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MONTANA CURTAILS JOINT AND SEVERAL LIABILITY

John Richardson*

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I. INTRODUCTION

Consider the following hypothetical. In 1987, the star of the local college football team caught a ride to the practice field with his mother. At a partially obscured intersection next to a grammar school, an uninsured, unemployed motorist broadsided their car, seriously injuring the football player. He was paralyzed from the neck down and required constant medical care for the remainder of his life.

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Subsequently, the former football player sued the driver and the school district. The jury found the driver ninety-five percent negligent for failing to look before proceeding through the uncontrolled intersection, and the school district five percent negligent for failing to trim the hedges which blocked the corner view. Though the school district was marginally negligent for the injury, Montana’s law imposing joint and several liability on all joint tortfeasors required the school district to pay the entire multi-million dollar damage award. The school district’s insurance rates skyrocketed. That extra cost in turn forced an increase in tax rates, termination of some insurance coverage, and curtailment of extra-curricular activities.

If the same hypothetical accident occurs today, the result is considerably different. The school district now must pay only its five percent of the damages and the plaintiff cannot recover the other ninety-five percent. His family’s life savings and the proceeds from selling their home are insufficient to cover the medical bills. Eventually the state assumes the victim’s medical and support expenses, and a promising career ends in welfare.

Faced with these alternative scenarios, Montana’s 1987 legislature amended the state’s joint and several liability statute to prevent the former and allow the latter. The amendment, which applies to causes of action arising on or after July 1, 1987, signals a fundamental reprioritization in Montana tort law that should have a significant impact on tort recovery in this state. This comment focuses on the contents and prospective problems of the new statute, including its constitutionality. A short history of Montana’s treatment of joint and several liability precedes the central discussion. Proposals for corrective legislation follow.

II. PRIOR LAW

Historically, Montana followed the majority of jurisdictions in limiting plaintiffs’ ability to recover damages by placing severe restrictions on joint liability. As early as 1892, Montana recognized

1. MONT. CODE ANN. § 27-1-703 (1987) [hereinafter the “statute”]; see Appendix to this comment for the text of the statute.
the complete defense of contributory negligence. This doctrine often preempted any consideration of joint liability by barring recovery by plaintiffs whose own negligence added to their injury. By 1909, the common law permitted plaintiffs to consolidate actions against multiple tortfeasors. It did not, however, furnish any mechanism for the recovery of damages allotted to judgment-proof defendants, and plaintiffs seldom bothered to sue them. In the 1930 case of *Black v. Martin*, Montana first recognized recovery based on joint liability, but only in cases of concurrent acts by joint tortfeasors, and only in cases not involving contributory negligence. Even in these circumstances, joint liability bore little resemblance to Montana's current statute as it forbade contribution, as such, among joint tortfeasors.

Montana's modern theory of joint and several liability started in 1975 when the legislature began adopting statutes more favorable to recovery by tort plaintiffs. In that year, Montana joined the growing majority of states by replacing contributory negligence with a more equitable comparative negligence statute. Two years later, the legislature again enhanced plaintiffs' chances of recovery by adopting joint and several liability and creating a right of contribution among joint tortfeasors.

5. Wail v. Helena St. Ry., 12 Mont. 44, 52, 29 P. 721, 722 (1892) (holding that contributory negligence is a question for the jury).


7. *Black v. Martin*, 88 Mont. 256, 265-66, 292 P. 577, 580 (1930). *Black v. Martin* arose out of an auto accident in which the plaintiff, a passenger, was injured and sued the driver of the other car. *Id.* at 261, 292 P. at 578. The Montana Supreme Court reversed a directed verdict for the defendant, finding that the defendant's negligence was a question of fact for the jury. *Id.* at 262, 292 P. at 578. In dicta, the court noted, "If the concurrent negligence of two or more persons causes an injury to a third person, they are jointly and severally liable. . . ." *Id.* at 265, 292 P. at 580.

8. See supra text accompanying note 5.

9. Variety, Inc. v. Hustad Corp., 145 Mont. 358, 368, 400 P.2d 408, 413-14 (1965) (holding that one joint tortfeasor could not recover from another even when the tortfeasor had paid the entire damages); See also Survey, Recent Decisions: Joint Tortfeasors: Contribution and Indemnity Between Concurrently Negligent Defendants Denied, 29 MONT. L. REV. 235 (1968) (calling for adoption of a Montana statute allowing contribution among joint tortfeasors).

10. Contributory negligence barred the plaintiff's recovery if the plaintiff's own actions contributed in any way to the injury. REVISED CODE OF MONTANA § 58-607 (1947) [hereinafter R.C.M. 1947]. Comparative negligence, on the other hand, allows recovery reduced by the percentage of the plaintiff's negligence so long as the plaintiff was less negligent than the defendant. R.C.M. § 58-607.1 (1975) (recodified MONT. CODE ANN. § 27-1-702 (1987)); see also Appendix (giving the text of the statute); Comment, Comparative Negligence in Montana, 37 MONT. L. REV. 152, 153-57 (1975) (discussing the history and adoption of comparative negligence).

11. R.C.M. § 58-607.2 (Supp. 1977); see Appendix for the text of the statute; see also Comment, supra note 10 at 164-69 (discussing the need for a contribution statute as a nec-
In 1979, however, the Montana Supreme Court in Consolidated Freightways Corp. v. Osier, restricted application of the joint and several liability statute. The court held that the statute applied only to comparative negligence cases, that is, cases in which plaintiffs had some degree of fault. Furthermore, the Consolidated Freightways court restricted the statutory right to contribution among joint tortfeasors by holding that the right extended only to defendants against whom plaintiffs had obtained a judgment. Thus, even though an unjoined party may have been partially responsible for a plaintiff's injury, jointly liable defendants had no cause of action for contribution or indemnity against that tortfeasor. Within these limits, however, some expansion of plaintiffs' right to recovery through joint liability did occur. In the 1979 case of Azure v. City of Billings, the Montana Supreme Court held that joint and several liability applied if the causes of the plaintiff's injuries were not readily divisible between the defendants.

Two years after Azure, the 1981 legislature acted to the benefit of both plaintiffs and defendants. It eased restrictions on plaintiffs' recovery by amending the joint and several liability statute to include all cases regardless of whether comparative negligence was an issue. The legislature also lessened the burden on jointly liable defendants by providing all parties a right to join any person who may have contributed to the injury. Defendants thereby acquired a procedure for gaining contribution from parties the plaintiffs chose not to join. The 1987 legislature again amended the statute.


13. Consolidated Freightways, 185 Mont. at 443-45, 605 P.2d at 1079.

14. Id.

15. Azure v. City of Billings, 182 Mont. 234, 253, 596 P.2d 460, 471 (1979). In this case, the court was unable to apportion the plaintiff's injuries between two independently acting defendants. The plaintiff was arrested after a bar owner struck the plaintiff in the head with a sap. Id. at 236, 596 P.2d at 462. The police failed to provide medical attention for sixteen hours after they mistook the plaintiff's deteriorating mental condition for intoxication. Id. at 237, 596 P.2d at 462-63. As a result of the injury and the delay, the plaintiff was permanently and totally disabled. Id. at 237, 596 P.2d at 463.

16. Mont. Code Ann. § 27-1-703(1) (1981); see also Appendix for the text of the statute. This amendment is an apparent reaction to the holding in Consolidated Freightways. See infra text accompanying notes 71-74.


18. Defendants profited from this liberal joinder rule in two ways. First, by including more parties in the allocation of negligence, the liability of each defendant was likely to
This time, however, the legislature acted wholly for the benefit of defendants and wholly to the detriment of plaintiffs in an attempt to deal with the pervasive effects of the "insurance crisis." 19

III. THE INSURANCE CRISIS

In the past several years, rapid changes in the insurance industry have become a major problem in both the public and private sectors. Businesses have complained of spiraling insurance costs and the unavailability of some types of insurance coverage. 20 Faced with the same problems, government entities have responded by increasing taxes and curtailing services. 21 As society attempts to manage this "insurance crisis," theories of blame and solution are fired in all directions.

Many blame the problem on excessive liberalization of the tort liability system. Advocates of reform complain about exorbitant jury awards. 22 They assert the unfairness of a system that requires responsible, solvent defendants to pay the damages allocated to uninsured, insolvent defendants. 23 They cite extreme cases of trivially negligent, "deep pocket" defendants saddled with multi-million dollar damages awards. 24 To correct these perceived wrongs, the insurance industry is pressing for broad tort reform legislation, including rollbacks in joint and several liability. 25

Opponents of tort reform find numerous faults with these justifications and point to a number of more complex explanations for...
the insurance problem. Many contend that the "insurance crisis" is either overstated or nonexistent. One commentator points out that the insurance industry is in sound financial condition. He finds no evidence of an increase in tort litigation, and asserts that the claim of vastly increased jury awards is a "myth" not reflected by statistics at the state level. Another supporter of the current tort system indicates that any increase in litigation is caused by the growth of many different types of litigation and not just tort claims. For others, the insurance crisis, if it exists at all, is caused by a number of interrelated problems including the natural insurance business cycle, the inefficiency of the industry, and the rise of products liability cases in the 1970's. One well established explanation states that insurance companies themselves created the problem by engaging in price wars to produce investable cash flow when interest rates were high during the early 1980's. Now that interest rates have leveled off, insurers have been forced to raise premium rates and cut high-risk coverage to maintain profitability. Finally, opponents of tort reform demonstrate that reform simply has not alleviated the problem; insurance remains unavailable at affordable prices while injured plaintiffs go

27. The authors claim that the insurance industry has made business appear unprofitable by failing to consider the income made on investments and that the industry will show recorded profits of $90 billion between 1986 and 1990. Investment in insurance stock seems to be one of the more profitable investments on Wall Street. Moskal & Berge, Tort Reform: Minnesota Does Not Need Legislation That Makes Victims Pay for the Negligence of Others, 13 WM. MITCHELL L. REV. 347, 353-54 (1987).
28. One article notes that the increase in federal litigation is a result of products liability cases, and has no relation to the number of state tort cases. In Minnesota, the volume of tort litigation has actually decreased. Id. at 349-50.
29. One author attacks the statistics showing increased jury awards as being incomplete and skewed in favor of insurance companies. In Minnesota, statistics show that jury verdicts fall well below the insurance industry calculations. Id. at 350-53.
31. Id. at 411-14.
32. Report, supra note 20, at 8; Comment, The Illinois Legislature's Attempt to Resolve the Insurance Crisis: Too Much Tort Reform and Too Little Insurance Regulation, 21 J. MARSHALL L. REV. 159, 162-63 (1987). During the early part of the 1980's, investment institutions paid an unusually high rate of interest. This encouraged insurance companies to raise cash for investment by selling an increased number of policies, thereby creating intense competition. See Who's behind the skyrocketing cost of insurance?, Missoulian, March 13, 1986, at 13, col. 1.
33. Who's behind the skyrocketing cost of insurance?, Missoulian, March 13, 1986, at 13, col. 1; see also Moskal & Berge, supra note 27, at 354-56. Some opponents of tort reform legislation charge that the industry's campaign to restrict tort recoveries amounts to a conspiracy based on a phony crisis to increase insurance profits. Comment, supra note 25, at 408-10.
uncompensated. A smaller, third group finds serious problems with the tort system, but maintains that reform is not enough. It posits that the tort system is an inherently inefficient method of compensating injured parties for a number of reasons. First, as much as half of the amount paid out by an insurance company is absorbed in the cost of recovering the judgment. Second, the system allows plaintiffs unjustified, duplicate recoveries. Finally, in some cases the injured party is left uncompensated because the defendant is judgment proof or no liable party exists. This third group would replace most or all of the tort system with no-fault social insurance programs.

Regardless of the realities of the insurance crisis or the ineffectiveness of tort reform, most state legislatures have responded by passing some type of tort reform legislation which includes a near universal curtailment of joint and several liability. Montana is no exception.

34. Following Iowa's elimination of joint and several liability, and curtailment of the collateral source rule in 1975, 41 counties were threatened with cancellation of liability coverage in 1986, and many paid a 1,000% increase in premiums. Even though Ontario, Canada's tort laws favor defendants, Ontario faces the same price and availability problems as Minnesota. Moskal & Berge, supra note 27, at 357-58.


36. Id. at 798.

37. Id. at 798-99.

38. Id. at 807-47.

39. Pressler and Schiefer, supra note 3, at 656-60 nn. 26-31. The authors detail joint and several liability laws through mid-1987 for most states. In addition, Indiana has abolished all rights to contribution. IND. CODE § 34-4-33-7 (Burns 1986). In New Jersey, a defendant adjudged 60% or more negligent is jointly liable for all damages, a defendant adjudged 60 to 20% negligent is jointly liable for all economic damage in addition to that defendant's non-economic damages, a defendant adjudged less than 20% negligent is severally liable only, and environmental torts are excepted. N.J. REV. STAT. § 2A:15-5.3 (West Supp. 1988). Oregon provides severability only for non-economic damages, joint liability for economic damages if the defendant is 15% or less negligent, severable liability only, and environmental torts are excepted. OR. REV. STAT. ANN. § 18.560 (Butterworth 1988), and a reduction for collateral sources, OR. REV. STAT. ANN. § 18.580 (Butterworth 1988).


In 1987, the legislature adopted at least eleven such statutes or amendments. MONT. CODE ANN. § 27-1-710 (1987) (limiting the liability for furnishing alcoholic beverages unless the person served is under age, visibly intoxicated or forced to consume the alcohol); MONT.

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IV. The Statute

The new version of Montana's joint and several liability statute attacks the insurance problem by altering joint and several liability and contribution, while retaining expansive rights to join-der. As with many legislative changes, these provisions raise a number of important issues which may soon face the courts. States with similar statutes have attempted to address some of these issues. However, since most tort reform legislation is relatively new, many unresolved problems remain. The following part of this comment explains the provisions of Montana's statute and addresses the potential problems of each.

A. The Fifty Percent Joint Liability Bar

The most important aspect of the 1987 amendment may be the limitation on joint and several liability. Like a number of other states, Montana has established a percentage bar on joint liabil-

- MONT. CODE ANN. § 27-1-703(5) (1987). Several other states effected tort reform by alteration of their contribution provisions. Indiana abolished all rights to contribution in 1983. Ind. CODE ANN. § 34-4-33-7 (Burns 1986). In Minnesota, all parties including the plaintiff are required to contribute pro rata to any damages which are not collectable from a defendant. Any state or city entity or employee less than 35% negligent must contribute only up to twice its adjudged negligence. Minn. Stat. Ann. § 604.02(2) (West 1988). Wyoming's comparative negligence statute provides that each defendant is liable only for his percentage of negligence. Wyo. Stat. § 1-1-109(d) (1977). The Wyoming legislature eliminated the contribution statute in 1986 when the courts continued to allow joint and several liability. See Burton v. Fisher Controls Co., 723 P.2d 1214, 1220-21 (Wyo. 1986).
- In establishing bars to joint liability, the states have used a variety of percentages and means of application. Like Montana, Iowa and South Dakota have 50% bars to joint liability. Iowa Code § 668.4 (West 1987); S.D. Codified Laws § 15-8-15.1 (Supp. 1988).
JOINT AND SEVERAL LIABILITY

Under the new statute, a defendant is only severally liable if the trier of fact determines that the defendant’s responsibility for the injury is fifty percent or less. Conversely, a defendant adjudged fifty percent or more accountable is jointly and severally liable as under the former statute. The number of defendants reaching the joint-liability level should be curtailed by the inclusion of non-parties in the negligence formula.

B. Negligence of Non-Parties

The new amendment requires the trier of fact to consider the negligence of nearly all persons who may have contributed to the injury when determining damages. The statute denotes three significant groups of non-parties: persons who have settled with the plaintiff, persons who are legally protected from liability, and York has a 50% bar for non-economic damages. N.Y. CIV. PRAC. L. & R. § 1601 (McKinney Supp. 1988). Alaska provides that defendants who are 50% or less negligent are jointly liable for no more than twice their percentage of negligence. ALASKA STAT. § .09.17.080(2) (Supp. 1987). Illinois has a straight 25% bar for all damages and Hawaii has a 20% bar for non-economic damages only. ILL. REV. STAT. ch. 110, para. 2-1118 (Smith-Hurd Supp. 1988); HAW. REV. STAT. § 663-10.9(3) (Supp. 1987). Louisiana provides that defendants are severally liable for the first 50% of the plaintiff’s damages, and are jointly and severally liable for the rest. LA. CIV. CODE ANN. art. 2324(B) (West Supp. 1988). In Minnesota, if a state or city is less than 35% negligent, it contributes only up to twice its negligence. MINN. STAT. § 604.02(1) (West 1988). New Jersey has a more complicated system. A defendant adjudged 60% or more negligent is jointly liable for all damages. A defendant adjudged negligent is jointly liable for all economic damages and severally liable for non-economic damages. A defendant adjudged less than 20% negligent is severally liable only. N.J. REV. STAT. § 2A:15-5.3 (West Supp. 1988). Oregon has a 15% bar for economic damages. OR. REV. STAT. ANN. § 18.485(3) (Butterworth 1988). Texas provides a 20% bar if the plaintiff is more negligent than the defendant, TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b) (Vernon 1986), and a 10% bar if the plaintiff is not negligent. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b) (Vernon Supp. 1988).

45. “Any party whose negligence is determined to be 50% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to him, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total amount of negligence attributable to the claimant.” MONT. CODE ANN. § 27-1-703(2) (1987).

46. Id.; “Except as provided in subsections (2) and (3), whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant . . . .” MONT. CODE ANN. § 27-1-703(1) (1987).

47. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons.


48. The statute mandates consideration of “persons released from liability by the

49. Id.; “Whenever the negligence of any party is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant . . . .” MONT. CODE ANN. § 27-1-703(1) (1987).

50. Id.; “Any party whose negligence is determined to be 50% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to him, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total amount of negligence attributable to the claimant.” MONT. CODE ANN. § 27-1-703(2) (1987).

51. Id.; “Except as provided in subsections (2) and (3), whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant . . . .” MONT. CODE ANN. § 27-1-703(1) (1987).
any persons who may have contributed to the injury.\textsuperscript{50} Inclusion of this last group provides the trier of fact with an extremely broad mandate to look beyond the joined parties. The only groups specifically excluded from consideration are employers or co-employees covered by a Workers' Compensation Act.\textsuperscript{51} This wide scope will probably dilute the extent of many defendants' liability.

1. Dilution of Negligence

On its face, the inclusion of non-parties in the negligence formula equitably apportions damages to all responsible parties in accordance with the goals of Montana's comparative negligence statute.\textsuperscript{52} However, it also translates into extra protection from

claimant." \textit{Id.}

This provision seems to be a legislative reaction to the Montana Supreme Court's holdings that joint tortfeasors who have settled with the plaintiff are not subject to contribution claims and that the plaintiff's claim is reduced by the dollar amount of such settlements. \textit{See} State ex rel. Deere & Co. v. District Court, \textit{Mont.}, 730 P.2d 396, 405 (1986).

Like Montana, some states provide that negligence must be allocated to parties who have reached a settlement with the defendant. \textit{Alaska Stat.} § 09.17.080(2) (Supp. 1987); \textit{Colo. Rev. Stat.} § 13-21-111.5(3)(a) (1987); \textit{Nev. Rev. Stat.} § 41.141(4) (1987); Wisconsin applies the same edict through construction of its common law rule that the fault of all tortfeasors must be considered whether or not they remain in the case. \textit{McDonough v. Van Eerden}, 650 F. Supp. 78, 79 (E.D. Wis. 1986).


50. "[A]nd any other persons who have a defense against the claimant . . . ." \textit{Id.} This clause may raise an issue over whether it includes unjoined parties in the negligence formula. While there was some confusion over this issue, the legislature apparently intended that the use of the term "persons" in this subsection instead of "parties" required the inclusion of non-parties. \textit{See} Judiciary Committee of the Montana State Senate, Minutes of the Meeting, February 12, 1987, at 5-6; Judiciary Committee of the Montana State House of Representatives, Minutes of the Meeting, March 10, 1987, at 4 and Exhibit B, example IX.


51. [I]n attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government. \textit{Mont. Code Ann.} § 27-1-703(4) (1987).

52. The Montana Supreme Court defined these goals, stating "[o]ut of Montana statutes, one may distill a statutory scheme and policy regarding the civil liability of negligent persons. First, \textit{everyone is responsible} for injury occasioned to another by his want of ordinary care in the management of his property or person." \textit{North v. Bunday}, \textit{Mont.}, 735 P.2d 270, 275 (1987) (emphasis in the original)(citing former \textit{Mont. Code Ann.} § 27-1-701 (1985) and holding that the plaintiff's negligence is to be compared to the
joint liability for defendants. The inclusion of the negligence of more parties waters down the negligence formula. It lowers each defendant's share of liability and thereby decreases the chance that any defendant will reach the fifty percent level. Dilution of a defendant's liability may be somewhat mitigated, however, because the same principle similarly lessens a plaintiff's liability. The inclusion of non-parties should also impact other traditional aspects of the tort system.

2. Discouraging Settlement

The inclusion of non-parties in the negligence formula should give plaintiffs two reasons to avoid settlement with any defendant. First, prior to the 1987 amendment plaintiffs were protected from their own misjudgment in determining the negligence of settling defendants. If a plaintiff settled with a defendant for an amount that was less than that defendant's percentage of negligence, the plaintiff's total recovery was not affected. The court deducted the dollar amount of the settlement from the plaintiff's adjudged damages regardless of the settling defendant's adjudged degree of fault. The remaining defendants paid the rest, including any settlement short-fall. The new statute corrects this inequity by deducting the settling defendant's percentage of liability from the other defendants' liability. Plaintiffs now suffer the burden of their own misjudgment and therefore are less likely to accept the risk of settling.

The second reason to avoid settlement also involves an extra burden placed on plaintiffs. At trial, non-settling defendants may try to shift as much of the blame as possible to the non-party—the "empty chair"—and thereby decrease the defendants' liability. This maneuver will increase plaintiffs' difficulties by placing the fault on a party who is not present to defend. Plaintiffs will be forced to defend the absent party to ensure maximum recovery.

combined negligence of all defendants in determining whether comparative negligence bars the plaintiff's recovery).


54. State ex rel. Deere & Co. v. District Court, ____ Mont. ___, 730 P.2d 396, 398 (1986); see infra text accompanying notes 77-82. In his dissent, Justice Gulbrandson pointed out the unfairness of the dollar amount reduction. Id. at ___, 730 P.2d. at 407.

55. Benson, New Role for Nonparties in Tort Actions—The Empty Chair, 15 Colo. Law. 1650, 1654 (1986) (discussing the effects of Colorado's new statute which abolishes joint and several liability and requires the consideration of the negligence of non-parties, including settled-out parties).
from the remaining defendants. Plaintiffs wishing to avoid the "empty chair" problem may simply refuse to settle and let potentially liable parties defend themselves.

On the other hand, plaintiffs may find settlement advantageous even with the extra defense burden. In some cases, plaintiffs may not foresee a reasonable chance of recovering at trial against defendants with questionable liability. In others, the defendants' lack of assets may render settlement more profitable than litigation. Further, plaintiffs may have tactical reasons to remove defendants who might win the jury's sympathy and thereby cast doubt on plaintiffs' entire recovery. In these cases, the advantages of settlement may continue to outweigh the disadvantages under the new amendment.

On the whole, discouraging settlement will probably have a mixed effect on the current tort system. It should provoke more litigation and encourage the inclusion of more parties in tort actions, thereby increasing the burden on the judicial system. While encouraging settlement is generally preferred to save the courts and parties time and expense, in some situations the 1987 amendment may create a more equitable settlement policy by ensuring that compensation agreements accurately reflect the parties' measure of actual negligence.

3. Unidentified Tortfeasors

In some jurisdictions a question has arisen as to whether the trier of fact may include the negligence of an unidentified tortfeasor when considering the negligence of non-parties. Baldwin v. City of Waterloo presented a classic example. In that case, unidentified vandals placed a utility pole across a roadway. The plaintiff, a passenger on a motorcycle, was injured in a collision with the pole. The plaintiff sued the city of Waterloo, the owner of the property from which the pole had been taken, and the lessor

58. Id. at 56.
59. Id. at 57-58.
60. At least one commentator believes that a lower percentage bar, such as 25%, may act to encourage settlement. The plaintiff will have little to gain by keeping a marginally negligent defendant in the litigation, and settlement with these defendants will allow the plaintiff to concentrate on the more negligent defendants. Tenenbaum, supra note 45, at 283.
62. Id. at 487-88.
of that property. The defendants moved to join the unidentified vandals or, in the alternative, to have the court include their percentage of negligence in the liability determination. The court denied both motions since Iowa’s joint and several liability statute lists only claimants, named defendants, persons released from liability, and third-party defendants as potentially liable by jury verdicts.

In Montana, a similar case would probably spark an interesting appeal if the legislature does not clarify the statute. Montana’s joint and several liability statute gives any party a right to join “any other person whose negligence may have contributed as a proximate cause to the injury complained of.” The requirements of service of process, however, significantly narrow this broad joinder. Unidentified defendants would necessarily require service by publication. The Montana Rules of Civil Procedure permit such service only in cases involving property in which the defendant has an interest or in cases involving marriage dissolution to which the defendant is a party. Proper service and joinder of an unidentified tortfeasor, therefore, is not possible.

Whether the negligence of an unidentified person may nevertheless be weighed, is an open question. The new joint and several liability provisions state that in determining each party’s negligence, the trier of fact shall consider the negligence of “any . . . persons who have a defense against the claimant.” Unidentified tortfeasors may well have a defense. However, they may have no opportunity to present that defense if uninformed of the cause of action. Policy considerations are not helpful. On one hand, the statute embodies an attempt to allocate responsibility for the injury fairly and should therefore include all persons who caused that injury. On the other hand, including an unidentified party would place an inequitable burden on plaintiffs. Plaintiffs would be forced to defend the unidentified tortfeasor to prevent the shifting of blame, but could be incapable of determining what defenses the absent party might have.

63. *Id.* at 488.

64. *Id.* Like Montana’s revised joint and several liability statute, the Iowa statute provides that defendants adjudged less than 50% negligent are not jointly liable. Inclusion of the negligence of the unknown vandal probably would have ensured that the other defendants did not reach the 50% trigger.

65. *Id.* at 492-93. This decision was codified in *Iowa Code* § 668.4 (1987).


69. See supra text accompanying notes 47-48.
C. Joinder

The less problematic joinder section of the statute no longer seems to serve any important function. This 1981 amendment gives defendants a right to join any persons who may have contributed to the plaintiff's injury. It thereby grants defendants a means of presenting to the jury the negligence of persons the plaintiff chose not to join.71

The 1987 amendment makes this provision obsolete. Under the new statute, the trier of fact must consider the negligence of non-parties. This “empty chair” is more advantageous to defendants than joinder. The “empty chair” gives defendants an opportunity to shift the blame to a tortfeasor who is absent from the courtroom and therefore unable to defend.72 Outside of a right to third party indemnity, to which defendants have a distinct right,73 defendants now gain no advantage by joining more parties. The amendment does, on the other hand, maintain maximum flexibility while ensuring the just allocation of damages to all responsible persons.

D. Contribution

Contribution presents the most labyrinthine subject of the current joint and several liability statute. The provision attempts an equitable apportionment of the burden on jointly liable defendants, but suffers from piecemeal amendments. The basic right to contribution is well established. Typically, joint liability compels solvent defendants to pay the damages apportioned to insolvent, uninsured co-defendants. The statute gives paying defendants a cause of action against non-paying defendants to recover that expenditure.74 This right to reimbursement may be of little value. If

70. “On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action.” MONT. CODE ANN. § 27-1-703(4) (1987).
71. The wide joinder clause was adopted by the first legislative session following the Montana Supreme Court's holding in Consolidated Freightways Corp. v. Osier, 185 Mont. 439, 605 P.2d 1076 (1979). In that case, the court held that even though the driver of the car in which the plaintiff was injured may have been partially responsible for the collision, the defendants had no right of contribution from parties against whom the plaintiff did not obtain a judgment. Id. at 444, 605 P.2d at 1079.
72. See supra text accompanying notes 47-48.
73. MONT. R. Civ. P. 14(a).
74. Except as provided in subsections (2) and (3), whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may
plaintiffs fail to recover from judgment-proof parties, jointly liable defendants are also likely to fail.

The statute also provides jointly liable defendants who pay other defendants' portions a more practical method of recovering some of that excess payment. If paying defendants cannot obtain sufficient contribution from judgment-proof defendants, the other parties must reimburse the paying defendants on a proportional basis. The reimbursing parties then have a right of contribution against the non-paying persons. Parties found less than fifty percent negligent, though not jointly liable, are still liable for contribution to the paying defendants, but only up to their percentage of negligence. While these rights are not problematic, a series of decisions by the Montana Supreme Court and reactions by the legislature have left other rights to contribution less than pellucid.

1. Contribution By Unjoined Parties

The current statute raises the issue of whether joint tortfeasors have a right of contribution from unjoined persons. The original contribution section of the statute provided contribution from “any other party against whom recovery is allowed.” The case of Consolidated Freightways Corp. v. Osier first defined the limits of this provision. That case arose out of a collision between a Consolidated Freightways tractor-trailer and the car in which Ms. Osier was a passenger. Ms. Osier brought an action against Consolidated, but chose not to include the driver of her vehicle. Consolidated filed a complaint against the driver seeking contribution for any damages established by Ms. Osier. The court disallowed the action, holding that the statute applied only to defendants against whom plaintiffs have recovered.

have contributed as a proximate cause to the injury complained of.


75. If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.


77. "A party found to be 50% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to him." Id.

78. R.C.M. § 58-607.2 (1977); see Appendix for text of statute.

79. Consolidated Freightways Corp. v. Osier, 185 Mont. at 441, 605 P.2d at 1078.

80. Id.

81. Id.

82. Id. at 444, 605 P.2d at 1079.
The 1981 legislature amended the statute to expand the right to contribution. It now includes "any other person whose negligence may have contributed as a proximate cause to the injury complained of." This language would certainly include contribution by unjoined persons, though it has not been tested in the courts. Other decisions relying on other parts of the statute have again confused the issue.

2. Contribution by Settled-Out Parties

When contribution is applied directly to plaintiffs' damages, defendants do not have a right to join released tortfeasors and thereby gain contribution above the amount of the released parties' settlement. In State ex rel. Deere & Co. v. District Court, a malfunctioning bulldozer manufactured by Deere and operated by an employee of Wade's Backhoe backed into the plaintiff Campbell, causing severe injuries. In the subsequent action for negligence against Wade's Backhoe and Deere, the plaintiff settled with and released defendant Deere. Wade's then attempted to join Deere as a third-party defendant. The court noted that the 1981 version of the joint and several liability statute let any party join "any other person whose negligence may have contributed as a proximate cause to the injury complained of." However, the court chose to focus on the section describing contribution to plaintiff's damages which stated, "Contribution shall be proportional to the negligence of the parties against whom recovery is allowed." The court held that joint tortfeasors have no right to join parties who have settled with the plaintiffs and thereby force them to make further contributions to the plaintiffs' damages. The 1987 amendment codifies this holding by replacing the term "negligence" with

84. The language of the statute is somewhat confusing in that it uses the same word, "contribution," to refer to both the defendants' liability for the plaintiffs' damages, see Mont. Code Ann. § 27-1-703(4) (1987), and to refer to a defendant's right to reimbursement for the payment of uncollectible damages, see Mont. Code Ann. § 27-1-703(1), (5) (1987).
85. However, the trier of fact must consider the released party's negligence and thereby reduce the contribution of the defendants. See supra text accompanying notes 39-43.
87. Id. at ___, 730 P.2d. at 398.
88. Id. at ___, 730 P.2d at 402 (quoting Mont. Code Ann. § 27-1-703(2) (1981)); see also Appendix for the complete text of the statute.
90. State ex rel. Deere & Co. ___ Mont. at ___ , 730 P.2d at 402.
"liability."

In the case of contributions to uncollectible damages, however, the amendment seems to prevent such a ruling. The 1981 statute declared that if the damages apportioned to a party could not be collected, "each of the other parties against whom recovery is allowed is liable to contribute a proportional part."\(^1\) The amended statute provides that "each of the other parties shall contribute a proportional part."\(^2\) By removing the exact wording relied upon in *State ex rel Deere*, the legislature may have opened the way for contribution by parties who have settled with plaintiffs, by non-parties, and even by plaintiffs. The legislature left the statute ambiguous by failing to replace "parties" with "persons."

### E. Exceptions to the Statute

Like many other state statutes,\(^3\) the Montana statute retains joint liability for concerted actions.\(^4\) The statute also specifically exempts consideration of the negligence of employers or co-employees which fall under any workers' compensation act.\(^5\) While Montana's statute does not specifically exclude intentional torts as some jurisdictions have,\(^6\) the statute addresses only the "negligence" of parties, and therefore should not include intentional torts.\(^7\) Other states adopting tort reform legislation have also excluded specific types of tortious behavior.\(^8\) The Montana Code

\(^{92}\) MONT. CODE ANN. § 27-1-703(5) (1987); see Appendix.
\(^{94}\) "A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other." MONT. CODE ANN. § 27-1-703(3) (1987).
\(^{95}\) See supra note 43.
\(^{97}\) Neither the legislature nor the judiciary have yet addressed the question of whether joint and several liability and contribution apply to intentional torts. Montana courts, however, could adopt a common law rule based on the policies in this statute.
Annotated contains forty statutes indexed under "torts" that refer to joint and several liability. Those statutes should not be affected by the 1987 amendment since, as a general rule, a more specific statute prevails over a general statute.99

V. CONSTITUTIONAL ANALYSIS

The 1987 amendment will add new ammunition to an important constitutional battle now raging in Montana.100 In the past seven years, the legislature and a majority of the Montana Supreme Court have repeatedly exchanged blows over the constitutionality of tort reform measures which limit the recovery of injured parties. The central issue has been whether these measures violate Montana's constitutional right to full legal redress. Some background is necessary to place this issue in proper perspective.101

A. Background

In 1983, open warfare erupted between the Montana's legislature and the majority of the Montana Supreme Court over whether limitations on government liability violated the right to full legal redress. The first skirmish occurred in White v. State.102 In that case, the Montana court struck down a statute103 which abrogated non-economic damages and which capped liability for economic damages for governmental entities.104 The legislature responded to White by adopting a statute which limited the dollar amount of governmental liability, but made no distinction on the basis of eco-


101. See Id. at 57-62 (providing an in-depth, historical examination of Montana's right of access to the courts and full legal redress and the effect of the since-aborted constitutional initiative to grant the legislature the power to limit tort recoveries).


104. White, 203 Mont. at 370, 661 P.2d at 1275.
nomic and non-economic damages. In *Pfost v. State*, the Montana Supreme Court held that this new version of tort reform also violated the right to full legal redress. The legislature has since reinstituted a cap on government liability as a temporary statute.

**B. Full Legal Redress**

In the *White* and *Pfost* decisions, the Montana Supreme Court relied on Article II, § 16 of the Montana Constitution to find a fundamental right to full legal redress. These decisions express a socially desirable goal of protecting the rights of plaintiffs to full recovery for their injuries. However, its application to statutes such as the new joint and several liability provisions could be troublesome.

The effects of *White* and *Pfost* should be limited to prevent Montana tort law from producing a difficult predicament. If, as the court stated in *Pfost*, a compelling reason is necessary for any statute affecting full legal redress, the legislature will be severely restricted in its ability to rectify mistakes, fine-tune legislation, and react to evolving popular sentiment. Lawmakers will be able to grant further rights to recovery but will never be able to restrict them. The legislature must have the flexibility to try out new ideas and to modify or repeal those statutes which do not perform as expected, or which are affected by changing circumstances or pub-

107. *Id.* at ___, 713 P.2d at 505-06.
109. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workman's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.
MONT. CONST. art. II, § 16.
110. The majority of other jurisdictions which have addressed this question have used a rational relationship test in upholding the constitutionality of tort reform measures. Majernik, *The Equal Protection Challenge to Tort Reform: A Fertile Ground for Changing Standards of Judicial Review*, 65 U. DET. L. REV. 129, 130 n.7 (1987) (listing tort reform statutes which have withstood constitutional attacks). Arizona appears to be Montana's only ally in finding a fundamental right to legal redress, but it relies on a unique state constitutional clause prohibiting any statutes limiting the amount of a plaintiff's recovery. See *Kenyon v. Hammer*, 142 Ariz. 69, 87, 688 P.2d 961, 975 (1984).
111. *White*, 203 Mont. at 368, 661 P.2d at 1275; *Pfost*, ___ Mont. at ___, 713 P.2d at 502.
112. *Pfost*, ___ Mont. at ___, 713 P.2d at 503.
lic attitudes. To avoid much of this problem, the right to full legal redress should be limited to remedies firmly rooted in the Montana and United States Constitutions.\(^\text{113}\) Other remedies are creatures of the legislature and the courts. These bodies should retain the ability to modify or abolish their own creations.

The recent amendments to the joint and several liability statute present an appropriate example. One reason the legislature imposed new restrictions was its belief that in granting unlimited joint and several liability, it had mistakenly placed an unfair burden on marginally liable defendants.\(^\text{114}\) The legislature should now be empowered to correct that mistake. A constitutional challenge to the new joint and several liability provision may give the Montana Supreme Court an opportunity to appropriately narrow the scope of the right to full legal redress.\(^\text{115}\)

\section*{C. Equal Protection Analysis of the 1987 Amendment}

In light of the White and Pfost decisions, a challenge to the amended joint and several liability statute will probably come on equal protection and full legal redress grounds.\(^\text{116}\) An equal protec-

\begin{footnotesize}
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\item \(^\text{113}\) The extent of remedies guaranteed by the Montana Constitution is debatable. The Montana Supreme Court has vacillated on whether the 1889 and 1972 constitutions incorporate common law remedies in existence at the times of their adoption. See Burke \textit{supra} note 100, at 64-67.
\item \(^\text{114}\) Before changing the bar to joint liability from 25\% to 50\%, the House discussed the fairness of imposing any uncollectible portion of the damages on the plaintiff and the defendant. Judiciary Committee of the Montana House of Representatives, Minutes of the Meeting, March 20, 1987, at 3-4, 50th Sess.
\item \(^\text{115}\) Other cases may provide an earlier opportunity to narrow the White and Pfost decisions. In Brewer v. Ski-Lift, Inc., ___ Mont. ___, 762 P.2d 226 (1988), the Montana Supreme Court passed up the chance to apply full legal redress in an equal protection context when it found the statute unconstitutional without addressing the full legal redress issue. \textit{Id.} at ____, 762 P.2d at 228.
\item The changing composition of the court should also facilitate a change. Justice Morrison recently left the court in a failed run for the governorship. He was replaced by Justice McDonough, who dissented to the Brewer decision, expressing his support for legislative control of tort liability. \textit{See Brewer, ___ Mont.} at ____, 762 P.2d at 231-32.
\item The analysis of a constitutional challenge could also turn solely on equal protection or solely on full legal redress without considering the other issue. This comment will consider an equal protection challenge with the right to full legal redress setting the level of scrutiny since it necessarily incorporates both of the former strategies.
\item The amendment may also be attacked under \textit{Mont. Const. art. II}, § 3, listing inalienable rights, or \textit{Mont. Const. art. II}, § 4, guaranteeing individual dignity.
\item Legislation which severely circumscribes the rights of handicapped persons, including the catastrophically injured, may discriminate on the basis of ‘social con-
\end{itemize}
\end{footnotesize}
tation analysis involves several steps. The court must determine whether the statute classifies, what level of scrutiny to apply, and whether the state's reasons for applying that classification are sufficient to meet that standard. 117

1. Classification

Initially, the court must determine whether the statute at issue classifies. 118 The 1987 amendment imposes a classification by permitting full recovery to plaintiffs who are injured by solvent defendants, and by denying full recovery to plaintiffs who happen to be injured by multiple defendants, at least one of whom is judgment proof, and at least one of whom is less than fifty percent negligent. But is this distinction sufficient to trigger an equal protection analysis? This differentiation is made on two tiers. First, plaintiffs are classified by whether they are injured by solvent or insolvent defendants, 119 a classification imposed by the hard realities of life. Second, the statute then subdivides this group into plaintiffs who may recover on the basis of joint liability and those who may not. This latter stage is a legislatively mandated classification which could support an equal protection challenge.

2. Level of Scrutiny

Assuming arguendo that a classification does exist, the next step is to determine what level of scrutiny should apply. 120 In Pfost the court stated, "Any state statute that restricts, limits, or modifies full legal redress for injury to person, property or character . . . affects a fundamental right and the state must show a compelling state interest if it is to sustain the constitutional validity of the statute." 121 In determining whether this mandate applies to a par-

117. Pfost, ___ Mont. at ___, 713 P.2d at 500-01.
118. Id. at ___, 713 P.2d at 500.
119. The California Supreme Court, using a rational relationship test, has found no violation of equal protection in California's statute abolishing joint liability for non-economic damages even though it discriminated on the basis of economic and non-economic damages. Evangelatos v. Superior Court (Van Waters & Rogers, Inc.), 246 Cal. Rptr. 629, 638, 753 P.2d 585, 594 (1988). The court held that the distinction between plaintiffs injured by solvent and insolvent tortfeasors is not a violation of equal protection. Id.
120. Pfost, ___ Mont. at ___, 713 P.2d at 501.
121. Id. at ___, 713 P.2d at 503.
ticular legislative act, the pivotal issue becomes to which aspects of
a cause of action does the right to "full legal redress" apply? So
far, the Montana Supreme Court has held only that the legislature
must show a compelling state interest to place an absolute cap on
tort damages.\textsuperscript{122}

Montana has not decided whether the right to full legal re-
dress includes the right to recover all damages from defendants
who are responsible for only part of those damages. In a situation
analogous to Montana's, the Florida Supreme Court held that caps
on tort recovery were unconstitutional.\textsuperscript{123} However, the court also
found that Florida's statute abrogating joint liability in some situa-
tions was not a due process or equal protection violation of that
state's constitutional right of access to the courts.\textsuperscript{124} Without elab-
oration, the court stated, "the right of access to the court . . . does
not include the right to recover for injuries beyond those caused by
the particular defendant."\textsuperscript{125} If Montana adopts this approach, the
legislature will have to show only that the statute bears a rational
relationship to accomplishing the proposed goal.

3. Legislative Reasons

The legislature had two major reasons for limiting joint and
several liability in Montana. First, the legislature acted to ensure
adequate insurance coverage at affordable prices.\textsuperscript{126} This reason
must fail under either the rationally related or compelling interest
test since the Montana Supreme Court has already found this rea-
soning insufficient.\textsuperscript{127} Also, the legislature was informed that there
is no evidence to show that tort reform will accomplish these
goals.\textsuperscript{128}

Second, the legislature acted to mitigate the inequity of forcing
marginally negligent defendants to pay damages far in excess
of their responsibility for the injury.\textsuperscript{129} This justification should
fare much better under either standard. The legislature created

\textsuperscript{122} \textit{Id.} at ___, 713 P.2d at 505-06.
\textsuperscript{123} Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987).
\textsuperscript{124} \textit{Id.} at 1091.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{See supra note 18.}
\textsuperscript{127} Pfost, ___ Mont. at ___, 713 P.2d at 505. "Under the record in this case, we
doubt that the legislation could pass even the lenient rational basis test . . . ." \textit{Id.}
\textsuperscript{128} Judiciary Committee of the Montana State Senate, Minutes of the Meeting, Jan.
\textsuperscript{129} Making each person responsible for only her or his own negligence seems to have
been a major motivation behind the amendment. In its original form, the amendment would
have eliminated all joint liability for just this reason. Judiciary Committee of the Montana
comparative negligence and joint liability to afford adequate recovery to injured plaintiffs. The legislature has an equally compelling interest in ensuring just treatment of liable defendants. The Montana Supreme Court has stated that one of the purposes of comparative negligence is to make all parties liable for their own negligence. The 1987 amendment brings the joint and several liability statute more in line with that goal and therefore should survive a constitutional challenge.

Ultimately, constitutional analysis reveals no clear indication whether Montana’s joint and several liability statute will survive a constitutional challenge. Advocates can argue equally effectively that the Montana Supreme Court should uphold the statute or, alternatively, strike it down. How the court will decide is an open question depending mostly on the court’s attitude toward tort reform.

VI. Conclusion

Regardless of the constitutionality of the recent amendments to Montana’s joint and several liability statute, the steps taken by the legislature do not represent the best solutions for Montanans. Instead, the amendments represent a major shift in the legislature’s attitude toward negligence liability. The old rule that the first principle in tort recovery is to make the injured plaintiff whole has given way to the perceived hardships of a tight insurance market. No evidence, however, indicates that tort reform measures, such as the 1987 amendment, will actually make affordable insurance more available. The legislature thus shifted much of the burden for uncollectible damages back to the injured plaintiff with no assurance that Montana will benefit. The state should use its power to regulate the insurance industry to ensure that Montana gains some advantage in exchange for surrendering the ability of its injured citizens to receive full compensation. At the very least, Montanans deserve to know whether insurance has become more available as a result of these measures.

To a certain extent, defenders of the insurance industry have wrapped liability reform in an appeal to a return to personal responsibility for an individual’s acts. On this reasoning, the fifty percent bar to comparative negligence and joint liability goes too far. The legislature could enact a more equitable solution by

130. See supra note 44.
131. There is a rough parallel between the statutes in that one cuts off all liability at 50% and the other cuts off joint liability at 50%.
adopting pure comparative negligence and a statute which bars joint liability if the defendant's liability is less than the plaintiff's.

Perhaps the legislature's best argument for changing the joint and several liability statute is the unfairness of requiring marginally negligent defendants to pay damages far beyond their degree of responsibility. The fifty percent ban is excessive for this purpose. The legislature could roll back the fifty percent bar to a level that would protect only defendants whose negligence is truly marginal.

So long as uncollectible damages remain a feature of our tort system, an unfair burden will fall on some parties. The problem is, where should Montana draw the line between placing this burden on solvent defendants and on injured plaintiffs? When doubt remains as to the equity of this decision, the plaintiff should receive its benefit. After all, the wealth of a state is measured by more than just the income of its citizens; it is also measured by its compassion for its injured citizens.

APPENDIX

EVOLUTION OF MONTANA'S JOINT AND SEVERAL LIABILITY, AND CONTRIBUTION STATUTE

Montana's original comparative negligence statute, adopted in 1975, followed the common law rule in not providing for joint and several liability or contribution.

Contributory negligence—when bars recovery.

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.
R.C.M. § 58-607.1 (1975) (now at MONT. CODE ANN. § 27-1-702 (1987)).

(The 1987 legislature amended this statute to adopt the combined comparative negligence rule. It now reads "the negligence of the person or combined negligence of all persons against whom recovery is sought." For the reasoning behind this change, see North v. Bundy, --- Mont. ---, 735 P.2d 270, 276 (1987) in which the same rule was judicially adopted.)

A 1977 statute provided for joint and several liability in comparative negligence cases and for contribution for uncollectible...
Multiple defendants jointly and severally liable—right of contribution.

(1) Whenever the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party is jointly and severally liable for the amount awarded to the claimant but has the right of contribution from any other party against whom recovery is allowed. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed.

(2) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.


Under this statute, the Montana Supreme Court in Consolidated Freightways Corp. v. Osier, 185 Mont. 439, 605 P.2d 1076 (1979), held that this statute applied only to comparative negligence cases—cases in which the plaintiff was negligent—and there was no right to contribution from unjoined persons. In 1981, the legislature amended the statute to overcome these shortcomings.

Multiple defendants jointly and severally liable—right of contribution.

(1) Whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

(3) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other
parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party’s share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.


(Emphasis indicates text added by the 1981 amendment. In the first sentence, “comparative” was deleted, and following “contribution from any other”, “party against whom recovery is allowed” was replaced by “person whose negligence may have contributed as a proximate cause to the injury complained of.”)

In 1987, the legislature again amended the statute. This time it reacted to the “insurance crisis” and State ex rel. Deere & Co. v. District Court, Mont. 730 P.2d 396 (1986) (holding that settling joint tortfeasors are not subject to contribution claims and that plaintiffs’ claims are reduced by the dollar amount of such settlements.)

Multiple defendants—determination of liability.

1. Except as provided in subsections (2) and (3), whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

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

3. A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contribution to the claimant’s damages or if one party acted as an agent of the other.

4. On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant.
The trier of fact shall apportion the percentage of negligence of all such persons. However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, or any other state, or of the federal government. Contribution shall be proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to him. MONT. CODE ANN. § 27-1-703 (1987).

(Emphasis indicates text added by the 1987 amendment. In the third sentence of subsection (4), “The trier of fact shall apportion the percentage of negligence of all such persons,” replaces, “Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons.” “Liability” in the fifth sentence of subsection (4), replaces “negligence.” In the first sentence of subsection (5), after “other parties,” “against whom recovery is allowed is liable to,” was replaced by “shall.”)