

HB

116



Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

HOUSE BILL 116

P.O. Box V
State Capitol
Juneau, Alaska 99811

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FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Public Safety
 Title: "An Act relating to immunity for
treatment of intoxicated persons..." BRU: Law Enforcement
 Sponsor: MacLean & Swackhammer Component: AST, FWP, VPSO
 Requestor: House C&RA

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

House Bill 116 would prevent lawsuits against the State, the Department, and its officers, employees, and agents for discretionary decisions regarding incapacitated (intoxicated) persons. Passage of this bill may eliminate future liability, but would have no fiscal impact on the Department's present budget.

Prepared by: Captain C. Roger McCoy, Special Assistant
 Division: Office of the Commissioner

Phone: 465-4322
 Date: 1/27/89

Approved by Commissioner: Arthur English
 Agency: Department of Public Safety

Date: -30-89

#2
FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to immunity for treatment of intoxicated persons."
Sponsor: Rep. MacLean & Swackhammer
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Susan E. Knighton
Prepared by: Susan E. Knighton, Director Phone: 465-3376
Division: Administrative Services Date: 1-30-89
Approved by *Susan Humphrey-Barnett* Date: 1-30-89
Agency: Department of Corrections

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

imposes upon a municipality an actionable duty to take persons incapacitated by alcohol in a public place into protective custody. We determine that it does and thus reverse the judgment of the trial court and remand for further proceedings.

I

On May 1, 1980, Thomas Busby was walking about two feet into the traffic lane on East Fifth Avenue in Anchorage.¹ Officer Foster was on patrol and spotted Busby, stopped him, moved him off to the side of the road, talked with him, and determined that Busby was intoxicated. Officer Foster then ran a warrant check on Busby but did not place him into protective custody. Apparently finding no outstanding warrants, Officer Foster then reentered her vehicle and proceeded on her way. Shortly after Officer Foster left, Busby was struck by a car and suffered injuries as a result.

In his suit against the Municipality, Busby alleged that the Municipality was negligent and/or reckless in failing to take him into protective custody and that the Municipality's omission was the direct and proximate cause of his injuries. After hearing was held on Busby's and the Municipality's cross-motions for summary judgment, the trial court determined that the Municipality owed Busby no affirmative duty to take him into protective custody and that, therefore, the Municipality could not have been negligent in failing to do so. Accordingly, the trial court granted summary judgment in favor of the Municipality. This appeal followed.

ferred to another health facility, and has no funds, may be taken to the person's home, if any. If the person has no home, the approved public treatment facility shall assist the person in obtaining shelter.

(g) Peace officers or members of the emergency service patrol who comply with this section are acting in the course of their official duty and are not criminally or civilly liable for it.

(j) For purposes of (b) of this section, "incapacitated by alcohol" means a person who, as the result of consumption of alcohol, is ren-

II

[1] In the recent case of *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985), we unequivocally reaffirmed our rejection of the so-called "public duty doctrine" as an unnecessary and unjustified expansion of the state's statutorily limited immunity. *Id.* at 1311-12; see also *Adams v. State*, 555 P.2d 235, 241-43 (Alaska 1976). In place of that doctrine, we indicated that the liability of a municipality for the negligent acts and omissions of its representatives will be governed by traditional tort principles. As we stated in *McLean*:

In practice, the public duty doctrine is an injunction against imposing liability on a government without first deciding what the government's duty is. While the public duty doctrine does protect the state from becoming the insurer of all private activity and from undue interference with its ability to govern, we believe that these concerns are better addressed by the tort concept of duty, which limits the class of people which may seek to hold the state responsible for negligent action, and by AS 09.50.250.

702 P.2d at 1313 (citation and footnote omitted). Thus, our determination here must be made with recourse to the principles embodied by the tort concept of duty.

[2, 3] As we have noted, "[d]uty" is not sacrosanct in itself but [is] only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* (quoting W. Prosser, *Handbook of the Law of Torts* § 53, at 325 (4th ed. 1971)). Thus stated, the process of finding that a defendant owes a duty to a

dered unconscious or has judgment or physical mobility so impaired that the person cannot readily recognize or escape conditions of apparent or imminent danger to personal health or safety. The definition in AS 47.37.270(8) applies to other portions of this chapter.

3. Because this appeal comes to us on summary judgment, our obligation is to draw all inferences of fact in favor of appellant Busby and against appellee Municipality. See, e.g., *Alaska Rent-a-Car v. Ford Motor Co.*, 526 P.2d 1136, 1139 (Alaska 1974).

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4. Section
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plaintiff is one which involves a fine balancing of conflicting policies; it is in essence an attempt to determine whether it would be fair and equitable to require an individual to act, or to refrain from acting, in a specified manner so as to avoid undue risk of harm to third persons. See generally *W. Keeton, D. Dobbs, R. Keeton, and G. Owen, The Law of Torts* § 53, at 356-58 (5th ed. 1984) (hereinafter *Prosser*). Recognizing the difficulty of this task, we have delineated a number of factors which should be considered to provide greater predictability in the decision-making process. These factors include the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community in imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved. *McLean*, 702 P.2d at 1314 (quoting *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981)).

[4] These independent considerations, however, may sometimes be superseded by the legislature. For example, where the legislature has considered and resolved conflicting policies by clearly enunciating a duty in a statute, the relevant statute should be considered and, in a proper case, adopted as the appropriate standard of care. See *Metcalf v. Wilbur, Inc.*, 645 P.2d 163, 167-68 (Alaska 1982); *Bachner v.*

Rich, 554 P.2d 430, 440-42 (Alaska 1976); *Breitkreutz v. Baker*, 514 P.2d 17, 20-21 (Alaska 1973); *Ferrell v. Baxter*, 484 P.2d 250, 263-65 (Alaska 1971); see generally *Prosser, supra* p. 6, § 36, at 220-29; Restatement (Second) of Torts § 285 (1965) (hereinafter Restatement). A statute enunciates the appropriate duty when it is found that (1) the plaintiff is within the class protected by the statute, (2) the harm/injury which occurred was of the type which the statute was intended to protect against, (3) the statute prescribes specific conduct rather than merely a general or abstract duty of care, (4) the defendant was a party charged with observing the statute, (5) the defendant can be fairly charged with being aware of the applicability of the statute, and (6) the statute is not so outdated or arbitrary as to make inequitable the statute's adoption as the standard of care. *E.g.*, *State Mechanical v. Liquid Air*, 665 P.2d 15, 18-19 (Alaska 1983); *Grothe v. Olafson*, 659 P.2d 602, 607 (Alaska 1983); see also Restatement § 286.⁴

[5, 6] Busby argues that AS 47.37.170(b) articulates the appropriate duty in this case. We agree. As the statute explicitly states, and as the trial court itself noted, AS 47.37.170(b)⁵ is intended to benefit and protect the health and well being of persons who are incapacitated by alcohol and imposes a mandatory duty upon law enforcement personnel to place such persons into protective custody. *Cf. Peter v. State*, 531 P.2d 1263, 1268 (Alaska 1975) (quoting House Concurrent Resolution No. 36 (1969) on treatment of problem drinkers and alcoholics); AS 47.37.010.⁶ In addition, accepting as true Busby's assertions⁷ that

4. Section 286 of the Restatement (Second) of Torts (1965) provides:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

5. See *supra* note 2.

6. AS 47.37.010 provides:

It is the policy of the state that alcoholics and intoxicated persons should not be criminally prosecuted for their consumption of alcoholic beverages and that they should be afforded a continuum of treatment so they may lead normal lives as productive members of society.

7. See *supra* note 3.

RECEIVED BY THE ATTORNEY GENERAL
 OFFICE OF THE ATTORNEY GENERAL
 1000 W. WASHINGTON
 ANCHORAGE, ALASKA 99501



he was a person incapacitated by alcohol in a public place, he was clearly a member of the protected class and his accident was of the type against which the statute was designed to protect. Finally, it cannot be doubted that the statute prescribes specific conduct rather than merely states some general or abstract duty of care; Officer Foster was within that class of persons charged with observing the statute; as a municipal police officer, she can fairly be charged with awareness that the statute applied; and the statute can hardly be considered so outdated or arbitrary as to make inequitable its application as the appropriate standard of care.

[7] The Municipality cites a number of cases which, it argues, mandate a different conclusion. Only two, however, require discussion. In *Stout v. City of Porterville*, 148 Cal.App.3d 937, 196 Cal.Rptr. 301 (1983), a California court refused to find that California Penal Code § 647(ff) set out an appropriate legislative standard of care in circumstances similar to those at issue here. *Id.* 196 Cal.Rptr. at 306-08. The statute in *Stout*, however, provided that an intoxicated person could only be taken to a voluntarily maintained public treatment facility. *Id.* The California court was therefore concerned that imposing a mandatory duty would cause counties participating in the voluntary treatment program to withdraw their support and thus cause the treatment program to collapse. *Id.* We have no similar concern in the present action.⁸ In addition, Penal Code § 647, unlike AS 47.37.170(b), was not intended to minimize the dangers faced by the inebriate, but simply to end the "revolving door" policy of jail and street, street and jail. *Id.* We thus decline to adopt *Stout's* analysis.

Marshall v. Ellison, 132 Ill.App.3d 732, 87 Ill.Dec. 704, 477 N.E.2d 830 (1985), also involves an analogous factual situation and statute.⁹ Nevertheless, this case is also

8. See AS 47.37.170(b), (c), *supra* note 2.

9. See Ill. Ann. Stat. ch. 111½, ¶ 6315(b) (Smith-Hurd Supp. 1986).

10. Our decision today is expressly limited to a discussion of duty. Because the trial court's judgment was based solely upon this issue, we

unpersuasive for at least two reasons. First, the court in *Marshall* apparently refused to find that the relevant statute imposed upon the state any mandatory duty on the basis of the state's sovereign immunity. *Id.* at 83. Relying upon *Rodriguez v. City of Cape Coral*, 451 So.2d 513 (Fla. App. 1984), *affirmed*, 468 So.2d 963 (Fla. 1985), the *Marshall* court stated:

Like the Florida statute [in *Rodriguez*], section 15(b) requires an officer to exercise his professional judgment in determining whether an individual appears to be incapacitated. We do not believe the public interest would be served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess a policeman's decision.

87 Ill. Dec. at 709, 477 N.E.2d at 835. Second, we find the *Marshall* court's statutory analysis questionable. Despite the unambiguous mandatory language in the Illinois statute and without citation to legislative history or any other authority, the court simply concluded that the legislature did not intend to create a cause of action under the statute for failure to take a person into protective custody. *Id.* Whatever the merits of the *Marshall* court's conclusion with respect to interpretation of the Illinois statute, we decline to apply its reasoning here.

We conclude then that AS 47.37.170(b) articulates an appropriate standard of care and thus hold that the Municipality has an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to an appropriate treatment facility.¹⁰

III

Busby's cross-motion and appeal seeking summary judgment in his favor are without merit. For the reasons discussed above, we REVERSE the judgment of the

trial court and proceedings consisting of the following:

need not, and do not, consider any question regarding alleged breach and express no opinion as to the factual merits of Busby's claim. Similarly, we express no opinion regarding any claims of municipal immunity under AS 09.65.070.

trial court and proceedings consisting of the following:

STATE

NORTHWEST

Supreme

Contractor more work than with State bridges. The Supreme District, Anchorage entered judgment and State appeal. The Supreme Court (1) use of blue-struction equipment was proper; book overtime have been reduced in addition of 15 rates was not of ten percent reasonable; a allocated part expensive grade

Affirmed remanded.

Matthews opinion in which

1. Damages < Plaintiff prove its duty."

trial court and REMAND for further proceedings consistent with this opinion.



STATE of Alaska, Appellant,

v.

NORTHWESTERN CONSTRUCTION,
INC., Appellee.

No. S-1141.

Supreme Court of Alaska.

Aug. 7, 1987.

Contractor which was required to do more work than indicated in its contract with State brought action to recover damages. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., entered judgment in favor of contractor, and State appealed amount of damages. The Supreme Court, Compton, J., held that: (1) use of blue book rental rates for construction equipment to calculate damages was proper; (2) State's claim that blue book overtime equipment hours should have been reduced by 50 percent could not be considered for first time on appeal; (3) addition of 15 percent profit to blue book rates was not double recovery; (4) addition of ten percent to costs for overhead was reasonable; and (5) contractor should have allocated part of its grader time to less expensive grader in calculating damages.

Affirmed in part, reversed in part, and remanded.

Matthews, J., dissented and filed an opinion in which Rabinowitz, C.J., joined.

1. Damages ⇨189

Plaintiff in contract action need only prove its damages to "reasonable certainty."

741 P.2d-7

2. Appeal and Error ⇨1008.1(5)

On appeal, Supreme Court will intervene only when convinced that trial court's findings of fact are clearly erroneous. Rules Civ.Proc., Rule 52(a).

3. States ⇨104

Use of construction equipment rental blue book rates to calculate damages was not clearly erroneous where state contract provided that payment for extra work would be calculated using blue book and blue book rates were commonly relied upon in state.

4. Appeal and Error ⇨169, 176

Issue raised for first time on appeal may be considered if issue is not dependent on any new or controverted facts, is closely related to appellant's trial court arguments, and could have been gleaned from pleadings, or if issue constitutes "plain error."

5. States ⇨214

State's argument that contractor's construction equipment rental blue book rate damages for extra work performed should have been reduced by 50 percent was dependent on new or controverted facts, was not closely related to State's trial court arguments, and could not have been gleaned from pleadings, and State was not entitled to argue that issue, which was raised for first time on appeal.

6. Appeal and Error ⇨169

Under "plain error" doctrine, issue not raised at trial may nonetheless be considered by Supreme Court if it appears that obvious mistake has been made which creates high likelihood that injustice has resulted.

See publication Words and Phrases for other judicial constructions and definitions.

7. States ⇨214

State was not allowed to raise for first time on appeal, under plain error doctrine, issue of whether contractor's damages, caused by extra work required and calculated using construction equipment rental rate blue book, should have been reduced by 50 percent, as there was no evidence that any state representative used 50 per-

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Alaska MUNICIPAL League

TELEPHONE
(907) 586-1325
FAX 463-5480

217 SECOND STREET, SUITE 200
JUNEAU, ALASKA 99801

TO: Representative Eileen Maclean, Chair
Members of House Community and Regional Affairs Committee

FROM: Scott A. Burgess, Executive Director

DATE: January 24, 1989

SUBJECT: HB 116 - Immunity for Treatment of Intoxicated Persons

The Alaska Municipal League supports HB 116. For the second year, relief from the implied liability created by the Supreme Court ruling in Busby v Municipality of Anchorage is a priority of the AML and the 123 municipalities the AML represents directly. The AML believes the Court misinterpreted the intent of the Legislature in AS 47.37.170(g) and the resulting implications of liability have created an unnecessary and unintentional burden on our law enforcement officials and our correctional facilities. HB 116, as introduced, provides legislative clarification for the courts and removes the threat of liability which is a deterrent to the protection of all our citizens.

I have attached a copy of the AML position on Busby which was contained in the AML's Municipal Platform which outlines the AML's legislative priorities for 1989 and which was provided to all legislators. HB 116 accomplishes the desired intent of the AML position on the Court's misinterpretation of AS 47.37. I have also attached copies of relevant AML resolutions passed by the AML membership at their annual conference in November.

Governor Cowper introduced HB 406 last year which would have provided immunity under AS 47.37 but unfortunately the bill did not get out of the House. Some believe that the immunity granted under AS 47.37.170(g) should be "qualified" by adding a legal test of "maliciousness". This is inappropriate and unnecessary. No problem or complaint existed before Busby. Our law enforcement officials are professionals and understand and carry out their duties under AS 47.37. Creating a civil liability for carrying out this duty may have the opposite effect of deterring the effective enforcement of AS 47.37.

The AML supports HB 116, appreciates the efforts of the sponsor to correct the problem it is causing in our communities, and urges the Committee to pass the bill out as introduced.

Attachments

Removal of Municipal Liability Imposed by Busby Decision

The Alaska Municipal League urges the Legislature to pass legislation reversing the implied liability of municipalities caused by the Busby decision regarding taking incapacitated persons into protective custody.

Background

The decision of the Alaska Supreme Court in Busby v. Municipality of Anchorage, which interpreted the intent of the Alaska Legislature in enacting AS 47.37.170(b), judicially created a duty to take incapacitated persons into custody that the Legislature did not intend to impose upon local communities.

The purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in local communities. However, to change that ability of local communities to help those in need into an affirmative duty to do so imposes on local communities obligations they are neither equipped nor fairly required to meet. The League supports a wide variety of measures to deal with the complicated issues of alcohol/drug abuse in Alaska. Nonetheless, the creation by the courts of a governmental obligation to take incapacitated persons into custody that took place without the discussion and study of the impacts of that obligation that would occur during the normal legislative process was not a good or fair way to address the problem.

The effect of this court decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correctional facility. The result has been great expense to the municipality or the State and an increased workload for peace officers, which comes at the expense of other duties, including investigation of violations of alcohol control laws.

Therefore, the League supports amending AS 47.37.170(b) by adding to it the following declaration: "This section shall not impose any affirmative duty upon municipalities or their agents to take persons incapacitated by alcohol into protective custody."

This is the narrowest possible legislative response to the Supreme Court's misinterpretation of legislative intent in the Busby case. Other programs and measures are needed to deal with the complex and difficult issues raised by alcohol/drug abuse in Alaska and it is appropriate for the Legislature to deal with those issues without "judicial legislation" by the courts.

Resolution of the Alaska Municipal League

Resolution No. 89-7

**A RESOLUTION URGING THE REVERSAL OF THE IMPLIED
LIABILITY OF MUNICIPALITIES REGARDING
TAKING INCAPACITATED PERSONS INTO PROTECTIVE CUSTODY**

WHEREAS, the purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in Alaska communities to help those in need, and

WHEREAS, the Alaska Supreme Court decision in Busby v. Municipality of Anchorage incorrectly interpreted the legislative intent behind AS 47.37.170(b) and judicially created an affirmative duty to take incapacitated persons into custody that was never intended to be imposed upon local communities, and

WHEREAS, the effect of this decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correctional facilities, and


WHEREAS, this obligation has resulted in a great deal of expense to municipalities or the State and an increased workload for peace officers, leaving them with inadequate time for other police duties, including investigation of violations of alcohol control laws, and

WHEREAS, this decision to burden local governments with an obligation that they are neither equipped nor fairly required to meet was arrived at judicially, without any communication with or consideration for the communities involved and the impact such an obligation would have;


NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the 16th Alaska Legislature to enact legislation which clarifies the municipalities' Good Samaritan role in assisting incapacitated individuals by adding to AS 47.37.170(b) the simple declaration:

"This section shall not impose any affirmative duty upon local governments or their agents to take persons incapacitated by alcohol into protective custody."

Adopted this 18th day of November 1988 in Fairbanks, Alaska.


Heather Flynn, President

ATTEST:


Scott A. Burgess, Executive Director

Resolution of the Alaska Municipal League

Resolution No. 89-8

**A RESOLUTION SEEKING ALTERATIONS OF STATE STATUTES
TO ALLOW MORE LOCAL AUTONOMY IN DEALING WITH
THE PUBLIC INEBRIATE PROBLEM**

WHEREAS, Alaska Statute 47.37.170(b) requires that a person appearing to be incapacitated by alcohol in a public place be taken into protective custody by a peace officer, and

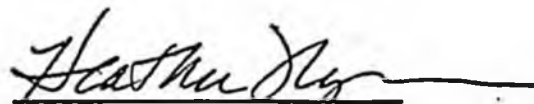
WHEREAS, little latitude is available to local governments under this statute to deal with the problem, and

WHEREAS, AS 47 places local jurisdictions in undue risk of litigation, and


WHEREAS, compliance with AS 47 jeopardizes municipal financial ability to provide health and related social services to persons experiencing alcohol related problems;

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the Legislature to alter AS 47.37.170 to permit greater local autonomy in dealing with public inebriates.

Adopted this 18th day of November 1988 in Fairbanks, Alaska.


Heather Flynn, President

ATTEST:


Scott A. Burgess, Executive Director

Resolution of the Alaska Municipal League

Resolution No. 89-9

**A RESOLUTION URGING THE LEGISLATURE TO PROVIDE FUNDING
TO MUNICIPALITIES TO OFFSET THE COST OF COMPLYING
WITH THE PROVISIONS OF AS 47.37**

WHEREAS, alcohol abuse is purported to be the number-one health problem in the State of Alaska, and

WHEREAS, the Alaska Supreme Court has held that municipalities have an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to an appropriate treatment facility, if one is available, and

WHEREAS, if a treatment facility is not available, the municipality must detain incapacitated persons in a state or municipal detention facility, and

WHEREAS, failure to provide protective custody to persons incapacitated by alcohol may result in liability for damages to the intoxicated person when injury results, and

WHEREAS, this increased responsibility and liability have been imposed on municipalities at a time when there are decreasing state revenues to fund municipal jail contracts, and

WHEREAS, treatment facilities and detention facilities have no real means to enforce the collection of fees from those who are taken into protective custody, and

WHEREAS, those taken into protective custody often do not have the resources to pay for medical treatment or detention, and

WHEREAS, local governments have been forced to assume the financial burden of providing medical examination, treatment, and protective custody detention as required by AS 47.37, and

WHEREAS, once an incapacitated person is taken into protective custody, the treatment facility or detention facility assumes further liability for the safety and welfare of that person while detained, and

WHEREAS, many standard municipal insurance policies specifically exclude "custodial care" from coverage, and

WHEREAS, a special alcohol tax would seem to make sense in that it would place the cost of the problem on the source of the problem, and

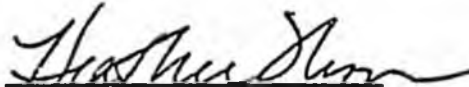
WHEREAS, AS 4.21.010 specifically prohibits municipalities from imposing such a tax, and

WHEREAS, barring this avenue for funding a State-mandated responsibility and liability, municipalities must look to the State for relief from the burden imposed on municipalities by AS 47.37 and the State Supreme Court;


NOW, THEREFORE, BE IT RESOLVED by the Alaska Municipal League that:

1. The Alaska State Legislature is hereby urged to provide direct funding to municipalities to offset the cost of complying with the provisions of AS 47.37; and
2. The Alaska State Legislature is further urged to amend AS 4.21.010 to allow local governments to impose a special tax on alcohol to fund mandated programs and procedures to deal with alcohol abuse within local communities and to fund substance abuse education.

Adopted this 18th day of November 1988 in Fairbanks, Alaska.


Heather Flynn, President

ATTEST:


Scott A. Burgess, Executive Director

Alaska Association Chiefs of Police



January 30, 1989

Representative Eileen MacLean
Alaska State House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Representative MacLean,

On behalf of the Alaska Association of Chiefs of Police, I want to go on record as supporting House Bill 116, which would remove liability imposed by the Busby Decision. We join the Alaska Municipal League and the Alaska Peace Officers Association in an effort to mitigate the unfair burden that was placed upon Municipalities and its employees by the courts in the Busby Case.

The language in House Bill 116 is simple and clear. We urge that the Legislature pass this Bill into Law this session.

Sincerely,

A handwritten signature in cursive script, reading "Duane Udland".

Duane Udland, Vice President
Alaska Association of Chiefs of Police

DU:vka

TESTIMONY ON HB 406 - BUSBY BILL - 1988
#6 H. J. J.

Dillingham is not unlike many rural Alaskan communities in that it has it's share of alcohol abuse. A large portion of the visible abuse is that of the public inebriate. The Dillingham police have over the past 5 years has placed emphasis on the protection of the public inebriate through protective custody detention. This has been accomplished through a cooperative program with the Bristol Bay Area Hospital.

The resources necessary for this have been borne solely by the community and region, without aid from the State office of Alcoholism and drug abuse.

The committee substitute for HB 406 is a reasonable addition to our current statute and provides some degree of protection to communities as a result of the ruling by the Alaska Supreme court in the BUSBY case.

If the law were to remain as it is in light of this recent ruling, we would be fostering an attitude within our police to turn their heads rather than extend a helping hand to these victims of alcoholism.

The enabling of alcoholics to shirk their responsibility by placing the liability on local communities will do more to detract from the efforts to treat the problem than help it. We need to once again renew our efforts in a positive way in dealing with this problem and to give our support to those who are out there on the streets dealing with this problem on a daily basis.

Our police throughout the state have hundreds of contacts daily with people in varying stages of intoxication, without this substitute the ability to effectively deal with them is greatly hampered. As the statute now stands police will be in a position to abuse

§ 47.37.130

§ 47.37.170 WELFARE, SOCIAL SERVICES & INSTITUTIONS § 47.37.170

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(1) emergency treatment provided by a facility affiliated with or part of the medical service of a general hospital;

- (2) inpatient treatment;
- (3) intermediate treatment; and
- (4) outpatient and follow-up treatment.

(c) The office shall insure that adequate and appropriate treatment is provided to alcoholics and intoxicated persons admitted under AS 47.37.160 — 47.37.190 within the limits of available state and federal funds.

(d) The office shall maintain, supervise and control all facilities operated by it subject to the regulations of the department. The administrator of each facility shall make an annual report of its activities to the coordinator in the form and manner the coordinator specifies.

(e) If possible, the office shall coordinate the activities of the program with all appropriate public and private resources.

(f) The coordinator shall prepare, publish, and distribute annually a list of all approved public and private treatment facilities.

(g) The office may contract for the use of any facility as an approved public treatment facility if the coordinator, subject to the regulations of the department, considers this an effective and economical course to follow. Contracting under this subsection is governed by AS 36.30 (State Procurement Code). (§ 1 ch 207 SLA 1972; am § 5 ch 150 SLA 1980; am § 62 ch 106 SLA 1986)

Effect of amendments. — The 1986 amendment, effective January 1, 1988, added the last sentence in subsection (g).

Sec. 47.37.170. Treatment and services for intoxicated persons and persons incapacitated by alcohol. (a) An intoxicated person may come voluntarily to an approved public treatment facility for emergency treatment. A person who appears to be intoxicated in a public place and to be in need of help or a person who appears to be intoxicated in or upon a licensed premise where intoxicating liquors are sold or consumed who refuses to leave upon being requested to leave by the owner, an employee or a peace officer may be taken into protective custody and assisted by a peace officer or a member of the emergency service patrol to the person's home, an approved public treatment facility, an approved private treatment facility, or another appropriate health facility. If all of the preceding facilities, including the person's home, are determined to be unavailable, a person taken into protective custody and assisted under this subsection may be taken to a state or municipal detention facility in the area.

(b) A person who appears to be incapacitated by alcohol in a public place shall be taken into protective custody by a peace officer or a member of the emergency service patrol and immediately brought to

an approved public treatment facility, an approved private treatment facility, or another appropriate health facility or service for emergency medical treatment. If no treatment facility or emergency medical service is available, a person who appears to be incapacitated by alcohol in a public place shall be taken to a state or municipal detention facility in the area, if that appears necessary for the protection of the person's health or safety.

(c) A person who voluntarily appears or is brought to an approved public treatment facility shall be examined by a licensed physician as soon as possible. After the examination, the person may be admitted as a patient or referred to another health facility. The approved public treatment facility which refers the person shall arrange for transportation.

(d) A person who, after medical examination, is found to be incapacitated by alcohol at the time of admission or to have become incapacitated at any time after admission, may not be detained at a facility after the person is no longer incapacitated by alcohol. A person may not be detained at a facility if the person remains incapacitated by alcohol for more than 48 hours after admission as a patient, unless the person is committed under AS 47.37.180. A person may consent to remain in the facility as long as the physician in charge considers it appropriate.

(e) A person who is not admitted to an approved public treatment facility, is not referred to another health facility, and has no funds, may be taken to the person's home, if any. If the person has no home, the approved public treatment facility shall assist the person in obtaining shelter.

(f) If a patient is admitted to an approved public treatment facility, his family or next of kin shall be promptly notified. If an adult patient who is not incapacitated requests that there be no notification of next of kin, his request shall be granted.

(g) Peace officers or members of the emergency service patrol who comply with this section are acting in the course of their official duty and are not criminally or civilly liable for it.

(h) If the physician in charge of the approved public treatment facility determines it is for the patient's benefit, an attempt shall be made to encourage the patient to submit to further diagnosis and appropriate voluntary treatment.

(i) A person taken to a detention facility (i) under (a) or (b) of this section may be detained only (1) until a treatment facility or emergency medical service is made available, or (2) until the person is no longer intoxicated or incapacitated by alcohol, or (3) for a maximum period of 12 hours, whichever occurs first. A detaining officer or a detention facility official may release a person who is detained under (a) or (b) of this section at any time to the custody of a responsible adult. A peace officer or a member of the emergency service patrol, in

detaining a person under (a) or (b) of this section and in taking the person to a treatment facility, an emergency medical service or a detention facility, is taking the person into protective custody and the officer or patrol member shall make reasonable efforts to provide for and protect the health and safety of the detainee. In taking a person into protective custody under (a) and (b) of this section, a detaining officer, a member of the emergency service patrol or a detention facility official may take reasonable steps for self-protection, including a full protective search of the person of a detainee. Protective custody under (a) and (b) of this section does not constitute an arrest and no entry or other record may be made to indicate that the person detained has been arrested or charged with a crime, except that a confidential record may be made which is necessary for the administrative purposes of the facility to which the person has been taken or which is necessary for statistical purposes where the person's name may not be disclosed.

(j) For purposes of (b) of this section, "incapacitated by alcohol" means a person who, as the result of consumption of alcohol, is rendered unconscious or has judgment or physical mobility so impaired that the person cannot readily recognize or escape conditions of apparent or imminent danger to personal health or safety. The definition in AS 47.37.270(9) applies to other portions of this chapter. (1 ch 207 SLA 1972; am §§ 1-4 ch 101 SLA 1976)

Editor's notes. — This section is set out above to correct a minor error in subsection (j) in the main pamphlet.

Sec. 47.37.270. Definitions. In this chapter

(1) "alcoholic" means a person who habitually lacks self-control in using alcoholic beverages, or uses alcoholic beverages to the extent that the person's health is substantially impaired or endangered, or the person's social or economic function is substantially disrupted;

(2) "approved private treatment facility" or "private facility" means a private agency meeting the standards prescribed in AS 47.37.140(a) and approved under AS 47.37.140(c);

(3) "approved public treatment facility" or "public facility" means a treatment agency operating under the direction and control of the office or providing treatment under AS 47.37.010 — 47.37.270 through a contract with the office under AS 47.37.130(g) or through a grant awarded under AS 47.30.475, and meeting the standards prescribed in AS 47.37.140(a) and approved under AS 47.37.140(c);

(4) "board" means the Review Board on Alcoholism established under AS 47.37.060;

(5) "commissioner" means the commissioner of health and social services;

Removal of Municipal Liability Imposed by Busby Decision

The Alaska Municipal League urges the Legislature to pass legislation reversing the implied liability of municipalities caused by the Busby decision regarding taking incapacitated persons into protective custody.

BACKGROUND

The decision of the Alaska Supreme Court in Busby v. Municipality of Anchorage, which interpreted the intent of the Alaska Legislature in enacting AS 47.37.170(b), judicially created a duty to take incapacitated persons into custody that the Legislature did not intend to impose upon local communities.

The purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in local communities. However, to change that ability of local communities to help those in need into an affirmative duty to do so imposes on local communities obligations they are neither equipped nor fairly required to meet. The League supports a wide variety of measures to deal with the complicated issues of alcohol/drug abuse in Alaska. Nonetheless, the creation by the courts of a governmental obligation to take incapacitated persons into custody that took place without the discussion and study of the impacts of that obligation that would occur during the normal legislative process was not a good or fair way to address the problem.

The effect of this court decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correctional facility. The result has been great expense to the municipality or the State and an increased workload for peace officers, which comes at the expense of other duties, including investigation of violations of alcohol control laws.

Therefore, the League supports amending AS 47.37.170(b) by the addition of a simple declaration as follows:

"This section shall not impose any affirmative duty upon municipalities or their agents to take persons incapacitated by alcohol into protective custody."

This is the narrowest possible legislative response to the Supreme Court's misinterpretation of legislative intent in the Busby case. Other programs and measures are needed to deal with the complex and difficult issues

raised by alcohol/drug abuse in Alaska and it is appropriate for the Legislature to deal with those issues without "judicial legislation" by our courts.

Position Paper

HB 116

For An Act Entitled: " An Act Relating to immunity of treatment for intoxicated persons...

This legislation would provide that a person may not bring an action for damages against the state, a municipality (or officers, agents, or employees of the municipality or state), a peace officer or members of the emergency services patrol based on the performance or failure to perform a duty imposed under AS 47.37.170. AS 47.37.170 provides that (1) an individual who is intoxicated in public may be taken into protective custody by a peace officer or member of the emergency services patrol and (2) that an individual who is incapacitated by alcohol shall be taken into protective custody by a peace officer or member of the emergency services patrol.

In 1987, the Alaska Supreme Court in Busby v. Municipality of Anchorage, found that AS 47.37.170 creates an affirmative and mandatory duty for law enforcement personnel to place persons who are incapacitated into protective custody. According to the court, failure to take an incapacitated person into protective custody creates a cause for action for damages against a peace officer (or member of an emergency service patrol) who decides not to do so, for injuries that occur as a result. The Busby decision has increased municipalities fear of potential liability.

Department Position

The Department of Health and Social Services does not support the granting of absolute immunity to municipalities with regard to their actions under AS 47.37.170. Absolute immunity would shield all action, however improperly motivated, and would deny individuals traditional tort recourse.

The Department believes that conditional liability, based on the standard of gross negligence, would preserve the rights of individuals while at the same time protecting Municipalities from lawsuits.

Position Paper, HB 116, pg. 2

Raising the standard of liability to gross negligence or reckless or intentional misconduct would strike an appropriate balance between the need to reduce the potential

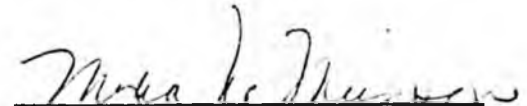
liability exposure of those involved in the protective custody process and the rights of intoxicated individuals to recover for injuries incurred because they are or are not taken into protective custody.

The Department suggests that the following changes be made to HB 116.

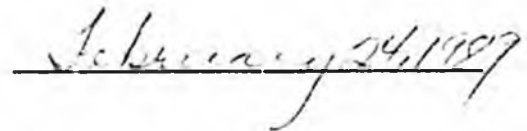
* Section 1. AS 47.37.170(g) is repealed and reenacted to read:

(g) A person may not bring a civil action for damages regarding the decision whether or not to take an intoxicated or incapacitated person into, or to release a person from, protective custody under this section, or for injuries incurred in protective custody. However, this subsection does not preclude liability for civil damages caused by gross negligence or reckless or intentional misconduct.

Approved by:


Myra M. Munson
Commissioner
Department of Health and
Social Services

Date:



"It is not the desire of the legislature that peace officers neglect their duty to provide protective custody to those that are incapacitated, but to prevent litigation that may arise from the inability to properly determine incapacitation."

Municipality of Anchorage



OFFICE OF THE MAYOR

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TOM FINK,
MAYOR

January 27, 1989

Representative Sam Cotten
P.O. Box 296
Eagle River 99577

Subject: Senate Bill 66/House Bill 116 - "Busby" Relief

Dear Representative Cotten:

I would like to take this opportunity to urge your support of Senate Bill 66 and House Bill 116 which offers local government's much needed relief from the "Busby" decision. I am sure you are aware of how the "Busby" decision has handicapped the day-to-day operations of our police and emergency services personnel, as well as the increased liability it imposes on state and local public safety agencies.

Sincerely,

Tom Fink
Mayor