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# Innocents and Experience: The Disturbing Record of Legal Reform in Montana

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# Innocents and Experience

## The Disturbing Record of Legal Reform in Montana

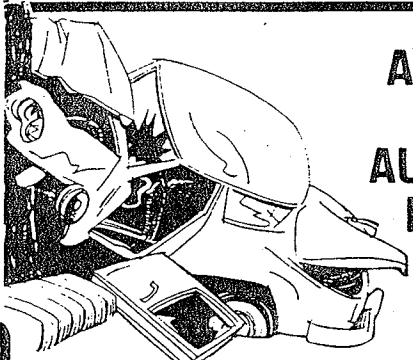
By: Greg Munro, Vice President

Political pundits worry that the public now decides elections based on images gained from "sound bite" media events. Plaintiffs' lawyers might respond that, at least in the political arena, the public hears competing sound bites. Not so in the arena of "tort reform" where public figures, politicians and policy makers hear only the corporate roar of those who would benefit by limiting victims rights to compensation. The interests promoting the myths underlying the belief that the nation is paralyzed by the tort system are so vested in money, power, and access to media that the voice of critical thinkers challenging the myths has not been heard. This is changing rapidly. In the past few years, scholars and scientists have undertaken careful, scientific studies of almost every myth involved in the "tort crisis". The results of careful study and analysis are now available, and the giant mirage of the tort crisis is shrinking in the face of truth. The national web of trial lawyer organizations is obtaining the data and making it accessible to

legislators, the media and the public in the hope that fact will supplant myth in the preservation of the tort system and jury trials.

This process is coming to fruition in Montana where the MTLA's Executive Director, Russell Hill, tirelessly collects and analyzes studies involving everything from insurance claims experience and premiums to doctors' incomes. He presents the data in clear and varied formats to the legislature, media and organizations involved in the tort reform debate. Where necessary, the MTLA is going to court to procure access to data kept secret by the reformers because it is inconsistent with their claims.

In Montana, when the vested interests say, "We need tort reform", they are ignoring the landslide of bills enacted hastily at their behest which severely limit victims rights with no resulting relief in insurance premiums. The public, policy makers, and the reformers themselves need to know how much they have changed Montana law and how many victim's rights have been lost. Hence, the Montana Trial Lawyers have surveyed the legislative changes to produce a partial list showing how many tools have been taken from lawyers who attempt to secure adequate compensation for victims of wrongs. We cannot afford to proceed to the next legislative session under the myth that we have not enacted tort reform in Montana. As the following list shows, the Montana Legislature had already enacted a great deal of tort reform even before the 1993 Legislature convened. Consider, in conjunction with the legislative summary at page 12, the legacy of "tort reform" in Montana:



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### Medical Negligence

#### Statutes of Limitations:

- Amendments to Sec. 27-2-205, MCA, in 1987 and 1989 and to Sec. 27-2-102, MCA, in 1987 drastically shortened the time period for young children injured by medical negligence to file a lawsuit.

#### Mandatory Screening Panels:

- The 1977 enactment of Secs. 27-6-101 to 27-6-704, MCA, required all patients injured by a doctor's negligence to await action by an administrative medical-review panel before filing suit.

- The 1989 enactment of Secs. 27-12-101 to 27-12-703, MCA, required all patients injured by a chiropractors' (continued on page 7)

## Innocents and Experience *(continued from page 6)*

negligence to await action by an administrative chiropractic-review panel before filing suit.

### **Obstetrics:**

- The enactment in 1989 of Sec. 27-1-734, MCA, immunizes doctors, nurses, and hospitals which negligently attend women in labor who happen to be the patients of direct entry midwives.

### **Emergencies:**

- The amendment in 1987 of Sec. 27-1-714, MCA, immunized doctors who treat victims in emergencies negligently as long as they collect no compensation for that treatment.

- The enactment in 1991 of Sec. 50-6-317, MCA, immunized doctors and nurses who negligently instruct emergency medical teams.

## **Workers Compensation**

### **Lump-Sum Settlements:**

- The amendment in 1985 of Sec. 39-71-741, MCA, imposed such complex criteria that injured workers seeking lump-sum settlements were effectively required to retain attorneys, financial or accounting experts, and vocational rehabilitation experts. Lump-sum settlements became rare; consequently, the number and administrative expenses of the state's inventory of open workers compensation files increased substantially.

### **Carpal-Tunnel Syndrome:**

- The amendment in 1987 of Sec. 39-71-119, MCA, tied benefits for workplace injuries to a single event in order to exclude repetitive-trauma injuries. Such disabling and objectively demonstrable injuries as carpal-tunnel syndrome now only qualify for diminished occupational-disease benefits.

### **Heart Attacks and Strokes:**

- The amendment in 1987 of Sec. 39-71-119, MCA, required employees who suffered work-related heart attacks, strokes, or similar injuries to prove that the "primary cause" of their injury was an event occurring on a single workshift.

### **Death Benefits:**

- The amendment in 1987 of Sec. 39-71-721, MCA, imposed a 10-year limit on death benefits payable to surviving families.

### **Schedule of Benefits:**

- The amendment in 1987 of Sec. 39-71-703, MCA,

abolished indemnity benefit schedules for injuries to specific limbs or bodily functions and tied indemnity benefits exclusively to wage loss.

### **Aggravation of Prior Injuries:**

- The amendment in 1987 of Sec. 39-71-407, MCA, required employees to demonstrate that work-related aggravations of prior injuries are "more probable than not".

### **Wage Loss:**

- The enactment in 1987 of Sec. 39-71-123, MCA, excluded from the calculation of disability benefits all wages but those paid in the four pay periods preceding a work-related injury.

### **Rehabilitation:**

- The amendment in 1987 of Secs. 39-71-1001 to 39-71-1033, MCA, and the enactment in 1991 of Sec. 39-71-2001, MCA, established a rehabilitation system which primarily identifies hypothetical job openings in order to terminate benefits for real job-related injuries.

### **Insurance Company Demands:**

- The amendment in 1987 of Sec. 39-71-414, MCA, reimburses insurers with the recoveries which injured workers won from third parties, even if those workers have not been made whole.

### **Mandatory Mediation:**

- The enactment in 1987 of Sec. 39-71-2401, MCA, required injured employees dissatisfied with the benefits paid by an insurer to participate in mandatory mediation before taking their grievance to the workers compensation court.

### **Claimant Attorney Fees:**

- The amendment in 1987 of Secs. 39-71-611 and 39-71-612, MCA, required injured workers who are wrongly denied benefits to pay their own attorney fees in securing those benefits unless they prove the insurer's refusal was "unreasonable."

- The amendment in 1987 and 1989 of Secs. 39-71-613 and 39-71-614, MCA, imposed complicated and restrictive regulations on the fees which claimant attorneys can charge in workers compensation cases.

### **Mental and Emotional Injuries:**

- The amendment in 1987 of Sec. 39-71-119, MCA, abolished benefits for work-related emotional and mental injuries as well as any resulting physical injuries.

*(continued on page 8)*

## Innocents and Experience *(continued from page 7)*

### **Prisoners:**

- The enactment in 1987 of Sec. 39-71-744, MCA, abolished benefits to injured employees who subsequently were convicted of felonies and incarcerated. Harboring little sympathy for criminals and focusing on the "room and board" already provided to prisoners, legislators overlooked the families deprived of employment income.

### **Statutory Interpretation:**

- The enactment in 1987 of Sec. 39-71-105, MCA, reversed Montana's long-standing policy of interpreting workers compensation laws in favor of claimants. In its place the Legislature announced a policy based on "reasonably constant rates" for employers, rapid return to work by injured employees, and minimal claimant access to attorneys.

## ***Immunities***

### **Liquor Licensees:**

- The enactment in 1986 of Sec. 27-1-710, MCA, and a subsequent amendment in 1989 dramatically relaxed the duty of establishments serving alcohol to do so responsibly.

### **Ditch Company Employees:**

- The enactment in 1987 of Sec. 27-1-731, MCA, immunizes ditch company employees from all individual civil liability except in cases of oppression, fraud, or malice.

### **Ski Areas:**

- The enactment in 1989 of Sec. 23-2-736, MCA, makes skiers instead of ski-area operators responsible for most physical, structural, and design dangers at ski areas.

### **Snowmobile Areas:**

- The enactment in 1987 of Secs. 23-2-653, 23-2-654, and 23-2-656, MCA, makes snowmobilers instead of snowmobile-area operators responsible for most physical, structural, and design dangers at snowmobile areas. In fact, a snowmobiler injured or killed at a snowmobile area is completely barred from recovering damages from a negligent operator if the inherent risks of snowmobiling contributed--no matter how slightly--to the injury or death.

### **Landowners:**

- The enactment in 1987 of Sec. 23-2-321, MCA, immunized landowners who negligently injure recreationists on public rivers or streams which flow through their property.

### **Horserace and Rodeo Sponsors:**

- The enactment in 1987 of Sec. 27-1-733, MCA, immunized nonprofit sponsors of virtually all events involving horses whenever they negligently injure voluntary participants.

### **Firefighters:**

- The amendment in 1989 of Sec. 7-33-2208, MCA, immunized fire chiefs and others for the damage they cause in negligently entering land to fight fires.

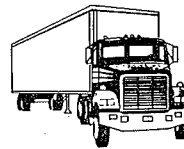
### **Mental Health Professionals:**

- The enactment in 1987 of Secs. 27-1-1101 to 27-1-1103, MCA, relaxes the duty of mental health professionals to warn others of their patients' violent tendencies.

### **Non-Profit Corporations:**

- The enactment in 1987 of Sec. 27-1-732, MCA, immunized officers and directors of nonprofit corporations from all civil liability for their negligent acts or omissions.

*(continued on page 9)*



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## Innocents and Experience (continued from page 8)

### Food Donors:

- The enactment in 1981 of Sec. 27-1-716, MCA, immunizes individuals and corporations who negligently donate dangerous food for free distribution.

### Emergencies:

- The amendment in 1987 of Sec. 27-1-714, MCA, immunized anyone who treats victims in emergencies negligently as long as they collect no compensation for that treatment.

## Damages

### Damages for Emotional Distress:

- The enactment in 1987 of Sec. 27-1-310, MCA, prohibited plaintiffs in contract-based lawsuits from recovering for any type or severity of mental or emotional injury unless they can also demonstrate physical injury.

### Punitive Damages:

- Amendments in 1985 and 1989 to Sec. 27-1-221, MCA, abolished punitive damages for constructive fraud and constructive malice; denied punitive damages to plaintiffs who demonstrate to a jury by a preponderance of evidence that they are justified; and forced plaintiffs to justify jury awards of punitive damages in a separate trial.

### Periodic Payment of Damages:

- The 1987 enactment of Secs. 25-9-401 to 25-9-406, MCA, authorizes a court to order payments of future damages in excess of \$100,000 to be made periodically.

### Statement of Damages:

The enactment in 1977 of Sec. 25-4-311, MCA, prevented the press and public from learning the amount of damages which a plaintiff seeks.

## Miscellaneous

### Products Liability:

- The enactment in 1987 of Sec. 27-1-719, MCA, created three new defenses for manufacturers whose defective products injure consumers.
- The enactment in 1987 of Sec. 27-1-720, MCA, severely restricted the rights of Montanans injured by defective firearms or ammunition to recover damages from the manufacturer.

### Joint and Several Liability:

- A 1987 amendment to Sec. 27-1-703, MCA, insulated wrongdoers from liability for the injuries they cause and allowed them to shift blame to other defendants, non-parties, and even parties immune from suit.

### Wrongful Discharge:

- The enactment in 1987 of Sec. 39-2-911, MCA, gutted the common-law responsibilities of employers who fire their employees.

### Insurance consumers:

- The enactment in 1987 of Sec. 33-23-203, MCA, abolished the right of policyholders to "stack" policy limits for their vehicles.

### Arbitration:

- The enactment in 1985 of Sec. 27-5-114, MCA, allowed insurance companies, banks, stock brokers, and other commercial enterprises to force dissatisfied customers into arbitration designated by those enterprises.

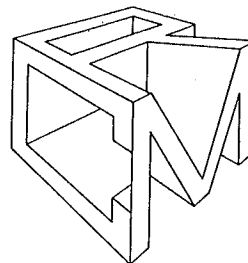
### Collateral-Source Rule:

- Amendments in 1987 to Secs. 27-1-307 and 27-1-308, MCA, reversed traditional civil law and forced plaintiffs into post-trial hearings designed to reduce jury awards against defendants by deducting any insurance payments, family care, or other benefits which those plaintiffs obtained (and often paid for) independently.

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