4-18-1986

Joint Hearing on Proposition 51

Senate Committee on Judiciary

Assembly Committee on Judiciary

California Legislature
SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman

ASSEMBLY COMMITTEE ON JUDICIARY
Elihu M. Harris, Chairman

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PROPOSITION 51

State Building Auditorium B-109
1350 Front Street
San Diego, California

April 18, 1986

SENATE AND ASSEMBLY COMMITTEES ON JUDICIARY

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86-6-194

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CHAIRMAN LOCKYER: Good morning. I thank you for allowing us to have a committee hearing in your wonderful community.

One of our statutory obligations is to have public hearings regarding initiatives that have qualified for the June ballot, and of course Proposition 51 will be, I suppose, the most controversial and debated and the subject of great campaigning and so on.

But we hope to have an opportunity to be slightly more contemplative and hear the views of people who have thought about these great issues, tort liability, insurance costs, and fairness in our judicial systems, and appreciate your willingness to share your thinking with us today.

Let me acknowledge and introduce Assemblywoman Marian La Follette from the Los Angeles area, and Senator Nicholas Petris from Oakland. I'm Senator Bill Lockyer from Hayward.

We may have other members joining us at different times during the morning. There were some more on the plane and some, I think, that found the beautiful weather a little bit enticing.

But we're here, and we'd like to hear what you have to say.

I guess Supervisor Golding is meant to begin. Thank you.

MS. GOLDING: First of all, welcome to San Diego. I've always felt that the capitol ought to be here.

CHAIRMAN LOCKYER: We have a little rule that applies to everyone, just identify yourself.

MS. GOLDING: I'm Supervisor Susan Golding, County Board of Supervisors, San Diego.

CHAIRMAN LOCKYER: Which area is your district?

MS. GOLDING: What area is my district? It's the Third District, which comprises about 85 percent of the City of San Diego plus some of North County San Diego.

I'd like to thank you for holding the hearing here, and for holding it in San Diego on Proposition 51. As I'm sure you know, joint and several liability is a problem that has reached crisis proportions for local governments, service agencies, businesses and therefore individuals throughout the State of California.

I think that all of us somewhere deep within us carry the sense that the underlying theme of the American system is one of fairness, and that means fairness for everyone. Our present joint and several liability law flies in the face of that perception.

Joint and several liability as presently constructed is inherently, blatantly unfair. It defies any logical explanation, and it's costing everyone of us dearly. The inequities that exist in the present system cost each of us in services that we should be getting from our government, services that can't be provided because the monies that fund them must be diverted to cover staggering deep pocket payments that local governments are presently asked and will continue to be asked to make in increasing amounts.

Every week our Board meets in closed session to hear cases pending against the County that exist simply because we are a deep pocket. And when I say "we", I'm referring to the citizens of San Diego and all of us who pay taxes, because the taxpayers are the County.

The present deep pocket law serves as an inducement to plaintiffs to find some way, however remote, to name a public agency as a codefendant in a personal injury law suit. In the aftermath of an accident, it is entirely possible that an attorney can go find a pebble on a road that could have conceivably contributed one percent to that accident. And that one percent contribution makes us as a public agency 100 percent liable. And that is ludicrous.

The vast majority of cases that come before us involve a drunk who has either run off a road, or who has run into someone else, and the drunk's family then sues us. He gets drunk, or she, and causes an accident, but we're a deep pocket so that taxpayers are forced to pick up the bill for the actions of the irresponsible.

Why should the average guy or gal pay for someone who won't take a taxi home to the tune of millions and millions of dollars?

Let me cite some recent examples. One that came before us not long ago involved a young driver driving at night without headlights and with a blood alcohol level of .16. That's 60 percent higher than what is needed to be legally drunk. She drifts onto the -- she drifts into the oncoming traffic and has an accident.

Who pays? The citizens of the County of San Diego.

In another recent case, the County was forced to pay over $2 million for an accident when the driver and all of his passengers were drinking as they drove at a dangerous and high speed on a dirt road that the County maintains in the South Bay. Not surprisingly, they failed to negotiate a turn and crashed.

Because of joint and several liability, the County was held responsible for all damages, even though it certainly wasn't 100 percent at fault or even close.

We were sued in another case when a motorcyclist stopped to either pick up or to just observe some clothing that had blown off another car. He was struck and killed. The basis of the suit against the County was improper trash pickup, as if somehow we can station someone every 10 feet along our 2,100 miles of County roads to pick up every little thing that either blows from or is tossed from a car. Where is the individual's responsibility?

Another case involved a driver who we think had a heart attack while driving who crashed across the curb and hit a power pole. I guess I don't have to tell you who ended up paying the family.

I just recently got a clipping from the Sierra Club Yodeler, their news magazine, which states that the rock climbing section of the Sierra Club was ordered to stop rock climbing activities. And it came from the Sierra Club National Headquarters in San Francisco because they were unable to obtain liability insurance to cover such activity.

It goes on to say: Why can't Sierra Club obtain insurance? Not because they haven't tried. There is an unfair law in California. We never voted on it; the Legislature never passed it. In fact, few people even know it exists, yet it directly effects the availability and affordability of liability insurance.

Here is an example of the law at work. A climber participating on a Sierra Club outing fails to protect himself adequately and sustains major injuries from a serious fall. Since his own insurance only covers his medical bills, his lawyer sues the outing leader and the Sierra Club for emotional and mental suffering. The lawyer convinces the jury that although the plaintiff was clearly at fault, the leader should have warned him that it was too wet, too cold, or too hot, or whatever. The jury finds the climber 99 percent at fault and the Sierra Club one percent at fault, and award the climber $2 million.

Now, instead of paying $20,000, which is one percent, the Sierra Club must pay the full $2 million because there is no one else to pay.

Clearly the law isn't fair, and why is it in existence?

The growth in the size of these deep pocket claims have been staggering. In 1974, there were approximately $500,000 in claims and law suits pending against the County of San Diego. Last year, the figure had climbed to $10 million.

Joint and several liability has also had a great impact on the sheer volume of cases. Claims against the County of San Diego have risen from around 500 in 1982, to nearly 1400 in 1985;

that's only three years. And the County Counsel has recommended doubling our reserve fund to cover the liability.

That is money that could be and would be going to provide services for child abuse, senior nutrition programs, or perhaps road repairs.

And the problem doesn't just affect local governments but the state as well. There are 2,000 liability cases pending against Cal Trans today seeking $4 billion.

Under the present system, liability of government agencies is limitless and unpredictable, and consequently, impossible to budget. And in many cases, therefore, impossible to insure against.

The Trial Lawyers Association, which is the special interest group most interested in preserving our present system, claims that this issue is really a problem with insurance companies, and that instead of altering our present tort system, we should be looking into new regulations for the insurance industry.

That is absolute poppycock, and the reason is simple. The County of San Diego is self-insured. Any changes necessary in the insurance industry are not going to change the deep pocket situation for the County of San Diego or the problem we have in providing services because of the great, vast amounts of money we must presently pay out in deep pocket claims.

Arguments about insurance reform are a smoke screen. They may be necessary, but they have nothing to do with deep pocket liability.

Proposition 51 is our only hope in stopping this hemorrhaging of public services and tax dollars. It is at the same time critically important to note that Proposition 51 will in no way, will in no way damage or limit anyone's ability to recover economic damages. All it does is limit a defendant's responsibility in a law suit to their proportional share of noneconomic damages, such as mental anguish, pain and suffering.

All we're asking for is a return to some sense of fairness. If you're at fault, you pay. If you're 20 percent at fault, you pay 20 percent. If you're one percent at fault, you pay one percent, and no more than that.

Proposition 51 will not relieve of us deep pocket responsibilities for actual economic damages. If we're found to be one percent at fault, we'll still have to pay the whole medical bill, but 51 will help to bring the present and unfair system under control before it devastates even further our ability to provide the services our citizens need, deserve and expect.

Every single county in the state along with 300 cities have endorsed this proposition because the need is so critical. If it passes, cities and counties that deserve liability insurance and need it will find it more readily available, and that's really the issue we're talking about, is the unavailability of liability insurance. Cities like Blue Lake in Humboldt County won't have to shut down all of their recreational facilities, which are presently locked and posted "No Trespassing"; child care facilities which have shut down because

of no liability insurance will be able to open up again; and the tuna boat owners, which here in San Diego cannot set out to sea anymore because their liability insurance has been cancelled, will once again be able to sail and provide jobs; local governments can again provide the services the citizens want.

I'm here to urge and strongly urge your support of Proposition 51, and I thank you, Senator, for your support.

CHAIRMAN LOCKYER: Thank you. I think Senator Petris had a question.

SENATOR PETRIS: I had a question on one of the cases, and now I've forgotten which one it was.

Were all of these cases judgments or were some settlements?

MS. GOLDING: Some were probably settlements, Senator. They would have been even higher if they had been judgments.

SENATOR PETRIS: What about the first one?

MS. GOLDING: Which one?

SENATOR PETRIS: The one running with no lights and with a high alcohol content.

MS. GOLDING: It was settled for $250,000. And we constantly settle for the simple reason that it saves us money even though none of us want to settle.

SENATOR PETRIS: Do you ever win a case in court in the County?

MS. GOLDING: Did we ever win a case in court on this type of issue? I don't know the answer.

I don't think so. I'm unaware of anything that we've won on this type of deep pocket liability.

In other words, gotten off with no payment at all?

SENATOR PETRIS: Yes, judgement for the defendants.

MS. GOLDING: I don't know.

SENATOR PETRIS: It's extraordinary if you haven't. In most courts in the state the defendants win more than they lose.

What kind of counsel do you have representing you?

MS. GOLDING: We have our County Counsel. He's not here today.

I honestly don't know the answer to your question, but I can find out.

MR. JOHNSON: If I can comment, Senator.

Ron Johnson, Senior Chief Deputy for the City of San Diego.

I do know the counsel at the County Counsel's Office. They are highly qualified, highly experienced, and present a very, very fine case.

SENATOR PETRIS: But you're telling me that they've never won a case?

MS. GOLDING: I don't know that.

MR. JOHNSON: They've won lots of cases, Senator.

SENATOR PETRIS: Well, that's what I'd like to know. I'd like to know how many of these cases are won, how many are dropped by the plaintiff, which happens sometimes, not too often I don't think, and what the total perspective is?

MS. GOLDING: I can get that information for you.

SENATOR PETRIS: If it's convenient, yes, I'd like to know.

Excuse me, I didn't mean to interrupt you.

MR. JOHNSON: No, I just wanted to say that the problem is trying to withstand the burden of not proving or not allowing the plaintiff to prove that the public entity was even one percent at fault is a tremendous burden to carry. So in cases where you have any kind of exposure, there's going to be a tendency to settle.

We, the City of San Diego, have tried some of those cases. We've won some and lost some. But the problem is when you lose, there are a lot of marbles in that packet to pick up. So in the marginal case, you're going to find settlements occurring with some regularity.

But we have tried some, and we have won some. We've also lost some.

SENATOR PETRIS: Let's go back to the first case. You have a drunk driving without any lights; very high alcoholic level, and what happened? Did he go off the road or hit somebody, or what? You said across the line; must have hit somebody else.

MS. GOLDING: Yes, that's correct.

SENATOR PETRIS: How many --

MS. GOLDING: The one that I'm thinking of -- the one that I'm thinking of that I remember recently was one where the person was driving drunk, and there was -- there was a ditch. Well, not really a ditch, but it was a ditch of type, way high on

the hill that previous to Prop. 13 days had been regularly cleaned out by the County. After Prop. 13, the County had to stop doing those kinds of things. So, there was some dirt on the road. And because of the dirt on the road, the County was held liable.

SENATOR PETRIS: By a jury?

MS. GOLDING: Yes -- no, we settled that one; we settled that one for, if I remember, $1 million: 500,000 going to the attorney and $500,000 going to the plaintiff.

SENATOR PETRIS: What were the injuries in that case?

MS. GOLDING: I don't remember right now. They were really severely severe injuries.

SENATOR PETRIS: I guess for the amounts you're talking, a quarter of a million, that's probably not as severe as most of them we hear about.

MS. GOLDING: This was a million.

SENATOR PETRIS: But the first case went to a jury you said? The one with no lights?

MS. GOLDING: Yeah.

SENATOR PETRIS: And what was the finding of the jury? What was the fault of the County?

MS. GOLDING: The first one was settled. The one I was just talking about we settled also.

SENATOR PETRIS: You felt, or your attorneys felt -- and I'm not criticizing anybody -- they felt -- first of all, there are no other parties involved here. They didn't sue anyone else, did they?

MS. GOLDING: There was no one else to sue that I know of in that particular case.

SENATOR PETRIS: The people who were hurt were hit by a drunk who crossed over the line, and they found some way to include the County as a defendant.

Now, what was the theory against the County?

MS. GOLDING: What was the one percent or more? I don't know.

SENATOR PETRIS: I think it's rather important.

MS. GOLDING: I can get the details.

SENATOR PETRIS: I know on the surface if you say to the average person out there, I give you these facts: Here's a person that's 60 percent over the statutory presumption of driving under the influence, no lights, and veers across the line and clobbers someone.

How many people in the audience would blame a public entity for that condition? It seems to me very remote and far fetched to assume that it would be the County --

MS. GOLDING: Well, in this case the line wasn't bright enough. The problem --

SENATOR PETRIS: He was so blind he couldn't see it anyway. Didn't you argue that in court?

MS. GOLDING: But Senator, the problem is presented to us and Ron -- I used to be on the City Council, and I sat and listened to all these cases on the City Council.

The problem is presented to us. And if the Members of the City Council or the County Board of Supervisors decide we're

going to tough it out and take it to a jury, our attorneys are sitting there saying: In 99 -- the chances are we're going to lose, and we're going to end up losing a lot more money than it would cost us to settle. And they only recommend that in cases where they're actually sure, really, really positive we're going to lose; otherwise we go ahead.

There are cases where, for example -- which is understandable -- there's a paraplegic because of an accident. What happens, obviously, is you've got the jury sitting there, and the person has no money to pay for their injuries themselves, or mental anguish, pain and suffering. The jury's sitting there, and you see the paraplegic in front of you, and what are you going to do? Deny any damages? If the County was only one percent at fault, who's going to pay for the rest of this person's suffering?

It's easy for a jury to assign it to an abstract entity like the city or the county, and that's what happens.

SENATOR PETRIS: Well, maybe they don't. Maybe they figure they'd rather pay it now than pay it later through the welfare program, because that's where it's going to end up; isn't it?

MS. GOLDING: In some cases, yes.

SENATOR PETRIS: You get a paraplegic, if you're talking about a person as in the first case who apparently didn't have any insurance, so it's not going to come from that person --

MS. GOLDING: Or limited insurance.

SENATOR PETRIS: Or extremely limited. Maybe they do a much more sophisticated calculation than you think. Maybe they're choosing between their taxes as taxpayers paying out welfare, Medicare, et cetera, and some fund that might be immediately available.

MS. GOLDING: But that still is not a just way of dealing with the problem. If indeed that turns out to be true, and I don't think the cost would be that high, that is, I think, and illegitimate way of dealing with the problem. If the taxpayers want to support welfare for certain people, then at least they have the right to do that, but this kind of settlement or damages award is not the same thing, and it's really -- it's a perversion, I think, of the justice system.

At least the other way the taxpayers know what they're funding, know what they're paying for.

SENATOR PETRIS: The motorcycle case, did that go to trial?

MS. GOLDING: I'm sorry, I should have that with me but I don't, so I don't know, Senator. But I will get you the details.

SENATOR PETRIS: If you can, I think it helps us analyze and compare.

I've been looking for the one percent case for a long time, and I haven't found one.

MS. GOLDING: I'll get you all of that.

SENATOR PETRIS: I've found small percentages, but I haven't found a one percent case yet. And in the motorcycle

case, it seems to me if that went to a jury -- you know, one of the toughest cases for a plaintiff to try is the slipping and falling cases in a supermarket. They say: Well, I slipped on something; somebody left a banana peel.

There are very, very, very few juries that are going to hold the supermarket to a standard that is so high that they have to have a person with a broom and a pan in every aisle every time a customer drops something they can go and pick it up. There's just no jury that does that.

And the ratio of cases won and lost in that situation is very high against the plaintiff.

A couple of these cases to me seem to fall into that category. That's why I wanted to get a little more detail.

MS. GOLDING: Even if it's 10 percent, if you end up paying 100 percent, that's just as unfair as one percent and pay 100 percent.

ASSEMBLYWOMAN LA FOLLETTE: Senator, I'd like to ask you a question because you are an attorney.

One of my problems is that, and as we've heard Supervisor Golding mention, one of the judgments was a million dollars, and 500,000 of that went to the attorney.

Now, I recognize that without the attorney they wouldn't have had -- the injured party wouldn't have had even $500,000. But I just would like to hear from you a discussion of the fairness of that.

SENATOR PETRIS: Sure, I'd be happy to.

First of all, I need more facts than that. I want to know whether that includes the appellate level or not.

There are some cases in which a 50 percent fee -- and maybe the attorney representative here today can elaborate on this because he's much more experienced at it, Mr. Hinton -- but just temporarily, there are some cases that go as high as 50 percent depending on how tough the factual situation is. Some cases, the evidence is overwhelming of negligence, you know, on the part of the defendant; they're a lot easier to win. Other cases are much more difficult.

I'd also like to know the total amount of fees paid out to both sides. The statistics show that for every dollar that the plaintiff's attorney receives, the defense get twice as much. That's the average. So if they paid out a half a million in that case, chances are the defense got more than that. It may be a very complicated case, so I can't comment without more facts.

MS. GOLDING: I will get you all the information on the cases and more.

Let me also say, Senator, that remember in Proposition 51, all economic damages will be paid for. So, in your case of citing welfare or something like that, economic are going to be paid for. It's just the extra pain and suffering that won't be in the sense that if you're only one percent, you only pay one percent.

SENATOR PETRIS: Well, there are a lot of people that don't have economic damages, but they have a lot of pain and suffering. You take a minor who isn't working who loses a leg, that's a lifetime problem confronting that person.

MS. GOLDING: I agree.

SENATOR PETRIS: No economic damage.

MS. GOLDING: The question is who should pay.

SENATOR PETRIS: Yes, I know. And it's a tough one. I understand that.

MR. JOHNSON: Could I comment on that?

The way that the statute is drafted, Proposition 51, it provides for prospective economic loss as well as already experienced economic loss.

So in your case, Senator, where you have a minor who had not achieved an earning career, the jury would be allowed to return a verdict for that individual for prospective economic loss, which would be entitled to 100 percent compensation from any and all defendants.

It would only be the noneconomic --

SENATOR PETRIS: For the loss of a leg?

MR. JOHNSON: That's correct.

SENATOR PETRIS: You try that sometime and get the experts on the other side to come in and show you these beautiful synthetic limbs, and they waltz people in here who dance, and jump rope, and do all that. That doesn't take away the humiliation, the pain, the degradation that goes at night when you take that limb off and hang it up in the closet somewhere or slide it under the bed and you hop around on one leg.

You know, it could improve that person's ability to do a job. They still can't do everything they could have done before.

So that is largely mythical, I think, in the projections that are made about how wonderful this is.

MR. JOHNSON: The economic loss would be paid. You're talking about the pain and suffering and humiliation, and that's a separate question. Under 51, that would not be compensated except by the defendant that was at fault.

As to the economic --

SENATOR PETRIS: There's no economic --

MR. JOHNSON: -- loss, that would be compensated 100 percent.

SENATOR PETRIS: The child is 12 and is not working, and there were no plans for that child to work until let's say she came from a family where there were no plans for her to work until she finished college.

What happens to those eight years, or whatever it is, ten years?

MR. JOHNSON: There would be no economic loss for that period, but there would be economic loss for the remainder of that child's life that would be compensated 100 percent.

SENATOR PETRIS: And what would the pain and suffering damage limit be?

MR. JOHNSON: Pain and suffering limit would proportion to fault, whatever the fault would be.

It would not reduce the judgment to the plaintiff. It would only reduce the judgment of the plaintiff's ability to collect that judgment from a lesser liable defendant.

SENATOR PETRIS: And you know who's going to be looking for the pebbles when this passes? The defense.

MR. JOHNSON: The same people who are looking for them now.

SENATOR PETRIS: The defense. They're going to bring in the pebbles, and they're going to bring in the auto repair shop that did the repair work on the brakes the last time around. They're going to say: It's your doctor's fault; he made a mistake in the way he treated you. They're going to be very, very ingenious in bringing in others to limit their own contribution.

I don't mean cities alone. I mean any defendant.

Anyway, I don't want to prolong this, Senator. Thank you.

CHAIRMAN LOCKYER: Thank you, Supervisor. We appreciate you being with us.

Mr. Johnson.

MR. JOHNSON: Thank you very much.

Ron Johnson, Senior Chief Deputy for the City of San Diego.

Let me also welcome you to San Diego. We appreciate the opportunity to address you here.

The problem changed in 1975, when Lee vs. Yellow Cab was passed -- was ruled upon by the court. You might recall that prior to that time if a plaintiff was one percent at fault for their own injury, they could not collect from any defendant at all. So, the old law changed in 1975.

It again changed in 1978, with American Motorcycle when the court ruled that even though the plaintiff could not be ruled ineligible for compensation because of his fault; that joint and several liability still was that law of the land, and any defendant would be required to pay 100 percent of any damages.

The impact of that on all parties, not just public entities, has been dramatic. Let me give you an example.

If you were driving your car at five miles over the speed limit, and a drunk came through a red light and hit you, propelled your car onto the sidewalk and you ran over a brain surgeon, you could be held 100 percent liable for the damage of that individual. You, as an individual. It doesn't require you to be the City of San Diego, or the County of San Diego, or some large manufacturing company. Each individual suffers from this same inequity.

It's not fair. It's not proper, and it is has impacted everybody in this state, including the public entities.

The City of San Diego, for example, has gone from a case load of 614 cases in 1976, to a case load of 1654 as of March 31, 1986. Our exposure to date runs approximately $15.7 million, while in 1980 it was $6.9 million.

The impact of this on our budgets and the ability of our elected officials to do their jobs for the community has been significant. It is also significant, although it's not the major problem, that insurance becomes unavailable to not only the City of San Diego, but the last projection I heard was that approximately 440 cities in the state of California would be uninsured as of July of 1986.

Our particular situation in terms of insurance, in 1984 we were able to purchase insurance with a $200,000 self-retention -- that is, the City pays the first $200,000; anything up to $30 million above that would be paid by the insurance company. The cost of that insurance to the City of San Diego was $157,000.

Last year, the offer to us was a self-retention by the City of San Diego would be $2 million rather than $200,000; that the top cap would be $500,000 on top of our 2 million. In other words, if it was a $3 million law suit, we would pay the first 2 million, the insurance would pay the next $500,000, and the City of San Diego would pay the remaining $500,000. For that generous offer of insurance, the insurance company wanted a premium of $1,200,000. In other words, if you put up all the money, we might consider insuring you.

Obviously it was inappropriate for us to accept that kind of insurance, so we went bare again.

The problem has been exacerbated by the fact that juries and judges, legitimately so, are looking at a severely injured individual in that courtroom. It's very hard to say to a paraplegic, or to children of a deceased father or mother, that the contribution to this injury is zero on behalf of an entity that can in fact respond in damages.

It's also unfair in the fact that the jury is not told or instructed on what the effect of their award is. They're asked to come back and determine liability: Is the County of San Diego, City of San Diego one percent, five percent, ten percent liable. When they make that finding, their belief is that that

will be the amount of money that the County will be required to pay; i.e., one, five, or ten percent of their ultimate verdict.

But that's not the case. We end up paying 100 percent in the uninsured or underinsured case. At a minimum, if we're going to stick with this kind of system, at least allow the juries to know what they're doing. But we don't allow them. We won't tell them the truth so they can make a proper judgment. We have to hide that fact from them. That, in my opinion, is unfair.

As I indicated to Senator Petris' indications or questions, in terms of recovery to the plaintiff individual, all of their economic, including potential economic loss in the future, will be covered. The only thing that will not be covered, and it'll be covered in the event there is insurance or assets of the guilty defendant, the only portion that will not be covered will be the pain and suffering.

And I don't mean to down play that. I mean, a death case or a serious injury case, they are significant. But on the other hand, if we're going to balance the equities between the 5 percent liable defendant for these injuries versus the plaintiff who has suffered these injuries, it seems a proper compromise to pay economic losses but then divide the noneconomic losses on the basis of fault.

There are many, many examples of cases we can give you. We have tried cases. The Clementi case, the State of California vs. Clementi case is an interesting case. It's a case where the police officer stopped a drunk and allowed him to leave. That

case came in at $3 million or $30 million, I forget; there's some difference obviously. And the State of California, the Attorney General's Office, has determined that to be a one percent at fault liability case. It was $3.1 million, and there are 15 cases listed by the State Attorney General of cases only by Cal Trans of one percent cases in the last three years. The City of San Diego has 5 or 6 that have occurred, and we have 20 pending now that could properly be classified as one percent cases.

We've lost cases in trial; we've settled cases before trial because of the one percent rule.

One case that I settled last year myself was a drunk that went over a center divider and impacted four soccer players, killing two, rendering one a paraplegic. The curve was substandard in that it was too tight. It did not have the proper radius by about two percent. It was a sufficient error in the design of the roadway that we were afraid to take that case to trail given the upside of the case. We settled it for a million-two. The upside potential of that case was $6-7 million; it made no sense to try that law suit. But we settled it and we settled it for one reason only: We settled it because of joint and several liability.

I would also urge that you support 51. It's necessary to the citizens of this community as it is to the citizens of this entire state.

Thank you.

SENATOR PETRIS: Thank you.

I know we're talking about a very difficult problem which is illustrated on both sides of the argument by a series of tragedies. I think we all understand that.

Let's get back to the 12-year old. How does a plaintiff establish the economic loss from that 12-year old after she finishes college? Suppose the lawyer asks her: Now, what were your plans? What do you want to be when you grow up?

She says: A brain surgeon.

But she can't stand on her feet for the hours required because of this synthetic leg.

The defense comes in with her playmates: Oh, we always thought she wanted to be a nurse.

Now, can't you see the defense raising all kinds of doubt in the eyes of the jury? First of all, how do you know you're ever going to be admitted to medical school let alone pass?

How do you establish what the economic loss of a person that's that young is going to be for the rest of her life in terms of reduced capacity to earn?

It's easy when a person is working now, today, as a brain surgeon and his hands are cut off, or something. That's going to be a serious problem.

I don't think there's a guarantee in those cases that you will come out with an accurate estimate of what the loss is going to be. Maybe they'll strike some kind of arbitrary thing.

On the other problem --

MR. JOHNSON: Could I answer that first?

SENATOR PETRIS: Yes.

MR. JOHNSON: It would be the same burden of proof that you have in the case law right now. If you were trying that case today, you would put in the economic information to try and show as much as you possibly could as a plaintiff that this particular individual had a particular career goal in mind, and that that was the economic loss.

The other thing that I've seen economists do is average that a person of 12 years of age, given their economic background, their educational background, would achieve "X" amount level of economic earnings over the next 20 years on an average, and use the average figure whether she was a brain surgeon or a truck driver. They come up with an average.

Those figures are put in now. There would be no difference on how you tried the case. The only difference is who pays the judgments.

SENATOR PETRIS: On joint liability, isn't the concept of the multiple tort-feasors liability an old, old one that goes back many hundreds of years in our system?

MR. JOHNSON: Yes, it does, along with contributory negligence, which barred all plaintiffs from any recovery if they were even one percent at fault. That was the law back in the common law until 1975 in California when the rule was changed.

We've fooled with the common law. We've changed the common law. We've changed it only on one side of the equation. We haven't equaled the equation.

SENATOR PETRIS: Well, it kind of goes back and forth, I guess.

One of the problems, I think, is that some of the critics, not including yourself, seem to imply -- nobody's done it here yet -- but the implication I get all the time in discussing this with lay persons is the notion that you can choose your target among several persons who contributed to the problem is something unique and brand new, and we all know it isn't. It's not only true in tort law; it's true in other kinds of judgments as well.

Thank you.

MR. JOHNSON: Thank you sir.

CHAIRMAN LOCKYER: Did you finish, Mr. Johnson?

MR. JOHNSON: Yes, I did. Thank you very much.

CHAIRMAN LOCKYER: I guess Ms. Jacob, you're next.

MS. JACOB: Thank you.

Senator Lockyer, Members of the Committee, I'm Diane Jacob, President-elect of the California School Boards Association, also a member of the Board of Trustees of the Jamul-Dulzura Union School District. Some people wonder if that's in this nation. It is, in fact, in San Diego County.

SENATOR PETRIS: What's the name again?

MS. JACOB: Jamul-Dulzura.

SENATOR PETRIS: Who was he?

MS. JACOB: I should tell you what Jamul means. It means dirty, slimy water.

(Laughter.)

MS. JACOB: I figured you were going to ask me that next.

The deep pocket law is costing schools in the State of California millions of dollars in increased insurance premiums, in unfair claims, in unnecessary attorney fees. It's also causing the loss of use of school property as well as new programs.

School children are among the innocent victims of this law, and any money that schools are forced to use for increasingly large liability premiums or deep pocket suits is money that is no longer available for the education of our children, staff salaries, invaluable programs in our schools. To put it very simply, our children are being robbed.

California schools are spending between $70-90 million on liability insurance premiums. In the last several months in districts in the state, they have increased from 300-600 percent. In some cases, it's even been more than that. In the Yucaipa Joint Unified School District, they've experience an 850 percent increase: $27,859 last year; this year their premiums were $265,000.

The hundreds of thousands of dollars being spent on liability insurance is money that is not being spent on education.

Locally, San Diego Unified School District experienced an increase of almost a half million dollars; to be precise, $469,000 in one year. At the same time, their coverage is

decreasing from 20 million to 11 million. A $1.4 million increase in one year is felt by the Grossmont Union High School District. And in little Jamul, the premiums increased $6,000, which by the way is 20 percent of our recent Lottery check.

One can't help wondering how many books, buses, classrooms and teachers could have been provided with this money. San Marcos Unified, by the way, also in San Diego County, spent more last year for liability insurance than was spent for text books.

There's no question about it. Every dollar spent on increased premiums or unfair claims is one dollar that's plucked right out of each and every classroom in this state. At a time when our public schools are fighting hard to be what Californians expect, the rug is being yanked right out from under them. California's per child expenditures are below the national average, $700 per child below the top 25 states in the nation, and $1600 per child below the State of New York. We're fighting hard for money.

Also, our schools are facing many challenges: reducing class sizes. We're 50th in the nation, which means we have the largest class sizes of any other state in the nation.

We're trying to attract quality teachers into the profession, building new facilities, there's a great need for that, and rehabilitating the old, upgrading the quality of curriculum, just to name a few of the things we're trying to do.

Unfortunately, these higher insurance premiums and claims are diverting money which could have been used to meet these challenges.

An even greater concern for schools is the threat of law suits and their impact on educational reform. A school district recently was forced to cancel an advanced science program on human anatomy because the use of a cadaver was deemed an unacceptable exposure by the insurance company because a student might get, quote-unquote, "all shook up" and file a law suit against the district, the university-supplied cadaver, and any other individual who could remotely be assigned some blame, and we wonder if maybe the cadaver itself would not be sued.

School districts throughout California are being hit with law suits, some justified, but most are frivolous. And the school is only remotely if at all connected to the accident. The cost of defending these law suits, which can take many years to resolve, often far exceeds the cost of a negotiated settlement.

School districts are being sued because pre-school children fell off swings after hours; high school students cut their hand on glass in softball fields -- by the way, used by a community group during non-school hours, so no relationship to the school program itself; and drivers running red lights and striking children in crosswalks.

Anyway, these are only some examples of law suits filed since school districts are a deep pocket. They are filed in today's legal climate, quite frankly, because there is a substantial likelihood that a plaintiff attorney will be able to get a fairly good settlement.

The law suit gamble, by the way, is better than buying a Lottery ticket, and the stakes are a lot higher, but this is a lottery that no voter in California ever voted for.

In the Grossmont Union High School District, I want to tell you a story of a recent example that is currently pending. A boy of eight years old went with his father to Santana High School to watch his dad play basketball in the Santana gymnasium. Now, it was a Santee Recreation Club basketball game sponsored by Crisis House of El Cajon. Now, the boy got a little bit tired of watching dad play basketball, so he wandered outside. He walked down to the baseball field, climbed up onto a backstop to watch some model airplanes that were being flown on the baseball field. Well, sometimes model airplanes lose control, and in this case the owner of the model airplane lost control of his plane. The airplane hit the boy like a missile, knocked him off the backstop, and the boy has sustained quite severe injuries.

Well, the man flying the model airplane is nowhere to be found. So, the boy's parents are suing the Grossmont High School District, the Santee Recreation Club, and Crisis House. And of course the school district is the truly deep pocket in this case. The district's being sued for, to round off, $2.8 million. It's interesting, the breakdown in that suit: $9,307 are for medical hospital expenses; $30,000 for future medical; $250,000 for future loss of earnings; and $2.85 for prospective general damages.

Now, the district has already spent over $8,000 in legal expenses. They have a $50,000 deductible, so they could spend up to $50,000 just on legal expenses.

One wonders what the fault would be in this case, but I think reasonable people would say that the school district has

little if no fault in this matter, but yet it will cost a lot of money, taking away from the education of those children.

Another issue. Schools have always been a center for community activities. Another concern for people should be in every community in this state is that more and more schools are prohibiting community groups from using school property because of this unfair law. In the Duarte School District, the district gave permission to a local community group to use a high school on Saturdays to give away free cheese. Well, a woman -- by the way, she didn't even qualify for the cheese but she came to get it anyway, and she wasn't even a resident of the area -- well, coming to get a portion of her what she thought was her share of the cheese, she was injured. She tripped in a hole on the playground. Well, the hole was nowhere near the area where the cheese was being given away, and to boot, a palm tree had been toppled over by vandals a couple of weeks prior to make the hole in the ground.

Well, the woman is suing the community group, the school district, and I don't have the exact numbers, Senator. You'll probably ask me about it. I'll be glad to get them for you.

But as a result of this, the most important point is, the school is no longer allowing community groups to use this property.

We don't argue that school districts should not pay a fair amount when the actions or inactions wrongly injure another. What school districts are fighting is the expenditure of their limited resources to pay for a system that is neither fair nor

equitable, a system which is not much more than a lottery for those who are prone to abuse it.

The California School Boards Association has joined one of the largest coalitions in California history, including all 58 counties, virtually every city, and over 70 statewide organizations in supporting Proposition 51. And I respectfully urge you to join us in supporting this proposition.

I thank you for the opportunity of being able to present this testimony before you.

CHAIRMAN LOCKYER: Thank you very much.

Sheriff, nice to have you with us.

SHERIFF DUFFY: Senator, it's a pleasure to be here. Welcome to San Diego County.

My name is John F. Duffy, and I'm the Sheriff of San Diego County.

One of the difficulties about being fourth is to try to avoid being repetitious, and I'll try to do that.

In my view, the taxpayers and consumers and citizens have had about as much of joint and several liability as they can stand. They simply can't stand much more. They've had experience enough in the past ten years. It's completely out of hand over the past ten years.

I'm here not only as the Sheriff of San Diego County, but also representing the California State Sheriffs' Association as well as the California Peace Officers' Association. I'm the past president of both organizations and currently serving on their boards and have been active since 1971.

Additionally -- who, by the way, are supporting Proposition 51 -- additionally, it's interesting to note that the California Police Chiefs' Association also supports it, as does PORAC, the Peace Officers' Research Association of California, being the rank and file service providers, the ones on the street, some 30-40,000 rank and file peace officers.

Additionally, it is supported by the California District Attorneys' Association, the Chief Probation Officers' Association, the Grand Jurors' Association whose responsibility it is among other things to be watchdog over local government, as well as citizens' organizations such as Californians Against Crime.

Three points I'd like to make basically are that the current joint and several liability is inherently unfair to government, to public utilities, to large corporations, and even to some small companies because of the so-called deep pocket.

The deep pocket leads directly to the taxpayers and to the consumer. It is John Q. Public who actually pays. There's no such thing as a major corporation accepting judgments and simply absorbing them. Those judgments and settlements are passed on to the consumer. In the case of a public entity, such as cities and counties, school districts, all of the money of those entities belongs to the public, and I might say it's rather limited, because that's my second point.

Public funds are extremely limited now, and the public has certain expectations of services. Proposition 13 has limited the ability of local government to raise additional funds, as everyone knows, on the cities and counties.

The spending limitations on government have been reached in some cases, and in some cases they're about to be reached. So in the future, we're looking at less money being available. Even if it's available, we can't spend it because of the voter-enacted spending limitation.

CHAIRMAN LOCKYER: Although -- pardon, Sheriff -- you can exceed it for a court order.

SHERIFF DUFFY: Yes, for a court order.

CHAIRMAN LOCKYER: So theoretically these amounts --

SHERIFF DUFFY: I'm sure we'll be in court on the day this applies. We can't afford to go out of business, to have unspended (sic) money and not provide services.

But large judgments basically mean less dollars available for vital public safety services as well as other governmental services.

It's difficult for me, and I won't even attempt to try, to relate specific judgments or settlements to specific service level cuts. I don't think that can be done. It has to be handled in a general way, but certainly any thinking individual will recognize it simply adds to the problem.

We have large judgments, as was discussed earlier by both the City Attorney and by Supervisor Golding, by Diane Jacob. It's evident that with the spending limitations, which are about to be reached, and with the difficulty of raising additional funds, more and more we're being cut down.

I don't think I need to tell you, Senator, or either one of the Senators, as a matter of fact, that in the northern part

of the state there are sheriff's offices who've been cut back tremendously. Butte County, for example, north of Sacramento, they've lost some 25 percent of their force, and other counties have experienced much the same thing. We haven't had that happen yet in San Diego County, but I wouldn't be surprised if it continues that we will someday be affected that way.

SENATOR PETRIS: Excuse me.

Over what period is that, and what's the cause?

SHERIFF DUFFY: Within the last ten years.

SENATOR PETRIS: Is it Prop. 13 related maybe?

SHERIFF DUFFY: Well, it's Prop. 13 related. It's also, among many other things, the lack of funds. If funds go to court ordered judgments or court settlements, they're not available for public service, and that's my point.

SENATOR PETRIS: Are there any impacts of judgments which specifically caused layoffs?

SHERIFF DUFFY: I just --

SENATOR PETRIS: Or are you talking about a combination of many things?

SHERIFF DUFFY: Senator, I've just testified that I'm not able, nor would I even try, to relate specific judgments to specific services level cuts. I don't think that can be done by anyone. But in the over all, when you have limited funding being crimped even more, and you have judgments which must be paid -- let me just perhaps illustrate that the cuts that were made in the Butte County Sheriff's Office were because the jail was under court order in terms of its staffing, as is the case, as a matter

of fact, in San Diego County. The cuts, the service cuts had to come from the patrol services. So they were down to two cars, two cars in all of Butte County, the unincorporated area, to provide law enforcement service as well as serve civil process.

So it's difficult, as I say, to relate those specific judgments, which have occurred also in Butte County. It's just part of the overall problem.

May I continue?

SENATOR PETRIS: Well, I needed some clarification there because I didn't want it to be mixed in with Prop. 13 cuts, which have been very substantial all over the state.

Periodic payments are made on the others, so the judgments don't have to all be paid at one time in a lot of cases.

Anyway, you've answered the question. You really don't know what can be attributed to what source. You're talking about a combination of things.

SHERIFF DUFFY: Part of the over all -- Prop. 13, as I say, initially cut the money, but it makes it impossible for cities and counties to raise taxes like they used to be able to do to meet the funding requirements, whether the funding requirements came from law suit judgments or whether they came from service level requirements. They're limited in their ability to get additional funds.

I guess my last point is that Proposition 51 is fair, in my view, to the injured party. It provides for all the economic damages as has been previously testified to here. It provides

for a proportionate share, based on liability, for the general damages for pain and suffering.

It also provides some relief to the beleaguered cities and counties who are trying their best to do the job in balancing the public service needs with limited funding levels, and at the same time accept their fair share of liability in those instances where they should accept liability.

Thank you.

ASSEMBLYWOMAN LA FOLLETTE: Mr. Lockyer, I have a question which sort of follows up on what Senator Petris was saying.

Would the School Board Association have the ability to determine the total costs of awards that have been granted, let's say, this last year, just to give us an example of the amount of money that is being diverted from education towards payment of these awards?

MS. JACOB: I can check and see if we can get that information for you.

ASSEMBLYWOMAN LA FOLLETTE: I think that would be very helpful.

CHAIRMAN LOCKYER: Thank you, Sheriff.

Who's next?

MR. BROOKS: It looks like I am.

MAYOR DORMAN: Well, you may testify. If I may be excused a minute, I've got a car parked that's going to get a ticket. I'll be right back.

CHAIRMAN LOCKYER: Why don't you go right now, Mayor. Go ahead right now.

MAYOR DORMAN: I also would like to welcome you to San Diego.

I am R. H. Dorman, Mayor of the City of Coronado.

Like the previous speaker, I'm going to try to avoid duplication; however, I would like to point out that when I was elected Mayor two years ago, our insurance was $22,000. The following year, it's $127,000 for coverage. This year, on April 1, they wouldn't insure us. We could not get insurance, along with other cities in the county, particularly in the San Diego area.

So, we and six other cities have joined together in a pooling proposition to share our liabilities. We are having to put in 270,000 into the kitty initially; we don't know how much more.

All of this, I'm trying to illustrate, is because of the joint and several liability being heaped on top of the comparative liability.

Now, I know that at least one of you is an attorney, and you know how this evolved. We had the tradition during our common law for many years of governmental immunity. You couldn't sue -- couldn't sue the king, and it came down.

That was taken away, and properly, because if we were at fault, we want to pay our fair share. But under this joint and several rule that came down to us under our common law, if you were at fault, you couldn't sue, period. You couldn't recover.

But when California courts adopted comparative liability, and heaped that on top of what was existing, they created a real problem for government-supported municipalities.

I have to worry about whether I've got enough money to pick up the garbage, to trim the parks, to pay our police and our force, and when we're subject to the liabilities purely because we are perceived as a deep pocket, and we have to pay the total judgment, there's something wrong with the system. It's not fair for a little city -- we have 10,000 voters over there, a small city, 20,000 population -- because we're blessed with a lot of public amenities -- one of the best beaches in Southern California -- our daytime population goes to over 60,000. We should not be the ultimate deep pocket for everybody that wants to come to Coronado and enjoy our recreational facilities.

What it's forcing us to do, because we're uninsured, is to restrict organized groups from using our facilities without them having a million dollar coverage with us to insure us. It's driving people away, precluding our citizens from enjoying the facilities.

One of the things that has been traditional in Coronado has been our summer concert series in the park, where the city co-sponsors it. At the next Council meeting, it looks like we're going to have to terminate that series of things that's part of the character of the city. I feel like I'm being subjected to terrorism of some kind because I cannot -- I have a fiduciary obligation to protect the city's resources. We cannot take risks which under insurance we could take.

So, I'm suggesting to you that the cure, as far as I'm concerned, this Proposition 51 is a step in the right direction. It does not go near far enough.

I think that since comparative liability was the creation of the courts, if you give us a chance to vote on it, you in the Legislature didn't pass it, that maybe we should make pure comparative negligence the law of the land, throw out the deep pocket joint and several thing because they're like oranges and apples.

Let us pay for the damages we caused in the degree of liability that we caused. Pure comparative negligence by the Legislature would cure this problem. And I would urge you to seriously consider it.

And at minimum I support this because somehow it's not going to be the miracle. I'm not foolish to know this is going to solve all the problems. I am hoping that as a result of this, a just system will come out of all of this for all of us.

This unfair situation we have now is just not right, that a small city like mine has to give up services, cut back on the amenities that make it a nice place to live, because we don't have the deep pocket to take care of these things.

Thank you very much.

CHAIRMAN LOCKYER: Thank you. I hope you didn't get a ticket.

MAYOR DORMAN: I hope not.

CHAIRMAN LOCKYER: We'll find a deep pocket for you.

ASSEMBLYWOMAN LA FOLLETTE: Are you volunteering?

CHAIRMAN LOCKYER: No, I'm a shallow one.

MR. BROOKS: Mr. Chairman and Members of the Committee, I appreciate the opportunity to testify before you today. My name is Michael Brooks. I represent the San Diego Taxpayers Association.

The Association has been the only public interest organization within San Diego County dedicated to promoting efficiency and economy in state and local government operations for over 40 years. We have a long history of promoting deep pocket reform and currently strongly support SB 75 and Proposition 51, as does our big brother, the California Taxpayers Association.

The Association believes the deep pocket law as it currently exists is unfair to taxpayers for several reasons. Taxpayers pay in the form of unfair taxes, unfair higher taxes, reduced government services, higher consumer prices, and higher prices for their own insurance.

As Sheriff Duffy suggested, when cities and counties are forced to go without insurance, as an alarming number have already found out that they've had to do, they could be forced to ground police and fire vehicles, which is also unfair to the taxpayers, or perhaps stall garbage collection.

When businesses are forced to close down because it's no longer feasible to stay in business, that also affects the local government tax base and forces them to reduce some services as a result of that, and it's the taxpayers and consumers who pay the price.

For those very simple reasons we are supporting Proposition 51 and do have a long history of supporting deep pocket reform.

We strongly urge your Committee to do something about deep pocket reform, and hopefully you will support the initiative.

Thank you.

CHAIRMAN LOCKYER: Thank you, Mr. Brooks.

Ms. Chitlow.

MS. CHITLOW: Senators and Assemblywoman, my name is Valerie Chitlow, and I'm here today as the representative of the California State PTA, but in particular the 9th District PTA, which encompasses all of San Diego and Imperial Counties.

Membership in the PTA is 84,000, just a little more than that locally, and just over one million statewide. Not only are parents and teachers members of the PTAs, but students, Legislators, local businessmen, and senior citizens are, too. In short, we are -- our membership is a real cross section of our communities.

The California State PTA has taken a position on Proposition 51 based on the votes of delegates to our State PTA convention. Delegates representing over one million members adopted the State PTA legislative platform in May, 1984. As a result of the vote, the State PTA has taken a position that keeps priorities for the needs of children and youth foremost. The California State PTA supports the passage of Proposition 51 on the basis that current law is unfair.

Currently, government groups such as school districts are sometimes included in personal injury suits, even though their fault may be minor or nonexistent. School districts, because they're funded through tax dollars, are considered to have deep pockets and to be capable of paying the entire award granted by juries, regardless of the district's percentage of actual liability.

It's a fact that cities and school districts have found it difficult to obtain liability insurance, and where insurance has been made available, premiums have often become prohibitively expensive. Most school districts statewide are now self-insured, meaning damage awards against them must be paid from the district's general fund.

However, the deep pockets issue is not just a proposition of increased insurance premiums and decreased student services to local school districts. In Placencia, California, the school district found itself in the position of having to deny use of its facilities to the City. The City's school district facilities use agreement requires the City to provide adequate levels of insurance. Unfortunately, Placencia is one of the 54 cities in California presently going bare.

Traditionally, the City provides a summer aquatics program for hundreds of its citizens and celebrates the Fourth of July with activities attended by 6-8,000, all on school district property. Unless the City can find insurance somewhere, the whole community will suffer this summer.

In the months ahead, situations similar to that of Placencia will be seen time and time again all over the State of California.

A specific example of the consequences of increased insurance premiums on student services and programs can be seen in one small local school district. The premiums have increased $100,000 in the last year. That equates to salaries for more than two to three full-time school nurses, teachers, school counselors, and librarians; or sixth grade camp made available to all district sixth graders; or twelve years of a fourth grade water safety program; or 1,334 buses for student field trips.

In short, deep pockets has increased school districts' insurance premiums, thereby forcing a mandatory reduction in the high standard of student services that were once available to all.

Proposition 51 will bring fairness to liability laws and will end the unjust drain on public resources, which also diverts funds that should be used for services for children and youths. We as PTA urge your support for Proposition 51.

Thank you.

CHAIRMAN LOCKYER: Thank you for joining us this morning.

I guess Ms. Cook is the cleanup batter.

MS. COOK: Mr. Chairman and Ms. La Follette, Roberta Cook of the California Chamber of Commerce.

It's indeed a pleasure to be here today, although I'm not from San Diego. The representative from the San Diego

Chamber is in Washington, D.C., so we're kind of playing a geographical game in moving people around.

The San Diego Chamber is one of approximately 300 chambers who are in support of Proposition 51. From our perspective at any rate, a new plague has hit California and the business community, and it's the plague of an unreasonable court doctrine called joint and several liability.

You've already heard some very fine examples of how this unfair rule is affecting people in California, and I suppose the plague of being eighth deserves even less to say than there was when you were fourth.

However, I will go ahead and mention that the problem for us, from our perspective, is that it's encouraging law suits against business and government mainly because they can pay the bill.

The problem with the joint and several liability rule is that it makes you as a business owner or a government entity almost limitless in liability exposure. When it's impossible to predict a risk, the thing that goes along with that equation is that insurance becomes almost impossible to purchase. So obviously when the law suits increase and risks increase, the availability and affordability of insurance goes hand in hand with that.

I have a cartoon that I intended to bring today that I'd love to show at this point. It shows three ships: the Nina, the Pinta, and the Santa Maria. And standing on the poop deck of one of the ships is Christopher Columbus speaking to a sailor, and he

says: Halt! We have to turn back! Our liability insurance was cancelled.

It's humorous, but it does speak for a situation that has happened to businesses in California. Just last summer we did a survey, and one out of eight California businesses are now bare, either because they cannot afford the insurance coverage, or it's not available.

What happens when a business is bare? I would like to refer you to an example that was mentioned in Ink magazine. A Southern California manufacturer of roller skates had his liability insurance escalate from $12,000 a year to $40,000 a year. And he's kind of a salty old business person, and he said: I'm not going to buckle under to this; I'm going to go bare. I'm going to tell my employees to double check every piece of merchandise, to do more marketing, and to live on the event that nothing bad will happen. He said: We're still producing roller skates, but I sleep a lot less at night.

Even closer to home in Sacramento, we have a Sacramento businesswoman who ran her business. She was a service organization and employed 10 full-time employees, 15 part-time employees, and when her liability insurance rose from $400 to $4,000, she sent the note to all of her clients and said: I'm sorry, I cannot pass this cost along to you; therefore I'm going out of business. It doesn't stretch much to know what happened to the 10 jobs and the 15 part-time jobs. They are now unemployed.

We feel that this is the type of problem that cries for relief, and we are in strong support of Proposition 51 to change an unfair rule of liability in California.

Thank you.

SENATOR PETRIS: On that example of 400 to 4,000, how many claims have been --

MS. COOK: None. She had no claims.

SENATOR PETRIS: Doesn't that raise some questions in your mind?

MS. COOK: No, because the risk is there. She had people that drove -- her employees drove from home to home or --

SENATOR PETRIS: But she had no claims. For most of us in the course of life as we encounter problems, people look at the track record in order to get some idea of what's happening in order to project policy in the future.

Now, the same thing happened in my district. We have an outstanding, very popular skating rink; 20 years owned and operated by one family. Not one claim filed against it during the entire 20 years, including the recent period of the so-called increase in claims. Their premium was running around 3,000 a year. All of a sudden in one year it jumped to $120,000.

Now to me, it seems that anyone observing that kind of development, where there's been absolutely no claims and a jump like that, somebody ought to be asking some questions as to why that's being done.

There are other examples in other parts of the state and in other states which compel me to try to find out what is it

behind the decision of a particular company, or a number of them, to cause a cancellation.

Does this mean that this skating rink is the only one in the state that's never had a claim and all the rest of them have been going crazy with claims? I don't know. And they're not giving us that information.

Do you happen to know about any of the other businesses that you've cited, what their track record shows on their claims, if any?

MS. COOK: I don't -- I don't have specific information on all of the businesses, but I do know that I frequently receive calls from local chambers who have been unable to also get directors and officers coverage for their local chambers, and they do not have previous claim records.

SENATOR PETRIS: All right. Doesn't that raise a question in your mind? It seems to me that that should.

When we scream insurance crisis under those kind of circumstances, it makes me very, very suspicious of what they're up to.

MS. COOK: It's because of the situation where a local chamber might have an event where they would have foot faces. And we've heard about the cases here where the person steps in a pit going to get cheese. Well, there's a law suit resulting out of that.

I think it's just the fact that there's more law suits and more exposure as much as any other thing.

SENATOR PETRIS: Yes, except that in each case you've given us, apparently there hasn't been any claim at all.

MS. COOK: Somebody's collecting because a lot went out.

SENATOR PETRIS: What?

MS. COOK: Somebody's collecting somewhere, because a lot has been paid out in insurance. I don't have the cases where particular employers paid large claims, but I do know that --

SENATOR PETRIS: But in the cases you gave us, nobody paid out anything, so what's all the commotion about? That troubles me.

MS. COOK: They're having to pay increased insurance prices which reduce their ability to carry on their business.

SENATOR PETRIS: I know that, but the question is: Why is the insurance company doing that?

MS. COOK: I have --

SENATOR PETRIS: Can they show us statistically that it's justified?

MS. COOK: That's not --

SENATOR PETRIS: Maybe they can; maybe they can't, but they haven't given us the information.

MS. COOK: Even if the insurance company could show you that information, Senator Petris, that's not going to solve the problem of deep pocket. For whatever reason the insurance companies are doing that, we still have the liability regardless of whether there's insurance or not.

SENATOR PETRIS: Except that if it turns out that they're not justified.

You know, a company was sued in Los Angeles last year or the year before, I don't remember, by a bunch of doctors. Now you remember we had the doctors' crisis 10 years ago, and we changed the law. And the premiums didn't go down. The doctors got fed up with it. They went to the much hated trial lawyers and said: We want to correct this situation. They sued one of the biggest companies in the state for gouging, for charging premiums far in excess of justification.

It didn't go to trial. Do you know why? The company settled it for $50 million. They're now reimbursing doctors who were in that law suit in L.A. County $50 million because they were gouging.

Now, if that's the case in the examples you've illustrated, I'd like to know because I think we're all entitled to know in order to form a judgment. If it turns out they're all justified, and they're not gouging, we'll go a certain way. If it turns out that they're gouging, then we need to know it in order to make an intelligent decision.

That's why I'm curious.

Thank you.

ASSEMBLYWOMAN LA FOLLETTE: Senator Petris, I think you're leading into the opposition, and we have heard from all the proponents.

SENATOR PETRIS: We have, okay.

Our reporter needs a break.

ASSEMBLYWOMAN LA FOLLETTE: Thank you very much, those of you who spoke in support of Proposition 51.

After a brief break, we'll have the opposition.

(Thereupon a brief recess was taken.)

ASSEMBLYWOMAN LA FOLLETTE: We will resume our meeting. The opposition will please come forward.

Senator Lockyer will be returning very shortly. He had an important telephone call to make, but he has asked me to introduce the opposition so they may start with their testimony.

Harry Snyder.

MR. SNYDER: Thank you.

My name is Harry Snyder. I represent Consumers Union of the United States, Inc., the nonprofit publisher of Consumer Reports Magazine. We have 500,000 paid subscribers in the State of California, and over 3½ million in the United States.

Consumers Union as an organization has long been involved with both the issues of insurance and the tort system, and we were the original publishers of Jeff O'Connell's book recommending a no fault automobile insurance system.

We have signed the ballot argument in opposition to Proposition 51 because we strongly feel that this is not tort reform and it is not aimed at solving the insurance crisis.

Indeed, we do have an insurance crisis in the United States and one in California. We may want to change our tort system, but the two things are not connected.

It's always stunning to me to hear a group of individuals as we just heard talk about enormous increases of their insurance premiums and not one mentioned the need to do something about regularizing and scrutinizing the insurance

industry. The courts don't raise insurance rates, and in fact there's be nothing that's been said that ties the enormous increases in insurance rates to our tort system.

I took a look at something that was out here on the public information counter called "Some Deep Pocket Cases." Not one of them would be affected by Proposition 51. In many cases, these are settlements or claims filed that have nothing to do with jury verdicts. In every other case where there is a jury verdict, and in the other cases as well, there's not one mention of pain and suffering; not one single mention of pain and suffering.

And the reason is that they cannot point to a case where pain and suffering have been awarded in a joint and several liability case against a city or county by a jury. We searched the 1985 records of jury verdicts for more than $1 million. We had to limit it because we have limited resources. We looked at the big cases because that's where we thought the problems would be.

We looked at all of the 1985 jury verdicts against cities and counties involving more than $1 million where joint and several liability was involved. There were eight such verdicts. Two of them -- one of them was thrown out; the other one's on appeal. Of the six remaining that we can assume are now paid, they were all limited to the amounts of proof for actual medical costs, which are very high, and some loss of earnings in some of the cases. That was six cases.

Not one of them involved a payment that could have been attributed to pain and suffering. So, Proposition 51 would not have affected any of those.

In addition, we found 28 cases where the verdict was for the defendant and the plaintiffs got nothing.

Now, I stopped -- you know, that stopped me in my tracks when I took a look at that information and said: That's all of the reported verdicts we could find, and the system is working. It makes sense. You go to trial against a city or county with a jury of taxpayers, they aren't giving away the store. They're very sensible. They may find liability. If they find liability, they may reward or make an award for plaintiffs, but they're not making any awards for pain and suffering.

So, as they say in the famous ad: Where's the beef? The beef is really an attempt to get at the entire tort system.

Now again, Consumers Union is willing to sit down and redraft a system to compensate the victims fairly without any trial lawyers being involved in it for defense or plaintiffs, if we can devise a good compensation system, and devise a system to deter wrongful actions by corporations, by cities and counties, by negligent people, or people who willfully and intentionally injury somebody. Those two things are the basis of our tort system: compensating victims; deterring wrongful action.

Proposition 51 does not compensate victims. It takes away from their compensation, and it lessens the deterrents for negligence.

That's the reason that we oppose it.

We also oppose it because it will divert attention from solving the insurance crisis that we have. We have proposals, some of them in the Legislature, to solve the insurance crisis.

There were a package of bills, several packages of bills, in front of the Finance, Insurance and Commerce Committee of our State Assembly on Tuesday, a 17-member committee. We couldn't get more than 6 Members of the Assembly in that committee at one time to address the insurance crisis. You'd think the insurance crisis went away.

There were more Members, probably by four times, of the lobbying associations for the insurance industry than there were Members of the Assembly in that room.

Where's the insurance crisis? Where's the answer to the insurance crisis?

Let me answer my own rhetorical question with information we've gotten from industry papers. Let me read to you some quotes. Open quotes:

> "It is right for the industry to withdraw and let the pressures for reform build in the courts and in the State Legislatures.
>
> John G. Byrne,
>
> GEICO Chairman
>
> Journal of Commerce, 1985"

Open quotes:

> "Don't get the idea that you're likelier to get tort reform if

> you're nice enough to write new business. That's totally unrealistic. Don't settle for promises. Your only power is whether or not you make the product available.
>
> George K. Bernstein
> Insurance Attorney at
> the Insurance Services
> Organization Meeting,
> January, 1986"

The Journal of Commerce reports:

> "The Insurance Information Institute will soon begin a $6.5 million nationwide advertising campaign designed, in the I.I.I.'s words, to 'change the widely held perception that there is an insurance crisis to a perception of a law suit crisis.'"

Close quotes. That's from the Journal of Commerce as well.

There is an insurance crisis. It's created by the industry. They don't want to take the hit for raising their premiums and dropping lines that are unprofitable.

On the other hand, where were these same city, county, and local government representatives when Senator Marks' bill was presented to the Senate Insurance Committee attempting to solve the problem for them? They didn't support the bill, and the

insurance industry killed the bill. It would have provided for reinsurance for self-insurance pools for cities and counties and for any other line where there's not adequate coverage.

It was a good measure. It still is a good measure, but the insurance industry will not let us solve this crisis because they want tort reform.

What does tort reform mean? Tort reform in their eyes means the elimination of punitive damages. It means the limitation on contingency fee arrangements for attorneys so that people will have a more difficult time getting to court. It means caps on pain and suffering, and perhaps caps on other awards. And it means structured payouts so that people really don't have to pay as much as the jury awards.

ASSEMBLYWOMAN LA FOLLETTE: You know, I don't think you're addressing Proposition 51. You're talking about maybe what you would recommend, but we're talking about Proposition 51.

MR. SNYDER: Well, I think I'm talking about Proposition 51.

ASSEMBLYWOMAN LA FOLLETTE: And I think you're right. I don't think that Proposition 51 is going to be the sole answer or even part of the answer to bringing about a change as far as insurance is concerned.

But I think what we're talking about is a fairness issue. Who ever is negligent should pay according to their degree of negligence. That's what we're here to talk about.

MR. SNYDER: Well --

ASSEMBLYWOMAN LA FOLLETTE: Tort reform, yes. I agree there should be tort reform, too, but let's try and keep the debate around Proposition 51.

MR. SNYDER: Let me tell you why I think this is connected with Proposition 51, then we can drop it if you like.

Mr. John McCann of the Insurance Information Institute in San Francisco has said:

> "Proposition 51 is the tip of the iceberg of the tort reform we want. It will not solve the problem, but it's the beginning that we want to go after the rest of tort reform."

So Proposition 51 is being pushed by the insurance industry and by chambers of commerce and business because they want tort reform. And I think it's important to understand that it is they want.

Now, if that' not relevant to your understanding of the issues, I'm happy to drop it, Mrs. La Follette.

Let me also say that from a consumer viewpoint this is not tort reform. This is an elimination of victims' rights. And the ad campaigns that are going on that say that this guarantees victims' rights are totally 180 degrees in opposition to what really happens.

And this changes the system of government which has always said: As between the negligent party and a guilty party, the guilty party should pay. And what this does is say: We're going to let the guilty party go free.

ASSEMBLYWOMAN LA FOLLETTE: It does not say that. It says: The guilty party is going to pay according to the amount of guilt.

MR. SNYDER: Well, in the court system, they really don't apportion guilt as between the defendant and the plaintiff. They apportion guilt as between different defendants to see which one should pay how much.

Now that system, which was put into place for the convenience of defendants so they don't have to have a second trial, is being used to denigrate the rights of the plaintiff.

The defendant, in order to be liable, has to be found -- and I'm sure a trial attorney here will be able to tell more about it -- has to be found to be guilty of having caused the injury and but for their negligence the injury wouldn't have happened.

So, they're found fully guilty as to the plaintiffs. They're let off because there are other defendants, and you want to prevent the plaintiff from recovering twice.

I don't think it's fair. And I don't think it's reform. It's not reform because it only takes from away from one side of the scale.

CHAIRMAN LOCKYER: Thank you, Mr. Snyder. Have you finished?

MR. SNYDER: I have provided a package of information to Ms. La Follette, and I can do that for the rest of the Committee Members. I think Senator Petris has a copy of our information, too.

CHAIRMAN LOCKYER: I didn't want to cut you off.

MR. SNYDER: You've never done that yet.

CHAIRMAN LOCKYER: That's true.

MR. FELLMETH: Mr. Chairman, my name is Bob Fellmeth. I a Professor of Law and the University of San Diego Law School here, and Director of the Center for Public Interest Law, and Editor of the California Regulatory Law Reporter, which records on the activities of California's regulatory agencies, including the Department of Insurance, which we're obviously very interested in and have been for some six years.

I've also been on the Board of Consumers Union and past chairman of the Athletic Commission.

I have some testimony which I've prepared to give to you, and I'm not going to read it. I know that just puts everybody to sleep. I'm just going to basically tell you some of the high points, hopefully the high points, and to address some of the questions that have been raised here.

There's no question but that Proposition 51 addresses a perceived inequity, and it does indeed address an abuse. Someone who is a relatively minor 10 percent at fault should not have to pay the whole 100 percent of the ticket and so forth. Let's accept that as a notion that that's the case.

The problem comes in because of what Harry described as the overlap of negligence. I think a good example for what I'm talking about has to do with the lead case, General Motors vs. Daly, the lead case which created comparative negligence in the product liability setting. It's the seminal case here in California.

I'll just change the facts a little bit to show you what I mean in terms of the problems of 51 and how it can be solved.

Let's say that we have someone driving down the street perfectly innocent. He has his seatbelt on.

Let's say that someone who's drunk crosses the center divider and smashes into him.

Our victim, and I call him Steve Victim, I think, is in a serious accident. The car is negligently designed so that the door in any even small collision flies open. He is catapulted out. This is what happened in Daly vs. General Motors, a defect in the door handle.

Now, a jury can look at those facts and say: Well, I think that Smith, the guy who hit him, the drunk, is 70 percent negligent; I think that the seatbelt manufacturer who's now out of business who designed a defective seatbelt that didn't work properly is 20 percent negligent; and I think that the auto manufacturer who designed a car so that at a slight collision the door flies open and the passenger flies out is 10 percent negligent, because after all, that happened after all these other things happened, and it wouldn't have happened but for.

And therefore, the end result is that our victim, who may be a paraplegic for life and in incredible pain and suffering for 30 or 40 years, receives 10 percent because of the one deep pocket that exists.

Now, the immediate answer to that is, well yeah, you can come up with all sorts of bizarre cases, and you can come up with all sorts of unusual situations, but this kind of situation I'm

describing is actually very common. It's very common for there to be a kind of overlapping negligence here. It's very common for someone's design negligence to be triggered by the negligence of someone else; that's usually the case. If someone designs a car so that you're speared on the steering column nicely in a 20-mile per hour collision, unless someone else does something negligent to trigger the accident it's not going to happen.

So, the solution is very simple, I think, and that is to allow juries to award percent fault equally more than 100 percent. In my hypothetical, we have, for example, a drunk driver 90 percent at fault. It seems appropriate to me. And we have a seatbelt manufacturer who's, say, 40 percent at fault. And the auto manufacturer's 60 percent at fault.

Then you've eliminated both abuses. You've eliminated the abuse of having one person who's not really at fault or who's minor, who's out there not doing anything, paying everything; and you've also eliminated the abuse of where there is overlapping negligence, which is often the case, depriving the victim of the kind of percentage recompense that a jury would like to award him because of the 100 percent ceiling on the total compensation package.

That's my solution to accommodate Proposition 51 to a legitimate court system that solves -- creates equity and solves the problems.

I don't think we should pass 51 and create probably a greater inequity in terms of abuse than we're addressing, given that the factual unusual circumstances which trigger the Proposition 51 abuse.

ASSEMBLYWOMAN LA FOLLETTE: May I react?

I think that's an intriguing idea, but I think that what you would find is that the lawyers with the greatest ability would come out with the highest percentage. So actually what you would find then is that -- then, of course, thinking about it further, that's also true today under the current system. Whichever lawyer has the greatest ability, those awards are going to be the biggest.

But in a way, what you're suggesting is not really going to make much of a change.

MR. FELLMETH: Yes, it is. It's going to create equity because if someone is at fault to a certain degree, they're going to pay that amount. They're not going to pay 100 percent if they're 10 percent at fault. But on the other hand, the jury's not going to be put in the position of taking someone who, because of their negligence, because of their design flaw, had a time bomb out there in society ready to go off the second anyone else's negligence is triggered, is going to get off with a 10 or 15 percent nondeterrent producing judgment. You want to have the deterrence producing judgment which matches the kind of negligence that occurs, the kind of wrong that occurs. And this allows you to do it more precisely.

I want to make one other comment about the insurance crisis. I know it's -- I think it's important, and I'll tell you why it ties into Proposition 51.

It ties in because we're looking at the victims first, and that's what upsets me. We're looking at the victims first

for redress through an insurance crisis where we have an obligation to look elsewhere first. The victims we should look at, but we have an obligation first, I think, to look at the insurance industry.

We have an insurance industry which has been exempt from antitrust law because of the McCarran-Ferguson Act. It's been exempt because of California state law. I spent 10 years as an antitrust prosecutor in this county, federal and state, and I believe very strongly that there are serious, serious practices going on in the insurance industry which would be felony offenses if they were subject to antitrust law.

They are engaged in cartel practices. They engage in open price fixing. They probably engage in surreptitious price fixing. They have divided the territory up so that most areas have anywhere from two to four insurance companies. They are engaged in division of territories and allocation of territories. They're engaged in group boycotts. They're engaged in almost every category of antitrust violation you can imagine.

If you simply look at the figures I have on page 5, and I haven't played any games with any numbers. I've simply taken the Insurance Commissioner's Annual Report, which no one ever seems to look at, for 1980, '82 and '84, and I've taken the total investment gain, the total premiums earned, and then in the last column when I say "Losses", I don't mean net losses. I mean these are claims paid out.

You'll see that claims paid out go up about the same rate as inflation with population increase. That's about what they've been going up.

This isn't a demagoguery about this judgment and that judgment and so forth. This is the actual numbers. And you see they don't go up that much at all, but you see the premiums earned and investment gain are extraordinary.

If in fact we had a regulatory system here, a PUC regulatory system here, which we should definitely impose where ever we have a cartel or monopoly power pricing anywhere, any industry, you would find these rates a fraction of their current levels.

This is because any kind of return on investment analysis of the insurance industries, similar to a utilities analysis, would in no way find acceptable the kind of profit levels that these figures indicate are occurring, not even close.

The rate base calculation and the return on investment calculation and the prudent expenditure evaluation would cut those insurance rates enormously.

My point is, the insurance firms have to make a choice. Either they're going to be subject to competition, or they're going to be regulated. They can't have it both ways. They've had it both ways. They have not been subject to meaningful maximum rate regulation a la PUC, not at all. And they've been exempt from antitrust law.

And if you want to go someplace to solve this problem, start there. Subject them to antitrust law. Maxine Waters has a bill right now which would do that, number one, and then make a decision. We have a line of insurance. Either it is competitive or it is not. If it's competitive, subject the industry to antitrust laws there and let the forces of the market place work.

If it is not competitive because there's a natural monopoly, there's only room for one or two insurance firms, fine. Recognize that fact; set up criteria to subject that line of insurance to maximum rate regulation by the PUC and impose PUC utility standards. If you have a monopoly, you have a cartel, you've got to have one or the other. You cannot have it both ways. You've had it both ways for a long time, and you're seeing the results of it.

It's not the tort claims crisis; it's the insurance monopoly crisis that we're under.

I think the other area of -- there are areas of abuse that have been raised by those who are proponents of Proposition 51 that should be addressed: increasing claims; false claim abuses; bad faith insurance awards which discourage insurance companies from fighting when they should fight when the claim's bad; the bringing of spurious law suits; the increasing judgments awarded. All these are factors, and they're something that should be looked at, but first look at the insurance industry and solve that problem, then move to the other.

One other factor, I want to close with this, and that is you should also look at the issue of reinsurance. When you have insurance companies withdrawing large areas of coverage as they are now, from child care centers and who knows what else, you want to look at why.

One of the reasons is because the reinsurers are withdrawing. When the reinsurers overseas, which is Lloyds of London, withdraw, that cuts down the amount of coverage that can

be extended by the California companies. That requires them to make a choice. They then shift to the most profitable line of business. Even if the other businesses may be profitable, they'll ship it to the most profitable line because they're limited all of a sudden, all at once, in the amount of coverage they can extend.

Lloyds of London has done that. It has come in with some of its friends and has decided: Okay, we can make monopoly power profits X, Y, and Z place; we're not doing that here. We're cutting it off.

They're not regulated by you. You have no control over them. You can't even examine their books; you don't know what they're doing. They've cut off the reinsurance. They cut off the amount of coverage, and all of a sudden there's a withdrawal and everyone says: tort system.

Nonsense.

CHAIRMAN LOCKYER: Thank you.

MR. HINTON: Good morning. I'm Peter Hinton, President of the California Trial Lawyers Association.

For those of you who have endured some of my remarks before, I apologize for being repetitious and will try to revitalize the presentation, Senator.

CHAIRMAN LOCKYER: You get to keep telling other people about your views. Do it.

MR. HINTON: Actually, the views which were somewhat unique several months ago I find now echoed in some interesting quarters.

I think from everyone I hear now, it's generally conceded that there's no real nexus, no real connection between any change in tort law and the focus that's now being brought to the joint and several liability issue.

Since 1978, there's not been a really dramatically significant case in tort law in California. Verdicts indeed go up at about the rate of the cost of living, in spite of some incredible misrepresentations that have been made by the insurance industry.

And this is now being echoed not by only the consumer groups, and the victims groups, and the labor groups that have formed a coalition to oppose this, but it's being determined by some people who no one would think would be opposed to it. For example, cities and the counties have been beating the drum for some change for a year and a half now, and yet according to this morning's paper, the mayor of the largest city in California has come out in opposition to the initiative, Mayor Bradley. They are self-insured, incidentally, and have been for a long time.

There's no big mystery any more for those who have paid much attention to what's happened as to why we're here. If the tort system has stayed about the same, the verdicts have stayed about the same, and they have, and this other myth I head echoed again this morning about the increase in litigation.

Let me give you a real consumer's magazine: Business Week, the current edition. If you will open it to page 24, you'll find an article entitled, "The Explosion in Liability Law Suits Is Nothing But A Myth." They took care to look at the

facts and the studies that have been done and stopped listening to the rhetoric; found out there's been a decrease in law suits.

There have been two studies by universities in Southern California, one by the Rand Corporation and one by the Judicial Council, which show that we file about the same number of law suits per thousand population we did in 1915 with a decrease in recent years.

The cases, some of which I heard recited this morning that are stated here, some have been national myths, are examined in this same Business Week article, and they conclude:

> "Behind the antecdotes, however, the hard, undramatic data don't make the case, and startling new evidence suggests that the law suit crisis may not even exist."

This is from Business Week.

Now, you heard a lot of drum beating about cases this morning, and I'll examine a couple of those in a minute.

But the point is, why are we here now? We're not here because of any change in the tort system. Joint and several liability's been with us since California became a state.

If there's no increase in litigation, and if verdicts go up at about the rate we would hope they would to keep up with the cost of living, what's all this crisis about? What's all the crisis atmosphere that cause people to bring joint and several liability change? What is it, anyway?

Joint and several liability is a doctrine which has said that if more than one person is found to be a wrong doer responsible for an injury under our law, then the innocent injured person can collect fully the damages they've sustained from any of these people who were wrong doers. That's what it is.

The hierarchy of values that the appellate courts have stated for years said: Our first concern is to fully compensate the innocent injured party. After that's done, we will let the guilty people sort out among themselves just how guilty each of them were and how they should share the burden of payment.

Now, there are two things that have happened to focus attention on it. One is the problem with the availability of insurance. I heard the first speaker this morning saying surely it's poppycock to talk about insurance, and then I think I heard the next eight speakers talk about insurance.

Well, it is a problem. You've had cities who have legitimate problems in California who have had increases of 300-1200 percent in their insurance premiums who've never had a claim against them involving this doctrine at all.

Why can that be? How can you withdraw insurance from child care centers?

In Colorado, in the preceding ten years, there was a total payout of $55,000 in claims for child care centers; in 1984, they took in $400,000 in premiums, and in 1985 they wouldn't offer insurance. There is no connection between what's going on.

There's some interesting little tricks of phrase used this morning that you need to be very aware of, and it's used in this little handout you've been given about cases: The city must pay; the city was forced to pay.

You know, I've never known anybody forced to pay money in a settlement. That is by definition a voluntary thing, or I've been handling all my cases the wrong way for a long time.

You make a settlement based on what you believe your exposure is under the law.

Now, the attention's focused here because, as Mr. Snyder pointed out, there are people as Mr. Bernstein that he quoted suggested, who are withholding the product in order to force a change. And that's very much what's happening in California. They're withholding insurance in order to force a change. Otherwise, why, in child care centers with no claims history, not get insurance?

Why did they close Charley Schultz' Skating Rink and Ski Slope, and the Easter Seal Society, which takes care of damaged children? And yesterday's Chronicle says that the ambulances can't get insurance even though the ambulance companies say: We have a very good claims history. Why is this being done now when there's no claims history?

Don't talk about the claims that have been made and a phony exposure based on some number somebody put on the paper when they had to file a claim within a hundred days or lose their right to bring a law suit. Look at the payout, and you're not going to find any change.

ASSEMBLYWOMAN LA FOLLETTE: I wanted to go back to your remark about settlements and negotiations as a result of settlements, and of course no one is forced to settle.

But usually isn't a settlement reached because there is the implied threat that the judgment will be far greater than the amount agreed upon in the settlement?

MR. HINTON: You know, I have sat on panels that have settled hundreds of cases, and I've never heard anybody use the word "threat".

They do make an assessment about what they believe the jury will determine the exposure to be under the law that exists, and under that determination they make a judgment about a proper payment for the case. But it's always made in conjunction with what they believe the law will determine their liability to be and a jury.

Now to say that it's a threat, to me betrays a lack of faith in the jury system and the legal system, and says that there's something unfair about it.

I don't think that case has been met.

ASSEMBLYWOMAN LA FOLLETTE: I think it also has to do with the fact that there have been some enormous judgments levied by juries because of some very, very capable trial attorneys.

And I am not taking away from trial attorneys as far as their capabilities are concerned, but I think there is that implied threat that the sympathy and the emotions that can be evoked within the jury members by a very outstanding trial attorney in the long run is something to be afraid of and is a threat.

MR. HINTON: You have a very high respect for trial attorneys, and that is very nice to hear, Ms. La Follette. But I have to tell you that I have represented thousands of people who have been injured, from very minor injuries to truly people who have had their lives devastated. And I have settled many cases, both as a panelist and as a party.

And my experience in doing that tells me two things. It tells me first of all that the settlement, while a good lawyer may have some effect on it, and we all of course would like to think that we do, it's generally made on a rather objective basis.

And the second thing I can tell you is that I've never represented anybody in my life who received sufficient compensation to think that their injury was worthwhile or even close to it.

The big settlements and the big awards that you hear about are paid to people who are truly damaged and for whom it can make a wonderful difference in their lives.

Money is not given away. There have been very few -- I mean, we've crossed a point where we started getting a million dollar recovery because that's where the cost of living was. The medical cost of living in recent years has gone up 13½ percent, well ahead of other costs. And that tends to define some of these recoveries.

But we have the same attitude taken here by people like Business Week about that, too. It's very realistic. They say we're just keeping up with the cost of living.

The reason, then, is that insurance is being withheld, and the insurance companies are crying crisis. They reported a $5.5 billion loss last year, but consumer advocate Robert Hunter, who is President of the National Insurance Consumers Organization and a former federal insurance administrator, analyzed the accounting on that and said they had a $6.6 billion profit. And after that, they hemmed and hawed and said: Gosh, we made a little mistake, and maybe we did have a $1.7 billion profit. That's from the Insurance Information Institute.

Now, you can judge the profit, I think, if you call your stock broker. Casualty insurance stocks increased in value 50 percent last year. That's 50 percent in one year.

How do you start a crisis? I think a lot of people would like to know that now.

I think anybody else in the business community would like to have a 50 percent year, and yet they're withholding the product and they're trying to force a change. That's why the attention is forced on this now.

The other reason is that you have a problem in California for which the Legislature has to assume some responsibility. That is that it would be no problem if you had multiple people responsible and everyone could pay their share. No one would quibble about it.

The problem occurs when some cannot pay. Now, why can they not pay?

The most common form of damage and injury in California is an automobile accident. In 1968, the Legislature said: It's okay in California to drive with $15,000 in liability insurance.

It cost $79 a day in 1968 to stay in a hospital. In 1986, it cost over $1,000 a day to stay in the hospital, and we still say: It's okay to drive with $15,000 in liability insurance.

Now, in what I've heard from other testimony there is an implication that all it takes is a clever lawyer and a sympathetic jury and a one percent case, and you've hit the jackpot with some kind of a lottery.

I'd like to bring you to the somewhat boring but very real facts that have to be confronted by anybody who brings a law suit. Let me give you a hypothetical example that may demonstrate several of the points in Proposition 51.

If you take -- I think Senator Petris referred to such a person -- let's take a 12-year old girl on a bicycle going to school in the bicycle lane. And a vehicle goes through an intersection overgrown with shrubbery and partially covering the stop sign. Makes it difficult to see. And because the car cannot see the stop sign, it goes through, hits the little girl, and dramatically amputates her leg at the scene of the accident.

Let's suppose this car has the $15,000 in insurance that most insured people drive with today. Let's assume that there were 16 prior accidents at that intersection.

Now, what happens? Let's step through the responsibility of the driver of the car. If he was not keeping a proper lookout, or was speeding, or both, he could be held responsible provided the following things occurred: the law suit is filed within one year. That is the shortest statute of

limitations in the country, but there are others as short. A one-year statute of limitations. That means if you don't file within a year, you're barred and you have no cause of action.

After filing that and getting it to court and paying the money that the attorney usually advances for whatever it takes to get the case that far, the costs, you go to trial. And at the trial it is necessary for the injured girl to establish that that driver was negligent, which she could probably do, and that his conduct was conduct without which the accident would not have occurred.

This is fundamental to an understanding of this. Nobody is ever held responsible in California unless their conduct was essential to the injury. If the person wouldn't have been injured had it not been for their conduct, they can't recover. So, you don't have any innocent people.

The second thing the jury has to find in a multiparty case, which is where this doctrine applies, is that each party they held responsible was a substantial factor in causing the injury. That's why there are no one percent cases that I have seen. I've heard of one or two, mostly on cross-complaints, and I'm sure there must be a half a dozen, but it's very interesting to me that while I hear trumpets of one percent liability, it's like the wonderful unicorn: you hear a lot about it, but nobody's ever seen one. And I have certainly never seen one against a city or a county.

I've heard them described, but I believe they were all settlements.

Now, why would that be? That's what it takes to bring liability against the driver.

What if it's the city? You don't have a year to file a law suit. You have 100 days. That's why the cities and counties are named so much because people don't have time to do an investigation. If they're later than 100 days, they may be barred completely from ever bringing the law suit. It's called a claims statute, and that is a fraud and a charade because they never pay the claim, maybe one in 10,000.

If they get by that, then they have to see if they can bring it at all, because someone made earlier reference to immunity. The king can do no wrong; the king is above the law. Well, the king is still above the law in the case of cities and counties.

It takes seven pages to list the immunities that would prevent anybody from ever getting a hearing in court or holding a city, or a county, or a state responsible.

If you're not barred by one of those, and you filed your claim, and you get to court, it is not sufficient to prove that the city or county was negligent, like it would be you or me or the driver of the car. Instead they have to carry an incredible burden. There can be no liability by the city unless the jury makes a finding that their conduct, the condition that caused the injury, was so bad that it, quote, "constituted a substantial risk of injury to people using the roadway with due care", close quotes.

In my defense days, we called that our directed verdict for defense instruction because it is almost impossible to win after that's given.

Now, if you get over that, and the jury finds that the person would not have been injured if the city's condition wasn't that bad, and that their condition was a substantial factor in causing it, 12 taxpayers now have to decide whether the person should be compensation and how fairly.

That is why there's no one percent case against a municipality or a county in spite of all the myth. I don't see how there ever could be.

Now, what do we want to do? We want to say: Gee, we want to reduce the responsibility of the cities and counties that have all this armor to keep them from ever being held responsible in the first place.

Is that good social policy? We all drive on the streets and highways, and there's nobody but the cities and counties to keep them well maintained and safe. Do we want to reduce that responsibility? I would think not.

Now, there's a myth sometimes propounded, too, that this applies only to cities and counties. It applies to a lot of the people.

And there's a myth saying it's all okay, because you're paid your out of pocket damages.

Now let's go back to the little girl. It doesn't cost much to sew up the stump of the leg or to fit her with a prosthesis or teach her how to walk. And there's already been an

exchange on this, but let me point out that that little girl gets no compensation under this law and under these facts for what happened to her when she goes back to school and wants to go to a dance, or go out for athletics.

ASSEMBLYWOMAN LA FOLLETTE: That statement you made isn't true, is it, that she gets no compensation under Proposition 51?

MR. HINTON: It's absolutely true. If you have a $15,000 driver and a city. Let's take the city in this case. Let's look at which case it is.

Let's say the driver was not speeding and he just couldn't see the stop sign, and there's 16 prior accidents. I would think the jury would be sufficiently outraged to find the city 90 percent responsible.

Let's take the same case where the driver had two beers. Still can't see the same stop sign, but people don't like drinking drivers. Now they put 90 percent of the responsibility on him.

Now the little girl's in trouble. Now she is not compensated when she goes back to school. She's not compensated for the emotional distress of having one leg. Her medical bills are paid, but there's a good deal more that happens to her life than that when she becomes, if she does become, a wife and a mother or a career person and has an altered view of herself as a person with one leg. I think she's missing a good deal in that fact.

ASSEMBLYWOMAN LA FOLLETTE: And her pain and suffering is compensated according to the percentage of negligence.

MR. HINTON: That's right. And in the case I gave you, that might be 10 percent. I don't think that's very fair.

You see, you wanted to talk about what was fair. Well let's talk about that.

You're concerned about being fair to the guilty party, and I'm concerned about being fair to the innocent injured party.

ASSEMBLYWOMAN LA FOLLETTE: Well I don't think there is any fairness that any of us can grant to anybody who has lost a limb or is paralyzed for life. I mean, there is no fairness as far as that is concerned.

MR. HINTON: Pardon me. I'm afraid we differ dramatically.

There's a great deal of fairness at least to the person who can be reasonably compensated for that loss. That's what our system's about.

Now, if you are one of those people that doesn't believe in compensating people, then of course this is an academic discussion. But most people in California think differently.

ASSEMBLYWOMAN LA FOLLETTE: I think you misinterpreted what I said.

MR. HINTON: I may well have. I'm sorry if I did.

CHAIRMAN LOCKYER: I think the point the Assemblywoman made is that you can't make that injured party the same again.

MR. HINTON: No, you can't. All you can do is compensate them.

We're a long way from where we were when someone was injured and your brother went back and beat up on his brother, the person that did it, and then started a tribal war. Hopefully that's where we've evolved.

Let me give you a couple of other examples where paying the economic loss didn't help a lot.

Let's say you live by a toxic dump. And there are a whole lot of dumpers, including a lot of midnight dumpers. But the neighbors around this area now find that their child is sterile.

Under Proposition 51, I suppose if you took it to its logical conclusion, that child might owe money back to the toxic dumpers. Probably no economic loss for being sterile; it's almost certainly a gain.

What about a toxics manufacturer that lets his hauling contract to the cheapest bidder? And a 25-year old rig going 70 miles an hour turns over on a freeway here in San Diego in the rain, and the contents hit the pavement and form acid clouds. And 100 people are now totally blind. That's a $50 doctor's visit for somebody to say you're never going to see again, but it has a rather dramatic effect on your life. It has an effect well beyond the $50 doctor visit, and maybe the fact that somebody would be compensated, if they were employed. If they're a child you're going to have an argument about what they would earn. If they're a senior citizen it doesn't count, and there are a few housewives who might be a little upset about being deprived of ecumenical compensation.

What do we do with a little girl who, because of a defective seatbelt, is thrown into the windshield and has keloid scars? Surgery can't be performed; it'll just make the scars worse. But she certainly has a dramatic effect on her life that we have always said she's entitled to compensation.

We have a system of justice that does a better job at treating people as individual human beings and restoring what we can of their dignity than any in the world. This is going to make a major change in that. It's going to make a major change in that is detrimental in several ways because now we are more worried about how guilty the guilty party is than we are about compensating the innocent.

That's a reversal of everything we've done in our system of law since we've had it. We're now going to make a major change which says: As long as you give back what they've spent out of their pocket, we don't care what happens, and we are no longer concerned with human damages. That's a fundamental change in our law.

You're going to make a change here which is going to reduce the incentive for people to be responsible and act responsibly and act morally. And I'm not making an empty statement here.

Let's look at what else the system's done. I think you're probably all familiar with the famous Pinto Memorandum from Ford Motor Company, where they made a cold-blooded calculation of the cost of law suits where people would be burned and scarred or killed from a defective gas tank, that would cost

-- a $15 part to replace to make it safe. They decided it was cheaper to let them burn and die than it was to recall the car.

The only motivation that they had to do anything was litigation.

And if you think that is one unique thing in a bygone age, just a week ago I read a paper from San Jose which quoted a document recently released by Occidental Petroleum Company. There is a toxic device, DBCP, I always have a little trouble with these initials. They were banned from the market, and then it looked like they'd be allowed to manufacture them again, and there was another memorandum saying: We think this many people will get cancer, and this many people will be rendered sterile, and this is what it's likely to cost in litigation, and this is what we're likely to make in profit, and if there's enough litigation we might have to review just how cost effective it is to go back into the market.

Now, there is a change -- and I've heard Senator Petris mention this -- there's a change in the morality of the boardrooms of this country. The recent case which outraged so many people in the insurance industry and the oil industry was Penzoil against Texaco. And I read a comment by a scholar from the East Coast, and he was outraged by the size of the verdict.

But the most telling remark in his article, which was printed in the Chronicle, was, and I quote:

> "Who would think that in this day and age someone would consider themselves bound by an oral agreement?"

See, we think if all we're thinking about is profit, then we need restraints. We haven't had any restraints in many areas that have been effective other than litigation. We've had restraints on manufacturers.

Now, are the cities and counties different? Unfortunately they're the only ones that maintain the streets and highways.

But they do have a unique problem. They don't have them for a profit. And there was an attempt to address their problem, and there are two bills that have been pending, one by the Speaker and now one by Assemblyman Waters, and I think the number's 3847, that essentially says if you have an uninsured or insolvent party that can't pay their share, then that share should be apportioned between the innocent or the injured party and the city based on their respective liability. So, if you had a $100,000 injury, and you have a city that was only 10 percent at fault, and you had a injured party 30 percent at fault, then the 60,000 would be apportioned by reducing that to only the one-fourth part of the city's share, which would be $15,000. So they pay a total under that situation of $25,000.

But if the party was innocent, then the city would owe the full amount because there wouldn't be anything to apportion. That protected the innocent plaintiff.

They have not supported that bill, even though it would give them dramatically greater relief than would Proposition 51 because they don't have to be responsible for economic loss.

The real charade here, and the real tragedy, is a misrepresentation in the arguments on the ballot by the witnesses you've heard that this will somehow save the problem. It will bring insurance back; it will make it affordable; it will reduce the premiums.

It has never happened. And I'll tell you, the people who are forcing this don't want it to happen.

In the Journal of Commerce, April 9th, do they want to reduced premiums in order to get what they call tort reform?

Tort reform, incidentally, is always a euphemism for reducing the victim's recovery.

Let's see what the insurance companies say. The President of Utica Mutual, quote:

> "There is universal belief among insurers that proposals calling for specific reductions in premiums to match reforms in the civil justice system are outrageous."

And let's see what's happened. Kansas and Iowa changed this law, and after they changed it, premiums went up; coverage went down; and there was no new availability; and you had an explosion in litigation.

That truck that now rear ends the small car and has adequate insurance will pay for the damage, but after Proposition 51, they will say: Wait a minute! What about the brakes? I had them fixed six months ago. I'd better bring in as a new party defendant the guy that worked on the brakes. What about the

phantom vehicle, and why didn't the city have a median barrier there? Oh, and incidentally, what about the dog that ran out in the road?

You laugh, but in a case in Kansas, they actually filed a law suit against a squirrel, and the Supreme Court said that under this changed rule they had to litigate the fault of the squirrel. He did not have an attorney at the trial.

(Laughter)

MR. HINTON: If we want to do something -- oh, let me address one random remark about attorney's fees.

I frankly, except possibly in some punitive damages, have never heard of a 50 percent attorney's fee being imposed. Maybe after an appeal if that was determined.

The typical attorney's fee in California is probably under 30 percent on the average, because you are limited in the case of children and mentally disabled persons to a much smaller court-imposed fee, and the guidelines now stand around 20 percent in many cases. The classic fee for an adult is a third of the recovery, after deducting costs in most cases, if they are successful in settling it. It may be as high as 40 percent to go to trial.

That enables people to get into the courthouse that can't get into the courthouse in other countries. It grew out of a populous movement in the 19th Century. It's one of the things that gives a uniquely democratic flavor to our system, that attorneys will take the poorest person's case, the most disabled, and they can get the best attorney they can find because the risk is borne by the attorney.

There are solutions needed, and there are solutions pending in the Legislature, but as Mr. Snyder indicated, they don't seem to get much of a hearing.

There are solutions to this by allowing pooling. Some of that's occurring anyway. Self-insurance is going to be a wave of the near future for some people. Temporary access to the general fund on a worker's compensation type of fund may be necessary in order to get over the emergency.

As a condition precedent to doing business, I think one member of your committee, Senator, has a bill in that says: Before insurance companies can do business in California, they must take some of the less desirable risks along with the good ones. They're going to have to stop red-lining not only Watts, but the cities, and the counties, and the child care centers.

They make a great deal of money here, incidentally. You've heard always about the losses of the insurance companies.

Let me just tell you that insurance companies in the last 10 years, according to a General Accounting Office Report to the Congress, had underwriting losses. That means they paid out more than they took in on the premium dollar. Underwriting losses of $28 billion. During the same 10 years, they had investment profits of $100 billion, more than $100 billion. That's where they make their money, and that's what they never tell the public about.

When they were making 22 percent on their investments, they sold for a lower price than they should because they were in a cutthroat competition to make that quick dollar, and that's

what got them into it, and that's what they say, and that's what I have heard them say in one recent address by a prominent member of the industry to an in-house group: Let's face it, folks. It's our greed that got us into it.

Their greed got them into it. Now they want the victims to get them out of it by passing Proposition 51.

If we want to change the emphasis on human damages, on individual dignity, if you want to reduce responsibility and reduce accountability, and do this for some phantom of mythical savings, it's not going to happen, and it's never been established anywhere.

If you want it because you figure you're getting insurance, that no insurance company will promise and never has given, then I think the people would be fooled if this is passed. I think the system would be harmed. I think our concept of justice would be dramatically altered for the worse, and I would like to think the people of California are smarter than that.

CHAIRMAN LOCKYER: Thank you, Mr. Hinton.

Any comments or questions?

Thank you all very much.

MR. HINTON: May I take one quick personal point?

There's a passed out packet of a case about the City of Antioch.

I can't rebut all the cases I heard this morning, but I can this one because I represented the injured party.

It says here that they were going 60 miles an hour in a 30 mile an hour zone; that there was beer at the scene; and the

City was held in because they didn't put in a breakaway light pole, along with some other people.

I'd like to tell you the real facts in that. They did have one expert who said the car was going 60. Other experts said a little over 40, as did all the passengers.

It was five kids that got out of bed 30 minutes before to go on a one-day trip out of town. There was no drinking by the driver; no drinking by the injured party. There was a six-pack of beer in the back with about two ounces out of one bottle.

The light pole violated nationally and California -- nationally recognized standards adopted by California which provide a minimum setback of four feet and a preferential setback as far as possible.

This pole was not four feet back. The breakaway theory had nothing to do with it. That was dismissed. The one party that that theory was against was dismissed very early in the law suit.

This pole was not four feet back. It was 14 inches back. If it had been four feet back, then one young man would not be dead, and the young lady I represented would still have two legs.

I would say the City got off lightly on that case in what they paid.

CHAIRMAN LOCKYER: Thank you.

There may be others who would like to add testimony or rebut any statements that have been heard, or provide us with research or whatever.

We've reached that point where we have to vacate. What I'd ask everyone to do is provide us that in writing. We'll add it to the record and make that available to anyone that is doing this kind of thing.

Let me thank everybody who participated for being with us, and most particularly my colleagues for their interest and willingness to come, and the staff.

Thank you.

(Thereupon this Joint Hearing of the Senate and Assembly Judiciary Committees was adjourned at approximately 12:00 Noon.)

--oo0oo--

CERTIFICATE OF SHORTHAND REPORTER

I, EVELYN MIZAK, a Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing Joint Hearing of the Senate and Assembly Judiciary Committees regarding Proposition 51 was reported in shorthand by me, Evelyn Mizak, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of April, 1986.

Evelyn Mizak

EVELYN MIZAK
Shorthand Reporter

APPENDICES

APPENDICE A

(Continued)

51 Multiple Defendants Tort Damage Liability: Initiative Statute

Official Title and Summary Prepared by the Attorney General

MULTIPLE DEFENDANTS TORT DAMAGE LIABILITY: INITIATIVE STATUTE. Under existing law, tort damages awarded a plaintiff in court against multiple defendants may all be collected from one defendant. A defendant paying all the damages may seek equitable reimbursement from other defendants. Under this amendment, this rule continues to apply to "economic damages," defined as objectively verifiable monetary losses, including medical expenses, earnings loss, and others specified; however, for "non-economic damages," defined as subjective, non-monetary losses, including pain, suffering, and others specified, each defendant's responsibility to pay plaintiff's damages would be limited in direct proportion to that defendant's percentage of fault. Summary of Legislative Analyst's estimate of net state and local government fiscal impact: Under current law, governments often pay non-economic damages that exceed their shares of fault. Approval of this measure would result in substantial savings to state and local governments. Savings could amount to several millions of dollars in any one year, although they would vary significantly from year to year.

Analysis by the Legislative Analyst

Background

When someone is injured or killed, or suffers property damage, the injured party (or his or her survivors) may try to make the person (or business or government) who is responsible for the loss pay damages. When a lawsuit is filed, the courts decide what the damages are, who caused them, and how much the responsible party should pay. If the court finds that the injured party was partly responsible for the injury, the responsibility of the other party is reduced accordingly.

In some cases, the court decides that more than one other party is responsible for the loss. In such cases, *all* of the other parties causing the loss are responsible for paying the damages, and the injured party can collect the damages from any of them. If the other responsible parties are not able to pay their shares, a party whose relative fault is, for example, 25 percent may have to pay 100 percent of the damages awarded by the court.

These damages could be for two types of losses: "economic" and "non-economic." Economic losses are damages such as lost wages and medical costs. Non-economic losses are damages such as pain and suffering or injury to one's reputation.

Proposal

This measure changes the rules governing who must pay for *non-economic damages*. It limits the liability of each responsible party in a lawsuit to that portion of non-economic damages that is equal to the responsible party's share of fault. The courts still could require one person to pay the *full* cost of *economic damages, if* the other responsible parties are not able to pay their shares.

Fiscal Effect

Under current law, governments often have to pay non-economic damages that exceed their shares of fault. Thus, approval of this measure would result in substantial savings to the state and local governments. The savings could amount to several millions of dollars in any one year, although they would vary significantly from year to year.

Voter Turnout. Just one of the changes California is making!
Karen Alarcon, San Martin

Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure amends and adds sections to the Civil Code; therefore, existing sections proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. This shall be known as the "Fair Responsibility Act of 1986."

SECTION 2. Section 1431 of the Civil Code is amended to read:

~~1431.~~ *§1431 Joint Liability*

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, *except as provided in Section 1431.2, and* except in the special cases mentioned in the ~~Title~~ *title* on the ~~Interpretation~~ *interpretation* of ~~Contracts~~ *contracts*. This presumption, in the case of a right, can be overcome only by express words to the contrary.

SECTION 3. Section 1431.1 is added to the Civil Code to read:

§1431.1 Findings and Declaration of Purpose

The People of the State of California find and declare as follows:

a) The legal doctrine of joint and several liability, also known as "the deep pocket rule", has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

SECTION 4. Section 1431.2 is added to the Civil Code to read:

§1431.2 Several Liability for Non-economic Damages

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b) (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

SECTION 5. Section 1431.3 is added to the Civil Code to read:

§1431.3 Nothing contained in this measure is intended, in any way, to alter the law of immunity.

SECTION 6. Section 1431.4 is added to the Civil Code to read:

§1431.4 Amendment or Repeal of Measure.

This measure may be amended or repealed by either of the procedures set forth in this section. If any portion of subsection (a) is declared invalid, then subsection (b) shall be the exclusive means of amending or repealing this measure.

(a) This measure may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 20 days prior to passage in each house the bill in its final form has been delivered to the Secretary of State for distribution to the news media.

(b) This measure may be amended or repealed by a statute that becomes effective only when approved by the electors.

SECTION 7. Section 1431.5 is added to the Civil Code to read:

§1431.5 Severability.

If any provision of this measure, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this measure to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this measure are severable.

51 Multiple Defendants Tort Damage Liability: Initiative Statute

Argument in Favor of Proposition 51

Nothing is more unfair than forcing someone—be it a city, a county or the state, a school, a business firm or a person—to pay for damages that are someone else's fault.

That's what California's "deep pocket" law is doing—at a cost of tens of millions of dollars annually. And that's why we need Proposition 51—the Fair Responsibility Act.

Regardless of whether it is a city, county or private enterprise that is hit with huge "deep pocket" court awards or out-of-court settlements, the *TAXPAYER AND CONSUMER ULTIMATELY PAY THE COSTS* through high taxes, increased costs of goods and services, and reduced governmental services.

How does the "deep pocket" law work? Here's an illustration:

A drunk driver speeds through a red light, hits another car, injures a passenger. The drunk driver has no assets or insurance.

The injured passenger's trial lawyer sues the driver *AND THE CITY* because the city has a very "deep pocket"—the city treasury or insurance. He claims the stop light was faulty.

The jury finds the drunk driver 95% at fault, the city only 5%. It awards the injured passenger $500,000 in economic damages (medical costs, lost earnings, property damage) and $1,000,000 in non-economic damages (emotional distress, pain and suffering, etc.).

Because the driver can't pay anything, THE CITY PAYS IT ALL—$1,500,000.

THAT'S THE "DEEP POCKET" LAW AND IT'S UNFAIR!

Under Proposition 51, the city could still pay all the victim's economic damages but only its 5% portion of the non-economic. Total: $550,000—that's $950,000 less!

Everyone agrees the injured passenger should be reimbursed. But there are *TWO VICTIMS*—the *ACCIDENT VICTIM* and the *TAXPAYER* who foots the bill.

Proposition 51 is a *GOOD COMPROMISE*—it takes care of both victims!

With the passage of Proposition 51:

- Liability insurance, now virtually impossible to obtain, would again be available to cities and counties.
- Private sector liability insurance premiums could drop 10% to 15%.
- The glut of lawsuits with dubious merit would be significantly reduced.

Every California county—and virtually all its cities—are *IN FAVOR OF PROPOSITION 51.*

One of the largest coalitions of school, governmental, law enforcement, small and large business, professional, labor and non-profit organizations in history urges you to *VOTE YES ON PROPOSITION 51.*

This initiative proposition was put on the ballot by hundreds of thousands of voters because repeated attempts in the Legislature to reform the unfair "deep pocket" law were thwarted by the intense lobbying of the California Trial Lawyers Association.

The trial lawyers' organization last year was the *LARGEST GIVER* of *SPECIAL INTEREST CAMPAIGN MONEY* to state legislators and is the major organized opposition to the Fair Responsibility Act.

Under the present "deep pocket" law:

- The party most at fault often doesn't pay—*THAT'S NOT FAIR!*
- You—the taxpayer and consumer—ultimately pay the "deep pocket" awards and settlements—*THAT'S NOT FAIR!*

Under Proposition 51:

- Victims and taxpayers alike are protected—*THAT'S FAIR!*

Don't let 5,400 trial lawyers hold 26 million Californians hostage. *VOTE YES ON PROPOSITION 51!*

RICHARD SIMPSON
California Taxpayers' Association

DONNETTA SPINK
President, California State Parent-Teacher Association

ELWIN E. (TED) COOKE
President, California Police Chiefs Association

Rebuttal to Argument in Favor of Proposition 51

Proposition 51 will *NOT* lower taxes, will *NOT* lower insurance rates and will *NOT* make insurance more available.

Proposition 51 is a fraud promoted by the insurance industry, chemical manufacturers, and local government officials.

Insurance companies back Proposition 51 because they want to increase their profits—they don't want to pay the claims they owe.

Toxic chemical producers back Proposition 51 because they want to increase their profits—they don't want to be held responsible for the cancer their toxic waste dumps cause.

Local government officials back Proposition 51 because they don't want to do the job we taxpayers elected them to do—protecting the people by maintaining efficient police and fire services and safe roads.

Proposition 51 will NOT reduce taxes. This insurance company windfall won't go to you.

If Proposition 51 passes, *our welfare rolls will increase.* People who must spend their life in a wheelchair or on a respirator will NOT be compensated by those who caused their injuries—they will be forced to go on welfare.

The insurance crisis is caused by a greedy insurance industry that is exempted from federal antitrust laws. There is no rate competition and thus no need to pass savings on to us.

Ralph Nader says,

> "The insurance industry is using its current massive premium gouging and arbitrary cancellations as a political battering ram to further bloat profits."

When was the last time your insurance company lowered your rates?

NO on Proposition 51—Protect your rights.

PAT CODY
DES Action

JAMES E. VERMEULEN
Founder and Executive Director
Asbestos Victims of America

Multiple Defendants Tort Damage Liability: Initiative Statute 51

Argument Against Proposition 51

If you or a member of your family is paralyzed for life by a drunk driver California law now protects your right to full and fair compensation for your injuries. This initiative removes that protection.

Proposition 51 is an attempt by big insurance companies to avoid paying victims for the injuries they suffer. *Passage of this initiative does nothing to guarantee that your insurance rates will be lower or that insurance will be more available than it is today.*

Our present system of justice has developed over hundreds of years to achieve the twin goals of (*one*) full compensation if you are injured because of someone else's fault and (*two*) encouraging safe and responsible practices and products. Every day, juries made up of taxpayers and consumers just like you carry out these goals. They decide who is at fault and put the responsibility where it belongs: not on innocent victims, but on drunk drivers, manufacturers of dangerous products or toxic waste and unsafe roads and highways. Where juries have been clearly wrong, appellate courts have overturned the jury awards.

But insurance companies never tell you that.

The current system works and it's fair: Those who caused the injuries pay the victims. Though juries assign a percentage of fault to those responsible, it is the involvement of everyone found guilty that caused the accident to occur. It is *not* fair to make innocent victims—who are not at fault—bear the cost, while the guilty walk away.

The insurance companies want the present system scrapped. Insurance companies have manufactured a crisis by refusing to issue policies, even in cases where they have no claims and no losses. They point to large jury awards as the root of the problem. You should know that juries give nothing—not one dollar—in 50% of the medical malpractice and product liability cases they hear.

But the insurance companies never tell you that either.

Insurance companies refuse to promise that insurance rates will be lower or policies more available if this initiative passes. In fact, Kansas and Ohio have measures similar to this proposition, yet they are also faced with insurance "crises." Proposition 51 solves *nothing*. The only guarantee it offers is that you lose your legal rights to full and fair compensation.

The battle over Proposition 51 is more than a mud fight between insurance companies and lawyers. Every Californian has a stake in assuring that businesses and local governments behave in a safe, responsible manner, and that innocent people who are injured by dangerous products or unsafe conditions are fully and fairly compensated. These values should not be sacrificed in favor of insurance industry profits.

Don't be fooled by slick ads. Don't be tricked by big corporations into voting away your legal rights. If you want to assure your access to justice and your ability to be compensated when injured by reckless and unethical behavior, join us in voting NO on Proposition 51 on June 3rd.

DON'T GIVE AWAY YOUR RIGHTS. VOTE NO!

HARRY M. SNYDER
Regional Director, California Consumers Union of U.S., Inc.

Rebuttal to Argument Against Proposition 51

California *TAXPAYERS ARE THE VICTIMS* of the unfair "deep pocket" law—*TRIAL LAWYERS ARE THE REAL BENEFICIARIES.*

PROPOSITION 51 PROTECTS BOTH INJURED VICTIMS AND TAXPAYERS.

• Injured victims will be FULLY COMPENSATED for *ALL* actual damages—present and future—medical bills, lost earnings and property damage. *VICTIMS' FAMILIES WILL NOT SUFFER FINANCIAL LOSS.*

Under Proposition 51:

• Liability insurance, now virtually impossible to obtain, could again be made available to cities and counties.

• Private sector commercial liability insurance premiums could drop 10–15%, according to D. Michael Enfield, managing director of the world's largest insurance brokerage.

IT'S A FAIR COMPROMISE. That's why one of the largest coalitions ever is supporting Proposition 51, including:

County Supervisors Association of California
League of California Cities
California Taxpayers' Association
California State PTA
California Chamber of Commerce
California Police Chiefs Association
California Community College Trustees
California Peace Officers Association
California School Boards Association
California State Sheriffs' Association
Consumer Alert
California Medical Association
Service Employees International Union, Joint Council #2
California Manufacturers Association
California Farm Bureau Federation
National Federation of Independent Business
California Dental Association
California District Attorneys Association
California Women for Agriculture
Zoological Society/San Diego
California Association of Recreation and Park Districts
Sierra Ski Areas Association
California Defense Counsel
Association for California Tort Reform
California Hospital Association
Associated General Contractors
California Restaurant Association
California Institute of Architects
Association of California School Administrators
Western United States Lifesaving Association
California Association of 4WD Clubs
All 58 COUNTIES, virtually EVERY CITY, and MANY MORE ORGANIZATIONS
(Legal limits prohibit a complete list.)

KIRK WEST
President, California Chamber of Commerce

PAT RUSSELL
President, League of California Cities
President, Los Angeles City Council

LESLIE BROWN
President, County Supervisors Association of California
Supervisor, Kings County

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency

APPENDICE C

TESTIMONY OF ROBERT C. FELLMETH

April 18, 1986

Good morning. I am Robert C. Fellmeth. I am currently a Professor of Law at the University of San Diego School of Law. My area of specialty in terms of teaching and publications is antitrust and regulatory law. I am currently directing the Center for Public Interest Law at the University. The Center publishes the California Regulatory Law Reporter. It monitors, through some 35 interns, the meetings and operations of California's regulatory agencies, including the Department of Insurance. My most recent relevant publication is California Regulatory Law and Practice with Folsom, published in 1983. I am a past member of the Board of Consumer's Union of the United States, and am past Chairman of the Athletic Commission, which regulates boxing and wrestling in California. A copy of my resume is attached.

I. A PROPOSED SOLUTION TO BOTH THE INJUSTICE OF CURRENT JOINT AND SEVERAL LIABILITY AND THE PROSPECTIVE INJUSTICE OF PROPOSITION 51

John Smith is drunk and driving South on Interstate 5. He crosses the center divider and smashes into Steve Victim. Victim has his seatbelt on but it malfunctions because of a design flaw by the belt manufacturer, who is now out of business. Victim's car is designed so the door flies open and he is catapulted out. He is a paraplegic and in intense pain for the rest of his life. He can collect no money from Smith and none from the seatbelt manufacturer. A jury reasonably awards 70% negligence to Smith, 20% to the seatbelt manufacturer and 10% to the auto manufacturer. Under Proposition 51 Victim will collect 10% of his pain and suffering damages -- which are legitimately considerable.

Of course anyone can conjure up unjust results from any system, but this result is likely to be common. There is often a situation where the fault behind a collision or accident rests with one person but the damage from the consequences rests with the negligence of another. In our example, we know that automobiles will collide. Should the manufacturer of that car who designs a serious defect so that the driver is speared on the steering column in a 20 MPH collision be spared the consequences because the collision itself was caused by additional negligence? Should the victim be deprived of compensation?

If one wants an example of this overlapping negligence, one

has only to review the lead case in California on comparative negligence in product liability, Daly v. GM. You had negligence in drinking, in failure to wear a belt, and in the design of a car which gratuitously caused the occupant to be thrown out.

On the other hand, it is also unfair for a company or city with 10% fault to pay 100% damages, particularly where a large portion of fault may lie with the plaintiff.

Is there a solution? I think so. Adopt Proposition 51, but only if fault percentages are not limited to a total of 100%. In our example, the drunk driver could be assessed 90% fault, the seatbelt manufacturer 40% and the auto manufacturer 60%. Then the limits of Proposition 51 would be more fairly applied. You then have limited both abuses: you do not have negligence which is excused because the negligence of another exposed that negligence, but you also do not have total payment of a claim by a relatively innocent party. A party who really is a minor part of the problem, at a 10% level, would only pay at a 10% level. Both abuses are addressed.

II. CAUSES OF THE CURRENT INSURANCE CRISIS

Some propositions:

A. Claims are increasing.

B. The transaction costs of litigation are outrageous, with attorneys and commissions soaking up more than 70% of all claim money paid.

C. Contingency fees and litigation costs create a false incentive to file marginal cases, using the costs of litigation

as a kind of blackmail to extract unjustified settlements.

D. Bad faith insurance awards have made insurance firms so afraid of non-payment that they pay false claims and pass the costs onto all of their consumers.

E. The insurance firms have divided most liability into specialized areas with only two to five carriers each, and they are allowed to collude and fix prices without meaningful regulatory review.

F. The insurance firms have created the current crisis by lying about claims pay outs, exaggerating claims by including current and pending filings based on plaintiff prayers for relief, and have restrained trade and fixed prices at high and artificial levels for their own aggrandizement.

G. The insurance industry is able to manage extensive coverage under current underwriting rules only because it is able to reinsure for much of its risk with foreign insurance carriers, led and substantially influenced by Lloyd's of London. These unregulated foreign carriers have, for their own self-interest, withdrawn much of their reinsurance, not because they were losing money but because they could make much more where they had less fettered cartel power in other markets.

I believe there is some truth to each of these propositions. But I am very concerned that we not solve the current problem at the expense of victims, and of a system which provides disincentives to large institutions to injure people. That may be where we are heading, and that is a mistake.

Instead, let's look at the California Insurance Commissioner's annual reports. Fire, marine, casualty and

miscellaneous insurers had the following total investment gain, premiums earned and losses incurred for 1980, 1982 and 1984 (the most recent report):

	1980	1982	1984
Investment gain	9,760,753	13,375,089	17,895,951
Premiums earned	13,668,010	15,179,042	18,647,044
Losses	8,581,924	10,627,377	14,667,167

These figures are in the thousands. They show losses increasing at just slightly more than the rate of inflation. They show insurance profits to be excessive by any measure. An economist will measure competitive profit as return on investment. The "investment" necessary to maintain an insurance operation is not comparable to the high fixed costs needed for a railroad or power utility. If the PUC were to do a legitimate rate of return analysis on a rate base it would not use the "assets" figure of insurance companies, badly bloated from many prior years of excessive profits. It would use those assets legitimately committed to ratepayer benefit by prudent expenditure. I believe that the rate of return insurance companies are receiving far exceeds any competitive rate of return.

It is not disputed that ISO is a cartel with the right to restrain trade and that most large California insurance companies belong to it. Insurance enjoys an exemption from antitrust exposure. Two Presidential commissions, under both Republican and Democratic administrations, have recommended ending that exemption. It could also be ended at the state level and AB 3472

(Waters) would do that. At the same time cartel pricing is allowed and to some extent is openly conducted, the market has been divided so that for many kinds of coverage there are one or two carriers. The Department of Insurance does not engage in maximum rate regulation of the type which is required where competition is lacking in the setting of prices. There is no calculation of rate base, no examination of expenses and non-monopoly business, no calculation of a fair rate of return and no appropriate ceilings imposed.

Insurance can no longer have it both ways. The Legislature must do the following: either a given area of coverage is subject to regulation on behalf of the public or it is subject to meaningful competition.

The Legislature must first subject all insurance to the forces of competition. If it is beneficial to all concerned to publish loss information, the State can do that. Second, where competition has been foreclosed by natural monopoly, i.e. for certain types of coverage there is only room for one or two carriers, there must be PUC type maximum rate regulation.

Where competition is workable, impose it. Where it is not, protect the public with maximum rate regulation. Pass AB 3472. Then pass another statute setting forth concentration criteria where, if certain standards are exceeded, PUC maximum rate regulation jurisdiction is invoked.

At present, we have neither competition nor meaningful regulation. Such a posture is indefensible as public policy.

After we straighten out the insurance marketplace we should turn our attention to the creation of efficient dispute

resolution mechanisms. We must replace the four years to trial and victory by resource exhaustion with a rational system. Sometimes an occasional wrong decision is better than delay and expense for contested resolution.

The message is as follows: look at actual loss pay outs, without the distortion of a few high judgment cases thrust demagogically forward (and usually judicially reduced or well deserved). And look at actual pay outs without the inclusion of "claims pending" which include inflated plaintiff counsel bluster in meaningless pleadings. After you have looked, then turn your attention to a competitive insurance industry and then to an efficient dispute resolution system. After you have exhausted these areas and there is still a crisis -- which is unlikely -- then address the victims of wrongful acts by others. Reduce incentives to represent those who have been hurt, reduce compensation to those who have been hurt, reduce incentives to perform safely, as a last resort, not as the first order of business.

CURRICULUM VITAE

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EDUCATION: Stanford University AB 1967

Harvard University JD 1970

MAJOR PUBLICATIONS:

THE INTERSTATE COMMERCE OMISSION (Grossman, 1970)

THE POLITICS OF LAND (Grossman, 1972)

AMERICAN GOVERNMENT (Little, Brown, 1972), Ed. by Peter Woll, Contributor

PROFILES OF MEMBERS OF CONGRESS (Congress Project, 1972), Editor

THE COMMERCE COMMITTEES (Grossman, 1976), Ed. by David Price

A TREATISE ON STATE ANTITRUST LAW (Bureau of National Affairs, 12-1978), w/ Papageorge

CALIFORNIA ANTITRUST LAW AND PRACTICE (Butterworths, 1983) (Treatise), w/ Folsom

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Continuing: California Regulatory Law Reporter (Quarterly: 1981 to present) Editor-in-Chief

MISCELLANEOUS:

"The Freedom of Information Act and the Federal Trade Commission," Harvard CR-CL Law Review, Spring of 1968.
"Local Prosecution of Antitrust Violators - A Survey of State Laws," Class Action Reports, Vol. 4, No. 3, 1976, p. 376.
"A Public Agency Antitrust Manual," National Association of District Attorneys (NADA), June 1977.
"Antitrust Enforcement by Local Prosecutors," California Western Law Review, Vol. 14, 1978, p. 1.

TEACHING:

Faculty of University of California at San Diego Extension (White Collar Crime in Political Science Department) 1976.

Faculty of National College of District Attorneys (Antitrust and Trade Regulation), 1975-77, 1979-80.

Faculty of National Judicial College, 1978.

Faculty of University of San Diego School of Law (Professor: Consumer Law, Antitrust, Trade Regulation II, Regulated Industries, California Administrative Law and Practice, Criminal Procedure), 1977-present.

EMPLOYMENT:

1969 - 1972: Associate, Center for Study of Responsive Law.

1973 - 1980: Deputy District Attorney, San Diego County Office of the District Attorney.

1979 - 1980: Assistant United States Attorney.

1976 - 1981: Athletic Commissioner, State of California.

In December of 1976, Professor Fellmeth was appointed to a four-year term as one of five commissioners regulating boxing, wrestling and karate in California. He was chairman in 1978 and 1979. He was reappointed in 1981 to complete a disability-pension plan and served as chairman that year, resigning in 1982. The Commission conducted a competition study leading to deregulation legislation, established a medical review committee and adopted Professor Fellmeth's disability and pension system for boxers, the nation's first such program.

1977 - Present: Professor, University of San Diego School of Law.

1980 - Present: Director, Center for Public Interest Law.
Editor, California Regulatory Law Reporter (CRLR).