

# Key Points About Montana's Medical Liability Insurance Crisis

EXHIBIT

DATE

HB'S

24, 59, 217

## Introduction

All over Montana, physicians and hospitals report the cost and availability of medical liability insurance coverage have reached crisis proportions. Dramatic increases in insurance premiums have caused severe cash flow problems for providers, and some physicians are even considering curtailing some medical services.

HB 26

HB 25-

HB 64

For the past year, a special interim legislative committee – the SJR 32 Subcommittee of the Legislative Council – has examined this problem and potential solutions. The subcommittee, created at the suggestion of hospitals, physicians and insurers, will recommend five proposals for consideration by the 2005 session of the Montana Legislature. Providers and insurers will offer additional proposals. This paper discusses each of these legislative proposals.

Montana already has in place a \$250,000 cap on non-economic damages and other tort reforms. If enacted, the proposals described below will enhance the protections provided by these earlier reforms. It is important to note that these proposals will not immediately end the medical liability insurance crisis in Montana and that other actions may be needed.

For additional information about any of these proposals, contact any of the provider and/or insurer organizations listed at the end of this paper.

## Proposals Developed by the SJR 32 Subcommittee and Endorsed by the Legislative Council

- **Loss of Chance Doctrine.** [SB 21, Sen. Duane Grimes (R-Clancy)] The "loss of chance" doctrine allows a claimant in a medical malpractice case to show that medical negligence has reduced chances of recovery from illness or injury. For instance, if a patient's chances of recovery were reduced from 40 to 30 percent due to the negligent treatment of a physician, the physician would be liable for an injury to the patient because of the reduction of 10 percent in the patient's chances of recovery.

However, the law on damages in such a case remains unsettled. When it adopted the loss of chance doctrine, the Supreme Court did not clarify that the damages should reflect damages only to the extent of the diminished or lost chance of survival.

**Legislative Proposal:** Clarify that damages in a loss of chance case should be determined using the proportional approach and limit recovery to the percentage of chance lost multiplied by the total damages.

- **Captain of Ship.** [HB 25, Rep. Don Roberts (R-Billings)] The "captain of the ship" doctrine was adopted by the Supreme Court in *Rudek v. Wright* (1985) in which a surgeon was found negligent for leaving a sponge in a patient even though the sponge nurse had given him a correct count of the sponges. The sponge was then overlooked by the radiologist who read the patient's x-rays. The Court found the surgeon liable for the death of the patient declaring that "[t]he surgeon is the 'captain of the ship' and he bears the responsibility of the surgical procedure."

In these circumstances, the physician is deemed negligent *per se* and does not have the opportunity to defend the claim on the basis that the injury was the result of the negligence of some other health care

provider – e.g. the hospital’s nurses or a radiologist – over whom he had no control.

**Legislative Proposal.** Eliminate the “captain of the ship” doctrine and allow a physician to defend a claim by pointing to the negligence of others and provide that a physician has no vicarious liability or responsibility for any injury or death arising out of the rendering or failure to render professional services by any health care provider over whom the physician had no control.

- **Apology without Admissibility.** [HB 24, Rep. George Golie (D-Great Falls); HB 59, Rep. Chris Harris (D-Bozeman); HB 217, Rep. Don Roberts] A physician should be able to apologize or express sympathy to an injured patient without having that communication be admitted as an admission against interest in a civil action.

**Legislative Proposal.** An apology or expression of sympathy or benevolence is inadmissible as evidence of admission of liability in a civil action.

- **Ostensible Agency.** [HB 26, Rep. George Golie] Many hospitals rely on physicians in private practice to provide services to patients as members of the medical staff. These physicians are not employees of the hospital and do not have authority to act for the hospital.

However, because it is sometimes difficult for a patient to know whether or not a physician is an employee, or otherwise the agent of the hospital, the hospital can be found liable for the acts of a physician who is merely on the staff of the hospital on the theory that the physician was the ostensible agent of the hospital. (An ostensible agent is a person who has the apparent authority to act for the hospital regardless of whether actual authority has been conferred.)

**Legislative Proposal.** Provide that liability may not be imposed on a health care provider for an act or omission by a person or entity alleged to have been an ostensible agent of the health care provider.

- **Expert Witness Qualifications.** [HB 64, Rep. Roy Brown (R-Billings)]. Substantial concern has been expressed regarding the potential for physicians without sufficient qualifications to testify as expert witnesses in medical malpractice actions – specifically, witnesses who are not appropriately credentialed, do not ordinarily treat the diagnosis or condition or provide the treatment that is the subject matter of a claim, or are not thoroughly familiar with applicable standards of care and, in some instances, testifying in an action who are not in the same specialty or sub-specialty as the physician against whom the claim has been filed.

**Legislative Proposal:** Enact expert witness qualifications similar to those included in S. 11, the proposed Medical Malpractice Tort Reform measure introduced in the United States Senate.

#### **Proposals to be Offered by the Provider-Insurer Coalition**

- **Offset of Personal Consumption Expenses** [LC 484, Sen. Duane Grimes] A “survival action” is brought on behalf of the decedent’s estate for damages incurred by the decedent caused by another’s negligence, whereas, a “wrongful death action” is an action brought on behalf of a decedent’s survivors for their damages resulting from another’s negligence that caused the death.

In Montana, a survival action and a wrongful death action must be combined into a one legal action and

any elements of damages may only be recovered once. In determining damages in a wrongful death action, economic consumption (i.e. the decedent's prospective personal expenses) may be deducted from the damages for future support of a decedent's heirs. In a survival action, however, economic consumption can not be deducted from the future lost earnings of the decedent. (The plaintiff in a survival action may recover future lost earnings but in a wrongful death action may recover lost future support of the decedent. Practically speaking, in most cases, there is little difference between future support and future earnings.)

**Legislative Proposal:** Expenses for economic consumption would be deductible from future lost earnings calculations in survival actions.

- **Advance payments [LC 427, Sen. Duane Grimes]** The Montana Supreme Court has recently issued opinions that require insurers to pay lost wages and medical expenses in those cases where liability is reasonably clear, separate and independent of any of the negotiations and without being able to require a release. [*Ridley v. Guaranty Nat'l Ins. Co.* (1997) and *DuBray v. Farmers Insurance Exchange* (2001)] Those cases were brought in the context of mandatory automobile insurance.

Failure to pay medical expenses or lost wages when liability is reasonably clear can result in a bad faith claim for punitive damages. Bodily injury and negligence arising from an automobile accident are usually much easier to determine than in a medical malpractice action. Medical malpractice actions are for the most part very complex and heavily reliant on testimony of expert witnesses. Even when the Medical Legal Panel has determined that a health care provider may have been negligent, liability is not always clear. If a medical malpractice insurer refuses to pay medical expenses and lost wages because it believes that its insured is not liable, it is threatened with a bad faith action.

**Legislative Proposal:** A decision by the Montana Medical Legal Panel in the Claimant's favor is not evidence that liability is reasonably clear.

- **Independent Medical Exam [LC 1036, Sen. Kim Gillan (D-Billings)]** In *Webb v. T.D.* (1998), the Supreme Court held "that a health care provider in Montana who is retained by a third party to do an independent medical examination has the . . . [duty] . . . [t]o exercise ordinary care to discover those conditions which pose an imminent danger to the examinee's physical or mental well-being and take reasonable steps to communicate to the examinee the presence of any such condition; and . . . [t]o exercise ordinary care to assure that when he or she advises an examinee about her condition following an independent examination, the advice comports with the standard of care for that health care provider's profession."

In this case, the plaintiff had only requested that the court find that the physician be held to the standard of care when undertaking to advise the patient. The court unnecessarily went beyond what the plaintiff had requested and found a duty to discover conditions that pose a danger to the patient and communicate those conditions to the patient.

**Legislative Proposal:** A physician conducting an independent medical exam has no duty to discover conditions which pose an imminent danger to the examinee's physical or mental well-being or take reasonable steps to communicate to the examinee the presence of any such condition.

- **Joint Underwriting Association [LC 1030, Rep. Dave Wanzenreid (D-Missoula)]** In 1977 the Montana Legislature enacted legislation providing for a joint underwriting association consisting of all casualty

insurance companies to provide medical malpractice insurance if it was no longer readily available to health care providers in the state. The legislation included a "sunset" in 1979, and the Legislature did not re-enact the measure.

**Legislative Proposal:** Authorize establishing a joint underwriting association as a safeguard against future lack of availability of medical malpractice insurance.

- **Annual Reports of Casualty Carriers [LC 483, Sen. Duane Grimes]** From 1977 to 2001, casualty insurance carriers were required to report to the state Insurance Commissioner's office important data for monitoring the status of medical malpractice insurance and determining significant trends in insurance settlements and premiums. In 2001, this requirement was repealed by the Legislature in a housekeeping bill. Consequently, data that would have been extremely helpful in examining the scope and the seriousness of the current medical malpractice insurance crisis was unavailable.

**Legislative Proposal:** Enact reporting requirements similar to those that were previously contained in Section 33-23-311, MCA.

- **Cap on Non-Economic Damages Related to ER Services. \$50,000 Cap on Civil Damages Related to ER Services [HB 222, Rep. Don Roberts]** Some of the most difficult situations for the tort system arise as a result of treatment of traumatic injury. Providers believe it is important to establish a separate standard for damages.

**Legislative Proposal:** A cap on civil damages for liability arising from care related to a trauma injury. Under this proposal, hospitals, employees, physicians or dentists would not be liable for more than \$50,000 in civil damages for claims arising from care necessitated by a traumatic event demanding immediate attention that is rendered in good faith to a patient who enters the emergency room.

This limit does not apply to any act or omission in rendering care that occurs after the patient is stabilized or that is unrelated to the original traumatic injury. In cases where the physician or dentist provides follow-up care to the patient he or she treated in the ER and the patient files a malpractice claim based on a medical condition that arises during follow-up care, a rebuttable presumption would exist that the medical condition was the result of the original traumatic injury and the \$50,000 limit would apply.

*This fact sheet was prepared by representatives of the following organizations:*

- *MHA (formerly the Montana Hospital Association) Key contacts: John W. Flink (406) 442-1911/[john@mtha.org](mailto:john@mtha.org) and Mark Taylor (406) 443-6820/[markt@bkbh.com](mailto:markt@bkbh.com).*
- *Montana Medical Association. Key contact: Pat Melby (406) 442-7450/[pmelby@luxanmurfitt.com](mailto:pmelby@luxanmurfitt.com).*
- *The Doctors Company. Key contact: Mona Jamison. (406) 442-5581/[Jamisonlawmona@cs.com](mailto:Jamisonlawmona@cs.com).*
- *Utah Medical Insurance Association. Key contacts: Leo Berry and Aimee Grmoljez. (406) 443-6820/[leo@bkbh.com](mailto:leo@bkbh.com); [aimee@bkbh.com](mailto:aimee@bkbh.com) and Larry Riley (406) 523-2500/[leriley@garlingtom.com](mailto:leriley@garlingtom.com)*
- *St. Vincent Healthcare, Holy Rosary Healthcare and St. James Healthcare. Key contacts: Mike Foster (406) 237-3038/[mike.foster@svh-mt.org](mailto:mike.foster@svh-mt.org) and Tom Ebzery. (406) 245-4881/[tebzery@earthlink.net](mailto:tebzery@earthlink.net).*