

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 16, 2004

8:08 a.m.

TAPE(S) 04-42,43

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Hollis French

MEMBERS ABSENT

Senator Johnny Ellis

COMMITTEE CALENDAR

SENATE BILL NO. 323

"An Act relating to a project owner's liability for workers' compensation and the exclusiveness of liability for workers' compensation."

MOVED CSSB 323(JUD) OUT OF COMMITTEE

SENATE BILL NO. 219

"An Act relating to offenses against unborn children."

MOVED CSSB 219(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 451

"An Act relating to therapeutic courts; and providing for an effective date."

MOVED HB 451 OUT OF COMMITTEE

HOUSE BILL NO. 503

"An Act relating to the tobacco product Master Settlement Agreement; and providing for an effective date."

SCHEDULED BUT NOT HEARD

CS FOR HOUSE BILL NO. 514(FIN) am

"An Act relating to child support modification and enforcement, to the establishment of paternity by the child support enforcement agency, and to the crimes of criminal nonsupport and aiding the nonpayment of child support; amending Rule 90.3, Alaska Rules of Civil Procedure; and providing for an effective date."

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 323

SHORT TITLE: WORKERS COMPENSATION AND CONTRACTORS

SPONSOR(s): SENATOR(s) SEEKINS

02/13/04 (S) READ THE FIRST TIME - REFERRALS
02/13/04 (S) L&C, JUD
03/04/04 (S) L&C AT 1:30 PM BELTZ 211
03/04/04 (S) Heard & Held
03/04/04 (S) MINUTE(L&C)
03/09/04 (S) L&C AT 1:30 PM BELTZ 211
03/09/04 (S) Moved SB 323 Out of Committee
03/09/04 (S) MINUTE(L&C)
03/10/04 (S) L&C RPT 2DP 2NR 1AM
03/10/04 (S) DP: BUNDE, SEEKINS; NR: DAVIS,
03/10/04 (S) STEVENS G; AM: FRENCH
03/17/04 (S) JUD AT 8:00 AM BUTROVICH 205
03/17/04 (S) Heard & Held
03/17/04 (S) MINUTE(JUD)
04/02/04 (S) JUD AT 8:00 AM BUTROVICH 205
04/02/04 (S) Heard & Held
04/02/04 (S) MINUTE(JUD)
04/07/04 (S) JUD AT 8:00 AM BUTROVICH 205
04/07/04 (S) Heard & Held
04/07/04 (S) MINUTE(JUD)
04/14/04 (S) JUD AT 5:30 PM BUTROVICH 205
04/14/04 (S) Heard & Held
04/14/04 (S) MINUTE(JUD)
04/16/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: SB 219

SHORT TITLE: OFFENSES AGAINST UNBORN CHILDREN

SPONSOR(s): SENATOR(s) DYSON

05/11/03 (S) READ THE FIRST TIME - REFERRALS
05/11/03 (S) STA, JUD
04/06/04 (S) STA AT 3:30 PM BELTZ 211
04/06/04 (S) Moved SB 219 Out of Committee
04/06/04 (S) MINUTE(STA)
04/07/04 (S) STA RPT 2DP 1NR
04/07/04 (S) DP: STEVENS G, COWDERY; NR: STEDMAN
04/07/04 (S) FIN REFERRAL ADDED AFTER JUD
04/16/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: HB 451

SHORT TITLE: THERAPEUTIC COURTS

SPONSOR(S): RULES BY REQUEST

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	JUD, FIN
03/01/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/01/04	(H)	Moved Out of Committee
03/01/04	(H)	MINUTE(JUD)
03/03/04	(H)	JUD RPT 7DP
03/03/04	(H)	DP: GARA, HOLM, SAMUELS, ANDERSON,
03/03/04	(H)	GRUENBERG, OGG, MCGUIRE
03/09/04	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
03/09/04	(H)	Moved Out of Committee
03/09/04	(H)	MINUTE(FIN)
03/12/04	(H)	FIN RPT 7DP 1NR
03/12/04	(H)	DP: MEYER, JOULE, CROFT, FATE, FOSTER,
03/12/04	(H)	HARRIS, WILLIAMS; NR: STOLTZE
03/22/04	(H)	TRANSMITTED TO (S)
03/22/04	(H)	VERSION: HB 451
03/24/04	(S)	READ THE FIRST TIME - REFERRALS
03/24/04	(S)	JUD, FIN
04/16/04	(S)	JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Jack Miller, Counsel
Alaska State Chamber of Commerce
217 Second Street
Juneau, Alaska 99801

POSITION STATEMENT: Answered questions about SB 323

Senator Fred Dyson
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SB 219

Jerry Luckhaupt
Legislative Legal and Research Services Division
Legislative Affairs Agency
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Answered questions about SB 219

Cassandra Johnson
Anchorage, AK
POSITION STATEMENT: Opposed to SB 219

Robin Smith for Dr. Carolyn Brown
Anchorage, AK
POSITION STATEMENT: Opposed to SB 219

Doug Wooliver
Alaska Court System
303 K St.
Anchorage, AK 99501-2084
POSITION STATEMENT: Presented HB 451 and answered questions

Sally Russell
Therapeutic Court Project Coordinator
Bethel
POSITION STATEMENT: Supports HB 451

Judge Stephanie Joannides
3rd Judicial District Anchorage
825 W 4th Ave.
Anchorage, AK 99501
POSITION STATEMENT: Supports HB 451

ACTION NARRATIVE

SB 323-WORKERS COMPENSATION AND CONTRACTORS

TAPE 04-42, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:08 a.m. Senators Ogan, French and Chair Seekins were present. Chair Seekins announced the committee would take up SB 323 first and reminded members that during the last hearing on the bill, the committee discussed the exclusiveness of liability and an amendment [Amendment 1] that allows sole proprietorships and partnerships to opt out of workers' compensation coverage in exchange for accepting exclusive liability for any injuries. After discussing several alternatives, that amendment was withdrawn.

CHAIR SEEKINS said he had another amendment drafted to address sole proprietors and partnerships. He also considered using SB 311 as the vehicle to address the issue, but he does not believe SB 311 will pass this session. He then moved to adopt the new amendment [Amendment 2], which reads as follows.

23-LS1498\D.6
Craver
4/15/04

A M E N D M E N T 2

OFFERED IN THE SENATE
TO: SB 323

Page 1, line 1, following "compensation":
Insert ", sole proprietors and partnerships without employees,"

Page 2, following line 2:
Insert a new bill section to read:
"* **Sec. 3.** AS 23.30.045 is amended by adding new subsections to read:

(g) Notwithstanding (a) of this section, a project owner, contractor, or subcontractor is not liable for and is not obligated to secure the payment of compensation to a sole proprietor or member of a partnership if the sole proprietor or member of a partnership agrees in writing that the project owner, contractor, and subcontractor do not, in regard to the sole proprietor or member of a partnership, have

(1) an obligation to secure compensation; and
(2) liability for compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215.

(h) A sole proprietor or member of a partnership who has agreed under (g) of this section may not maintain an action against the project owner, contractor, or subcontractor, or an insurer of the project owner, contractor, or subcontractor, at law or in admiralty for damages on account of injury or death."

Renumber the following bill section accordingly.

SENATOR FRENCH objected for the purpose of discussion.

CHAIR SEEKINS informed members that Amendment 2 would prohibit sole proprietors and partners who opt out of workers' compensation coverage from having any recourse against a contractor or project owner for injuries.

SENATOR OGAN stated support for Amendment 2 because he believes many sole proprietors would prefer to carry their own health insurance and accept the risk of being injured at the workplace. He then declared a conflict of interest and asked to be excused

from voting, as he is likely to be a sole proprietor in the future.

CHAIR SEEKINS objected and informed Senator Ogan he is required to vote.

SENATOR FRENCH asked the status of the law now with respect to sole proprietors' ability to sue for accidents caused by negligence of the project owner. He expressed concern that Amendment 2 will give the sole proprietor very little; it will no longer require the project owner to provide workers' compensation coverage but will take away a sole proprietor's right to sue for negligence.

CHAIR SEEKINS responded:

I will guarantee you that I will not hire a sole proprietor or a member of a partnership to perform any work for me unless they have workers' compensation insurance and neither would any other project owner, simply because if they choose not to have insurance under the way this law is read and they could - then I could be liable for that at a later date. So, I have 120 employees, approximately; 119 of those are covered by workers' comp - I'm not. So my only action for a workers' comp accident in my dealership would be against myself and what I'm saying here is that if you're a contractor and you have workers' comp insurance and you're a sole proprietor or partner and you want to work for a project owner or another contractor, a contractor would not hire you unless they would have the same kind of recourse as if you carried the insurance. That's what this amendment does....

SENATOR FRENCH said in his thinking, the worker gets nothing out of this benefit. He suggested giving project owners two choices: either covering all workers with workers' compensation or being subject to liability for any torts caused by negligence on the project site. That way, the economic choice lies with the person best able to control [safety at the work site].

CHAIR SEEKINS replied, "...I don't have any objection to leaving the bill the way it is and putting small contractors out of business if you don't, Senator." He said any subcontractor or partnership with employees would have to cover his or her employees. Amendment 2 will only allow the owners of the

business to exempt themselves and look only to themselves for remedy in case of injuries that would normally be covered under workers' compensation. He pointed out that many sole proprietorships consist of single employees and, under the current bill, they will have the choice of getting workers' compensation coverage or not being hired. With Amendment 2, they could opt out of workers' compensation coverage if they are willing to take the risk themselves.

SENATOR THERRIAULT asked:

...If I own a company that does tile work and I employ the three of you I will have to have insurance on the three of you but I don't have to carry it on myself as the owner of the company, why would you make me carry it on myself if I have no employees? What's the difference? I still own the business. It's just an issue of whether I have employees or not, and whether I have employees or not dictates whether I cover my employees so why would I be held to a different standard just because I have employees for coverage for myself?

SENATOR OGAN said he was under the impression that Amendment 2 will allow a sole proprietor with no employees to opt out of workers' compensation.

CHAIR SEEKINS agreed and said Amendment 2 will exempt the sole proprietor or partner from carrying workers' compensation coverage on himself and instead make his sole remedy against himself, regardless of whether he has employees or not. He explained that under the current law, the sole proprietor or partner is not required to carry workers' compensation coverage but there is no way under SB 323 to limit him to a single remedy.

SENATOR OGAN said having been a sole proprietor for many years and being willing to accept responsibility for his own actions, he believes Amendment 2 needs to pass. As a sole proprietor, he is aware of how difficult it is to wear many hats and deal with business expenses. He noted without allowing them to be accountable for their own actions, SB 323 is a nonstarter without Amendment 2.

8:28 a.m.

SENATOR FRENCH opined that SB 323 has flaws and will be made worse with Amendment 2 because a sole proprietor who is injured on the worksite now can sue someone up the line. He explained:

"...if the crane swinging lumber over your head - if the wire rope on that crane snaps and drops a load of lumber on you, you can sue someone up the line for their negligence, for not inspecting the cable, for not hiring - for not following safe safety practices. That's your remedy against the negligence against the folks on the job site. This amendment is going to say give it up. This amendment isn't going to cover you with workers' comp, isn't going to make the project owner cover you with workers' comp and, moreover is going to take away your right to be made whole due to the negligence of people upstream from you. So, I don't see how the little guy in this situation is any better off after the passage of this bill than he is right now. Right now he's got 1,000 years of common law protecting him and what he's going to have after this is a statute that says you better go get workers' comp and if you don't get workers' comp, you're on your own when you step on to the job site. So I am not under the impression that this is good for a small business.

SENATOR THERRIAULT asked if, under the scenario presented by Senator French, the small business owner with several employees who does not carry workers' compensation on himself would have a different remedy than a sole proprietor with no employees and no coverage.

CHAIR SEEKINS asked if the objection to adopting Amendment 2 is maintained.

SENATOR FRENCH interjected and attempted to answer Senator Therriault's question. He maintained that someone without workers' compensation coverage has the right to sue, therefore, sole proprietors with and without employees are treated equally under the law right now.

CHAIR SEEKINS added that if he were a major contractor who hired a subcontractor with employees who did not cover himself, he would ask the subcontractor to sign a waiver on himself, require him to get workers' compensation coverage or not come on the job site. He noted:

What we're contemplating is the small sole proprietor, more than likely, who comes on the job site to perform a job. If I was a major contractor and I never came on that job site, there wouldn't be a risk, but I think if I was the project owner and you were going to come on that job site, I would want to protect myself from that kind of risk by asking you either to make sure you have coverage or that you have signed a waiver yourself.... What this bill, quite frankly, when we talk about the little guy, is it mandates that there be coverage for that little guy but it also says you can only take against any other party upstream from you the same exclusive remedy that you can take against your employer as if you were the only party involved. So if that contractor or that business owner was the only entity involved and something happens, that employee's exclusive remedy is against workers' comp....

SENATOR FRENCH argued the exclusiveness of the remedy has always come in exchange for workers' compensation insurance coverage. For giving up the right to sue, the employee gets covered by a workers' compensation insurance policy. He said he sees this as a bad bargain for working Alaskans.

CHAIR SEEKINS said if a person chooses not to have a policy, that person should assume the risk.

SENATOR FRENCH maintained his objection to the adoption of Amendment 2, therefore a roll call vote was taken. The motion to adopt Amendment 2 carried with Senators Ogan, Seekins and Therriault in favor, and Senator French opposed.

SENATOR OGAN repeated that he believes that SB 323 has improved a lot and he appreciates the work done on it. He said his only concern with the bill is that if a subcontractor or contractor chooses not to have workers' compensation, liability could be transferred to the project owner [for negligence]. However, nothing in the bill will allow the project owner to pursue the subcontractor or contractor who has no insurance. He expressed concern that there will not be a lot of enforcement to ensure that employers have workers' compensation and suggested adding a provision to the bill to allow the project owner to pursue a subcontractor or contractor.

CHAIR SEEKINS asked Mr. Miller to address Senator Ogan's concern.

MR. JACK MILLER, counsel to the Alaska State Chamber of Commerce, replied:

Yes, in fact, under normal subrogation law, if a - for example, current law allows and, in fact, this is the law that's in place, if a subcontractor's employee is injured and the subcontractor does not have the required workers' compensation coverage for that employee, that employee can receive workers' compensation benefits from the contractor. Once that contractor - the contractor's insurer pays the workers' compensation benefits, they are subrogated to the rights of the injured worker to pursue a claim against the subcontractor.

CHAIR SEEKINS affirmed that is already in place.

SENATOR OGAN asked if anything in SB 323 would change that.

MR. MILLER said SB 323 would not. If a contractor has to step in and pay for workers' compensation benefits for an injured worker down the line, once the payment is made, the project owner or contractor is subrogated to the rights of the injured worker to pursue a claim for compensation against the employer of that injured worker. He noted that since that is existing law, nothing needs to be added to SB 323 on that point.

SENATOR OGAN pointed out that the bill says, "If the employer is a contractor and fails to secure the payment of compensation to its employees of a subcontractor, the project owner is liable for and shall secure the payment...." He asked for further explanation of subrogation.

CHAIR SEEKINS said if he was a contractor and Senator Ogan subcontracted with him and one of Senator Ogan's employees was hurt and Senator Ogan did not have workers' compensation coverage, Chair Seekins would have to make sure that employee receives all benefits due him under workers' compensation. Then, Chair Seekins' insurance company would sue Senator Ogan for the cost of that claim.

MR. MILLER affirmed that is correct and repeated that is the current subrogation law in Alaska.

SENATOR FRENCH maintained his objection to SB 323 and referred to an e-mail from Mr. Miller that said the bill will have no

effect on the obligation of the parties to procure workers' compensation coverage. He expressed concern that it will exclude from liability any person who was liable for or potentially liable for securing payment of compensation.

MR. MILLER responded:

Let me just say, Senator French has mentioned this several times. When he first mentioned it, I actually contacted him. I didn't want to make a big deal of it on the record and I told him he had been misrepresenting me and he actually sent me an e-mail apologizing for doing that. So let me now, on the record, state clearly that that is a misrepresentation of that e-mail. The question I was asked is are insurance policies going to have to change. Is there going to be some expanded need for more workers' compensation coverage with this bill and the answer is no. However, the injured workers have expanded rights because they now have rights again from the subcontractor to contractor to the project owner and, again, the benefits of this bill are that all [indisc.] parties [indisc.] to a project can integrate their safety practices and I believe dramatically reduce work related injuries.

SENATOR FRENCH said his question goes right back to the sentence: Is there anything in this bill that forces a project owner to buy a workers' compensation policy to cover a subcontractor's employees?

MR. MILLER said project owners already have it. All workers' compensation policies in the state must fully comply with the terms of the workers' compensation act. He opined that Senator French is asking the wrong question because if a project owner has a workers' compensation policy, it complies with the workers' compensation act and will automatically cover the subcontractor's employees if injured.

SENATOR FRENCH questioned what would happen if the project owner does not have a workers' compensation policy.

MR. MILLER replied, "If the employee does not have a workers' compensation remedy against anyone, under those circumstances only, they would default into another section of the statute, which allows for a tort claim."

CHAIR SEEKINS asked if no one has that policy upstream, the employee has a direct action against the project owner.

MR. MILLER said the employee could sue either for workers' compensation benefits or for a tort remedy against his direct employer if neither the subcontractor, the contractor, nor the project owner have coverage.

SENATOR OGAN moved CSSB 323(JUD) from committee with individual recommendations and attached fiscal notes. He stated that today's discussion cleared up a lot of questions he had about the bill and that he appreciates the amendment.

SENATOR FRENCH objected.

The motion carried with Senators Ogan, Therriault and Seekins in favor and Senator French opposed.

SB 219-OFFENSES AGAINST UNBORN CHILDREN

The committee took up SB 219, sponsored by Senator Fred Dyson.

SENATOR FRED DYSON, District I, told members that he filed the bill last year but expected the House version to be the vehicle that moved forward. However that bill got "high centered" in the House so, at the request of the sponsor of the House bill, he has been working to get SB 219 passed.

SENATOR DYSON informed members that Congress has enacted an unborn child protection act but it is only in effect under federal law and federal jurisdiction. Thirty-one states have enacted or are in the process of enacting similar legislation in state law. SB 219 mirrors the intent of the federal law but is tailored to fit into Alaska's statutory structure. He asked members to adopt the proposed committee substitute (CS), labeled version H. In that version, a few lines were changed to make sure that this law does not apply to people involved in abortion services with the permission of the mother.

SENATOR OGAN moved to adopt version H as the working document before the committee.

CHAIR SEEKINS announced that without objection, version H was before the committee.

SENATOR DYSON pointed out that on page 2, line 31, subsection (3) is new. It exempts acts by a pregnant woman committed

against herself and her unborn child. Similar language on page 3, lines 26 -27, makes clear that a woman who consciously does something to herself or with the assistance of medical people to abort a child is not subject to prosecution.

CHAIR SEEKINS asked if this law would only apply to acts done unwillingly against a mother and unborn child.

SENATOR DYSON said that is correct. He said the bill is clear that the crime is murder if the offender intended to harm the unborn child; the crime is manslaughter if harm was done unintentionally but occurred as the result of assault, rape, burglary, etc. He believes the bill is well drafted; it follows model legislation.

CHAIR SEEKINS referred to the language on page 2, lines 16-19, and said the standard is recklessly rather than negligently.

SENATOR DYSON affirmed that is correct. He then noted the first law of this type was enacted in California in 1970 after a tragic occurrence in which an unborn child died.

SENATOR OGAN said he would be more comfortable with the language that exempts a woman who harms herself or unborn child if it only applied to an abortion performed by a doctor or some type of standard medical practice for the sake of safety.

CHAIR SEEKINS agreed but said SB 219 is meant to apply to acts done by an outside party that are not agreed to by the woman. He stated:

We would now be bringing under the law, if we made this any more difficult, someone who maybe was a very emotionally distraught prospective mother who may do something without whatever the level of culpability is, simply trying to avoid all kinds of emotional problems, as they might be, we would simply be widening the net and taking that person in. And I think the intent - tell me if I'm wrong here Senator, is that you're bringing the net in for those people outside of that woman herself who would cause the death of the baby but not trying to put the woman, herself, inside that net. Under current law, all of them are outside of the net.

SENATOR DYSON said he is sympathetic to Senator Ogan's concern but he does not believe this bill is the proper place to address that concern.

TAPE 04-42, SIDE B

He noted such a change would open up the possibility of prosecuting the woman for assault if she, for instance, was imbibing alcohol or smoking and damaged the child. He said although those concerns might be legitimate and worthy of consideration, they are outside of the scope of SB 219.

SENATOR OGAN said, for the record, he has spent a lot of time thinking about children who are assaulted by their parents by alcohol abuse and that is avoidable.

CHAIR SEEKINS agreed that the damage done to unborn children as the result of alcohol abuse is a terrible scourge on Alaska and, more data is showing the amount of damage is so huge as to compel the legislature to address that issue, but not in this bill.

SENATOR DYSON agreed and mentioned some of his personal experiences with fetal alcohol syndrome children.

SENATOR FRENCH asked Senator Dyson if it is his intention to "weed out" of this bill any harm a woman might do to her fetus through smoking, drinking alcohol, or use of recreational drugs.

SENATOR DYSON said that is correct.

SENATOR FRENCH asked Senator Dyson why he chose the moment of conception for protection rather than the viability standard.

SENATOR DYSON asked Mr. Luckhaupt, the drafter, to help him address the question. He believed SB 219 follows model legislation from other states.

MR. JERRY LUCKHAUPT, legislative counsel, Legislative Legal and Research Services, explained that he used the moment of conception as the definition of unborn child because the model legislation he was supplied with used that definition, as does the federal legislation. He believes it will be difficult to apply.

SENATOR DYSON noted that historically, the law has tended to follow the science, and up until the 1860s or 1870s, the law

generally got involved past the stage of "quickenning," which is when the mother first notices movement of the fetus. He furthered:

As our understanding of embryology and so on and so forth has progressed, they realized that that was kind of an arbitrary point and that obviously it was life of a developing child far beyond that. So somewhere on that spectrum - and from my perspective philosophically or in terms of a worldview, as long as it is clear that that's a wanted child, you know, in that spectrum, in that progression, caught doing activity that caused the damage or termination from that has the same effect of damaging or killing a wanted human being and so on, so that's why I picked it.... What if it's after conception but before implantation and actually no one would know at that point and it would be very difficult to even know that a crime had happened because previous to implantation, the woman is not receiving any chemical signals in her body that it's happened and the hormonal changes are not happening so it would be very difficult to prove that there was even a conceived child starting that process. So I think there will be no prosecutions here under this until there's some evidence that there was a pregnancy in process.

SENATOR FRENCH said he could foresee prosecutions brought in front of members of the community in other states where all of the voir dire before the jurors centers on when one believes life begins. He said that would stray off of the normal path of criminal prosecution. His sense is that the closer the definition gets to a viable fetus, the more workable the law will be in the hands of the prosecutor, judge, and jury.

CHAIR SEEKINS noted in many cases, viability is considered to be as late as the seventh month of pregnancy.

SENATOR DYSON said he is aware of a child who survived [outside of the womb] at 19 weeks and as technology moves forward, that target will change. He said he is not sure he would want to support a law that says a person is culpable for killing a child at 28 weeks but not at 24 weeks. In his view, the value of that unborn child shouldn't be set based upon available technology.

SENATOR OGAN noted that many women have miscarriages that are stress induced. He questioned how stress caused by another's actions, whether intentional or not, would be handled.

SENATOR DYSON said he believes this bill addresses that scenario exquisitely because if one's intent is to engage in another crime, such as setting a fire to a house, that person would be prosecuted for arson and whatever damage was done to the people and their possessions. In addition, if that crime caused a miscarriage or premature birth, the person could be charged with that unintended action. However, that would only apply if the harm done to the unborn child occurred as the result of another crime.

CHAIR SEEKINS asked, if the charge was manslaughter, an automobile accident would be included.

MR. LUCKHAUPT said it would not in the example given by Senator Dyson. He tried to adopt Alaska's murder statutes with changes to apply in this situation. He retained crimes like felony murder so that if someone was in the process of committing a felony and caused the death of an unborn child, that person would be prosecuted for murder. He said one could be prosecuted for manslaughter or criminally negligent homicide resulting from an auto accident if other circumstances are involved, for example driving while under the influence of alcohol or engaging in drag racing.

CHAIR SEEKINS took public testimony.

MS. CASSANDRA JOHNSON, an Anchorage resident, said all agree that domestic violence is a serious problem in our society and that it is all too prevalent in Alaska. She believes SB 219 is not about protecting pregnant women; if it were, it would include sentence enhancement provisions for assault or mandatory education programs. With eight years of work experience in domestic violence, she thinks SB 219 is the wrong approach to protect women from assault by husbands, partners, or former partners. The National Domestic Violence Advocates and National Advocates for Pregnant Women opposed this bill on the federal level. She urged the committee to not pass the bill.

MS. ROBIN SMITH, a resident of Anchorage, read the following testimony for Dr. Carolyn Brown, an OB-GYN who was unable to attend. She apologized in advance if the testimony does not apply to the new committee substitute.

I have read through SB 219 a number of times and would like to offer the following comments to the proposed legislation. I ask that these remarks be incorporated into the record and they be considered by the Senate Judiciary Committee.

Homicide is the number one killer of pregnant women in our country. 240,000 pregnant women, 6 percent of all pregnant women, are battered each year. Injury to a fetus is first and foremost in an injury to a pregnant woman, where the fetus presides. It is imperative that any fair and just legislation deal with that issue.

The proposed legislation deals with none of that if it does not address the injuries to the pregnant woman. So where is the protection provided in the name of SB 219 that [is] desperately needed for that mission? Otherwise, what does this proposed legislation mean to the pregnant woman who carries that fetus or the alleged perpetrator?

[Indisc.] offenses perpetrated by a pregnant woman on the fetus. These may include, but are not limited to, abuse of alcohol, tobacco, legal and illegal drugs and pharmaceuticals, attempted suicide, self abortion, missing prenatal appointments, abandonment of reasonable nutrition, resulting in obesity, a [indisc.] injury, refusal of prenatal care, prenatal negligence, working with environmental hazards, sexual promiscuity resulting in sexually transmitted diseases and [indisc.] of tubal pregnancy, to name a few. Many of these can result in the death of the fetus. What will this proposed legislation do with these women and will they be charged with murder?

There may be offenses perpetrated by physicians and [indisc.] with an in vitro fertilization or an idea for assistive reproductive technology, where multiple zygotes or [indisc.] may be destroyed or frozen. Is this murder and are the zygotes and [indisc.] unborn children if this results in destruction? There also may be offenses where the pregnant woman chooses not to file charges against the alleged perpetrator. How does this proposed legislation plan to deal with this?

The [indisc.] just what the offenses are, who the offenders are, and the manner of the offenses are so

convoluted and [indisc.] so as to make this proposed legislation as written a threat to due process, right to privacy, freedom from unreasonable search and fundamental rights of women, including reproductive rights. Who is [indisc.] pregnancies to assure that offenses are not committed against the fetus with drugs, tobacco, alcohol, neglect that may lead to fetal death and injury? How will we know? And what about second-hand smoke? Will all stillbirths be mandated to be investigated as potential murder and who will do this and at what cost?

[The remainder of Dr. Brown's testimony was inaudible.]

SENATOR DYSON informed Ms. Smith that a paragraph is included in the bill that says a woman cannot be prosecuted if the actions that resulted in the death or injury to the unborn child were committed under usual and customary standards of medical practice during diagnostic testing or therapeutic treatment. He believes that will provide protection from prosecution if the damage occurred during a medical procedure.

SENATOR OGAN felt the secondhand smoke issue should be addressed. He asked if a person could not be prosecuted unless criminal intent was involved.

MR. LUCKHAUPT said that is an interesting issue and would involve questions of fact and approximate cause. He said medical science has not progressed so far as to be able to prove that secondhand smoke was the cause of a miscarriage. He surmised if one required a pregnant woman to sit in a smoky room with the intent of doing harm to the fetus, and medical testimony could back that up as the cause of the miscarriage, he could see that occurring.

CHAIR SEEKINS thought, if the woman was unknowingly forced into that situation, that would be an assault.

MR. LUCKHAUPT said he could clearly see that situation, just like forcing a pregnant woman to drink alcohol.

CHAIR SEEKINS asked if current law already addresses similar acts against the woman herself.

MR. LUCKHAUPT said it does. He noted the definition of serious physical injury specifically includes miscarriage.

CHAIR SEEKINS said those laws are not reiterated in this bill but that does not indicate an intent to not provide the same coverage to the woman that this bill will provide to the unborn child.

MR. LUCKHAUPT replied:

That would be correct. We are not attempting to - or at least the draft legislation I was provided, what I could discern from that, it was not attempting in any way to define a person for purposes of our murder and assault statutes to include an unborn child within that definition and so thereby you avoid all those questions about a child being born alive or being viable, or any of those things, but it was an attempt to create a whole new area of law to protect this unborn child outside of all of the existing law that already exists.

SENATOR OGAN said many women who work in bars are exposed to secondhand smoke and noted that an assault charge requires intent. He wondered whether the state would have to prove criminal intent on the part of an employer if a child was born with a defect because of exposure to secondhand smoke in a work environment.

MR. LUCKHAUPT said the state of culpability required for an assault charge is "knowingly" so a person would have to be aware that the conduct is of that nature. He noted the scenario described by Senator Ogan presents one of the problems, for example, the woman's pregnancy might not be obvious. There will be many circumstances in which it will be difficult to show the perpetrator had the requisite criminal intent to cause harm to the unborn child. That will always be a limitation in regard to the assault provisions of the bill.

SENATOR FRENCH referred to the definitions on page 2 and asked for reassurance that the bill would not apply to anything in the area of assistive reproductive techniques if something went wrong with a procedure.

SENATOR DYSON said that is correct; the bill is not intended to deal with any fertilized human cells outside of the womb.

SENATOR FRENCH suggested expanding subsection (2) on page 2, lines 29-30, to make certain the bill does not cover any of that. His concern is this could stray into legitimate areas of

medical technology and in the hands of the wrong prosecutor, could lead to trouble.

SENATOR DYSON said he is not an expert in that area and does not have the tools to deal with that. He added, "But I think that there's got to be intent here - gotta be intent to have done a criminal act or a criminal act against the woman that leaves us in the clear there."

MR. LUCKHAUPT noted that "therapeutic treatment" is fairly broad but he could add the correct phrase dealing with reproductive therapy.

CHAIR SEEKINS noted the committee is talking about attempts to assist in conception.

SENATOR FRENCH commented that Senator Dyson made a good point but he pointed out the manslaughter standard is reckless, which is a high standard but it can be overcome.

CHAIR SEEKINS said the committee is only attempting to address a conceived egg within the woman and there must be intent to cause harm.

SENATOR DYSON said he is aware of a situation that involved enhanced fertility with implantation of several embryos. Later in the pregnancy, the doctors felt development of the three embryos was threatening the chance of success of any of them and performed a therapeutic abortion. During that surgery, the leg of the surviving embryo was amputated.

SENATOR FRENCH said that although he understands the intent of the bill, the definition of "unborn child" is fairly broad and does not say whether it is inside the womb.

CHAIR SEEKINS suggested adding the phrase to page 2, line 30, after the word "or", "medical practice to assist pregnancy."

MR. LUCKHAUPT thought that was a good start.

SENATOR DYSON said he would be open to inserting "and in utero" on page 5, line 10, after the word "conceived."

SENATOR FRENCH said the federal definition of "unborn" child means a child in utero, which means a human child at any stage of development who is carried in the womb.

CHAIR SEEKINS again suggested adding "medical practice to assist pregnancy" at the end of line 30 on page 2 [Amendment 1].

SENATOR DYSON accepted that as a friendly amendment.

SENATOR OGAN moved to adopt Amendment 1.

CHAIR SEEKINS announced that with no objection, Amendment 1 was adopted.

SENATOR DYSON suggested a conceptual amendment to adopt the federal definition of an unborn child [Amendment 2].

SENATOR OGAN so moved.

CHAIR SEEKINS announced that with no objection, Amendment 2 was adopted.

SENATOR FRENCH asked for the opportunity to work on a definition that moves closer to viability. He believes without that, this bill will be very difficult to implement.

SENATOR DYSON committed to Senator French that such an amendment would be considered at "other stops along the way," although he would not support it.

SENATOR OGAN recalled seeing a photo on a national magazine cover of an in utero operation in which a tiny hand was hanging on to the fingernail of the surgeon. He noted that baby was not viable but it looked like the baby knew he was having a life altering operation.

With no further discussion, SENATOR OGAN moved CSSB 219(JUD) from committee with individual recommendations and its attached fiscal notes.

SENATOR FRENCH objected.

The motion carried with Senators Therriault, Ogan and Seekins in favor and Senator French opposed.

The committee took a brief at ease.

9:45 a.m.

HB 451-THERAPEUTIC COURTS

MR. DOUG WOOLIVER, administrative attorney for the Alaska Court System (ACS), explained that HB 451 was introduced by the House Rules Committee at the request of the ACS. It does two things: it extends the termination date of two pilot therapeutic court programs and it deletes a sunset clause on a superior court judge position that was added to the Anchorage bench in 2001.

He noted that in 2001, Speaker Brian Porter introduced HB 172, which created two pilot felony DUI courts, one in Anchorage and one in Bethel. The purpose of the therapeutic courts was to combine intensive outpatient treatment with close court supervision in hope of significantly reducing the recidivism rate for people with drug and alcohol related problems. These programs have had great success. Judge Wanamaker oversees the therapeutic court in Anchorage at the district court level. His program shows recidivism rates of 25 percent. The more standard rate for people in that category is 70 percent. Speaker Porter wanted to apply that same success to felony level offenders so introduced HB 172.

As part of that legislation, the Alaska Judicial Council was tasked with studying the effectiveness of the program, which is important because those programs are labor-intensive for ACS. Unfortunately, the bill required a report in July of 2005, almost a year after the two therapeutic courts will have closed.

HB 451 will allow the two programs to continue until July of 2006 to give the legislature a chance to see whether they are effective. The bill also deletes the sunset clause that was put on the Anchorage superior court judge position in the last committee of referral. The superior court had not had a new judge position since 1984, therefore HB 172 was used as the vehicle to create that position to handle the therapeutic court and to handle the increase caseload in Anchorage. Since 1984, Anchorage has seen a 100 percent increase in its felony caseload. At the same time, Representative Rokeberg had sponsored several bills related to felony DUIs and other DUI changes. ACS cannot afford to lose that judge and go back to its 1984 level of coverage.

SENATOR FRENCH said he attended two graduations at the therapeutic court and was very impressed by the program. He asked whether the report will provide information on how those graduates are doing six months later.

MR. WOOLIVER said the Alaska Judicial Council also wants that information and Judge Wanamaker has statistics on people who have been out of the program for two or three years.

SENATOR OGAN asked if the study will contain a cost analysis that includes the savings from the lower recidivism rate.

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MR. WOOLIVER said that information will also be included. He noted the two judges who run the programs are available to testify on-line.

MS. SALLY RUSSELL, Therapeutic Court Project Coordinator in Bethel, informed members that Judge Devaney had to leave for a 9:30 hearing so she would testify in his place. She said Judge Devaney wanted to pass on that the Bethel Therapeutic Court has been wildly successful and has changed people's lives. They hope the program will go on forever.

ANCHORAGE SUPERIOR COURT JUDGE STEPHANIE JOANNIDES told members she presides over the felony DUI and felony drug court. The drug court model has been used on a national level since the 1980s. Throughout her legal career as a prosecutor in Juneau and as a judge in Anchorage, she has heard many lawyers and judges express frustration about seeing the same people in court over and over, even though they receive longer jail terms with each successive offense. She believes our society cannot afford to not use therapeutic courts from the standpoint of economics and public safety. The drug court model is based on the theory that insanity is behaving the same way repeatedly and expecting different results. The drug court model is working across the country. When Alaska began its first drug court in 2001, approximately 400 were in operation. Because of its overwhelming success nationwide, over 1,000 drug courts are now operating around the country.

JUDGE JOANNIDES explained that in therapeutic court, people are held accountable. The drug court model forces the workers from different agencies to sit at the same table and come up with an effective plan to make sure the person on probation will actually succeed. The offender appears before her every week and the probation officer reports to her immediately if the offender is not adhering to the requirements of the program. In addition, the treatment provider gives her information.

SENATOR OGAN said he believes extending the program is worthwhile because it works for some people. He then moved HB 451 from committee.

CHAIR SEEKINS announced that without objection, HB 451 had moved from committee. He thanked Judge Joannides for her testimony and adjourned the meeting at 10:00 a.m.