

House BILL NO. 572

Brainard

Leeman
Curtis

INTRODUCED BY *William*

Clark ORR *Montgomery* *Hilborn* *Lash* *Boharski* *you*

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR SEVERAL LIABILITY FOR MOST TORT ACTIONS; LIMITING JOINT AND SEVERAL LIABILITY TO CERTAIN SPECIFIED TORT ACTIONS; PROVIDING FOR THE EFFECT OF A RELEASE OR OF A COVENANT NOT TO SUE; AMENDING SECTIONS 25-9-411, 27-1-702, 27-1-703, 27-1-719, 28-1-301, AND 28-11-311, MCA; AND PROVIDING CONTINGENT EFFECTIVE DATES AND AN APPLICABILITY DATE."
Wells *Ammer* *Lash* *Boharski* *you*

Shelton *Garfield*

Wm. E. Boharski

WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is premised on a modified joint and several liability scheme, have repeatedly been struck down by the Montana Supreme Court; and

WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable to nonparties impair the effectiveness of the current modified joint and several liability system in Montana; and

WHEREAS, 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 to which they cause or contribute to the harm; and

WHEREAS, the current system of joint and several liability, which apportions all liability only among parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of fault; and

WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately reflect the liability of settled or released parties; and

WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants having to pay for the liability of insolvent, immune, or settled parties; and

WHEREAS, the present system of joint and several liability for all tort actions does not reflect the state's policy of liability in proportion to fault; and

WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain situations; and

WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except

1 for specific situations; and

2 WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state
3 interests.

4 THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished,
5 except for specific causes of action, and is replaced with a comparative fault system utilizing the principles
6 of several liability.

7

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

9

10 **NEW SECTION. Section 1. Several liability -- purpose -- pleading -- determination -- nonparties.**

11 (1) The purpose of 27-1-703 and this section is to substitute several liability for the former law providing
12 for joint and several liability, except for certain actions. The purpose of several liability is to allocate
13 responsibility based on fault to all parties to an occurrence, rather than only to the parties to the litigation,
14 and to ensure that the liability of each party to an occurrence is allocated in direct proportion to that party's
15 fault.

16 (2) In an action brought as a result of the death of a person or injury to a person or property, the
17 liability of a defendant is several only and is not joint, except as provided in subsection (7). A defendant
18 is liable only for that percentage of damages that is equal to the ratio of defendant's fault to the total fault
19 attributed to all persons involved in the occurrence from which the action arose, including claimants,
20 defendants, and persons not party to the action. A separate judgment must be entered against the
21 defendant for that amount.

22 (3) In determining the percentage of fault of persons who are parties to the action, the trier of fact
23 shall consider the fault of persons not a party to the action, based upon evidence of those persons' fault,
24 that is admissible in evidence. Assessment of fault against a nonparty does not subject the nonparty to
25 liability in the action or any other action and may not be introduced as evidence of liability in any other
26 action.

27 (4) The percentage of fault attributable to parties to the action may total less than 100% if the trier
28 of fact finds that fault contributing to cause the claimant's loss is attributable to other persons.

29 (5) The jury shall return a special verdict, or the judge shall make special findings in the absence
30 of a jury, determining the percentage of fault attributable to each party and determining the total amount

1 of damages sustained by the claimant.

2 (6) A defendant shall affirmatively plead comparative fault and identify in the answer or within a
3 reasonable amount of time after filing the answer as determined by the court, each person who the
4 defendant alleges is at fault with respect to the occurrence that is the basis for the action. A defendant
5 who pleads the comparative fault of another has the burden of proving the fault.

6 (7) Section 27-1-703 applies and this section does not apply to an action arising from:

7 (a) the concerted acts or omissions of two or more persons;

8 (b) the act or omission of a person acting as the agent or servant of another; or

9 (c) an act or omission that violates a state environmental law relating to hazardous or deleterious
10 substances.

11 (8) For purposes of this section, "fault" means an act or omission that proximately caused or
12 contributed to injury or damages sustained by a person seeking recovery and includes negligence in any
13 of its degrees, contributory negligence, strict liability, and products liability.

14

15 **NEW SECTION. Section 2. Effect of a release or covenant not to sue.** A release or covenant not
16 to sue given to one of two or more persons potentially liable in tort for the same injury, death, damage, or
17 loss:

18 (1) does not discharge any of the other persons from liability for the person's several pro rata share
19 of liability unless the terms of the release or covenant provide for a discharge of liability;

20 (2) reduces the aggregate claim against the other persons to the extent of any percentage of fault
21 found by the trier of fact under [section 1] to be attributable to the person to whom the release or covenant
22 was given; and

23 (3) discharges the person to whom it was given from all liability for contribution.

24

25 **Section 3.** Section 25-9-411, MCA, is amended to read:

26 **"25-9-411. Medical malpractice noneconomic damages limitation.** (1) (a) In a malpractice claim
27 or claims against one or more health care providers based on a single incident of malpractice, an award for
28 past and future damages for noneconomic loss may not exceed \$250,000. All claims for noneconomic loss
29 deriving from injuries to a patient are subject to an award not to exceed \$250,000. This limitation applies
30 whether:

1 (i) based on the same act or a series of acts that allegedly caused the injury, injuries, death, or
2 deaths on which the action or actions are based; or

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

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

6 (2) (a) For purposes of the limitation on awards contained in subsection (1), a claimant has the
7 burden of proving separate injuries, each arising from a different act or series of acts. An award or
8 combination of awards in excess of \$250,000 must be reduced to \$250,000, after which the court shall
9 make other reductions that are required by law. If a combination of awards for past and future noneconomic
10 loss is reduced in the same action, future noneconomic loss must be reduced first and, if necessary to reach
11 the \$250,000 limit, past noneconomic loss must then be reduced. If a combination of awards is reduced
12 to \$250,000, a claimant's share of the \$250,000 must be the same percentage as the claimant's share of
13 the combined awards before reduction.

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

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

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

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

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

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

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

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

22 (i) a person suffering bodily injury;

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

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

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

26 (v) a person bringing a wrongful death action.

27 (b) "Health care provider" means a physician, dentist, podiatrist, optometrist, chiropractor, physical
28 therapist, or nurse licensed under Title 37 or a health care facility licensed under Title 50, chapter 5.

29 (c) "Malpractice claim" means a claim based on a negligent act or omission by a health care
30 provider in the rendering of professional services that is the proximate cause of a personal injury or

1 wrongful death.

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

3 (i) physical and mental pain or suffering;

4 (ii) emotional distress;

5 (iii) inconvenience;

6 (iv) subjective, nonmonetary loss arising from physical impairment or disfigurement;

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

8 (vi) injury to reputation; and

9 (vii) humiliation.

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

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12 **Section 4.** Section 27-1-702, MCA, is amended to read:

13 **"27-1-702. Comparative negligence fault -- extent to which contributory negligence fault bars**
 14 **recovery in action for damages.** Contributory ~~negligence shall~~ fault does not bar recovery in an action by
 15 ~~any a person or his a person's~~ a person's legal representative to recover tort damages for ~~negligence resulting in death~~
 16 of a person or injury to a person or property if such negligence the contributory fault was not greater than
 17 the negligence fault of the person defendant or the combined negligence fault of all ~~persons against whom~~
 18 ~~recovery is sought~~ defendants and nonparties, but ~~any~~ damages allowed ~~shall~~ must be diminished in ~~the~~
 19 proportion to the ~~amount of negligence~~ percentage of fault attributable to the person recovering."
 20

20

21 **Section 5.** Section 27-1-703, MCA, is amended to read:

22 **"27-1-703. Multiple defendants -- determination of liability.** (1) ~~Except as provided in subsections~~
 23 ~~(2) and (3), whenever the negligence of a party in any action is an issue~~ In an action referred to in [section
 24 1(7)(c)], each party against whom recovery may be allowed is jointly and severally liable for the amount
 25 that may be awarded to the claimant but has the right of contribution from any other person whose
 26 negligence may have contributed as a proximate cause to the injury complained of.

27 ~~(2) A party whose negligence is determined to be 50% or less of the combined negligence of all~~
 28 ~~persons described in subsection (4) is severally liable only and is responsible only for the amount of~~
 29 ~~negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly~~
 30 ~~and severally liable for the total loss the amount attributable to the claimant.~~

1 ~~(3)(2)~~ A In an action referred to in [section 1(7)(a) or (7)(b)], a party may be jointly liable for all
2 damages caused by the negligence of another if both acted in concert in contributing to the claimant's
3 damages or if one party acted as an agent of the other.

4 ~~(4)~~ On motion of any party against whom a claim is asserted for negligence resulting in death or
5 injury to person or property, any other person whose negligence may have contributed as a proximate
6 cause to the injury complained of may be joined as an additional party to the action. For purposes of
7 determining the percentage of liability attributable to each party whose action contributed to the injury
8 complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants,
9 and third party defendants. The liability of nonparties, including persons released from liability by the
10 claimant and persons immune from liability to the claimant, must also be considered by the trier of fact,
11 as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all persons
12 listed in this subsection. Contribution must be proportional to the liability of the parties against whom
13 recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to Rule 19,
14 Montana Rules of Civil Procedure.

15 ~~(5)~~ If for any reason all or part of the contribution from a party liable for contribution cannot be
16 obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the
17 noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution
18 from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is
19 liable for contribution under this section only up to the percentage of negligence attributed to that party.

20 ~~(6)~~ (a) In an action based on negligence, a defendant may assert as a defense that the damages
21 of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty
22 defense.

23 ~~(b)~~ In determining the percentage of liability attributable to persons who are parties to the action,
24 the trier of fact shall consider the negligence of nonparties, including persons released from liability by the
25 claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in
26 accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or
27 conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.

28 ~~(c)~~ The burden of proof as to a nonparty's liability is on the defendant or defendants who
29 affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden
30 of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to

1 ~~the injury of the claimant or alter other proof requirements.~~

2 ~~(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who~~
 3 ~~gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the~~
 4 ~~defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:~~

5 ~~(i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;~~

6 ~~(ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and~~

7 ~~(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional~~
 8 ~~defendant to the action before the expiration of the period of limitation applicable to the claim. However,~~
 9 ~~this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation~~
 10 ~~has expired.~~

11 ~~(e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the~~
 12 ~~defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing~~
 13 ~~the defendant's answer to each nonparty at the nonparty's last known address by certified mail, return~~
 14 ~~receipt requested."~~

15
 16 **Section 6.** Section 27-1-719, MCA, is amended to read:

17 **"27-1-719. Liability of seller of product for physical harm to user or consumer.** (1) As used in this
 18 section, "seller" means a manufacturer, wholesaler, or retailer.

19 (2) A person who sells a product in a defective condition unreasonably dangerous to a user or
 20 consumer or to the property of a user or consumer is liable for physical harm caused by the product to the
 21 ultimate user or consumer or to ~~his~~ the user's or consumer's property if:

22 (a) the seller is engaged in the business of selling such a product; and

23 (b) the product is expected to and does reach the user or consumer without substantial change in
 24 the condition in which it is sold.

25 (3) The provisions of subsection (2) apply even if:

26 (a) the seller exercised all possible care in the preparation and sale of ~~his~~ the product; and

27 (b) the user or consumer did not buy the product from or enter into any contractual relation with
 28 the seller.

29 (4) Subsection (2)(b) does not apply to a claim for relief based upon improper product design.

30 (5) ~~Except as provided in this subsection, contributory negligence is not~~ Contributory fault is a

1 defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage
 2 caused by a defectively manufactured or defectively designed product. A seller named as a defendant in
 3 an action based on strict liability in tort for damages to a person or property caused by a defectively
 4 designed or defectively manufactured product may assert the following affirmative defenses against the
 5 user or consumer, the legal representative of the user or consumer, or any person claiming damages by
 6 reason of injury to the user or consumer:

7 (a) The user or consumer of the product discovered the defect or the defect was open and obvious
 8 and the user or consumer unreasonably made use of the product and was injured by it.

9 (b) The product was unreasonably misused by the user or consumer and ~~such~~ the misuse caused
 10 or contributed to the injury.

11 (6) The affirmative defenses referred to in subsection (5) mitigate or bar recovery and must be
 12 applied in accordance with the principles of comparative negligence ~~fault~~ fault set forth in 27-1-702 and [section
 13 1]."

14

15 **Section 7.** Section 28-1-301, MCA, is amended to read:

16 "**28-1-301. Types of obligations involving several persons.** Except as provided in 27-1-703 and
 17 [section 1], an obligation imposed upon several persons or a right created in favor of several persons may
 18 be:

19 (1) joint;

20 (2) several; or

21 (3) joint and several."

22

23 **Section 8.** Section 28-11-311, MCA, is amended to read:

24 "**28-11-311. Person indemnifying liable jointly and severally.** Except as may be otherwise provided
 25 in 27-1-703 and [section 1], ~~one a person~~ who indemnifies another person against an act to be done by
 26 the latter is liable jointly with the person indemnified and separately to every person injured by ~~such~~ the
 27 act."

28

29 **NEW SECTION. Section 9. Severability.** If a part of [this act] is invalid, all valid parts that are
 30 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its

1 applications, the part remains in effect in all valid applications that are severable from the invalid
2 applications.

3
4 **NEW SECTION. Section 10. Applicability.** [This act] applies to causes of action that arise after
5 [the effective date of this act].

6
7 **NEW SECTION. Section 11. Contingent effective dates.** (1) [This act] is effective on May 11,
8 1997, if ___ Bill No. ___ [LC1155] is not passed and approved.

9 (2) If ___ Bill No. ___ [LC1155] is passed and approved and is invalidated or is found to be
10 unconstitutional by the Montana supreme court, [this act] is effective on the day after the effective date
11 of the invalidation or of the finding of unconstitutionality.

12 -END-

1 HOUSE BILL NO. 572

2 INTRODUCED BY ANDERSON, REHBEIN, STORY, TASH, BITNEY, JORE, ELLIS, BRAINARD, KEENAN,
3 DEVANEY, CLARK, ORR, MOOD, BEAUDRY, MCGEE, HIBBARD, CURTISS, SIMPKINS, M. HANSON,
4 WELLS, GRIMES, SOFT, KNOX, L. TAYLOR, KASTEN, GRADY, FELAND, CRIPPEN, ESTRADA,
5 GROSFIELD, MCNUTT, BOHARSKI, HOLLAND

6
7 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR SEVERAL LIABILITY FOR MOST TORT
8 ACTIONS; LIMITING JOINT AND SEVERAL LIABILITY TO CERTAIN SPECIFIED TORT ACTIONS; PROVIDING
9 FOR THE EFFECT OF A RELEASE OR OF A COVENANT NOT TO SUE; PROVIDING THAT NO AMOUNT OF
10 CONTRIBUTORY FAULT BARS RECOVERY; AMENDING SECTIONS 25-9-411, 27-1-702, 27-1-703,
11 27-1-719, 28-1-301, AND 28-11-311, MCA; AND PROVIDING CONTINGENT EFFECTIVE DATES AND AN
12 APPLICABILITY DATE."

13
14 WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is
15 premised on a modified joint and several liability scheme, have repeatedly been struck down by the
16 Montana Supreme Court; and

17 WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable
18 to nonparties impair the effectiveness of the current modified joint and several liability system in Montana;
19 and

20 WHEREAS, the Legislature intends that the policy of the state should be a system of comparative
21 fault in which persons are held responsible only to the extent to which they cause or contribute to the
22 harm; and

23 WHEREAS, the current system of joint and several liability, which apportions all liability only among
24 parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of
25 fault; and

26 WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately
27 reflect the liability of settled or released parties; and

28 WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants
29 having to pay for the liability of insolvent, immune, or settled parties; and

30 WHEREAS, the present system of joint and several liability for all tort actions does not reflect the

1 state's policy of liability in proportion to fault; and

2 WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain
3 situations; and

4 WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except
5 for specific situations; and

6 WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state
7 interests.

8 THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished,
9 except for specific causes of action, and is replaced with a comparative fault system utilizing the principles
10 of several liability.

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

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14 **NEW SECTION. Section 1. Several liability -- purpose -- pleading -- determination -- nonparties.**

15 (1) The purpose of 27-1-703 and this section is to substitute several liability for the former law providing
16 for joint and several liability, except for certain actions. The purpose of several liability is to allocate
17 responsibility based on fault to all parties to an occurrence, rather than only to the parties to the litigation,
18 and to ensure that the liability of each party to an occurrence is allocated in direct proportion to that party's
19 fault.

20 (2) In an action brought as a result of the death of a person or injury to a person or property, the
21 liability of a defendant is several only and is not joint, except as provided in subsection (7). A defendant
22 is liable only for that percentage of damages that is equal to the ratio of defendant's fault to the total fault
23 attributed to all persons involved in the occurrence from which the action arose, including claimants,
24 defendants, and persons not party to the action. A separate judgment must be entered against the
25 defendant for that amount.

26 (3) In determining the percentage of fault of persons who are parties to the action, the trier of fact
27 shall consider the fault of persons not a party to the action, based upon evidence of those persons' fault,
28 that is admissible in evidence. Assessment of fault against a nonparty does not subject the nonparty to
29 liability in the action or any other action and may not be introduced as evidence of liability in any other
30 action.

1 (4) The percentage of fault attributable to parties to the action may total less than 100% if the trier
2 of fact finds that fault contributing to cause the claimant's loss is attributable to other persons.

3 (5) The jury shall return a special verdict, or the judge shall make special findings in the absence
4 of a jury, determining the percentage of fault attributable to each party and determining the total amount
5 of damages sustained by the claimant.

6 (6) A defendant shall affirmatively plead comparative fault and identify in the answer or within a
7 reasonable amount of time after filing the answer as determined by the court, each person who the
8 defendant alleges is at fault with respect to the occurrence that is the basis for the action. A defendant
9 who pleads the comparative fault of another has the burden of proving the fault.

10 (7) Section 27-1-703 applies and this section does not apply to an action arising from:

11 (a) the concerted acts or omissions of two or more persons;

12 (b) the act or omission of a person acting as the agent or servant of another; or

13 (c) an act or omission that violates a state environmental law relating to hazardous or deleterious
14 substances.

15 (8) For purposes of this section, "fault" means an act or omission that proximately caused or
16 contributed to injury or damages sustained by a person seeking recovery and includes negligence in any
17 of its degrees, contributory negligence, strict liability, and products liability.

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19 **NEW SECTION. Section 2. Effect of a release or covenant not to sue.** A release or covenant not
20 to sue given to one of two or more persons potentially liable in tort for the same injury, death, damage, or
21 loss:

22 (1) does not discharge any of the other persons from liability for the person's several pro rata share
23 of liability unless the terms of the release or covenant provide for a discharge of liability;

24 (2) reduces the aggregate claim against the other persons to the extent of any percentage of fault
25 found by the trier of fact under [section 1] to be attributable to the person to whom the release or covenant
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 2 past and future damages for noneconomic loss may not exceed \$250,000. All claims for noneconomic loss
 3 deriving from injuries to a patient are subject to an award not to exceed \$250,000. This limitation applies
 4 whether:

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 6 deaths on which the action or actions are based; or

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 9 contained in subsection (1)(a) applies to each patient and all claims deriving from injuries to that patient.

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 11 burden of proving separate injuries, each arising from a different act or series of acts. An award or
 12 combination of awards in excess of \$250,000 must be reduced to \$250,000, after which the court shall
 13 make other reductions that are required by law. If a combination of awards for past and future noneconomic
 14 loss is reduced in the same action, future noneconomic loss must be reduced first and, if necessary to reach
 15 the \$250,000 limit, past noneconomic loss must then be reduced. If a combination of awards is reduced
 16 to \$250,000, a claimant's share of the \$250,000 must be the same percentage as the claimant's share of
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19 (i) first, reductions under 27-1-702; and

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

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

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

26 (i) a person suffering bodily injury;

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7 damages or if one party acted as an agent of the other.

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9 ~~injury to person or property, any other person whose negligence may have contributed as a proximate~~
10 ~~cause to the injury complained of may be joined as an additional party to the action. For purposes of~~
11 ~~determining the percentage of liability attributable to each party whose action contributed to the injury~~
12 ~~complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants,~~
13 ~~and third party defendants. The liability of nonparties, including persons released from liability by the~~
14 ~~claimant and persons immune from liability to the claimant, must also be considered by the trier of fact,~~
15 ~~as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all persons~~
16 ~~listed in this subsection. Contribution must be proportional to the liability of the parties against whom~~
17 ~~recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to Rule 19,~~
18 ~~Montana Rules of Civil Procedure.~~

19 ~~(5) If for any reason all or part of the contribution from a party liable for contribution cannot be~~
20 ~~obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the~~
21 ~~noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution~~
22 ~~from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is~~
23 ~~liable for contribution under this section only up to the percentage of negligence attributed to that party.~~

24 ~~(6) (a) In an action based on negligence, a defendant may assert as a defense that the damages~~
25 ~~of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty~~
26 ~~defense.~~

27 ~~(b) In determining the percentage of liability attributable to persons who are parties to the action,~~
28 ~~the trier of fact shall consider the negligence of nonparties, including persons released from liability by the~~
29 ~~claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in~~
30 ~~accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or~~

1 ~~conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.~~

2 ~~(c) The burden of proof as to a nonparty's liability is on the defendant or defendants who~~
 3 ~~affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden~~
 4 ~~of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to~~
 5 ~~the injury of the claimant or alter other proof requirements.~~

6 ~~(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who~~
 7 ~~gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the~~
 8 ~~defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:~~

9 ~~(i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;~~

10 ~~(ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and~~

11 ~~(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional~~
 12 ~~defendant to the action before the expiration of the period of limitation applicable to the claim. However,~~
 13 ~~this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation~~
 14 ~~has expired.~~

15 ~~(e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the~~
 16 ~~defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing~~
 17 ~~the defendant's answer to each nonparty at the nonparty's last known address by certified mail, return~~
 18 ~~receipt requested."~~

19

20 **Section 6.** Section 27-1-719, MCA, is amended to read:

21 **"27-1-719. Liability of seller of product for physical harm to user or consumer.** (1) As used in this
 22 section, "seller" means a manufacturer, wholesaler, or retailer.

23 (2) A person who sells a product in a defective condition unreasonably dangerous to a user or
 24 consumer or to the property of a user or consumer is liable for physical harm caused by the product to the
 25 ultimate user or consumer or to ~~his~~ the user's or consumer's property if:

26 (a) the seller is engaged in the business of selling such a product; and

27 (b) the product is expected to and does reach the user or consumer without substantial change in
 28 the condition in which it is sold.

29 (3) The provisions of subsection (2) apply even if:

30 (a) the seller exercised all possible care in the preparation and sale of ~~his~~ the product; and

1 (b) the user or consumer did not buy the product from or enter into any contractual relation with
2 the seller.

3 (4) Subsection (2)(b) does not apply to a claim for relief based upon improper product design.

4 (5) ~~Except as provided in this subsection, contributory negligence is not~~ Contributory fault is a
5 defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage
6 caused by a defectively manufactured or defectively designed product. A seller named as a defendant in
7 an action based on strict liability in tort for damages to a person or property caused by a defectively
8 designed or defectively manufactured product may assert the following affirmative defenses against the
9 user or consumer, the legal representative of the user or consumer, or any person claiming damages by
10 reason of injury to the user or consumer:

11 (a) The user or consumer of the product discovered the defect or the defect was open and obvious
12 and the user or consumer unreasonably made use of the product and was injured by it.

13 (b) The product was unreasonably misused by the user or consumer and ~~such~~ the misuse caused
14 or contributed to the injury.

15 (6) The affirmative defenses referred to in subsection (5) mitigate or bar recovery and must be
16 applied in accordance with the principles of comparative ~~negligence~~ fault set forth in 27-1-702 and [section
17 1]."

18

19 **Section 7.** Section 28-1-301, MCA, is amended to read:

20 "**28-1-301. Types of obligations involving several persons.** Except as provided in 27-1-703 and
21 [section 1], an obligation imposed upon several persons or a right created in favor of several persons may
22 be:

23 (1) joint;

24 (2) several; or

25 (3) joint and several."

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27 **Section 8.** Section 28-11-311, MCA, is amended to read:

28 "**28-11-311. Person indemnifying liable jointly and severally.** Except as may be otherwise provided
29 in 27-1-703 and [section 1], ~~one a person~~ who indemnifies another person against an act to be done by
30 the latter is liable jointly with the person indemnified and separately to every person injured by ~~such~~ the

1 act."

2

3 ~~NEW SECTION. Section 9. Severability. If a part of [this act] is invalid, all valid parts that are~~
4 ~~severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its~~
5 ~~applications, the part remains in effect in all valid applications that are severable from the invalid~~
6 ~~applications.~~

7

8 NEW SECTION. SECTION 9. NONSEVERABILITY. IT IS THE INTENT OF THE LEGISLATURE THAT
9 EACH PART OF [THIS ACT] IS ESSENTIALLY DEPENDENT UPON EVERY OTHER PART, AND IF ONE PART
10 IS HELD UNCONSTITUTIONAL OR INVALID, ALL OTHER PARTS ARE INVALID.

11

12 NEW SECTION. Section 10. Applicability. [This act] applies to causes of action that arise after
13 [the effective date of this act].

14

15 NEW SECTION. Section 11. Contingent effective dates. (1) [This act] is effective on May 11,
16 1997, if ___ Bill No. ___ [LC1155] is not passed and approved.

17 (2) If ___ Bill No. ___ [LC1155] is passed and approved and is invalidated or is found to be
18 unconstitutional by the Montana supreme court, [this act] is effective on the day after the effective date
19 of the invalidation or of the finding of unconstitutionality.

20

-END-

1 HOUSE BILL NO. 572

2 INTRODUCED BY ANDERSON, REHBEIN, STORY, TASH, BITNEY, JORE, ELLIS, BRAINARD, KEENAN,
3 DEVANEY, CLARK, ORR, MOOD, BEAUDRY, MCGEE, HIBBARD, CURTISS, SIMPKINS, M. HANSON,
4 WELLS, GRIMES, SOFT, KNOX, L. TAYLOR, KASTEN, GRADY, FELAND, CRIPPEN, ESTRADA,
5 GROSFIELD, MCNUTT, BOHARSKI, HOLLAND

6
7 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR SEVERAL LIABILITY FOR MOST TORT
8 ACTIONS; LIMITING JOINT AND SEVERAL LIABILITY TO CERTAIN SPECIFIED TORT ACTIONS; PROVIDING
9 FOR THE EFFECT OF A RELEASE OR OF A COVENANT NOT TO SUE; PROVIDING THAT NO AMOUNT OF
10 CONTRIBUTORY FAULT BARS RECOVERY; AMENDING SECTIONS 25-9-411, 27-1-702, 27-1-703,
11 27-1-719, 28-1-301, AND 28-11-311, MCA; AND PROVIDING CONTINGENT EFFECTIVE DATES AND AN
12 APPLICABILITY DATE."

**THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE
REPRINTED. PLEASE REFER TO SECOND READING COPY
(YELLOW) FOR COMPLETE TEXT.**

1 HOUSE BILL NO. 572

2 INTRODUCED BY ANDERSON, REHBEIN, STORY, TASH, BITNEY, JORE, ELLIS, BRAINARD, KEENAN,
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10 ~~CONTRIBUTORY FAULT BARS RECOVERY;~~ AMENDING SECTIONS 25-9-411, 27-1-702, 27-1-703,
11 27-1-719, 28-1-301, AND 28-11-311, MCA; AND PROVIDING CONTINGENT EFFECTIVE DATES AND AN
12 APPLICABILITY DATE."

13
14 WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is
15 premised on a modified joint and several liability scheme, have repeatedly been struck down by the
16 Montana Supreme Court; and

17 WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable
18 to nonparties impair the effectiveness of the current modified joint and several liability system in Montana;
19 and

20 WHEREAS, the Legislature intends that the policy of the state should be a system of comparative
21 fault in which persons are held responsible only to the extent to which they cause or contribute to the
22 harm; and

23 WHEREAS, the current system of joint and several liability, which apportions all liability only among
24 parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of
25 fault; and

26 WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately
27 reflect the liability of settled or released parties; and

28 WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants
29 having to pay for the liability of insolvent, immune, or settled parties; and

30 WHEREAS, the present system of joint and several liability for all tort actions does not reflect the

1 state's policy of liability in proportion to fault; and

2 WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain
3 situations; and

4 WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except
5 for specific situations; and

6 WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state
7 interests.

8 THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished,
9 except for specific causes of action, and is replaced with a comparative fault system utilizing the principles
10 of several liability.

11

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

13

14 **NEW SECTION. Section 1. Several liability -- purpose -- pleading -- determination -- nonparties.**

15 (1) The purpose of 27-1-703 and this section is to substitute several liability for the former law providing
16 for joint and several liability, except for certain actions. The purpose of several liability is to allocate
17 responsibility based on fault to all parties to an occurrence, rather than only to the parties to the litigation,
18 and to ensure that the liability of each party to an occurrence is allocated in direct proportion to that party's
19 fault.

20 (2) In an action brought as a result of the death of a person or injury to a person or property, the
21 liability of a defendant is several only and is not joint, except as provided in subsection (7). A defendant
22 is liable only for that percentage of damages that is equal to the ratio of defendant's fault to the total fault
23 attributed to all persons involved in the occurrence from which the action arose, including claimants,
24 defendants, and persons not party to the action. A separate judgment must be entered against the
25 defendant for that amount.

26 (3) In determining the percentage of fault of persons who are parties to the action, the trier of fact
27 shall consider the fault of persons not a party to the action, based upon evidence of those persons' fault,
28 that is admissible in evidence. Assessment of fault against a nonparty does not subject the nonparty to
29 liability in the action or any other action and may not be introduced as evidence of liability in any other
30 action.

1 (4) The percentage of fault attributable to parties to the action may total less than 100% if the trier
2 of fact finds that fault contributing to cause the claimant's loss is attributable to other persons.

3 (5) The jury shall return a special verdict, or the judge shall make special findings in the absence
4 of a jury, determining the percentage of fault attributable to each party and determining the total amount
5 of damages sustained by the claimant.

6 (6) A defendant shall affirmatively plead comparative fault and identify in the answer or within a
7 reasonable amount of time after filing the answer as determined by the court, each person who the
8 defendant alleges is at fault with respect to the occurrence that is the basis for the action. A defendant
9 who pleads the comparative fault of another has the burden of proving the fault.

10 (7) Section 27-1-703 applies and this section does not apply to an action arising from:

11 (a) the concerted acts or omissions of two or more persons;

12 (b) the act or omission of a person acting as the agent or servant of another; or

13 (c) an act or omission that violates a state environmental law relating to hazardous or deleterious
14 substances.

15 (8) For purposes of this section, "fault" means an act or omission that proximately caused or
16 contributed to injury or damages sustained by a person seeking recovery and includes negligence in any
17 of its degrees, contributory negligence, strict liability, and products liability.

18
19 **NEW SECTION. Section 2. Effect of a release or covenant not to sue.** A release or covenant not
20 to sue given to one of two or more persons potentially liable in tort for the same injury, death, damage, or
21 loss:

22 (1) does not discharge any of the other persons from liability for the person's several pro rata share
23 of liability unless the terms of the release or covenant provide for a discharge of liability;

24 (2) reduces the aggregate claim against the other persons to the extent of any percentage of fault
25 found by the trier of fact under [section 1] to be attributable to the person to whom the release or covenant
26 was given; and

27 (3) discharges the person to whom it was given from all liability for contribution.

28
29 **Section 3.** Section 25-9-411, MCA, is amended to read:

30 **"25-9-411. Medical malpractice noneconomic damages limitation.** (1) (a) In a malpractice claim

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

5 (i) based on the same act or a series of acts that allegedly caused the injury, injuries, death, or
6 deaths on which the action or actions are based; or

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

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

10 (2) (a) For purposes of the limitation on awards contained in subsection (1), a claimant has the
11 burden of proving separate injuries, each arising from a different act or series of acts. An award or
12 combination of awards in excess of \$250,000 must be reduced to \$250,000, after which the court shall
13 make other reductions that are required by law. If a combination of awards for past and future noneconomic
14 loss is reduced in the same action, future noneconomic loss must be reduced first and, if necessary to reach
15 the \$250,000 limit, past noneconomic loss must then be reduced. If a combination of awards is reduced
16 to \$250,000, a claimant's share of the \$250,000 must be the same percentage as the claimant's share of
17 the combined awards before reduction.

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

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

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

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

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

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

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

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

26 (i) a person suffering bodily injury;

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

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

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

30 (v) a person bringing a wrongful death action.

1 (b) "Health care provider" means a physician, dentist, podiatrist, optometrist, chiropractor, physical
2 therapist, or nurse licensed under Title 37 or a health care facility licensed under Title 50, chapter 5.

3 (c) "Malpractice claim" means a claim based on a negligent act or omission by a health care
4 provider in the rendering of professional services that is the proximate cause of a personal injury or
5 wrongful death.

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

7 (i) physical and mental pain or suffering;

8 (ii) emotional distress;

9 (iii) inconvenience;

10 (iv) subjective, nonmonetary loss arising from physical impairment or disfigurement;

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

12 (vi) injury to reputation; and

13 (vii) humiliation.

14 (e) "Patient" means a person who receives services from a health care provider."
15

16 **Section 4.** Section 27-1-702, MCA, is amended to read:

17 **"27-1-702. Comparative negligence fault -- extent to which contributory negligence fault bars**
18 **recovery in action for damages.** Contributory ~~negligence shall~~ fault does not bar recovery in an action by
19 ~~any a person or his a person's~~ any a person or his a person's legal representative to recover tort damages for ~~negligence resulting in death~~
20 ~~of a person or injury to a person or property if such negligence the contributory fault was not greater than~~
21 ~~the negligence fault of the person defendant or the combined negligence fault of all persons against whom~~
22 ~~recovery is sought defendants and nonparties~~ **IF THE CONTRIBUTORY FAULT WAS NOT GREATER THAN**
23 **THE FAULT OF THE DEFENDANT OR THE COMBINED FAULT OF ALL DEFENDANTS AND NONPARTIES,**
24 ~~but any damages allowed shall must~~ must be diminished in the proportion to the ~~amount of negligence~~
25 percentage of fault attributable to the person recovering."
26

27 **Section 5.** Section 27-1-703, MCA, is amended to read:

28 **"27-1-703. Multiple defendants -- determination of liability.** (1) ~~Except as provided in subsections~~
29 ~~(2) and (3), whenever the negligence of a party in any action is an issue~~ In an action referred to in [section
30 1(7)(c)], each party against whom recovery may be allowed is jointly and severally liable for the amount

1 that may be awarded to the claimant but has the right of contribution from any other person whose
2 negligence may have contributed as a proximate cause to the injury complained of.

3 ~~(2) A party whose negligence is determined to be 50% or less of the combined negligence of all~~
4 ~~persons described in subsection (4) is severally liable only and is responsible only for the amount of~~
5 ~~negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly~~
6 ~~and severally liable for the total loss the amount attributable to the claimant.~~

7 ~~(3)(2) A~~ In an action referred to in [section 1(7)(a) or (7)(b)], a party may be jointly liable for all
8 damages caused by the negligence of another if both acted in concert in contributing to the claimant's
9 damages or if one party acted as an agent of the other.

10 ~~(4) On motion of any party against whom a claim is asserted for negligence resulting in death or~~
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~~(c) The burden of proof as to a nonparty's liability is on the defendant or defendants who affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to the injury of the claimant or alter other proof requirements.~~

~~(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:~~

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~~(e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing the defendant's answer to each nonparty at the nonparty's last known address by certified mail, return receipt requested."~~

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(b) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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2 (a) the seller exercised all possible care in the preparation and sale of ~~his~~ the product; and

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4 the seller.

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7 defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage
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9 an action based on strict liability in tort for damages to a person or property caused by a defectively
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12 reason of injury to the user or consumer:

13 (a) The user or consumer of the product discovered the defect or the defect was open and obvious
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16 or contributed to the injury.

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19 1]."

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8 ACTIONS; LIMITING JOINT AND SEVERAL LIABILITY TO CERTAIN SPECIFIED TORT ACTIONS; PROVIDING
9 FOR THE EFFECT OF A RELEASE OR OF A COVENANT NOT TO SUE; ~~PROVIDING THAT NO AMOUNT OF~~
10 ~~CONTRIBUTORY FAULT BARS RECOVERY~~; AMENDING SECTIONS 25-9-411, 27-1-702, 27-1-703,
11 27-1-719, 28-1-301, AND 28-11-311, MCA; AND PROVIDING CONTINGENT EFFECTIVE DATES AND AN
12 APPLICABILITY DATE."
13

14 WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is
15 premised on a modified joint and several liability scheme, have repeatedly been struck down by the
16 Montana Supreme Court; and

17 WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable
18 to nonparties impair the effectiveness of the current modified joint and several liability system in Montana;
19 and

20 WHEREAS, the Legislature intends that the policy of the state should be a system of comparative
21 fault in which persons are held responsible only to the extent to which they cause or contribute to the
22 harm; and

23 WHEREAS, the current system of joint and several liability, which apportions all liability only among
24 parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of
25 fault; and

26 WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately
27 reflect the liability of settled or released parties; and

28 WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants
29 having to pay for the liability of insolvent, immune, or settled parties; and

30 WHEREAS, the present system of joint and several liability for all tort actions does not reflect the

1 state's policy of liability in proportion to fault; and

2 WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain
3 situations; and

4 WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except
5 for specific situations; and

6 WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state
7 interests.

8 THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished,
9 except for specific causes of action, and is replaced with a comparative fault system utilizing the principles
10 of several liability.

11

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

13

14 **NEW SECTION. Section 1. Several liability -- purpose -- pleading -- determination -- nonparties.**

15 (1) The purpose of 27-1-703 and this section is to substitute several liability for the former law providing
16 for joint and several liability, except for certain actions. The purpose of several liability is to allocate
17 responsibility based on fault to all parties to an occurrence, rather than only to the parties to the litigation,
18 and to ensure that the liability of each party to an occurrence is allocated in direct proportion to that party's
19 fault.

20 (2) In an action brought as a result of the death of a person or injury to a person or property, the
21 liability of a defendant is several only and is not joint, except as provided in subsection (7). A defendant
22 is liable only for that percentage of damages that is equal to the ratio of defendant's fault to the total fault
23 attributed to all persons involved in the occurrence from which the action arose, including claimants,
24 defendants, and persons not party to the action. A separate judgment must be entered against the
25 defendant for that amount.

26 (3) In determining the percentage of fault of persons who are parties to the action, the trier of fact
27 shall consider the fault of persons not a party to the action, based upon evidence of those persons' fault,
28 that is admissible in evidence. Assessment of fault against a nonparty does not subject the nonparty to
29 liability in the action or any other action and may not be introduced as evidence of liability in any other
30 action.

1 (4) The percentage of fault attributable to parties to the action may total less than 100% if the trier
2 of fact finds that fault contributing to cause the claimant's loss is attributable to other persons.

3 (5) The jury shall return a special verdict, or the judge shall make special findings in the absence
4 of a jury, determining the percentage of fault attributable to each party and determining the total amount
5 of damages sustained by the claimant.

6 (6) A defendant shall affirmatively plead comparative fault and identify in the answer or within a
7 reasonable amount of time after filing the answer as determined by the court, each person who the
8 defendant alleges is at fault with respect to the occurrence that is the basis for the action. A defendant
9 who pleads the comparative fault of another has the burden of proving the fault.

10 (7) Section 27-1-703 applies and this section does not apply to an action arising from:

11 (a) the concerted acts or omissions of two or more persons;

12 (b) the act or omission of a person acting as the agent or servant of another; or

13 (c) an act or omission that violates a state environmental law relating to hazardous or deleterious
14 substances.

15 (8) For purposes of this section, "fault" means an act or omission that proximately caused or
16 contributed to injury or damages sustained by a person seeking recovery and includes negligence in any
17 of its degrees, contributory negligence, strict liability, and products liability.

18
19 **NEW SECTION. Section 2. Effect of a release or covenant not to sue.** A release or covenant not
20 to sue given to one of two or more persons potentially liable in tort for the same injury, death, damage, or
21 loss:

22 (1) does not discharge any of the other persons from liability for the person's several pro rata share
23 of liability unless the terms of the release or covenant provide for a discharge of liability;

24 (2) reduces the aggregate claim against the other persons to the extent of any percentage of fault
25 found by the trier of fact under [section 1] to be attributable to the person to whom the release or covenant
26 was given; and

27 (3) discharges the person to whom it was given from all liability for contribution.

28
29 **Section 3.** Section 25-9-411, MCA, is amended to read:

30 **"25-9-411. Medical malpractice noneconomic damages limitation.** (1) (a) In a malpractice claim

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

5 (i) based on the same act or a series of acts that allegedly caused the injury, injuries, death, or
 6 deaths on which the action or actions are based; or

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

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

10 (2) (a) For purposes of the limitation on awards contained in subsection (1), a claimant has the
 11 burden of proving separate injuries, each arising from a different act or series of acts. An award or
 12 combination of awards in excess of \$250,000 must be reduced to \$250,000, after which the court shall
 13 make other reductions that are required by law. If a combination of awards for past and future noneconomic
 14 loss is reduced in the same action, future noneconomic loss must be reduced first and, if necessary to reach
 15 the \$250,000 limit, past noneconomic loss must then be reduced. If a combination of awards is reduced
 16 to \$250,000, a claimant's share of the \$250,000 must be the same percentage as the claimant's share of
 17 the combined awards before reduction.

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

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

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

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

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

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

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

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

26 (i) a person suffering bodily injury;

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

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

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

30 (v) a person bringing a wrongful death action.

1 (b) "Health care provider" means a physician, dentist, podiatrist, optometrist, chiropractor, physical
2 therapist, or nurse licensed under Title 37 or a health care facility licensed under Title 50, chapter 5.

3 (c) "Malpractice claim" means a claim based on a negligent act or omission by a health care
4 provider in the rendering of professional services that is the proximate cause of a personal injury or
5 wrongful death.

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

7 (i) physical and mental pain or suffering;

8 (ii) emotional distress;

9 (iii) inconvenience;

10 (iv) subjective, nonmonetary loss arising from physical impairment or disfigurement;

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

12 (vi) injury to reputation; and

13 (vii) humiliation.

14 (e) "Patient" means a person who receives services from a health care provider."
15

16 **Section 4.** Section 27-1-702, MCA, is amended to read:

17 **"27-1-702. Comparative negligence fault -- extent to which contributory negligence fault bars**
18 **recovery in action for damages.** Contributory ~~negligence shall~~ fault does not bar recovery in an action by
19 ~~any a person or his a person's~~ a person or his a person's legal representative to recover tort damages for ~~negligence resulting in~~
20 ~~of a person or injury to a person or property if such negligence the contributory fault was not greater than~~
21 ~~the negligence fault of the person defendant or the combined negligence fault of all persons against whom~~
22 ~~recovery is sought defendants and nonparties~~ IF THE CONTRIBUTORY FAULT WAS NOT GREATER THAN
23 THE FAULT OF THE DEFENDANT OR THE COMBINED FAULT OF ALL DEFENDANTS AND NONPARTIES,
24 but ~~any~~ damages allowed ~~shall~~ must be diminished in ~~the~~ proportion to the ~~amount of negligence~~
25 percentage of fault attributable to the person recovering."
26

27 **Section 5.** Section 27-1-703, MCA, is amended to read:

28 **"27-1-703. Multiple defendants -- determination of liability.** (1) ~~Except as provided in subsections~~
29 ~~(2) and (3), whenever the negligence of a party in any action is an issue~~ In an action referred to in [section
30 1(7)(c)], each party against whom recovery may be allowed is jointly and severally liable for the amount

1 that may be awarded to the claimant but has the right of contribution from any other person whose
2 negligence may have contributed as a proximate cause to the injury complained of.

3 ~~(2) A party whose negligence is determined to be 50% or less of the combined negligence of all~~
4 ~~persons described in subsection (4) is severally liable only and is responsible only for the amount of~~
5 ~~negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly~~
6 ~~and severally liable for the total less the amount attributable to the claimant.~~

7 ~~(3)(2) A~~ In an action referred to in [section 1(7)(a) or (7)(b)], a party may be jointly liable for all
8 damages caused by the negligence of another if both acted in concert in contributing to the claimant's
9 damages or if one party acted as an agent of the other.

10 ~~(4) On motion of any party against whom a claim is asserted for negligence resulting in death or~~
11 ~~injury to person or property, any other person whose negligence may have contributed as a proximate~~
12 ~~cause to the injury complained of may be joined as an additional party to the action. For purposes of~~
13 ~~determining the percentage of liability attributable to each party whose action contributed to the injury~~
14 ~~complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants,~~
15 ~~and third party defendants. The liability of nonparties, including persons released from liability by the~~
16 ~~claimant and persons immune from liability to the claimant, must also be considered by the trier of fact,~~
17 ~~as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all persons~~
18 ~~listed in this subsection. Contribution must be proportional to the liability of the parties against whom~~
19 ~~recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to Rule 19,~~
20 ~~Montana Rules of Civil Procedure.~~

21 ~~(5) If for any reason all or part of the contribution from a party liable for contribution cannot be~~
22 ~~obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the~~
23 ~~noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution~~
24 ~~from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is~~
25 ~~liable for contribution under this section only up to the percentage of negligence attributed to that party.~~

26 ~~(6) (a) In an action based on negligence, a defendant may assert as a defense that the damages~~
27 ~~of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty~~
28 ~~defense.~~

29 ~~(b) In determining the percentage of liability attributable to persons who are parties to the action,~~
30 ~~the trier of fact shall consider the negligence of nonparties, including persons released from liability by the~~

1 claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in
 2 accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or
 3 conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.

4 (c) ~~The burden of proof as to a nonparty's liability is on the defendant or defendants who~~
 5 ~~affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden~~
 6 ~~of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to~~
 7 ~~the injury of the claimant or alter other proof requirements.~~

8 (d) ~~A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who~~
 9 ~~gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the~~
 10 ~~defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:~~

11 (i) ~~giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;~~

12 (ii) ~~giving the claimant a reasonable opportunity to defend against a nonparty defense; and~~

13 (iii) ~~giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional~~
 14 ~~defendant to the action before the expiration of the period of limitation applicable to the claim. However,~~
 15 ~~this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation~~
 16 ~~has expired.~~

17 (e) ~~If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the~~
 18 ~~defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing~~
 19 ~~the defendant's answer to each nonparty at the nonparty's last known address by certified mail, return~~
 20 ~~receipt requested."~~

21
 22 **Section 6.** Section 27-1-719, MCA, is amended to read:

23 **"27-1-719. Liability of seller of product for physical harm to user or consumer.** (1) As used in this
 24 section, "seller" means a manufacturer, wholesaler, or retailer.

25 (2) A person who sells a product in a defective condition unreasonably dangerous to a user or
 26 consumer or to the property of a user or consumer is liable for physical harm caused by the product to the
 27 ultimate user or consumer or to ~~his~~ the user's or consumer's property if:

28 (a) the seller is engaged in the business of selling such a product; and

29 (b) the product is expected to and does reach the user or consumer without substantial change in
 30 the condition in which it is sold.

1 (3) The provisions of subsection (2) apply even if:

2 (a) the seller exercised all possible care in the preparation and sale of ~~his~~ the product; and

3 (b) the user or consumer did not buy the product from or enter into any contractual relation with
4 the seller.

5 (4) Subsection (2)(b) does not apply to a claim for relief based upon improper product design.

6 (5) ~~Except as provided in this subsection, contributory negligence is not~~ Contributory fault is a
7 defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage
8 caused by a defectively manufactured or defectively designed product. A seller named as a defendant in
9 an action based on strict liability in tort for damages to a person or property caused by a defectively
10 designed or defectively manufactured product may assert the following affirmative defenses against the
11 user or consumer, the legal representative of the user or consumer, or any person claiming damages by
12 reason of injury to the user or consumer:

13 (a) The user or consumer of the product discovered the defect or the defect was open and obvious
14 and the user or consumer unreasonably made use of the product and was injured by it.

15 (b) The product was unreasonably misused by the user or consumer and ~~such~~ the misuse caused
16 or contributed to the injury.

17 (6) The affirmative defenses referred to in subsection (5) mitigate or bar recovery and must be
18 applied in accordance with the principles of comparative ~~negligence~~ fault set forth in 27-1-702 and [section
19 1]."

20

21 **Section 7.** Section 28-1-301, MCA, is amended to read:

22 "**28-1-301. Types of obligations involving several persons.** Except as provided in 27-1-703 and
23 [section 1], an obligation imposed upon several persons or a right created in favor of several persons may
24 be:

25 (1) joint;

26 (2) several; or

27 (3) joint and several."

28

29 **Section 8.** Section 28-11-311, MCA, is amended to read:

30 "**28-11-311. Person indemnifying liable jointly and severally.** Except as may be otherwise provided

1 in 27-1-703 and [section 1], ~~one a person~~ who indemnifies another person against an act to be done by
 2 the latter is liable jointly with the person indemnified and separately to every person injured by ~~each the~~
 3 act."

4
 5 ~~NEW SECTION. Section 9. Severability. If a part of [this act] is invalid, all valid parts that are~~
 6 ~~severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its~~
 7 ~~applications, the part remains in effect in all valid applications that are severable from the invalid~~
 8 ~~applications.~~

9
 10 ~~NEW SECTION. SECTION 9. NONSEVERABILITY. IT IS THE INTENT OF THE LEGISLATURE THAT~~
 11 ~~EACH PART OF [THIS ACT] IS ESSENTIALLY DEPENDENT UPON EVERY OTHER PART, AND IF ONE PART~~
 12 ~~IS HELD UNCONSTITUTIONAL OR INVALID, ALL OTHER PARTS ARE INVALID.~~

13
 14 NEW SECTION. SECTION 9. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID
 15 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]
 16 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID
 17 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

18
 19 NEW SECTION. Section 10. Applicability. [This act] applies to causes of action that arise after
 20 [the effective date of this act].

21
 22 NEW SECTION. Section 11. Contingent effective dates. (1) [This act] is effective on May 11,
 23 1997, if ___ Bill No. ___ [LC1155] is not passed and approved.

24 (2) If ___ Bill No. ___ [LC1155] is passed and approved and is invalidated or is found to be
 25 unconstitutional by the Montana supreme court, [this act] is effective on the day after the effective date
 26 of the invalidation or of the finding of unconstitutionality.

27 -END-

OFFICE OF THE GOVERNOR

STATE OF MONTANA



MARC RACICOT
GOVERNOR

STATE CAPITOL
HELENA, MONTANA 59620-0801

April 21, 1997

The Honorable John Mercer
Speaker of the House
State Capitol
Helena MT 59620

The Honorable Gary Aklestad
President of the Senate
State Capitol
Helena MT 59620

Dear Speaker Mercer and President Aklestad:

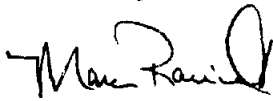
In accordance with the power vested in me as Governor by the Constitution and laws of the State of Montana, I hereby return with amendments House Bill 572, **"AN ACT PROVIDING FOR SEVERAL LIABILITY FOR MOST TORT ACTIONS; LIMITING JOINT AND SEVERAL LIABILITY TO CERTAIN SPECIFIED TORT ACTIONS; PROVIDING FOR THE EFFECT OF A RELEASE OR A COVENANT NOT TO SUE; AMENDING SECTIONS 25-9-411, 27-1-702, 27-1-703, 27-1-719, 28-1-301, AND 28-11-311, MCA; AND PROVIDING CONTINGENT EFFECTIVE DATES AND AN APPLICABILITY DATE"** for the following reasons.

House Bill 572 provides for a system of comparative fault in which persons are held responsible only to the extent to which they cause or contribute to the harm. It apportions liability among all tortfeasors according to their equitable share of fault.

While I support House Bill 572, it requires technical changes in order to provide that several liability and apportionment of liability apply to defendants acting in concert or in an agency relationship, while not affecting the doctrines of vicarious liability and respondeat superior. Without the amendments, a corporation sued for the acts of its employee may be excluded from the application of several liability and the apportionment of damages to other parties at fault. The amendments leave in place the idea that the principal cannot transfer liability to its agent.

Representative Anderson, the bill's sponsor, has been informed of and understands the need for these amendments.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc Racicot". The signature is fluid and cursive, with a large initial "M" and a stylized "R".

MARC RACICOT
Governor

GOVERNOR'S AMENDMENTS TO
House Bill No. 572
(Reference Copy)
April 21, 1997

1. Page 3, line 10.

Following: "from"

Strike: ":",

2. Page 3, lines 11 through 14.

Strike: subsections (a) through (c) in their entirety

Insert: "an act or omission that violates a state environmental law relating to hazardous or deleterious substances."

Insert: "(8) Parties whose liability arises from acts or omissions in concert or from acts or omissions arising from an agency or employment relationship shall be apportioned a single percentage of fault and shall be treated as a single party for purposes of this section."

3. Page 3, line 15.

Strike: "8"

Insert: "9"

4. Page 5, line 28.

Following: "**liability.**"

Strike: "(1)"

5. Page 6, lines 7 through 9.

Strike: subsection (2) in its entirety

1 HOUSE BILL NO. 572

2 INTRODUCED BY ANDERSON, REHBEIN, STORY, TASH, BITNEY, JORE, ELLIS, BRAINARD, KEENAN,
 3 DEVANEY, CLARK, ORR, MOOD, BEAUDRY, MCGEE, HIBBARD, CURTISS, SIMPKINS, M. HANSON,
 4 WELLS, GRIMES, SOFT, KNOX, L. TAYLOR, KASTEN, GRADY, FELAND, CRIPPEN, ESTRADA,
 5 GROSFIELD, MCNUTT, BOHARSKI, HOLLAND

6
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 11 27-1-719, 28-1-301, AND 28-11-311, MCA; AND PROVIDING CONTINGENT EFFECTIVE DATES AND AN
 12 APPLICABILITY DATE."

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 14 WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is
 15 premised on a modified joint and several liability scheme, have repeatedly been struck down by the
 16 Montana Supreme Court; and

17 WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable
 18 to nonparties impair the effectiveness of the current modified joint and several liability system in Montana;
 19 and

20 WHEREAS, the Legislature intends that the policy of the state should be a system of comparative
 21 fault in which persons are held responsible only to the extent to which they cause or contribute to the
 22 harm; and

23 WHEREAS, the current system of joint and several liability, which apportions all liability only among
 24 parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of
 25 fault; and

26 WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately
 27 reflect the liability of settled or released parties; and

28 WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants
 29 having to pay for the liability of insolvent, immune, or settled parties; and

30 WHEREAS, the present system of joint and several liability for all tort actions does not reflect the

1 state’s policy of liability in proportion to fault; and

2 WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain
3 situations; and

4 WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except
5 for specific situations; and

6 WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state
7 interests.

8 THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished,
9 except for specific causes of action, and is replaced with a comparative fault system utilizing the principles
10 of several liability.

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

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15 (1) The purpose of 27-1-703 and this section is to substitute several liability for the former law providing
16 for joint and several liability, except for certain actions. The purpose of several liability is to allocate
17 responsibility based on fault to all parties to an occurrence, rather than only to the parties to the litigation,
18 and to ensure that the liability of each party to an occurrence is allocated in direct proportion to that party’s
19 fault.

20 (2) In an action brought as a result of the death of a person or injury to a person or property, the
21 liability of a defendant is several only and is not joint, except as provided in subsection (7). A defendant
22 is liable only for that percentage of damages that is equal to the ratio of defendant’s fault to the total fault
23 attributed to all persons involved in the occurrence from which the action arose, including claimants,
24 defendants, and persons not party to the action. A separate judgment must be entered against the
25 defendant for that amount.

26 (3) In determining the percentage of fault of persons who are parties to the action, the trier of fact
27 shall consider the fault of persons not a party to the action, based upon evidence of those persons’ fault,
28 that is admissible in evidence. Assessment of fault against a nonparty does not subject the nonparty to
29 liability in the action or any other action and may not be introduced as evidence of liability in any other
30 action.

1 (4) The percentage of fault attributable to parties to the action may total less than 100% if the trier
2 of fact finds that fault contributing to cause the claimant's loss is attributable to other persons.

3 (5) The jury shall return a special verdict, or the judge shall make special findings in the absence
4 of a jury, determining the percentage of fault attributable to each party and determining the total amount
5 of damages sustained by the claimant.

6 (6) A defendant shall affirmatively plead comparative fault and identify in the answer or within a
7 reasonable amount of time after filing the answer as determined by the court, each person who the
8 defendant alleges is at fault with respect to the occurrence that is the basis for the action. A defendant
9 who pleads the comparative fault of another has the burden of proving the fault.

10 (7) Section 27-1-703 applies and this section does not apply to an action arising from:

11 ~~(a) the concerted acts or omissions of two or more persons;~~

12 ~~(b) the act or omission of a person acting as the agent or servant of another; or~~

13 ~~(c) an act or omission that violates a state environmental law relating to hazardous or deleterious~~

14 ~~substances.~~ AN ACT OR OMISSION THAT VIOLATES A STATE ENVIRONMENTAL LAW RELATING TO

15 HAZARDOUS OR DELETERIOUS SUBSTANCES.

16 (8) PARTIES WHOSE LIABILITY ARISES FROM ACTS OR OMISSIONS IN CONCERT OR FROM

17 ACTS OR OMISSIONS ARISING FROM AN AGENCY OR EMPLOYMENT RELATIONSHIP MUST BE

18 APPORTIONED A SINGLE PERCENTAGE OF FAULT AND MUST BE TREATED AS A SINGLE PARTY FOR

19 PURPOSES OF THIS SECTION.

20 ~~(8)(9)~~ For purposes of this section, "fault" means an act or omission that proximately caused or
21 contributed to injury or damages sustained by a person seeking recovery and includes negligence in any
22 of its degrees, contributory negligence, strict liability, and products liability.

23

24 NEW SECTION. Section 2. Effect of a release or covenant not to sue. A release or covenant not
25 to sue given to one of two or more persons potentially liable in tort for the same injury, death, damage, or
26 loss:

27 (1) does not discharge any of the other persons from liability for the person's several pro rata share
28 of liability unless the terms of the release or covenant provide for a discharge of liability;

29 (2) reduces the aggregate claim against the other persons to the extent of any percentage of fault
30 found by the trier of fact under [section 1] to be attributable to the person to whom the release or covenant

1 was given; and

2 (3) discharges the person to whom it was given from all liability for contribution.

3

4 **Section 3.** Section 25-9-411, MCA, is amended to read:

5 **"25-9-411. Medical malpractice noneconomic damages limitation.** (1) (a) In a malpractice claim
6 or claims against one or more health care providers based on a single incident of malpractice, an award for
7 past and future damages for noneconomic loss may not exceed \$250,000. All claims for noneconomic loss
8 deriving from injuries to a patient are subject to an award not to exceed \$250,000. This limitation applies
9 whether:

10 (i) based on the same act or a series of acts that allegedly caused the injury, injuries, death, or
11 deaths on which the action or actions are based; or

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

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

15 (2) (a) For purposes of the limitation on awards contained in subsection (1), a claimant has the
16 burden of proving separate injuries, each arising from a different act or series of acts. An award or
17 combination of awards in excess of \$250,000 must be reduced to \$250,000, after which the court shall
18 make other reductions that are required by law. If a combination of awards for past and future noneconomic
19 loss is reduced in the same action, future noneconomic loss must be reduced first and, if necessary to reach
20 the \$250,000 limit, past noneconomic loss must then be reduced. If a combination of awards is reduced
21 to \$250,000, a claimant's share of the \$250,000 must be the same percentage as the claimant's share of
22 the combined awards before reduction.

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

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

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

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

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

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

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

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

- 1 (i) a person suffering bodily injury;
- 2 (ii) a person making a claim as a result of bodily injury to or the death of another;
- 3 (iii) a person making a claim on behalf of someone who suffered bodily injury or death;
- 4 (iv) the representative of the estate of a person who suffered bodily injury or death; or
- 5 (v) a person bringing a wrongful death action.
- 6 (b) "Health care provider" means a physician, dentist, podiatrist, optometrist, chiropractor, physical
- 7 therapist, or nurse licensed under Title 37 or a health care facility licensed under Title 50, chapter 5.
- 8 (c) "Malpractice claim" means a claim based on a negligent act or omission by a health care
- 9 provider in the rendering of professional services that is the proximate cause of a personal injury or
- 10 wrongful death.
- 11 (d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to:
- 12 (i) physical and mental pain or suffering;
- 13 (ii) emotional distress;
- 14 (iii) inconvenience;
- 15 (iv) subjective, nonmonetary loss arising from physical impairment or disfigurement;
- 16 (v) loss of society, companionship, and consortium, other than household services;
- 17 (vi) injury to reputation; and
- 18 (vii) humiliation.
- 19 (e) "Patient" means a person who receives services from a health care provider."

20

21 **Section 4.** Section 27-1-702, MCA, is amended to read:

22 **"27-1-702. Comparative negligence fault -- extent to which contributory negligence fault bars**

23 **recovery in action for damages.** Contributory ~~negligence shall~~ fault does not bar recovery in an action by

24 ~~any a person or his a person's~~ a person or his a person's legal representative to recover tort damages for ~~negligence resulting in death~~

25 of a person or injury to a person or property if such negligence the contributory fault was not greater than

26 the negligence fault of the person defendant or the combined negligence fault of all persons against whom

27 recovery is sought defendants and nonparties IF THE CONTRIBUTORY FAULT WAS NOT GREATER THAN

28 THE FAULT OF THE DEFENDANT OR THE COMBINED FAULT OF ALL DEFENDANTS AND NONPARTIES,

29 but ~~any~~ damages allowed shall must be diminished in the proportion to the ~~amount of negligence~~

30 percentage of fault attributable to the person recovering."

1 **Section 5.** Section 27-1-703, MCA, is amended to read:

2 "**27-1-703. Multiple defendants -- determination of liability.** ~~(1) Except as provided in subsections~~
3 ~~(2) and (3), whenever the negligence of a party in any action is an issue In an action referred to in [section~~
4 ~~1(7)(c)], each EACH party against whom recovery may be allowed is jointly and severally liable for the~~
5 amount that may be awarded to the claimant but has the right of contribution from any other person whose
6 negligence may have contributed as a proximate cause to the injury complained of.

7 ~~(2) A party whose negligence is determined to be 50% or less of the combined negligence of all~~
8 ~~persons described in subsection (4) is severally liable only and is responsible only for the amount of~~
9 ~~negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly~~
10 ~~and severally liable for the total less the amount attributable to the claimant.~~

11 ~~(3)(2) A In an action referred to in [section 1(7)(a) or (7)(b)], a party may be jointly liable for all~~
12 ~~damages caused by the negligence of another if both acted in concert in contributing to the claimant's~~
13 ~~damages or if one party acted as an agent of the other.~~

14 ~~(4) On motion of any party against whom a claim is asserted for negligence resulting in death or~~
15 ~~injury to person or property, any other person whose negligence may have contributed as a proximate~~
16 ~~cause to the injury complained of may be joined as an additional party to the action. For purposes of~~
17 ~~determining the percentage of liability attributable to each party whose action contributed to the injury~~
18 ~~complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants,~~
19 ~~and third party defendants. The liability of nonparties, including persons released from liability by the~~
20 ~~claimant and persons immune from liability to the claimant, must also be considered by the trier of fact,~~
21 ~~as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all persons~~
22 ~~listed in this subsection. Contribution must be proportional to the liability of the parties against whom~~
23 ~~recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to Rule 19,~~
24 ~~Montana Rules of Civil Procedure.~~

25 ~~(5) If for any reason all or part of the contribution from a party liable for contribution cannot be~~
26 ~~obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the~~
27 ~~noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution~~
28 ~~from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is~~
29 ~~liable for contribution under this section only up to the percentage of negligence attributed to that party.~~

30 ~~(6) (a) In an action based on negligence, a defendant may assert as a defense that the damages~~

1 ~~of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty~~
 2 ~~defense.~~

3 ~~(b) In determining the percentage of liability attributable to persons who are parties to the action,~~
 4 ~~the trier of fact shall consider the negligence of nonparties, including persons released from liability by the~~
 5 ~~claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in~~
 6 ~~accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or~~
 7 ~~conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.~~

8 ~~(c) The burden of proof as to a nonparty's liability is on the defendant or defendants who~~
 9 ~~affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden~~
 10 ~~of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to~~
 11 ~~the injury of the claimant or alter other proof requirements.~~

12 ~~(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who~~
 13 ~~gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the~~
 14 ~~defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:~~

15 ~~(i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;~~

16 ~~(ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and~~

17 ~~(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional~~
 18 ~~defendant to the action before the expiration of the period of limitation applicable to the claim. However,~~
 19 ~~this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation~~
 20 ~~has expired.~~

21 ~~(e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the~~
 22 ~~defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing~~
 23 ~~the defendant's answer to each nonparty at the nonparty's last known address by certified mail, return~~
 24 ~~receipt requested."~~

25

26 **Section 6.** Section 27-1-719, MCA, is amended to read:

27 **"27-1-719. Liability of seller of product for physical harm to user or consumer.** (1) As used in this
 28 section, "seller" means a manufacturer, wholesaler, or retailer.

29 (2) A person who sells a product in a defective condition unreasonably dangerous to a user or
 30 consumer or to the property of a user or consumer is liable for physical harm caused by the product to the

1 ultimate user or consumer or to ~~his~~ the user's or consumer's property if:

2 (a) the seller is engaged in the business of selling such a product; and

3 (b) the product is expected to and does reach the user or consumer without substantial change in
4 the condition in which it is sold.

5 (3) The provisions of subsection (2) apply even if:

6 (a) the seller exercised all possible care in the preparation and sale of ~~his~~ the product; and

7 (b) the user or consumer did not buy the product from or enter into any contractual relation with
8 the seller.

9 (4) Subsection (2)(b) does not apply to a claim for relief based upon improper product design.

10 (5) ~~Except as provided in this subsection, contributory negligence is not~~ Contributory fault is a
11 defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage
12 caused by a defectively manufactured or defectively designed product. A seller named as a defendant in
13 an action based on strict liability in tort for damages to a person or property caused by a defectively
14 designed or defectively manufactured product may assert the following affirmative defenses against the
15 user or consumer, the legal representative of the user or consumer, or any person claiming damages by
16 reason of injury to the user or consumer:

17 (a) The user or consumer of the product discovered the defect or the defect was open and obvious
18 and the user or consumer unreasonably made use of the product and was injured by it.

19 (b) The product was unreasonably misused by the user or consumer and ~~each~~ the misuse caused
20 or contributed to the injury.

21 (6) The affirmative defenses referred to in subsection (5) mitigate or bar recovery and must be
22 applied in accordance with the principles of comparative ~~negligence~~ fault set forth in 27-1-702 and [section
23 1]."

24

25 **Section 7.** Section 28-1-301, MCA, is amended to read:

26 **"28-1-301. Types of obligations involving several persons.** Except as provided in 27-1-703 and
27 [section 1], an obligation imposed upon several persons or a right created in favor of several persons may
28 be:

29 (1) joint;

30 (2) several; or

1 (3) joint and several."

2

3 **Section 8.** Section 28-11-311, MCA, is amended to read:

4 "28-11-311. **Person indemnifying liable jointly and severally.** Except as may be otherwise provided
5 in 27-1-703 and [section 1], ~~one a person~~ who indemnifies another person against an act to be done by
6 the latter is liable jointly with the person indemnified and separately to every person injured by ~~such the~~
7 act."

8

9 ~~**NEW SECTION. Section 9. Severability.** If a part of [this act] is invalid, all valid parts that are
10 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its
11 applications, the part remains in effect in all valid applications that are severable from the invalid
12 applications.~~

13

14 ~~**NEW SECTION. SECTION 9. NONSEVERABILITY.** IT IS THE INTENT OF THE LEGISLATURE THAT
15 EACH PART OF [THIS ACT] IS ESSENTIALLY DEPENDENT UPON EVERY OTHER PART, AND IF ONE PART
16 IS HELD UNCONSTITUTIONAL OR INVALID, ALL OTHER PARTS ARE INVALID.~~

17

18 **NEW SECTION. SECTION 9. SEVERABILITY.** IF A PART OF [THIS ACT] IS INVALID, ALL VALID
19 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]
20 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID
21 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

22

23 **NEW SECTION. Section 10. Applicability.** [This act] applies to causes of action that arise after
24 [the effective date of this act].

25

26 **NEW SECTION. Section 11. Contingent effective dates.** (1) [This act] is effective on May 11,
27 1997, if ___ Bill No. ___ [LC1155] is not passed and approved.

28 (2) If ___ Bill No. ___ [LC1155] is passed and approved and is invalidated or is found to be
29 unconstitutional by the Montana supreme court, [this act] is effective on the day after the effective date
30 of the invalidation or of the finding of unconstitutionality.

-END-