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Recommendation 3: Tort Reform: LC 5005

This bill revises and clarifies the legal "loss of chance" doctrine as might be applicable under the *Aasheim* decision.⁵ Under *Aasheim*, if an injured person is injured further as a result of medical malpractice and the injured person's chance of recovery is further diminished as a result of the malpractice, the person is awarded the full amount of damages attributable to the malpractice *plus* the amount of damages due to the initial injury.

For example, let us assume that a person has injured her knee in an accident. As a result of the accident, she will have only a 50% chance of recovering her preaccident use of her knee. Rather than accepting even odds of full recovery, she chooses, knowing the associated risks of additional injury, to undergo orthopedic surgery to repair her injured knee. The surgery is not successful, the knee is not repaired, and her chance of recovering full use of the knee has declined to only 15%. She alleges malpractice and asks for damages of \$100,000. Under *Aasheim*, the damages payable to her are the entire \$100,000 determined for the loss of use of the knee—starting from the knee's condition prior to the accident.

In many other jurisdictions, the damages payable as a result of the malpractice would be only 35% of the amount determined for the loss of chance of recovery because her presurgery chance of recovery was only 50%. Therefore, in such jurisdictions and under the example, because the woman still has a 15% chance of recovery and because her chance of recovery prior to the surgery was only 50%, the damages assessable to the malpractice solely is 35% of the total damages.

⁵ *Aasheim v. Humberger*, 215 Mont. 127, 695 P.2d 824 (1985).

LC 5005 statutorily prescribes that calculation for damages for a "loss of chance". Under the bill, damages awarded must be the difference between the percentage chance of recovering prior to the malpractice (50% in the example) and the percentage chance of recovering after the malpractice (15%), multiplied by the total damages (\$100,000). Under LC 5005, the amount of damages payable would be \$35,000, i.e. 35% of the total damages.

Recommendation 4: Tort Reform: LC 5007

This bill establishes as a matter of state policy and the rules of evidence that an act of or words of benevolence from a medical provider cannot be used as evidence in a civil action for medical malpractice.

Testimony revealed that some medical providers, both individuals and institutions, often desire to express an apology, fault, sympathy, compassion, etc., for the pain, suffering, or death of a person in their care. However, in such instances health care providers are typically advised by legal counsel to refrain from such expressions for fear that the expression will be proffered as evidence of an admission of liability. This bill statutorily precludes expressions of sympathy, compassion, or benevolence from being admitted as evidence of admission of liability.

The Legislative Council members' rationale, as a group or as individuals, for the recommendations is not included as part of this discussion mainly because the rationale is unknown, perhaps even unknowable. Those who are familiar with the legislative process understand that it is foolhardy to speculate as to *why* any one legislator or group of legislators supports or opposes a policy, a bill, an amendment, or anything else on which a vote may be cast. However, reviewing information provided in the subsequent