in and defendant themselves if they so choose. Under Plumb there was no opportunity for a non-party to come in and defend themselves. Language was specifically included to give a settled or released party the opportunity to defend themselves if they so chose. It is not mandatory.

SEN. DOHERTY asked **Mr. Cameron** why he would advise his client to settle a case in advance of trial? You have the opportunity to come in. You are not required to come in. As an attorney, would you ever recommend to your clients that they not defend at trial?

Mr. Cameron stated that he provides insurance defense. In a case in which a settlement in the range of policy limits would be appropriate, he could recommend to the insurance carrier to settle to avoid the potential of an excess liability problem which could arise under an insurance bad faith claim against the insurer. If the insurer declines an opportunity to settle a case for a reasonable amount when liability is reasonably clear, the insurance company can be held liable even if there is only a $100,000 liability policy. The only time he would recommend settling to an insurance carrier under the scenario created by HB 571, would be where the insurance carrier's liability is greatly in excess of policy limits. They could settle for something close to policy limits incur the additional costs of defending if the insured would require it.

SEN. DOHERTY asked **Mr. Cameron** why he would advise his client to enter into a settlement and to retain him to appear at trial?

Mr. Cameron stated that that seemed to be coming up in the Plumb decision. In that case, the non-party was a doctor. A physician's name and reputation is important. The purpose of continuing in the lawsuit for the benefit of a settled-out defendant would be to protect his name and reputation.

SEN. DOHERTY asked **Mr. Owen**, with the various contingencies on this bill, if it would be reasonable to rethink whether we should have a Supreme Court in the State of Montana?

Mr. Owen stated that the commentary says that we should have a Supreme Court. However, he feels it is fair for a group of people to disagree with a Supreme Court over these conclusions. The commentary clearly suggests that if this court continues to interpret this Constitution in this manner, it is fair that a group of people disagree.

SEN. MIKE HALLIGAN asked what the options would be?

Mr. Cameron stated that the most desirable option would be to recognize how effective the dollar credit rule has been in reducing the remaining deep pocket defendant's liability. Those settlements are arrived at very carefully after considering all the risks and potential liabilities.

SEN. HALLIGAN asked **Ms. Dringman** what options other states used in dealing with the empty chair issue?

Ms. Dringman answered that a number of states allow an allocation of liability to a non-party. Oregon limits the consideration of non-party fault to a settled or released party for the reason that the plaintiffs negotiated that that was in their best interest. They had an opportunity to bring them into the lawsuit and did not do so. It is fair to consider the liability of that settled party as opposed to a party that is immune from suit or is not subject to the jurisdiction of the court. A number of states eliminate joint and several all together. There is no underlying policy that a plaintiff is going to collect 100% of damages regardless of who they collect it from and regardless of the liability of the defendant they collect that money from. Other states retain a joint and several liability scheme which states that a defendant 1% liable can pay all damages. One state retains a pure contributory negligence standard which states that a plaintiff who is 1% at fault recovers nothing.

SEN. HOLDEN commented that on page 2, line 26, the bill states that you must take into consideration the percentage of the negligence.

Mr. Cameron explained that he did not mean to create the impression that the bill does not require consideration of percent of negligence of the empty chair. The bill requires a determination of a percentage of negligence to be attributable to people who have settled out of the lawsuit. If he needs to decide how much fault to apportion to more than one person, he had better hear from all the people being accused of being at fault if he is expected to come up with an accurate percentage of fault.

SEN. HOLDEN asked why plaintiffs agree to take early settlements and then pursue claims against other parties?

Mr. Cameron stated that goes on a case-by-case basis. He has never been involved in a case in which the primarily responsible person was let out of the lawsuit by paying a small amount to the plaintiff.

SEN. HOLDEN felt that a drunk driver with no insurance could be primarily responsible for the entire accident but another driver involved in the same accident is put on the hook because he has a liability policy.

Closing by Sponsor:

{Tape: 1; Side: b; Approx. Time Count: 10:04}

REP. BEAUDRY stated that in a small town there was an accident where a two year old was left in a car which was running. The person who pulled up next let her two-year-old out of the car. He was standing on the lawn of the school. The two-year-old in the car which was running, pulled the car into gear and pinned the boy against the wall. The parent of the severely injured boy, settled with the responsible party for the car which was left running. The settlement was $20,000. The injuries to the boy are in the millions. The school is going to pay the money based on it's responsibility. That money will come from the people in the community where the school is located. The school's lawyer will be able to deduct $20,000. If the school is 10% liable, under this law it would be responsible for 10% of a million dollar award. Today, the school is responsible for a million dollars minus the $20,000 which has already been paid. If the person in the empty chair wants to sit in the chair, he is welcome to do that but the amount of his settlement will not change no matter what the jury finds. If you are 20% responsible, you pay 20%.

HEARING ON HB 572

{Tape: 1; Side: b; Approx. Time Count: 10:10}

Sponsor: **REP. SHEILL ANDERSON, HD 25, Livingston**

Proponents:
Page Dringman, Montana Municipal Insurance Authority
Chris Gallus, Montana Chamber of Commerce and Montana Liability Coalition
Alec Hanson, League of Cities and the Montana Municipal Insurance Authority
Tom Harrison, Montana Society of CPAs
Dwight Easton, Farmers Insurance
Jim Kimball, City of Billings
Russ Ritter, Washington Corporations
John Schontz, Montana Association of Realtors

Don Allen, Montana Wood Products Association
Barbara Ranf, U S West Communications

Opponents: **Robert Cameron, Lawyer**
Russell Hill, Montana Trial Lawyers Association
John Sullivan, Montana Defense Trial Lawyers
Jackie Lenmark, American Insurance Association

Opening Statement by Sponsor:

REP. SHEILL ANDERSON, HD 25, Livingston, introduced HB 572. Joint and several liability allows too much responsibility to people who are left in an action. This unfairly tags them with damages. The last page of this bill explains how this bill would come into play in the event the previous bill fails to pass the legislature or is found to be unconstitutional by the court. If it fails to pass the legislature, this bill would become the vehicle used. If both bills pass and **REP. BEAUDRY's** bill is found to be unconstitutional by the court, this bill would have an immediate effective date at that time. If any part of this bill is found to be unconstitutional, we would revert to current law. House Bill 572 establishes a scheme of several liability only.

On page 1, lines 20-22, it states that where the legislature intends that the policy of the state should be a system of comparative fault in which persons are held responsible only to the extent in which they cause or contribute to the harm.

Page 2, lines 4 and 5, notes that at least 10 other states have abrogated the doctrine of joint and several liability except for specific situations. Lines 27 and 28 state that in determining the percentage of fault to the persons who are parties to the action, the trier of fact shall consider the fault of persons not a party to the action based upon evidence of those person's fault which is admissible in evidence.

Page 3 states that the percentage of fault attributable to parties to the action may total less than 100% if the trier of fact finds that fault contributing to cause the claimant's loss is attributable to other persons. Lines 10 thru 14, note that we retain joint and several liability when there is a concerted act or omission of two or more persons or the act or omission of a person acting as an agent or servant of another or in those cases where an act or omission violates the state environmental law relating to hazardous or deleterious substances.

Page 5 was amended in House Judiciary to allow for a pure comparative scheme. If a defendant is 5% at fault, he can be held responsible for 5%. Currently, if the plaintiff's fault is greater than the defendant's fault, the plaintiff cannot recover. This would provide a pure comparative.

Proponents' Testimony:

Page Dringman, Montana Municipal Insurance Authority, stated that if HB 571 is found unconstitutional, we are at a point where defendants will pay 100% of damages regardless of their liability. Other states have repealed the doctrine of joint and several liability. There is a case involving Disney World wherein a woman was injured while she and her fiance were driving bumper cars. The jury determined that her fiance was 85% at fault, she was 14% at fault and Disney World was 1% at fault. The state law did not allow for allocating fault to a settled party. She released her fiance from liability. Disney World, with 1% liability, paid 86% of the damages. House Bill 572 allows that the parties pay to the extent to which they are liable.

States have repealed joint and several liability in several ways. Some bills have retained joint and several liability for certain causes of action where people act in concert, one person acts as an agent, or there are environmental damages. Some states have kept joint and several for economic damages, but eliminated it for non-economic damages. Some of the states which have repealed joint and several liability are Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Oregon and Utah.

Chris Gallus, Montana Chamber of Commerce and Montana Liability Coalition, rose in support of HB 572. **EXHIBIT 5**

Alec Hanson, League of Cities and the Montana Municipal Insurance Authority, spoke in support of HB 572. He stated that cities and towns have two problems under current law. The first problem is their enormous exposure. Seventy percent of the traffic in the state of Montana travels over city and town streets and county roads. They have police and fire departments, emergency medical services, water and sewer departments.

The second part of the problem is responsibility. They have created their own insurance program which is financed out of taxpayer dollars. The statutes for the State of Montana provide for a judgment levy. Several years ago, Plentywood was hit with a judgment for which they did not have insurance. The taxpayers in Plentywood paid 35 mills for three years to pay off the lawsuit. They are trying to apportion the cost of their responsibility so they pay their fair share for the trouble which they cause and not much more.

Tom Harrison, Montana Society of CPAs, stated he was present to offer a proposed amendment. He referred to section 1 (2), which uses the language "injury to a person or property."

{Tape: 2; Side: a; Approx. Time Count: 10:24}

A New York court included economic damages in Lippies v. Atlantic Bank. In Federal Savings and Loan v. Huff, the Kansas court construed that economic loss was not included. His amendment would be to insert the words "and economic loss" after the word "property".

Dwight Easton, Farmers Insurance, offered an amendment, **EXHIBIT 6.** He referred to page 5, line 20, following the word "property" he would add "if the contributory fault was not greater than the fault of the defendant or the combined fault of all defendants and non-parties." Pure comparative negligence radically changes existing tort law in Montana. Present law requires a finding of a claimant to be less than 50% at fault in order to recover. Any award of damages is then reduced by the amount of fault attributed to the claimant and by the amount of fault attributed to any third party which might be involved. House Bill 572 completely abandons the requirement that the claimant be 50% or less at fault. Instead, it institutes a system where the claimant may be 90% at fault but could still sue the other party for the remaining 10%. It would permit persons who are the principal cause of their own injury to sue for and receive damages from those substantially less at fault or merely slightly responsible. He asked that HB 572 be amended back to its original introduced form. If this cannot be done, he asked that the committee give a do not pass recommendation to the bill.

Jim Kimball, City of Billings, rose in support of HB 572.

Russ Ritter, Washington Corporations, rose in support of HB 572.

John Schontz, Montana Association of Realtors, stated they support the bill as originally drafted.

Don Allen, Montana Wood Products Association, rose in support of HB 572 and HB 571.

Barbara Ranf, U S West Communications, stated they support the bill in its current form.

Opponents' Testimony:

Robert Cameron, Lawyer, stated HB 572 is unconstitutional and bad public policy. This bill is flawed by requiring the trier of fact to consider the fault of persons not parties to the action. Under the current system, no innocent deep pocket is being stuck with any liability. The only deep pockets stuck with liability are the ones which a jury has found to be negligent or otherwise at fault. Senate Bill 212, which was passed in the 1995 Legislature, created the non-party defense. **EXHIBIT 7**

Russell Hill, Montana Trial Lawyers Association, referred the committee to his written testimony, **EXHIBIT 3.** The issue is to make the Supreme Court rule both bills to be unconstitutional. Newville dealt with a settled party. The Plumb case did not

involve a settled party. The Supreme Court struck down the portions of the law which refer to non-party defenses. House Bill 572 may be contingent effective decades from now. The orphan's share settles on the plaintiff. Until 1997, a plaintiff could sue any deep pocket and receive the entire recovery from that defendant and that defendant had no right of contribution from other defendants. The evolution of joint and several in contribution has been to favor deep pocket defendants so they can pull in contribution from other defendants. This bill retains the dollar credit rule.

John Sullivan, Montana Defense Trial Lawyers, stated they were not opposed to the entire bill. They are concerned about the amendment made by **REP. BOHARSKI** in the House Judiciary Committee. That amendment is in section 4 and would create a pure comparative fault system.

He presented three propositions. Proposition no. 1 is that the slightest fault by the plaintiff absolutely bars the plaintiff's recovery. Proposition no. 2 is that no amount of fault by the plaintiff bars the plaintiff's recovery. This would mean that in all cases the plaintiff wins something. Proposition 3 is if the plaintiff is 50% or more at fault, the plaintiff cannot recover. This is the balanced approach.

Jackie Lenmark, American Insurance Association, stated they are opposed only to the above-mentioned amendment which was put on in the House Judiciary Committee. Referring to the pure comparative negligence doctrine, she talked about a drunk driver who went by a stop sign and hit a pickup travelling 60 mph. The drunk who was driving a sub compact was broadsided by the pickup. His injuries are approximately $500,000. The jury sets the drunk's negligence at 95%. He is the plaintiff. The negligence of the pickup driver is 5%. He would have to pay the drunk, $25,000 in damages.

Pure comparative negligence rewards the wrongdoer for his wrongs and punishes the innocent victim. It conflicts with the public's sense of justice. Nearly all of the 30 states with modified comparative negligence have adopted it through legislation which is influenced by the public.

Pure comparative negligence raises insurance costs because every party recovers. It also encourages litigation.

They support modified comparative negligence and pure several liability under the comparative negligence scheme. A party is only responsible for the amount of their own fault and plaintiff cannot recover against that party unless plaintiff's negligence is less than that party.

Questions From Committee Members and Responses:

SEN. DOHERTY asked why there was a non-severability clause on the bill?

REP. ANDERSON explained that it was put on because they did not want parts of the bill to be changed to benefit one party.

SEN. DOHERTY stated that the old language was that contributory negligence was not a defense and now contributory fault is a defense. In a strict products liability case, why would we want this language in the bill?

Ms. Dringman clarified that this was added after looking at other states and how "fault" is defined. Page 3, section 1 (8) states that fault means an act or omission that proximately caused or contributed to injury or damages sustained by a person seeking recovery and includes negligence in any of its degrees, contributory negligence, strict liability and products liability. Contributory negligence has not been a defense to products liability in the past. The defenses have been misuse of a product or an obvious defect. Some people believe that even if you have a products liability case and someone negligently installed the product, why should the manufacturer of that product not be able to compare his or her share of liability with the person who acted negligently in installing or using the product aside from just the misuse or defective condition.

SEN. DOHERTY presented the scenario wherein he represented a housing authority. A furnace was installed in the house, one of the valves opened when it shouldn't and death occurred due to carbon monoxide poisoning. As a representative of the housing authority, he would be able to go after the manufacturer, and the manufacturer would be able to go after the fault of the housing authority which installed the allegedly defective furnace. This doesn't go to the plaintiff. This would be a conflict between the potential tortfeasors.

Ms. Dringman stated the housing authority, as installer, could allege the fault of the manufacturer. If a plaintiff is bringing a case against the manufacturer for damages, the manufacturer could allege that the installation was a contributing fault.

SEN. DOHERTY commented that the contingent effective date was pretty creative. If the other bill passes and is eventually held unconstitutional, this bill would then go into effect. The Supreme Court needs to have a case presented, there needs to be facts raised, this could take one to thirty years to occur. Why wouldn't we simply come back to the next legislature and deal with the problem? There have been special sessions called to deal with the injustices of the Supreme Court.

REP. ANDERSON explained that they have tried time and again to address the empty chair problem which SB 212 attempted to

address. He likes the scheme of several liability. The Legislature will let the court know their good faith intent.

SEN. HOLDEN asked **Ms. Lenmark** if she agreed with **Mr. Shannahan's** amendment?

Ms. Lenmark stated she would support the amendment.

SEN. DOHERTY asked **REP. ANDERSON** if he opposed the amendment to strip the comparative fault language out of the bill? If your argument is that everyone needs to be responsible for the percentage of fault which they create, you are left with comparative fault.

REP. ANDERSON commented that the people who would like to have the amendment stripped have a good point in that it will increase litigation. He felt that **SEN. DOHERTY** made a good point in arguing that each party should be responsible for their exact percent, but that would leave it in a pure comparative sense. That's a policy call.

SEN. BISHOP asked **Mr. Hill** if there was any way to carry out the intent of the legislature and not have the bill declared unconstitutional by the court?

Mr. Hill stated that they are right back where they were two years ago. The only way the legislature can do what it wants to do, which is to make sure than no one's allocation of fault is affected by an escaping settling party, is to make sure that when someone settles they are still liable for contribution or they do not settle. There is a difference in allocating fault and then going after contribution among all the defendants. If the legislature does not wish to deal with that problem, then it is impossible to insure there will be both settlement and absolute allocation of all at-fault parties.

{Tape: 2; Side: b; Approx. Time Count: 11:00}

SEN. BISHOP asked **Mr. Cameron** what he was referring to when he talked about coming into court with clean hands?

Mr. Cameron explained the clean hands doctrine applies in principles involving equity disputes. His point was that a truly innocent deep pocket has nothing to fear under current law.

Closing by Sponsor:

REP. ANDERSON commented that **Mr. Harrison's** amendment was a good amendment and he encouraged the committee to add it. Referring to severability, he didn't want all the severable, several schemes unconstitutional except for the pure comparative negligence. **REP. KOTTEL** presented the amendment for a pure comparative scheme and then also offered the non-severability amendment.

If the committee feels it is fair for the person 51% responsible for an incident being the only person in a trial and all the other defendant's evidence being inadmissible, and that person pay 100% of the damages, then they should not pass HB 571 or HB 572. The plaintiff benefits under current law. If the committee wants a party to pay only the percent contributed to an incident, then the committee should pass this bill.

HEARING ON HB 264

Sponsor: **REP. BRAD MOLNAR, HD 22, Laurel**

Proponents:
Allen C. McMillan, Superintendent of Schools, Laurel
REP. ELLEN BERGMAN, HD 4, Miles City
Mike McKota, School Administrator, Harlem

Opponents:
Craig Anderson, Chief Probation Officer, Seventh Judicial District
Allen Horsfall, Jr., Western Montana Regional Juvenile Detention Center
David Gates, Bozeman School Board
Judith B. Herzog, Citizen
Toni Jenson, Montana Association of Homes and Services for Children
Nate Schweber, Youth Justice Council
Bob Runkel, Director of Special Education of Public Instruction
Eric Feavor, Montana Federation of Teachers and Montana Education Association
Candy Wimmer, MBCC
Bob Cooper, Executive Director for Montana Youth Homes
Janey McCauley, Executive Director of Montana Community Partners
Mary Alice Cook, Children and Families
Sally Stanzberry, Missoula Youth Homes

Opening Statement by Sponsor:

REP. BRAD MOLNAR, HD 22, Laurel, introduced HB 264. This bill passed the House by a two to one margin. If a student is moved from one school district to another and has drug or criminal issues in his life, they will inform the school as to the issues and the school then decides if they will accept that student up to and including the levels allowed by the federal government. The other part of the bill deals with an offense which could be a status offense. The juvenile probation officer may overlook the first offense, but after that he needs to inform the school and the school may take administrative action pursuant to their rules. Schools can use a point system and expel the student. He presented a letter from **Neal J. Christensen, Counselor, Helena High School, EXHIBIT 8.**

Proponents' Testimony:

Allen C. McMillan, Superintendent of Schools, Laurel, rose in support of HB 264. Having pertinent information about students helps them design a more effective program for those students. There is an increase in students who have a background with the juvenile justice system. They deal with children with handicaps, families torn apart by drugs and alcohol or violence, and children who have made poor choices and must deal with the consequences. They accept the challenge of working with these students, but it is essential that they know as much as possible about the individual student. They want them to succeed, not just survive. If the schools feel they cannot serve the student as best they can and ensure their success, they need to have the option to say they need to have this student placed somewhere else. This could occur after the fact.

Very often they will take a student who has been expelled from a Billings school and give him a second change. Administration will lay down very specific guidelines. This advance information will give them the ability to prepare their staff and students.

Regarding notice on a second offense, they could invoke a training rule. If they have a student who has developed a problem with drugs or alcohol, they need to have that information in order to help them and to be alert to possible harm to other students.

They understand and deal with confidentiality every day. They acknowledge that these students deserve a second change and also deserve to be part of an education system which is perhaps their only ticket away from their problems.

REP. ELLEN BERGMAN, HD 4, Miles City, presented written testimony from **Fred Anderson, Principal, Custer County District High School, EXHIBIT 9.**

Mike McKota, School Administrator, Harlem, commented that this bill makes common sense. Public education is going down hill. The prison case just settled, stated that the predators must be separated from the non-predators. It is a violation of their constitutional rights. Why don't we do the same in the public schools? The 95% of the students who come to school every day are not protected. Sexual molesters, abusers, harassers, and severely emotionally disturbed students are next to your sons and daughters every day and a lot of serious things happen.

When did public education become part of the criminal justice system? That is the responsibility of the State of Montana, the Department of Corrections or Juvenile Justice. They are the people who should be handling these kids. Teachers, administrators, and support personnel are asked to be psychologists, nutritionists, law enforcement personnel and surrogate parents. It is time to realize the importance of the

95% of the students who are being shoved to the side. School boards need the power to say no to those who will disrupt too many other students.

Opponents' Testimony:

Craig Anderson, Chief Probation Officer, Seventh Judicial District, rose in opposition to HB 264. This bill says that if a probation officer has reason to believe that an individual is using drugs, the schools may expel them. That is exclusionary. In 1995, students across the state self-reported that 35% have used marijuana. Twenty percent stated they had used it in the last 20 days. This bill will create additional problems.

Allen Horsfall, Jr., Western Montana Regional Juvenile Detention Center, stated he is opposed to the part of the bill which talks about "reasonable cause" and refusing to accept students in the public school system based upon reasonable cause. There is a difference between probable cause and reasonable cause. In this case a student may be prohibited from going to school based upon suspicion in what has been identified in a high risk group of students.

He is concerned about the right of due process. What appeal process would the youth have? Does the youth have a right to state his case? Court orders state that the youth will attend school on a regular basis with a concerted effort to make passing grades with no unexcused absences.

{Tape: 3; Side: a; Approx. Time Count: 11:43}

David Gates, Bozeman School Board, rose in opposition to the bill. Eighty percent of the students who commit crimes are first offenders and do not re-offend. Most of the students this bill would cover should not be included. The ones who are in treatment or placement should be included. They do that in Gallatin County.

Judith B. Herzog, Citizen, spoke in opposition to the bill. This bill establishes the Drug Free and Crime Free School Acts. Youth Courts would be mandated to notify schools when a youth is held but not convicted. A 1992 study from the Office of Juvenile Justice and Delinquency Prevention found that 95% of youth arrested for violent crimes were not attending school. Kids on the street have more time to become involved in criminal activity. **EXHIBIT 10**

Toni Jenson, Montana Association of Homes and Services for Children, stated that under the provisions of this bill, a first grader who is suspected of shoplifting could be expelled from school. Under this bill, children could not be placed in shelter or group homes if they are not enrolled in school. They would be sent back to unsafe family situations. Most of these kids are desperate kids who need help, not exclusion. Time is of the

essence for these children who need stabilization and intervention, not isolation.

Nate Schweber, Youth Justice Council, stated that he recently read that Article X, Section One of the Montana State Constitution guarantees quality educational opportunities to each and every student in Montana.

Bob Runkel, Director of Special Education of Public Instruction, stated that education is the key public resource which defines an individual's future. The lack of education can sentence an individual to low paying jobs and a life of poverty. Denying a child access to education is a lifetime of denied job opportunities and lost income. Schools should be informed when students who pose a physical risk to staff and others enroll in our schools. Certain behaviors of children are not appropriate, should not be tolerated by schools, and children should be accountable for that behavior. In some cases, children need to be removed from the classroom for their good and the good of their classmates. They disagree that the path for achieving safe schools with disciplined students must be accomplished through denying certain children an education. Let's hold our children accountable by requiring an education instead of preventing an education. Let's hold ourselves accountable to our children by making available for schools alternative education programs and financial resources to support them. When it comes to an education, it is simply not necessary that we sacrifice one child's right at the expense of another. We do not do this at Pine Hills where our children continue to receive a quality and Montana accredited educational program. Why should we do this for a child on probation?

Eric Feavor, Montana Federation of Teachers and Montana Education Association, rose in opposition to HB 264.

Candy Wimmer, MBCC, rose in opposition to HB 264. She is concerned about what is reasonable cause, which drugs are covered, no due process for excluding children from an educational opportunity, and activity which has nothing to do with activity on school grounds.

Bob Cooper, Executive Director for Montana Youth Homes, rose in opposition to the bill. He is not opposed to sharing of information with schools. They work in close proximity with the schools.

Janey McCauley, Executive Director of Montana Community Partners, stated she vice-chaired the Study Commission for Juvenile Justice and Mental Health. They support schools having information about children and assessment of families and children.

Mary Alice Cook, Children and Families, rose in opposition to the bill.

Sally Stanzberry, Missoula Youth Homes, rose in opposition to the bill. She supports appropriate information exchange.

Questions From Committee Members and Responses:

SEN. HALLIGAN, referring to the issues of due process, ability to face accusers, which drugs are included, etc., asked the sponsor to respond.

REP. MOLNAR stated this bill states up to and including federal law pertaining to the Children with Disabilities Act. If a child is in a treatment program of any kind, they cannot be denied an education because of suspicions. This bill states that the information be given to the schools. Why is the juvenile probation officer involved? It is because of criminal activity. He knows the student is a drug dealer. He informs the school to keep an eye on him. The school has a right to expel that student according to their rules and the federal laws.

SEN. BARTLETT stated the bill referred to violation of a statute. A student who is cited twice for a traffic violation or smoking cigarettes would be covered under this bill.

REP. MOLNAR stated that would deal with the incident involved. If a student is cited twice for smoking cigarettes and is on track team, he could be kicked off the track team.

Closing by Sponsor:

REP. MOLNAR commented that **Mr. Anderson** stated that 35% of our kids had admitted using marijuana. This shows the influence of some of these students. Thirty-five percent of the violent felonies in Gallatin County are committed by juveniles. Is that who we want in our schools? We are taking a kid from school district "A" because his dad found 15 ounces of marijuana under his bed and placing him in foster care. The next day the kid is back in another school district. He is an active drug dealer. Why doesn't that school have a right to that information? A fairly well known juvenile dealer in his town left school and tried to get into a Billings school, not for an education but for economic opportunity.

Our schools are not jails without bars. Our schools are not treatment centers without treatment. They are schools. All are welcome if they will try.

ADJOURNMENT

Adjournment: The meeting adjourned at 12:10 p.m.

SEN. BRUCE D. CRIPPEN, Chairman

JUDY KEINTZ, Secretary

BDC/JJK