

1993

## Wyoming Tort Reform and the Medical Malpractice Insurance Crisis: A Second Opinion

Susan Mark

Brian C. Shuck

Follow this and additional works at: [https://scholarship.law.uwyo.edu/land\\_water](https://scholarship.law.uwyo.edu/land_water)

---

### Recommended Citation

Mark, Susan and Shuck, Brian C. (1993) "Wyoming Tort Reform and the Medical Malpractice Insurance Crisis: A Second Opinion," *Land & Water Law Review*: Vol. 28 : Iss. 2 , pp. 593 - 626.  
Available at: [https://scholarship.law.uwyo.edu/land\\_water/vol28/iss2/5](https://scholarship.law.uwyo.edu/land_water/vol28/iss2/5)

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

## COMMENTS

### WYOMING TORT REFORM AND THE MEDICAL MALPRACTICE INSURANCE CRISIS: A SECOND OPINION

#### INTRODUCTION

For nearly twenty years, Wyoming and the nation have faced problems with medical malpractice insurance availability and affordability.<sup>1</sup> The media and the public labeled these problems an "insurance crisis."<sup>2</sup> Over this twenty-year period, insurance premiums unexpectedly increased and certain lines of medical malpractice insurance became unavailable at any price. During the peak years of 1975 and 1986, the crisis' effects were more pronounced.<sup>3</sup> This insurance crisis has continued to ignite heated debates among insurers, physicians, consumer advocates, and trial attorneys.<sup>4</sup> While these parties have not agreed as to the cause of the insurance crisis or the best solution, all parties have agreed that finding and affording insurance continues to be a crucial problem in our society.<sup>5</sup>

Intense public pressure to resolve the crisis caused state legislatures nationwide during the 1970's and 1980's to gather information from the insurance industry, medical community, and the

---

1. DEBORAH R. HENSLER ET AL., *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS I* (Rand Institute for Civil Justice, R-3391-ICJ, 1987). See *High Insurance Rates Concern Obstetricians*, NORTHERN WYO. DAILY NEWS (Worland, Wyo.), Feb. 12, 1988, at 12 [hereinafter *Rates Concern Obstetricians*]; *Wyoming Doctors Face Rising Insurance Rates*, NORTHERN WYO. DAILY NEWS (Worland, Wyo.), June 6, 1985, at 7 [hereinafter *Rising Insurance Rates*].

2. HENSLER et al., *supra* note 1, at 1. The medical malpractice insurance crisis also effected not only medical professionals, but government entities as well. See *Insurer Drops State Coverage*, THE POWELL TRIBUNE (Powell, Wyo.), Sept. 26, 1985 (available through the University of Wyoming Coe Library newspaper clippings file under the heading "insurance"). In the mid-1980's, the State of Wyoming and numerous Wyoming municipalities found insurers were unwilling to renew municipal liability insurance policies. Some insurers were willing to extend liability coverage to the State "if high-risk facilities such as hospitals . . . could be excluded" from coverage. *Id.* See also *Lawmakers Hope to Deal with State Insurance Crisis*, NEWS RECORD (Gillette, Wyo.), Feb. 13, 1986, at 14 [hereinafter *Lawmakers*].

3. In 1974 and 1975, most state legislatures were under intense pressure to resolve that decade's insurance crisis. See PATRICIA M. DANZON, *MEDICAL MALPRACTICE 2* (1985). The second peak occurred in the mid 1980's. See Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 Hous. L. Rev. 207, 214 (1990).

4. HENSLER et al., *supra* note 1, at 1.

5. *Id.*

legal profession. Much of the information was conflicting.<sup>6</sup> The major underlying conflict was whether the tort system had become skewed in favor of plaintiffs and was encouraging litigation. Even with little concrete data available, the insurance lobby was effective in convincing most state legislatures that a litigation crisis<sup>7</sup> existed thereby causing a recurring insurance crisis.<sup>8</sup> Many state legislatures, including the Wyoming Legislature, responded with significant tort reform legislation in the mid-1970's and again in the mid-1980's.<sup>9</sup>

Recently, political debates centering on a nationwide health care insurance crisis have renewed interest in tort reform as a means to control health care costs.<sup>10</sup> In Wyoming, medical interest groups and medical malpractice insurers continue to pressure the Wyoming Legislature to enact tort reforms.<sup>11</sup> However, before the Wyoming Legislature considers future tort reforms to control either medical

6. *Id.* See *infra* text accompanying notes 16-32 (discussing the conflicting views of tort reform proponents and opponents).

7. 1 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 23 (1991) [hereinafter *A.L.I.*]. The term "litigation crisis" describes a perceived explosion in the number of suits filed. Many argue that this increase is a result of our society's changing expectations and values. It is now much more acceptable to consult with a lawyer and file a tort claim. People feel more entitled to a higher level of protection against bodily injury both before and after an accident occurs. *Id.*

8. DANZON, *supra* note 3, at 2. Empirical evidence was not available in the 1970's or the 1980's to resolve the conflicting views. *Id.* Commentators claim the insurance industry began a concentrated campaign in 1984 in which it placed most of the blame at the feet of the tort law system. By 1986, the Insurance Information Institute reportedly was spending six and one-half million dollars on advertising and other efforts to tie the insurance crisis to the need for tort reform. Sanders & Joyce, *supra* note 3, at 214.

9. TARKY LOMBARDI, JR., MEDICAL MALPRACTICE INSURANCE: A LEGISLATOR'S VIEW 118-19 (1978). In the mid-1970's, 49 states passed legislation designed to address the medical malpractice crisis. *Id.* Many states enacted additional tort reforms between 1985 and 1988. Sanders & Joyce, *supra* note 3, at 210. Compare Tamara K. Vincelette, Comment, *Medical Malpractice Insurance Crisis: The Boys Who Cry "Wolf,"* 21 LAND & WATER L. REV. 203 (1986) (arguing against enactment of tort reform in Wyoming). For commentary on tort reform in other states, see Pamela Burch Fort et al., *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U.L. REV. 505 (1986); Thomas C. Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of It All*, 49 LA. L. REV. 629 (1989); Kathy T. Graham, 1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?, 24 WILLAMETTE L. REV. 283 (1988); David A. Kramer, *Issues and Ramifications of Texas Tort Reform*, 18 ST. MARY'S L.J. 713 (1987); Leonard Schulte, *Availability, Affordability and Accountability Regulatory Reform of Insurance*, 14 FLA. ST. U.L. REV. 557 (1986); Note, Maureen Roach Tobin, *The Current Status of Tort Reform in Iowa*, 35 DRAKE L. REV. 859 (1986-87).

10. *Rx for Health Care*, NEWSWEEK, Sept. 28, 1992, at 20. President Bush supported limiting malpractice awards and insurance-industry reforms. *Id.* Indeed, the 1992 presidential race may have been heavily influenced by the insurance crisis. As noted in a newspaper article, "[a] Gallup poll last year showed 91% of Americans believe the nation faces a health-care crisis." Peter A. Brown, *Candidates Offer Health-Care Remedies*, ROCKY MOUNTAIN NEWS, Sept. 2, 1992, at 4. Some politicians believe the medical community's fears of personal liability and further increases in medical malpractice insurance have been driving the increase in health care costs. *Id.*

11. *Legislative Perspective*, THE COFFEE HOUSE (Wyo. Trial Lawyers Ass'n, Cheyenne, Wyo.), Mar. 1992, at 6.

malpractice or health care insurance costs, it should assess the success of past tort reforms.

This comment's treatment of the medical malpractice insurance crisis is analogous to the diagnostic process used by a physician who is consulted for a second opinion. Just as the physician compiles a medical history, investigates the symptoms, and reviews prior treatment efforts before prescribing a new treatment, this comment follows a similar course. First, this comment compiles a "patient history" and investigates symptoms by examining the historical information. Second, this comment reviews the "past treatments" of the insurance crisis by outlining the various Wyoming legislative and court-initiated reforms. Next, this section strives to determine whether a litigation crisis actually existed and could have caused an insurance crisis. Finally, this comment analyzes whether past reforms were necessary to treat any underlying insurance crisis and offers a "second opinion" concerning the future course of treatment.

#### BACKGROUND

##### *"Patient History"*

The term "tort reform"<sup>12</sup> describes the means to achieving several goals. Tort reforms are enacted to reduce claim frequency, reduce claim severity,<sup>13</sup> and eliminate frivolous and unfairly stale lawsuits, thereby reducing insurance premium prices and improving insurance availability.<sup>14</sup> Generally, these reforms function by reducing plaintiffs' access to the courts, reducing plaintiffs' chances of prevailing at trial, or reducing plaintiffs' chances of fully recovering.<sup>15</sup>

---

12. In the mid-1980's, the term "tort reform" became widely used to describe what legislatures looked to as a cure for the perceived ailing legal system. See, e.g., *Malpractice Premiums Skyrocketing for Doctors*, NEWS RECORD (Gillette, Wyo.), June 6, 1985, at 5 [hereinafter *Malpractice Premiums Skyrocket*] (stating medical malpractice insurance could become unavailable if tort reforms were not enacted).

13. "Claim frequency" is the conventional term used to describe the number of claims filed. "Claim severity" refers to those factors affecting an insurer's ability to predict future payouts. These factors include the probability that a claim will be paid, the amount of payment and the speed with which a claim is resolved. See DANZON, *supra* note 3, at 20-21. An additional tort reform goal for many state legislatures has been reducing the uncertainty of jury award sizes. These legislatures have passed reforms limiting plaintiffs' damage awards, typically referred to as caps on damages. *Id.* at 30.

14. *Id.* at 2. See Sanders & Joyce, *supra* note 3, at 223.

15. See LOMBARDI, *supra* note 9. See also Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 513 (1989). The major tort reforms of the 1970's and 1980's have been categorized as

Tort reform is a political issue which requires recognition of both tort reform proponents' and opponents' views. Proponents claim the tort system has become so plaintiff-oriented that the process is really a game of chance for defendants.<sup>16</sup> Proponents urge that an expansion of tort plaintiffs' rights has caused an excessive number of lawsuits.<sup>17</sup> In their opinion, many claims are frivolous or unfairly stale. Moreover, they feel the present tort system often pays too much.<sup>18</sup> Proponents also contend that judges and juries frequently

follows:

A. Aimed at the number of lawsuits (insurance "frequency"):

1. Arbitration
2. Attorney fee controls
3. Certificate of merit
4. Costs awardable
5. Pretrial screening panels
6. Statutes of limitations

B. Aimed at size of recoveries ("severity"):

1. Ad damnum clauses restricted
2. "Caps" on awards (non-economic, total)
3. Collateral source offset (permissive, mandatory)
4. Joint & several liability changes
5. Periodic payments of damages ("structured" awards)
6. Punitive damage limits

C. Aimed at plaintiffs difficulty (or costs) of winning:

1. Expert witness requirements
2. Informed consent limits
3. Professional standard of care reasserted
4. Res ipsa loquitur restrictions
5. Statute of frauds for medical promises

D. Aimed at functioning, cost of judicial process:

1. Mediation
2. Notice of intent to sue
3. Pre-calendar conference required
4. Preferred scheduling for malpractice cases

E. Miscellaneous

1. Extension of Good Samaritan statutes
2. Immunity for school athletic injuries
3. All other.

*Id.* Other reform efforts were directed at the insurance and medical industries, and have been categorized as follows:

A. Insurance reforms

1. Joint Underwriting Associations
2. Limits on insurance cancellation
3. Mandates for liability coverage
4. Patient Compensation Funds
5. Reporting Requirements

B. Reforms Aimed at Medical Quality

1. Peer review requirements, protection from lawsuits
2. Powers of disciplinary boards increased
3. Reporting requirements, data compilations
4. Requirements for continuing medical education

*Id.*

16. Bovbjerg, *supra* note 15, at 507. "Clearly a general 'liberalization' of common-law doctrines and processes in recent decades has favored plaintiffs." *Id.* at 506.

17. *Id.* at 506-07.

18. *Id.* at 507.

make poor decisions about fault.<sup>19</sup> They urge this is particularly true if the defendant is an institution or corporation whom jurors perceive as having "deep pockets."<sup>20</sup> Proponents believe legislative tort reforms offer a solution to inequitable treatment of defendants,<sup>21</sup> while at the same time preserving the tort system's basic functions of compensation and deterrence. They also urge that tort reform removes the emotionalism often involved in medical malpractice lawsuits.<sup>22</sup>

Further, proponents advise that tort reform provides increased certainty at two levels.<sup>23</sup> First, increased certainty allows physicians to know exactly what negligence is actionable and encourages them to limit their defensive medical practices accordingly.<sup>24</sup> Second, increased certainty allows insurance companies to more accurately predict underwriting risk.<sup>25</sup> Proponents conclude that increased certainty ultimately will provide all medical specialties with adequate insurance coverage at reasonable premiums and will prevent future insurance crises.<sup>26</sup>

In contrast, opponents argue that tort reform will not solve the insurance crisis. Some opponents believe that incompetent doctors<sup>27</sup>

19. *Id.*

20. Sanders & Joyce, *supra* note 3, at 256 & n.197; see *Ed Won't Sign: Insurance Bill Said 'Horrible'*, POWELL TRIBUNE (Powell, Wyo.), Mar. 18, 1986, at 9 [hereinafter *Ed Won't Sign*] (explaining the "deep pocket" theory).

21. See Bovbjerg, *supra* note 15, at 507.

22. *Id.* at 508. Proponents claim that allowing plaintiffs to bring medical malpractice cases several years after the allegedly negligent act, coupled with overly-sympathetic juries, often color results. *Id.*

23. See Sanders & Joyce, *supra* note 3, at 232 (discussing the problem of uncertainty generally).

24. Bovbjerg, *supra* note 15, at 509. "Defensive medicine has been defined as 'a deviation from what the physician believes is sound practice, and is generally so regarded, induced by a threat of liability . . . Not all practices motivated for liability considerations result in poor-quality care. It is, therefore, difficult to draw the line between where good medicine stops and defensive practice begins.'" DANZON, *supra* note 3, at 146.

25. *Cf.*, Sanders & Joyce, *supra* note 3, at 232. In the insurance industry, the party assuming a risk in return for the payment of a premium is the "underwriter." BLACK'S LAW DICTIONARY 1527 (6th ed. 1990). "Insurance risk" is defined as the danger of a loss resulting from the uncertainty that actual future returns or losses will deviate from expected returns or losses. *Id.* at 1328.

26. Frank A. Sloan, *Responses to the Malpractice "Insurance Crisis" of the 1970's: An Empirical Assessment*, 9 J. OF HEALTH POL., POL'Y & L. 629, 633 (1985). "Legislators assumed that, if new laws could reduce the number and dollar amounts of malpractice awards, insurers would be in a better position to predict recoveries, and therefore would maintain coverage at reasonable rates and assure availability of malpractice insurance". *Id.* See Sanders & Joyce, *supra* note 3, at 217 (citing U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 45-52 (1986) [hereinafter *1986 Dep't of Justice Rep.*]).

27. Robert S. Adler, *Stalking the Rogue Physician: An Analysis Of The Health Care Quality Improvement Act*, 28 AM. BUS. L.J. 683, 689-94 (1991). Conservative studies estimate five to ten percent of doctors are incompetent, while other studies indicate four to thirty

and the insurance industry have caused the insurance crisis of the past two decades.<sup>28</sup> Opponents claim the insurance industry exercised poor business judgments which resulted in the boom and bust cycles of profitability, price, and availability.<sup>29</sup> They also claim that insurance companies have drastically increased transaction costs by aggressively defending against claims.<sup>30</sup> Reform opponents argue that holding the medical community civilly liable for improper actions has deterrent value and may actually reduce medical costs by preventing unnecessary injuries. Although the costs of litigating over cause and fault create added overhead costs, injury costs savings outweigh the added overhead costs.<sup>31</sup> For these reasons, opponents view physician peer review and increased insurance industry accountability as better solutions than tort reform to prevent future insurance crises.<sup>32</sup>

During the peak years of 1975 and 1986, the Wyoming Legislature was under pressure similar to other state legislatures to resolve the medical malpractice insurance crisis.<sup>33</sup> Wyoming legislators

percent are incompetent. *Id.* Before 1986, no national system existed for identifying and removing incompetent physicians. *Id.* at 737. The prior system allowed a "rogue physician," whose license was suspended in one state, to set up practice in another state. *Id.* The HCQIA resolved the "rogue physician" problem by establishing a peer review system and requiring submission of reports to the Department of Health and Human Services. *Id.* at 684. In drafting the HCQIA, Congress was careful to remove disincentives to participating in the program. The doctors participating in the peer review are immune from libel suits. The reports now make it possible to study the frequency and severity of malpractice claims nationwide. *Id.* at 689, 729. The HCQIA is a good example of a reform which does not narrow plaintiffs' rights or impact tort law. *Id.* at 737.

28. Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 400 (1987).

29. *Id.* Another commentator noted "[t]he phenomenon known as the 'underwriting cycle' is unique to the insurance industry and represents a significant cause of the periodic malpractice insurance crises." David J. Nye et al., *The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances*, 76 GEO. L.J. 1495, 1525 & n.68 (1988) (providing a brief description of the underwriting cycle and listing other authorities which discuss the subject in depth). This article explains that the underwriting cycle peaked in 1985, which is approximately the time of the second peak in the insurance crisis. *Id.* Alternatively, opponents claim that insurance companies may have been in collusion. The collusion explanation is fueled in part by the virtual exemption of insurance companies from federal antitrust laws through the McCarran-Ferguson Act of 1945. 15 U.S.C. §§ 1011-15 (1982 & Supp. 1985). *But see* Richard N. Clarke et al., *Sources of the Crisis in Liability Insurance: An Economic Analysis*, 5 YALE J. ON REG. 367, 377-84 (1988) (arguing against the collusion theory). *See* discussion *infra* notes 35-37 (discussing insurance reforms).

30. Sanders & Joyce, *supra* note 3, at 216 n.35. For example, insurance companies' defense costs tripled from 1975 to 1986. In 1986, insurance companies were paying defense lawyers 46 cents for every dollar paid to injury victims. This increase in transaction costs directly affected insurance rates. *Id.*

31. DANZON, *supra* note 3, at 221. Only a small percentage of malpractice incidents ever culminate in filed claims and an even smaller percentage of claims result in compensation. *See* DEBORAH R. HENSLER ET AL., ACCIDENTS AND INJURIES IN THE U.S.: COSTS, COMPENSATION AND CLAIMING BEHAVIOR (Rand Institute for Civil Justice 1991).

32. Adler, *supra* note 27, at 685.

33. The Wyoming Medical Association has been active in lobbying for tort reforms. *See, e.g., Minutes of the Ann. Meeting of the Wyo. St. Bar*, 11 LAND & WATER L. REV.

received conflicting information from lobbyists on both sides but received little empirical data. Despite this lack of statistical data, the Wyoming Legislature attempted to resolve the crisis utilizing three basic approaches: (1) enacting new requirements for the insurance industry, (2) deregulating other aspects of the insurance industry, and (3) enacting tort reforms.<sup>34</sup> Beginning in 1976, the legislature required all medical malpractice insurers to annually report all claims against and all awards or settlements made on behalf of health care providers.<sup>35</sup> In 1983, the legislature deregulated insurance price-setting by enacting the "Competitive Rating Act."<sup>36</sup>

---

307, 310-311 (1976) [hereinafter *Wyoming St. Bar Minutes*].

A representative from the Wyoming Medical Association spoke at the annual bar convention meeting and described the group's legislative efforts. . . . [T]he Wyoming Medical Association has drafted a proposed bill that contains the following proposals:

- (1) That insurance companies . . . report all claims and pay-outs.
- (2) That the medical malpractice statute of limitation be reduced to two years with no tolling provision for minors.
- (3) That recoveries in the case of a minor be paid not in cash, but in annuities (meaning that the attorney must wait for his fee).
- (4) That all insurance companies be required to join an underwriting pool and be required to underwrite doctors even if the particular company does not normally underwrite medical malpractice policies.
- (5) That a disabled physicians' act be adopted.
- (6) That contingent fees for medical malpractice litigation be reduced to fifteen percent.
- (7) That the concept of informed consent be completely revised.
- (8) That the peer review committee be made totally immune from liability.
- (9) That the *res ipsa loquitur* rule no longer be applied to the medical profession.
- (10) That a patient's compensation fund be established.
- (11) That prior to filing a complaint sixty days notice be given to the defendant.
- (12) That the rule of implied warranty be eliminated.
- (13) That the collateral source rule be eliminated.
- (14) That punitive damages be eliminated.
- (15) That an assigned risk law be adopted.
- (16) That Wyoming's constitutional provision on wrongful death, Article I, Section 8, be amended.
- (17) That a model counterclaim abuse of process law be adopted eliminating separate actions.

*Id.*

34. Even though the Wyoming Legislature has never directed reform at physicians, the United States Congress responded to the 1986 medical malpractice crisis by enacting the Health Care Quality Improvement Act of 1986 (HCQIA). 42 U.S.C.A. § 1011-52 (West Supp. 1989). See discussion of this Act *supra* note 27.

35. WYO. STAT. §§ 26-3-123 to -124 (1991). Prior to 1976, the state required insurers to submit information regarding only their financial condition and transactions of the previous twelve months. *Id.* § 26-3-123. Beginning in 1976, the Wyoming Legislature required medical malpractice policy underwriters to also annually report all claims against, and all awards or settlements made on behalf of, health care providers. *Id.* § 26-3-124. See *id.* § 26-3-125 (requiring insurers offering coverage to governmental entities to make an additional report of the number of claims filed, amount paid, amount of premiums received, and the number of policies canceled).

36. 1983 Wyo. Sess. Laws ch. 186, §§ 1-4. The Competitive Rating Act effectively deleted the Wyoming Insurance Department's (W.I.D.) authority to review and approve rates for most lines of insurance. 5 STATE OF WYO. ANN. REP., *Insurance Dep't* 5 (1986) [here-



In 1988, the legislature amended this act, thereby vesting the Wyoming Insurance Department (W.I.D.) with authority to re-regulate lines of insurance after the W.I.D. Commissioner deemed them to have become "noncompetitive."<sup>37</sup>

*"Review of Prior Treatments"*

1. Wyoming Tort Reform: 1976 to 1985

The bulk of the Wyoming Legislature's response to the insurance crisis came in the area of tort reform.<sup>38</sup> In 1976, the Wyoming Legislature responded to the perceived medical malpractice crisis by passing legislation designed to limit plaintiffs' rights.<sup>39</sup> These statutes prohibited ad damnum clauses and decreased the time period under the statute of limitations for professional liability actions. The fol-

---

in after 1986 Ann. Rep.]. Deregulation also allowed Wyoming insurance companies to use any region in the country for purposes of experience to set rates. Insurance companies set prices based on underwriting risk. In turn, this underwriting risk is based on many factors. The historical data analyzing these factors is called "purposes of experience." For example, a Wyoming insurance company may use Florida for purposes of experience to underwrite obstetrical insurance. Because Florida's obstetrical malpractice claims in the 1980's were the highest in the country, obstetrical insurance during this period was virtually eliminated. Therefore, using Florida for purposes of experience, a Wyoming insurer could eliminate coverage in Wyoming even though there may have been no malpractice claims in Wyoming. 5 STATE OF WYO. ANN. REP., *Insurance Dep't 5* (1988) [hereinafter 1988 Ann. Rep.]. In this 1988 report, the W.I.D. responded once again to the "availability and affordability crisis," stating that reforms should be aimed at the insurance industry. The W.I.D. requested reinstatement of its authority over rates to ensure the rates charged are fair. The W.I.D. further requested to have the authority to dictate to the insurance companies which regions in the country can be used for purposes of experience. *Id.* Such reforms may be justified, since the use of foreign experience ratings earned Wyoming medical malpractice insurers 337.2% profit on premiums in 1985, while the average medical malpractice insurer earned 15.3% on premiums. *National Insurance Consumer Organization Analyzes Wyoming's Malpractice Rates*, THE COFFEE HOUSE (Wyo. Trial Lawyers Ass'n, Cheyenne, Wyo.), Spring 1988, at 21 [hereinafter *Wyo. Malpractice Rates*]. See 5 1986 Ann. Rep., *supra* note 36.

37. 1988 Wyo. Sess. Laws ch. 56, § 1. Under the amendment, a "noncompetitive market" is:

(D) any market in which:

- (I) There are less than five (5) insurers actually issuing a particular line of insurance as determined by the commissioner;
- (II) Three (3) insurers transact more than ninety percent (90%) of the business;
- (III) Two (2) insurers transact more than eighty percent (80%) of the business; or
- (IV) There is reasonable evidence, as determined by the commissioner, of collusion among insurers in setting prices.

WYO. STAT. § 26-14-103(a)(vii) (1991). When the W.I.D. Commissioner finds that a market is noncompetitive, he may then re-regulate those rates. *Id.* § 26-14-106(b) (1991). Moreover, the amendment empowers the W.I.D. Commissioner to dictate which regions of the country can be used for purposes of experience. *Id.* § 26-14-106(f)(iv) (1991).

38. *White v. State*, 784 P.2d 1313, 1319 (1989) (stating that most recent legislative reforms have been constructed to protect potential civil defendants).

39. *Id.*

lowing year, the Wyoming State Bar recommended new restrictions on contingent fees.<sup>40</sup>

The Wyoming Legislature restricted the use of ad damnum clauses by prohibiting plaintiffs from pleading the specific amount of damages sought.<sup>41</sup> The statute did not, however, limit the amount of damages which could be requested at trial. Some lawmakers believed that "requiring [plaintiffs] to declare damages sought before trial [could] contribute to unreasonably high [jury] awards. . . ."<sup>42</sup> The Wyoming Legislature also shortened the statute of limitations time period for negligence actions brought against persons "rendering . . . licensed or certified professional or health care services . . . ."<sup>43</sup> The statute decreased the time from four years to two years, and thereby expanded the existing protection for medical personnel.<sup>44</sup>

During the mid-1970's, the legal community also considered contingent fees as an area needing reform.<sup>45</sup> At the time, no clear standards had been adopted for fixing contingent fee percentages. The Wyoming Code of Professional Responsibility (Code) was the only rule which addressed contingent fees to any extent.<sup>46</sup> However, the Code was vague in this area and merely prohibited attorneys from collecting "an illegal or clearly excessive fee."<sup>47</sup> Then in 1977,

40. *Minutes of the Ann. Meeting of the Bd. of Comm'rs of the Wyo. St. Bar*, 13 LAND & WATER L. REV. 679, 681-83 (1978). These recommendations were later forwarded to the court rules committee. See *In the Matter of Amended Rules for the Org. and Gov't of the Wyo. St. Bar for Att'ys at Law of the St. of Wyo.*, 493-501 Wyo. XX (West 1973).

41. WYO. STAT. § 1-1-114 (1988). See also Wyo. R. Crv. P. 8. See Adler, *supra* note 27, at 685 n.10 (stating that most state legislatures enacted legislation revoking "the plaintiff's right to name a specific dollar amount in his . . . complaint").

42. *Committee Urges Court to Consider Recommendations About Coverage*, ROCK SPRINGS DAILY ROCKET-MINER (Rock Springs, Wyo.), Oct. 24, 1985, at 1.

43. WYO. STAT. § 1-3-107 (1988). "Licensed professionals" includes psychologists, lawyers and accountants in addition to physicians. "Health care services" includes numerous specialized vocations within the health care field. *Id.* The statute provided minors with a separate statute of limitations. WYO. STAT. § 1-3-107(a)(ii) (1988). Compare WYO. STAT. § 1-3-105(a)(iv)(C) (1988) (providing a four-year statute of limitations for most other negligence actions).

44. WYO. STAT. § 1-3-107 (1988).

45. *Wyoming St. Bar Minutes*, *supra* note 33, at 310-11. The Wyoming Medical Association proposed reducing contingent fees in all civil court cases to fifteen percent. *Id.*

46. WYO. CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-106 (1971). See *In the Matter of Amended Rules for the Org. and Gov't of the Wyo. St. Bar for Att'ys at Law of the St. of Wyo.*, 493-501 Wyo. XX (West 1973) (adopting the A.B.A. Model Code of Professional Responsibility, with amendments, as the ethical code governing Wyoming attorneys). Cf. WYO. RULES OF PROFESSIONAL CONDUCT, Rule 1.5 (1986). In 1986, the Wyoming State Bar adopted the Rules, thereby replacing the Code. Rule 1.5 addresses fee arrangements with even less specificity than Disciplinary Rule 2-106 of the Code.

47. WYOMING CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-106(A) (1971). A fee is not clearly excessive unless "a lawyer of ordinary prudence would be left with the definite and firm conviction that the fee is in excess of a reasonable fee." *Id.*, Disciplinary Rule 2-106(B) (emphasis added). The Code also provided recommendations for attorneys in setting fees. *Id.*, Ethical Considerations 2-16, 2-17, 2-18, and 2-20.

the Wyoming Supreme Court approved new rules specifically governing contingent fees.<sup>48</sup> These disciplinary rules limit the cases in which contingent fee agreements are appropriate, provide a process and standards for judicial review of contingent fee agreements, provide a schedule of circumstances under which a contingent fee agreement is presumed to be reasonable, and provide a list of factors to consider when determining whether a contingent fee agreement is reasonable.<sup>49</sup>

## 2. Wyoming Tort Reform: 1986 to 1989

By 1986, the medical malpractice insurance crisis had peaked again.<sup>50</sup> The Wyoming Legislature responded by enacting extensive reforms during the late-1980's.<sup>51</sup> These reforms were designed to discourage frivolous malpractice claims,<sup>52</sup> curb increases in prem-

48. See generally Rules Governing Contingent Fees for Members of the Wyoming State Bar (1977) (reprinted in the "Wyoming Court Rules" volume of the Wyoming Statutes in the "Attorneys" section).

49. *Id.*, Rules 3; 5(a), (b), (f), and (g) (1986). Contingent fees can reasonably range from one percent to fifty percent, depending on the circumstances. *Id.*

50. *Malpractice Premiums Skyrocketing*, *supra* note 12 (reporting that medical malpractice insurance could become unavailable if tort reforms are not enacted). See also Bovbjerg, *supra* note 15, at 503; But see Vincelette, *supra* note 9, at 209 (casting doubt on the existence of a medical malpractice crisis in the mid-1980's).

51. Among the 1986 reforms were numerous statutes enacted which are unrelated to the medical malpractice crisis and therefore beyond the scope of this comment. See *White v. State*, 784 P.2d 1313, 1320-21 (Wyo. 1989) (listing all the tort reform measures enacted by the 1986 Wyoming Legislature). One reform was the enactment of a dram shop negligence action. WYO. STAT. § 12-8-301 (1986). Although the Wyoming Supreme Court historically declined opportunities to judicially impose dram shop liability, it recanted in 1983 by creating a new negligence cause of action. *McClellan v. Tottenhoff*, 666 P.2d 408, 410 (Wyo. 1983). As a result of this decision, a person providing alcohol to a minor or an intoxicated person became liable for any damages caused by the person served. *Id.* at 412-13. In response to insurance companies' refusals to renew liability insurance policies for Wyoming bar owners, the legislature took action to prevent a broad interpretation of *McClellan*. WYO. STAT. § 12-8-301 (1986). See John Horsley, *Insurance Firms Leaving Bars High and Dry*, NORTHERN WYO. DAILY NEWS (Worland, Wyo.), June 6, 1985, at 3. The statute creates a rule of non-liability except where the defendant has violated Wyoming Statute section 12-5-301(a)(v) pertaining to drive-thru package liquor stores providing alcohol to minors and intoxicated persons, or the defendant has violated Wyoming Statute section 12-6-101(a) pertaining to persons providing alcohol to minors. WYO. STAT. § 12-8-301 (1986).

Other reforms were: (1) limits on liability for amateur rodeos sponsored by public schools and non-profit organizations, WYO. STAT. § 1-1-118 (1988); (2) elimination of liability for the executive decisions made by governmental agencies and non-profit organizations, WYO. STAT. § 1-23-107 (1988); and (3) elimination of governmental liability for defects in the design, construction, and maintenance of streets and highways, WYO. STAT. § 1-39-120 (1988). See also 1986 Wyo. Sess. Laws ch. 74, §§ 1-5 (creating a temporary state emergency self-insurance program available to both state and local governmental entities through June 30, 1988); 1986 Wyo. Sess. Laws ch. 81, §§ 1-5 (permitting local governments to participate in the state self-insurance program until the program expired on June 30, 1988); and 1988 Wyo. Sess. Laws ch. 6, § 2 (establishing a permanent self-insurance program).

52. WYO. STAT. § 1-14-128 (1988).

iums, and prevent insurance unavailability.<sup>53</sup> While some of the reforms targeted medical malpractice issues directly, others had an indirect effect. The direct reforms were designed to radically curtail medical malpractice litigation.<sup>54</sup>

The Wyoming Legislature joined the majority of states by creating a medical malpractice claim review panel.<sup>55</sup> The Wyoming Medical Review Panel Act required all potential claimants to submit their claims to a review panel prior to filing suit.<sup>56</sup> The goal of this act was to prevent plaintiffs from filing frivolous claims which would ultimately reduce the growth of medical malpractice premiums.<sup>57</sup> However, the Wyoming Supreme Court subsequently held that the Wyoming Medical Review Panel Act violated equal protection principles embodied in the state constitution.<sup>58</sup> As a result, Wyoming is

53. See *White v. State*, 784 P.2d 1313, 1320-21 (Wyo. 1989) (describing the overall efforts made by the 1986 Wyoming Legislature to make liability more predictable and make certain risks more insurable). See, e.g., Dennis Davis, *Dram Shop Bill Flies Through: Jones Insurance Bills Pass*, POWELL TRIBUNE (Powell, Wyo.), March 11, 1986; *Rep. Tom Jones' Bill on Insurance Reform Wins Introduction*, POWELL TRIBUNE (Powell, Wyo.), Feb. 2, 1986 (available through the University of Wyoming Coe Library newspaper clippings file under the heading "insurance").

54. One tort reform introduced which was intended to drastically affect medical malpractice litigation was a cap on non-economic damage awards. Although the Governor's Select Insurance Committee supported caps on damages, many Wyoming attorneys opposed the measure. *Governor's Insurance Panel Supports Ceiling*, NORTHERN WYO. DAILY NEWS (Worland, Wyo.), Jan. 29, 1986, at 12 (reporting the committee's endorsement of a bill to limit pain and suffering and punitive damage awards); *Survey: Lawyers Oppose Cap on Damages Awarded*, NEWS RECORD (Gillette, Wyo.), Aug. 18, 1987, at 3 (reporting a legislator's and several attorneys' opposition to limiting damage awards). Before the session ended, this bill was defeated. *Jones Insurance Bill Dies in House*, POWELL TRIBUNE (Powell, Wyo.), Feb. 25, 1986 (available through the University of Wyoming Coe Library newspaper clippings file under the heading "insurance"). The medical lobby has never been successful in lobbying for caps on damages. However, in 1988 the legislature passed a bill designed to limit noneconomic damages in cases against accountants. S.F. 0052, 49th Leg., 1st Sess., (1988). This bill was later vetoed by the Governor because it purportedly violated article 10, section 4 of the Wyoming Constitution. See *Constitutional Challenges to Tort Reform*, THE COFFEE HOUSE (Wyo. Trial Lawyers Ass'n), Spring 1988, at 5-6 [hereinafter *Constitutional Challenges*] (reporting case law from other jurisdictions which held damage caps unconstitutional).

55. WYO. STAT. §§ 9-2-1501 to -1511 (1988).

56. *Id.* The review panel consisted of a five member board, including two health care providers, two attorneys, and one lay member. *Id.*, § 9-2-1508(a). *But see Attorneys Oppose Rules for Review Panel*, ROCK SPRINGS DAILY ROCKET-MINER (Rock Springs, Wyo.), July 24, 1986, at 6 (criticizing the rules and composition of the medical review panel). See also Fredrick Lee Fisch, Comment, *An Obstacle Course to Court: A First Look at Wyoming's Medical Review Panel Act*, 22 LAND & WATER L. REV. 489, 490 (1987).

57. Fisch, *supra* note 56, at 496-97; see also *Medical Panel Achieves Goal of Reducing Claim Numbers*, NORTHERN WYO. DAILY NEWS (Worland, Wyo.), Dec. 18, 1987, at 12 (reporting the program's success in reducing the number of medical malpractice claims filed in state court).

58. *Hoem v. State*, 756 P.2d 780 (Wyo. 1988) (interpreting the Wyoming Constitution); see *Condemarin v. University Hosp.*, 775 P.2d 348, 356 (Utah 1989) (stating the proper standard of review for equal protection analysis of medical malpractice legislation).

now one of only a few states in which a court has found such legislation unconstitutional.<sup>59</sup>

A second statute also directly addressing medical malpractice liability fared better. This statute articulated the standard of care for health care providers.<sup>60</sup> In cases where the defending health care provider was nationally certified, the plaintiff's burden of proof was increased from a simple showing of negligence to a showing that the health care provider failed to act in accordance with the standard of care set forth by that specific national certifying board.<sup>61</sup> In cases where the health care provider was not nationally certified, the standard was defined as "the standard of care adhered to by health care providers in good standing performing similar health care services."<sup>62</sup>

The Wyoming Legislature also enacted reforms which had an indirect effect on medical malpractice issues. Under one statute, an attorney could be sanctioned, including payment of the opposing party's legal fees, for filing ungrounded pleadings, motions, and other papers.<sup>63</sup> Under another statute, the legislature authorized dismissal of an action where the defendant filed an affidavit of non-involvement in lieu of an answer.<sup>64</sup> However, the most significant indirect reform was the elimination of Wyoming's doctrine of joint and several liability.<sup>65</sup>

Prior to 1986, a successful plaintiff could recover all of his damages from a "deep pocket" who was found to be a mere one percent negligent under the doctrine of joint and several liability.<sup>66</sup> In 1986, joint and several liability in negligence actions was eliminated by amending the comparative negligence statute.<sup>67</sup> The amendment effectively limited a negligent party's payment to the portion of the total award for which he was directly responsible. Furthermore, the amendment placed the burden on the plaintiff to attempt recovery from all the potential defendants or bear the cost of the injury himself. The amendment's impact was significant be-

---

59. See generally Fisch, *supra* note 56, at 492-94 (discussing the constitutionality of mandatory medical review panels under various states' schemes); *Constitutional Challenges*, *supra* note 54, at 6.

60. WYO. STAT. § 1-12-601 (1988).

61. *Id.* § 1-12-601(a)(i).

62. *Id.* § 1-12-601(a)(ii).

63. WYO. STAT. § 1-14-128 (1988).

64. WYO. STAT. § 1-1-117 (1988).

65. 1986 Wyo. Sess. Laws ch. 24, §§ 1-2 (amending Wyoming Statutes section 1-1-109 and repealing sections 1-1-110 to -113). See *Joint Liability Bill Earns Praise*, NORTHERN WYO. DAILY NEWS (Worland, Wyo.), Mar. 12, 1986, at 16.

66. 1973 Wyo. Sess. Laws, ch. 28, § 1 (originally codified at WYO. STAT. § 1-7.2 (Supp. 1973)).

67. WYO. STAT. § 1-1-109 (1988).

cause Wyoming statutes previously imposed joint and several liability on numerous potential civil defendants.<sup>68</sup> Plaintiffs were now foreclosed from recovering the total amount of damages from a health care provider with deep pockets, thus discouraging plaintiffs from filing suit where the defending health care provider contributed only minimally to the plaintiff's injury.

Joint and several liability in negligence actions was also eliminated by repealing the statutory sections pertaining to contribution by co-defendants.<sup>69</sup> Under these sections, a plaintiff could collect the whole judgment from one defendant and leave this defendant with the burden of seeking contribution from the other negligent parties. The joint and several liability amendment rendered contribution unnecessary since each actor was now liable for only his percentage of fault.<sup>70</sup>

Since 1986, both the Wyoming Supreme Court and the Wyoming Legislature have taken measures which affected tort reform and indirectly impacted medical issues. In 1987, the Wyoming Supreme Court amended the Wyoming Rules of Civil Procedure to strengthen sanctions against attorneys who knowingly bring frivolous suits.<sup>71</sup> The amendment added teeth to the previous rule which had merely provided "appropriate disciplinary action" for "willful violations."<sup>72</sup> The rule now provides that the judge, upon one party's

68. Prior to the amendment, a number of Wyoming statutes imposed joint and several liability on medical personnel. WYO. STAT. § 17-13-303 (1989) (imposing joint and several liability on partners); WYO. STAT. § 1-31-120 (1988) (corporate trustees); WYO. STAT. § 17-16-204 (1989) (persons acting on behalf of a for-profit corporation prior to incorporation); WYO. STAT. § 17-19-204 (1992) (persons acting on behalf of not-for-profit corporations). Although the tort theory of joint and several liability was eliminated by the 1986 amendment to Wyoming Statutes section 1-1-109, sections 17-16-204 and 17-19-204 may impose joint and several liability based on a contract theory.

Other statutes which impose joint and several liability are WYO. STAT. § 17-10-118 (1989) (directors of cooperative marketing associations); WYO. STAT. § 17-15-133 (1989) (persons operating an unauthorized limited liability company); WYO. STAT. § 26-15-117(a) (1991) (insurers issuing joint or combination policies); WYO. STAT. § 26-27-120(a) (1991) (subscribers associated with reciprocal insurers); WYO. STAT. § 26-42-112 (1991) (life and health insurance affiliates in insolvency); WYO. STAT. § 17-4-122(b) (1989) (partners, officers, directors, persons controlling, and employees aiding persons engaged in the improper or illegal sale of securities); WYO. STAT. § 31-12-104(b) (1989) (automobile drivers who damage highways, streets or appurtenances through negligent or illegal acts); WYO. STAT. § 35-18-103(a)(vi) (1988) (mobile home warrantors); WYO. STAT. § 33-31-101 (1987) (warehouse bondsman); WYO. STAT. §§ 34.1-3-116(a),(b),(c) and 34.1-3-605(f) (1991) (makers, drawers, acceptors, indorsers, and accommodation parties of negotiable instruments); WYO. STAT. § 11-19-505 (1989) (persons owning or controlling sheep carrying infectious diseases); WYO. STAT. § 11-31-105 (1989) (owners of dogs which chase or kill livestock or other domestic animals).

69. WYO. STAT. §§ 1-1-110 to -113 (repealed).

70. See WYO. STAT. § 1-1-109 (1988).

71. Wyo. R. Civ. P. 11 (originally amended by order of the Wyoming Supreme Court and published in Amendment to Civil Procedure Rule 11, 730-736 Wyo. XIX-XX (1987)).

72. Cf. WYO. R. CIV. P. 11(a) (1957), reprinted in 397-401 Wyo. 25 (1966) (previous rule). Although this amendment requires judges to sanction plaintiff's counsel for bringing frivolous suits, defense counsel may similarly be sanctioned for frivolous motions during the course of a trial. *Id.*

request or upon his own initiative, must impose an appropriate sanction for a violation of the rule.<sup>73</sup>

In 1988, the Wyoming Legislature amended a statute which increased the maximum liability of governmental entities for the negligence of the physicians they employ.<sup>74</sup> Under this amendment, the amount a plaintiff could recover from a governmental entity increased from \$500,000 to \$1,000,000.<sup>75</sup> At first blush, the Wyoming Legislature appears generous. However, the legislature nonetheless opted to retain a ceiling on plaintiffs' awards rather than allowing unlimited recoveries.

### 3. Wyoming Tort Reform: 1990 to 1993

Although the organized lobbying groups who pushed to enact tort reforms have temporarily retreated, the Wyoming Legislature continues to grapple with an array of new tort reforms with each new session. In 1991, the Select Committee on Health Care addressed the perceived health care crisis and identified a number of solutions.<sup>76</sup> In its report, the committee included tort reform on the list of solutions.<sup>77</sup> The report further stated that the committee contemplated introducing a bill to reinstate a pre-trial medical review panel.<sup>78</sup> Although the traditional tort reform lobbyists have not launched a recent campaign, the legislature is receiving new tort reform measures "on an ad hoc" basis.<sup>79</sup> During the 1992 Legislative

73. Wyo. R. Civ. P. 11. These sanctions explicitly contemplate reasonable expenses, including attorney's fees. *Id.*

74. WYO. STAT. § 1-39-110(b) (1988).

75. *Id.* § 1-39-110(b). For a discussion of the equal protection aspects of this statute, see *Troyer v. State Dep't of Health and Social Servs.*, 722 P.2d 158 (Wyo. 1986). In *Troyer*, the court held that the trial court's failure to find that elevator installers were covered by the "health care provider" exception to governmental immunity was not erroneous. *Id.* at 162. The court further held that a \$500,000 limit on recoveries against health care providers did not violate Article 10, section 4 of the Wyoming Constitution or the Equal Protection Clause of the United States Constitution. *Id.* at 163-66.

76. Charles Scott, *Report From the Select Committee on Health Care*, 11 Wyo. Q. UPDATE 42, 45-46 (Fall 1991). The committee reported that two causes of higher health care costs were "[t]he record keeping side of defensive medical practices caused by the malpractice system" and the costs of "... defensive medicine associated with our malpractice system." *Id.*

77. *Id.* at 46. "There are some known solutions to the [medical] malpractice problems (restrictive caps on awards, limitations on punitive damages, pre-trial review panels), . . ."

*Id.*

78. *Id.* However, the committee has not yet introduced such a bill. The committee recognized that the Wyoming Constitution must be amended before reinstating the medical review panel. *Id.* Instead, the committee introduced several medical and insurance reforms at the 1993 Legislative Session. See, e.g., 1993 Wyo. Sess. Laws chs. 50, 55, 83, and 90; S.F. 0021, 52nd Leg., 2d Sess. (1993); S.F. 0025, 52nd Leg., 2d Sess. (1993); S.F. 0123, 52nd Leg., 2d Sess. (1993).

79. Interview with Pete Maxfield, Albany Cty. Senator, *Wyoming Legislature* (Mar. 17, 1993).

Session, the legislature considered numerous tort reforms.<sup>80</sup> Similarly, in 1993, the legislature was asked to review more tort reform legislation.<sup>81</sup> Of those bills considered, the legislature enacted a few even though the need for and effects of past reforms have never been fully evaluated.

#### 4. Expansion of Plaintiffs' Rights: 1974 to 1993

At a time when Wyoming's legislature and courts were curtailing certain aspects of plaintiffs' rights, certain other aspects have been expanding. These expansions included adoption of a comparative negligence statute and a selective abolition of governmental immunity.<sup>82</sup> Twenty years ago, the Wyoming law governing the attri-

80. In 1992, several bills indirectly impacting medical issues were filed. *Legislative Perspective*, *supra* note 11, at 6. See, e.g., H.J. Res. 0001, 51st Leg., 2d Sess. (1992) (medical injury-no fault compensation fund); H.J. Res. 0010, 51st Leg., 2d Sess. (1992) (caps on damages); H.B. 0128, 51st Leg., 2d Sess. (1992) (punitive damages); H.B. 0103, 51st Leg., 2d Sess. (1992) (limitations on contingent fees); and H.B. 0191, 51st Leg., 2d Sess. (1992). Each of these bills was defeated. Other general tort reform bills met a similar fate. See, e.g., H.B. 0136, 51st Leg., 2d Sess. (1992) (foster parent immunity); H.B. 0202, 51st Leg., 2d Sess. (1992) (equine activities). *But see* WYO. STAT. § 17-19-830 (1992). In 1992, the legislature enacted a statute which granted immunity to individuals serving as board members for non-profit corporations. *Id.* Although some people may view this legislation as a new tort reform, the legislature merely recodified previously existing statutes. *Compare* WYO. STAT. § 1-23-107 (Supp. 1992). The previous statute provided immunity to both board members of non-profit corporations and government officials. After recodification, this statute only applies to government officials.

81. During the 1993 Wyoming Legislative Session, the legislature did not consider any tort reforms relating to medical malpractice. However, the legislature did consider numerous non-medical tort reforms and enacted three of them. See, e.g., 1993 Wyo. Sess. Laws ch. 47, § 1 (limiting access to the courts in worker's compensation co-employee suits to only cases where the injury results from a co-employee's intentional act); 1993 Wyo. Sess. Laws ch. 162, § 1 (limiting liability of those involved in equine activities); 1993 Wyo. Sess. Laws ch. 229, § 1 (creating a medical panel to review expenses in worker's compensation cases). The legislature also considered other tort reforms relating to non-medical interests which were subsequently defeated. See, e.g., H.B. 0013, 52nd Leg., 1st Sess. (1993) (proposing mandatory non-binding mediation); S.F. 0093, 52nd Leg., 1st Sess. (1993) (proposing to drastically rework the worker's compensation statute relating to physical impairment, vetoed by the governor). *But see* 1993 Wyo. Sess. Laws ch. 65, § 1 (extending the Wyoming Governmental Claims Act to cover the negligent acts of search and rescue personnel).

82. Four significant changes unrelated to the medical malpractice crisis have also occurred. First, the Supreme Court allowed tort claims against co-employees rather than requiring the Wyoming Worker's Compensation system to provide the exclusive remedy. *Mills v. Reynolds*, 837 P.2d 48 (Wyo. 1992) [hereinafter *Mills II*]. See Stephanie Materi, Casenote, *The Dilemma of Co-Employee Immunity and the Confusion in the Aftermath of Mills II*, 28 LAND & WATER L. REV. 271 (1993). The holding in *Mills II* expanded plaintiffs' rights and opened the door for numerous plaintiffs to file claims in the state courts. *Id.* at 287. However, in 1993, the Wyoming Legislature closed the door in the majority of such cases by limiting availability of this procedure to only those cases involving intentional acts by a co-employee. 1993 Wyo. Sess. Laws ch. 47, § 1 (amending Wyoming Statute section 27-14-104(a)). Second, the Wyoming Supreme Court expanded plaintiffs' rights by limiting the doctrine of parental immunity. *Dellapenta v. Dellapenta*, 838 P.2d 1153, 1157 (Wyo. 1992). The court decided that whether a parent was negligent in failing to fasten a child's seatbelt was a jury question. *Id.* at 1161. The holding in *Dellapenta* may have opened the door to



bution of fault in negligence actions was radically changed, resulting in a significant impact on medical malpractice claims. In 1973, the Wyoming Legislature directly affected negligence actions by amending the contributory negligence statute in favor of comparative negligence.<sup>83</sup> The amendment effectively increased the number of plaintiffs who were entitled to compensation.<sup>84</sup> The new comparative negligence statute made it possible for plaintiffs to recover in situations where a plaintiff's negligence was "not as great as" the defendant's negligence.<sup>85</sup>

In 1979, the Wyoming Legislature again significantly expanded plaintiffs' rights by enacting the Wyoming Governmental Claims Act.<sup>86</sup> Under this act, an injured plaintiff could sue the State or a local governmental entity for damages resulting from the negligence of public employees operating a public hospital or providing public outpatient health care. In addition, the amendment made the negligence of health care providers employed by a governmental entity actionable.<sup>87</sup>

total abrogation of parental immunity, which would greatly expand certain plaintiffs' rights, thus increasing the number of actions filed. Finally, the Wyoming Legislature increased the maximum amount to \$2,000 that parents could be held liable for property damage caused by their children. WYO. STAT. § 14-2-203 (Supp. 1992). Previously, the statute limited the maximum amount of damages to \$300. WYO. STAT. § 14-2-203(b) (1988). This may have been an adjustment for inflation rather than an actual expansion of plaintiffs' rights.

83. 1973 Wyo. Sess. Laws ch. 28, § 1. See also Glenn E. Smith, Comment, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 597 (1973).

84. Smith, *supra* note 83, at 600. Prior to 1973, the contributory negligence doctrine barred plaintiffs from any recovery who were found to be a mere one percent negligent.

85. 1973 Wyo. Sess. Laws ch. 28, § 1. This legislation was first codified at WYO. STAT. § 1-7.2(a) (Supp. 1973).

86. WYO. STAT. §§ 1-39-101 to -119 (1988) (providing a new avenue of compensation for injured plaintiffs by selectively abolishing sovereign immunity). See *Oyler v. State*, 618 P.2d 1042 (Wyo. 1980) (acting as a catalyst for the Governmental Claims Act adopted by the Wyoming Legislature in 1979). But see WYO. STAT. § 1-39-120 (1988) (re-enacting governmental immunity for defects in the design, construction, and maintenance of streets and highways). See also discussion *supra* note 51 (discussing the re-enactment as a part of the 1986 tort reform package). Prior to 1979, the Wyoming Supreme Court displayed disenchantment towards sovereign immunity. *White v. State*, 784 P.2d 1313, 1319-20 (Wyo. 1989) (providing the historical background leading to the partial abrogation of the governmental immunity doctrine). See generally Lawrence J. Wolfe, Comment, *Wyoming's Governmental Claims Act: Sovereign Immunity with Exceptions—A Statutory Analysis*, 15 LAND & WATER L. REV. 619 (1980). The Governmental Claims Act created a flurry of litigation and exposed the State and local governments to enormous litigation and settlement expenses. The increased exposure prompted the Wyoming Legislature to make additional appropriations and the local governments to examine their current insurance coverage. Because of an increased caseload, the Wyoming Legislature appropriated an additional \$750,000 to the Attorney General's Office to cover litigation and settlement expenses. From 1979 to 1988, the Attorney General's Office defended eighty-six lawsuits claiming in excess of 100 million dollars in damages. *White*, 784 P.2d at 1321-22.

87. WYO. STAT. §§ 1-39-109 to -110 (1988). All employees of the various county hospitals, public health facilities, University of Wyoming supported health facilities, and the state hospital are affected by this legislation. Of the twenty-five critical care hospital facilities in Wyoming, twenty are presently publicly funded. Telephone interview with Robert Kidd, Pres., *Wyo. Hosp. Ass'n* (Feb. 15, 1993). These public institutions and other health care

## DISCUSSION

A thoughtful discussion of Wyoming tort reform must answer two fundamental questions. First, did Wyoming experience a medical malpractice litigation crisis justifying past tort reforms? To answer this question, the discussion turns to Wyoming statistics and statistical compilations from other states. Second, what were the effects of these tort reforms? In answering this second question, the discussion looks to statistics from other states to hypothesize the likely effects of tort reform in Wyoming. Based on these answers, this discussion concludes by proposing a future approach to tort reforms in Wyoming.

*Did Wyoming Experience a Medical Malpractice Litigation Crisis?*

Determining whether tort reforms were necessary in Wyoming from 1975 to 1993 involves analyzing whether litigation crises actually existed. Litigation crises are commonly caused by two separate phenomena: drastic increases in tort litigation and excessive jury awards.<sup>88</sup>

## 1. Did Tort Litigation Increase?

When the Wyoming Legislature enacted tort reforms in the 1970's and 1980's, it was provided with little statewide empirical data to demonstrate whether the tort system had caused either a litigation crisis or a medical malpractice insurance crisis.<sup>89</sup> Since 1986,

---

facilities in Wyoming presently employ 617 physicians, 5209 nurses, 34 anesthesiologists, and numerous other medical personnel. Telephone interview with Rebecca Sabado, Licensing Officer, *Wyo. Bd. of Medicine* (Feb. 16, 1992) (data on doctors and anesthesiologists licensed and practicing in Wyoming accurate as of Feb. 8, 1993); telephone interview with Becky Wilson, Licensing Specialist, *Wyo. Bd. of Nursing* (Feb. 16, 1993) (data on nurses licensed in Wyoming accurate as of Dec. 1, 1993). Excluded from the twenty-five facilities were the Wyoming State Hospital and the various other non-critical care facilities directly funded by the legislature. Telephone interview with Robert Kidd, Pres., *Wyo. Hosp. Ass'n* (Feb. 15, 1993).

Certain sections of the act also allow injured persons to sue the state or local governmental entity under certain circumstances. *See e.g.*, WYO. STAT. § 1-39-105 (1988) (providing an exception to governmental immunity when damages are caused by the negligence of a public employee while operating a motor vehicle); WYO. STAT. § 1-39-106 (1988) (while providing maintenance for a building, recreational area or park); WYO. STAT. § 1-39-107 (1988) (while operating an airport); WYO. STAT. § 1-39-108 (1988) (while operating a public utility or service); WYO. STAT. § 1-39-112 (1988) (while acting within the scope of his duties as a police officer).

88. *See generally* HENSLER et al., *supra* note 1, at 5-24.

89. *See* DANZON, *supra* note 3, at 2 ("Participants in the debate over tort reform did not have available to them then, nor do they now, much empirical evidence to resolve the conflicting views of what caused the crisis of the mid-1970s and, more generally, of how the liability and insurance mechanisms operate in practice."); *Ed Won't Sign*, *supra* note 20 (stating that the 1980's reforms were passed with little debate and supporting the inference that little research went into the decision).

crude statistical data have become available to aid in determining whether a tort litigation crisis existed in Wyoming.<sup>90</sup> Generally, these statistics show that the annual number of Wyoming civil court cases filed decreased from 1984 to 1990 as Wyoming's population declined and suggest that Wyoming did not experience a litigation crisis in the 1980's.<sup>91</sup> However, these crude statistics are inadequate for a detailed tort reform analysis for two reasons. First, these statistics include significant aberrations. For example, civil filings inexplicably

90. These data, when combined with other Wyoming statistics, can be used to generate meaningful comparisons.

Wyoming Civil Filing Trend 1984-1990:

<u>YEAR</u>	<u>FILINGS*</u>	<u>TOTAL CIVIL POPULATION</u>	<u>FILINGS PER TOTAL POPULATION</u>	<u>PERCENTAGE CHANGE</u>
1984	11,278	511,000	2,207	
1985	9,429	509,000	1,852	-16%
1986	9,694	507,000	1,912	+03%
1987	7,587	490,000	1,548	-19%
1988	7,340	479,000	1,532	-01%
1989	7,907	474,000	1,668	+09%
1990	10,907	454,000	2,369	+42%

\*"Total civil filings" covers all civil claims filed, including tort claims, divorces, juvenile cases, and contract-based claims, as well as criminal appeals and post-conviction remedy proceedings. Total civil filings statistics compiled from COURT STATISTICS PROJECTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 1990 (WILLIAMSBURG, VA: NATIONAL CENTER FOR STATE COURTS, 125, 1992) [hereinafter *Court Statistics Projects*]; COURT STATISTICS PROJECTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 1989 (WILLIAMSBURG, VA: NATIONAL CENTER FOR STATE COURTS, 117, 1991); COURT STATISTICS PROJECTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 1988 (WILLIAMSBURG, VA: NATIONAL CENTER FOR STATE COURTS, 129, 1990); COURT STATISTICS PROJECTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 1987 (WILLIAMSBURG, VA: NATIONAL CENTER FOR STATE COURTS, 105, 1989); COURT STATISTICS PROJECTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 1986 (WILLIAMSBURG, VA: NATIONAL CENTER FOR STATE COURTS, 173, 1988); COURT STATISTICS PROJECTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 1985 (WILLIAMSBURG, VA: NATIONAL CENTER FOR STATE COURTS, 234, 1987); population figures provided by *Court Statistics Projects*, 315 [hereinafter *chart*]. Filings per 100,000 population and percentage changes computed by the authors.

91. See *chart*, *supra* note 90. More specifically, Wyoming's total civil filings declined sixteen percent in 1985. Ironically, this decline occurred immediately prior to the time the Wyoming Legislature was responding to the perceived medical malpractice insurance crisis and was enacting numerous tort reforms. *Id.* at \*\*. Nationwide, civil filing rates "... increased slightly during this period, but fewer courts were reporting significant increases from 1985 to 1986 . . ." Craig Boersema et al., *Tort Litigation in the State Trial Courts, 1981 to 1986*, 13 STATE CT. J. 4, 5 (Winter 1989). The high correlation between changes in tort litigation and population changes is consistent with statistics in other states. *Id.* See Brian J. Ostrom, *Changing Caseloads: The View From The State Courts*, 16 STATE CT. J. 11, 12 (Spring 1992). Reduced variations in population-adjusted filing rates clearly show that caseload levels in the state trial courts are correlated highly with population. Yet the lack of a perfect correlation between caseload volume and population suggests that other social, economic, and legal forces affect filing rates in the states. *Id.*

increased forty-two percent in 1991.<sup>92</sup> Second, these statistics are not broken down in a fashion that makes them helpful to a tort reform analysis. To be meaningful, civil court filing statistics should be separated into tort categories.<sup>93</sup> Since present Wyoming statistics are inadequate, this comment must discuss empirical analyses based on other states' statistics and extrapolate those results to Wyoming.

Statistical compilations from 1981 to 1986 can be used to identify whether a litigation crisis existed nationwide.<sup>94</sup> Unfortunately, when past statistics were previously analyzed, conflicting reports resulted since the methods and categories of analysis were not standardized. For example, tort reform proponents and opponents used the same statistics, but reached diametrically opposed conclusions.<sup>95</sup> During this time, a Department of Justice study reported a litigation explosion and linked it to the medical malpractice insurance crisis.<sup>96</sup> This report fueled the confusion because it failed to explain the paradox arising from tort reform proponents' and opponents' differing statistical analyses. Moreover, numerous state legislatures re-

92. See chart, *supra* note 90. It will be several years before data is sufficient to explain whether this increase is an aberration or a trend.

93. HENSLER et al., *supra* note 1, at 3. Only recently have statistics been compiled which are helpful in deciding whether the number of tort claims filed in Wyoming courts are actually exploding. The Wyoming Court Coordinator recently began breaking down civil filings by tort category and will make the information available for the first time in 1993. Telephone interview with Robert Duncan, Wyo. Ct. Coordinator (Feb. 26, 1993).

94. See Sanders & Joyce, *supra* note 3, at 212-14 (discussing the 1986 *Dep't of Justice Rep.*).

95. HENSLER et al., *supra* note 1, at 2; see *supra* text accompanying notes 16-32 (discussing the conflicting views of tort reform proponents and opponents).

96. Sanders & Joyce, *supra* note 3, at 212-14. The Department of Justice report concluded tort law was causing the insurance crisis and recommended eight changes:

1. permit no expansion of strict liability
2. take a number of actions, including greater deference to government agency standards and findings, to assure that decisions about causation rest upon the best available scientific evidence.
3. eliminate joint and several liability.
4. limit non-economic damages by placing a \$100,000.00 cap on compensation for general damages (pain and suffering, and mental anguish and punitive damages combined).
5. allow for periodic payment of future economic damages.
6. limit the application of the collateral source rule except in situations in which the insurer is subrogated to that portion of the plaintiff's claim
7. schedule plaintiff attorney contingency fees.
8. develop alternative dispute resolution mechanisms.

The Department of Justice report also suggested other changes:

1. retreating from strict liability in products liability cases.
2. restricting the doctrine of *res ipsa loquitur*.
3. punishing lawyers who bring frivolous suits or raise defenses and reinstating immunity provisions.

*Id.* at 217 (citing 1986 *Dep't of Justice Rep.*, *supra* note 26, at 62-75). The Department of Justice's study is now severely criticized because it relied on federal court statistics rather than relying on state court statistics. Federal tort filings are a very small part of total tort filings. *Id.* While federal torts did grow dramatically, the growth was probably the result of mass tort claims. *Id.* (citing 1986 *Dep't of Justice Rep.*, *supra* note 26, at 491-510).

lied on the Department of Justice report and enacted reforms without recognizing the study's flaws.

The first report to explain the statistical paradox was published by the RAND Institute for Civil Justice (I.C.J.) in 1987.<sup>97</sup> The I.C.J. found that what had been previously regarded as a solitary tort system was in reality a system with "three [categories] of torts, each with its own distinct class of litigants, attorneys, and legal dynamics."<sup>98</sup> The I.C.J. report divided total tort claims into ordinary accidents, high stake torts, and mass latent injury torts (mass torts).<sup>99</sup> This division was crucial to any accurate statistical analysis of growth in claims filed since increases in the number and size of judgments varied greatly among the three categories.<sup>100</sup> Because the earlier Department of Justice report did not separate one tort category from another, it did not accurately reflect the categorical growth variances.<sup>101</sup>

In contrast to the Department of Justice's conclusion, the I.C.J. reported that malpractice litigation was merely growing moderately and was not exploding.<sup>102</sup> What was exploding, however, was the phenomenon of mass torts.<sup>103</sup> Courts in certain locations were overwhelmed because mass tort claims tended to surface abruptly in large numbers and were geographically concentrated.<sup>104</sup> These mass torts temporarily distorted court caseload statistics, creating the illusion of a long-term litigation crisis.<sup>105</sup> High stake torts and mass torts were not the source of any tort system growth beyond that corresponding to population increases.<sup>106</sup> The Department of Justice report failed to account for the distorting effects of mass torts when

97. HENSLER et al., *supra* note 1, at 2.

98. *Id.* at 2-3.

99. *Id.* at 30-31. The I.C.J. report describes ordinary accidents as typical automobile accident cases. It differentiates high stake torts as those cases wherein the plaintiffs often seek larger judgments, such as malpractice and products liability cases. Finally, "mass torts" describes on-going litigation with multiple claimants, such as Dalkon Shield and asbestos litigation. *Id.* at 11.

100. *See id.* at 30. The I.C.J. concluded that each side was describing different parts of the tort system without categorizing by the type of tort. *Id.* at 34. Consequently, those states who relied upon the Department of Justice made decisions based on a flawed analysis.

101. Sanders & Joyce, *supra* note 3, at 229-32.

102. HENSLER et al., *supra* note 1, at 11. This conclusion is reached by factoring out the effects of inflation, population growth, and overall shifts in population from rural to urban settings. *Id.* at 6.

103. *Id.* at 10. Mass torts made their debut in 1981 as the first of many asbestos and Dalkon Shield claims were filed. *Id.*

104. *Id.* at 10-11.

105. *Id.* at 10. An illusion of an explosion results because mass torts tend to be highly concentrated and statutes of limitations can cause a large number of people to file claims at the same time. Therefore, courts in certain locations can become temporarily hectic and overwhelmed. *Id.*

106. *See id.* at 30. The I.C.J. study showed that ordinary personal injury torts such as auto cases were "... growing slowly in frequency and cost." *Id.*

it determined that medical malpractice litigation was exploding.<sup>107</sup>

Mass tort distortion outside Wyoming may also have spurred insurance availability and affordability problems here in Wyoming. Wyoming insurance companies were using other regions for purposes of experience.<sup>108</sup> Data from other regions, biased by mass tort litigation, may have caused lawmakers, insurers, and the public to accept the insurance industry's proposition that medical malpractice litigation was exploding in Wyoming.<sup>109</sup> This same biased data also provided the basis for Wyoming insurers to raise prices and limit coverage in the same fashion as in other, more litigious, areas.

In retrospect, the increase in Wyoming medical malpractice insurance premiums did not result from an explosion in the number of tort claims filed in Wyoming courts. Understanding that torts must be categorized to accurately assess their growth should prevent misidentifying this part of a litigation crisis in the future.<sup>110</sup> Statistics compiled and categorized as either ordinary accident, malpractice, product liability or mass tort are most helpful in determining growth trends.<sup>111</sup> Wyoming reporting practices have recently improved because, in 1992, the Wyoming Court Coordinator began to categorize civil filings.<sup>112</sup> These better reporting practices will provide the data

107. Sanders & Joyce, *supra* note 3, at 232.

108. See 1988 Ann. Rep., *supra* note 36.

109. *Id.* In 1988, torts were categorized for the first time in Wyoming. Automobile torts, not mass torts, make up the majority of all Wyoming tort cases filed. Auto torts comprised thirty-one percent of all tort claims filed. Jury Verdict Research, Inc., *Personal Injury Verdict Survey, Wyoming edition* (Jury Verdict Research, Inc.) (1988). Nationally, the tort caseload was also dominated by auto torts, accounting for between forty and sixty percent of tort claims filed in urban areas. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?*, 140 U. PA. L. REV. 1147, 1208 (1992); see HENSLER et al., *supra* note 1, at 8-9. Any perceived rise in Wyoming tort filings was probably a result of ordinary accidents rather than malpractice claims. Therefore, it is likely that auto torts accounted for the largest percentage of any civil litigation increase during the 1980s.

110. Ostrom, *supra* note 91, at 12. It is also important to categorize all civil filings. This was seen when nationally, an analysis of total civil filings concluded "the increase in 1986 filings can be attributed to increased litigation in the general civil area-torts, contracts, and real property rights-and not just torts". Boersema et al., *supra* note 91, at 14. An analysis of 1984-1990 filings shows this trend is continuing. The most dramatic increases in the civil caseload tend to be for real property rights and contract cases, not torts. Ostrom, *supra* note 91, at 14. The increased litigation in all civil areas further corroborates the theory that civil filings are directly related to population. *Id.* at 12.

111. Boersema et al., *supra* note 91, at 4-5. Considering torts as a percentage of total civil filings provides another basis for measuring the amount of change in tort litigation whether torts are becoming a larger component of state court caseloads. Additionally, torts can then be compared to general civil cases, including real property rights and contract cases, to determine if they are increasing more sharply and more consistently. See Adler, *supra* note 27, at 731 n.218. To help accomplish tort categorization the Health Care Quality Improvement Act (HCQIA) was amended in 1987 to provide researchers access to the Department of Health and Human Services data bank which collects data on payouts and medical malpractice claims. 42 U.S.C. § 11137(b)(1).

112. See *supra* text accompanying note 93. The new compilation method categorizes claims into the various tort categories, as well as categories such as property actions, tort actions, contract actions, etc.

necessary to determine whether increases in Wyoming insurance rates can be justified by actual statewide injury and damage patterns.

## 2. Were Jury Awards Excessive?

At first glance, anecdotal stories of seemingly outrageous jury awards appear to support a litigation crisis theory.<sup>113</sup> An I.C.J. study of jury awards over a twenty-five year period confirmed the existence of substantial growth in jury awards nationwide. This study further indicated an increased probability that a plaintiff would recover.<sup>114</sup> These findings can be explained, however, because juries were also seeing cases involving progressively more serious injuries and larger medical expenses.<sup>115</sup>

The I.C.J. study also found that juries were awarded more money in either a product liability or a malpractice suit or action than in auto accident suits for injuries of the same degree of severity.<sup>116</sup> However, a recent federal study of damage awards in five states found that damage awards were not "erratic or excessive," but were reasonably aligned with plaintiffs' injuries.<sup>117</sup> A small fraction of tort cases do receive excessive damage awards, and most of the overall growth in the statistical average tort claim payment

113. Bovbjerg, *supra* note 15, at 507.

114. HENSLER et al., *supra* note 1, at 17-19. The I.C.J. study consisted of data from Cook County, California. In that area, average awards adjusted for inflation increased from \$59,000 during the years 1960-1964 to \$187,000 during the years 1980-1984. In the 1960's, plaintiffs won about one-fourth of product liability and medical malpractice cases. In contrast, plaintiffs won about one-third of such cases in the 1970's and half of such cases in the 1980's. *Id.*

115. *Id.* at 21. This 1986 I.C.J. study based its findings solely on jury awards in malpractice and products liability litigation over the twenty-five year period ending in 1984. Therefore, this study is free of the distorting effects of mass tort litigation.

116. *Id.* Whether this suggests juries are responding to the "deep pocket" effect or are concerned with sending a deterrence message is unknown. *Id.* The I.C.J. study also confirmed that, when appealed, the largest awards were routinely reduced on average by one half. *Id.* at 22 (citing MICHAEL G. SHANLEY & MARK A. PETERSON, POSTTRIAL ADJUSTMENTS TO JURY AWARDS (RAND, Institute for Civil Justice, R-3511-ICJ)). This "study involved 900 cases, tried between 1982 and 1984 in Cook County, in San Francisco and in a group of smaller California cities, including urban, suburban, and rural communities. The sample included a full range of verdicts, from million-dollar awards to defense verdicts. Eighty percent of verdicts were left unchanged. The reduced cases had awards more than three times the size of the sample average, and involved reductions of almost half the original award." *Id.*

117. James Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Product Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L. REV. 479, 482 (1990) (*discussing*, United States General Accounting Office Study, Product Liability: Verdicts and Case Resolution (September 1989)). This study also showed that since the mid-1980s appellate courts have increasingly ruled in favor of defendants in product liability cases and have reviewed punitive damage awards with greater scrutiny - in many cases, reducing them. This indicates there is self correction in the legal process for awards. *Id.*

amount is attributable to these excessive awards.<sup>118</sup> These few large awards have distorted tort damage figures in a manner similar to the bias mass tort growth brought to tort litigation.

Any Wyoming statistical analyses available during the 1986 peak of the insurance crisis were inadequate to demonstrate whether excessive jury awards had caused a litigation crisis. For example, one study found that only eleven personal injury awards have exceeded one million dollars since 1962.<sup>119</sup> However, this study lacked the information necessary to determine whether the eleven awards included medical malpractice cases or to compute what the average medical malpractice award was in Wyoming. Second, although the Wyoming Insurance Department compiled claim payout figures from 1985 through 1991, Wyoming jury award information prior to 1985 was sparse.<sup>120</sup> Moreover, neither of these studies were available in 1986 when the Wyoming Legislature was enacting tort reforms. Since Wyoming data was either inadequate or unavailable prior to 1986, extrapolation using out-of-state data is necessary. The data from other states suggests that Wyoming did not experience a litigation

---

118. MARK A. PETERSON & GEORGE L. PRIEST, *THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979*, 22 (RAND, Institute for Civil Justice, R-2881-ICJ 1982). However, jury verdicts are not the best indicator of insurance claim payments because the largest jury verdicts are often reduced by the trial judge or on appeal. Saks, *supra* note 109, at 1280-81. One report states that jury verdicts were reduced in fifteen percent of cases and increased in less than three percent of cases. Overall, "[d]efendants paid an average of [seventy-one percent] of what the juries awarded [footnote omitted]. The larger the awards, the sharper the reductions. . . ." *Id.* Unfortunately, most studies base their findings on jury verdicts rather than post-adjustment judgments. *Id.* at 1281 n.520.

119. Wyoming has the 42nd lowest average verdict in the country. Jury Verdict Research, *Personal Injury Verdict Survey, Wyoming edition* (1988).

120. Claim payout figures include both jury awards and settlement payment figures. The year 1985 appeared problematic for medical malpractice insurers. In that year, claim payouts (direct losses paid) exceeded direct premiums earned (total premiums charged in a year by malpractice insurers). Claim payouts did not remain a problem for medical malpractice insurers either. From 1985 to 1991, claim payouts have ranged from 3.26 million to 5.28 million dollars with a mean average of 3.68 million dollars. However, direct premiums earned have ranged from 3.84 million dollars to 9.76 million dollars with a mean average of 9.16 million dollars. While direct premiums earned have tripled, the number of doctors in Wyoming has not. In fact, that number has remained almost constant.

Year	Dr. Pop.	(in dollars)	
		Dir. Prem. Earned	Dir. Losses Pd.
1991	633	8,118,101	3,871,724
1990	630	9,752,853	4,651,331
1989	645	9,767,036	3,932,486
1988	645	9,662,554	4,708,076
1987	637	8,753,330	4,109,232
1986	650	5,971,974	3,253,109
1985	640	3,841,975	5,282,109

Interview with Lonny Warren, Senior Examiner, Wyo. Insurance Dep't (Feb. 11, 1993) (providing raw statistical data).



crisis as a result of excessive jury awards or settlements.<sup>121</sup> Instead, the size of claim payments in Wyoming probably exhibited normal growth.<sup>122</sup>

In summary, no litigation crisis existed in Wyoming in the last twenty years. Based on the analyses of tort filing statistics and jury awards, the medical malpractice insurance affordability and availability problems were not caused by a malpractice litigation crisis in Wyoming.<sup>123</sup> Insurance companies did not consider the biasing effects of mass torts or the jury award distortions felt in other parts of the country when computing Wyoming insurance rates or limiting coverage. Although tort filings, insurance claims, and payouts have continued to rise over the decades, this rise cannot be considered abnormal growth and it alone did not precipitate the medical malpractice insurance crisis.<sup>124</sup>

### *What Were the Effects of Wyoming Tort Reforms?*

To answer the second question posed by this discussion, this section first discusses the effects nationally of all tort reform measures, whether or not enacted in Wyoming. The Wyoming Legislature did not enact all of the possible tort reforms. The section then hypothesizes the likely effects of Wyoming tort reforms using national data.

Only recently has a long-term empirical analysis of the 1970's reforms become available.<sup>125</sup> Surprisingly, the effect of certain reforms may be exactly the opposite of what was intended. Other reforms have had no effect at all.

Generally, tort reforms limit plaintiffs' rights by reducing claim frequency, increasing the certainty that a plaintiff would not win and reducing claim severity.<sup>126</sup> Legislatures attempted to reduce claim frequency by limiting plaintiff's access to the courts through reforms such as binding arbitration, pretrial screening panels, shortening sta-

121. HENSLER et al., *supra* note 1, at 18-19; Henderson & Eisenberg, *supra* note 117, at 482.

122. HENSLER et al., *supra* note 1, at 18-19; Henderson & Eisenberg, *supra* note 117, at 482.

123. Ken Myers, *Professor's Study of Tort System Finds No 'Litigation Explosion'*, THE NAT'L L.J. (New York, N.Y.), Sept. 7, 1992, at 4.

124. See *supra* note 27 and accompanying text discussing insurance market cycles and medical quality as additional causes of the medical malpractice insurance crisis.

125. Sloan, *supra* note 26, at 664. It is too early to thoroughly analyze the effects of the 1980's reforms. Only since 1989 have the 1970 reforms been analyzed using pooled cross-sectional data prior to, and well after, the 1970 reforms were implemented.

126. Bovbjerg, *supra* note 15, at 513. Plaintiffs rights are impacted by limiting their court access, limiting their awards and increasing their difficulty or costs for bringing a claim. These limitations hoped to achieve the three goals of reducing claim frequency, reducing claim severity and increasing the certainty that a plaintiff would not win. *Id.*

tutes of limitations and eliminating the collateral source rule.<sup>127</sup> Reforms measures aimed at increasing plaintiffs' difficulty or costs of winning were usually attempted through reasserting a professional standard of care or strengthening expert witness requirements.<sup>128</sup> Finally, legislatures limited the size and severity of recoveries with reforms such as ad damnum restrictions, caps on damage awards, and eliminating the collateral source offset rule.<sup>129</sup>

Of all the various measures enacted to reduce claim frequency, only three could be empirically linked to actual changes in claim frequency.<sup>130</sup> Two reforms had the desired effect, one reform had the opposite effect of what was expected.<sup>131</sup> Reductions in the statute of limitations for medical malpractice cases and the elimination of the collateral source exclusion<sup>132</sup> generally decreased claim frequency, particularly when those measures were applied in concert.<sup>133</sup> Establishing binding arbitration systems tended to increase the number of claims significantly.<sup>134</sup> Smaller or weaker claims which ordinarily would not be litigated due to cost/probability of success constraints were often pressed in the more straightforward, less costly arbitration environment.<sup>135</sup> No other specific reform measure including pretrial screening panels showed an empirical link to any change in claim frequency.<sup>136</sup>

Increasing the cost and difficulty of bringing a successful claim was another intent of some tort reform measures.<sup>137</sup> The underlying

127. *Id.*

128. *Id.*

129. *Id.*

130. Patricia Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 *OHIO ST. L.J.* 413, 416 (1987).

131. *Id.*

132.

The collateral source rule prohibits the introduction into evidence of any indication that the patient has already been compensated by a source other than the defendant. Although the scope of the statutes concerning the collateral source rule vary considerably, modifications of this rule have taken three basic forms. First, some states simply allow evidence of compensation to be presented to the jury. Second, in some states the jury is required to make a mandatory offset; the award is reduced by the amount from the collateral source. Third, a jury is permitted, but not mandated, to reduce the award by the amount of the collateral source.

Drucilla K. Barker, *The Effects of Tort Reform on Medical Malpractice Insurance Markets: An Empirical Analysis*, 17 *J. OF HEALTH, POL., POL'Y & L.* 143, 149 (Spring 1992).

133. DANZON, *supra* note 3, at 416. Shortening the limitation period by one year reduces claim frequency by eight percent. *Id.*

134. Sanders & Joyce, *supra* note 3, at 259.

135. *Id.*

136. *Id.*

137. DANZON, *supra* note 3, at 416. Many reforms were directly aimed at increasing plaintiffs' litigations costs. These reforms decreased both the probability that a claim would be paid and decreased the amount paid. *Id.* Examples include restricting informed consent as a method to establish liability, setting requirements for expert witnesses, reasserting the traditional professional standard of care, and restricting the res ipsa loquitur doctrine. Bovbjerg, *supra* note 15, at 527-30.

idea of these changes to tort law and procedure was to increase the risk of losing the action, thereby causing plaintiffs and their lawyers to think twice before investing time and money. No specific reform, or combination of reforms was found to reduce the "winning percentage" of plaintiffs' claims.<sup>138</sup>

The third, and most contentious potential impact of tort reform concerns severity, or the size of awards made to plaintiffs by juries.<sup>139</sup> These measures have brought the intended result. Ad damnum restrictions, caps on jury awards (non-economic, punitive and total), and the collateral source offset rule have been shown, individually and together, to reduce jury awards in varying degrees.<sup>140</sup> Eliminating the collateral source rule causes offsetting other payments to the plaintiff against jury damage awards. This offset has reduced jury awards and reduced claim frequency since small awards are less likely to be legally pursued.

Tort reform overall was designed to ultimately reduce insurance premium prices and improve insurance availability.<sup>141</sup> The body of available evidence shows tort reform had practically no effect on premium prices,<sup>142</sup> even though reforms stabilized coverage.<sup>143</sup>

Tort reforms were expected to lower insurer's potential risk since there would be fewer claims. Tort reform was also expected to aid in predicting losses more precisely for the claims which were brought. This decreased risk of potential claims and increased certainty in expected losses should have resulted in lower premiums. One study found tort reform did limit and stabilize insurer's expected losses for actual claims brought but did not decrease an insurer's potential risk. Although reduced losses could have reduced premiums as hoped, insurers instead, used tort reform to increase their profitability.<sup>144</sup>

The study concluded tort reform improved insurance industry profitability while having little effect on decreasing risk.<sup>145</sup> This re-

138. Sanders & Joyce, *supra* note 3, at 257-258.

139. *Id.*

140. *Id.* The only tort reform which measurably lowers tort litigation is a cap on damages. However, damage caps are fatally flawed in three respects. Since a flat cap on damages does not take into account a victim's age at the time of injury, it can lead to anomalous results. The principal fear, however, is that caps will become part of business's, and the medical profession's profitability equation. Calculating in advance the total tort liability would completely circumvent the deterrence aspect of the tort system. Barker, *supra* note 132, at 158. Damage caps are unconstitutional in Wyoming, and the drastic step of amending the Constitution has not been taken.

141. Sloan, *supra* note 26, at 633.

142. *Id.* at 642. *But see* Bovbjerg, *supra* note 15, at 549 ("The common-sense, political viewpoint is that "reduction" means a true drop in premiums rather than a change in the rate of growth. An actual drop is much to ask in today's litigious climate.").

143. *See* Bovbjerg, *supra* note 15, at 549.

144. *See Id.* at 158.

145. Barker, *supra* note 132, at 158. Barker's 1992 study measured tort reform's effect

sult is surprising since it was certainly an unintended effect by state legislatures. Overall, tort reform improved insurance industry profitability for the period of 1977-1986.<sup>146</sup>

Wyoming took steps to limit claim frequency by enacting a shorter statute of limitations. Using national studies, the effect of decreasing the time limit under the malpractice statute of limitations would likely decrease the number of claims filed in Wyoming.<sup>147</sup> Wyoming also enacted the standard of care for medical personnel in order to make it more difficult to bring a claim.<sup>148</sup> This was expected to not only decrease the number of claims, but also to decrease the probability that a claim would be paid and decrease the amount paid. However, national studies show this result is unlikely to occur in Wyoming.<sup>149</sup> Wyoming reforms aimed at decreasing claim severity restricted *ad damnum* clauses and eliminated joint and several liability. Since the studies show that only caps on damages resulted in any measurable impact on claim severity, these two reforms probably have had little effect in Wyoming.

Moreover, Wyoming malpractice insurance premiums did not decrease.<sup>150</sup> From 1985 to 1991, total premiums have generally risen while doctor population remained steady.<sup>151</sup> Using loss ratio as a measure of profitability, Wyoming loss ratio data indicates medical malpractice insurance company profitability has been high over the

---

on medical malpractice insurance markets. It used statewide loss ratio data to assess tort reform effects on profitability and underwriting risk in the medical malpractice insurance industry. *Id.* at 145. "Loss ratio" is the ratio of incurred losses to earned premiums. It reflects the proportion of premium dollars that are returned in the form of loss payments to those insured. *Id.* Relative prices, unlike absolute prices can be examined by loss ratio data. Demographic variations among states are thus reflected. *Id.*

146. *Id.*

147. See *supra* text accompanying notes 43-44.

148. See *supra* text accompanying notes 60-62.

149. Imposing a professional standard of care raises plaintiffs' difficulty or costs of winning. Bovbjerg, *supra* note 15, at 548.

150. From 1985 to 1990, premiums earned rose from \$3,841,975 to \$9,752,853. In 1991, premiums earned only topped eight million dollars. This drop was due to a refund paid back by to doctors by the Doctor's Insurance Co. This insurer is owned by doctors. The refund was paid after a review of the years 1986 and 1987. Interview with John McBride, Insurance Commissioner, *Wyo. Insurance Dep't*, in Cheyenne, Wyo. (Feb. 17, 1993).

151. From 1985 to 1991, the number of doctors remained relatively steady.

<u>Year</u>	<u>Number of Doctors</u>
1985	640
1986	650
1987	637
1988	645
1989	645
1990	630
1991	633

Telephone Interview with Rebecca Sabado, Wyo. Bd. of Med. (Feb. 16, 1993).

last twenty years.<sup>152</sup> This is despite fluctuations since 1985.<sup>153</sup> It is unclear whether Wyoming tort reform measures caused the increased profitability or if the increased profitability was caused by the Competitive Rating Act deregulation or some combination of each. A comparison between Wyoming medical malpractice insurance and other Wyoming liability insurance profitabilities shows that medical malpractice insurance is the most profitable line of liability insurance.<sup>154</sup>

152. Malpractice insurers would strongly disagree with this conclusion. They claim adjustment expenses are very high for malpractice insurance because of litigation expenses. *Id.* Unfortunately specific information about litigation expenses is lacking.

153. Loss ratio is computed by dividing direct losses incurred by direct premiums earned. The lower the loss ratio the greater the profits. The Wyoming Insurance Department computed Wyoming loss ratios as follows:

Year	Direct Premiums Earned (dollars)	Direct Losses Incurred (dollars)	Loss Ratio
1991	8,118,101	5,014,202	61.77
1990	9,752,853	(7,487,655)	(76.5)%
1989	9,767,036	15,227,535	155.91%
1988	9,662,554	3,174,550	32.85%
1987	8,753,330	572,081	65.44%
1986	5,971,974	5,405,797	90.52%
1985	3,841,975	(8,513,821)	(220.9)%
<b>TOTAL</b>	<b>55,867,823</b>	<b>8,548,689</b>	<b>15.58%</b>

Interview with John McBride, Insurance Commissioner, *Wyo. Insurance Dep't.*, in Cheyenne, Wyo. (Feb. 11, 1993).

Direct premiums earned is the dollar figure collected for that year. Direct losses incurred includes estimated liability on claims filed that year, but not yet adjudicated. Conservative accounting practices would dictate these potential liabilities be shown at or near worst case, whether or not the claim would, in fact ever be paid. Direct losses paid represents actual cash disbursements. Viewed over time it represents more accurately actual losses incurred. Direct losses paid for 1985 through 1991 are below:

Year	Direct Premiums Earned (dollars)	Direct Losses Paid (dollars)
1991	8,118,101	3,871,724
1990	9,752,853	4,651,331
1989	9,767,036	3,932,486
1988	9,662,554	4,708,076
1987	8,753,330	4,109,232
1986	5,971,974	3,263,109
1985	3,841,975	5,282,292
	<b>55,867,823</b>	<b>29,818,250</b>

*Id.*

154. Seven year summary of Wyoming profitability results for all lines of insurance:

*Future Treatment of Tort Reforms: A "Second Opinion"*

The Wyoming Legislature could adopt one of three approaches to tort reform. The first is the "wait and see" approach. The Wyoming legislature could sit idle until it is clear whether tort reforms are needed and what reforms would be effective. Second, the legislature could enact conservative reforms while further tests and studies are performed. Third, the legislature could aggressively enact tort reforms, relying on the process of trial and error to produce an eventual cure.

An aggressive approach of enacting tort reform in the future could inequitably compromise plaintiffs' rights and make it impossible to judge the effects of the past reforms. In contrast, the "wait and see" approach might be unnecessarily passive. The Wyoming Legislature should adopt a conservative approach by postponing any major tort reform legislation until after the effects of past tort reforms can be fully recognized and analyzed.<sup>155</sup> Some interim legislative action is needed, however. The Wyoming Legislature should amend two past tort reforms affecting medical malpractice litigation to provide consistent statutory application and articulate standards. These amendments would correct past inconsistent interpretations of the present comparative negligence statute and remove ambiguity from the Governmental Claims Act claims procedures. In addition, the Wyoming Legislature should aggressively facilitate insurance re-

---

<u>Line of Business</u>	<u>Average Loss Ratio</u>
Priv Pass Auto Liab	77.8
Priv Pass Auto Phys	60.7
Priva Pass Auto total	68.5
Comm Auto Liab	56.0
Comm Auto Phys	47.6
Comm Auto Total	52.5
Homeowners Mult Per	80.6
Farmowners Mult Per	56.7
Commercial Mult Per	52.9
Fire	37.2
Allied Lines	68.4
Inland Marine	39.3
Medical Malpractice	15.3
Other Liability	74.9
Workers Compensation	25.8
All Other	67.3
Total All Lines	62.8

Interview with John McBride, Insurance Commissioner, *Wyo. Insurance Dep't*, in Cheyenne, Wyo. (Feb. 17, 1993). Figures provided by the NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *Profitability Results - Seven Year Summary* (1992).

155. See *supra* note 93 and accompanying text (stating that the effects of past tort reforms in Wyoming cannot accurately be identified because the Wyoming Court Coordinator only began separating the various civil court claims filed into tort categories in 1991).

forms by requiring insurance companies to base their experience ratings on reasonable statistics.

### 1. Repairing the Comparative Negligence Statute

The Wyoming State District Courts have inconsistently interpreted the comparative negligence statute since it was enacted in 1986.<sup>156</sup> If strictly construed by the courts, this statute should decrease the number of tort claims filed and size of judgments awarded. The Wyoming Supreme Court interpreted the comparative negligence statute to require that the percentage of negligence of all "actors," whether parties to the action or not, must be decided by the jury.<sup>157</sup> Even though the statute fails to define the term "actors," case law suggests that "actors" include all persons who may be shown to have causally contributed to the tortious event.<sup>158</sup>

However, some Wyoming State District Courts have construed the statute differently.<sup>159</sup> These courts continue to cite the 1981 *Palmeno v. Cashen* decision as support for taking certain negligence allocation decisions away from the jury.<sup>160</sup> Recently, one court liberally interpreted the present statute to allow joint and several liability in cases involving multiple negligent actors even when some of the negligent actors were not haled into court and the defendant did not allege that the plaintiff was negligent.<sup>161</sup> This interpretation made one defendant jointly and severally liable for all negligent parties.<sup>162</sup> To the extent that judges rely on *Palmeno v. Cashen* to take negligence allocation decisions away from the jury, the liberal interpretation is flawed. Reliance on this holding is inappropriate

156. *Compare Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834, 836-37 (Wyo. 1991) (applying a conservative interpretation) with *Martinez v. City of Cheyenne*, 791 P.2d 949, 962 (Wyo. 1990) (applying a liberal interpretation). See generally Alan W. Mortensen, Note, *A Marriage of Strict Tort Liability and Comparative Negligence — Left Waiting at the Altar?*, *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (Wyo. 1991), 27 LAND & WATER L. REV. 223 (1992).

157. *Phillips*, 806 P.2d at 835-37 (discussing apportionment of fault to all actors under the 1986 amendment to Wyoming Statute section 1-1-109 which eliminated the doctrine of joint and several liability).

158. *Board of Cty. Comm'rs v. Ridenour*, 623 P.2d 1174 (Wyo. 1981). This holding expressly forbids liberal construction of the comparative negligence statute. In this decision, the court held that "[t]he jury must ascertain the percentage of negligence of all participants to an occurrence." *Id.* at 1188.

159. See, e.g., *Jury Instructions, Andrews v. Bird-O'Donnell Constr. Co.* (No. 234-77), J. Hanscum, 2d Wyo. Jud. Dist. (June 24, 1992) [hereinafter *Jury Instructions*]. In *Andrews*, Judge Arthur Hanscum denied instructions on comparative negligence. *Id.* The courts have recently been inclined to act as super-legislatures and have construed several state statutes more liberally than the Wyoming Legislature intended. See, e.g., *Dellapenta v. Dellapenta*, 838 P.2d 1153, 1167 (Wyo. 1992) (Cardine, J., dissenting).

160. *Palmeno v. Cashen*, 627 P.2d 163 (Wyo. 1981).

161. See, e.g., *Jury Instructions, supra* note 159.

162. *Id.*

because the court in *Palmeno* based its holding on the comparative negligence statute in its form five years before the 1986 amendment abolishing joint and several liability.<sup>163</sup> In addition, the liberal interpretation unjustifiably punishes a defendant who stops to help the injured plaintiff but releases any other negligent person who disinterestedly continues on his way and is unidentifiable for later service.<sup>164</sup> The Wyoming Legislature should remedy the problem of inconsistent interpretation by defining the term "actors" to mean all persons who may have causally contributed to the tortious event, whether a party to the action or not. Such an amendment would add consistency in interpretation and prevent anomalous results.

## 2. Repairing the Governmental Claims Act

Both plaintiffs and defendants would benefit from a thorough housecleaning of the Governmental Claims Act.<sup>165</sup> The structure and wording of the act present two interpretative problems. The first problem lies in the structure of the act's statute of limitations and the claims period.<sup>166</sup> A liberal interpretation of these two sections permits a plaintiff to bring an additional claim for the same injury after expiration of the statute of limitations, but within the claims period.<sup>167</sup> The Wyoming Legislature should clean up the claims and statute of limitations provisions of the act by amending the act to make the claims period shorter than the statute of limitations period.

The second problem arises because one section of the act does not clearly set forth whether a claimant must wait for the *State* to act upon a claim prior to bringing suit. The section provides: "[i]n the case of claims against *local governments*[,] the claim submitted need not be acted upon by the entity prior to suit."<sup>168</sup> In contrast, this language seems to imply that a claimant must wait for the *State* to act on his claim before he files suit. Assuming this inference is correct, the implications of this requirement are unclear. The statute can be read to imply either that the statute merely requires the State to act on the claim, but the statute of limitations period still begins

163. Compare *Palmeno*, 627 P.2d at 165-66 with WYO. STAT. § 1-1-109 (1988) (eliminating joint and several liability).

164. See, e.g., *Jury Instructions*, *supra* note 159.

165. For a discussion of the Wyoming Governmental Claims Act, see *supra* notes 86-87 and accompanying text.

166. See WYO. STAT. §§ 1-39-113 to -114 (1988) for the statute of limitations and the claims period of the Act.

167. See Opinion Letter, *Peyton v. Board of Cty. Comm'rs* (No. 91C-186), J. Lehman, 2d Jud. Dist., at 3 (Sept. 4, 1992) (denying motion for summary judgment when a second claim was filed within the claims period, but after the statute of limitations had run on the first claim).

168. WYO. STAT. § 1-39-113(c) (1988) (emphasis added).



on the date the claim is filed or that the statute of limitations does not begin to run in actions against the State until the State acts on the claim. Regardless of which interpretation is correct, the statute is ambiguous. The Wyoming Legislature should amend the act to clarify whether a claimant must wait for the State to act upon a claim prior to bringing suit. Failure to amend these two statutes will subject all state funded health programs to needless uncertainty and duplicative claims.

### 3. Insurance Reforms

Reforms directed at the insurance industry need not be as conservative. Presently, all of Wyoming physician's malpractice policies are underwritten by three insurance companies.<sup>169</sup> Thus, the W.I.D. considers the physician malpractice line of coverage "noncompetitive."<sup>170</sup> Based on this categorization, the W.I.D. has rightly exercised his discretion by requiring insurers to submit a statement of intent to raise medical malpractice insurance rates for the Commissioner's approval. To date, the W.I.D. has not received any statements of intent to raise rates.<sup>171</sup> This is a step in the right direction. Involving the W.I.D. in rate hike decisions should ensure that any future rate increases are justified by actual injury and damage award patterns in Wyoming.

In the future, the W.I.D. should also require Wyoming insurers to use experience ratings from states more consistent with Wyoming's current litigatory environment. Wyoming physicians are not highly compensated by national standards, and claim filings and damage awards in Wyoming also are lower than the national average. Many Wyoming physicians complain of spending a high percentage of their yearly income paying insurance premiums.<sup>172</sup> Although empirical data from other states suggests that physicians have spent the same percentage of their salaries on malpractice insurance for the last decade, Wyoming statistics suggest that Wyoming physicians have spent an increased percentage of their salaries

---

169. Interview with John McBride, Insurance Commissioner, *Wyo. Insurance Dep't*, in Cheyenne, Wyo. (Feb. 17, 1993).

170. *Id.* See WYO. STAT. § 26-14-103(a)(vii)(D)(II) (1991) (defining noncompetitive markets).

171. See, e.g., Letter from John McBride, Insurance Commissioner, *Wyo. Insurance Dep't*, to St. Paul Fire & Marine Ins. Co. (1988) (on file in with the Wyoming Insurance Department).

172. See *Rates Concern Obstetricians*, *supra* note 1, at 12.

on insurance.<sup>173</sup> As a result, Wyoming insurers are making unjustifiably high profits by setting Wyoming insurance premiums on experience ratings from non-comparable states.<sup>174</sup> If not using Wyoming experience ratings, at a minimum, the W.I.D. should require Wyoming insurers to use experience ratings from demographically similar regions. This should lower medical malpractice insurance premiums without compromising plaintiffs' chances at justifiable recoveries.

#### CONCLUSION

Over the past twenty years, Wyoming has been experiencing a medical malpractice insurance crisis. Acting on the belief that a litigation crisis caused this insurance crisis, the Wyoming Legislature enacted numerous reforms. These reforms were designed to reduce plaintiffs' rights to bring suit or, if a suit was brought, to allow merely a limited recovery. When enacted, the Wyoming Legislature had little information on which to base these reforms. During this same time period, the Wyoming courts have also been expanding changing tort law.

Since these reforms were enacted, tort litigation reporting has expanded and an increasing number of studies have analyzed the reported statistics. Based on the new analyses, Wyoming did not experience a medical malpractice litigation crisis during the 1970's and 1980's which could have caused an insurance crisis. In addition, it now appears that certain of Wyoming's past tort reforms were only minimally effective in reducing either claim frequency or claim severity. Other reforms were completely ineffective and even deleterious. On the positive side, however, the better statistical reporting methods will eventually allow a more informed Wyoming Legislature to assess the effects of any future tort reforms when enacted, without a twenty-year delay.

The direction of future reforms is the subject of continuing debate. Little empirical data is available to predict the likely effects of future reforms. Until solid empirical data is available to assess past reforms and predict the likely effects of future tort reforms,

---

173. United States Congress, Office of Technology Assessment, *HEALTH CARE IN RURAL AMERICA* 325 (U.S. Gov't Printing Office 1990) ("The incomes of rural physicians are lower . . ."). Most of Wyoming would be considered rural by this national study's standards. *Id.* at 35. *But see* Allen K. Hutkin, *Resolving the Medical Malpractice Crisis: Alternatives to Litigation*, 4 J. OF HEALTH, POL., POL'Y, & L. 21, 23 n.10 (1990). While the cost of malpractice insurance may be spiraling upward, the percentage of gross income spent by doctors on malpractice insurance nationwide has remained roughly the same for a decade, at less than four percent of income. *Id.*

174. For a discussion of the Wyoming Insurance Department's recommendation to require Wyoming insurers to set experience ratings based on more reasonable statistics, see authority *supra* note 36.

the Wyoming Legislature takes the risk of enacting legislation which treats the symptoms rather than curing the disease. For this reason, the Wyoming Legislature would be wise to postpone all significant tort reform efforts until solid statistical data is available.

However, the State need not refrain from all attempts to stabilize growth in medical malpractice insurance premiums. The legislature should consider amendments to the comparative negligence statute and the Governmental Claims Act. In addition, the W.I.D. Commissioner should consider greater regulation of medical malpractice insurers. Although a program to directly regulate medical malpractice insurance rates would be cost prohibitive, the W.I.D. Commissioner should require Wyoming insurers to use experience ratings from states which reflect Wyoming's current litigatory environment. This would help to insure that insurance premiums are reasonably aligned with the medical malpractice litigation climate in Wyoming and would prevent insurance companies from profiting excessively at the expense of Wyoming physicians and patients.

BRIAN C. SHUCK AND SUSAN MARTIN