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(FILE 3)

HOUSE JUDICIARY COMMITTEE

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MINNESOTA INJURY COMPENSATION  
STUDY COMMISSION

REPORT TO THE LEGISLATURE

JANUARY, 1990

*Haynes*

The members of the Injury Compensation Study Commission endorse and submit this report to the Legislature, in accordance with the Act of April 12, 1988, ch. 503, § 4, 1988 Minn. Laws, 375, 378.

Robert E. Bowen

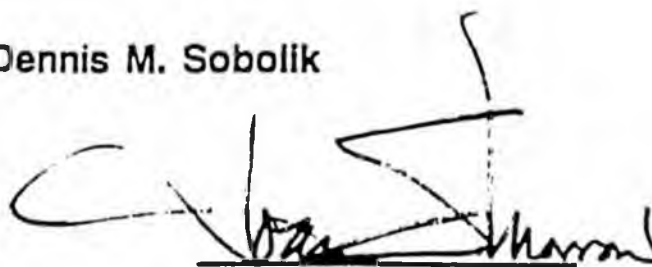
John W. Carey

James F. Hogg

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Joan S. Morrow

Dennis M. Sobolik

A handwritten signature in black ink, appearing to read "Joan S. Morrow", is written over a horizontal line. The signature is stylized and cursive.

Joan S. Morrow, Chairman,

For the Commission

Michael K. Steenson, Reporter

## ACKNOWLEDGMENTS

The Commission wishes to acknowledge the generous support of the William Mitchell College of Law in providing staff support and facilities to facilitate the work of the Commission. The Commission wishes to acknowledge the excellent support provided by Jacalyn Martin, Rider, Bennett, Egan & Arundel; Catarina E. Nilson, William Mitchell College of Law; and Janet Lund, Director of the Legislative Coordinating Commission.

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## I. Process, Methodology and Goals

The Legislature provided for the creation of a study commission on the civil justice system in 1988.<sup>1</sup> The six-member study commission, appointed in 1988, was composed of:

Robert E. Bowen, Hennepin County District Judge, retired.

John W. Carey, attorney at law. Sieben, Gross, Von Holtum, McCoy & Carey.

James F. Hogg, President and Dean, William Mitchell College of Law.

Dennis J. Johnson, President, MADD.

Joan S. Morrow, attorney at law. Rider, Bennett, Egan & Arundel

Dennis M. Sobolik, attorney at law. Brink, Sobolik, Severson, Vroom & Malm

Joan Morrow chaired the Commission. The Reporter for the Commission was Professor Michael K. Steenson, Margaret H. and James E. Kelley Professor of Tort Law, William Mitchell College of Law.

The Commission held ten public hearings, beginning in January, 1989, and ending in October, 1989. The initial hearings were held at the William Mitchell College of Law. Beginning in May, the hearings were held at the State Capitol. Notice of the hearings was given to all interested parties, including attorneys, business persons, injured and disabled persons, judges and insurers. No one who asked to testify at Commission hearings was refused that opportunity. The Commission heard testimony from over 50 witnesses during the hearings and received voluminous written submissions.

Following each hearing the Commission met in afternoon sessions, open to the public, to discuss the issues set for hearing. The Commission elicited suggestions from interested persons of topics to be covered. The hearing topics included punitive damages; joint and several liability; comparative fault; statutes of limitations and repose; alternative dispute resolution and incentives to alternative dispute resolution; alternative compensation systems and testimony from injured persons on damages; the collateral source statute and attorneys' fees; damages, additur and remittitur, caps on damages, and periodic payments; and the helmet law, seat belts, homeowners' insurance, and liquor liability. At the tenth hearing the Commission heard testimony on draft legislation addressing many of the areas of concern. In addition, the Commission held two day-long public meetings to consider its recommendations and findings.

The Commission had the benefit of testimony from the following persons:

January 25, 1989 - Punitive Damages

Janet Dolan, Esq. - General Counsel, Tennant Company  
John Stanoch, Esq. and Paul Godlewski, Esq. - MTLA  
Michael Ehrlichman - Director, United Handicapped Federation State Council  
on Disabilities  
Phillip Cole, Esq. - Past President, MDLA  
Theodore Olson, Esq. - Washington, D.C. - Civil Justice Coalition  
Timothy R. Thornton, Esq. - General Counsel, Northwest Airlines

February 14, 1989 - Joint and Several Liability

Steve Young, Esq. - Winthrop & Weinstine, former Dean, Hamline Law School  
John Stanoch, Esq. - MTLA  
John Hottinger, Esq. - MDLA  
William Huestis - President, Road Rescue, Inc.  
David Lillehaug, Esq. - Minnesota Justice Foundation  
Richard Benson, C.P.A. - Arthur Andersen & Co.

March 16, 1989 - Comparative Fault

David Prince, Esq. - Professor, William Mitchell College of Law  
Victor Schwartz, Esq., Washington, D.C. - Adjunct Professor, Georgetown  
University  
John Stanoch, Esq. - MTLA  
George Soule, Esq. - MDLA  
G. Alan Cunningham, Esq. - Faegre & Benson

April 12, 1989 - Statutes of Limitation and Repose

Richard Bland, Esq. - Midwest Medical Insurance Co.  
Mary Belgrade, Esq. - Chicago, Illinois, Alliance of American Insurers  
Steve Sunde, Esq.  
Robert A. Awsumb, Esq. - MDLA  
Victoria Lemberger, Esq. - Minnesota Hospital Association  
Reed MacKenzie, Esq.

May 10, 1989 - Alternative Dispute Resolution and Incentives to Alternative Dispute  
Resolution

Nancy Welsh, Esq. - Director, Mediation Center

Theodore Smetak, Esq. - MDLA

Hon. Charles Flinn - Chairman, Supreme Court - MSBA Joint Task Force on ADR

Dennis Johnson, Esq. - MTLA

James Deye - Regional Director, American Arbitration Association

June 21, 1989 - Alternative Compensation Systems and Damages

James Erickson - Personal injury plaintiff

Fred Pritzker, Esq. - MTLA

George Priest - Professor of Law, Yale University

Val Jerich - Personal injury plaintiff

John Stanoch, Esq. - MTLA

Steve Young, Esq. - Wintthrop & Weinstine

July 12, 1989 - Collateral Source Statutes and Attorneys' Fees

Richard Bland, Esq. - MMIC

Marin Connor, Esq. - Washington, D.C. - President, American Tort Reform Association

William Jepsen, Esq. - MTLA

John Stanoch, Esq. - MTLA

Mark Hallberg, Esq.

P. Kenneth Kohnstamm, Esq. - Assistant Attorney General, State of Minnesota

Mike Lindberg, Esq. - Association of Minnesota Counties

Richard Thomas, Esq. - MDLA

September 13, 1989 - Helmet Law, Seat Belts, Liquor Liability, Homeowners Insurance Exclusions

Rolf Sonnesyn, Esq. - MDLA

Robert Hauer, Esq. - MTLA

Brian Mahoney, M.D. - Minnesota Medical Association

Robert Johnson - Insurance Federation of Minnesota

Peter Strauss - Chicago, Illinois, Alliance of American Insurers

James Wicka, Esq. - MADD

William Sieben, Esq. - MTLA

October 17, 1989 - Draft Legislation

James Loizeaux, C.P.A. - Minnesota Society of CPAs.

William Jepsen, Esq. - MTLA

John Herman, Esq. - Minnesota Society of American Architects

Peder Larson, Esq. - Minnesota Chapter of Associated Builders and Contractors  
Thomas Schmidt, Esq. - Civil Justice Coalition  
Richard Thomas, Esq. - MDLA  
Kathleen Gaylord, Esq. - Northwest Airlines

The Commission's analysis has focused on the tort system in general, including common and statutory law. The overriding concern of the Commission in analyzing the civil justice system has been in perpetuating a fair and balanced approach to the sometimes incompatible goals of the tort system, accountability and compensation. The Commission has taken the position that tort law must consider the following goals:

1. Accountability.
2. Compensation.
3. Predictability.
4. Consistency of results.
5. Risk prevention.
6. Speed of resolution.
7. Accessibility to the system.
8. Fairness of the system.
9. Reasonableness of the costs of the system.

## II. Summary of Recommendations

The Commission makes a number of recommendations for legislative change in the law governing tort claims. These recommendations are unanimously endorsed by all Commission members. The Commission considered other proposals, many of which were supported by some Commission members; however, because none won unanimous support, a requirement for Commission endorsement, the Commission offers no recommendations on those proposals.

The Commission's recommendations are as follows:

### A. Comparative Fault

1. The Comparative Fault Act should be amended to provide for the application of comparative fault principles in cases involving claims for economic loss.
2. The definition of "fault" in the statute should be amended in four respects:
  - a. Primary assumption of risk should be explicitly excluded as

conduct subject to comparison under the act.

b. The doctrine of last clear chance should be abolished.

c. The statute should be amended to provide that evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages should not be considered in determining the cause of an accident, but only in determining the damages a claimant is entitled to recover.

d. The defense of complicity in actions brought under the Civil Damage Act, section 340A.801, should no longer be a complete defense but should be subject to apportionment under section 604.01, the Comparative Fault Act.

#### B. Statutes of Repose.

Section 541.051, the statute of repose governing claims arising out of improvements to real property, should be amended to exclude from the statute certain products liability actions.

#### C. Punitive Damages.

1. Subdivision 1 of section 549.20 should be amended to provide for a "deliberate disregard" standard in place of the current "willful indifference" standard, and the deliberate disregard standard should be more specifically defined.

2. Section 549.20, subdivision 2, should be amended to strengthen the standards required to impose liability for punitive damages on a principal or employer for the acts of an agent or employee.

3. A new subdivision 4 should be added to section 549.20 that will require bifurcation of the punitive damages issue upon the request of the defendant.

4. A new subdivision 5 should be added to section 549.20 that will provide specific direction to the courts to review any punitive damages award in light of the factors in section 549.20, subdivision 3.

#### D. Civil Damage Act

1. Section 340A.801 should be amended to permit social host liability where

the social host makes alcoholic beverages available to a minor.

2. The complete defense of complicity should be a partial defense subject to comparison under the Comparative Fault Act.

E. Caps on Damages; Enumeration of Damages.

Sections 549.23, the statutory cap on certain kinds of damages, and section 549.24, requiring enumeration by the finder of fact of certain types of damages, should be repealed.

F. Collateral Sources.

Section 65B.51 and section 548.36 should be amended to require a reduction of any jury verdict first by any collateral sources that must be deducted under the statutes and second, by the claimant's percentage of fault, if any.

G. Seat Belts and Motorcycle Helmets.

1. The penalties for failure to wear seat belts should be increased.
2. Motorcycle helmets should once again be mandatory for all motorcycle operators and passengers.
3. Seat belt evidence should continue to be inadmissible in civil litigation.
4. The current helmet law provision precluding recovery for damages a motorcycle operator or passenger could have avoided by wearing a helmet should be preserved.

H. Household Exclusion in Homeowners' Policies.

The household exclusion should be eliminated through an amendment to section 65A.295.

I. Penalties for Failure to Carry Automobile Insurance.

The penalties for failure to carry automobile insurance as required by the No-Fault Automobile Insurance Act and to carry proof of insurance coverage should be increased through amendments to sections 65B.67, 169.791 and 169.793.

J. Medical Assistance Liens.

Section 256B.042 should be amended to bring the State's right to reimbursement for medical assistance payments into line with reimbursement rights under the No-Fault Act, and the nature of the State's reimbursement right should be clarified so that resolution of tort claims is facilitated.

#### K. Alternative Dispute Resolution.

The Commission approves in substantial part the Final Report of the Minnesota Supreme Court and Minnesota State Bar Association Task Force on Alternative Dispute Resolution.

1. The Commission approves Part I. with the exception of subpart D.. 1. The Task Force recommendation states that the judge has the power to disagree with the alternative dispute resolution process adopted by the parties and may order the parties to utilize one of the non-binding ADR processes. The Commission takes the position that if the parties agree to the alternative resolution process to be used, the judge should not have the power to interfere with that choice.

Second, as to the timing of the conference, subpart D.1 states that if the parties are unable to agree on the ADR process or the timing of the process, the court shall schedule a conference with the parties within the next 30 days." The Commission takes the position that the court, within 30 days, should schedule a conference to take place at some later date.

2. The Commission takes no position on Part II of the report, which deals with the training and qualification of neutral persons for court annexed and court referred ADR programs.

#### L. State and Municipal Tort Liability.

The legislature should study the desirability and financial feasibility of raising the caps on damages for the state and its political subdivisions.

#### M. Mandatory Automobile Liability Insurance.

The legislature should study the mandatory automobile liability insurance limits in Minnesota, with a view toward increasing those limits.

#### N. Attorneys Fees

Legislative intervention in the form of regulation of contingent fees is unwarranted.

### III. Introduction and Analysis

The tort system in Minnesota is not and cannot be a uniform system of liability and compensation. Rather, it is a patchwork, dealing with such diverse issues as products liability, medical malpractice, and the liability of dram shops and other providers of alcoholic beverages. While there are common problems that transcend these pockets of tort law, each area presents its own problems and each may require different solutions. Moreover, the tort system in Minnesota and other states does not stand alone. The tort system is driven in substantial part by the institution of insurance. The presence of insurance makes possible broad-based compensation for persons who are injured in automobile accidents, by defective products, through medical malpractice, or because of other types of negligent misconduct. The charge of the Commission did not include an examination of issues of insurance availability and affordability, although those issues on occasion were part of the presentations made by witnesses testifying before the Commission. A prior Minnesota report has raised questions concerning the impact of tort reform on the affordability and availability of insurance, concluding that modifications of tort law do not guarantee either a reduction of insurance costs or an increase in the availability of insurance.<sup>2</sup>

Nor can the tort system be viewed solely as a structure of the common law. In many cases the right to recover in a tort action is controlled in whole or in part by statute. Any view of the tort system thus must take into consideration not only the decisions of the courts, but also those of the legislature, both of which must be viewed against the backdrop of the institution of insurance.<sup>3</sup>

Civil justice reform efforts frequently focus on the role of the common law in creating inequities in the civil justice system, but the critical role played by the legislature must also be considered. Both the legislature and courts have a role in establishing rights and liabilities in the system and both must be examined in determining whether the system operates fairly.

The legislature's role may have a significant impact on tort law. The Minnesota legislature has created compensation schemes that both supplant and supplement tort recoveries. The two most prominent are workers' compensation and no-fault automobile insurance. In cases where workers' compensation benefits are received by an injured employee, workers' compensation is the employee's exclusive remedy. In motor vehicle accident cases, an injured person has the right to receive no-fault automobile insurance benefits in exchange for some restrictions on the right to recover in tort.<sup>4</sup> The legislature has taken other action that limits tort recoveries in certain types of cases, and has enacted legislation that governs various aspects of tort litigation, such as the way fault is compared and distributed among parties to tort litigation.<sup>5</sup>

The approach taken by the Minnesota Supreme Court to personal injury law has varied over the years. On occasion the court has taken liberal positions in expanding tort law,<sup>6</sup> but more recently the court has taken a relatively conservative position in personal injury cases. More recent decisions have shown due regard for the place of fault in tort law and for the need to limit liability in order to avoid turning the tort system into one that operates essentially as a compensation system without regard to fault.<sup>7</sup>

Those testifying before the Commission recognized the need of a tort system, in part to ensure accountability and in part to ensure compensation. The American approach to the problem of safety relies heavily on the tort system to ensure accountability. While in other countries there is a greater degree of government involvement in resolving safety issues, in the United States the tort system is a necessary supplement to government regulation.

The need for accountability is not the sole goal of the tort system, however.<sup>8</sup> Tort law is also intended to provide compensation in cases where someone has been injured through the fault of another. The problem for legislatures, courts, and the Commission is in striking an appropriate balance between those two goals.

The tort system as it exists today in Minnesota has a strong fault basis. Although the principle of strict liability has been accepted in Minnesota in products liability cases and cases involving abnormally dangerous activities, strict liability has had limited application. The court has indicated an intent to limit strict liability for abnormally dangerous activities and has in effect supplanted strict liability theory in products liability cases with negligence theory.<sup>9</sup>

The civil justice system as it operates in Minnesota may be analyzed in a number of ways. The analysis could focus on the insurance system, on the structure of the common law to determine whether the system has been unduly extended by liberalizing decisions permitting new theories of recovery, on the damages that are recoverable under the system, or the means used to resolve the cases, on the methods of dividing damages among multiple tortfeasors, on the basis of apportioning fault among parties to the litigation, on the liability of particular parties, such as the state and its municipalities, or on alternative compensation schemes.

To reiterate and re-emphasize, the Commission's analysis has focused on the tort system in general, including common and statutory law. The overriding concern of the Commission in analyzing the civil justice system has been in perpetuating a fair and balanced approach to the sometimes incompatible goals of the tort system, accountability and compensation. The Commission has taken the position that tort law must consider the following goals:

1. Accountability.
2. Compensation.
3. Predictability.
4. Consistency of results.
5. Risk prevention.
6. Speed of resolution.
7. Accessibility to the system.
8. Fairness of the system.
9. Reasonableness of the costs of the system.

## IV. Recommendations

### A. Comparative Fault and Joint and Several Liability

#### 1. Introduction

Comparative fault and the rule of joint and several liability have generated a significant amount of legislative activity in the past few years. The trend in the United States has been toward the adoption of comparative fault and negligence statutes and procedures. Most of the statutes enacted have been modified comparative fault or negligence statutes, in which a plaintiff will be barred from recovery if the plaintiff's fault is greater than, or in some states equal to, the defendant's fault. Several states have adopted pure comparative negligence or fault statutes or procedures under which a plaintiff is not barred from recovery even if the plaintiff is more at fault than the defendant or defendants. The plaintiff's recovery, however, is reduced by the plaintiff's percentage of fault.

The comparative fault and negligence statutes differ significantly from jurisdiction to jurisdiction. Minnesota has one of the more detailed comparative fault statutes in the United States. It contains detailed provisions governing the losses subject to comparison, the types of fault that are subject to comparison, the impact of settlement on comparative fault determinations, and how the rule of joint and several liability applies.

#### 2. The Minnesota Experience

Prior to the adoption of comparative negligence, contributory negligence was a complete defense to negligence claims in Minnesota. In cases where the plaintiff was not contributorily negligent the plaintiff was entitled to recover damages against the defendant. If the plaintiff sued two or more defendants and one of those defendants

could not pay, the remaining defendant or defendants would be responsible for the uncollectible share of the insolvent defendant and would be obligated to pay the plaintiff 100 percent of the plaintiff's damages under the rule of joint and several liability.

Minnesota first adopted comparative negligence in 1969, modeling its statute after Wisconsin's. The 1969 comparative negligence statute was a modified statute, barring claimant from recovery if the claimant's fault was equal to or greater than the fault of the person against whom recovery was sought. The 1969 statute took no position on the rule of joint and several liability, but the Minnesota Supreme Court has taken the position that the rule of joint and several liability was not affected by the adoption of the statute.<sup>10</sup> In Madav v. Yellow Taxi Co.,<sup>11</sup> a case that arose before the 1978 amendments of the comparative negligence statute, the Minnesota Supreme Court took the position that "It has always been the law of this state that parties whose negligence concurs to causae injury are jointly and severally liable although not acting in concert."<sup>12</sup>

In 1978 the statute was amended in several ways. It adopted a broad definition of "fault," paving the way for a comparison not only of claims based on negligence but also claims based on breach of warranty and strict liability. The definition also provided for the comparison of various types of plaintiff misconduct falling under a general heading of contributory negligence.

The 1978 amendments also modified the rule of joint and several liability for the first time. Taking a middle position between full retention and complete abolition of joint and several liability, the legislature adopted a loss reallocation provision that required a defendant's uncollectible share of a judgment to be absorbed by the remaining parties to the litigation, including the plaintiff. Joint and several liability was retained for parties in the chain of manufacture and distribution. The amendments also changed the cutoff point for recovery, barring recovery by a claimant only where the claimant's fault is greater than the fault of the person against whom recovery is sought. Under the 1969 version a claimant was barred from recovery if the claimant's fault was equal to or greater than the fault of the person against whom recovery was sought.

In 1986, the legislature amended the act again to modify the rule of joint and several liability by providing that the State and its municipalities, if less than 35 percent at fault, cannot be held liable for more than twice their percentage of fault.

In 1988 the legislature again amended the rule of joint and several liability by providing that a defendant whose percentage of fault is 15 percent or less cannot be held liable for more than 4 times that percentage of fault. The rule does not apply in cases involving environmental torts.

There is thus a division in the rules applicable to joint and several liability. To summarize, the State and its municipalities are jointly and severally liable with other defendants if their percentage of fault is 35 percent or more. If their percentage of fault is less than 35 percent, the State and its municipalities may be held liable for no more than twice their percentage of fault. Defendants other than the state and its municipalities are jointly and severally liable with the other defendants if their percentage of fault exceeds 15 percent. If their percentage of fault is 15 percent or less, they may be held liable for no more than 4 times that percentage of fault. Defendants who have committed environmental torts or defendants in products liability cases who are in the chain of manufacture and distribution remain jointly and severally liable with no limitation. The current Minnesota position is thus a patchwork, depending on the type of claim and the status of the defendant involved in the litigation.

### 3. Commission Recommendations Regarding Comparative Fault

The subjects of comparative fault and joint and several liability have received a significant amount of attention nationwide. The Commission has made four recommendations for modification of the Comparative Fault Act but no recommendation as to joint and several liability, solely because of lack of unanimity.

There are four adjustments that should be made to the Comparative Fault Act, one to expand the types of claims that are subject to comparison and three that relate to the definition of "fault" in the statute.

First, the statute should be amended to provide for the application of comparative fault principles in cases involving claims for economic loss. The Act as it currently reads applies only to claims involving personal injury, wrongful death, and property damage, but not to cases involving economic loss. On its face, therefore, the act does not apply to cases involving economic losses, even though those losses result from the negligence of another party. This means that claims for professional liability, such as legal or account malpractice, or cases involving breach of warranty that result solely in economic loss, could be excluded from the statute, even though contributory negligence is a valid defense to those claims.

On occasion, the Minnesota courts have applied comparative fault principles to economic loss claims. For example, the Minnesota Supreme Court has applied comparative fault principles in a case involving a claim for economic loss arising out of a negligent misrepresentation,<sup>13</sup> the Minnesota Court of Appeals has applied the Comparative Fault Act to a case involving accountant malpractice.<sup>14</sup> A statutory amendment will give the courts clear authority to apply comparative fault principles to cases involving claims for economic loss; however, any legislative amendment applying comparative fault principles to claims for economic loss has to be accomplished with

the clear idea that the defenses to claims for economic loss will not be expanded by such an amendment. If contributory negligence is not a defense to a certain kind of claim for economic loss, such as in a breach of warranty claim where the claimant's negligence had nothing to do with the creation of the defect in the product, then contributory negligence would not be made a defense by the amendment.<sup>15</sup>

Second, the definition of "fault" in the statute should be amended in four respects. The definition should first be amended to exclude primary assumption of risk as conduct that is subject to comparison. If primary assumption applies in a case, the defendant simply owes no duty to the plaintiff and there is nothing to compare. As an example, the Minnesota Supreme Court applied the primary assumption of risk concept in a case involving the deaths of firefighters who were attempting to put out a fire that broke out around an 11,000 gallon liquid propane tank. The Court held that the firefighters assumed the risk in the primary sense and that the trustees in the wrongful death case arising from their deaths were therefore precluded from recovery.<sup>16</sup> The Court noted that where primary assumption applies, the defendant owes no duty to the plaintiff.<sup>17</sup>

A second change in the definition should be to eliminate the doctrine of last clear chance, a common law doctrine developed to ameliorate the harsh effect of the common law rule which made contributory negligence a complete bar to recovery. To illustrate the application of the last clear chance, or discovered peril doctrine, if a defendant discovered that the plaintiff was in a position of peril, even as a result of the plaintiff's own prior negligence, that the defendant saw that the person harmed was in that position, and had enough time and the opportunity to avoid that harm, but negligently failed to do so, the plaintiff's contributory negligence would not be a legal cause of the plaintiff's injury.<sup>18</sup> With the advent of comparative fault, the doctrine of last clear chance is no longer necessary and should be abolished.<sup>19</sup> Most of the jurisdictions that have considered the last clear chance issue have held that comparative negligence voids last clear chance.<sup>20</sup>

The third change is to eliminate the defense of complicity in claims arising under the Civil Damage Act should be subject to comparison and apportionment under the statute. This is discussed at length in Part IV., D of this Report.

Finally, the statute should be amended to provide that evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages should not be considered in determining the cause of an accident, but only in determining the damages to which a plaintiff is entitled to recover.

In summary, the Commission makes the following recommendations:

1. The Comparative Fault Act should be amended to provide for the

application of comparative fault principles in cases involving claims for economic loss.

2. The definition of "fault" in the statute should be amended in four respects:

- a. Primary assumption of risk should be clearly excluded as conduct subject to comparison under the act.
- b. The doctrine of last clear chance should be abolished.
- c. The statute should be amended to provide that evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages should not be considered in determining the cause of an accident, but only in determining the damages a plaintiff is entitled to recover.
- d. The defense of complicity in actions brought under the Civil Damage Act, section 340A.801, should no longer be a complete defense but should be subject to comparison and apportionment under section 604.01, the Comparative Fault Act.

#### 4. The Problem of Joint and Several Liability

The rule of joint and several liability involves complex considerations, as demonstrated by the frequent legislative activity in the area and by the variety of legislation the states have adopted. Over thirty states have modified the rule of joint and several liability. The approaches the states have taken varies, but the primary approaches are as follows:

1. Complete abolition of the rule of joint and several liability.
2. Modification of the rule of joint and several liability by providing for the reallocation of loss among the remaining parties to the litigation, including the plaintiff where the plaintiff is at fault.
3. Elimination of joint and several liability for noneconomic loss but retention of the rule for economic loss.
4. Elimination of joint and several liability only for losses under a specified amount.
5. Elimination of joint and several liability for defendants who are under a certain

percentage of fault.

6. Limitation of joint and several liability to a multiple of a defendant's percentage of fault if the percentage is below a certain cutoff.

7. Elimination of joint and several liability only where the plaintiff is at fault or more at fault than the defendant.

8. Elimination of joint and several liability except for certain types of actions. Depending on the jurisdiction, exceptions have been created for intentional torts, environmental torts, products liability and strict liability actions, professional malpractice claims, asbestos-related torts, aviation torts, actions arising from the manufacture of medical devices or pharmaceutical products, and claims arising from automobile accidents.

There is no clear rationale for either the limitations on joint and several liability or the exemptions from those limitations. The variance in recent legislative responses to the rule of joint and several liability is the product of political compromise. The reality of the debate over the rule of joint and several liability is that there is no objective path that provides a ready basis for reform of the rule. The Commission sought through many hours of discussion to arrive at a consensus on a more uniform rule for joint and several liability. Its inability to do so, despite a strong desire on the part of all Commission members to find a point of agreement, is suggestive of the polarity this issue produces.

#### 5. Proposed Comparative Fault Legislation

With the suggested changes, the Comparative Fault Act would read as follows:

##### COMPARATIVE FAULT; EFFECT

Subdivision 1. Scope of application. Contributory fault ~~shall~~ does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, ~~or~~ in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed ~~shall~~ must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Subd. 1a. Fault. "Fault" includes acts or omissions that are in any

measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity in actions under Minn. Stat. § 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Subd. 2. Personal injury or death; settlement or payment. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of the injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subd. 3. Property damage or economic loss; settlement or payment. Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subd. 4. Settlement or payment; admissibility of evidence. Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subd. 5. Credit for settlements and payments; refund. All settlements and payments made under subdivision 2 and 3 shall be credited against any final settlement or judgment; provided however, that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for any amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person

entitled to such damages.

#### 604.02 APPORTIONMENT OF DAMAGES

Subdivision 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except in cases where liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299E - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01, a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2.

If the state or a municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for a percentage of the whole award no greater than twice the amount of fault, including any amount reallocated to the state or municipality under subdivision 2.

Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

### B. Statutes of Limitation and Repose

## 1. The Minnesota Experience

Minnesota has various statutes prescribing the time in which actions must be brought. Section 541.05, subd. 1 (5) establishes a six year statute of limitations for negligence actions. Section 541.05, subd. 2 imposes a four year statute of limitations on strict liability actions "arising from the manufacture, sale, use or consumption of a product."

Section 541.07 imposes a two year statute of limitations for various intentional torts, including libel, slander, assault, battery, and false imprisonment. It also imposes a two year statute of limitations in "all actions against physicians, surgeons, dentists, other health care professionals . . . and veterinarians . . . hospitals, sanatoriums, for malpractice, error, mistake or failure to cure, whether based on contract or tort."

Section 573.02, subdivision 1 requires that wrongful death actions be brought within three years of the date of the death of the decedent, but in no event more than six years from the act or omission that resulted in death.

Overlaying the statutes of limitations is the tolling provision. The tolling provision suspends the running of a statute of limitations during the claimant's period of disability. For example, the tolling statute suspends the running of the statute of limitations in cases where the claimant is under the age of 18 years, is insane, or imprisoned under a criminal charge.<sup>21</sup>

Statutes of limitation limit the time, after a claim accrues or an injury occurs, in which an action may be brought. The time at which a statute of limitations begins to run depends on the type of statute and how it is interpreted by the courts, absent a definitive provision in the statute itself.

A statute of repose, on the other hand, imposes an outside limitation on the time in which an action may be brought, conditioned on a certain event or occurrence that is independent of the time the claim accrues or the injury occurs.<sup>22</sup>

In general, tort statutes of limitations will run from the time damage or injury occurs or the discovery of the damage or injury. In medical malpractice cases in Minnesota the general rule is that the two-year statute of limitations begins to run from the date of termination of treatment,<sup>23</sup> which means that the statute could run before the injury is discovered or not start to run for years following the injury. At no point, however, has the legislature defined the time at which the statute begins to run.

For products liability cases there is no statute of repose but rather a safe useful life statute, Section 604.03, that limits liability according to a variety of factors, but

imposes no definite outside limitation on the time a products liability action may be brought. In Hodder v. Goodyear,<sup>24</sup> the Supreme Court substantially limited the potential reach of the useful life statute by making it a factor for the jury to consider in determining the comparative fault of the parties to products liability litigation. A finding that the useful life of a product has expired is not an automatic bar to recovery.

## 2. The History of Section 541.051 - Improvements to Real Property

Section 541.051 is a true statute of repose. It applies to cases involving the liability of "any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property" or the "owner of the real property." Actions to recover damages for injury to person or property, including wrongful death, must be brought within two years of the discovery of the damage or injury, but in no event "shall such a cause of action accrue more than ten years after substantial completion of the construction." As enacted there was a ten year statute of repose in the statute. There was an interim limitation of fifteen years, from 1980 to 1986, when the time limitation was reduced to ten years.

As enacted, the statute applied only to persons "performing or furnishing the design, planning, supervision, or observation of construction or construction" of improvements to real property.

In 1977, in Pacific Indemnity Co. v. Thompson-Yaeger, Inc.,<sup>25</sup> the Supreme Court held the statute unconstitutional, stating that there is "no basis for including within the protection of the statute persons who construct or design improvements to real estate, and excluding other persons against whom third parties might bring claims should they incur injury, such as owners and material suppliers." The Court concluded that the statutory classification scheme was unconstitutional because of the exclusions.

Following Pacific Indemnity, the legislature corrected the constitutional deficiency by amending the statute to include "any person performing or furnishing the design, planning, supervision, materials, or observation of construction" as well as the owner of the real property. In Sartori v. Harnischfeger Corp.,<sup>26</sup> the Court held the statute constitutional against assertions that it violated the due process and remedies clauses of the Minnesota Constitution.

Following the abolition of privity of contract and the adoption of discovery rules and tort statutes of limitations, the trade associations of contractors and architects threatened by the possibility of expanding liability, introduced statutes of repose limiting their liability in state legislatures.<sup>27</sup> Over forty jurisdictions adopted statutes of repose. Minnesota's statute was enacted in 1965.

The problem that has arisen with section 541.051 is not with the time limitations.

Ratner. :: is with the scope of the statute. The Minnesota Supreme Court has interpreted the term "improvement to real property" as:

[A] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.<sup>23</sup>

The appellate and federal courts in Minnesota have applied the statute to a variety of real property improvements, including removable pipes covering a grain auger installed below ground level;<sup>29</sup> an unfinished steel stairway;<sup>30</sup> light fixtures and light fixture components;<sup>31</sup> a switch gear compartment and electrical cables;<sup>32</sup> an industrial rock crusher;<sup>33</sup> a crane located in a mining facility;<sup>34</sup> and a concrete molding machine and conveyor system.<sup>35</sup>

### 3. The Commission's Recommendations

The Commission's primary concern over section 541.051 is the unpredictability that has been spawned by a statute that sometimes applies so as to create a statute of repose and shorter statute of limitations than applies to most products liability actions. This has resulted in an unduly large amount of appellate court activity, lost claims, and potential legal malpractice problems. In a sense, a statute intended to avoid discrimination has worked a reverse discrimination by exempting from liability only a certain class of product manufacturers while other product manufacturers are subject to liability without the benefit of a statute of repose.

In cases involving improvements to real property, the Commission is convinced that there are good and independent reasons justifying the statute of repose, but that those reasons do not extend to products liability cases in general. In cases involving real estate improvements, a number of entities, including suppliers of building materials, contractors, subcontractors, and workers, all come together for a limited time to construct an improvement. After a certain time it becomes difficult to sort out liability issues. In addition, real property improvements have an indefinite life, and after the improvement is finished there is no access to the property, unlike cases involving products. This combination of attributes may justify separate treatment of claims arising out of improvements to real property, but it does not justify inclusion of standard products liability claims in a statute intended to address a different problem. The Commission therefore recommends that section 541.051 be amended to exclude from the statute certain products liability actions. The recommended language, which in part tracks the Virginia Code provision, is as follows:

(d) The limitations prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery installed upon real

property

The Commission considered other statutes of repose but determined that any potential problems were not significant enough to justify action.

Achieving uniformity of statutes of limitations is arguably a desirable goal. Although a suggestion was made to the Commission advocating uniformity, the Commission determined that comprehensive review and change was unnecessary at this point.

4. Constitutionality of Section 541.051

Questions concerning the constitutionality of statutes of repose have arisen in Minnesota and other jurisdictions, in particular because of the distinctions that have been made between persons who participate in the construction of improvements to real property and other similarly situated persons. Any time a statute of repose limits the liability for one group of individuals but not another similarly situated group, the statute is subject to constitutional attack on various bases, including equal protection and due process challenges. The Minnesota experience with statutes of repose makes a more extended discussion of the constitutional issues necessary in light of the recommendation the Commission has made for amendment of the statute of repose.

In Pacific Indemnity Co. v. Thompson-Yaeger, Inc.,<sup>36</sup> the Minnesota Supreme Court held Section 541.051 unconstitutional insofar as it provided immunity from suit for a limited class of defendants, persons "performing or furnishing the design, planning, supervision, or observation of construction or construction of such improvement to real property . . ."

The Court concluded that the statute was unconstitutional, stating that there was "no basis for including within the protection of the statute persons who construct or design improvements to real estate, and excluding other persons against whom third parties might bring claims should they incur injury, such as owners and material suppliers. Legislative classifications must apply uniformly to all persons who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be natural and reasonable, not fanciful and arbitrary."<sup>37</sup>

A more detailed analysis, and one which the Minnesota Supreme Court cited with approval in Pacific Indemnity, appears in the Illinois Supreme Court's analysis in Skinner v. Anderson.<sup>38</sup> As in other statutes, the Illinois statute distinguished persons who perform and furnish the "design, planning, supervision of construction or construction" of improvements to real property, from other classes, such as

materialmen, who are ignored by the statute, and owners and occupants of property, who are specifically excepted. In Skinner the Court stated that:

The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property, or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It can not be said that the one event is more likely than the other to occur within four years after construction is completed. The problems are sometimes with distinctions between owners of the property, on the one hand, and architects and contractors on the other, or between architects and contractors and building product suppliers.

Making the distinctions may be easier, however, if the purpose of the statutes is considered. In Cape Henry v. National Gypsum,<sup>39</sup> the Virginia Supreme Court said that:

We conclude that the General Assembly intended to perpetuate a distinction between, on the one hand, those who furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers or suppliers, at the direction of architects, designers, and contractors, and, on the other hand, those who furnish machinery or equipment. Unlike ordinary building materials, machinery and equipment are subject to close quality control at the factory and may be made subject to independent manufacturer's warranties, voidable if the equipment is not installed and used in strict compliance with the manufacturer's instructions. Materialmen in the latter category have means of protecting themselves which are not available to the former. We construe [the Virginia statute of repose] to cover the former category and to exclude the latter.

The Court reaffirmed this position in Grice v. Hungerford Mechanical Corp.<sup>40</sup>

In Cape Henry, the issue concerned the application of the statute to defects in exterior wall panels. The Court concluded that the panels were ordinary building materials. In Grice, the Court concluded that an electrical panel box and the instructions for assembling, wiring, grounding, and installing the unit during construction of a particular building are determined by the specifications and plans provided by the architect or other design professional, and no instructions are received from the

manufacturer.

The Virginia statute includes an exception not only for suppliers or manufacturers of equipment or machinery, but it also exempts those entities when they supply "other articles." The Virginia Supreme Court has concluded that the language "other articles" is superfluous.<sup>41</sup>

In Pacific Indemnity, the Court noted that constitutional challenges had been made to similar statutes in fifteen other states at the time of its decision. The Court noted that in ten states the statutes had been upheld and in five the statutes were held unconstitutional. One of the states upholding its statute was Virginia. At the time of the challenge, the first part of the Virginia statute was substantially the same as the Minnesota statute challenged in Pacific Indemnity. The United States District Court for the Western District of Virginia held the statute constitutional in Smith v. Allen-Bradley Co.<sup>42</sup> but the constitutional challenge in the case was solely a due process challenge based on the fact that the statute barred the plaintiff's action before it accrued. The court rejected the challenge.

The Virginia statute was amended in 1973 to exclude manufacturers or suppliers of equipment or machinery:

This limitation shall not apply to the manufacturer or supplier of any equipment or machinery or any other articles which are installed in or become a part of any real property either as improvements or otherwise.<sup>43</sup>

It may seem inconsistent that the Commission is recommending an exception from a statute that was held constitutional by the Virginia Supreme Court and seemingly disapproved by the Minnesota Supreme Court in Pacific Indemnity; however, the constitutional challenges to the Minnesota and Virginia statutes were not the same and the exemption that is embodied in the Virginia statute was not at issue in the Virginia case disapproved by the court in Pacific Indemnity. In addition, although the Minnesota statute as it existed when Pacific Indemnity was held unconstitutional because of equal protection problems, exemption of products liability defendants should not run create the same problem. Once the function of the statute of repose in real property improvement cases is recognized there should be no problem in understanding that exclusion of products liability defendants from the statute of repose will not frustrate that function.

## C. Punitive Damages

### 1. The Minnesota Experience

The punitive damages issue must be viewed against a complex backdrop of legislative limits on punitive damages, judicial limits imposed by the Minnesota Supreme Court, the constitutional concerns raised in the Supreme Court of the United States, the empirical data on punitive damages, and the reasons for punitive damages.

Minnesota has recognized the right to recover punitive damages since 1862. The purpose of punitive damages is to punish certain defendants as well as to deter the defendants and others from engaging in conduct that is detrimental to the interests of society.<sup>44</sup>

The right to recover punitive damages is currently controlled by Minn. Stat. Section 549.20, which reads as follows:

Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing the agent, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly

situated persons, and the severity of any criminal penalty to which the defendant may be subject.

In 1986 the legislature added Minn. Stat. Section 549.191:

Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

Section 549.20 was part of the 1978 tort reform package. The legislature established a "clear and convincing evidence" standard for the award of punitive damages, required a showing of "willful indifference to the rights or safety of others" to justify an award of punitive damages, limited the circumstances under which an award of damages could be made against a master or principal and established a list of factors for the guidance of the trier of fact in awarding punitive damages. The 1986 statute addressed another concern, one raised primarily by physicians but experienced by many defendants, of automatic pleading of punitive damages claims without an adequate basis for those claims.

The statutory restrictions on punitive damages are coupled with restrictions placed on the availability of punitive damages by the Minnesota Supreme Court. The Court has consistently held that punitive damages are not available in cases involving breach of contract, absent the commission of a separate and independent tort.<sup>45</sup> The Court has also held that punitive damages are unavailable in products liability cases involving only claims for property damage.<sup>46</sup> The Court in Eisert also held that punitive damages were unavailable in wrongful death cases, a holding reversed by the legislature in 1983 through an amendment of the wrongful death act.<sup>47</sup>

## 2. Punitive Damages Issues and Other States' Legislative Responses

The Minnesota response to punitive damages issues has parallels in other states that have enacted legislation regulating the availability of punitive damages. Those issues, many of which have been addressed in the Minnesota legislation, include the following:

1. Should punitive "damages" be available at all in the civil justice system, since they are a penalty and are unrelated to compensation for injuries?
2. If punitive damages are available, what evidentiary standard should apply?
3. What standard of conduct must the plaintiff prove to justify an award of punitive damages?
4. When should a principal or employer be held liable for punitive damages for the acts of an agent or employee?
5. How should multiple punitive damages award for the same conduct be avoided or regulated?
6. Should punitive damages awards be limited and if so, how?
7. Who should benefit from an award of punitive damages?
8. Should punitive damages issues be tried separate from the other issues in a torts case?
9. How should frivolous punitive damages claims be limited?
10. Who should decide whether punitive damages should be awarded?
11. Who should decide the amount of the punitive damages award?
12. What should the appropriate standard of review of punitive damages awards be?

Recent legislative responses to punitive damages deal with some of these issues. Several states have limited punitive damages, either by placing a cap on the damages, by limiting punitive damages awards to a fixed multiple of compensatory damages, or through some combination of a cap and a multiple of compensatory damages. As with joint and several liability, there may be an exclusion for certain types of actions.

Several states have adopted a clear and convincing evidence standard for punitive damages. One has adopted the criminal burden of proof requiring proof beyond a reasonable doubt. Several states require the payment of punitive damages awards, in all or part, to state funds.

Two states place restrictions on multiple damages awards. Four states require bifurcated trials. Four states also preclude the assertion of a punitive damages claim in the original complaint, requiring a prima facie showing of liability before the complaint can be amended to include a punitive damages claim. Five states provide an FDA government standard defense.<sup>48</sup> The question of whether these measures are necessary or sufficient responses to the questions raised by punitive damages awards must be further considered in light of the potential constitutional problems created by unlimited and arbitrary awards not subject to established guidelines and in light of the empirical data available on the punitive damages issue.

### 3. The Constitutionality of Punitive Damages

In Browning-Ferris Industries v. Kelco Disposal, Inc.,<sup>49</sup> the Supreme Court of the United States held that the excessive fines clause of the Eighth Amendment is inapplicable to punitive or exemplary damages awards in civil suits involving private parties. The petitioners in the case also asked the Court to review the punitive damages award to determine whether it violated the due process clause of the Fourteenth Amendment, but the Court declined because the due process argument was not raised before either the district court or court of appeals.

Justice Brennan, joined by Justice Marshall, concurred in the Court's opinion, but with the understanding that the Court preserved the opportunity for a holding that the due process clause limits the imposition of punitive damages in civil cases. Justice Brennan's concern was that

Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following instruction: "In determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts." . . . Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of the government . . . I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed."<sup>50</sup>

Justice O'Connor, joined by Justice Stevens, concurred in part and dissented in part. Justice O'Connor agreed with the Court that the due process claims were not properly raised, but she disagreed with the Court's conclusion that the Eighth Amendment's excessive fines clause is inapplicable to civil suits between private parties.<sup>51</sup>

While the due process issue is open, the Court has not yet granted review in any case raising that issue. This term the Court has denied certiorari in three cases raising the due process issue.<sup>52</sup> In a fourth case the Court, per Justice Kennedy, granted a stay of execution and enforcement of the judgment of the Alabama Supreme Court pending a decision on the petitioners' writ for certiorari.<sup>53</sup> No action has yet been

taken on a fifth case raising the issue.<sup>54</sup>

#### 4. The Commission's Recommendations

A remaining issue is whether the problems surrounding punitive damages are serious enough to justify legislative action. The studies on the number, amount, and impact of punitive damages are inconclusive.<sup>55</sup> There are suggestions in Minnesota and elsewhere that punitive damages are necessary to achieve deterrence, yet there appears to be an acknowledgement that punitive damages may not effectively deter dangerous conduct.<sup>56</sup> There is a concern over the increase in the number and amount of punitive damages,<sup>57</sup> yet the available data show that the concern is perhaps unfounded. There is no clear evidence of abuse of punitive damages in Minnesota.

Nonetheless, the Commission is concerned about the lack of predictability of punitive damages awards caused by the lack of clear guidelines for awarding punitive damages and for determining when a principal or employer will be held liable in punitive damages for the acts of an agent or employee. The Commission is also concerned about the procedures for awarding punitive damages, particularly where the issues of compensatory damages and punitive damages issues are not bifurcated. Finally, the Commission is concerned about the current lack of a clear legislative direction to the courts to specifically scrutinize punitive damages awards in light of the statutory standards. Accordingly, the Commission makes the following recommendations.

First, the Commission recommends that subdivision 1 of section 549.20 be amended to provide for a "deliberate disregard" standard in place of the current "willful indifference" standard, and that the deliberate disregard standard be more specifically defined. The Commission is concerned that the "willful indifference" standard is not a stringent enough standard to separate the claims that justify an award of punitive damages from claims that may involve nothing more than reckless behavior. The suggested standard is as follows:

Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a ~~willful indifference to~~ deliberate disregard for the rights or safety of others.

A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the rights or safety of others; or

(b) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Second, the Commission recommends that subdivision 2 of section 549.20 be amended to strengthen the standards required to impose liability for punitive damages on a principal or employer for the acts of an agent or employee. The Commission has two concerns. First, the standard that subjects the principal to liability for employing an agent should be the same as the standard necessary to impose punitive damages on the principal under subdivision 1 of section 549.20. Second, for the principal to be held liable for the acts of a managerial agent, the agent should have the authority to act at a policy making level in the corporation. Absent such an amendment, a principal or employer may be held liable for the misconduct of a lower level employee who has no significant responsibilities for corporate decision making. The proposed amendment implementing these changes is as follows:

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal ~~was reckless~~ deliberately disregarded a high probability that the agent was unfit in employing the agent, or

(c) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment, or

(d) the principal or a managerial agent described in subdivision 2(c) of this section, of the principal ratified or approved the act while knowing of its character and probable consequences.

Third, the Commission recommends that a new subdivision 4 be added to section 549.20 that will require bifurcation of the punitive damages issue upon the request of the defendant. Bifurcation will ensure a greater degree of fairness to the defendant who is subject to the punitive damages claim. The evidence appropriate only to the punitive damages issue will be introduced in the trial on the liability and compensatory damages issues. The suggested amendment reads as follows:

Subd. 4. In a civil action in which punitive damages are sought, the trier of fact shall, if requested to do so by any party, first determine whether compensatory damages are to be awarded. Evidence of the financial

condition of the defendant and other evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages are to be awarded.

Fourth, the Commission recommends the addition of a new subdivision 5 to section 549.20 that will provide specific direction to the courts to review any punitive damages award in light of the factors in section 549.20, subdivision 3. This recommendation is intended to require detailed judicial scrutiny of punitive damages awards. The suggested amendment reads as follows:

Subd. 5. The trial judge shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 of this section and shall make specific findings with respect to them. On appeal, if any, the appellate court shall also review the award in light of the factors set forth in subdivision 3 of this section. Nothing in this section shall be construed to preclude or limit the trial judge's or the appellate court's authority to limit punitive damages.

## D. Civil Damage Act

### 1. Social Host Liability

Minn. Stat. § 340A.801, the Civil Damage Act, applies only to a person who illegally sells intoxicating liquor. The act reads as follows:

Subdivision 1. Right of Action. A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.

Subd. 2. Actions. All suits for damages under this section must be by civil action in a court of this state having jurisdiction.

Subd. 3. Comparative Negligence. Actions under this section are governed by section 604.01.

Subd. 4. Subrogation claims denied. There shall be no recovery by any insurance company against any liquor vendor under subrogation clauses of the uninsured, underinsured, collision, or other first party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or part under this section. The provisions of section 65B.53, subdivision 3, do not apply to actions under this section.

As it now exists, the Civil Damage Act only allows actions against sellers of alcoholic beverages, defined in Minn. Stat. section 340A.101, subd. 2 as "any beverage containing more than one-half of one percent alcohol by volume." There is no room for any common law negligence action against a seller of alcoholic beverages, nor is a negligence action permitted against social hosts, no matter what the circumstances. The Civil Damage Act is not only restrictive in its application, but it is also the exclusive remedy that exists for injuries that occur because alcoholic beverages provided to another result in intoxication and injury.

In 1972, the Minnesota Supreme Court concluded in Ross v. Ross<sup>58</sup> that an action under the Civil Damage Act as it then read permitted a cause of action "against every violator whether in the liquor business or not." The Court's opinion was based on its interpretation of the legislative history of the Act, dating back to 1911.

In 1972 the Act permitted actions "against person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person." Ross involved a Civil Damage Act claim against two men who furnished intoxicating liquor to a minor, causing the death of the minor in a car accident.

In addition to permitting Civil Damage Act actions against any violator of the Act whether in the liquor business or not, the Supreme Court held in 1973 in Trail v. Christian,<sup>59</sup> that a common law negligence action could be brought against a seller of nonintoxicating liquor, defined to include 3.2 beer. Although the Civil Damage Act did not make the sale of 3.2 beer actionable, the Supreme Court in Trail stated that "[w]e will not promote legislative silence to legislative preemption. To do so would immunize a certain segment of the liquor industry, namely dispensers of 3.2 beer, from liability for negligent conduct which causes serious injury to innocent third persons."<sup>60</sup>

## 2. Social Host Liability and Commission Recommendations

Trail aside, the Supreme Court has interpreted the Civil Damage Act to be the sole source of recovery for injuries caused when a person furnishes alcoholic beverages to another. In 1977 the legislature amended the Act by deleting the word "giving" from the Act. That deletion precluded any actions such as in Ross. The court held in Cady v. Coleman that the words "[a]ny person" who sells or barter liquor means "a person u

the business of providing liquor, and not a social host who happens to receive some consideration from his guests in return for drinks he provides.<sup>61</sup> In Walker v. Kenney,<sup>62</sup> the Court adhered to its holding in Cady, but left open the issue of whether a social host could be held liable for furnishing liquor to a minor. The Court subsequently answered that question in Holmquist v. Miller,<sup>63</sup> holding that the Civil Damage Act preempts a cause of action against a social host for negligently serving alcohol, whether to a minor or adult. The Court held in Meany v. Newell<sup>64</sup> that an employer is not liable under the Civil Damage Act for furnishing alcohol to an employee.

Subsequent amendments to the Act removed the word "bartering," leaving an illegal sale as the only basis for imposing liability under the Act, and expanded the definition of an illegal sale to include "alcoholic beverages," now defined to include 3.2 beer.

More recently, in Stevens v. Thielen,<sup>65</sup> and Beseke v. Garden Center, Inc.,<sup>66</sup> the Court of Appeals, following Holmquist, held that the Civil Damage Act preempts any common law negligence action against a social host if the host's action is even remotely related to the negligent furnishing of alcohol to another. In Stevens the Court of Appeals refused to impose common law social host liability on a parent who provided his daughter with two kegs of strong beer for her sixteenth birthday party, where the consumption of some of the beer led to the intoxication and related death of one of the guests at the party. In Beseke the Court of Appeals extended this immunity to a claim for negligent supervision of students who became intoxicated at a school function.

As it currently stands, Minnesota law clearly prohibits actions against social hosts who furnish intoxicating liquor to guests, whether the guests are adults or minors. Liability under the Civil Damage Act is precluded because the Act applies only to commercial vendors of intoxicating liquor and preempts the common law. As the Court of Appeals stated in Stevens, "[a]ny change in the law . . . should come from the legislature."<sup>67</sup>

Nationally, the courts have been reluctant to impose social host liability on those who negligently serve alcohol to others.<sup>68</sup> The primary reason for that reluctance is the difficulty involved in establishing reasonable standards of conduct for people in a social setting and the uncertainty that would result from any attempts to impose liability for all social hosts in the variety of situations where the issue would arise. The result differs when the issue is whether social host liability should be imposed on a social host who negligently furnishes alcohol to a minor.<sup>69</sup> In that situation the courts are much more willing to impose liability on social hosts.

The Commission therefore recommends that social host liability be permitted in cases where a person knowingly provides or furnishes alcoholic beverages to a person

under the age of 21 years. The Commission recommends that this be accomplished by an amendment to the Civil Damage Act, adding a new subdivision 5, permitting common law actions in such cases. The proposed amendment reads as follows:

Subd. 5. Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.

#### 4. The Defense of Complicity

##### a. Background

The defense of complicity in Civil Damage Act cases was first advanced by the Minnesota Supreme Court in Turk v. Long Branch Saloon.<sup>70</sup> The defense of complicity prevents a person from recovering in a Civil Damage Act case against a vendor of alcoholic beverages if the person "knowingly and actively" participated in the events leading to the intoxication of the person who caused injury to the claimant. It is a complete defense. The Court's construction of the defense was based upon its assumption that the Civil Damage Act "was intended solely to protect 'innocent third persons.'"

In 1977 the Civil Damage Act was amended to state that comparative fault applied to claims under the Civil Damage Act, raising the possibility that complicity would be an apportionable defense under the Comparative Fault Act. That issue was raised in Herriv v. Muzik.<sup>71</sup> In Herriv the Supreme Court held that the 1977 amendment did not enlarge the class of beneficiaries the Civil Damage Act was intended to protect and that the defense of complicity would remain a complete defense.

##### b. Commission Recommendations

The defense of complicity imposes a penalty on a person who provides alcoholic beverages to another. It precludes recovery by the person who contributes to the other's intoxication. Comparison of this penalty to the treatment given to social hosts under the Civil Damage Act results in an inconsistency that is difficult to explain. No equivalent penalties are imposed on social hosts who furnish alcoholic beverages to another person who is injured or in turn causes injury to some other person. Yet, the defense of complicity in essence penalizes someone who would fall in the category of social host if a Civil Damage Act claim were brought against that person. The treatment is not symmetrical.

In addition, complicity is difficult to distinguish from other facets of contributory negligence already subject to comparison under the Comparative Fault Act, section

604.01, subdivision 1a. A claimant's conduct constituting secondary assumption of risk, misuse of a product, and an unreasonable failure to mitigate or to avoid damages are all subject to comparison under the Comparative Fault Act as types of contributory negligence.<sup>72</sup> Complicity fits more readily into this grouping of defenses than as a separate, complete bar to recovery in Civil Damage Act cases.

The same conduct will receive inconsistent treatment, depending on whether the injured person brings suit against the intoxicated driver who was driving at the time of the accident or against the bar that illegally sold alcoholic beverages to the intoxicated driver. If the injured person, after knowingly and actively participating in the intoxication of the driver, gets into the driver's car and is injured in an accident, the injured person's actions would likely constitute contributory negligence that would reduce but not bar recovery unless the injured person's percentage of fault exceeds the negligent driver's; however, if the injured person brings suit against the bar, recovery will be completely barred by the complete defense of complicity.

The Commission therefore recommends that the defense of complicity no longer be a complete defense but rather that it be considered a partial defense subject to comparison under the Comparative Fault Act. This can be achieved by amending the definition of "fault" in the Comparative Fault Act, section 604.01, subdivision 1a, to include the defense of complicity. That proposed legislation is contained in part IV., A, of this Report.

## E. Intangible Losses

In 1986, the Legislature enacted Minn. Stat. section 549.23, which places limits on the damages recoverable in a civil action:

Subdivision 1. Definition. For purposes of this section, "intangible loss" means embarrassment, emotional distress, and loss of consortium. Intangible loss does not include pain, disability or disfigurement.

Subd. 2. Limitation. In civil actions, whether based on contract or tort, the amount of damages per person for intangible losses may not exceed \$400,000.

Subd. 3. Jury not informed of limitation. The court may not inform the jury of the existence of the limitation in subdivision 2.

Subd. 4. Not new action. This section does not create a new cause of action for intangible loss.

This statute was accompanied by section 549.24, which requires damages awards to be broken into the categories noted in section 549.23:

The court shall require the jury to specify amounts for past damages and future damages as defined in section 604.07. Within each category of damages, the jury must further specify amounts for intangible loss as defined in section 549.23.

Section 604.07, the discount statute, was repealed in 1988, but the special verdict requirement continues.

The Commission recommends repeal of both statutes for a number of reasons. The cap should be repealed because it has been ineffective: it applies only to a very small category of cases. Further, the Commission disfavors caps on damages, believing that remittitur by trial courts can rectify excessive damages awards. Section 549.24 should be repealed because the repeal of the discount provision makes it unnecessary. Finally, repeal avoids the problems that exist when damages elements are specifically enumerated in verdict forms, leading to a potential tendency by juries to overvalue the damages in a tort claims.

## F. Deductions under the No-Fault and Collateral Source Statutes

### 1. Introduction

The common law collateral source rule precluded the reduction of a tort recovery by amounts received by the plaintiff from other sources, including insurance coverage, even if the net result was a double recovery by the plaintiff of the same losses.<sup>73</sup> The rule has been modified in various ways through the enactment of specific provisions providing either for subrogation by insurers making payments to the plaintiff or by offset provisions intended to give the defendant, or the defendant's insurer, the right to offset tort liability by insurance payments made to the plaintiff.

The Workers' Compensation Act contains provisions that give a workers' compensation insurer a right of subrogation or reimbursement.<sup>74</sup> The No-Fault Act contains both subrogation<sup>75</sup> and offset<sup>76</sup> provisions, and a new collateral source statute enacted by the legislature as part of its 1986 tort reform package provides for an offset of certain insurance benefits in cases where subrogation rights are not asserted.

Both the No-Fault Act and collateral source statute create problems with their offset provisions in cases where a plaintiff is at fault in causing the accident that led to the plaintiff's injuries and damages. In such cases the plaintiff's tort recovery must be

reduced by both the insurance benefits the plaintiff has received and, according to the Comparative Fault Act, by the plaintiff's percentage of fault.

## 2. The No-Fault Act and Resultant Problems

The No-Fault Act currently requires a reduction of a plaintiff's tort recovery through an offset provision in section 65B.51, subdivision 1:

With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by section 65B.41 to 65B.71, there shall be deducted from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible.

To illustrate the operation of this section, assume that the plaintiff, injured through the negligence of an insured driver, receives \$5,000 in medical expenses from her insurer, and then brings suit against the driver. Assume that the plaintiff recovers a total of \$10,000 in the tort action, consisting of \$5,000 in damages for past medical expenses and \$5,000 in damages for pain and suffering. Section 65B.51, subdivision 1, prevents the plaintiff from recovering twice for her economic loss by requiring a reduction of the \$10,000 tort recovery by the \$5,000 in medical expenses received by the plaintiff from her insurer. The plaintiff's net tort recovery will thus be \$5,000, which represents her uncompensated pain and suffering. The result is fair. The \$5,000 from the tort recovery coupled with the \$5,000 in no-fault benefits the plaintiff received from her own insurer gives the plaintiff full compensation.

If the plaintiff was also at fault in causing the accident, a second reduction of the tort recovery must be made. Section 604.01, subd. 1 of the Comparative Fault Act mandates a reduction of the plaintiff's tort recovery by the plaintiff's percentage of fault. Neither the Comparative Fault Act nor the No-Fault Act states which reduction must be made first: however, the Minnesota Supreme Court in Parr v. Cloutier,<sup>77</sup> decided that a tort recovery should be reduced first by the plaintiff's percentage of fault and then by any no-fault benefits received by the plaintiff.

To illustrate the impact of the decision, assume the same facts as in the first hypothetical, but with the additional fact that the plaintiff and defendant are each 50% at fault in causing the accident. Now the plaintiff's recovery must be reduced by the amount of no-fault benefits and by the plaintiff's percentage of fault. The order of reduction is critical. If Parr is followed and the plaintiff's recovery is reduced first by the plaintiff's percentage of fault and second by the amount of no-fault benefits received, the plaintiff receives nothing from the defendant. The \$10,000 tort recovery is reduced by the plaintiff's percentage of fault, 50 percent, to \$5,000, and then by the

amount of no-fault benefits the plaintiff received, \$5,000, leaving the plaintiff with no tort recovery. On the other hand, if the tort recovery is reduced first by \$5,000, the no-fault benefits the plaintiff received, reducing the tort recovery to \$5,000, and then by the plaintiff's percentage of fault, 50 percent, the plaintiff will be entitled to receive \$2,500, or one-half of the uncompensated damages awarded to the plaintiff for pain and suffering. The result is fair to the plaintiff, who is not barred from recovering uncompensated elements of loss from the defendant, and fair to the defendant, who is entitled to have those uncompensated damages reduced by the plaintiff's percentage of fault. To follow the Court's decision in Part does more than prevent a double recovery of economic loss: it permits an invasion and undue reduction of damages that are not covered by the No-Fault Act. In some cases it may completely preclude tort recovery, despite the fact that the plaintiff is less at fault than the defendant.

### 3. The Commission's Recommendations

The Minnesota Supreme Court in another context has recognized the unfairness of utilizing the offset provision in section 65B.51, subdivision 1, to permit a reduction of elements of loss that are not covered by no-fault payments.<sup>78</sup> Given the unfairness of the procedure adopted by the Court in Part and the Court's subsequent recognition that the offset provision in section 65B.51, subdivision 1, should not be used in a way that permits an undue reduction of elements of a tort recovery for which no-fault benefits are not available, the Commission recommends that section 65B.51, subdivision 1 be amended to require a reduction of a plaintiff's tort recovery first by the no-fault benefits received by the plaintiff and second by the plaintiff's percentage of fault. The recommended amendment to section 65B.51 is as follows:

Subdivision 1. [DEDUCTION OF BASIC ECONOMIC LOSS BENEFITS.] With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by section 65B.51 to 65B.71, ~~there shall be deducted~~ the court shall deduct from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible. In any case where the claimant is found to be at fault under section 604.01, the deduction for basic economic loss benefits must be made before the claimant's damages are reduced under 604.01, subdivision 1.

### 4. The Collateral Source Statute and Commission Recommendations

The same potential problem exists in cases involving the collateral source statute, Section 548.36. The statute provides for the reduction of a plaintiff's tort recovery by certain collateral sources, as defined by the statute. To avoid the Part problem, the

Commission recommends that section 543.36, subdivision 3 be amended to make it parallel to the suggested amendment of section 65B.51, subdivision 1.

Subd. 3. [DUTIES OF THE COURT.] (a) The court shall reduce the award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2).

(b) If the court cannot determine the amounts specified in paragraph (a) from the written evidence submitted, the court may within ten days request additional written evidence or schedule a conference with the parties to obtain further evidence.

(c) In any case where the claimant is found to be at fault under section 604.01, the reduction required under paragraph (a) shall be made before the claimant's damages are reduced under section 604.01, subdivision 1.

## G. Seat Belts and Motorcycle Helmets

### 1. The Minnesota Experience

There are two questions that relate to the use of motorcycle helmets and seat belts. One relates to civil litigation and whether evidence of failure to wear seat belts and motorcycle helmets should be admissible in civil litigation to reduce or bar an injured person's recovery. The other relates to the penalties that should be imposed for failure to wear helmets or seat belts. Minnesota currently takes different, arguably inconsistent, positions with respect to seat belts and motorcycle helmets.

The law currently requires the use of passenger restraint systems for children:

(a) Every motor vehicle operator, when transporting a child under the age of four on the streets and highways of this state in a motor vehicle equipped with factory-installed seat belts, shall equip and install for use in the motor vehicle, according to the manufacturer's instructions, a child passenger restraint system meeting federal motor vehicle safety standards.

(b) No motor vehicle operator who is operating a motor vehicle on the streets and highways of this state may transport a child under the age of four in a seat of a motor vehicle equipped with a factory-installed seat belt, unless the child is properly fastened in the child-passenger restraint system. Any motor vehicle operator who violates this subdivision is guilty of a petty misdemeanor and may be sentenced to pay a fine of not more than \$25.<sup>79</sup>

Although there are exceptions, there are also seat belt requirements for drivers and other passengers of motor vehicles:

A properly adjusted and fastened seat belt shall be worn by:

- (1) the driver of a passenger vehicle;
- (2) a passenger riding in the front seat of a passenger vehicle; and
- (3) a passenger riding in any seat of a passenger vehicle who is older than three but younger than 11 years of age.

A person who is 15 years of age or older and who violates clause (1) or (2) is subject to a fine of \$10. The driver of the passenger vehicle in which the violation occurred is subject to a \$10 fine for a violation of clause (2) or (3) by a child of the driver under the age of 15 or any child under the age of 11. A peace officer may not issue a citation for a violation of this section unless the officer lawfully stopped or detained the driver of the motor vehicle for a moving violation other than a violation involving motor vehicle equipment. The department of public safety shall not record a violation of this subdivision on a person's driving record.<sup>80</sup>

While the law mandates the use of seat belts and child restraint systems in certain situations, evidence of failure to use seat belts or restraint systems is inadmissible in civil litigation, pursuant to a specific statutory limitation:

Proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.<sup>81</sup>

In contrast, only motorcycle riders under the age of 18 are required to wear helmets:

No person under the age of 18 shall operate or ride a motorcycle on the streets and highways of this state without wearing protective headgear that complies with standards established by the commissioner of public safety; and no person shall operate a motorcycle without wearing an eye-protective device except when the motorcycle is equipped with a wind screen.<sup>82</sup>

And, although seat belt evidence is inadmissible in civil litigation, failure to wear a motorcycle helmet will result in a reduction of the damages that could have been avoided had the injured rider worn a helmet:

In an action to recover damages for negligence resulting in any head injury to an operator or passenger of a motorcycle, evidence of whether or not the injured person was wearing protective headgear that complied with standards established by the commissioner of public safety shall be admissible only with respect to the question of damages for head injuries. Damages for head injuries of any person who was not wearing protective headgear shall be reduced to the extent that those injuries could have been avoided by wearing protective headgear that complied with standards established by the commissioner of public safety. For the purposes of this subdivision "operator or passenger" means any operator or passenger regardless of whether that operator or passenger was required by law to wear protective headgear that complied with standards established by the commissioner of public safety.<sup>83</sup>

Prior to a 1977 amendment, the law required all motorcycle riders to wear protective headgear:

When operating a motorcycle on the streets and highways of this state, the operator and passenger, if any, shall wear protective headgear that complies with standards established by the commissioner of public safety; and no person shall operate a motorcycle unless he is wearing an eye-protective device of a type approved by the commissioner, except when the motorcycle is equipped with a wind screen.

The 1977 amendment repealed the mandatory helmet law, except for persons under the age of 18 years. It also added the provision currently in subdivision 6 that precludes the recovery of damages that could have been avoided had the motorcycle operator or passenger worn approved headgear.

## 2. Commission Recommendations

In analyzing the requirements, penalties, and impact on civil litigation, the Commission has come to the conclusion that the penalties for failure to wear seat belts should be increased, that motorcycle helmets should once again be mandatory for all operators and passengers, that seat belt evidence should continue to be inadmissible in civil litigation, and that the current helmet law provision precluding recovery for damages the operator or passenger could have avoided by wearing a helmet should be preserved.

The reason for requiring increased penalties for failure to wear seat belts is simply

a recognition of the increased safety factor that is likely to result if the penalties are increased. Currently, wearing of seat belts is the single most significant means of reducing serious injury and death in automobile accidents. The Commission specifically recommends an increase in the fine for failure to wear seat belts and repeal of the limitation on a peace officer's authority to issue citations for failure to wear seat belts unless the officer has made a stop for a moving violation other than a violation involving motor vehicle equipment. The implementing legislation, amending Minnesota Statutes 1988, section 169.686, subdivision 1, is as follows:

Subdivision 1. [SEAT BELT REQUIREMENT.] A properly adjusted and fastened seat belt shall be worn by:

- (1) the driver of a passenger vehicle;
- (2) a passenger riding in the front seat of a passenger vehicle; and
- (3) a passenger riding in any seat of a passenger vehicle who is older than three but younger than 11 years of age.

A person who is 15 years of age or older and who violates clause (1) or (2) is subject to a fine of ~~\$10~~ \$50. The driver of the passenger vehicle in which the violation occurred is subject to a ~~\$10~~ \$50 fine for a violation of clause (2) or (3) by a child of the driver under the age of 15 or any child under the age of 11. ~~A peace officer may not issue a citation for a violation of this section unless the officer lawfully stopped or detained the driver of the motor vehicle for a moving violation other than a violation involving motor vehicle equipment.~~ The department of public safety shall not record a violation of this subdivision on a person's driving record.

Precluding introduction of seat belt evidence in civil litigation may seem inconsistent with the position the Commission has taken on penalties, particularly when the Comparative Fault Act defines "fault" as failure to mitigate damages or an unreasonable failure to avoid damages. Failure to wear seat belts might fit comfortably within those aspects of fault; however, the Commission is acutely aware that in Wisconsin, where seat belt evidence is admissible, the experience has been that routine automobile accident cases are turned into more lengthy trials because of the introduction of seat belt mitigation evidence through the use of expert witnesses. Rather than making litigation more expensive and complex, the Commission recommends that seat belt evidence not be admissible, but that motor vehicle operators and passengers be strongly encouraged to wear seat belts through increased penalties and better public education preceding enforcement of those penalties.

The Commission was also impressed by medical testimony indicating that in many cases serious head injuries and death can be avoided if motorcycle operators and passengers are required to wear helmets.<sup>84</sup> Those who argue that motorcyclists should have the right to decide whether to wear a helmet because their decision is a personal

one ignore not only the emotional cost to friends and family when they are injured, but the societal cost in emergency treatment, long-term medical care, nursing home and rehabilitation costs and loss of productivity.

Although the mandatory helmet law was repealed in 1977, the Commission recommends that the mandatory helmet law be reinstated for the same reasons that it is recommending an increase in the penalties for failure to wear seat belts. The amending legislation, which would add a new subdivision 3 to section 169.974, is as follows:

Subd. 3. (Helmet use requirement). Protective headgear shall be worn by:

(1) The operator of any motorcycle or other vehicle defined in section 169.01, subdivision 4; and

2) Any passenger on a motorcycle or other vehicle defined in section 169.01, subdivision 4.

Any operator or passenger who violates this subdivision is guilty of a petty misdemeanor and may be sentenced to pay a fine of not more than \$25.

Finally, the Commission recommends no change in the current law precluding recovery of damages the motorcycle operator or passenger could have avoided by wearing a helmet. There is no indication that the law has posed any particular difficulties in civil litigation.

## H. The Household Exclusion in Homeowners Insurance

A household exclusion clause contained in a homeowner's policy excludes liability insurance coverage for any bodily injury to an insured or a resident relative of the insured. For example, if a parent negligently injures the parent's child while riding a lawnmower and at the same time also injures the minor child of a next door neighbor, the parent would have liability insurance coverage under the homeowner's policy for the injury sustained by the neighbor child but not for the injury sustained by the parent's own child.

In *Anderson v. Stream*,<sup>85</sup> the Minnesota Supreme Court abolished parental immunity, completing a chain of decisions beginning with *Balts v. Balts*,<sup>86</sup> where the court abolished immunity in suits brought by parents against their children, and *Silesky v. Kelman*,<sup>87</sup> in which the Court first limited the scope of parental tort immunity.<sup>88</sup> Following *Balts* and *Silesky*, the Court abolished interspousal tort immunity in 1969 in *Beaudette v. Frana*.<sup>89</sup>

Although household exclusions are void in cases where statutory coverage is required and the exclusion is inconsistent with the statute mandating coverage, there is no statutory prohibition against utilization of a household exclusion in homeowners insurance policies. Yet, the allowance of household exclusion clauses within homeowners' policies seems inconsistent with the broadening of tort liability achieved by the abolition of intrafamily tort immunities.

The Commission finds it noteworthy that both the courts<sup>90</sup> and legislature<sup>91</sup> of Minnesota have condemned household exclusionary clauses in relation to automobile insurance. In Beaudette v. Frana,<sup>92</sup> the Supreme Court recognized "that the social gain of providing tangible financial protection for those whom an insured wrongdoer ordinarily has the most natural motive to protect transcends the more intangible social loss of impairing the integrity of the family relationship."<sup>93</sup> In Hime v. State Farm Fire & Casualty Co.,<sup>94</sup> the Court applied the Baudette rationale to explain the Minnesota position on family exclusions in automobile insurance cases, concluding that "this same social gain transcends the arguable social loss of impairing insurance contract provisions that provide for familial exclusions." It is the opinion of this Commission that this public policy should extend to homeowner's insurance contracts. Doing so would eliminate the problems the Commission has identified, namely, that most homeowners believe they have household coverage and are unaware of the significant gap in coverage that often leaves injured persons uncompensated merely because the negligent party is a relative.

While the Commission is not unmindful of the affront to freedom of contract in recommending elimination of the household exclusion, it is convinced that the public interest in favor of eliminating the exclusion outweighs other considerations. Insurers are in a position to increase premiums to reflect the increased risk they are assuming, as those carriers who have been offering household coverage have done for years.

In addition, although questions may be raised concerning the possibility of fraud and collusion between family members should the exclusion be eliminated, the instances of collusion are rare and have not been a problem in the area of automobile insurance claims.

The Commission considered two primary alternatives in recommending the elimination of the household exclusion. The first was to let the insured elect whether or not to have liability coverage, leaving the insurer and insured with some latitude in contracting for the coverage; however, representatives of the insurance industry convinced the Commission that it would be better to mandate this coverage than to make it a matter of election by the insured, with the attendant litigation that has been spawned by other mandatory offer or election provisions in the automobile insurance context.

The second alternative, and one which the Commission recommends, is complete elimination of the household exclusion. This would be accomplished by an amendment to the statutory provisions governing homeowner's insurance. The proposed amendment amends section 65A.295 by adding a new subpart (e), which reads as follows:

(e) [Certain Provisions Prohibited.] No homeowner's insurance policy may contain a provision excluding coverage for members of the same household.

## I. Penalties for Failure to Carry Automobile Insurance

The Commission is concerned that there are currently insufficient incentives for motor vehicle owners to procure the insurance required by the No-Fault Automobile Insurance Act. Accordingly, the Commission recommends that the penalties for failure to carry the necessary insurance be increased to provide the necessary incentives. The implementing legislation is as follows:

Minnesota Statutes 1989 Supplement, section 65B.67, subdivision 4, is amended to read:

Subd. 4. [PENALTY]. (a) A person who violates this section is guilty of a misdemeanor. A person who violates this section within ten years of the first of two prior convictions under this section, or a statute or ordinance from another state in conformity with this section, is guilty of a gross misdemeanor. the operator of a motor vehicle or motorcycle who violates subdivision 3 and who causes or contributes to causing a motor vehicle or motorcycle accident that results in the death of any person or in substantial bodily harm to any person, as defined in section 609.02, subdivision 7a, is guilty of a gross misdemeanor. In addition to any sentence of imprisonment which the court may impose on a person convicted of violating this section, the court shall impose a fine of not less than \$500 nor more than the maximum amount authorized by law. The same prosecuting authority who is responsible for prosecuting misdemeanor violation of this section is responsible for prosecuting gross misdemeanor violations of this section.

(b) In addition to the criminal penalty, the driver's license of an operator convicted under this section shall be revoked for not more than 12 months. If the operator is also an owner of the motor vehicle or motorcycle, the registration of the motor vehicle or motorcycle shall also be revoked for not more than 12 months. Before reinstatement of a driver's license or

registration, the operator shall file with the commission of public safety the written certificate of an insurance carrier authorized to do business in this state stating that security has been provided by the operator as required by section 65b.48.

(c) The commissioner shall include a notice of the penalties contained in this section on all forms for registration of motor vehicles or motorcycles required to maintain a plan of reparation security.

Minnesota Statutes 1989 Supplement, section 169.791, subdivision 6, is amended to read:

Subd. 6. [PENALTY.] Any violation of this section is a misdemeanor. In addition to any sentence of imprisonment which the court may impose, the court shall impose a fine of not less than \$500 nor more than \$700.

Minnesota Statutes 1989 Supplement, section 169.793, subdivision 2, is amended to read:

Subd. 2. [PENALTY.] Any person who violates any of the provisions of subdivision 1 is guilty of a misdemeanor. In addition to any sentence of imprisonment which the court may impose, the court shall impose a fine of not less than \$500 nor more than \$700.

## J. Medical Liens

Pursuant to section 256B.042, the State of Minnesota has a lien against any cause of action the person receiving medical assistance has against third persons. Section 256B.042, subd. 5, currently provides that, following any judgment, award, or settlement of a cause of action, the state, after deduction of reasonable costs and attorney fees, is entitled to recover the full amount of medical assistance paid to or on behalf of the injured person. The remainder is paid to the plaintiff, although in any event the plaintiff is entitled to receive at least one-third of the award following the deduction of costs and attorney fees.

The existence of the lien and the method of its calculation present problems that the Commission recommends be solved legislatively. The existence of the lien frequently frustrates and delays settlement of personal injury claims because of a lack of clarity in the guidelines used to determine the amount of the lien. The method of calculation of the lien is inconsistent with the way reimbursement is calculated in other insurance settings. In cases involving other insurance payments, such as in no-fault cases, the insurer's right to reimbursement is limited by the amount of benefits paid and is permitted only to the extent necessary to prevent a double recovery of loss. The

medical assistance lien does more, however. The lien may be asserted against elements of damage for which no medical assistance coverage has been paid. The Commission therefore recommends the following amendment to section 256B.042:

#### 256B.042 THIRD PARTY LIABILITY

Subdivision 1. When the state agency provides, pays for or becomes liable for medical care, it shall have a lien for the cost of the care upon any and all causes of action which accrue to the person to whom the care was furnished, or to the person's legal representatives, as a result of the injuries which necessitated the medical care.

Subd. 2. The state agency may perfect and enforce its lien by following the procedures set forth in sections 514.69, 514.70 and 514.71, and its verified lien statement shall be filed with the appropriate court administrator in the county of financial responsibility. The verified lien statement shall contain the following: the name and address of the person to whom medical care was furnished, the date of injury, the name and address of the vendor or vendors furnishing medical care, the dates of the service, the amount claimed to be due for the care, and, to the best of the state agency's knowledge, the names and addresses of all persons, firms, or corporations claimed to be liable for damages arising from the injuries. This section shall not affect the priority of any attorney's lien. The state agency is not subject to any limitations period referred to in 514.69 or 514.71 and has one year from the date notice is received by it under subdivision 4 to file its verified lien statement. The state agency may commence an action to enforce the lien within one year of (1) the date the notice is received or (2) the date the recipient's cause of action is concluded by judgment, award, settlement, or otherwise, whichever is later.

Subd. 3. The attorney general, or the appropriate county attorney acting at the direction of the attorney general, shall represent the state agency to enforce the lien created under this section or, if no action has been brought, may initiate and prosecute an independent action on behalf of the state agency against a person, firm, or corporation that may be liable to the person to whom the care was furnished.

Subd. 4. Notice. The state agency must be given notice of monetary claims against a person, firm, or corporation that may be liable to pay part or all of the cost of medical care when the state agency has paid or become liable for the cost of that care. Notice must be given as follows:

(a) Applicants for medical assistance shall notify the state or local

agency of any possible claims when they submit the application. Recipients of medical assistance shall notify the state or local agency of any possible claims when those claims arise.

b) A person providing medical care services to a recipient of medical assistance shall notify the state agency when the person has reason to believe that a third party may be liable for payment of the cost of medical care.

c) A person who is a party to a claim upon which the state agency may be entitled to a lien under this section shall notify the state agency of its potential lien claim before filing a claim, commencing an action, or negotiating a settlement. Notice given to the local agency is not sufficient to meet the requirements of paragraphs (b) and (c).

Subd. 5. Costs deducted. Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has filed its lien, including compensation for liquidated, unliquidated, or other damages, ~~reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and other collection costs.~~ the state agency may be reimbursed for medical expenses paid, but only to the extent of those expenses and only to the extent that recovery on the claim absent the lien would produce a duplication of benefits or reimbursement of the same loss. The lien shall be enforceable against the plaintiff only if the state agency, upon demand by the plaintiff, agrees to pay a share of the attorney fees and costs incurred to prosecute the claim, in such proportion as the amount of the state agency's lien bears to any eventual recovery on the claim.

Upon settlement, the state is authorized to negotiate and reduce its liens for reimbursement in accordance with facts and circumstances including, but not limited to, comparative fault, the likelihood of recovery, causation and the limits of recovery.

## K. Alternative Dispute Resolution

Because of the increasing costs associated with litigation, and the need for alternative methods of settling lawsuits more expeditiously and at a lower cost, the Commission recognizes the importance of alternative dispute resolution. The Commission has examined the report of the Minnesota Supreme Court and Minnesota

State Bar Association Task Force on Alternative Dispute Resolution<sup>95</sup> and endorses most of the recommendations made in Part I of the Summary of Recommendations in that report.

The recommendations in Part I of the report are as follows:

## I. ADMINISTRATION & STRUCTURE

### A. ATTORNEYS AND LITIGANTS SHOULD HAVE AVAILABLE TO THEM ALTERNATIVE DISPUTE RESOLUTION PROCESSES

### B. NOTICE AND CONSIDERATION OF ADR PROCESSES

1. Upon filing of the lawsuit, the court administrator in the county shall give notice to attorneys of ADR providers available to the district.
2. ADR processes currently used by the court system shall be included in the options to be presented to the parties.
3. Attorneys shall be required to communicate the information to their clients at the commencement of the lawsuit.

### C. MANDATORY PARTIES' CASE MANAGEMENT AND ADR SELECTION PROCESS

1. Within 45 days of the filing of the case, the parties shall meet to discuss case management issues, including the selection of an ADR process and the timing of the ADR process. Within 60 days of the filing of the case the attorneys shall communicate the results, in writing, to the court.

### D. DISCRETIONARY JUDICIAL CONFERENCE

1. If the parties cannot agree on the appropriate ADR process, or the timing of the ADR process, or if the court does not approve the parties agreement regarding the ADR process, the court shall schedule a conference with the parties within the next 30 days. The ADR processes available will be discussed. If no agreement on the process is reached or if the judge disagrees with the process selected, the judge may order the parties to utilize one of the non-binding ADR processes.
2. The decision to refer a case to an ADR process shall not be

based on the type of case involved. The judge shall determine, on a case by case basis, whether a dispute is appropriate for resolution by an ADR process.

3. The Court should encourage parties to participate in ADR processes. Sanctions should only be imposed if there was failure to participate in the process in accordance with the order of the court.

#### E. SELECTION OF NEUTRAL

1. Parties shall choose their own qualified neutral if they can agree. If the parties are unable to agree, the court may appoint the neutral.

2. In appropriate circumstances, excluding mediation, the court, upon agreement of the parties, may appoint an individual who does not qualify under standards promulgated for neutrals if the court bases its appointment on legal or other professional training or experience.

#### F. SITE OF ADR PROCESS

1. The appropriate setting for the ADR process may be determined by agreement of the parties and the neutral or order of the court.

#### G. ATTENDANCE AT ADR PROCEEDINGS

1. Non-binding ADR program sessions shall not be open to the public except with the consent of the parties.

2. Attorneys for the parties shall be permitted to attend all ADR proceedings.

3. Processes aimed at settlement of the case, such as mediation, mini-trials, or med-arb, shall be attended by individuals with the authority to settle the case.

4. Processes aimed at reaching a decision on the case, such as arbitration or summary jury trial, need not be attended by individuals with the authority to settle the case, so long as they are reasonably accessible.

## H. CONFIDENTIALITY OF PROCEEDINGS

1. Statements made and documents produced in a mediation, mini-trial, or summary jury trial may not be used by a party or a third party at a subsequent proceeding on the same case or in a collateral proceeding. In binding arbitration and when the time period for de novo review expires in non-binding arbitration, admissions, sworn testimony and documents produced may be used in subsequent proceedings for any purpose.
2. The notes, records, and recollection of the neutral shall be private and protected from disclosure, unless required by law, or in connection with a judicial challenge to, or enforcement of, an arbitration award.
3. The appropriate rules and statutes shall be amended to include provisions relating to ADR, including the Data Privacy Act and the Supreme Court Rules on Public Access to Records of the Judicial Branch. . .

The Commission approves Part I, with the exception of subpart D., 1. That recommendation states that the judge has the power to disagree with the alternative dispute resolution process adopted by the parties and may order the parties to utilize one of the non-binding ADR processes. The Commission takes the position that if the parties agree to the alternative resolution process to be used, the judge should not have the power to interfere with that choice.

Second, as to the timing of the conference, subpart D.1 states that if the parties are unable to agree on the ADR process or the timing of the process, "the court shall schedule a conference with the parties within the next 30 days." The Commission takes the position that the court, within 30 days, should schedule a conference to take place at some later date.

The Commission takes no position on Part II of the report, which deals with the training and qualification of neutral persons for court annexed and court referred ADR programs.

The Commission recommends the enactment of enabling legislation facilitating judicial adoption and implementation of alternative dispute resolution procedures consistent with the Minnesota Supreme Court and Minnesota State Bar Association Task Force recommendations on Alternative Dispute Resolution.

## L. State and Municipal Tort Liability

In 1962, in Spanel v. Mounds View School District No. 621,<sup>96</sup> the Minnesota Supreme Court prospectively abolished municipal tort immunity. The legislature responded in 1963 by enacting Minn. Stat. chapter 466, which abolished local governmental unit tort immunity, but imposed a cap on individual claims of \$25,000 for wrongful death claims and \$50,000 for personal injury claims, subject to a cap of \$300,000 per occurrence. In 1975, in Nietung v. Blondell,<sup>97</sup> the Court prospectively abolished state tort immunity, although not on constitutional grounds. The legislature responded by enacting the state tort claims statute with a limit on liability of \$100,000 for death and other claims, subject to a \$500,000 per occurrence limit.

In 1976 the legislature increased the cap for municipal liability to \$100,000 for wrongful death or other injury, bringing that limit into line with the limit on state tort liability, but preserving the \$300,000 per occurrence cap on damages. In 1983 the legislature increased the individual limits on liability to \$200,000 under both tort claims statutes and increased the per occurrence limits to \$600,000 under both statutes.

The caps in both statutes have been subject to constitutional attack and the Minnesota Supreme Court held both constitutional against equal protection and due process attacks.<sup>98</sup> In both cases the court noted that the statutes limiting state and municipal tort liability have legitimate governmental purposes: "protection of the fiscal integrity and financial stability of the State" and its political subdivisions.<sup>99</sup> The Court concluded that the limitations on liability were rationally related to a legitimate governmental purpose and were therefore constitutional.

The Commission has considered the limitations on the liability of the State of Minnesota and its municipalities, and the arguments for and against expanding that liability. The Commission is aware of the inequities that arise when seriously injured individuals are severely restricted in the amount of money they are able to collect from the state or political subdivisions when the cap applies, as well as of the problems that arise when the state or municipalities are held liable for performing governmental functions that are obligatory and the governmental bankruptcy that could arise from unlimited liability.

The Commission has experienced some frustration at the lack of claims data to support the extent of the exposure of the state and its municipalities to tort liability. Absent that data it is difficult to make any concrete recommendation concerning an increase in caps on damages. However, the Commission does recommend that the legislature give serious consideration to directing the state and municipalities to collect data on claims experience and, thereafter, to raising the caps on damages for political subdivisions, particularly given the fact that many of those subdivisions have insurance

limits in excess of the caps.

### M. Mandatory Automobile Liability Insurance

When the no-fault automobile insurance act was originally enacted in 1975 the required limits for automobile liability insurance were set at \$25,000 bodily injury per person, subject to a \$50,000 per occurrence limit, and \$10,000 for property damage. That limit was increased in 1985 to \$30,000 bodily injury per person with a \$60,000 per occurrence limit, and \$10,000 in property damage.<sup>100</sup> In many cases, the mandatory limits are inadequate to fully compensate the injured individual.

The Commission recommends that the legislature study the automobile liability insurance limits, with a view toward increasing those limits.

### N. Attorney Fees

Criticism of civil litigation frequently focuses on the contingent fee arrangement plaintiffs make with their attorneys. Under the contingent fee arrangement the attorney receives a set percentage of a tort recovery, usually between 25 and 50 percent, rather than an hourly fee. The attorney's compensation is thus contingent on success in the lawsuit. The contingent fee arrangement is virtually the sole method used to finance personal injury litigation.

There are numerous arguments that have been made for and against the contingent fee arrangement. The chief attribute of the contingent fee is that it allows an injured person to obtain access to the best available legal counsel and to obtain access to the courts, regardless of means. The chief criticisms are that the contingent fee fosters conflicts of interest and frivolous litigation, and overcompensates some attorneys.<sup>101</sup>

No one has seriously argued that the contingent fee arrangement should be completely abolished in favor of the English rule, which requires the losing party to pay the other party's attorneys fees, but there have been numerous suggestions for limiting the contingent fee, usually based on a sliding scale that reduces the amount of the contingent fee as the damages award increases.

The consensus of the Commission is that there is no justification for legislative intervention in the area of contingent fees. There is nothing inherently unfair about the contingent fee arrangement. The arrangement is a matter of contract between the plaintiff and the plaintiff's attorney. While numerous formulae for determining fees have been proposed over the years, none have been workable or fair for all cases to which they could apply. The Commission is of the opinion that peer pressure and

attorney education are the best means of ensuring that the contingent fee will not be abused.

Accordingly, the Commission recommends that there be no legislative intervention into the area of contingent fee arrangements.

## ENDNOTES

1. Act of April 12, 1988. ch. 503, § 4. 1988 Minn. Laws 375. 378, provided as follows:

The speaker of the house of representatives and the majority leader of the senate shall each appoint three persons to a commission to study the civil justice system and current and alternative methods of compensating injured persons. Not later than January 1, 1990, the study commission shall report its findings to the legislature along with any recommendations for legislative action.

2. See The Commercial Liability Insurance Crisis. Report of the Governor's Blue Ribbon Comm'n (Jan. 1987).

3. See Henderson, "Crisis" in Accident Loss Reparations Systems: Where We Are and How We Got There. 1976 Ariz. St. L.J. 401; George L. Priest. Testimony to the Minnesota Injury Compensation Study Commission. June 21, 1989.

4. In general, a person injured through the negligent driving of another may recover damages in excess of those covered by the payment of no-fault benefits and for pain and suffering if the injured person is able to meet one of the "tort thresholds" in the no-fault act. To meet those thresholds the injured person must show medical expenses in excess of \$4,000, permanent injury, permanent disfigurement, a disability that lasts for 60 days or more, or the injury must result in the death of the person. See Minn. Stat. § 65B.51 (1988).

5. See Minn. Stat. § 604.01 - .02 (1988).

6. See, e.g., *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975) (abolishing state tort immunity); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967) (adopting strict liability in tort for defective products); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962) (abolishing municipal tort liability).

7. There are many examples of cases where the Minnesota Supreme Court has acted to prevent what it perceived to be an undue expansion of tort liability. See, e.g., *Mahowald v. Minnesota Gas. Co.*, 344 N.W.2d 856 (Minn. 1984) (limiting the scope of strict liability for abnormally dangerous activities); *Salin v. Kloempken*, 322 N.W.2d 736 (Minn. 1982) (refusing to allow recovery for loss of parental consortium); *Stadler v. Cross*, 295 N.W.2d

552 (Minn. 1980) (disallowing recovery by bystanders suffering emotional distress). In products liability cases the Court has effectively limited strict liability in tort through application of negligence principles in cases involving design defects and failure to warn claims. See *Germann v. r.L. Smithe Mach. Co.*, 395 N.W.2d 922 (Minn. 1986); *Bilotta v Kelley Co.*, 346 N.W.2d 616 (Minn. 1984).

8. See, e.g., F. Harper, F. James & O. Gray, *The Law of Torts* §§ 13.1 - .2 (2d ed. 1986)

9. See *Germann v. S.F. Smithe Co.*, 395 N.W.2d 922 (Minn. 1986); *Bilotta v. Kelley Co.* 346 N.W.2d 616 (Minn. 1984).

10. See *Maday v. Yellow Taxi Co.*, 311 N.W.2d 849, 850 (Minn. 1981); *Ruberg v. Skell Oil Co.*, 297 N.W.2d 746, 751-52 (Minn. 1980)

11. 311 N.W.2d 849 (Minn. 1981).

12. *Id.* at 850.

13. See *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986).

14. See *Halla Nursery, Inc. v. Baumann-Furne & Co.*, 438 N.W.2d 400 (Minn. Ct. App. 1989), review granted.

15. See *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50 (Minn. 1982).

16. See *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1980).

17. *Id.* at 348-49.

18. See, e.g., *Jacoboski v. Prax*, 290 Minn. 218, 187 N.W.2d 125 (1971).

19. In the *Minnesota Civil Jury Instruction Guides* (3d ed. 1986), the Civil Jury Instruction Guides Committee of the State District Judges Association took the position "that the discovered peril doctrine is inconsistent with the Comparative Fault Act." See *id.*, JIG 143 Comment; *Uniform Comparative Fault Act* § 1, comment (1977).

20. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 67 (5th ed. 1984). The Minnesota appellate courts have not been directly presented with an opportunity to rule on the issue. The court of appeals, however, has assumed the applicability of the doctrine. See *Thorn v. Glass Depot*, 373 N.W.2d 79 (Minn. Ct. App. 1985).

21. Minn. Stat. § 541.15 (1988).

22. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 *Amer. U.L. Rev.* 579, 582-87 (1981).
23. The rule was adopted in *Schmidt v. Esser*, 178 Minn. 82, 86, 226 N.W.2d 196, 197 (1929), and the Minnesota courts have continuously followed that rule since that time. See *Johnson v. Winthrop Laboratories Division of Sterling Drug, Inc.*, 291 Minn. 145, 190 N.W.2d 77 (1971); *St. Aubin v. Burke*, 434 N.W.2d 282 (Minn. Ct. App. 1989), rev. denied. However, in *Offerdahl v. University of Minnesota Hospitals and Clinics*, 426 N.W.2d 425 (Minn. 1988), the Minnesota Supreme Court held that a "single act" exception applied in a situation where the alleged tort is a single act of surgery, complete at the time of the surgery, and where no continuous course of treatment could cure or relieve the condition created by the allegedly tortious action. In such a case the statute of limitations runs from the date of the surgery. *Id.* at 428-29.
24. 426 N.W.2d 826 (Minn. 1988).
25. 260 N.W.2d 548 (Minn. 1977).
26. 432 N.W.2d 448 (Minn. 1988).
27. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 *Amer. U.L. Rev.* 579, 587 (1981).
28. *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 63, 226 N.W.2d 603, 607 (1975).
29. See *Farnham v. Nasby Agri-Systems, Inc.*, 437 N.W.2d 760 (Minn. Ct. App. 1989), rev. denied.
30. See *O'Connor v. M.A. Mortenson Co.*, 424 N.W.2d 92 (Minn. Ct. App. 1988), rev. denied.
31. See *Citizen's Sec. Mut. Ins. Co. v. General Elec. Corp.*, 394 N.W.2d 167 (Minn. Ct. App. 1986), rev. denied.
32. *Kemp v. Allis-Chalmers Corp.*, 390 N.W.2d 848 (Minn. Ct. App. 1986).
33. *Moen v. Rexamord, Inc.*, 659 F. Supp. 988 (D. Minn. 1987), *aff'd*, 845 F.2d 1027 (8th Cir. 1988).
34. See *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988).
35. See *Thorp v. Price Bros. Co.*, 441 N.W.2d 817 (Minn. Ct. App. 1989).
36. 260 N.W.2d 548 (Minn. 1977).

37. Id. at 555.
38. 38 Ill. 2d 455, 231 N.W.2d 588 (1967).
39. 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985).
40. \_\_\_ Va. \_\_\_, 374 S.E.2d 17 (1988).
41. Grice, \_\_\_ Va. at \_\_\_, 374 N.W.2d at 19.
42. 371 N.W.2d 698, 701 (W.D. Va. 1974).
43. Va. Code § 8.01-250.
44. See, e.g., *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988); *Haugen & Tarkow, Punitive Damages in Minnesota: The Common Law and Developments under Section 549.20 of the Minnesota Statutes*, 11 Wm. Mitchell L. R. 353, 356 (1985).
45. See, e.g., *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46 (Minn. 1983).
46. See *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982).
47. See Act of June 14, 1983, ch. 347, section 2, 1983 Minn. Laws 2397-98.
48. Source authority for the punitive damages legislation is American Tort Reform Ass. Legislative Reform in the Punitive Damages Area as of June 30, 1989.
49. 109 S. Ct. 2909 (1989).
50. Id. at 2923.
51. Id. at 2924. Justice O'Connor's concern with punitive damages has been raised others:

Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. . . Since then, awards more than 30 times as high have been sustained on appeal. . . The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. . . Similarly, designers of airplanes and motor vehicles have been

forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages. . .

The trend toward multi-million dollar awards of punitive damages is exemplified by this case. A Vermont jury found that Browning-Ferris Industries, Inc. . . . tried to monopolize the Burlington roll-off waste disposal market and interfered with the contractual relations of Kelco Disposal, Inc. . . The jury awarded Kelco \$51,000 in compensatory damages (later trebled) on the antitrust claim, and over \$6 million in punitive damages. The award of punitive damages was 117 times the actual damages suffered by Kelco and far exceeds the highest reported award of punitive damages affirmed by a Vermont court. . . .

Id. (citations omitted).

52. See Volkswagen of America, Inc. v. Gibbs, 110 S. Ct. 418 (1989); Clardy v. Sanders, 110 S. Ct. 376 (1989); Combined Ins. Co. v. Ainsworth, 110 S. Ct. 376 (1989).

53. See Healthamerica v. Menton. 110 S. Ct. 226 (1989).

54. See Clayton Brokerage Co. of St. Louis, Inc. v. Jordan, No. 88-1483.

55. See American Bar Association, Report of the Action Comm'n to Improve the Tort Liability System 17 (1987); S. Daniels, Project Director, Punitive Damages: Storm on the Horizon?, American Bar Foundation, preliminary Report of the Punitive Damages Project (1986); Daniels, Punitive Damages: The Real Story, Amer. Bar Assoc. Jour. (Aug. 1, 1986).

56. See Testimony of Phillip Cole, Esq., Past President, MDLA, before the Minnesota Injury Compensation Study Comm'n, Jan. 25, 1989.

57. See Testimony of Theodore B. Olson on Behalf of the Minnesota Civil Justice Coalition 11-14 (Jan. 25, 1989).

58. 294 Minn. 115, 200 N.W.2d 149 (1972).

59. 298 Minn. 101, 213 N.W.2d 618 (1973).

60. Id. at 112, 213 N.W.2d at 625.

61. 315 N.W.2d 593 (Minn. 1982).

62. 338 N.W.2d 254 (Minn. 1983).

63. 367 N.W.2d 468 (Minn. 1985).

64. 367 N.W.2d 472 (Minn. 1985).
65. 394 N.W.2d 834 (Minn. Ct. App. 1986).
66. 401 N.W.2d 428 (Minn. Ct. App. 1987).
67. 394 N.W.2d at 837.
68. See Lussnig and Ream, Social Host Liability and Minor Guests, For the Defense (August, 1989); Comment, 102 Harv. L. Rev. 549 (1988).
69. See Sage v. Johnson, 437 N.W.2d 582 (Iowa 1989), listing the jurisdictions.
70. 280 Minn. 438, 159 N.W.2d 903 (1968).
71. 374 N.W.2d 275 (Minn. 1985).
72. See Minnesota Civil Jury Instruction Guides, JIG 130 (3d ed. 1986).
73. See, e.g., Hueper v. Goodrich, 314 N.W.2d 828 (Minn. 1982).
74. See Minn. Stat. § 176.061 (1988)
75. See Id. § 65B.53, subds. 2, 3, 6, 8 (1988).
76. See Id. § 65B.51, subd. 1.
77. 297 N.W.2d 138 (Minn. 1980).
78. See Tuenge v. Konetski, 320 N.W.2d 420 (Minn. 1982). In Tuenge the jur determined that the plaintiff's claimed wage loss was less than the no-fault benefit received by the plaintiff for lost wages. The Supreme Court held that the plaintiff's tort award could be reduced only by the amount of damages received by the plaintiff for wage loss. To do otherwise would permit a reduction of uncompensated elements of loss.
79. Minn. Stat. section 169.685 (1988).
80. Id. section 169.686, subd. 1.
81. Id. section 169.685, subd. 4.
82. Id. section 169.974, subd. 4(a).
83. Id. section 169.974, subd. 6.

84. See Testimony of Dr. Brian Mahoney Before the Minnesota Injury Compensation Study Comm'n (Sept. 13, 1989).
85. 295 N.W.2d 595 (Minn. 1980).
86. 273 Minn. 419, 142 N.W.2d 66 (1966).
87. 281 Minn. 431, 161 N.W.2d 631 (1968).
88. In Silesky, the Court limited immunity to cases "(1) where the alleged negligent act involves an exercise of reasonable parental authority over the child," or "(2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. . . ." Id. at 442, 161 N.W.2d at 638.
89. 285 Minn. 366, 173 N.W.2d 416 (1969).
90. See, e.g., Burgraff v. Aetna Life & Cas. Co., 346 N.W.2d 627 (Minn. 1984).
91. See Minn. Stat. § 65B.43, subd. 5 (1988).
92. 285 Minn. 366, 173 N.W.2d 416 (1969).
93. 273 Minn. 419, 142 N.W.2d 66 (1966).
94. 284 N.W.2d 829 (Minn. 1979).
95. Minnesota Supreme Court and Minnesota State Bar Association Task Force on Alternative Dispute Resolution, Final Report (July 1989).
96. 264 Minn. 279, 118 N.W.2d 795 (1962).
97. 306 Minn. 122, 235 N.W.2d 597 (1975).
98. See Snyder v. City of Minneapolis, 441 N.W.2d 781 (Minn. 1989) (municipal tort liability); Lienhard v. State, 431 N.W.2d 861 (Minn. 1988) (state tort liability).
99. Lienhard, 431 N.W.2d at 867; Snyder, 441 N.W.2d at 789.
100. See Minn. Stat. § 65B.49, subd. 3 (1988).
101. See American Bar Association, Report of the Action Commission to Improve the Tort Liability System 25-27 (1987).

APPENDIX

PROPOSED LEGISLATION

TABLE OF CONTENTS BY SECTION AND TOPIC

Sec. 1	Household Exclusion and Homeowners' Insurance
Sec. 2	Deduction of No-Fault Benefits
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Sec. 5	Penalties for Failure to Produce Proof of Insurance
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Sec. 19	Repeal of Minn. Stat. §§ 549.23 and 549.24
Sec. 20	Effective Dates and Application

## A bill for an act

relating to civil actions: prohibiting exclusion of any member of a household from homeowners insurance policies; addressing reduction of damages in an action under no-fault automobile insurance; establishing a minimum fine for failure to purchase automobile insurance; increasing the fine for failure to use seat belts; establishing minimum and maximum fines for failure to produce proof of automobile insurance and for using a false automobile insurance identification card; requiring use of protective headgear on motorcycles; clarifying the execution of a state agency lien for medical assistance in a civil case; preserving common law tort law claims against adults who knowingly alcoholic beverages to minors; changing the standard for awarding punitive damages; addressing when a principal may be held liable for punitive damages for an act of the principal's agent; requiring a separate trial to address punitive damages; requiring the court to review a punitive damages award; making the contributory negligence rule apply to damages resulting from economic loss; redefining fault; abolishing the doctrine of last clear chance; repealing the limit on intangible loss damages and the requirement that a jury specify amounts for past, future and intangible loss damages; amending Minnesota Statutes 1989 Supplement, sections 65B.67, subdivision 4; 169.791, subdivision 6; 169.793, subdivision 2; Minnesota Statutes 1988, sections 65A.295; 65B.51, subdivision 1; 169.686, subdivision 1; 169.974, by adding a subdivision; 256B.042, subdivision 5; 340A.801, by adding a subdivision; 541.051, subdivision 1; 548.16, subdivision 3; 549.20, subdivisions 1 and 2, and by adding two subdivisions; 604.01, subdivisions 1, 1a, and 3; repealing Minnesota Statutes 1988, sections 549.23 and 549.24.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1988, section 65A.295, is amended to read:

65A.295 [HOMEOWNER'S INSURANCE COVERAGE.].

1a) Every insurer writing homeowner's insurance in this

1 state shall make available at least one form of homeowner's  
2 policy for each level of peril coverage offered by the insurer  
3 in which the insured has the option to specify the dollar amount  
4 of coverage provided for structures other than the dwelling and  
5 for personal property. The premium must be reduced to reflect  
6 the reduced risk of lesser coverage.

7 (b) A written notice must be provided to all applicants for  
8 homeowner's insurance at the time of application informing them  
9 of the options provided in paragraph (a).

10 (c) Coverage for structures other than the dwelling is the  
11 coverage provided under "Coverage B, Other Structures" in the  
12 standard homeowner's policy. Coverage for personal property is  
13 the coverage provided under "Coverage C, Personal Property" in  
14 the standard homeowner's package policy.

15 (d) "Level of peril" refers to basic, broad, and all risk  
16 levels of coverage.

17 (e) No insurer may include in any homeowner's insurance  
18 policy a provision excluding coverage for members of the same  
19 household.

20 Sec. 2. Minnesota Statutes 1988, section 65B.51,  
21 subdivision 1, is amended to read:

22 Subdivision 1. [DEDUCTION OF BASIC ECONOMIC LOSS  
23 BENEFITS.] With respect to a cause of action in negligence  
24 accruing as a result of injury arising out of the operation,  
25 ownership, maintenance or use of a motor vehicle with respect to  
26 which security has been provided as required by sections 65B.41  
27 to 65B.71, ~~there shall be deducted~~ the court shall deduct from  
28 any recovery the value of basic or optional economic loss  
29 benefits paid or payable, or which would be payable but for any  
30 applicable deductible. In any case where the claimant is found  
31 to be at fault under section 604.01, the deduction for basic  
32 economic loss benefits must be made before the claimant's  
33 damages are reduced under section 604.01, subdivision 1.

34 Sec. 3. Minnesota Statutes 1989 Supplement, section  
35 65B.67, subdivision 4, is amended to read:

36 Subd. 4. [PENALTY.] (a) A person who violates this section

1 is guilty of a misdemeanor. A person who violates this section  
2 within ten years of the first of two prior convictions under  
3 this section, or a statute or ordinance from another state in  
4 conformity with this section, is guilty of a gross misdemeanor.  
5 The operator of a motor vehicle or motorcycle who violates  
6 subdivision 3 and who causes or contributes to causing a motor  
7 vehicle or motorcycle accident that results in the death of any  
8 person or in substantial bodily harm to any person, as defined  
9 in section 609.02, subdivision 7a, is guilty of a gross  
10 misdemeanor. In addition to any sentence of imprisonment which  
11 the court may impose on a person convicted of violating this  
12 section, the court shall impose a fine of not less than \$500.

13 Sec. 4. Minnesota Statutes 1988, section 169.686,  
14 subdivision 1, is amended to read:

15 Subdivision 1. (SEAT BELT REQUIREMENT.) A properly  
16 adjusted and fastened seat belt shall be worn by:

- 17 (1) the driver of a passenger vehicle;  
18 (2) a passenger riding in the front seat of a passenger  
19 vehicle; and  
20 (3) a passenger riding in any seat of a passenger vehicle  
21 who is older than three but younger than 11 years of age.

22 A person who is 15 years of age or older and who violates  
23 clause (1) or (2) is subject to a fine of \$10 \$50. The driver  
24 of the passenger vehicle in which the violation occurred is  
25 subject to a \$10 \$50 fine for a violation of clause (2) or (3)  
26 by a child of the driver under the age of 15 or any child under  
27 the age of 11. ~~A peace officer may not issue a citation for a~~  
28 ~~violation of this section unless the officer lawfully stopped or~~  
29 ~~detained the driver of the motor vehicle for a moving violation~~  
30 ~~other than a violation involving motor vehicle equipment. The~~  
31 department of public safety shall not record a violation of this  
32 subdivision on a person's driving record. The same prosecuting  
33 authority who is responsible for prosecuting misdemeanor  
34 violations of this section is responsible for prosecuting gross  
35 misdemeanor violations of this section.

36 Sec. 5. Minnesota Statutes 1989 Supplement, section

1 169.721, subdivision 6, is amended to read:

2 Subd. 6. [PENALTY.] Any violation of this section is a  
3 misdemeanor. In addition to any sentence of imprisonment which  
4 the court may impose, the court shall impose a fine of not less  
5 than \$500 nor more than \$700.

6 Sec. 5. Minnesota Statutes 1989 Supplement, section  
7 169.721, subdivision 2, is amended to read:

8 Subd. 2. [PENALTY.] Any person who violates any of the  
9 provisions of subdivision 1 is guilty of a misdemeanor. In  
10 addition to any sentence of imprisonment which the court may  
11 impose, the court shall impose a fine of not less than \$500 nor  
12 more than \$700.

13 Sec. 7. Minnesota Statutes 1988, section 169.974, is  
14 amended by adding a subdivision to read:

15 Subd. 3. [HELMET USE REQUIRED.] Protective headgear shall  
16 be worn by:

17 (1) The operator of any motorcycle or other vehicle defined  
18 in section 169.01, subdivision 4; and

19 (2) Any passenger on a motorcycle or other vehicle defined  
20 in section 169.01, subdivision 4.

21 Any operator or passenger who violates this subdivision is  
22 guilty of a petty misdemeanor and may be sentenced to pay a fine  
23 of not more than \$25.

24 Sec. 3. Minnesota Statutes 1988, section 256B.042,  
25 subdivision 5, is amended to read:

26 Subd. 5. [COSTS DEDUCTED.] Upon any judgment, award, or  
27 settlement of a cause of action, or any part of it, upon which  
28 the state agency has filed its lien, including compensation for  
29 liquidated, unliquidated, or other damages, ~~reasonable costs of~~  
30 ~~collection including attorney fees must be deducted first.~~  
31 ~~The full amount of medical assistance paid to or on behalf of~~  
32 ~~the person as a result of the injury must be deducted next, and~~  
33 ~~paid to the state agency. The rest must be paid to the medical~~  
34 ~~assistance recipient or other plaintiff. The plaintiff~~  
35 ~~however, must receive at least one-third of the net recovery~~  
36 ~~after attorney fees and other collection costs~~ the state agency

1 may be reimbursed for medical expenses paid, but only to the  
2 extent of those expenses and only to the extent that recovery on  
3 the claim absent the lien would produce a duplication of  
4 benefits or reimbursement of the same loss. The lien is  
5 enforceable against the plaintiff only if the state agency, upon  
6 demand by the plaintiff, agrees to pay a share of the attorney  
7 fees and costs incurred to prosecute the claim, in such  
8 proportion as the amount of the state agency's lien bears to any  
9 eventual recovery on the claim.

10 Upon settlement, the state agency may negotiate and reduce  
11 its lien for reimbursement in accordance with the facts and  
12 circumstances of the case, including, but not limited to,  
13 comparative fault under section 504.01, the likelihood of  
14 recovery, causation, and applicable limits of recovery.

15 Sec. 9. Minnesota Statutes 1988, section 340A.801, is  
16 amended by adding a subdivision to read:

17 Subd. 5. Nothing in this chapter precludes common law tort  
18 claims against any person 21 years old or older who knowingly  
19 provides or furnishes alcoholic beverages to a person under the  
20 age of 21 years.

21 Sec. 10. Minnesota Statutes 1988, section 541.051,  
22 subdivision 1, is amended to read:

23 Subdivision 1. (a) Except where fraud is involved, no  
24 action by any person in contract, tort, or otherwise to recover  
25 damages for any injury to property, real or personal, or for  
26 bodily injury or wrongful death, arising out of the defective  
27 and unsafe condition of an improvement to real property, nor any  
28 action for contribution or indemnity for damages sustained on  
29 account of the injury, shall be brought against any person  
30 performing or furnishing the design, planning, supervision,  
31 materials, or observation of construction or construction of the  
32 improvement to real property or against the owner of the real  
33 property more than two years after discovery of the injury or,  
34 in the case of an action for contribution or indemnity, accrual  
35 of the cause of action, nor, in any event shall such a cause of  
36 action accrue more than ten years after substantial completion

1 of the construction. Date of substantial completion shall be  
2 determined by the date when construction is sufficiently  
3 completed so that the owner or the owner's representative can  
4 occupy or use the improvement for the intended purpose.

5 (b) For purposes of paragraph (a), a cause of action  
6 accrues upon discovery of the injury or, in the case of an  
7 action for contribution or indemnity, upon payment of a final  
8 judgment, arbitration award, or settlement arising out of the  
9 defective and unsafe condition.

10 (c) Nothing in this section shall apply to actions for  
11 damages resulting from negligence in the maintenance, operation  
12 or inspection of the real property improvement against the owner  
13 or other person in possession.

14 (d) The limitations prescribed in this section do not apply  
15 to the manufacturer or supplier of any equipment or machinery  
16 installed upon real property.

17 Sec. 11. Minnesota Statutes 1988, section 548.36,  
18 subdivision 3, is amended to read:

19 Subd. 3. [DUTIES OF THE COURT.] (a) The court shall reduce  
20 the award by the amounts determined under subdivision 2, clause  
21 (1), and offset any reduction in the award by the amounts  
22 determined under subdivision 2, clause (2).

23 (b) If the court cannot determine the amounts specified in  
24 paragraph (a) from the written evidence submitted, the court may  
25 within ten days request additional written evidence or schedule  
26 a conference with the parties to obtain further evidence.

27 (c) In any case where the claimant is found to be at fault  
28 under section 604.01, the reduction required under paragraph (a)  
29 must be made before the claimant's damages are reduced under  
30 section 604.01, subdivision 1.

31 Sec. 12. Minnesota Statutes 1988, section 549.20,  
32 subdivision 1, is amended to read:

33 Subdivision 1. (a) Punitive damages shall be allowed in  
34 civil actions only upon clear and convincing evidence that the  
35 acts of the defendant show ~~a-willful-indifference-to~~ deliberate  
36 disregard for the rights or safety of others.

1 b) A defendant has acted with deliberate disregard for the  
2 rights or safety of others if the defendant has knowledge of  
3 facts or intentionally disregards facts that create a high  
4 probability of injury to the rights or safety of others and:

5 (1) deliberately proceeds to act in conscious or  
6 intentional disregard of the high degree of probability of  
7 injury to the rights or safety of others; or

8 (2) deliberately proceeds to act with indifference to the  
9 high probability of injury to the rights or safety of others.

10 Sec. 13. Minnesota Statutes 1988, section 549.20,  
11 subdivision 2, is amended to read:

12 Subd. 2. Punitive damages can properly be awarded against  
13 a master or principal because of an act done by an agent only if:

14 a) the principal authorized the doing and the manner of  
15 the act, or

16 (b) the agent was unfit and the principal was ~~reckless in~~  
17 ~~employing the agent~~ deliberately disregarded a high probability  
18 that the agent was unfit, or

19 (c) the agent was employed in a managerial capacity with  
20 authority to establish policy and make planning level decisions  
21 for the principal and was acting in the scope of that  
22 employment, or

23 (d) the principal or a managerial agent of the principal,  
24 described in clause (c), ratified or approved the act while  
25 knowing of its character and probable consequences.

26 Sec. 14. Minnesota Statutes 1988, section 549.20, is  
27 amended by adding a subdivision to read:

28 Subd. 4. In a civil action in which punitive damages are  
29 sought, the trier of fact shall, if requested to do so by the  
30 defendant, first determine whether compensatory damages are to  
31 be awarded. Evidence of the financial condition of the  
32 defendant and other evidence relevant only to punitive damages  
33 is not admissible in that proceeding. After such determination  
34 has been made, the trier of fact shall, in a separate  
35 proceeding, determine whether and in what amount punitive  
36 damages will be awarded.

1           Sec. 15. Minnesota Statutes 1988, section 549.20, is  
2 amended by adding a subdivision to read:

3           Subd. 5. The court shall specifically review the punitive  
4 damages award in light of the factors set forth in subdivision 1  
5 and shall make specific findings with respect to them. The  
6 appellate court, if any, also shall review the award in light of  
7 the factors set forth in that subdivision. Nothing in this  
8 section may be construed to restrict either court's authority to  
9 limit punitive damages.

10           Sec. 16. Minnesota Statutes 1988, section 604.01,  
11 subdivision 1, is amended to read:

12           Subdivision 1. [SCOPE OF APPLICATION.] Contributory  
13 fault shall does not bar recovery in an action by any person or  
14 the person's legal representative to recover damages for fault  
15 resulting in death, or in injury to person or property, or in  
16 economic loss, if the contributory fault was not greater than  
17 the fault of the person against whom recovery is sought, but any  
18 damages allowed shall must be diminished in proportion to the  
19 amount of fault attributable to the person recovering. The  
20 court may, and when requested by any party shall, direct the  
21 jury to find separate special verdicts determining the amount of  
22 damages and the percentage of fault attributable to each party;  
23 and the court shall then reduce the amount of damages in  
24 proportion to the amount of fault attributable to the person  
25 recovering.

26           Sec. 17. Minnesota Statutes 1988, section 604.01,  
27 subdivision 1a, is amended to read:

28           Subd. 1a. [FAULT.] "Fault" includes acts or omissions that  
29 are in any measure negligent or reckless toward the person or  
30 property of the actor or others, or that subject a person to  
31 strict tort liability. The term also includes breach of  
32 warranty, unreasonable assumption of risk not constituting an  
33 express consent or primary assumption of risk, misuse of a  
34 product and unreasonable failure to avoid an injury or to  
35 mitigate damages, and the defense of complicity under section  
36 340A.801. Legal requirements of causal relation apply both to

1 fault as the basis for liability and to contributory fault. The  
2 doctrine of last clear chance is abolished.

3 Evidence of unreasonable failure to avoid aggravating an  
4 injury or to mitigate damages may be considered only in  
5 determining the damages to which the claimant is entitled. It  
6 may not be considered in determining the cause of an accident.

7 Sec. 18. Minnesota Statutes 1988, section 604.01,  
8 subdivision 3, is amended to read:

9 Subd. 3. PROPERTY DAMAGE OR ECONOMIC LOSS; SETTLEMENT OR  
10 PAYMENT.] Settlement with or any payment made to a person or on  
11 the person's behalf to others for damage to or destruction of  
12 property or for economic loss shall does not constitute an  
13 admission of liability by the person making the payment or on  
14 whose behalf the payment was made.

15 Sec. 19. REPEALER.]

16 Minnesota Statutes 1988, sections 549.23 and 549.24 are  
17 repealed.

18 Sec. 20. [EFFECTIVE DATE; APPLICATION.]

19 Section 1 is effective May 1, 1991, and applies to all  
20 insurance policies providing homeowners coverage that are  
21 executed, issued, issued for delivery, delivered, continued, or  
22 renewed on or after that date. Sections 2, 8, and 10 to 19 are  
23 effective the day following final enactment and apply to all  
24 causes of action arising on or after that date. Sections 3 to 7  
25 are effective August 1, 1990, and apply to violations occurring  
26 on or after that date. Section 9 is effective August 1, 1990  
27 and applies to causes of action arising on or after that date.



# Alaska Academy of Trial Lawyers

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Office: 540 L Street, Suite 102 • Anchorage

Compliments of  
Max Gruenberg  
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Board of Governors April 11, 1989

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The Honorable Dave Donley  
Alaska State Legislature  
P.O. Box V (MS 3100)  
Juneau, Alaska 99811

Re: H.B. 166

Dear Representative Donley:

As you know, I am the president of the Alaska Academy of Trial Lawyers, an organization of nearly 200 lawyers from all over Alaska. The recent hearings held by your committee have been the subject of much discussion and concern by the members of the Academy in relation to the lack of scheduled hearings to address toxic and environmental issues. I understand there now will be hearings to address these areas and you are to be congratulated for this. We believe the hearings will clearly reflect that H.B. 166 is harmful to the civil rights of those victims harmed by toxic or environmental torts.

The recent disaster in Valdez has highlighted the inappropriate nature of many aspects of this bill. This bill will have an absolutely devastating effect upon the abilities of victims of future environmental or toxic torts to recover full compensation for their damages and injuries under state law.

The impact of the bill is such that it will not only harm individuals such as fisherman, but it will also harm organizations such as native corporations. For instance, have you considered, in any depth, how this bill is going to impact the rights of native corporations to recover for damages to their lands as a result of toxic or environmental torts? This is presently a very interesting question. The previously passed tort reform bill (AS 09.17.010) contains a \$500,000.00 limit for non-economic damages. Therefore, it is certainly arguable that every native corporation in the

The Honorable Dave Donley  
Alaska State Legislature  
April 11, 1989  
Page 2

Prince William Sound has been limited by the legislature to \$500,000.00 for non-economic loss as a result of the damage to their ancestral lands. Certainly, this defense is going to be raised, and it will ultimately be litigated, but this is simply one example of the devastating nature that so-called "tort reform" can have in the environmental area.

Of equal concern in relation to the \$500,000.00 limitation in AS 09.17.010 is the argument that it limits punitive damages claims to \$500,000.00. Imagine that! In Valdez, where the gross, criminal negligence has resulted in hundreds of millions, if not billions, of dollars in damages the punitive damages claims of each native corporation, each fisherman, each processor, etc. may be limited to \$500,000.00 under state law! Even the State of Alaska's claims may be limited to \$500,000.00!

As another example, the recent initiative doing away with joint and several liability is going to have a severe impact in the Valdez disaster. You can bet that the oil companies and the insurance companies are going to ultimately sue everybody in sight trying to lay off some liability, claiming that other parties are responsible for a portion of the incredible damages that have occurred. In this respect a terrible disservice to the citizens of Alaska was performed by the Coalition For Tort Reform.

Further, the six-year statute of repose proposed in the present bill H.B. 166 is disastrous in relation to environmental and toxic torts. In many instances, the damages caused by environmental pollution go on for many, many years beyond the six years. In other instances, the acts of neglect are not discovered as they have been hidden by the polluters. This has occurred over and over again across the United States. Polluters don't generally advertise that they have polluted, and quite often the environmental disaster is not apparent immediately -- unlike the Valdez situation.

As you know, environmental interests are coming together across this state, nationally and internationally, to address the Valdez situation. The so-called contingency plan of the oil companies has been found to be grossly inadequate, and governmental controls to protect us all need to be erected and strengthened. Similarly, we would hope that your committee would step back a pace or two and re-examine this bill in light of the Valdez disaster.

The Honorable Dave Donley  
Alaska State Legislature  
April 11, 1989  
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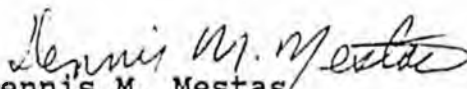
Frankly, I believe you will see increasing efforts to link so-called "tort reformers" with the Valdez disaster as the public becomes more aware of the limitations of liability passed in Alaska in the last several years. I am sure neither you nor your committee wish to be seen as assisting the oil companies and other special interests in further dismantling the legal system which provides at least some protection for victims of environmental disasters.

Indeed, the legislature would be doing a far greater service to consider repealing the limitations passed in 1986 rather than extending them further. At the very least, exceptions for toxic and environmental torts should be made and clearly the limitations provisions of AS 09.17.010 should be clarified or eliminated.

On behalf of the Academy membership, I urge you to reconsider this bill in light of the Valdez disaster. I look forward to reporting to the membership the actions of yourself and your committee in this regard.

Sincerely yours,

ALASKA ACADEMY OF TRIAL LAWYERS

  
Dennis M. Mestas  
President

cc: House Labor & Commerce Committee:

Max F. Gruenberg, Jr.  
David Finkelstein  
H. A. "Red" Boucher  
Virginia M. Collins  
Loren Lemar.  
Mark Boyer

# INTRODUCTION

Hayden

11/31/66

A statute of limitations is a law that requires a party who believes himself or herself to have been injured to bring an action against the responsible party within a certain time frame. Most states and the District of Columbia have enacted such statutes to protect architects, engineers and others in the construction industry from exposure to unlimited liability on individual projects.

These laws attempt to strike a reasonable balance between the interests of those who may be potentially "harmed" and the rights of defendants to be free of potential suits after a reasonable period of time. In states where no such legislation is in effect, design professionals face a lifetime of liability on each of their projects.

Most state laws relating to design professionals are actually "statutes of repose." These are laws that set time periods within which a suit may be filed regarding a cause of action regardless of when the cause occurred. The usual statute of limitations starts to run from the date of injury or other cause of action and actions brought after the end of the statutory time period are barred. The statute of repose establishes the beginning of the time period not the cause of action, such as an injury, but another event, such as the substantial completion of a building. When the specified time period has expired, suits for actions occurring after that period are barred.

State statutes of limitations for design professionals and the construction industry come under attack in the courts periodically, and may in fact be found to be unconstitutional. A review of the case law referred to in those situations will provide a complete understanding of the problems involved in an individual state. It is important that AIA state and local components, as well as individual architects, closely monitor activity relative to their state's statutes and that industry members now seeking new or amended laws carefully review related legislative and judicial activity to track a well-defined path through the legislative process.

AIA's "Compendium: State Statutes of Limitations" is timely and should be a useful working tool for those dealing with this issue.

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# SUMMARY

Alabama:	No statute of limitations at this time; previous law declared unconstitutional
Alaska:	Six years from substantial completion
Arizona:	Does not have a statute of limitations for design professionals
Arkansas:	Five years from substantial completion
California:	Ten years from substantial completion
Colorado:	Ten years from substantial completion
Connecticut:	Seven years from substantial completion
Delaware:	Six years from substantial completion
District of Columbia:	Ten years from substantial completion
Florida:	Four years from actual possession by owner
Georgia:	Ten years from substantial completion
Hawaii:	Ten years from substantial completion
Idaho:	Six years from substantial completion
Illinois:	Ten years from substantial completion plus four years from discovery of cause to take action
Indiana:	Ten years from substantial completion
Iowa:	Does not have a statute of limitations for design professionals
Kansas:	Ten years after performance of services
Kentucky:	Five years after performance of services
Louisiana:	Ten years after occupation by owner
Maine:	Ten years after substantial completion
Maryland:	Ten years after improvement becomes available
Massachusetts:	Six years after performance of design or construction
Michigan:	Six years after occupancy or acceptance of improvement
Minnesota:	Fifteen years after substantial completion
Mississippi:	Six years after written acceptance or use
Missouri:	Ten years after completion of construction

Montana:	Ten years after completion of construction, plus one year for action after cause
Nebraska:	Ten years after professional service is rendered
Nevada:	Eight years after substantial completion
New Hampshire:	No statute of limitations at this time; previous law declared unconstitutional
New Jersey:	Ten years after performance of services and construction
New Mexico:	Ten years after substantial completion
New York:	Three years after cause for action
North Carolina:	Six years after substantial completion
North Dakota:	Ten years after substantial completion
Ohio:	Ten years after performance of services and construction
Oklahoma:	Five years after substantial completion, plus two years for action after cause
Oregon:	Six years after substantial completion
Pennsylvania:	Twelve years after substantial completion
Rhode Island:	Ten years after substantial completion
South Carolina:	No statute of limitations at this time; previous law declared unconstitutional
South Dakota:	No statute of limitations at this time; previous law declared unconstitutional
Tennessee:	Four years after substantial completion
Texas:	Ten years after substantial completion
Utah:	Seven years after substantial completion
Vermont:	Six years after cause of action
Virginia:	Five years after performance of services
Washington:	Six years after substantial completion
Wisconsin:	Six years after substantial completion
Wyoming:	Ten years after substantial completion

RETURN TO: \_\_\_\_\_

Provided by the American Consulting Engineers Council.

Volume XVIII, No. 6  
(Replaces Volume IX, No. 6)

## STATUTES OF LIMITATION AND REPOSE

Almost thirty years have passed since the enactment in 1961 of the first special statute of limitation for lawsuits against architects, engineers and others who design and build construction projects. During this period, much interest has been focused on the legislative programs that led to the enactment of such statutes and their interpretation by the courts once enacted.

This issue of *Guidelines for Improving Practice* updates Volume IX, Number 6; it will review some of that history and provide an update on the current status of statutes of limitation and repose for architects and engineers. It should be recognized, however, that new court decisions interpreting these statutes are being handed down with increasing frequency and some of the following information could quickly become out of date. Therefore, if the need arises, an attorney should be consulted to determine the precise status of the statutes of limitation or repose in any given jurisdiction.

The earlier Guideline reports on this subject have been identified as statutes of limitation, whereas in more recent years the courts have generally identified these statutes as statutes of repose. The essential difference between the two is that a statute of limitation refers to a limited period of time during which a plaintiff must file an action after the cause of action accrues; that is from the time the injury or damage was first discovered or reasonably should have been discovered. This limited period of time is usually in the two to three year range. A statute of repose, on the other hand, bars an action for injury or damage after a stated period of time following substantial completion of the project. Thus, injury or damage flowing from a constructed facility more than the number of years stated in the law (on the average between seven and eight years) is barred and the question of the alleged negligence of the design professional is not subject to legal procedures.

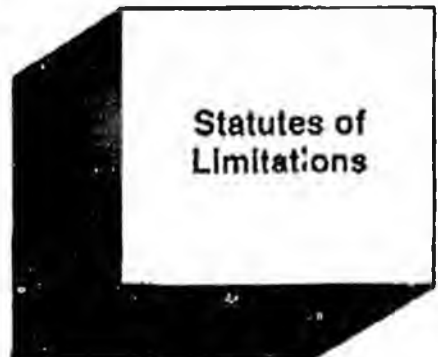
Statutes of repose have been challenged on constitutional grounds in almost every state which has enacted such a law. Most of these challenges have failed, but as shown in the following tabulation, some courts have rejected the statute of repose in cases where the injury or damage occurred after the statute had run out, and the plaintiff was denied the opportunity to present evidence of alleged negligence. Those courts which have rejected the constitutional challenges have noted that in striking

a balance between the interests of potential plaintiffs and the interests of potential defendants who have a right to be free from suit after the passage of a reasonable period of time, the plaintiff is still free to pursue a claim against the owner or tenant in possession of the building; therefore the plaintiff is not left without a remedy.

In addition to the constitutional issue, the courts in many cases have had occasion to interpret the statutes in terms of those protected by it, the precise language as to scope of coverage by types of projects, and, in some cases, differences between patent (obvious) and latent (hidden) alleged defects. The following tabulation is summarized from a detailed review of the reference to the state codes and the pertinent court decisions. This comprehensive information is available to those architects and engineers, as well as to their attorneys, who may need such detail.

### STATE BY STATE STATUS OF STATUTES OF LIMITATION AND REPOSE

- Alabama**—Seven year statute enacted in 1975 ruled unconstitutional in 1983.
- Alaska**—Six year statute enacted in 1967 held unconstitutional in 1988.
- Arizona**—No special statute has been enacted.
- Arkansas**—Five year (contract) and four year (tort) statute enacted in 1967 upheld in 1970, and U.S. Supreme Court dismissed further challenge because no federal question was involved.
- California**—Four year (patent defects) and ten year (latent defects) statutes enacted in 1967 and 1971 upheld in 1976 and 1982.
- Connecticut**—Seven year statute enacted in 1969 upheld in 1988.
- Delaware**—Six year statute enacted in 1970 upheld in 1984.
- District of Columbia**—Ten year statute



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General Information—50

enacted in 1972 upheld in 1986.

**Florida**—Fifteen year statute for patent defects and four years for latent defects enacted in 1980 upheld in 1986.

**Georgia**—Eight year statute enacted in 1968 upheld in 1982.

**Hawaii**—Ten year statute enacted in 1983. No cases to date on validity of the statute; previous statutes held unconstitutional in 1973 and 1982.

**Idaho**—Six year statute enacted in 1965 upheld in 1982.

**Illinois**—Two year statute of limitations for architects and engineers enacted in 1983 upheld in 1986; four year statute of repose held unconstitutional in 1967.

**Indiana**—Ten year statute enacted in 1967 upheld in 1983.

**Iowa**—No special statute enacted.

**Kansas**—Two year (patent defects) and ten year (latent defects) enacted in 1963. No reported cases, but held by trial court to bar malpractice action against an architect in 1977.

**Kentucky**—Five year statute enacted in 1966 held unconstitutional in 1985.

**Louisiana**—Ten year statute enacted in 1964 upheld in 1978.

**Maine**—Ten year statute enacted in 1975. No reported cases.

**Maryland**—Ten year statute enacted in 1979 upheld in 1985.

**Massachusetts**—Six year statute enacted in 1968 upheld in 1982.

**Michigan**—Six year statute enacted in 1967 upheld in 1980.

**Minnesota**—Ten year statute enacted in 1980 upheld in 1982.

**Mississippi**—Ten year statute enacted in 1966 upheld in 1982.

**Missouri**—The year statute enacted in 1976. No reported cases.

**Montana**—Ten year statute enacted in 1971 upheld in 1976.

**Nebraska**—Ten year statute enacted in 1972 upheld in 1987.

**Nevada**—Twelve year statute enacted in 1985 following 1965 statute being held unconstitutional in 1983. No reported cases on 1985 statute.

**New Hampshire**—Six year statute enacted in 1965 held unconstitutional in 1982.

**New Jersey**—Ten year statute enacted in 1967 upheld in 1972.

**New Mexico**—Ten year statute enacted in 1967 upheld in 1977.

**New York**—No separate statute for design professionals,

but general malpractice law applied to cut off actions against design professionals on contract claims after six years following issuance of certificate of completion, and three years for claims based on negligence. Personal injury action by person with no prior relationship to design professional not covered by three year limit for negligence claim.

**North Carolina**—Six year statute enacted in 1963 upheld in 1983.

**North Dakota**—Ten year statute enacted in 1967 upheld in 1988.

**Ohio**—Ten year statute for negligence enacted in 1963 upheld in 1984; contract actions governed by fifteen year statute of limitations.

**Oklahoma**—Ten year statute enacted in 1978 held unconstitutional in 1987; appeal pending before state supreme court.

**Oregon**—Ten year statute enacted in 1971 upheld in 1971.

**Pennsylvania**—Twelve year statute enacted in 1965 upheld in 1978.

**Puerto Rico**—Ten year statute under ancient Spanish "plazo decenal" concept (imposing presumption of liability by design professionals if damage occurs within ten years of substantial completion, but absolute immunity after ten years) upheld in 1988.

**Rhode Island**—Ten year statute enacted in 1975 upheld in 1985.

**South Carolina**—Thirteen year statute enacted in 1986 after ten year statute enacted in 1970 was held unconstitutional in 1978. No reported cases under 1986 statute.

**South Dakota**—Ten year statute enacted in 1966 held unconstitutional in 1984.

**Tennessee**—Four year statute enacted in 1965 upheld in 1981.

**Texas**—Ten year statute enacted in 1975 upheld in 1987.

**Utah**—Seven year statute enacted in 1967 upheld in 1974.

**Vermont**—Eight year statute under general tort law enacted in 1959 applied to dismiss action against design professional in 1976.

**Virginia**—Five year statute enacted in 1964 upheld in 1974.

**Washington**—Six year statute enacted in 1967 upheld in 1972.

**West Virginia**—Ten year statute enacted in 1983. No reported cases.

**Wisconsin**—Six year statute enacted in 1979 following 1976 statute being held unconstitutional in 1975. No reported cases under 1979 statute.

**Wyoming**—Ten year statute enacted in 1973 held unconstitutional in 1980.

that the former record owner would have received the notice, would have prevented foreclosure by paying off the State's lien, and then would have allowed Emerson to continue his adverse possession. The causal connection between the allegedly defective notice and Schnabel's present predicament is too attenuated to confer standing upon him.

The causation aspect of standing has never been well developed by this court. However, federal courts have addressed the issue at length. To have standing in federal court, a litigant must show that *but for* the challenged action, his injury would not have occurred. See *Warth v. Seldin*, 422 U.S. 490, 504-08, 95 S.Ct. 2197, 2207-2210, 45 L.Ed.2d 343, 358-59 (1975) (in a challenge of restrictive zoning practices, litigants lacked standing because they failed to allege facts showing that, "absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield"). In *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40-45, 96 S.Ct. 1917, 1225-1227, 48 L.Ed.2d 450, 462-64 (1976), the Court held that the causation requirement of standing is not merely prudential, but is mandated by Article III.<sup>3</sup>

In Alaska state courts, standing restrictions are prudential, rather than constitutionally mandated. In this case, the party entitled to notice was the 1957 record owner. That person, whomever he may be, does not claim that the notice was defective. Under these circumstances, it is imprudent to entertain such a claim by one who was not injured by the alleged violation. To do so would be a misallocation of judicial resources.

Schnabel's alternative basis for standing is that he seeks to protect not his own rights but the rights of a third party—namely, the former record owner. A litigant can have standing to protect the constitutional rights of a third party when a special relationship exists between the two,

3. The *Warth* and *Simon* opinions have been criticized, primarily because the Supreme Court required such a high degree of certainty in the

and when the third party's rights would otherwise go unasserted. This court allowed standing on this basis in *Wagstaff v. Superior Court, Family Court Division*, 535 P.2d 1220, 1226 (Alaska 1975). However, in Schnabel's case, this basis for standing is totally inapposite: Schnabel seeks to vindicate the rights of the former record owner not to *protect* that person, but instead to possess adversely *against* him. In other words, Schnabel is not an appropriate representative.

For these reasons, I would affirm the superior court's holding that Schnabel lacks standing. As for the defense of laches, I agree that it would otherwise bar Schnabel's claim. However, a person who lacks standing to raise a claim cannot unreasonably delay in asserting it.



TURNER CONSTRUCTION COMPANY,  
INC., Petitioner,

v.

Robert SCALES and Kip  
Clapper, Respondents.

Phillip IVERSON d/b/a Iverson  
Construction Company,  
Petitioner,

v.

DeWayne B. CARSON and Robert J.  
Kottre d/b/a K & W Doors,  
Respondents.

Nos. S-1429, S-1600.

Supreme Court of Alaska.

April 1, 1988.

Action was brought against construction company and others for loss as result of fire in apartment complex. The Superi-

causal connection. See L. Tribe, *American Constitutional Law* 129-34 (2d ed. 1988).

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or Court, Third Judicial District, Anchorage, Douglas J. Serdaheey and Joan M. Katz, JJ., ruled six year statute of repose unconstitutional and petitions for review were filed. The Supreme Court, Burke, J., held that six year statute of repose on suits against design professionals violated equal protection clause of State Constitution.

Affirmed.

#### 1. Limitation of Actions $\S$ 165

Statute of repose differs from statute of limitations in that former may bar cause of action before it accrues, because statute begins to run from specific date unrelated to date of injury so that cause of action thus precluded is *damnum absque injuria*, loss without remedy, while in contrast, statute of limitations begins to run when plaintiff's cause of action accrues or is discovered and thus operates to prevent plaintiff from sleeping on his or her rights.

#### 2. Constitutional Law $\S$ 42.2(2)

Injured party's interest in invalidating six-year statute of repose on suits against design professionals was as great as that of materialmen or defendant in possession, so that injured party had standing to assert claim that statute violated equal protection clause of State and Federal Constitutions because it did not protect all defendants similarly situated and two-year savings period unfairly discriminated against parties injured in seventh and eighth year after construction. AS 09.10.055; Const. Art. 1,  $\S$  1; U.S.C.A. Const.Amend. 14.

#### 3. Constitutional Law $\S$ 213.1(1)

When plaintiff challenges statute on state and federal equal protection grounds, first question Supreme Court must consider is whether constitutional claimant asserts fundamental constitutional right or statute uses a suspect classification and if answer to either question is yes, then statute is unconstitutional under federal standard absent compelling state interest. U.S. C.A. Const.Amend. 14; Const. Art. 1,  $\S$  1.

#### 4. Constitutional Law $\S$ 249(3)

##### Limitation of Actions $\S$ 4(2)

Six-year statute of repose on suits against design professionals classified defendants based on their occupation or nature of work they performed and classified plaintiffs based on time of their injury, so that neither was suspect class, and right asserted was interest in suing particular party, which was not fundamental constitutional right, but as interest in redressing wrongs through judicial process was significant one, compelling state interest standard did not apply and Supreme Court would analyze significant constitutional claim asserted under fair and substantial relationship test of State Constitution. Const. Art. 1,  $\S$  1, 7.

#### 5. Constitutional Law $\S$ 249(3)

##### Limitation of Actions $\S$ 4(2)

There was no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and goals of encouraging construction, and thus six-year statute of repose on suits against design professionals violated equal protection clause of state constitution AS 09.10.055; Const. Art. 1,  $\S$  1, 7.

Paula Williams and Dan Cadra, Law Offices of Roy W. Matthews III, Anchorage, for petitioner Turner Const. Co.

Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for petitioner Philip Iverson.

Joseph A. Kalamarides, Kalamarides & MacMillan, Anchorage, for respondent Robert Scales.

Jeffrey M. Feldman and Stuart A. Ollanik, Gilmore & Feldman, Anchorage, and Jeffrey D. Jefferson, Nordstrom, Steele & Jefferson, Kenai, for respondent DeWayne B. Carson.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

## OPINION

BURKE, Justice.

The question in these consolidated cases is whether AS 09.10.055, the six-year statute of repose on suits against design professionals, violates the Alaska Constitution. The superior court ruled the statute unconstitutional. We affirm.

## I. FACTS AND PROCEEDINGS

*Turner Construction v. Scales*, File No. S-1429. Robert Scales suffered property damage when a fire occurred in the Winterbrook Apartments in 1984.<sup>1</sup> Turner Construction Company built the apartments in 1978. Scales sued Turner Construction and others for his loss, alleging in part that the fire was caused by Turner Construction's negligent construction and installation of a fireplace.

[1] Turner Construction asserted that Scales' cause of action was barred by AS 09.10.055, the six-year statute of repose<sup>2</sup> governing actions against design professionals such as architects, engineers and contractors, and moved for judgment on the pleadings. Scales moved to strike the defense on the ground that the statute is unconstitutional. Superior Court Judge Douglas J. Serdahely granted Scales' motion, concluding that AS 09.10.055 violates the due process<sup>3</sup> and equal protection<sup>4</sup> clauses of the Alaska Constitution.

*Iverson v. Carson*, File No. S-1600. DeWayne B. Carson was injured in 1985, while attempting to install an automatic garage door opener in his home. Phillip Iverson built the home in 1978; the garage door was originally installed by a subcontractor.

1. Given the procedural posture of these cases, we must assume the allegations in the plaintiffs' complaints are true. *Freezer Storage v. Armstrong Cork*, 476 Pa. 270, 382 A.2d 715, 717 (1978).

2. A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded

Seven months after his injury, Carson sued Iverson and the subcontractor. Iverson moved for summary judgment, based on the six year statute of repose, because Carson was injured six-and-a-half years after substantial completion of the improvement. Superior Court Judge Joan M. Katz denied Iverson's motion, concluding that AS 09.10.055 violates the equal protection clause<sup>5</sup> of the Alaska Constitution.

## II. THE STATUTE

The statute in question was enacted in 1967. It provides in part:

(a) No action, whether in contract or in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

is *damnum absque injuria*, a loss without a remedy.

In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

3. Alaska Const. art. I, § 7.

4. Alaska Const. art. I, § 1.

5. *Id.*

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of the state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

AS 09.10.055 (Emphasis added).

The House Judiciary Report notes that this section "places a . . . statute of limitation on lawsuits against architects, designers and builders." 1967 House Journal 261. It is clear, however, that the House intended to enact a statute of repose. An explanatory report by the Judiciary Committee stated in part:

[T]he time begins running upon 'substantial completion' of the improvement; consequently this bill limits not only the bringing of the cause of action, but in effect prevents the cause of action from arising when an injury occurs after the time limitation has expired. An action based on a defect not discovered until after the time limitation has expired would likewise be precluded.

*Id.* at 365.<sup>6</sup>

### III. EQUAL PROTECTION

[2] Scales and Carson argue that AS 09.10.055 violates the equal protection clauses of the state and federal constitutions because (1) it does not protect all defendants similarly situated and (2) the two-year savings period in subsection (b) unfairly discriminates against plaintiffs injured in the seventh and eighth years after construction. The design professionals contend that the injured plaintiffs lack

6. AS 09.10.055 is one of many state statutes enacted as a result of a concerted national lobbying effort by design professionals sparked by an increase in their potential liability for design and construction defects. See, e.g., Collins, *Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality*, 29 Fed'n of Ins.Couns.Q. 41, 44-45 (1978).

standing to challenge the statute on the first of these grounds, because the plaintiffs are not members of the class of unprotected defendants. The design professionals further contend that the statute is constitutional.

*Standing.* The injured plaintiffs' first constitutional claim is based on the rights of third parties—potential defendants, such as owners and tenants, who are not protected by the statute.<sup>7</sup> Every court which has addressed the issue has concluded that persons such as the plaintiffs are proper parties to assert this claim, because they are precluded from asserting their own rights against defendants who might otherwise be liable; the statute narrows the group against which recovery is available. *McClanahan v. American Gilsonite*, 494 F.Supp. 1334, 1342-44 (D.Colo.1980); *Shibuya v. Architects Hawaii*, 65 Hawaii 26, 647 P.2d 276, 282 (1982). The injured plaintiffs' interest in invalidating the statute is as great as that of the materialman or the defendant in possession. *Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514, 523 (1982). We find this reasoning persuasive, therefore, we conclude that the injured plaintiffs have standing to assert the equal protection challenge.

[3] *Equal protection.* When a plaintiff challenges a statute on state and federal equal protection grounds, the first question we must consider is whether the constitutional claimant asserts a fundamental constitutional right or the statute uses a suspect classification. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978). If the answer to either question is "yes," then the statute is unconstitutional under the federal standard absent a compelling state interest. *Id.*

[4] This statute classifies defendants based on their occupation or the nature of the work they perform; it classifies plaintiffs based on the time of their injury.

7. The statute expressly excludes from its protection owners, tenants and others in possession. AS 09.10.055(d). Most courts construe the statute to exclude materialmen and manufacturers of component parts as well.

Neither is a suspect class. The right asserted is the interest in suing a particular party, which is not a fundamental constitutional right; nonetheless, the interest in redressing wrongs through the judicial process is a significant one. *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983). We, therefore, conclude that the compelling state interest standard does not apply and we may analyze the significant constitutional claims asserted under the fair and substantial relationship test of the state constitution. *Erickson*, 574 P.2d at 12.

[5] We next examine the statutory purpose to determine whether it is a legitimate exercise of the state's police power. *Id.* The purpose of the statute is to encourage construction and avoid stale claims by shielding certain defendants from potential future liability. See *Yarbro v. Hilton Hotels*, 655 P.2d 822, 825-27 (Colo.1982). We believe that these are legitimate government purposes.

The final step is to examine the means to determine whether they substantially further the statutory purpose. *Erickson*, 574 P.2d at 12. In doing so, we do not hypothesize facts which would sustain otherwise questionable legislation. *Isakson v. Rickcy*, 550 P.2d 359, 362 (Alaska 1976).

Scales argues that AS 09.10.055 is unconstitutional because it fails to protect owners, tenants, and materialmen, while protecting others who are similarly situated, such as architects, planners, engineers, and construction contractors. Turner Construction contends that there are substantial differences between these groups justifying the statutory distinction.

Many courts have suggested distinctions to justify the challenged classification. The exclusion of owners, tenants, and others in possession is most often rationalized by the fact that such persons have continuing control over access to and maintenance of the property. *Klein*, 437 N.E.2d at 522-25; *Freezer Storage*, 382 A.2d at 718. Some courts also point to the different

treatment of owners and tenants at common law, such as the larger class of potential plaintiffs which may sue design professionals, the legal theories available to those plaintiffs, and the common law defenses available only to landlords and tenants. *Freezer Storage*, 382 A.2d at 718-20. Others cite the possibility of defective maintenance and alterations. *Yarbro*, 655 P.2d at 827-28.

Various justifications are also found to support the distinction between materialmen and design professionals.<sup>8</sup> One argument is that, because materialmen provide standard goods manufactured by standard processes, they may be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. *Klein*, 437 N.E.2d at 524; *Freezer Storage*, 382 A.2d at 719. In other words, buildings are more complex than their component parts. *Freezer Storage*, 382 A.2d at 719. Furthermore, design professionals have special expertise; they should be encouraged to experiment and their creativity should not be stifled. *Klein*, 437 N.E.2d at 524; *O'Brien v. Hazelt & Erdal*, 410 Mich. 1, 299 N.W.2d 336, 342 (1980).

We are not persuaded by any of these diverse rationales. One effect of the statute of repose is to eliminate the statutory right of contribution among tortfeasors. In *Arctic Structures v. Wedmore*, 605 P.2d 426, 435 (Alaska 1979), we ruled that the Uniform Contribution Among Tortfeasors Act, AS 09.16.010-060, did not abolish the common law rule of joint and several liability; therefore, each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury. It follows that whenever an unprotected owner is 50% at fault and a protected contractor is 50% at fault, the unprotected owner would be 100% liable for all damages, without a remedy for contribution. The statute of repose, therefore, does not entirely abrogate liability for defective de-

8. For purposes of argument, we assume without deciding that AS 09.10.055 does not protect ma-

terialmen or manufacturers.

sign work, but shifts it. Thus, the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered.

In our view, there is no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction. The shift of liability to unprotected parties decreases their incentive to build in corresponding measure to the increased incentives of protected parties. If anything, the disincentive on the part of owners may be greater than their proportional measure of liability shift, because they may be liable for a product over which they have no control. Moreover, design defects may be catastrophic, and experimental designs shift correspondingly greater unknown risks to owners, giving them even more reason not to finance construction. Thus, we believe that the statutory means are not substantially or rationally related to the ends. We conclude that AS 09.10.055 violates the equal protection clause of the Alaska Constitution.

The decisions of the superior court in File Nos. S-1429 and S-1600 are AFFIRMED.



Robert MERRY, Appellant,

v.

STATE of Alaska, Appellee.

No. A-1635.

Court of Appeals of Alaska.

March 25, 1988.

Rehearing Denied April 12, 1988.

While defendant was on probation for misconduct involving controlled substance in third degree, defendant pled no contest

to another felony. The State then moved to revoke defendant's probation based on the second felony conviction. The Superior Court, Third Judicial District, Anchorage, S.J. Buckalew, Jr., J., revoked defendant's probation and imposed sentence of three and one-half years, and defendant appealed. The Court of Appeals, Coats, J., held that: (1) court's later imposition of consecutive sentence after mistakenly imposing concurrent sentence did not constitute double jeopardy; (2) court's pronouncement of sentence outside presence of defendant and his counsel constituted harmless error; and (3) imposition of sentence for probation violation after violation was considered as aggravating factor at another sentencing proceeding did not violate double jeopardy.

Affirmed.

#### 1. Criminal Law $\S$ 189

Once sentence is legally imposed and not subject to change under criminal rules, double jeopardy bars court from increasing sentence. U.S.C.A. Const. Amend. 5.

#### 2. Criminal Law $\S$ 189

Court's later imposition of consecutive sentence after mistakenly imposing concurrent sentence did not violate constitutional provisions prohibiting double jeopardy; it was clear from sentencing record that court made mistake and that court intended to impose consecutive sentence. U.S.C.A. Const. Amend. 5.

#### 3. Criminal Law $\S$ 987

Not every correction in judgment requires presence of defendant; however, sentencing is critical stage of criminal proceeding, at which defendant should be present.

#### 4. Criminal Law $\S$ 1177

Court's pronouncement of sentence outside presence of defendant and his counsel constituted harmless error, where defendant was given notice of fact that court had made change in sentence on record and defendant never asked court to pronounce sentence in his presence.

Schwartz

LAW

✓ F: 101(c)

PROVISIONS FOR BUILDING LAWS

For more than 25 years the design profession, jointly with contractors, has acted to secure state laws which effectively cut off rights of action by plaintiffs for alleged negligence after a reasonable period of time following completion of a project.

These efforts have been largely successful through enactment of what were originally called "statutes of limitation," but now are more properly designated as "statutes of repose." Only two state legislatures (Arizona and Iowa) have failed to pass any kind of legislation along this line.

With few exceptions, these laws cutting off a right of action against A/E's and contractors after the established period of time have been attacked on constitutional grounds. The score stands at 30 states finding them constitutional and 10 holding them unconstitutional. In the remaining 10 states there has been no definitive decision.

The basic legal issue on which the courts have ruled one way or the other on the constitutional question is in reality more of a social or policy issue. Courts which have come down against such statutes argue that they are contrary to the "open courts" provisions in the state constitution to bar an action for injury before the injury has occurred. Thus, where there was a defect in design or construction which was not manifest until years after substantial completion of the project, and beyond the statutory cutoff period, it would be an injustice to dismiss the suit for damages before the injured party had a chance to prove negligence.

The contrary, and majority, view of courts which have passed on the issue is that it may be equally unfair to the designer or contractor to face a negligence claim indefinitely. At some reasonable point in time, a person should not have to face a never-ending possibility of a suit based on work done many years earlier.

#### Factors favoring a limitation

The courts finding in favor of the constitutionality of statutes of repose also note the problem of proof of fault years after the project is completed. Documents have disappeared and witnesses, if still available, have faulty memories of the facts. Favorable decisions often note that, unlike products, the design and construction of projects are not subject to testing. Finally, the majority view is that the issue is properly one for legislative policy determination, rather than judicial fiat.

What is a reasonable cutoff period following substantial completion? This varies considerably among the state laws, ranging from a low of four years to a high of 15 years, with an average of seven or eight years. Some

attempts are being made to lower the cutoff to five years, but there is a danger that the courts may consider this unduly short.

Now that the basic concept is well established in the majority of states, a series of court decisions have dealt with the question of interpretation of the specific language. Still a current question is whether the statute of repose applies to products incorporated into a structure. The courts are split, depending on the particular facts of the case, and it may be some time before a consensus emerges on the issue.

In a recent Pennsylvania case, for instance, a federal court applying Pennsylvania law in an action against the manufacturer of an oven that had been installed in an industrial building held that the statute did not apply because the oven was not "an improvement to real property." This is language common to all the state statutes of repose.

Contrary to the conclusion in the Pennsylvania case, the Texas Court of Appeals has held that the statute did apply to the manufacturer of a wall heater that allegedly caused carbon monoxide poisoning. The heater, the court said, was an "improvement to real property," and not just a fixture because it was actually built into the wall.

Therein may lie the distinction to guide the courts in subsequent cases: Was the product an integral part of the building, thereby being an "improvement to real property"? Or was the product installed in such a way that it was readily movable, thereby being a fixture? A dissenting justice in the Pennsylvania case said the answer "should turn upon whether their component parts were specifically designed for this purpose or were shelf items intended for many purposes . . . ."

The Supreme Judicial Court of Massachusetts recently held that the statute of repose did not protect the supplier of a circuit breaker which had been incorporated into the structure on a permanent basis, but applied only to those who " . . . render particularized services for the design and construction of particular improvements to particular pieces of real property."

As is always the case, each decision turns on its own facts. But the most likely test should be whether the product in question becomes a permanent part of the structure, thereby losing its character as a separate product, just as the bricks and steel in a building are absorbed into and become an integral part of the building. However, as usual, the courts will have the last word. Δ

Milton F. Lunch is former general counsel to the National Society of Professional Engineers, and presently serves as a consultant in engineering and legal matters. His statements in this article should be considered only as general information and not as an offer of legal advice.

## The scope and legality of statutes of repose

Most courts uphold laws cutting off actions against designers and contractors, but split on the issue of their application to products

By Milton F. Lunch

HOUSING, LAND, PRESENT;  
 (101) (C)  
 BUILDING LAWS

EXHIBIT "A"

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/Unconstitutional</u>	<u>Citation</u>
Alabama		Unconstitutional	<u>Jackson v. Mannesman Corp.</u> , 437 So.2d 725 (1983).
Alaska	§09.10.055	Undecided	
Arizona	None		
Arkansas	§37-239	Constitutional	<u>Carter v. Hartenstein</u> 455 S.W.2d 918 (1970)
California	§337.1, 337.15	Constitutional	<u>Barnhouse v. City of Pinole</u> , App., 183 Cal.Rptr.881 (Ct.App 1982)
Colorado	§13-80-127	Constitutional	<u>Criswell v. M.J. Brock &amp; Sons, Inc.</u> 601 P.2d 495 (1984)
Connecticut	§52-584a	Constitutional	<u>Patricia O. Ecker v. Town of West Hartford</u> 205 A.2d 219 (1987)
Delaware	§8127	Constitutional	<u>Cheswold Vol. Fire Co. v. Lambertson</u> Const., 489 A.2d 413 (1984)
Dist of Columbia	§12-310	Constitutional	<u>Westerman v. Firemans Fund Ins Co.</u> , 499 A.2d 116 (Ct.App. 1985)
Florida	§95.11	Constitutional	<u>American Liberty Ins Co. v. West &amp; Conyers</u> 491 So.2d 573 (Ct.App 1986)

HOUSING, LAND, PROPERTY  
BUILDING LAWS

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/ Unconstitutional</u>	<u>Citation</u>
Georgia	§3-1006	Constitutional	<u>Mullis v. Southern Co Services, Inc.</u> , 296 SE.2d 379 (1982)
Hawaii	§657-8	Undecided*	<u>Shibuya v. Architects Hawaii Ltd.</u> , 647 P.2d 276 (1982)
Idaho	§5-241	Constitutional	<u>Twin Falls Clinic &amp; Hospital Bldg v. Hamill</u> , 644 P.2d 341 (1982)
Illinois	§22.3	Constitutional	<u>Matayka v. Melia</u> , 456 N.E.2d 353 (Ill.App. 1983)
Indiana	§34-4-20-1	Constitutional	<u>Beecher v. White</u> , 447 N.E.2d 622 (Ind.App.1983)
Iowa	None		
Kansas	None		
Kentucky	§413.135	Constitutional	<u>Carney v. Moody</u> , 546 S.W.2d 40 (1982)
Louisiana	§9:2772	Constitutional	<u>Burmester v. Gravity</u> 366 So.2d 1381 (1978)
Maine	§752-A	Undecided	
Maryland	§5-108	Constitutional	<u>Whiting-Turner Con- tracting Co. v. Coupard</u> , 499 A.2d 178 (Ct.App. 1985)

HOUSING, LAND  
BUILDING LAWS

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/ Unconstitutional</u>	<u>Citation</u>
Massachusetts	§2B	Constitutional	<u>Keign v. Catalano</u> , 437 N.E.2d 514 (S.Jud.Ct. 1982)
Michigan	§27A.5839	Constitutional	<u>O'Brien v. Hazelet &amp; Erdal</u> , 299 N.W.2d 33 (1980)
Minnesota	§541.051	Constitutional	<u>Calder v. City of Crystal</u> , 318 N.W.2d 838 (1982)
Mississippi	§15-1-41	Constitutional	<u>Anderson v. Fred Wagner, Etc.</u> , 402 So.2d 320 (1981)
Missouri	§516.097	Undecided	
Montana	§93-2619	Constitutional	<u>Reeves v. Ille Electric Company</u> , 551 P.2d 647 (1976)
Nebraska	§25-222,223	Constitutional	<u>Williams v. Kingery Const Co</u> , 404 N.W.2d 32 (1987)
Nevada	§1	Unconstitutional	<u>State Farm Fire and Cas v. All Elec., In</u> 660 P.2d 995 (1983)
New Hampshire	None	Unconstitutional	<u>Henderson Clay Products v. Edgar Wood, Etc.</u> , 451 A.2d 174 (1982)
New Jersey	§2A:14-1.1	Constitutional	<u>Rosenberg v. Town of North Bergen</u> , 293 A.2d 662 (1972)

PROPERTY  
BUILDING LAWS

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/ Unconstitutional</u>	<u>Citation</u>
New Mexico	§37-1 27	Constitutional	<u>Howell v. Burk, 568 P.2d 214 (Ct.App. 1977)</u>
New York	None		
North Carolina	§1-46	Constitutional	<u>Lamb v. Wedgewood South Corp., 302 S.E.2d 868 (1983)</u>
North Dakota	§28-01-44	Undecided	
Ohio	§2305.131	Constitutional	<u>Elizabeth Gamble Deaconess Home v. Turner Const., 470 N.E.2d 950 (Ct.App. 1984)</u>
Oregon	§12.135	Constitutional	<u>Joseph v. Burns, 491 P.2d 203 (1971)</u>
Pennsylvania	§5536	Constitutional	<u>Freezer Storage, Inc. v. Armstrong Cork Co. 382 A.2d 715 (1978)</u>
Rhode Island	§9-1-29	Constitutional	<u>Walsh v. Gowing, 494 A.2d 543 (1985)</u>
South Carolina		Unconstitutional	<u>Broome v. Truluck, 241 S.E.2d 739 (1978)</u>
South Dakota		Unconstitutional	<u>Daugaard v. Baltic Co-Op. Bldg. Supply Ass'n., 349 N.W.2d 419 (1984)</u>

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/Unconstitutional</u>	<u>Citation</u>
Tennessee	\$28-314	Constitutional	<u>Harmon v. Angus R. Jessup Associates, Inc.</u> , 619 S.W.2d 522 (1981)
Texas	\$5536a	Constitutional	<u>McCulloch v. Fox &amp; Jacobs, Inc.</u> , 696 S.W.2d 918 (Ct.App. 1985)
Utah	\$78-12-25.5	Constitutional	<u>Good v. Christensen</u> 527 P.2d 223 (1974)
Vermont	\$511	Undecided	
Virginia	\$8.01-250	Constitutional	<u>Smith v. Allen Bradley Co.</u> , 371 F.Supp. 698 (1974)
Washington	\$4.16.310	Constitutional	<u>Jones v. Weyerhaeuser Co.</u> , 741 P.2d 75 (Ct. App. 1987)
West Virginia	None		
Wisconsin	\$893.155	Constitutional	<u>United States Fire Ins Co v. E.D. Wesley Co.</u> , 301 N.W.2d 271 (1980)
Wyoming	\$1-3-111	Undecided*	<u>Phillips v. ABC Bldrs'</u> 611 P.2d 821 (1980)

\* Previous statute declared unconstitutional. New statute has been adopted by the Legislature, but not ruled upon by the Court.

BUILDING LAW/01 (E)  
11/20/86

STATUTES OF REPOSE FOR DESIGN PROFESSIONALS

Held Constitutional

ARKANSAS	<u>Carter v. Hartenstein</u> , 455 S.W. 2d 918 (Ark. 1970); app. dismissed for want of substantial federal question, 401 U.S. 901 (1971)
CALIFORNIA	<u>Regents of the University of California v. Hartford Accident &amp; Indemnity Co.</u> , 131 Cal. Rptr. 112 (Cal. App. 1976)
COLORADO	<u>Yarbro v. Hilton Hotels Corp.</u> , 655 P. 2d 822 (Colo. 1982)
DELAWARE	<u>Cheswold Volunteer Fire Co. v. Lambert &amp; Sons Constr. Co.</u> , 462 A 2d 416 (Del. 1983)
D. C.	<u>Britt v. Schindler Elevator Corp.</u> , 637 F. Supp. 734 (D.D.C. 1986)
FLORIDA	<u>American Liberty Insurance Company v. West &amp; Conyers, Architects and Engineers</u> , 491 So. 2d 573 (Fla. App. 1986)
GEORGIA	<u>Mullis, et al. v. Southern Services Co.</u> , 296 So. 2d 579 (Ga. 1982)
IDAHO	<u>Twin Falls Clinic &amp; Hospital Bldg. Corp. v. Hammill</u> , 644 P. 2d 347 (Ida. 1982)
LOUISIANA	<u>Burmester v. Gravity Drainage District No. 2</u> , 366 So. 2d 1381 (La. 1978)
MARYLAND	<u>Whiting-Turner Contracting Co. v. Coupard</u> , 499 A. 2d 178 (Md. 1985)
MASSACHUSETTS	<u>Klein v. Catalano</u> , 437 N.E. 2d 514 (Mass. 1982)
MICHIGAN	<u>O'Brien v. Hazelet &amp; Erdal</u> , 299 N.W. 2d 336 (Mich. 1980)
MINNESOTA	<u>Calder v. City of Crystal</u> , 318 N.W. 2d 838 (Minn. 1982)
MISSISSIPPI	<u>Anderson v. Fred Wagner &amp; Roy Anderson, Jr.</u> , 402 So. 2d 320 (Miss. 1982)
MONTANA	<u>Reeves v. Ille Electric Co.</u> , 551 P. 2d 647 (Mont. 1976)
NEW JERSEY	<u>Rosenberg v. Town of North Bergen</u> , 293 A. 2d 662 (N.J. 1972)
NEW MEXICO	<u>Terry v. New Mexico State Highway Commission</u> , 645 P. 2d 1375 (N.M. 1982)
NORTH CAROLINA	<u>Lamb v. Wedgewood</u> , 286 S.E. 2d 876 (N.C. App. 1982)
OHIO	<u>Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower &amp; Clancy</u> , 740 F. 2d 1362 (6th Cir. 1984)
OREGON	<u>Joseph v. Burns</u> , 491 P. 2d 203 (Ore. 1971)
PENNSYLVANIA	<u>Freezer Storage Inc. v. Armstrong Cork Co.</u> , 382 A. 2d 715 (Pa. 1978)
TENNESSEE	<u>Harmon v. Angus R. Jessup Associates, Inc.</u> , 619 S.W. 2d 522 (Tenn. 1981)
TEXAS	<u>Hill v. Forrast &amp; Cotton, Inc.</u> , 555 S.W. 2d 145 (Tex. Civ. App. 1977)
UTAH	<u>Good v. Christensen</u> , 527 P. 2d 223 (Utah 1974)
VIRGINIA	<u>Smith v. Allen-Bradley Co.</u> , 371 F. Supp. 698 (W.D. Va. 1974)
WASHINGTON	<u>Yakima Fruit &amp; Cold Storage Co. v. Central Heating &amp; Plumbing Co.</u> , 503 P. 2d 108 (Wash. 1972)

STATUTES OF REPOSE FOR DESIGN PROFESSIONALS

Unconstitutional

- HAWAII Fujioka v. Kam, 514 P. 2d 568 (Hawaii 1973)
- ILLINOIS Skinner v. Anderson, 231 N.E. 2d 588 (Ill. 1967) \*
- KENTUCKY Tabler v. Wallace, 704 S.W. 2d 179 (Ky. 1986)
- NEVADA State Farm Fire & Casualty Co. v. All Electric, Inc., 660 P. 2d 995 (Nev. 1983)
- NEW HAMPSHIRE Henderson Clay Products, Inc. v. Edgar Wood & Associates, Inc., 451 A. 2d 174 (N.H. 1982)
- OKLAHOMA Loyal Order of Moose Lodge 1785 v. Cavaness, 563 P. 2d 143 (Okla. 1977)
- SOUTH CAROLINA Broome v. Truluck, 241 S.E. 2d 739 (S.C. 1978)
- SOUTH DAKOTA Daugaard v. Baltic Cooperative Bldg. Supply Assn., 349 N.W. 2d 419 (S.D. 1984)
- WISCONSIN Kallas Millwork Corp. v. Square D. Co., 225 N.W. 2d 454 (Wis., 1974)

\* But see, Skinner v. Hellmuth, Obata & Kassabaum, Inc., Oct. 17, 1986, upholding separate classification of A/Es for purpose of two-year cut-off period not related to substantial completion issue (copy enclosed).



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

REFUSE

P.O. Box Y, State Capitol  
Juneau, Alaska 99811-3100  
Mail Stop 3100  
(907) 465-1991

May 17, 1988

MEMORANDUM

TO:

ATTN:

FROM: Gretchen Keiser  
Legislative Analyst

RE: Alaska Builder Liability for Construction Flaws  
Research Request 88.253

You requested information on state and municipal laws governing builder liability for construction flaws. Specifically, you wanted to know the length of the period of liability following completion of construction.

Under Alaska's Code of Civil Procedure, a person must bring an action to recover ". . . for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property. . ." within six years of substantial completion of an improvement (AS 09.10.055; Attachment A). This statute also allows for actions (within the six-year period) against a person performing or furnishing the design, planning, supervision, or construction of an improvement to recover damages for injuries or wrongful death arising out of a deficiency. According to the statutory citation, this limitation of actions relating to construction was enacted in 1967 (61 SLA 67).

Jim Baldwin, Assistant Attorney General, was not aware of any municipal ordinances specifically addressing the issue of limitation of actions relating to construction, but considered it unlikely that municipalities would establish a limitation of actions which differed from state statute. I contacted the municipal law departments of the home rule municipalities of Anchorage, Juneau and Sitka and all indicated that they have no ordinances addressing this specific issue. They would rely on state statute if the issue arose.

Please contact me if you have any further questions.

Attachment

ATTACHMENT A

Alaska Statute 09.10.055

Collateral references. — Construction of statute authorizing constructive or substituted service of process on, and continuation of pending action against foreign representative of deceased nonresident driver

of motor vehicle arising out of accident occurring in state, 18 ALR2d 844  
 Probate, in state where assets are found of will of nonresident which has been admitted to probate in state of domicile, 20 ALR3d 1031

**Sec. 09.05.040. Service of process on resident who leaves state after accident.** A resident who has operated a motor vehicle, or has owned a motor vehicle operated with the express or implied consent of the owner which has been involved in an accident or collision on a public highway, and who has moved to another state after the accident or collision shall be treated as a nonresident for service of process as provided under AS 09.05.020 and 09.05.030. (S 1 ch 59 S.L.A. 1963)

NOTES TO DECISIONS

Section operates in conjunction with AS 09.05.020. — In cases arising from motor vehicle accidents in which the defendant subsequently leaves the state, AS 09.05.020 operates in conjunction with this section to authorize service upon an absent defendant by serving the commissioner of revenue. Pursuant to those provisions, the commissioner of revenue is, as a matter of law, appointed as defendant's statutory agent so that service upon him is of the same effect and validity as personal service upon the defendant. *Byrne v. Ogil*, Sup. Ct. Op. No. 721 (File No. 1359), 4AA P 2d 718 (1971).

In an action for damages arising from an automobile collision in this state, the statute of limitations is not tolled by the defendant's absence from the state, as provided by AS 09.10.130, when, during the defendant's absence, the plaintiff had the right to proceed against him under AS 09.05.020, which, in conjunction with this section, makes the commissioner of revenue the agent of the absent defendant for purposes of service of process. *Byrne v. Ogil*, Sup. Ct. Op. No. 722 (File No. 1359), 4AA P 2d 716 (1971).

Chapter 10. Limitations of Actions.

Section

10 General limitations on civil actions

30 Actions to recover real property in 10 years

60 Action upon judgment or sealed instrument in 10 years

80 Actions to be brought in six years

85 Certain actions relating to construction in six years

80 Actions to be brought in three years

70 Actions to be brought in two years

80 Actions to be brought in one year

90 Actions for penalty

100 Other actions in 10 years

110 Annual of cause of action upon mutual, open, and current account

120 Actions in name of state, political subdivisions, or public corporations

Section

130 Effect of absence from state or concealment

140 Disabilities of minority, incompetency and imprisonment

180 Inability of alien during war

170 Injunction against commencement of action

180 Disability

150 Coexisting disabilities

200 Acknowledgment or promise

210 Payment on account

220 When nonresident's cause of action barred

230 Certain actions relating to real property

240 Commencement of action after dismissal or reversal

Collateral references. — 61 Am Jur 2d, Limitation of Actions, § 1 et seq  
 53 C.J.S., Limitations of Actions, § 1 et seq

When statute of limitations begins to run against actions to recover interest, 30 ALR 1085

When limitation begins to run against an action to recover on account of removal of mineral from land, 37 ALR 1112

What amounts to commencement of suit to enforce mechanic's lien, 75 ALR 695

Law requiring service of notice before bringing suit, as affecting time from which statute of limitations begins to run, 95 ALR 1188, 3 ALR2d 711

When "bell" deemed to have taken place for purposes of statute of limitations which fixes commencement of period at time of judicial sale, 101 ALR 1348

When limitation commences to run against suit for reform of instrument, 106 ALR 1338

Character or kind of action or proceeding within operation of statute which permits new action after expiration of period of limitations, upon failure of previous actions commenced within the period, 120 ALR 376, 79 ALR2d 1309

Duress or undue influence as tolling or suspending statutes of limitations, 121 ALR 1294

Commencement of action as suspending of running of limitations against claim which is subject of setoff, counterclaim, or recoupment, 127 ALR 909

When statute of limitations commences to run against action to recover tax, 131 ALR 822

War as suspending running of limitations in absence of specific statutory provisions to that effect, 137 ALR 1454, 140 ALR 1518, 141 ALR 1511

Ancillary proceedings as suspending or removing bar of statute of limitations as to judgment, 156 ALR 787

Application and limits of rule that death of person liable does not interrupt running of statute of limitations, 174 ALR 1423

Validity of contractual waiver of statute of limitations, 1 ALR2d 1445

Limitation period as affected by requirement of notice or presentation of claim against governmental body, 3 ALR2d 711

New party brought in after statute has run, 6 ALR2d 6

Fraud as tolling period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500

First and last day included or excluded for purposes of statute, 20 ALR2d 1249

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 ALR2d 236

Promissory estoppel as to statute of limitations, 48 ALR2d 1079

Raising defense of statute by demurrer, equivalent motion to dismiss or by motion for judgment on pleadings, 61 ALR2d 300

Raising statute by motion for summary judgment, 61 ALR2d 341

Validity of statute enlarging limitation period, 79 ALR2d 1080

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 ALR2d 1399

General appearance as avoiding otherwise effective bar of statute of limitations, 92 ALR2d 1200

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 ALR2d 965

Statute limiting time for probate as applicable to will probated in another jurisdiction, 87 ALR2d 721

Federal court's adoption of state period of limitation, in action to enforce federally created right, as including related or subsidiary state laws or rules as to limitations, 90 ALR2d 265

Extraterritorial operation of limitation applicable to statutory cause of action, other than by reason of "borrowing statute," 95 ALR2d 1162

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 ALR3d 1234

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 ALR3d 1197

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 ALR3d 1361

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127

Agreement of parties as estopping reliance on statute of limitations, 43 ALR3d 756

Promises to settle or perform as estopping reliance on statute of limitations, 44 ALR3d 482

Mainly diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 ALR3d 760

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 ALR3d 630

Delay caused by other litigation as estopping reliance on statute of limitations, 45 ALR3d 702

Validity of contractual provision establishing period of limitations longer than that provided by state statute of limitations, 44 ALR3d 1172

Relation back of amended pleading substituting true name of defendant for fictitious name used in earlier pleading as to avoid bar of limitations, 45 ALR3d 130

Legal malpractice by permitting statutory time limitation to run against client's claim, 90 ALR3d 293

Delay in prosecution of disciplinary proceeding as defense or mitigating circumstance, 93 ALR3d 1057

Statute of limitations as bar to arbitration under agreement, 94 ALR3d 533

Laches or acquiescence as defense, so as to bar recovery or arrears of permanent alimony or child support, 5 ALR4th 1015

Statute limiting time for commencement of action to establish paternity of illegitimate child as violating child's constitutional rights, 18 ALR4th 928

Claims for expenses of last sickness or funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon, 17 ALR4th 530

**Sec. 09.10.010. General limitations on civil actions.** No person may commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute. (1) 101 ch 101 SLA 1962)

**Cross references.** — For commencement of action, see Civ R 3, for relation back of amendment to pleading to date of original pleading, see Civ R 15(c)

#### NOTES TO DECISIONS

This section codifies the general policies of granting repose and ensuring fresh evidence at trial by establishing certain time limits for all civil actions. *Haakanson v Wakefield Seafoods, Inc.*, Sup Ct Op No 1843 (File No 3428, 349); 600 P 2d 1087 (1979)

The defense of the statute of limitations must be specifically pleaded. *Devine v Carionada*, 15 Alaska 232, 143 P Supp 561 (D Alaska 1964)

**Foreclosure actions.** — The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. *Dworkin v First Nat'l Bank*, Sup Ct Op No 499 (File No 929), 444 P 2d 777 (1964)

In the absence of a controlling statute a foreclosure action is subject to the same

period of limitations as the underlying debt. *Dworkin v First Nat'l Bank*, Sup Ct Op No 499 (File No 929), 444 P 2d 777 (1964)

In a suit to foreclose a mortgage the six-year period of limitation to controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. *Dworkin v First Nat'l Bank*, Sup Ct Op No 499 (File No 929), 444 P 2d 777 (1964)

The six-year statute of limitations (AS 09 10 060), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v First Nat'l Bank*, Sup Ct Op No 499 (File No 929), 444 P 2d 777 (1964)

**Tort actions.** — A tort action must be commenced within two years after the cause of action has accrued. *Bliverton v*

*Marler*, Sup Ct Op No 186 (File No 3411, 349 P 2d 3 (1964))

Quoted in *Growth v Noss*, Sup Ct Op

**Sec. 09 10 020. When action commenced.** (Repealed, 1 ch 27 SLA 1966. For present law, see Civ R 3.)

**Sec. 09.10.030. Actions to recover real property in 10 years.** No person may bring an action for the recovery of real property, or for the recovery of the possession of it unless commenced within 10 years. No action may be maintained for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action. (1) 103 ch 101 SLA 1962)

**Cross references.** — For adverse possession, see AS 09 25 060

#### NOTES TO DECISIONS

- I General Consideration
- II Adverse Possession
  - A Generally
  - B Actual Possession
  - C Notorious Possession
  - D Exclusive Possession
  - E Continuous Possession
  - F Hostile Possession

#### I GENERAL CONSIDERATION.

This section is a statute of repose. *Roberts v Joerg*, 5 Alaska 190 (1914)

And presupposes that there never has been a deed. *Roberts v Joerg*, 5 Alaska 190 (1914)

But section may be basis of new title.

— While this statute purports only to bar the remedy it is clear that it can be the basis of a new title, which may be asserted adversely as well as defensively. *Ringstad v Gagnon*, 12 Alaska 190, 171 P 2d 170 (9th Cir 1948)

This action can be utilized on the basis of a new title. *Apers v Day & Night Fuel Co.*, Sup Ct Op No 532 (File No 944), 451 P 2d 879 (1969)

The statute not only establishes a time limit within which an action to recover real property must be brought, but also constitutes the method by which a claimant may establish a new title through adverse possession. *Bentley Family Trust v Lynn Enters, Inc.*, Sup Ct Op No 3434 (File No 8015, 8038), 656 P 2d 761 (1983)

Such no right of way. — While this section purports only to bar a remedy, it

may be used as the basis of establishing an easement of right of way across another's land. *Hamery v Houston*, Sup Ct Op No 24, 47 (File No 47), 359 P 2d 121 (1961)

And possession right may be protected by action. — In *Noble v Melhorn*, 5 Alaska 229 (1917) the court said: "The necessary right then acquired by defendant to a property right, for the protection of which an appropriate action may be maintained by the occupant." *Ringstad v Gagnon*, 12 Alaska 190, 171 P 2d 170 (9th Cir 1948). See notes under section 11, "Adverse Possession."

**Applicability of provisions requiring possession of estate within 10 years.**

— The provisions of this section that an action may be maintained unless it appears that the plaintiff or his predecessor was seized or possessed of the premises within 10 years is not applicable to any party except a plaintiff. *Justice Indegard v Prud'homme*, 13 Alaska 197 P Supp 617 (D Alaska 1955)

**Essential difference between requirements for claim under color of title and one without such color of title as to the number of years of possession.**

required. In both cases, there must be uninterrupted adverse and notorious possession, but only seven years is required under AS 09 25 050 as opposed to 10 years under this section. *Shulta v. Young*, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

A trust once established is not within the statute of limitations. *Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 304 (1915).

If defendants were holding land as trustees for the plaintiff as grantor, the statute would not run until there was some act of disavowal done by said trustees which showed adversely to the alleged cestui que trust. *Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 304 (1915).

As possession of trustee is presumed to be possession of cestui que trust. — *Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 304 (1915).

Owner of land should not be disturbed in absence of clear proof of surrender of rights. — Before a court would be justified in interfering with an owner's enjoyment of his own land, it ought to be satisfied by the clearest kind of proof that the owner has surrendered that absolute possession which the law guarantees to him. *Roberts v. Jaeger*, 5 Alaska 190 (1914).

Statute does not run until plaintiff acquires title. The statute of limitations begins to run against a grantee under the general land laws of the United States only from the date when he acquires the title and an occupancy by another prior to that time will not be deemed adverse to the title of such grantee. *Tyre Conrod Mining Co. v. Langstedt*, 136 F. 124 (9th Cir. 1905).

To start the statute of limitations running against a plaintiff who relied on a townsite trustee's deed, he must have been disavowed and in order to be disavowed he must have at some time have been seized of title, either of fee or freehold, and until the issuance of patent to him he was not an owner. *Valentine v. McGrath*, 4 Alaska 102 (1910); *Alaska & N.W.T.T. Co. v. Bernhoffer*, 4 Alaska 99 (1910).

If in the delay, the duration of time after title seized, that raises the bar of the statute, this may not be by violation, else one ought to be barred before time seized. *Valentine v. McGrath*, 4 Alaska 102 (1910).

Thus, the statute of limitations does not begin to run against the claimant of a mining claim before his patent issues. *Tyre Conrod Mining Co. v.*

*Langstedt*, 136 F. 124 (9th Cir. 1905).

The action of an owner on his own land does not start the running of adverse possession. *Kattunen v. Dyer*, 261 F. 2d 611 (9th Cir. 1956).

Foreclosure actions. In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six year period of limitation is controlling and the ten year period pertaining to actions upon sealed instruments is inapplicable. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six year statute of limitations (AS 09 10 060), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Quoted in *Alaska Nat'l Bank v. Linn*, Sup. Ct. Op. No. 1372 (File No. 2754), 559 P.2d 1049 (1977).

Stated in *Walsh v. Emerick*, Sup. Ct. Op. No. 2072 (File No. 4655), 611 P.2d 28 (1980).

## II. ADVERSE POSSESSION

### A. Generally

Legal title gives constructive possession until ouster by adverse possession. — A legal title gives a right of possession as well as the legal title and possession coextensive with the right, until there is an ouster by adverse possession. *Tyre Conrod Mining Co. v. Langstedt*, 136 F. 709 (9th Cir. 1904), rev'd on other grounds, 136 F. 124 (9th Cir. 1905).

Supposition underlying adverse possession. — Adverse possession presupposes the existence of some title or right to possession in another which is adverse to the one claiming title by adverse possession. *Ayers v. Day & Night Fuel Co.*, Sup. Ct. Op. No. 532 (File No. 944), 451 P.2d 579 (1969).

The good faith of the claimant is not a relevant issue under the ten year adverse possession statute. *Lott v. Malson Road Baptist Church, Inc.*, Sup. Ct. Op. No. 602 (File No. 1101), 466 P.2d 815 (1970).

Elements required under AS 09 25 050 and this section. Under both AS 09 25 050 applicable when possession is under color of title and this section applicable in other cases, the claimant must satisfy the basic elements of adverse possession in establishing his or her claim. *Bentley Family Trust v. Lynx Enterprises, Inc.*, Sup. Ct. Op. No. 2904 (File Nos. 6015, 6036), 658 P.2d 761 (1983).

Three basic requirements for adverse possession are: (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner. *Shulta v. Young*, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Possession must be open, notorious, visible, continuous for the statutory period and under a claim of right. *City of Anchorage v. Nesbitt*, Sup. Ct. Op. No. 1111 (File No. 2040), 530 P.2d 1324 (1975).

Purpose of requirements. — The main purpose of nearly all the requirements is essentially the same, that is, to put the record owner on notice of the existence of an adverse claimant. *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

From the standpoint of the true owner, the purpose of the various requirements of adverse possession — that the nonpermissive use be actual, open, notorious, continuous, exclusive and hostile — is to put him on notice of the hostile nature of the possession so that he, the owner, may take steps to vindicate his rights by legal action. *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974); *Shulta v. Young*, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Adverse possession gives notice of rights. — Where a person is in visible possession of real property adverse to the world and open and notorious, notice must be taken of his actual rights. A purchaser would be placed upon notice thereby. *Nording v. Carlson*, 265 F.2d 507 (9th Cir. 1958).

Mere occupation of the premises, even for the statutory period, does not establish title. *Ayers v. Day & Night Fuel Co.*, Sup. Ct. Op. No. 532 (File No. 944), 451 P.2d 579 (1969).

Occupant cannot hold adversely who admits title is in United States.

To constitute adverse possession there must be among other requirements an entry under claim of right hostile to the true owner and to the world and an occupant of land cannot hold adversely while he admits the title to be in the United States. *Tyre Conrod Mining Co. v. Langstedt*, 136 F. 124 (9th Cir. 1905).

Effect of patent on adverse claims.

Since the issuance of a patent has the effect of cutting off, as against the United States and its grantees, all adverse claims based on use or occupancy not included pursuant to any statute providing for ultimate title, in the absence of any color of title, adverse possession by the defendant claiming title by such possession must be shown for the period of 10 years prior to the commencement of a proceeding under this section. *Juneau Independent School Dist. v. Smith*, 13 Alaska 1, 92 F. Supp. 617 (D. Alaska 1950).

When statute of limitations begins to run. — See notes to *Tyre Conrod Mining Co. v. Langstedt*, 136 F. 124 (9th Cir. 1905); *Valentine v. McGrath*, 4 Alaska 102 (1910); and *Alaska & N.W.T.T. Co. v. Bernhoffer*, 4 Alaska 99 (1910); under analysis line I, "General Consideration."

Burden of proof upon adverse possessor. — A party claiming title to real property by adverse possession must bear the burden of proving each element by clear and convincing evidence. *Bentley Family Trust v. Lynx Enterprises, Inc.*, Sup. Ct. Op. No. 2904 (File Nos. 6015, 6036), 658 P.2d 761 (1983).

Plaintiff may show adverse possession by his predecessors. — An instruction was error which failed to let the jury consider the adverse possession of plaintiff's predecessors in interest in determining whether plaintiff had acquired title by adverse possession. *Ringstad v. Greenus*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

Without attempt to transfer title. — It is the transfer of possession, not title, which is the critical element, because a paper transfer is not necessary to construct adverse possession. The privity required is that there must be a continuous possession by mutual consent, so that the possession of the true owner shall not constructively intervene. *Ringstad v.*

Grannis 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

**If there is agreement to transfer possessor's rights.** If successive possessions are connected by any agreement or understanding which has for its object a transfer of the rights of the possessor, and is accompanied by a transfer of possession in fact it is sufficient to constitute a continuous possession. *Rogstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

**Thus, grantee may lack grantor's possession of lands not covered by deed.** It is generally held that if, in connection with the conveyance of lands, there are circumstances showing an intent to transfer to the grantee the possession of other adjacent land occupied by the grantor and not covered by the deed, there is created such a privity that the grantee is permitted to tack the period of the grantor's occupancy to his own in establishing title by adverse possession to the land not mentioned in the deed. *Rogstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

**Adverse possessions may be tacked.**

That the adverse possession may be by different occupants where a privity exists between them is almost universally held. The essential thing is that the continuity of possession is not broken so that the owner's constructive possession will attach and allow him to recover the land. *Rogstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

The adverse possession may be by different occupants, where a privity exists between them. *Penn v. Ivey*, Sup. Ct. Op. No. 2120 (File No. 4113), 615 P.2d 1 (1980).

**Claim by prescription.** The requisites for a claim by prescription are essentially the same as for adverse possession except that a prescriptive claim is limited to certain rights in the land of another such as an easement. *City of Anchorage v. Neslett*, Sup. Ct. Op. No. 1111 (File No. 2040), 530 P.2d 1324 (1975).

To establish a prescriptive right to an easement, the user must have been open, continuous, and adverse, under claim of title or right, and with the knowledge and acquiescence of the owner of the servient estate. *Roberts v. Jaeger*, 5 Alaska 190 (1914).

Use alone for the statutory period, even with the knowledge of the owner, would not establish an easement. *Hamerly v. Dennis*, Sup. Ct. Op. No. 24, 74 (File No. 47), 359 P.2d 121 (1961).

A road and bridge used for 20 full years by the public, under conditions creating a prescriptive right, that right becoming vested and determined at the end of 20 years, it was immaterial to decide whether the length of time required in Alaska for a prescriptive right of way is 20 years or 10 years, the latter time being the limitation by this section for bringing an action relating to the possession of real property. *Clark v. Taylor*, 9 Alaska 298 (1938).

**City's use of property by maintaining power line on it.** *See City of Anchorage v. Neslett*, Sup. Ct. Op. No. 1111 (File No. 2040), 530 P.2d 1324 (1975).

**Adverse possessor prevailed.** Where defendant in eminent domain showed by competent evidence that he entered upon land at a time when he had a right to do so, and under a claim of right, and had ever since been in the actual, exclusive, and continuous possession thereof, holding adversely to the plaintiff and his predecessors in interest during the statutory period, to wit, more than 10 years after the issuance of patent to the plaintiff's predecessor and before the commencement of action, judgment was for defendant. *Noble v. Melchor*, 5 Alaska 729 (1917).

#### B. Actual Possession.

**Possession must be actual and continuous.** Where the plaintiff has the better and superior right and title, the defendant's alleged adverse possession could not avail them, unless it was actual and continuous, as constructively the plaintiff is in possession by reason of its superior title and right. *Pacific Coal & Transp. Co. v. Pioneer Mining Co.*, 205 F.577 (9th Cir. 1913).

Only property actually possessed by the claimant during the whole statutory period may be acquired by adverse possession. *Bentley Family Trust v. Lynx Enters., Inc.*, Sup. Ct. Op. No. 2604 (File No. 6015, 6038), 658 P.2d 761 (1983).

**Actual possession defined.** Actual possession means a *possession* which is definite, positive, and notorious. *Pacific Coal & Transp. Co. v. Pioneer Mining Co.*, 205 F.577 (9th Cir. 1913).

There cannot be constructive possession in two persons claiming to hold adversely at one and the same time. *Pacific Coal & Transp. Co. v. Pioneer Mining Co.*, 205 F.577 (9th Cir. 1913).

#### C. Notorious Possession.

**"Notorious" possession.** The requirement that the possession must

have been reasonably visible to the record owner to "notorious" possession so that if the owner visits the property he would be put on notice and is able to assert his rights. *Shilta v. Young*, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

**Imputed knowledge of adverse possessor's activities.** In determining if an adverse possession is reasonably visible to the true owner, the test is not whether the owner in fact knows of the adverse possessor's activities, but whether the owner can be charged with such knowledge. In addition to imputing such knowledge courts generally recognize that common knowledge, as well as physical visibility, is relevant evidence that the true owner has been put on notice. *Bentley Family Trust v. Lynx Enters., Inc.*, Sup. Ct. Op. No. 2604 (File Nos. 6015, 6038), 658 P.2d 761 (1983).

**Character of the land must be considered with reference to the requirement of sufficient notoriety.** Hence, the same acts are not required for unimproved and forested land as for urban lots. *Shilta v. Young*, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

**Acts alone may be sufficient to put owner on notice.** Where the user has acted, without permission of the true owner, in a manner inconsistent with the true owner's rights, the acts alone (without any explicit claim of right or intent to dispossess) may be sufficient to put the true owner on notice of the nonpermissive use. *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

**Being on the property at least once a year for a half or full day and walking the boundary lines hardly would give indication to the owner that there was a hostile claim.** *Shilta v. Young*, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

**Flying over property in an airplane gives no notice of possession.** *Shilta v. Young*, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

**The physical facts of entry and continued possession may themselves evidence an intent to occupy and to hold as of right sufficient in law to support the acquisition of rights by prescription.** *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

**Repute as owner, without evidence of possession on the land, is not alone sufficient.** *Shilta v. Young*, Sup. Ct. Op.

No. 1460 (File No. 3003), 567 P.2d 769 (1977).

**Payment of taxes is a critical factor although it is only regarded as an indication with a visible physical presence on the land.** *Shilta v. Young*, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

**Claimants' leasing of property and exclusion of threatening interference.**

Claimants' leasing of the property and excluding others from the land when their interest was threatened satisfied the requirement that an adverse possessor act as if he owns the land rather than as if he is merely on the land with the permission of the true owner. *Bentley Family Trust v. Lynx Enters., Inc.*, Sup. Ct. Op. No. 2604 (File Nos. 6015, 6038), 658 P.2d 761 (1983).

#### D. Exclusive Possession.

**Exclusive dominion over property required.** To deprive the record owner of his title, the adverse claimant's acts must "exclude a purpose to exercise exclusive dominion over the property." *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

An owner would have no reason to believe that a person was making a claim of ownership inconsistent with his own if that person's possession was not exclusive, but in participation with the owner or with the general public. *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

Where possession was actual, open, notorious, and continuous, with a claim of ownership, but was not shown to be either exclusive or hostile, the possession was not adverse, and the statute of limitations never began to run. *Tyee Conard Mining Co. v. Langstedt*, 121 F.709 (9th Cir. 1903), *rev'd on other grounds*, 138 F.124 (9th Cir. 1905).

The exclusive use requirement is often defined quite similarly to certain of the other requirements of adverse possession. *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

**Total exclusivity is not required.** *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

A claimant's possession need not be absolutely exclusive; it need only be a type of possession which would characterize an owner's use. *Peters v. Juneau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018

File Nos. 1041, 1041; 519 P.2d 426 (1974).

Occasional claimdiggers could not destroy the exclusive character of adverse use where such casual intrusions were legally not considered by the user to interfere or conflict with his own use in allowing strangers to come on the land to dig claims and in allowing friends, relatives and others occasional use of the land (the user was merely acting as any other hospitable landowner might). *Peters v. Juneau Douglas Coal Shovel Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

**G. Continuous Possession**

Possession must be actual and continuous. See note under this catchline under analysis line H H. Actual Possession.

One of the requirements for acquisition of title by adverse possession is that the possession must be continuous for the statutory period in order to prevent the original owners' possession from constructively attaching to the land thus starting the statute running anew because the owner must be out of possession for 10 years in order for the statute to be able to go into effect to recover the land. *Ringold v. Brannan*, 12 Alaska 171 (1907) (9th Cir. 1948).

A showing that use was openly adverse to the owner's interest must be for the full statutory period of ten years. If during that period it is established that the adverse claimant has done something to recognize the owner's title, the continuity of the adverse possession period is interrupted and the ten year period of limitation does not begin to run again in the adverse claimant's favor until he repudiate the owner's title. *Ayres v. Day & Night Fuel Co.*, Sup. Ct. Op. No. 572 (File No. 944; 451 P.2d 519 (1969).

**F. Hostile Possession**

Possession presumed to be with permission. When one enters into possession of use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title. *Hamerly v. Denton*, Sup. Ct. Op. No. 24 (File No. 47; 359 P.2d 121 (1961); *Ayres v. Day & Night Fuel Co.*, Sup. Ct. Op. No. 572 (File No. 944; 451 P.2d 520 (1969); *Peters v. Juneau Douglas Coal Shovel Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

This presumption that one who enters into possession of use of another's property does so with the owner's permission is rebutted by the adverse claimant's showing that he was not on the property by permission and establishing that the record title holder could have been ousted from possession throughout the statutory period. *Peters v. Juneau Douglas Coal Shovel Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

Which presumption may be overcome only by clear evidence of assertion of hostile right. The presumption that one who enters into possession of use of another's property does so with the owner's permission is overcome only by showing that such use of another's land was not only continuous and uninterrupted but was openly adverse to the owner's interest, i.e. by proof of a distinct and positive assertion of a right hostile to the owner of the property. *Hamerly v. Denton*, Sup. Ct. Op. No. 24 (File No. 47; 359 P.2d 121 (1961); *Ayres v. Day & Night Fuel Co.*, Sup. Ct. Op. No. 572 (File No. 944; 451 P.2d 520 (1969).

See note to Title Council Mining Co. v. Langstedt, 1210 (9th Cir. 1907) rev'd on other grounds, 130 F. 124 (9th Cir. 1905); under catchline "Exclusive dominion over property required" under analysis line H H. "Exclusive Possession."

As there is no presumption user is hostile. The adversary character of the holding or enjoyment is one of the tests of the sufficiency of that holding or enjoyment and there is no more reason for indulging in the presumption that a 10 year simple user of a right of way is hostile than there is for indulging in the presumption that any other simple holding of land for 10 years is hostile to the true owner. *Kudaska v. Jaeger*, 5 Alaska 190 (1914).

Acquiescence of owner in hostile acts of possessor. The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the possessor. *Peters v. Juneau Douglas Coal Shovel Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

The word "hostile" is frequently used as a term of art meaning that the claim is "adverse" or under "claim of right," and that it is not subordinate to the title of the true owner. *City of Anchorage v. Noullet*, Sup. Ct. Op. No. 1111 (File No. 2040; 530 P.2d 1324 (1975).

One determination of when use is permissive as opposed to "hostile" as under a "claim of right," was *City of Anchorage v. Noullet*, Sup. Ct. Op. No. 1111 (File No. 2040; 530 P.2d 1324 (1975).

The test for determining the existence of the requisite degree of hostility is a fairly objective one. The question is whether or not the claimant acted toward the land as if he owned it. His belief as to the true legal ownership of the land, his good faith or bad faith in entering into possession, i.e. whether he claimed a legal right to enter, or avowed himself a trespasser, all are irrelevant. *Peters v. Juneau Douglas Coal Shovel Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

The claimant's beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession, i.e. whether he claimed a legal right to

enter, or avowed himself a trespasser, all are irrelevant. The proper determination of whether the required degree of hostility exists is whether the acts of the claimant are the acts of an owner sufficient to give the record owner notice of the possessor's claim. *Peters v. Juneau Douglas Coal Shovel Council*, Sup. Ct. Op. No. 1018 (File No. 1041; 519 P.2d 426 (1974).

Finding of hostility not clearly erroneous. Although it is clear that the hostility requirement is not satisfied if the adverse claimant had the permission of the record owner to use the property, the trial court's finding of hostility was not clearly erroneous where the only evidence of permission was before the trial court as the record owner's own testimony and this evidence was directly contradicted by the adverse claimant who testified that such conversation had never taken place. *Peters v. Day*, Sup. Ct. Op. No. 2120 (File No. 4113; 615 P.2d 1 (1980).

Collateral references. 51 Am. Jur. 2d, Limitation of Actions, § 84 88, 119, 122.

51 C.J.S., Limitation of Actions, § 14 - 42, 118.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors, 76 ALM 844, 160 ALM 2d 1094 (1) and see generally as real property for purpose of determining applicable statute

of limitations, 50 ALM 276; 101 ALM 882; 131 ALM 1371.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitations, 14 ALM 2d 598.

Owner's conveyance of land as entry thereon tolling running of statute of limitations for purpose of adverse possession, 76 ALM 844.

**Sec. 09.10.040. Action upon judgment or sealed instrument in 10 years. No person may bring an action upon a judgment or decree of a court of the United States, or of a state or territory within the United States, and no action may be brought upon a sealed instrument unless commenced within 10 years.** (S. 104 ch. 101 S.L.A. 1962)

**NOTES TO DECISIONS**

The presence of a seal, where required, is not a mere formality, but is a matter of substance. *Carlin v. Grigsby*, 9 Alaska 378 (1918); see AS 09.25.130.

Instruments purporting to be under seal should be plainly and unequivocally so drawn in order to distinguish them from other instruments of a less solemn character, and the rule as to what constitutes a sealed instrument should be strictly interpreted so that account *Carlin v. Grigsby*, 9 Alaska 378 (1918).

Mere recital without mark, etc., is insufficient. In order to convert a mortgage into a sealed instrument, it is necessary that some seal or mark or mark that can be identified as a seal be affixed thereto, and the mere recital that the same includes seal, whether such recital appears in the body of the instrument, or in the acknowledgment, is insufficient. *Carlin v. Grigsby*, 9 Alaska 378 (1918).

Mortgage as sealed instrument. — The parties to a mortgage may make it a

sealed instrument if they so desire and thus bring it within the section. *Carlkin v Grigsby*, 9 Alaska 378 (1938).

The question as to whether or not a mortgage is a sealed instrument is one of fact to be determined by the court upon an inspection of the instrument itself. *Carlkin v Grigsby*, 9 Alaska 378 (1938).

Mistake, etc., as ground for correcting a mortgage to make it a sealed instrument, see *Carlkin v Grigsby*, 9 Alaska 378 (1938).

Child support payments are judgments at the time each payment accrued. Thus, the applicable statute of limitations on actions to recover arrearages in child support payments is that applicable for judgments, which is 10 years. *Young v Williams*, Sup Ct Op No 1693 (File No 3310), 583 P.2d 201 (1978).

Effect of filing complaint. — The filing of a complaint tolls the applicable statute of limitations and has the legal

effect of commencing an action. *Hamilton v Seattle Marine & Fishing Supply Co.*, Sup Ct Op No 1401 (File No 2695), 562 P.2d 333 (1977).

Law of place where action brought governs. — A statutory limitation on the time for commencing actions is generally considered to be a matter of procedure, and thus governed by the law of the place where the action is brought. *Hamilton v Seattle Marine & Fishing Supply Co.*, Sup Ct Op No 1401 (File No 2695), 562 P.2d 333 (1977).

Creditor's efforts to enforce money judgment obtained in state of Washington were not time barred. See *Hamilton v Seattle Marine & Fishing Supply Co.*, Sup Ct Op No 1401 (File No 2695), 562 P.2d 333 (1977).

Quoted in *Hobbins v Hobbins*, Sup Ct Op No 2523 (File No 6109), P.2d (1967).

Collateral references. — 34 Am Jur, Limitation of Actions, § 79 91, 137 157 53 C.J.S., Limitation of Actions, § 56 66, 123 132.

Suspension or removal of bar of statute of limitations as against judgment, 21 ALR 1036, 166 ALR 764, 45 ALR2d 947.

See as affecting running of limitations on negotiable instruments, 53 ALR 1174, 97 ALR 617.

Retrospective application of statute of limitations to actions on judgment already barred, 67 ALR 304.

Statute of limitations applicable to interest on judgment, 120 ALR 719.

Part payment or promise to pay judgment as affecting the running of statute of limitations, 45 ALR2d 947.

**Sec. 09.10.050. Actions to be brought in six years.** No person may bring an action (1) upon a contract or liability, express or implied, excepting those mentioned in AS 09.10.040 or 09.10.055; (2) for waste or trespass upon real property; or (3) for taking, detaining, or injuring personal property, including an action for its specific recovery, except those mentioned in AS 09.10.055, unless commenced within six years. (1) 105 ch 101 SLA 1962, am § 1 ch 61 SLA 1967)

Cross references. — For limitation on action against subdivisor in contested transactions, see AS 34.55.030(f).

## NOTES TO DECISIONS

Quasi contractual recovery. — Quasi contractual recovery is an implied contract for the purpose of applying statute of limitation. *Estate of Waters v Hoodley*, Sup Ct Op No 638 (File No 1169), 474 P.2d 85 (1971).

Relief from duress contract. — In seeking relief from a duress contract, the action is on an implied contract under the six year statute of limitations. *Estate of Waters v Hoodley*, Sup Ct Op No 638 (File No 1169), 474 P.2d 85 (1971).

Mortgage not under seal is governed by this section. — The parties to a mortgage may make it a sealed instrument if they so desire and thus bring it within the 10 year statute. If they do not choose to avail themselves of that opportunity the instrument must perform be governed by the law applicable to instruments not under seal and suit thereon must be brought within six years or the action is barred and the lien expires by operation of law. *Carlkin v Grigsby*, 9 Alaska 378 (1938).

Misrepresentation and negligence are tort concepts, not contract, and the two year statute of limitation (AS 09.10.070) respecting torts governs. *Austin v Fulton Ins Co*, Sup Ct Op No 498 (File No 911), 444 P.2d 536 (1968).

Where the essence of a plaintiff's complaint in an action for legal malpractice was negligence, the period of limitation found in AS 09.10.070, rather than this section, applied. *Van Horn Lodge, Inc v White*, Sup Ct Op No 2336 (File No 4447), 627 P.2d 641 (1981).

When statute of limitations begins to run in contract actions. — The statute of limitations begins to run in contract causes of action from the time the right of action accrues. This is usually the time of the breach of the agreement, rather than the time that actual damages are sustained as a consequence of the breach. *Howarth v First Nat'l Bank*, Sup Ct Op No 1188 (File No 2203), 540 P.2d 486 (1975), aff'd on rehearing, 551 P.2d 934 (1976).

It is not material that the injury from the breach is not suffered until afterward, the commencement of the limitation being contemporaneous with the origin of the cause of action. *Howarth v First Nat'l Bank*, Sup Ct Op No 1188 (File No 2203), 540 P.2d 486 (1975), aff'd on rehearing, 551 P.2d 934 (1976).

If plaintiff can prove that defendant bank had a contractual duty "to preserve and protect" his property, including a duty to maintain fire insurance, in consideration for assignment of right, title and interest in all moneys due or to become due to plaintiff under a real estate contract with another party, and the bank does not fulfill its duty either by acting as the insurer of the property or by contracting with an insurance company, then the statute of limitations will not bar recovery, and breach would not occur until plaintiff's property suffered fire damage and additionally defendant bank refused to compensate plaintiff. *Howarth v First Nat'l Bank*, Sup Ct Op No 1188 (File No 2203), 540 P.2d 486 (1975), aff'd on rehearing, 551 P.2d 934 (1976).

Statute of limitations begins to run from execution of demand note. — Paper payable on demand is due immediately, so an action may be brought at any time after date and delivery of the note without any further demand than the suit, so that the statute of limitations begins to run from its date. *North Am Trading & Transp Co v Byrne*, 4 Alaska 26 (1910).

A promissory note, payable on demand, becomes due immediately and the statute of limitations commences to run on the date of its execution. *Backlund v Ferguson*, 11 Alaska 348.

Unless note or circumstances show it was not immediately due. — The rule that paper payable on demand is due immediately may not apply where there is something on the paper, or in the circumstances under which it is given, to show that it was not the intention that it should become due immediately. *North Am Trading & Transp Co v Byrne*, 4 Alaska 26 (1910).

Action against bank official by depositor for conversion. — Action against bank official for conversion of payroll checks endorsed by plaintiff for deposit to his bank account and for passing forged checks written on plaintiff's account was governed by six year statute of limitations in this section rather than two-year statute of limitations in AS 09.10.070. *Veet v First Nat'l Bank*, Sup Ct Op No 2629 (File No 5969), 659 P.2d 1233 (1983).

Recharging debris on mining claim. — An action for injury to mining claims by discharge of debris thereon was an action for trespass upon real property and not an

action on the case, and was governed by the six year limitation provided in this section, where the debris was discharged more or less directly over the surface of the ground below, not principally through its deposition in a stream. *Ercog v. Fairbanks Exploration Co.*, 9 Alaska 264, 95 F.2d 859 (9th Cir. cert. denied) 9 Alaska 292, 305 U.S. 615, 59 S. Ct. 74, 811, Ed. 392 (1918).

**Tax refunds.** The taxpayer is not limited to recovery of overpayments according to § 115010. The common law has long recognized a cause of action in assumpsit to recover overpayments of taxes. Because the statutory remedies do not explicitly supersede the common law remedies, they are intended as a supplement, and the earlier remedy in assumpsit is still available. Hence, a claim for a refund was timely under this section, the six year statute of limitations applicable to recovery of personal property. *State v. Wakefield Fisheries, Inc.*, Sup. Ct. Op. No. 778 (File No. 1397, 1398), 495 P.2d 166 (1972).

**Foreclosure actions.** In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six year period of limitation is controlling and the ten year period pertaining to actions upon sealed instruments is inapplicable. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six year statute of limitations (this section), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v.*

*First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

**Slipping on ice as breach of implied contractual duty.** Where in a suit for injuries suffered by plaintiff when she slipped and fell on ice which had accumulated near the entrance to a lodge where she had been a paying guest, plaintiff contended that she was injured by reason of defendant's breach of their implied contractual duty as innkeepers to keep their premises in reasonably safe condition for their guests and, therefore, that the six year statute of limitations should control, it was held that the controlling statute of limitations was the two year statute governing tort actions, and not the six year statute relating to actions on contract. *Silveston v. Marler*, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 4 (1964).

Applied in *State v. Heeler King Co.*, Sup. Ct. Op. No. 1344 (File No. 2605, 2606, 2607), 569 P.2d 56 (1976), modified on rehearing on other grounds, 562 P.2d 702 (1977); *Clars v. Stack Steel & Supply Co.*, Sup. Ct. Op. No. 2093 (File No. 4104), 611 P.2d 80 (1980); *Municipality of Anchorage v. Sisters of Providence in Wash., Inc.*, Sup. Ct. Op. No. 2343 (File No. 5017, 5018, 5329), 628 P.2d 22 (1981); *Roberts v. Brooks*, Sup. Ct. Op. No. 2544 (File No. 5616), 649 P.2d 710 (1982).

Quoted in *King v. First Nat'l Bank*, Sup. Ct. Op. No. 2525 (File No. 5380), P.2d (1982).

Stated in *Walker v. White*, Sup. Ct. Op. No. 2196 (File No. 4574), 618 P.2d 561 (1980).

Cited in *Oaks v. Rogewicz*, Sup. Ct. Op. No. 318 (File No. 580), 409 P.2d 439 (1966); *Pally v. Hepp*, Sup. Ct. Op. No. 513 (File No. 942), 448 P.2d 310 (1968); *Alaska Airlines v. Lockheed Aircraft Corp.*, 430 F. Supp. 134 (D. Alaska 1977); *Straight v. Hill*, Sup. Ct. Op. No. 2256 (File No. 4610), 622 P.2d 425 (1981); *Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.*, Sup. Ct. Op. No. 2286 (File No. 4690), 623 P.2d 324 (1981); *State, N.S.E. Regional Aquaculture Ass'n v. Alea*, Sup. Ct. Op. No. 2488 (File No. 5085, 5086, 5142), 646 P.2d 203 (1982).

Timely suit to enforce policy as interrupting limitations against claimant's amended pleading to reform it, or vice versa, 92 ALR2d 168.

What statute of limitations governs action by contractor for defective or

**Collateral referen.** — What constitutes a contract in writ within statute, 3 ALR2d 809.

Statute of limitations applicable to action for encroachment, 24 ALR2d 903.

improper performance of work by private building contractor, 1 ALR2d 914.

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 ALR2d 1197.

When cause of action accrues, for purposes of statute of limitations, against action based upon encroachment of building or other structure upon land of another, 12 ALR2d 1265.

Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common law trespass, 15 ALR2d 1228.

Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 ALR2d 1438.

Time limitations as to claims based on uninsured motorist clause, 28 ALR2d 580.

Insurer's failure to pay amount of admitted liability as precluding reliance on statute of limitations, 41 ALR2d 1111.

What statute of limitations covers action for indemnity, 57 ALR2d 831.

What statute of limitations governs action for interference with contract or other economic relations, 58 ALR2d 1027.

What statute of limitation applies to action for surplus of proceeds from sale of collateral, 59 ALR2d 1205.

Change of law as to applicable statute of limitations in contract actions, 70 ALR2d 639.

When statute of limitations begins to run against action to recover money paid by mistake, 79 ALR2d 764.

Limitation of action against insurer for breach of contract to defend, 96 ALR2d 1191.

What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 ALR4th 677.

What statute of limitations governs physician's action for wrongful denial of hospital privileges, 3 ALR4th 1214.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment, 14 ALR4th 1085.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 ALR4th 456.

**Sec. 09.10.055. Certain actions relating to construction in six years.**

(a) No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(c) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint stock company. (§ 2 ch 61 SLA 1967)

**Collateral references.** What statute of limitations governs action by contractor for defective or improper performance of work by private building contractor. 1 ALR3d 914

When statute of limitations begins to run on negligent design claim against architect. 90 ALR3d 507

Validity and construction, as to claim alleging design defects, of statute

imposing time limitations upon action against architect or engineer for injury of death arising out of defective or unsafe condition of improvement to test project. 93 ALR3d 1242

Statutes of limitation - actions by put-chaasers or contractors against vendors or contractors involving defects in houses or other buildings caused by soil instability. 12 ALR3d 866

**Sec. 09.10.060. Actions to be brought in three years.** (a) No person may bring an action against a peace officer or coroner upon a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected upon an execution, unless brought within three years. This section does not apply to an action for an escape.

(b) No person may bring an action upon a statute for penalty or forfeiture where the action is given to the party aggrieved or to that party and the state unless brought within three years, except where the statute imposing it prescribes a different limitation. (§ 1.06 ch 101 SLA 1962)

**Sec. 09.10.070. Actions to be brought in two years.** No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise, (2) upon a statute for a forfeiture or penalty to the state, or (3) upon a liability created by statute, other than a penalty or forfeiture; unless commenced within two years. (§ 1.07 ch 101 SLA 1962)

NOTES TO DECISIONS

- I General Consideration
- II Torts
  - A Generally
  - B Strict Liability
  - C Misrepresentation and Negligence
  - D Libel
- III Forfeiture or Penalty to State
- IV Other Statutory Liability
- V Procedure
  - A Generally
  - B Tolling Statute

I. GENERAL CONSIDERATION.

The policy of the law is to allow a reasonable but definitely limited time for the

bringing of an action after which the matter is put to rest. *Byrne v Ogle*, Sup Ct Op No 722 (File No 1359), 488 P 2d 716 (1971)

**Purpose of statute of limitations.** The goal of the statute of limitations and the substituted service procedure is to provide speedy adjudication of claims. *Byrne v Ogle*, Sup Ct Op No 722 (File No 1359), 488 P 2d 716 (1971)

The purpose of statutes of limitations is to encourage promptness in the prosecution of actions and thus avoid the injustices which may result from the prosecution of stale claims. *Byrne v Ogle*, Sup Ct Op No 722 (File No 1359), 488 P 2d 716 (1971); *McCracken v Davis*, Sup Ct Op No 1389 (File No 2849), 560 P 2d 771 (1977); *Johnson v City of Fairbanks*, Sup Ct Op No 1672 (File No 3444), 583 P 2d 181 (1978)

Statutes of limitations attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses. *McCracken v Davis*, Sup Ct Op No 1389 (File No 2849), 560 P 2d 771 (1977)

This section reflects a state policy that a plaintiff's commencement of action is the affirmative step necessary to assure that his assertion of a claim is timely. *Johnson v City of Fairbanks*, Sup Ct Op No 1672 (File No 3444), 583 P 2d 181 (1978); *DeHusman v City of Anchorage*, Sup Ct Op No 1673 (File No 2996), 583 P 2d 791 (1978)

This section and AS 09.65.500 compared. - See *Haskanson v Wakefield Sealaska, Inc.*, Sup Ct Op No 1943 (File No 3428, 3422), 600 P 2d 1087 (1979)

Insurance adjusters not required to advise on applicability of statutes of limitations. - Insurance adjusters, as a matter of law, are not required to give advice in regard to the potential applicability of statutes of limitations. *Grooth v Ness*, Sup Ct Op No 370 (File No 817), 421 P 2d 624 (1966)

Applied in *Lillegraven v Tanga*, Sup Ct Op No 109 (File No 173), 375 P 2d 139 (1962); *State v Baker*, Sup Ct Op No 227 (File No 428), 393 P 2d 893 (1964); *Alaska Airlines v Lockheed Aircraft Corp.*, 430 F Supp 134 (D Alaska 1977)

Quoted in *Meier v City of Ketchikan*, Sup Ct Op No 291 (File No 489), 403 P 2d 34 (1965); *Adkins v Nabors Alaska Drilling, Inc.*, Sup Ct Op No 2056 (File No 4410), 609 P 2d 15 (1980); *Nurman v Nichiro Gyogyo Kaisha, Ltd.*, Sup Ct Op No 2511 (File No 5254), 645 P 2d 191 (1982); *King v First Nat'l Bank*, Sup Ct Op No 2525 (File No 5380), P 2d (1982); *Shiffman v "K", Inc.*, Sup Ct Op

No 2843 (File No 5615, 6112, 657 P 2d 401 (1981)

Cited in *Harrow Dev. Co. v Fulton Ins. Co.*, 418 F 2d 116 (9th Cir 1969); *Robertson v Seidman & Seidman*, 682 F 2d 583 (2d Cir 1978); *Heredia Corp. v Adams*, Sup Ct Op No 2042 (File No 3880), 1966, 610 P 2d 24 (1980)

II. TORTS

A. Generally.

This section is generally considered by Alaska courts to be a "tort" statute. *Anderson v Fairchild Hiller Corp.*, 158 F Supp 976 (D Alaska 1971)

It is a "residual" statute in that it governs all claims for injury to the person unless specifically provided otherwise in some other statute. *Anderson v Fairchild Hiller Corp.*, 158 F Supp 976 (D Alaska 1971)

A tort action must be commenced within two years after the cause of action has accrued. *Silverton v Marble*, Sup Ct Op No 186 (File No 3411), 389 P 2d 3 (1964)

The uniform limitations period implicitly allows every victim of tortious conduct in Alaska, regardless of where he resides and regardless of whether the alleged tortious conduct was by a governmental unit or not, to commence an action for damages within two years without complying with any other time limit. *Johnson v City of Fairbanks*, Sup Ct Op No 1672 (File No 3444), 583 P 2d 181 (1978); *DeHusman v City of Anchorage*, Sup Ct Op No 1673 (File No 2996), 583 P 2d 791 (1978)

The statute of limitation as to torts does not usually begin to run until the tort is complete. *Austin v Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968)

When tort complete. - A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. *Austin v Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968)

Municipalities prohibited from requiring shorter notice period for tort claims. - AS 09.65.070, authorizing actions against municipalities, implicitly prohibits municipalities from requiring a potential plaintiff to submit notice of tort claims, as a condition to bringing an action, within a period shorter than the period provided by the statute of limitations. *Johnson v City of Fairbanks*, Sup Ct Op No 1672 (File No 3444), 583 P 2d

181 (1978) *InHanson v. City of Anchorage*, Sup Ct Op No 167 (File No 790) 561 P 2d 291 (1978).

#### Action for unlawful imprisonment

Allegation that defendant in his capacity as United States attorney caused plaintiff to be arrested on criminal complaints issued by codefendants without probable cause or investigation purports to state a claim of tort against defendant subject to a two-year period of limitation under this section. *Williams v. Coughlan*, 11 Alaska 147, 244 P 2d 699h (1957).

**Action to enforce liability of third person under Workmen's Compensation Law.** From the express language of the Workmen's Compensation Law as to liability of third persons, the right sought to be enforced is based on tort rather than on contract and this action is therefore the applicable statute of limitations. *Boeka v. Alaska Air Transp. Inc.*, 14 Alaska 159, 199 P Supp 695 (1 Alaska 1954).

**Wrongful interference with right to preserve dead body.** There is a claim for relief for wrongful interference with the right to preserve a dead body. *Burns v. Anchorage Funeral Chapel*, Sup Ct Op No 778 (File No 1465), 495 P 2d 70 (1972).

A claim for relief for wrongful interference with the right to preserve a dead body belongs exclusively to the surviving spouse or to the next of kin of the decedent. This substantive right is in the surviving spouse or next of kin, whether the claim is analyzed as a tortious invasion of a property right or infliction of emotional harm. *Burns v. Anchorage Funeral Chapel*, Sup Ct Op No 778 (File No 1465), 495 P 2d 70 (1972).

It is generally the law in this country that the right to possess, preserve and bury, or otherwise dispose of a dead body belongs to the surviving spouse and, if none such, then to the next of kin in the order of their relation to the decedent, that a violation of that right is a tort, and that damages for mental suffering are recoverable for a willful invasion of the rights relating to dead bodies. *Burns v. Anchorage Funeral Chapel*, Sup Ct Op No 778 (File No 1465), 495 P 2d 70 (1972).

**Personal injuries resulting from breach of warranty in sale of goods.** In an action to recover damages for personal injuries resulting from an alleged breach of warranty in the sale of goods, the two-year statute of limitations for personal injury actions does not apply.

*Sinka v. Northern Commercial Co.*, Sup Ct Op No 747 (File Nos 1360, 1361, 1371) P 2d 116 (1973).

Where an action is correctly brought within the framework of the Uniform Commercial Code, the applicable statute of limitations is that provided by the Code, although the damages sought are for personal injuries. *Sinka v. Northern Commercial Co.*, Sup Ct Op No 747 (File Nos 1360, 1361, 491 P 2d 116 (1973).

By the repeal of section provided by the Alaska legislature in enacting the Uniform Commercial Code 9-10-101, ch 114, S.A. 1967, providing in part that "all acts and parts of acts inconsistent with this Act are hereby repealed," the general two-year statute of limitations this section was repealed to the extent that it might otherwise control recovery for personal injuries resulting from breach of warranty under the Code. *Sinka v. Northern Commercial Co.*, Sup Ct Op No 747 (File Nos 1360, 1361, 491 P 2d 116 (1973).

**Action against bank official by depositor for conversion.** Action against bank official for conversion of payroll checks endorsed by plaintiff for deposit to his bank account and for passing forged checks written on plaintiff's account was governed by six-year statute of limitations in AS 09-10-050 rather than two-year statute of limitations in this section. *Veat v. First Nat'l Bank*, Sup Ct Op No 7629 (File No 5969), 659 P 2d 1233 (1981).

**Slipping on ice as breach of implied contractual duty.** — See same catchline in note to AS 09-10-050.

#### B. Strict Liability

There is no other statute specifically limiting the period for bringing strict liability claims. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

To require strict liability claims to be brought within two years is a reasonable interpretation of the public policy of Alaska. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

Although the genesis of strict liability lies in warranty theory, it is now clear that breach of warranty itself was originally considered a species of fraud or misrepresentation, sounding in tort. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

Even in its present form, strict liability is more nearly akin to tortious negligence than to contractual warranty, because no

contract is required and because strict liability may not be disclaimed. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

**But longer limitation allowed those in privity with defendant.** There are valid reasons for allowing a longer limitation period under AS 45-05-242 (now AS 45-02-125), to plaintiffs who have contracted with the defendant, or who otherwise satisfy the privity requirement, than to those who have not. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

**As to reasons for allowing longer limitation period to plaintiffs contracting with the defendant, see** *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

**Cause of action based on damage to a generator due to engine failure was barred by the two-year statute of limitations applicable to "economic loss" caused by a defective product.** *Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.*, Sup Ct Op No 2286 (File No 4690), 623 P 2d 324 (1981).

#### C. Misrepresentation and Negligence

**Misrepresentation and negligence are tort concepts, not contract, and the two-year statute of limitation (this section) respecting torts governs.** *Austin v. Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

**Negligent misrepresentation is a tort falling under the two-year statute of limitations.** *Estate of Waters v. Hoadley*, Sup Ct Op No 618 (File No 1169), 474 P 2d 85 (1970).

A cause of action for misrepresentation in a business transaction is complete when the injured person has been deprived of his property or otherwise has suffered pecuniary loss or has incurred liability as a result of a misrepresentation. *Austin v. Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

Where the essence of a plaintiff's complaint in an action for legal malpractice was negligence, the period of limitation found in this section, rather than AS 09-10-060, applied. *Van Horn Lodge, Inc. v. White*, Sup Ct Op No 2336 (File No 4447), 627 P 2d 641 (1981).

**Legal malpractice.** — This section is the proper statute to be applied in attorney malpractice actions based on negligence. *Greater Area, Inc. v. Backman*, Sup Ct Op No 2589 (File No 5557), P 2d (1982).

Statute of limitations for legal malpractice does not begin to run until client discovers or reasonably should discover existence of all elements of his cause of action, thus if client discovers his attorney's negligence before he suffers consequential damages, the statute of limitations will not begin to run until client suffers actual damages. *Greater Area, Inc. v. Backman*, Sup Ct Op No 2589 (File No 5557), P 2d (1982).

**Negligent failure to procure earthquake coverage.** Where plaintiff's claim based upon defendant's negligent failure to procure or cost earthquake coverage, and plaintiff's claim based upon defendant's negligent misrepresentation, did not ripen until the earthquake loss occurred in March 1964, the statute of limitation did not commence to run until that time, and plaintiff's action, instituted in February of 1966, was brought within the two-year statutory period. *Austin v. Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

Where plaintiff's interest was in being protected against earthquake loss, there was no invasion of infringement upon or impairment of such interest until there had been a loss by earthquake, in case until that event occurred such protection could avail the plaintiff nothing. His interest which is legally protected was in being such protection when it was needed, at the time of the loss and not before. Thus, there must be an injury or harm to plaintiff as a consequence of defendant's negligence to serve as a basis for recovery of damages before the tort becomes actionable and before the period of limitation commences to run. *Austin v. Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

#### D. Label

**When period of limitations begins to run.** — Normally the period of limitations for libel begins to run when the libel is "published." *Ches v. Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1218 (1977).

"Publication" imparts communication to a third party. *Ches v. Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

**But courts have differed on exactly when it occurs.** *Ches v. Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

**When publication occurred.** — Where defendant wrote a letter to plaintiff's employer, accusing plaintiff of conduct

which was highly unethical and a gross misapprehension, and a week later the employee wrote a letter to defendant in which he acknowledged that he had received the letter "publication" of the alleged libel occurred on the date the employee wrote his reply. *Chist v Stern*, Sup Ct Op No 1400 (File No 2710, 2711) 561 P 2d 1216 (1977).

**III. FORFEITURE OR PENALTY TO STATE.**

Item (2) of this section deals with civil penalties. *State v American Can Co*, Sup Ct Op No 41 (File No 76), 362 P 2d 196 (1961).

**Action to forfeit contraband.** — Since a forfeiture action is independent of any other criminal proceedings, this can only occur as an action must be brought within two years of the seizure. *United States v Three Thousand Two Hundred Thirty Six Dollars*, 167 F Supp 495 (D Alaska 1958).

Where seizure was effected in a gambling raid on September 11, 1955 and the libel in rem filed on December 12, 1957, the libel was barred by this section. *United States v Three Thousand Two Hundred Thirty Six Dollars*, 167 F Supp 495 (D Alaska 1958).

**IV. OTHER STATUTORY LIABILITY.**

**Tax refunds.** — The taxpayer is not limited to recovery of overpayments according to AS 43.16.010. The common law has long recognized a cause of action in assumpsit to recover overpayments of taxes. Because the statutory remedies do not explicitly supersede the common law remedies, they are intended as a supplement, and the earlier remedy in assumpsit is still available. Hence, a claim for a refund was timely under AS 09.10.050, the six year statute of limitations applicable to recovery of personal property. *State v Wakefield Fisheries, Inc.*, Sup Ct Op No 779 (File Nos 1497, 1498), 495 P 2d 168 (1972).

**Borough's levy of past years' taxes.** — Six year statute of limitations provides for in AS 09.10.120, rather than two year limitation provided for in AS 09.10.070(a)(3) was applicable to borough's efforts to levy past years' taxes. *Alacum, Inc v North Slope Borough*, Sup Ct Op No 2622 (File Nos 6037, 6050), P 2d 1194 (1963).

**Recovery of back pay for discrimination under the Equal Pay for Women Act** is limited to that earned within two years prior to commencement

of her suit. *Brown v Wood*, Sup Ct Op No 1551 (File Nos 2501, 2505), 535 P 2d 100 (1976) modified on other grounds 592 P 2d 1250 (1979).

**V. PROCEDURE**

**A. Generally**

**Amendment related back to date of original complaint.** — Since the amendment adding parties plaintiff related back to the date of the original complaint, the two year tort statute of limitations was not bar to prosecution of the claim for relief. *Huena v Anchorage Funeral Chapel*, Sup Ct Op No 728 (File No 1465), 495 P 2d 70 (1972).

Where an amendment to a complaint did not state a new claim for relief but related back to the date of the original complaint, it was not barred by the statute of limitations. *Jakobs v Holland*, Sup Ct Op No 1018 (File Nos 1724, 1795), 520 P 2d 297 (1974).

**Aid cross claim.** — Cross claim more than two years after the cause of a statute but less than two years after the original answer was filed and was not barred by this section. *Estate of Thompson v Mercedes Benz, Inc.*, Sup Ct Op No 962 (File No 1672), 514 P 2d 1269 (1973).

**Addition of defendant after expiration of statute of limitations.** — Trial court did not abuse its discretion in finding that Alaska case law did not mandate the addition of a party defendant after the expiration of the applicable statute of limitations. *McCracker*, Sup Ct Op No 1389 (File No 1474), 577 P 2d 771 (1977).

**Claim not barred.** — The day for the running of the statute of limitations fell on a Saturday, when the court was closed, and the following Monday was a legal holiday, the claim which was filed on the next Tuesday was not barred by the statute of limitation. *Davis v Sturm, Ruger & Co.*, Sup Ct Op No 1356 (File No 3141), 557 P 2d 1133 (1976).

**Equitable estoppel.** — The doctrine of equitable estoppel as a prohibition against unjust reliance upon a statute of limitations is a salutary one and therefore the supreme court adopts the rule for Alaska. *Growth v Nease*, Sup Ct Op No 370 (File No 617), 421 P 2d 624 (1966).

Both federal and state authorities have established that the doctrine of equitable estoppel is available as a bar to inequitable reliance upon statutes of limi-

tiniana. *Dumeth v Nease*, Sup Ct Op No 370 (File No 617), 421 P 2d 624 (1966).

**Establishing equitable estoppel.** — To establish an equitable estoppel it is generally necessary that the party seeking to assert it show that the other party made some misrepresentation, or false statement or acted fraudulently, and that he reasonably relied on such acts or representations of the other party, and due to such reliance did not institute suit timely. *Growth v Nease*, Sup Ct Op No 370 (File No 617), 421 P 2d 624 (1966).

There is authority to the effect that equitable estoppel requires more than inaction or silence by a person who has no obligation to speak or act. Yet there can be circumstances where inaction or silence combined with acts or representations can give rise to an appropriate situation calling for the application of the estoppel doctrine. *Growth v Nease*, Sup Ct Op No 370 (File No 617), 421 P 2d 624 (1966).

A party who fraudulently conceals from a plaintiff the existence of a cause of action may be estopped to plead the statute of limitations if the plaintiff's delay in bringing suit was occasioned by reliance on the false or fraudulent representations. *Chist v Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

Where plaintiffs were never lulled into a false sense of security by any specific conduct on the part of the defendant implying that the statute of limitations would not be raised, there is no evidentiary basis for invocation of the doctrine of equitable estoppel. *Garfield v Clark*, Sup Ct Op No 1476 (File No 2867), 567 P 2d 77 (1977).

**Defendants estopped to urge statute of limitations.** — Repeated promises to pay the taxes in consideration of forbearance by the city from taking legal steps to collect them in reliance upon which the city forbore to take legal action estopped the defendants from urging the statute of limitations. *Dammert v City of Klawock*, 14 Alaska 20, 199 F 2d 32 (9th Cir 1952).

**Defendant not estopped to plead statute.** — See *Chist v Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

**Waiver of statute.** — An escrow agreement as to payment of taxes constituted a waiver of the statute of limitations. *Dammert v City of Klawock*, 14 Alaska 20, 199 F 2d 32 (9th Cir 1952).

The running of the limitation period is an affirmative defense which if not pleaded was waived. *Municipality of Anchorage v Sisters of Providence in Wash., Inc.*, Sup

Ct Op No 2144 (File Nos 5017, 5018, 5129), 628 P 2d 22 (1981).

**Application of foreign period of limitations.** — Where the foreign limitation qualifies or conditions the right of action, Alaska will apply the foreign period of limitations, even though longer than Alaska's own period of limitations. *Marine Constr & Design Co v Vessel Trim*, Sup Ct Op No 448 (File No 821), 414 P 2d 683 (1967).

**B. Tolling Statute**

**Commencement of the statute interrupts the running of the statute.** *Silverton v Marler*, Sup Ct Op No 186 (File No 341), 389 P 2d 3 (1964).

**And Civ. R. 3 controls.** — With respect to the manner of commencing a civil action as it may bear upon the time for commencing the action under a statute of limitations, there is no reason why Civ. R. 3 should not be controlling. *Silverton v Marler*, Sup Ct Op No 186 (File No 341), 389 P 2d 3 (1964).

**Definition of "commenced" in Civ. R. 3.** — In Civ. R. 3, which states that "a civil action is commenced by filing a complaint with the court," it is to be found the definition of the term "commenced" as used in statutes of limitations. *Chist v Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

**Filing of the complaint tolls the statute of limitations.** *Silverton v Marler*, Sup Ct Op No 186 (File No 341), 389 P 2d 3 (1964).

The two year statute did not constitute a defense to plaintiff's claim, because the running of the statutory period was interrupted by the filing of her complaint before the expiration of two years from the date of her injury. *Silverton v Marler*, Sup Ct Op No 186 (File No 341), 389 P 2d 3 (1964).

**And not the further act of issuing summons.** — See *Silverton v Marler*, Sup Ct Op No 186 (File No 341), 389 P 2d 3 (1964).

**Civil R. 27 petition to perpetuate testimony is not a complaint for the purposes of Rule 3 and the statute of limitations.** *Chist v Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

**Statutes of limitation aided by substituted service.** — Statutes of limitations attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses. In the attainment of those ends, substantial aid is provided by statutes establishing

substituted service. By this means, the equivalent of personal service is made obtainable on absent defendants for purposes of lapse of time. Alaska statutes place an absent defendant in a motor vehicle case on an equal plane with those present within the state. Thus, where substituted service is available, the usual statute of limitations should apply unaltered. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 468 P.2d 716 (1971).

A tolling provision will not operate to suspend a statute of limitations when substituted service is available in an auto accident case. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 468 P.2d 716 (1971).

To apply the tolling statute (AS 09.10.130) to a situation where the defendant is at all times amenable to service is repugnant to the general purpose of statutes of limitations. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 468 P.2d 716 (1971).

In cases arising from motor vehicle accidents in which the defendant subsequently leaves the state, AS 09.05.020 operates in conjunction with AS 09.05.040 to authorize service upon an absent defendant by serving the commissioner of revenue. Pursuant to these provisions, the commissioner of revenue is, as a matter of law, appointed as defendant's statutory agent so that service upon him is of the same effect and validity as personal service upon the defendant. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 468 P.2d 716 (1971).

Tolling of statute by concealment or nondisclosure of negligence. — A concealment or nondisclosure of negligence tolls the statute until the injured party has actual notice of the negligence or, in the exercise of ordinary care, should have known of the negligence. *Sharrow v. Archer*, Sup. Ct. Op. No. 2609 (File No. 6135), 658 P.2d 1311 (1983).

Section was tolled during plaintiff's minority, i.e., until he was 19 years of age. *Turnbull v. Honkowsky*, 274 F. Supp. 733 (D. Alaska, 1967), aff'd, 419 F.2d 104 (9th Cir. 1969).

**Collateral references.** — 51 Am. Jur. 2d, Limitation of Actions, §§ 102-108; 63 C.J.S., Limitation of Actions, §§ 74, 174-176.

Estoppel against defense of limitations in tort actions. 77 ALR 1044.

Computation of the limitations period provided by this section subsequent to the removal of the disability of minority is to be made by including the first day and including the last. *Tutobull v. Bonkowsky*, 274 F. Supp. 733 (D. Alaska, 1967), aff'd, 419 F.2d 104 (9th Cir. 1969).

Section is not tolled by imprisonment unless plaintiff imprisoned on date of last tort. — AS 09.10.140 does not toll the two year limitation provided by this section where the record in the case does not show that on the latest date of the tortious act plaintiff was imprisoned. *Williams v. McNulty*, 16 Alaska 509, 239 P.2d 150 (9th Cir. 1956). See also *Williams v. Strand*, 16 Alaska 512, 239 P.2d 151 (9th Cir. 1956).

Tolling of statute of limitations during disability of parolee. — See *Hush v. Reid*, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973).

Time spent on parole not to toll section after December 14, 1973. — After December 14, 1973, the date of the opinion in *Hush v. Reid*, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973), holding former AS 11.05.070 (now AS 33.30.310) and AS 33.15.190 unconstitutional in depriving parolees of the right to initiate civil suits, time spent on parole shall not toll the statute of limitations, provided however, that any person on parole as of that date shall, in any event, have one year from that date within which to bring an action. *State v. McCracken*, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

But section was tolled by time spent on parole prior to that date. — See *State v. McCracken*, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

The supreme court's finding in *Hush v. Reid*, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973), that former AS 11.05.070 (now AS 33.30.310) and AS 33.15.190 were unconstitutional in depriving the parolee of access to the courts may not properly be considered retroactive. *State v. McCracken*, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

Limitation of actions as to slanders of title based on recording of instrument purporting to affect title. 39 ALR2d 880.

When statute of limitations begins to run against action for false imprisonment or false arrest. 49 ALR2d 922.

Application of statute of limitations to damage actions against public accountants for negligence in preparation of professional services. 26 ALR2d 1419.

What constitutes "publication" of libel in order to start running of period of limitations. 42 ALR2d 807.

What statute of limitations covers action for indemnity. 51 ALR2d 831.

When statute of limitations commences to run against claim for contribution or indemnity based on tort. 57 ALR2d 867.

What statute of limitations applies to action for contribution against joint tortfeasor. 57 ALR2d 927.

Statute of limitations in illegitimate or bastardy proceedings. 59 ALR2d 685.

Provision of attempt by seller to repair goods as tolling statute of limitations for breach of warranty. 64 ALR2d 1277.

Effect of unpaid employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident. 71 ALR2d 849.

Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident. 72 ALR2d 1085.

Minority of surviving children as tolling limitation period in state wrongful death action. 85 ALR2d 102.

Applicability to action against nurse in her professional capacity of statute of limitations applicable to malpractice. 88 ALR2d 1116.

What statute of limitations governs actions based on strict liability in tort. 91 ALR2d 455.

When does statute of limitations begin to run upon an action by subrogee insurer against third party tortfeasor. 91 ALR2d 814.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedure. 91 ALR2d 218.

What statute of limitations governs damage action against attorney for malpractice. 2 ALR4th 284.

What statute of limitations governs action arising out of transaction consummated by use of credit card. 2 ALR4th 677.

When statute of limitations begins to run in dental malpractice suits. 1 ALR4th 118.

What statute of limitations governs physician's action for wrongful denial of hospital privileges. 4 ALR4th 1214.

Availability of and time for bringing action against former director, officer, or stockholder in divisive corporation for personal injuries incurred after final dissolution. 20 ALR4th 414.

**Sec. 09.10.080. Actions to be brought in one year.** No person may bring an action against a peace officer for the escape of a person arrested or imprisoned on civil process unless commenced within one year. (S 108 ch 101 SLA 1962)

#### NOTES TO DECISIONS

Only this section and AS 09.10.090 provide for one year statute of limitations. — See *Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc.*, Sup. Ct. Op. No. 940 (File No. 1780), 614 P.2d 223 (1973). No provision whatever is made for a

limitation period of less than one year from the accrual of the cause of action. *Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc.*, Sup. Ct. Op. No. 940 (File No. 1780), 614 P.2d 223 (1973).

**Sec. 09.10.090. Actions for penalty.** No person may bring an action upon a statute for the penalty given in whole or in part to the person who will prosecute for the same unless commenced within one year after the commission of the offense. If the action is not commenced within one year by a private party, it may be commenced on behalf of the state within two years after the period of limitation by a private party has expired. (S 109 ch 101 SLA 1962)



Engineers  
Planners  
Economists  
Scientists

February 21, 1989

Representative Peter Goll  
Co-Chairman, House Judiciary Committee  
House of Representatives  
P.O. Box V  
Juneau, AK 99811

Dear Representative Goll:

Subject: House Bill No. 166, Tort Reform

I am writing to urge your favorable consideration of HB 166, the omnibus tort reform bill.

This bill will bring essential judicial reform to many public and private business sectors. In the case of my own business, reestablishing Statutes of Repose and Limitation, as provided in Sections 09.10.052 and 09.10.070 of the bill, is especially vital.

A copy of a "rationale" paper put out by the American Consulting Engineers Council is attached. This paper lists five important reasons for a strong statute of repose. These are all patently fair reasons which we believe should transcend any argument that a statute of repose is a special interest issue.

The stated purpose of HB 166 is, ". . . to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." For companies such as CH2M HILL, which has been established in Alaska for over 20 years, the fulfillment of that purpose by passing statutes of repose and limitation is essential to the future stability of our business.

Thank you in advance for your positive support

Sincerely,

Dan M. Rowley, P.E.  
Alaska Regional Manager

bjja:079:34



# American Consulting Engineers Council

1015 Fifteenth Street, N.W. Washington, D.C. 20005

202-347-7474

December, 1987

Rationale for

## STATUTES OF REPOSE

For actions arising out of "improvements to real property" a special statute exists in many states to limit the time a claim can be brought for design deficiencies. These special statutes are commonly called "statutes of repose." They differ from statutes of limitations in that the time period in which to bring an action usually begins to run from the date of substantial completion of the project. Under a statute of limitations, the time period begins on the date of injury or discovery thereof.

There are several important reasons to support a strong statute of repose:

1. Unlike most products, the useful life of an improvement to real property can last for decades and even centuries. Evidence relative to any claim brought years after completion might be lost or destroyed, and witnesses may no longer be available. In addition, it is terribly expensive and virtually impossible to maintain records involving all past projects.
2. Data on claims filed for design deficiencies demonstrate conclusively that the vast majority of design cases arise within the first five years after completion of a project.
3. Once the owner accepts the project, all maintenance and subsequent improvements are beyond the control of other parties, including the designers of the project. Improper maintenance and repairs (or inattention to necessary maintenance and upgrading) can lead to numerous claims, and it is not fair to bring the design professional into the suit.
4. Without a statute of repose, design professionals may be unfairly exposed to evolving standards and technology being applied to a dated project. Often, it is very difficult for a defendant to prove what the "state-of-the-art" standards were at the time the project was designed. As a result, a defendant's design might be judged against current standards.
5. The expense of living with liability exposure for an infinite period of time is an unfair burden both for design professionals and their clients. The cost of insurance to cover all past work, no matter how long ago it was designed, against the threat of litigation is an expense carried by design professional and client alike.

It should be understood that even if the time period to make a claim against a design professional has expired under a statute of repose, an injured plaintiff still has recourse to seek and obtain compensation. A statute of repose for design deficiencies merely helps the plaintiff to focus the action on the party or parties who may be truly at fault.



# Alaska Academy of Trial Lawyers

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February 16, 1990

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The Honorable Peter Goll  
House of Representatives  
P.O. Box V  
Juneau, Alaska 99811

Re: Collateral Source Rule

Dear Representative Goll:

Thank you for the opportunity to comment concerning the collateral source rule. Before addressing the specific provisions of section 10 of CSHB166, I would like to offer general observations about the collateral source rule in Alaska.

For well over 100 years, the common law rule was that a wrongdoer should pay all the damages he caused. Accordingly, the law did not allow the wrongdoer to benefit from amounts the victim received from collateral sources. That rule has already been changed in Alaska. As part of the 1986 tort reform package, the legislature enacted AS 09.17.070. In a nutshell that statute provides that after a trial results in an award to the injured victim, the defendant may ask for a hearing and present evidence as to the collateral benefits received by the victim. The victim may introduce evidence as to the premiums he paid for the collateral benefits, as well as the attorneys' fees he incurred in obtaining the award for his injuries. If the collateral benefits exceed these amounts, the judge is required to reduce the injury award by the amount of excess collateral benefits.

That statute adequately covers the collateral benefit question. It was enacted as part of the compromise legislation agreed to by the tort reform group. Yet as soon as the compromise legislation was passed, they initiated new efforts to make further inroads on victims' rights under the guise of changing the collateral source rule. I am confident the people lobbying you have no underlying facts to show the current statute does not work.

The Honorable Peter Goll  
February 16, 1990  
Page 2

It is curious that you were visited by doctors about this proposal. In medical malpractice cases collateral benefits are not controlled by AS 09.17.070 but by AS 09.55.548. The doctors probably do not know or understand this. Sometimes they are so eager to do away with the civil justice system that they become mere pawns of the insurance industry's "reform" group.

I assume the "reformers" claim that victims are receiving windfalls or double recovery. This is simply not the case. Virtually every health, automobile or liability insurance policy contains a subrogation clause. Those provisions provide that if monies are paid to the insured, who later recovers from a third party those same damages, the insurance company must be reimbursed. Such provisions are almost universal and prevent double recovery. As a person representing victims for the past 15 years, I assure you they are not receiving double recovery.

This is no "free lunch" on this issue. As you know, the costs of health insurance and workers compensation insurance are already too high. If the innocent insurer is denied its subrogation rights, it will have a worse loss experience. This will be reflected in higher rates, whether we are talking about health insurance, collision insurance, or workers compensation insurance. Instead of the wrongdoer's liability insurer paying the victim's loss, the loss will be improperly shifted to some other entity. There will not, however, be any net saving to consumers.

By the same token, changing the collateral source rule would have virtually no impact on liability insurance rates. In a 1986 filing with the Florida Insurance Commissioner, Aetna Insurance Company projected that changing the collateral source rule would lower liability insurance rate by only .4% (.004)! That amounted to \$2.00 on a \$500.00 premium. Even the most rabid "reformers" would have to admit this is an insignificant amount. Since AS 09.17.070 already changed the common law rule, however, any premium reduction from this proposed additional change would be nonexistent.

The Honorable Peter Goll  
February 16, 1990  
Page 3

As noted above, existing AS 09.17.070 mandates that the trial judge shall reduce an award by the amount of the excess collateral benefits. Given the existence of that remedy, it is difficult to see why further legislation is even being requested. It is certainly not required. I will, however, point out problems with the specific language of the proposal.

First, the collateral sources listed in section (a) are generally subrogated to the victim's rights and therefore have the right to the return of their money. For example, employers and their workers compensation insurers have a statutory lien and the right to recover their payments in the event the victim is successful in a lawsuit against a third party. See AS 23.30.015(a) & (i). This proposed statute is inconsistent with that existing workers compensation statute. It is also inconsistent with federal statutes giving the United States government the right to subrogated reimbursement of its payments to injured workers. See 5 U.S.C. § 8131. I cannot see how the state can successfully override a controlling federal statute.

As noted above, virtually all insurance policies have subrogation clauses. The prospect of declaring all those subrogation clauses void should give pause to legislators faced with this proposal. As written, however, this proposal is even more suspect. It does not void all such clauses, but arbitrarily takes away the right to subrogation if a defendant in a civil action elects to pursue the procedure outlined in the proposed statute. Thus if Friendly Health Insurance pays two identical claims to two victims, it would have subrogation rights in respect to both payments. If one of the wrongdoers elected to follow the procedure in the proposed statute, the election would deprive the insurer of its subrogation rights with respect to that claim. From a constitutional point of view, it is difficult to see what rational basis the legislature might have to justify giving this power to wrongdoers.

Since existing AS 09.17.070 already remedies any problem in the collateral source arena, I suspect the main reason the "reformers" are pushing the new bill is to

The Honorable Peter Goll  
February 16, 1990  
Page 4

change the procedural aspects. They want all this information dumped in the laps of jurors. The obvious reason is a hope to prejudice jurors against the victim. The wrongdoers obviously want to put into evidence collateral payments in hopes the jury will, in effect say "Hey, this guy has already been paid. What's he doing here?" Their confusion could well result in victims being denied the damages to which they are entitled. There is simply no reason to inject such collateral issues into the trial. The trial should focus on the liability of the wrongdoer and the total damages sustained by the victim. Any necessary adjustments are already adequately covered by AS 09.17.070. That statute is carefully drawn, requires that an award be reduced by excess collateral benefits, and sets out a precise formula by which that determination is to be made. That statute handles the matter in a fair, well defined way. It should not be changed.

Thank you again for the opportunity to comment on this matter. If anything in this letter is unclear or if you have additional questions, I would be pleased to discuss them. If you or members of the Judiciary Committee have additional questions, the Academy would be pleased to comment upon them or provide any testimony you desire.

Very truly yours,

ATKINSON, CONWAY & GAGNON

By

  
W. Michael Moody

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## CONSTITUTIONAL CHALLENGES TO WASHINGTON'S LIMIT ON NONECONOMIC DAMAGES IN CASES OF PERSONAL INJURY AND DEATH

In 1986 the Washington legislature passed a tort reform act<sup>1</sup> to ameliorate a perceived crisis in the availability and cost of liability insurance.<sup>2</sup> One of the act's provisions limits the amount of noneconomic damages recoverable in personal injury and wrongful death actions.<sup>3</sup> Cases to which this damages limit applies began coming to trial only in the past few months. In October 1987, one judge applied the limit to reduce a jury verdict by over one million dollars.<sup>4</sup>

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1. Tort Law Revisions (Tort Reform Act), ch. 305, 1986 Wash. Laws 1354 (codified as amended in scattered titles of WASH. REV. CODE (1987)).

2. *Id.* § 100.

3. *Id.* § 301 (codified at WASH. REV. CODE § 4.56.250 (1987)). The section provides in relevant part as follows:

[(1)] (b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

4. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6 (Wash. Super. Ct. Oct. 30, 1987). In *Sofie* the jury awarded the plaintiff \$1,345,833, of which the jury allocated \$1,154,592 to noneconomic damages. Special Verdict Form at 2. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6 (Wash. Super. Ct. Oct. 30, 1987). The court reduced noneconomic damages to \$125,136 and granted the plaintiff a judgment of \$316,377, in conformity with the statutory cap. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6, slip op. at 2-3 (Wash. Super. Ct. Oct. 30, 1987).

Some trial courts have held the Washington limit unconstitutional. *E.g.*, *Carter v. Fibreboard Corp.*, No. 87-2-03555-7 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988) (defense of Section 4.56.250 damages limit struck down as violative of equal protection and jury trial guarantees of Washington constitution); *Foster v. Fibreboard Corp.*, No. 87-2-05629-5 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (defense of Section 4.56.250 struck down on equal protection and jury trial grounds).

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THE ASSISTANT  
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Similar damages limits have been challenged in other states on numerous federal and state constitutional grounds, including substantive due process,<sup>5</sup> equal protection,<sup>6</sup> a right of trial by jury,<sup>7</sup> special legislation,<sup>8</sup> special privilege,<sup>9</sup> and a right of access to the courts.<sup>10</sup> By a slight majority, courts have declared the limits unconstitutional.<sup>11</sup>

This Comment considers the constitutionality of the Washington cap on noneconomic damages. The Comment briefly reviews the recent legislation of medical malpractice and tort reform damages ceilings and judicial decisions on the constitutionality of such ceilings. The Comment then analyzes the constitutionality of the Washington limit under the substantive due process and equal protection guarantees of the federal and state constitutions.<sup>12</sup> Because under the federal constitution a court should give the statute only minimal scrutiny, the statute probably does not offend fourteenth amendment protections. Under the Washington Constitution, however, a court should give the statute intermediate scrutiny. Under intermediate scrutiny a court probably will hold that the limit violates the state equal protection guarantee, but a court probably will not hold the limit violative of substantive due process. Under the right of trial by jury guarantee of the state constitution, the statute also is unconstitutional.<sup>13</sup>

5. *E.g.*, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 157, 695 P.2d 665, 679, 211 Cal. Rptr. 368, 382, *appeal dismissed*, 474 U.S. 892 (1985).

6. *E.g.*, *Arneson v. Olson*, 270 N.W.2d 125, 129 (N.D. 1978).

7. *E.g.*, *Boyd v. Bulala*, 647 F. Supp. 781, 788 (W.D. Va. 1986).

8. *See, e.g.*, *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736, 743 (1976) (citing ILL. CONST. art. IV, § 13 prohibition of special legislation).

9. *E.g.*, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657, 668-69 (1977).

10. *E.g.*, *Smith v. Department of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987). For an annotated list of many of the recent decisions in this area, see Table: Reported Decisions on the Constitutionality of Medical Malpractice and Tort Reform Damages Limits [hereinafter Table], *infra* p. 675. For citations to these decisions, see *infra* notes 38-49.

11. *See infra* Table p. 675.

12. Federal and Washington constitutional challenges are considered separately here because the proper standard of review in substantive due process and equal protection challenges of the damages limit should be higher under the Washington Constitution than under the federal constitution. *See infra* notes 106-28 and accompanying text.

13. For additional commentary on the constitutionality of the Washington noneconomic damages limit, see Wiggins, Hamitiaux & Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193 (1986/87); Development in the Law, *The 1986 Washington Tort Reform Act: Noneconomic Damages Cap (RCW 4.56.250)*, 23 WILLAMETTE L. REV. 215 (1987).

## Washington's Noneconomic Damages Limit

### I. BACKGROUND

#### A. Insurance Crises and Damages Limits

Many damages limits now in effect are part of state medical malpractice legislation of the mid-1970's.<sup>14</sup> During that period, state legislatures perceived that medical malpractice insurance had become widely unavailable and increasingly expensive.<sup>15</sup> Virtually all legislatures responded to this insurance crisis by enacting laws to control medical malpractice litigation.<sup>16</sup> In at least one-fifth of the states, these laws included provisions to limit recoverable damages.<sup>17</sup> The provisions limit either the liability of each defendant,<sup>18</sup> the recovery of each plaintiff,<sup>19</sup> or both.<sup>20</sup> Nearly all the limits are flat figures<sup>21</sup> that apply either to noneconomic damages only,<sup>22</sup> nonmedical damages only,<sup>23</sup> or all damages.<sup>24</sup>

A different insurance crisis arose in the mid-1980's. During that period, the cost of liability insurance increased not only for health care providers<sup>25</sup> but also for day care centers, architects, commercial fishermen, and other businesses and professions.<sup>26</sup> Many businesses and local governments found liability insurance difficult to obtain.<sup>27</sup> In

14. See, e.g., statutes cited *infra* notes 18-24.

15. See Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 759-60 (1977); Note, *Fein v. Permanente Medical Group: Future Trends in Damage Limitation Adjudication*, 80 NW. U.L. REV. 1643, 1649 n.49 (1986).

16. See, e.g., Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 419 (1979).

17. See Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 945 (1984).

18. E.g., TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988).

19. E.g., OHIO REV. CODE ANN. § 2307.43 (Anderson 1981).

20. E.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); NEB. REV. STAT. § 44-2825 (Supp. 1986).

21. E.g., OHIO REV. CODE ANN. § 2307.43 (Anderson 1981) (\$200,000 limit on general damages); W. VA. CODE ANN. § 55-7B-8 (Michie Supp. 1987) (\$1,000,000 limit on noneconomic damages).

22. E.g., CAL. CIV. CODE § 3333.2 (West Supp. 1988).

23. E.g., LA. REV. STAT. ANN. § 40:1299.42 (West 1977 & Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988).

24. E.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); NEB. REV. STAT. § 44-2825 (Supp. 1986).

25. Bell, *supra* note 17, at 939; Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 195 n.1 (1985), reprinted in 35 DEF. L.J. 359 (1986).

26. Newsday, Oct. 29, 1985, at 11, col. 3.

27. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 333-34 n.19 (1987) (citing U.S. ATTY'S GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6-14 (1986)).

Washington State, a legislative committee formed to study the crisis found that it had been caused by a combination of poor management practices in the insurance industry and rising litigation costs and awards.<sup>28</sup>

Washington was one of a number of states to respond to the crisis by enacting tort reform legislation<sup>29</sup> that included a limit on the recovery of noneconomic damages.<sup>30</sup> Under the Washington statute, the limit varies with the plaintiff's life expectancy and the average annual state wage.<sup>31</sup> The limit at present ranges from \$125,136 for a male aged sixty-four or older to \$632,606 for a newborn female.<sup>32</sup>

Washington imposes no other statutory ceiling on damages recoverable in personal injury and wrongful death actions. Other states have limited recovery of damages in common-law causes of action by such legislation as automobile accident victim compensation acts<sup>33</sup> and in statutory causes of action by such legislation as dram-shop acts,<sup>34</sup> governmental tort claims acts,<sup>35</sup> and wrongful death

28. JOINT STUDY COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY, REPORT TO THE LEGISLATURE (Nov. 13, 1985) (copy on file with the *Washington Law Review*).

29. Sugarman, *supra* note 27, at 347. Among other things, Washington's act limits noneconomic damages, provides for review of plaintiffs attorneys fees, modifies joint and several liability, modifies the statute of limitations for malpractice cases, and permits structured awards or periodic payments of future economic damages over \$100,000. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 233 n.3 (1987).

30. Sugarman, *supra* note 27, at 348 & n.115 (citing a \$500,000 limit in Alaska that does not apply to "disfigurement or severe physical impairment," a \$450,000 limit in Florida, a \$350,000 limit in Maryland, a \$400,000 limit in Minnesota that does not apply to "pain, disability or disfigurement," and an \$875,000 limit in New Hampshire); Reistrup, *The Final Frontiers*, Nat'l L.J., Dec. 7, 1987 at 13, col. 1 (citing a \$400,000 limit in Idaho, a \$250,000 limit in Kansas, a review of the reasonableness of awards over \$250,000 in North Dakota, and a \$500,000 limit in Oregon).

31. WASH. REV. CODE § 4.56.250(2) (1987).

32. See *id.*; 6 WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, WASH. PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS, App. B ("Life Expectancy Table [Revised]") (2d ed. Supp. 1984) (based on WASH. STATE INS. COMM'R, COMMISSIONERS STANDARD ORDINARY TABLE OF MORTALITY (1980)); WASH. STATE EMPLOYMENT SEC. DEPT LABOR MKT. & ECON. ANALYSIS BRANCH, AVERAGE ANNUAL STATE WAGE (1986). The limit for a 64-year-old or older male is calculated by multiplying 0.43 (the statutory factor) by a life expectancy of 15 years (the statutory minimum life expectancy) by \$19,401 (the average annual state wage).

33. See, e.g., the Illinois statute cited in *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (recovery for certain noneconomic loss tied to amount of medical expenses).

34. E.g., ILL. ANN. STAT. ch. 43, para. 135 (Smith-Hurd Supp. 1987) (\$15,000 to \$40,000 limits on recovery from liquor supplier for injuries inflicted by intoxicated person).

35. E.g., MD. CTS. & JUD. PROC. CODE ANN. § 5-403 (Supp. 1987) (liability of local government may not exceed \$200,000 per individual claim and \$500,000 per total claims arising from same tortious occurrence); N.H. REV. STAT. ANN. § 507-B:4 (Supp. 1987) (limits of \$150,000 per claimant and \$500,000 per occurrence on amount recoverable in personal injury action against governmental subdivision).

## Washington's Noneconomic Damages Limit

acts.<sup>36</sup> Under the federal Price-Anderson Act, Congress imposes a limit of \$560,000,000 on the liability of a federally-licensed nuclear power plant for damages arising from a nuclear accident.<sup>37</sup>

### B. Judicial Response to Damages Limits

Several reported decisions address the constitutionality of medical malpractice and tort reform damages limits. The medical malpractice limits of California,<sup>38</sup> Indiana,<sup>39</sup> and Nebraska<sup>40</sup> have been upheld. The tort reform limit of Florida<sup>41</sup> and the medical malpractice limits of Illinois,<sup>42</sup> New Hampshire,<sup>43</sup> North Dakota,<sup>44</sup> Ohio,<sup>45</sup> and Virginia<sup>46</sup> have been invalidated. Courts had split as to the constitutionality of the Texas medical malpractice damages cap, but the Texas Supreme Court recently held the limit invalid.<sup>47</sup> The constitutionality of the medical malpractice limits of Idaho<sup>48</sup> and Louisiana<sup>49</sup> have been considered but not fully decided in reported decisions; those courts remanded the issue to the trial level. Damages limits in state automo-

36. *E.g.*, ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1959) (recovery for wrongful death limited in some instances to from \$20,000 to \$30,000).

37. Price-Anderson Act, 42 U.S.C. § 2210 (1983 & Supp. 1986).

38. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

39. *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

40. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

41. *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987).

42. *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

43. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

44. *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

45. *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (Ohio C.P. 1985); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ohio C.P. 1976) (dictum).

46. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986).

47. *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (constitutional under federal constitution; court certified to Texas Supreme Court whether cap was valid under Texas constitution); *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986) (unconstitutional); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244 (Tex. Ct. App. 1987) (constitutional), *overruled*. *Lucas v. United States*, No. C-6181 (Tex. May 11, 1988) (WESTLAW, Allstates database); *Detar Hosp. v. Estrada*, 694 S.W.2d 359 (Tex. Ct. App. 1985) (unconstitutional); *Malone & Hyde, Inc. v. Hobrecht*, 685 S.W.2d 739 (Tex. Ct. App. 1985) (unconstitutional); *Baptist Hosp. v. Baber*, 672 S.W.2d 296 (Tex. Ct. App. 1984) (unconstitutional).

In *Lucas* the certified question of whether the cap was constitutional under the Texas Constitution was answered in the negative by the Texas Supreme Court in May 1988. The Texas court held that the damages limit violated the open courts provision of the Texas Constitution. *Lucas v. United States*, No. C-6181 (Tex. May 11, 1988) (WESTLAW, Allstates database).

48. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). On remand, the limit was held unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing *Jones v. State Bd. of Medicine*, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

49. *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985).

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bile accident victim compensation acts,<sup>50</sup> dramshop acts,<sup>51</sup> governmental tort claims acts,<sup>52</sup> and wrongful death acts<sup>53</sup> also have been challenged on constitutional grounds.

The United States Supreme Court validated two damages ceilings under the federal constitution. In *Duke Power Co. v. Carolina Environmental Study Group*<sup>54</sup> the Court upheld the federal Price-Anderson Act limit on nuclear power plant liability.<sup>55</sup> In *Fein v. Permanente Medical Group*<sup>56</sup> the Court dismissed the appeal from the California Supreme Court's ruling that California's medical malpractice noneconomic damages limit was constitutional. The Court dismissed the appeal for want of a substantial federal question.<sup>57</sup>

50. *E.g.*, *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (Illinois auto accident victim recovery limit unconstitutional).

51. *E.g.*, *Cunningham v. Brown*, 22 Ill. 2d 23, 174 N.E.2d 153 (1961) (Illinois dramshop act damages cap constitutional); *McGuire v. C & L Restaurant*, 346 N.W.2d 605 (Minn. 1984) (Minnesota dramshop act damages cap unconstitutional).

52. *E.g.*, *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983) (holding unconstitutional a statute that denied recovery of noneconomic damages and limited recovery of economic damages from state and its subdivisions, but upholding a statute that denied recovery of punitive damages); *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704 (1979) (statutory limit of \$50,000 per claimant in recovery against governmental subdivisions for bodily injury constitutional), *appeal dismissed*, 445 U.S. 921 (1980).

53. *E.g.*, *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) (wrongful death act recovery limit of \$25,000 constitutional).

54. 438 U.S. 59 (1978).

55. The Court held that the limit did not deny fifth amendment due process because the limit was supported by the need to encourage private industry to participate in the development of nuclear energy resources and by the federal government's commitment to protect the public from the consequences of a nuclear disaster. *Id.* at 84-87. The limit did not deny equal protection because the differing treatment of those injured in nuclear accidents and those injured in other types of accidents was justified by the "general rationality" of the Act. *Id.* at 93-94.

56. 474 U.S. 892 (1985).

57. *Id.* at 892. Justice White dissented to the dismissal on the grounds that the appeal raised the unresolved issue of whether due process requires a statutory compensation scheme to be a quid pro quo for the common-law or statutory remedy it replaces. *Id.* at 894-95 (White, J., dissenting).

Because *Fein* was a summary disposition, its precedential value is unclear. See *Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) ("[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'" (brackets original) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973))). Indeed, subsequent decisions by federal courts on the federal constitutionality of state medical malpractice damages limits have not recognized the *Fein* dismissal as precedential or persuasive. See, e.g., *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986) (Texas medical malpractice damages cap unconstitutional under federal and state equal protection guarantees); *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (Virginia cap unconstitutional under jury trial right of state and federal constitutions).

## II. CONSTITUTIONALITY OF THE WASHINGTON LIMIT

### A. *United States Constitution: Due Process and Equal Protection*

The fourteenth amendment to the United States Constitution provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>58</sup> Under these clauses, Washington's damages cap is subject to attack on the grounds that it denies substantive due process by depriving personal injury plaintiffs of property without providing an adequate benefit in return<sup>59</sup> and denies the equal protection of the laws by discriminating against or among injured plaintiffs. These challenges are considered, first, by determining the appropriate standard of review, and second, by applying the appropriate standard to the statute. Because the federal constitution requires only minimal scrutiny of the statute, the statute probably does not offend either due process or equal protection.

#### 1. *Standard of Review*

The United States Supreme Court currently subjects legislation challenged on substantive due process and equal protection grounds to three standards of review.<sup>60</sup> The Court applies the same standard whether the legislation is challenged on substantive due process or equal protection grounds.<sup>61</sup> Strict scrutiny is applied where the effect of legislation is either to create a suspect classification<sup>62</sup> or to infringe

58. U.S. CONST. amend. XIV, § 1.

59. Since the 1930's the United States Supreme Court has more often applied equal protection than substantive due process analysis to legislation challenged on fourteenth amendment grounds, and has rarely declared state legislation unconstitutional on substantive due process grounds. *Johnson v. E. Astt*, 217 N.W.2d 771, 775 (N.D. 1974); *J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW* 352 (3d ed. 1986). The Washington Supreme Court has become similarly disenchanted with substantive due process. See *Aetna Life Ins. v. Washington Life & Disability Guar.*, 83 Wash. 2d 523, 533-34, 520 P.2d 162, 169 (1974); *Seattle Times v. Tielsch*, 80 Wash. 2d 502, 512, 495 P.2d 1366, 1371 (1972) (Finley, J., dissenting) ("the now dormant specter of substantive due process"). Nevertheless, the United States and Washington Supreme Courts still recognize a substantive due process barrier to unreasonable state regulation. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (state criminal abortion statute violates due process); *State v. Santos*, 104 Wash. 2d 142, 148, 702 P.2d 1179, 1183 (1985) (substantive due process requires accuracy in establishing paternity).

Although a number of courts have considered substantive due process challenges of statutory damages caps, no reported decisions have invalidated medical malpractice or tort reform damages ceilings on substantive due process grounds. See *infra* Table p. 675.

60. See 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 323-26 (1986).

61. *Id.* at 323.

62. E.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (classification based on race).

on a fundamental right.<sup>63</sup> Legislation is unconstitutional under strict scrutiny if it is not necessary to the promotion of a compelling state interest. The Court recently has applied intermediate scrutiny to review legislation that creates classifications based on gender, alienage, or legitimacy.<sup>64</sup> Under the intermediate standard, legislation is unconstitutional if it does not both serve important governmental objectives and bear a substantial relationship to the accomplishment of those objectives.<sup>65</sup> Rational basis, or minimal, scrutiny is applied to most economic and social welfare legislation. Under the rational basis test there is a strong presumption of constitutionality,<sup>66</sup> and legislation is invalid only if the classification created by the legislation is not rationally related to any conceivable legitimate legislative purpose.<sup>67</sup>

The federal constitution requires only minimal scrutiny of the Washington damages ceiling. Strict scrutiny is inappropriate because the ceiling neither creates suspect classifications nor affects fundamental rights. The limit creates only economic<sup>68</sup> and age<sup>69</sup> classifications. The Court has not held such classifications suspect.<sup>70</sup> Further, the right to compensation for personal injuries is not fundamental under

63. E.g. *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy).

64. 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 326-27 (1986). The intermediate standard is known also as "means-focus," "means scrutiny," and the "substantial relationship" test. See *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399, 407 (1976), *cert. denied*, 431 U.S. 914 (1977); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831 (1980). The Court does not appear to have applied intermediate scrutiny to legislation challenged on substantive due process grounds under the federal constitution, nor has any other court in a reported decision applied intermediate scrutiny to a federal substantive due process challenge of a medical malpractice or tort reform damages cap.

65. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

66. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

67. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). At least one commentator suggests that the Court should give the rational basis test "teeth" such that a court would consider whether a basis exists in reality rather than merely in the court's imagination. G. GUNTHER, CONSTITUTIONAL LAW 604-05 (11th ed. 1985).

68. Washington's limit creates the following economic classifications: First, it classifies according to whether damages are economic or noneconomic and discriminates in the case of the latter, and second, it classifies according to whether damages are above or below the limit and discriminates in the case of the former.

69. Washington's limit classifies according to age by permitting plaintiffs with shorter life expectancies less recovery than plaintiffs with longer life expectancies. For example, Plaintiff A, a newborn male, has a life expectancy of 70.83 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. Plaintiff B, a 63-year-old male, has a life expectancy of 15.38 years. *Id.* The average annual state wage is \$19,401. WASH. STATE EMPLOYMENT SEC. DEP'T LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. The statute limits Plaintiff B's noneconomic damages to \$128,307. However, Plaintiff A's limit is \$590,894.

70. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83 (1978) (economic classification not suspect); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (age classification not suspect); 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON

strict scrutiny of state action is applied to racial, alienage, and national origin classifications. Intermediate scrutiny is applied to classifications based on gender, age, and illegitimacy. Minimal scrutiny is applied to classifications based on race, alienage, and national origin. The Supreme Court has held that a classification is not rational if it is not based on a legitimate governmental interest.

Further, the intermediate scrutiny of the Washington damages limit is appropriate because it is based on the state's fundamental interests in protecting its citizens from economic hardship.

Further, the Washington damages limit is appropriate because it is based on the state's fundamental interests in protecting its citizens from economic hardship.

CONSTITUTIONAL LAW: The Washington damages limit is known also as the "Jones v. State Bd. of Health" rule. It was first applied in *Jones v. State Bd. of Health*, 41 Wn.2d 441 (1977); *Carson v. State Bd. of Health*, 41 Wn.2d 441 (1977). The Washington Supreme Court has applied the rule to a variety of cases involving the state's regulation of health care. The rule requires that the state justify its classification under the Washington Constitution by showing that it is based on a legitimate governmental interest and that the classification is necessary to protect that interest.

One commentator has argued that a court would be oversteering the state's imagination. G. J. ...

First, it classifies plaintiffs in the case of the Washington damages limit below the limit and above the limit.

Plaintiffs with shorter life expectancies, for example, Plaintiff A, have a life expectancy of 15.38 years. Plaintiff B, on the other hand, has a life expectancy of 18.86 years. The Washington Supreme Court has held that the Washington damages limit is appropriate because it is based on the state's fundamental interests in protecting its citizens from economic hardship.

*Id.* (1978) (economic damages limit); *Id.* (1976) (economic damages limit); *Id.* (1976) (economic damages limit).

CONSTITUTIONAL LAW: TREATISE ON

the federal constitution.<sup>71</sup> A fundamental right is one explicitly or implicitly guaranteed by the constitution.<sup>72</sup> The right to recover in tort is not so guaranteed.<sup>73</sup>

Intermediate scrutiny also is inappropriate under the federal constitution. The United States Supreme Court has applied the intermediate standard only to classifications based on gender,<sup>74</sup> alienage,<sup>75</sup> and legitimacy.<sup>76</sup> The Court recently gave minimal rather than intermediate scrutiny to classifications based on age<sup>77</sup> and on the type and degree of personal injury where the affected right was the right to collect full damages.<sup>78</sup> The statute's age-based classification does incidentally create a gender-based classification, because women generally have longer life expectancies than men.<sup>79</sup> The gender-based classification, however, is only incidental to the age-based classification and does not reflect invidious gender-based discrimination. It therefore should not trigger intermediate scrutiny.<sup>80</sup> The apparent purpose of the age-based classification is to increase the potential recovery as the potential life span increases.<sup>81</sup> It is consistent with this purpose that if women live longer, they suffer greater noneconomic loss and should be allowed greater recovery.

Minimal scrutiny also is proper under the 1978 decision of the United States Supreme Court to apply minimal scrutiny to a damages

CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 335 (1986) (age classification not suspect).

71. *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985); see *Duke Power Co.*, 438 U.S. at 83-84.

72. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

73. *Boyd v. Bulala*, 647 F. Supp. 781, 787 (W.D. Va. 1986).

74. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

75. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

76. *E.g.*, *Lalli v. Lalli*, 439 U.S. 259, 268, 275-76 (1978).

77. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

78. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83-84 (1978).

79. Between birth and age 98, women have greater life expectancies than men. For example, Plaintiff B, a 63-year-old male, has a life expectancy of 15.38 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. However, Plaintiff C, a 63-year-old female, has a life expectancy of 18.86 years. *Id.* Assuming an average annual state wage of \$19,401, Plaintiff B's noneconomic damages are limited to \$128,307, while Plaintiff C might recover noneconomic damages of up to \$157,338.

80. See *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

81. The legislature's reasoning might have been that pain and suffering damages should be greater for a plaintiff who will have to endure pain and suffering longer. This "assumes that in all cases the injured victim will have ongoing injuries and ongoing future suffering, which is clearly not the case. . . . [Not] all injured victims will continue to suffer for the future." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (granting motion to strike defense of noneconomic damages cap on equal protection and right to jury trial grounds).

limit similar to the Washington cap. In *Duke Power Co. v. Carolina Environmental Study Group*<sup>82</sup> the Court found that the Price-Anderson Act's \$560,000,000 nuclear power plant liability limit was "a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'"<sup>83</sup> In the Price-Anderson Act, Congress encouraged the availability of nuclear power by reducing the liability of nuclear power plants.<sup>84</sup>

Washington's noneconomic damages limit seems to have arisen out of a similar legislative effort. The Washington legislature sought to encourage the availability and affordability of liability insurance for governmental, professional, and other entities by reducing the awards of some personal injury plaintiffs. Particularly because the Court in *Duke Power Co.* considered a damages limit, *Duke Power Co.* is strong authority that a damages cap should not be given more than minimal scrutiny under the federal constitution.<sup>85</sup>

## 2. Application of Review

Under a rational basis standard of review, Washington's noneconomic damages limit probably does not violate the federal constitutional guarantee of substantive due process. The test is whether the challenged law is rationally related<sup>86</sup> to a valid state objective.<sup>87</sup> This suggests two inquiries: First, whether there is a valid state objective, and second, whether the statute has a rational relation to that objective.

Any conceivable legitimate state objective satisfies the first requirement. The stated purpose of the Washington Tort Reform Act was to "create a more equitable distribution of the cost and risk of injury and

82. 438 U.S. 59 (1978).

83. *Id.* at 83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

84. *Id.* at 84.

85. A majority of recent decisions supports this conclusion. See *infra* Table p. 000. In *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), the New Hampshire Supreme Court concluded that heightened scrutiny of New Hampshire's recovery limit was not required under the federal constitution, since the United States Supreme Court had applied heightened scrutiny only in "cases involving classifications based upon gender and illegitimacy." *Id.* at 831. Instead, the *Carson* court went on to apply heightened scrutiny—the substantial relationship test—under the state constitution. *Id.*

86. The dictionary definitions of the key components of this test might be useful references, since courts sometimes have little guidance in applying the test other than the plain meaning of these words. "Rationally" means reasonably or sensibly. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1885 (1981). "Related" means "connected by reason of an established or discoverable relation." *Id.* at 1916. Compare the key component of the substantial relationship test: "Substantial" means materially, importantly, or essentially. See *id.* at 2280.

87. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955).

increase the availability and affordability of insurance."<sup>88</sup> The legislature determined that a serious liability insurance problem existed within the state. Insurance unavailability and unaffordability had caused some entities either to cease operating, for want of insurance, or to operate without insurance. Without insurance, many entities might be unable to pay tort judgments due injured plaintiffs. Under these facts, making liability insurance more available and affordable seems a valid legislative objective.

Moreover, the damages limit appears rationally related to the legislature's purpose. The limit is arbitrary to the extent that it relies on the product of an individual's age, the average annual state wage, and the figure 0.43.<sup>89</sup> However, the Court in *Duke Power Co.* did not find this kind of arbitrariness fatal to the constitutionality of the statute.<sup>90</sup> Limiting recoverable noneconomic damages could rationally be related to a reduction in insurer uncertainties and liabilities. This reduction could rationally be related to an increase in insurance availability and a reduction in insurance rates. Because there appears to be a rational relation between the damages limit and a valid state objective, the limit probably is not unconstitutional on federal substantive due process grounds.

Under rational basis review, Washington's limit similarly does not appear to violate the federal equal protection guarantee.<sup>91</sup> The proper test is whether the challenged classification is rationally related to a conceivable legitimate governmental purpose.<sup>92</sup> This test is virtually identical to the substantive due process test and is equally deferential to the legislature. The legislature's desire to make liability insurance available and affordable to governmental, professional, and other entities is a legitimate governmental purpose.<sup>93</sup> The economic<sup>94</sup> and age<sup>95</sup> classifications created by the damages cap seem rationally related to that purpose, because it is rational to believe that these classifications

88. 1986 Wash. Laws ch. 305, § 100.

89. See WASH. REV. CODE § 4.56.250(2) (1987).

90. *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 86 (1978).

91. *Contra Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (Washington's noneconomic damages cap denies equal protection under rational basis test).

92. *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (pertinent inquiry is whether classification advances legitimate legislative goals in a rational fashion); *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959) (legislative classification valid if based upon a state of facts that reasonably can be conceived to constitute a distinction or difference in state policy)

93. See *supra* text accompanying note 88.

94. See *supra* note 68.

95. See *supra* note 69.

will reduce tort judgments, insurer liability, and insurance rates.<sup>96</sup> The age classification, for example, is rationally related to the legitimate objective of allowing relatively greater compensation for noneconomic loss to plaintiffs who will endure their intangible losses over a longer period of time.<sup>97</sup> Because these classifications are rationally related to a legitimate governmental purpose, they do not unconstitutionally deny equal protection under the federal constitution.

### B. *Washington Constitution: Due Process and Equal Protection*

A court should apply a higher standard of review to substantive due process and equal protection challenges to the statute under the Washington Constitution than under the federal constitution. The United States Supreme Court acknowledges the authority of state courts to interpret state constitutional guarantees to be more protective of individual rights than the federal counterparts.<sup>98</sup> Washington courts in a number of cases have exercised this authority.<sup>99</sup>

The Washington Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."<sup>100</sup> Although this adopts verbatim the federal due process guarantee,<sup>101</sup> Washington courts have held that federal case law interpreting the federal due process clause does not bind judicial interpretation of the state due process clause.<sup>102</sup> The Washington Constitution provides further that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."<sup>103</sup> While the Washington Supreme Court has held that this provision and the federal equal protection provision are substan-

96. It is irrelevant that the cap is not the most direct or complete means by which the legislature could achieve its objective, because the legislature is free to attack perceived problems one step at a time. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

97. *Contra Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) ("There is no rational relationship for distinguishing between two individual victims otherwise similarly situated with respect to injury simply because of age.").

98. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

99. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 493 (1984).

100. WASH. CONST. art. I, § 3.

101. Compare *id.* with U.S. CONST. amend. XIV, § 1, cl. 3.

102. *Petstel, Inc. v. County of King*, 77 Wash. 2d 144, 153, 459 P.2d 937, 942 (1969). However, federal case law is given great weight and prevails to the extent it affords greater protection. *Id.*; *Olympic Forest Products v. Chaussee Corp.*, 82 Wash. 2d 418, 422, 511 P.2d 1002, 1005 (1973) (procedural due process challenge).

103. WASH. CONST. art. I, § 12. This section is entitled, "Special Privileges and Immunities Prohibited."

tially identical despite their differing language,<sup>104</sup> Washington courts also consistently have held that the Washington equal protection provision may be interpreted to provide greater individual rights than the federal guarantee.<sup>105</sup>

1. *Standard of Review*

Washington courts reviewing legislation under the state constitution use the same three standards of review currently applied by the United States Supreme Court under the federal constitution.<sup>106</sup> However, Washington courts do not apply these standards in the same manner as the United States Supreme Court. Instead, Washington courts sometimes subject challenged legislation to higher standards of review than are applicable under the federal constitution.

For example, in *State v. Wood*<sup>107</sup> the Washington Supreme Court noted that the United States Supreme Court had not yet found gender-based classifications suspect and thus subject to strict scrutiny.<sup>108</sup> The Washington court held, however, that under the Washington equal protection guarantee gender was a suspect classification "requiring strict scrutiny to determine whether the State has demonstrated a compelling state interest to uphold such classification."<sup>109</sup> Again, in *Darrin v. Gould*<sup>110</sup> the Washington Supreme Court acknowledged that the United States Supreme Court had found neither that gender-based classifications were suspect, nor that education was a fundamental right.<sup>111</sup> Nevertheless, the Washington court held that an education free from sexual discrimination was a fundamental right under the Washington Constitution.<sup>112</sup> *Wood, Darrin*, and other Washington

104. *State v. Perrigoue*, 81 Wash. 2d 640, 503 P.2d 1063 (1972). The federal provision requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4.

105. See, e.g., *Darrin v. Gould*, 85 Wash. 2d 859, 868, 540 P.2d 882, 888 (1975); *State v. Alfonso*, 41 Wash. App. 121, 126, 702 P.2d 1218, 1221 (1985).

106. See, e.g., *State v. Rice*, 98 Wash. 2d 384, 655 P.2d 1145 (1982) (strict scrutiny); *Griffin v. Department of Social & Health Servs.*, 91 Wash. 2d 616, 590 P.2d 816 (1979) (minimal scrutiny); *State v. Wood*, 89 Wash. 2d 97, 569 P.2d 1148 (1977) (strict scrutiny); *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975) (intermediate scrutiny); *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wash. App. 225, 660 P.2d 1124 (1983) (minimal scrutiny).

107. 89 Wash. 2d 97, 569 P.2d 1148 (1977).

108. *Id.* at 100, 569 P.2d at 1150.

109. *Id.* The United States Supreme Court has held that gender-based classifications deserve intermediate, but not strict, scrutiny. E.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

110. 85 Wash. 2d 859, 540 P.2d 882 (1975).

111. *Id.* at 865-66, 540 P.2d at 886-87.

112. *Id.* at 870, 540 P.2d at 888. The right to an education free from sexual discrimination is provided by the Washington Constitution. WASH. CONST. art. IX, § 1.

decisions, as well as case law in other states and considerations of public policy, strongly suggest that Washington courts should apply a higher standard of review to Washington's noneconomic damages cap.

a. *Washington Case Law*

Under Washington case law the right to be compensated for personal injuries is important enough that statutes burdening the right trigger intermediate scrutiny.<sup>113</sup> In 1975 the Washington Supreme Court held in *Hunter v. North Mason School District*<sup>114</sup> that

{t}he right to be indemnified<sup>115</sup> for personal injuries is a substantial property right . . . . Statutory classifications which substantially burden such rights as to some individuals but not others are permissible under the equal protection clause of the Fourteenth Amendment only if they are "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>116</sup>

Application of this intermediate standard should be extended to the right to the full recovery of noneconomic damages. A damages cap significantly affects the right to be indemnified. Indemnification is the restoration of the victim of a loss,<sup>117</sup> and in Washington such restoration includes compensation for noneconomic loss.<sup>118</sup> Washington's

113. See *Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 20 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988). No reported Washington decisions have characterized the right to recover in tort as "fundamental" so as to trigger strict scrutiny in substantive due process or equal protection analysis.

114. 85 Wash. 2d 810, 539 P.2d 845 (1975).

115. The *Hunter* court seems to have meant "indemnified" to include the proper elements of negligence damages, which at the time of *Hunter* included noneconomic damages such as pain and suffering.

116. *Hunter*, 85 Wash. 2d at 814, 539 P.2d at 848 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (additional citations omitted). The standard applied in *Hunter* is more intense than the rational basis test. See *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399, 407 (1976), cert. denied, 431 U.S. 914 (1977); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 830-31 (1980); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244, 249 (Tex. Ct. App. 1987). But see *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585, 600 (1980). The *Johnson* court applied "the fair and substantial relationship test" to Indiana's damages cap in the apparent belief that it was invoking only minimal scrutiny. See 404 N.E.2d at 600-01.

The United States Supreme Court's decision in *Duke Power Co. v. Carolina Envtl. Study Group* three years after *Hunter* suggests that the *Hunter* court was incorrect to apply intermediate scrutiny under the federal constitution. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). The *Hunter* court instead might safely have relied solely on the state equal protection clause. See *Sibley v. Board of Supervisors*, 477 So. 2d 1094, 1104-07 (La. 1985); *Carson*, 424 A.2d at 831.

117. See BLACK'S LAW DICTIONARY 692 (5th ed. 1979).

118. See *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984). The court in *Shaw* noted that Washington law permitted recovery of damages for pain and suffering and other noneconomic damages, and that under Washington law such damages were compensatory. *Id.* at 1208.

limit in one case reduced the aggregate damages award by eighty-six percent.<sup>119</sup> This is as significant an infringement on the right to indemnification as was the statute challenged in *Hunter*, which statute effectively eliminated the plaintiff's cause of action.<sup>120</sup>

*b. Case Law in Other States*

In some cases, courts in other states have applied intermediate scrutiny to state due process and equal protection challenges of damages caps. While the rational basis test has been applied more often, the decisions to invoke intermediate scrutiny show greater sensitivity to the discriminatory effect of damages ceilings and the nature of the interests at stake. In one case, a court invoked intermediate scrutiny partly in reliance on the Washington Supreme Court's decision in *Hunter v. North Mason School District*.<sup>121</sup>

In *Carson v. Maurer*<sup>122</sup> the New Hampshire court cited the Washington court's holding in *Hunter* that the right to recover for personal injuries is a substantial property right.<sup>123</sup> The *Carson* court found that characterization compelling, concluding that "the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test."<sup>124</sup> The court acknowledged that the United States Supreme Court had restricted application of intermediate scrutiny to cases involving classifications based on gender and illegitimacy, but announced that it was free to grant individuals greater protections under the state constitution.<sup>125</sup>

119. See *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6, slip op. at 2 (Wash. Super. Ct. Oct. 30, 1987).

120. The *Hunter* court invalidated a Washington statute that required persons with claims against certain governmental bodies to either file their claims with those bodies within 120 days of the date the claim arose or forfeit those claims. 85 Wash. 2d at 811 n.1, 539 P.2d at 846 n.1.

121. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (citing *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975)).

122. 120 N.H. 925, 424 A.2d 825 (1980).

123. 424 A.2d at 830.

124. *Id.* Some courts have relied on other grounds to review medical malpractice damages ceilings under intermediate scrutiny. In *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978), the North Dakota court relied on its earlier use of intermediate scrutiny of a statute that limited tort recoveries in *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974). The *Hassett* court had found that the United States Supreme Court's then-recent introduction of a new intermediate analysis closely approximated the test historically used by the North Dakota court. 217 N.W.2d at 775. In *Sibley v. Board of Supervisors*, 477 So. 2d 1094, 1107-08 (La. 1985), the Louisiana court found that a damages limit classified people based on their physical condition, a classification prohibited under the Louisiana Constitution.

125. 424 A.2d at 831.

In *Jones v. State Board of Medicine*<sup>126</sup> the Idaho Supreme Court held that intermediate scrutiny was applicable where "the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute."<sup>127</sup> The discriminatory character of the Washington limit is apparent on its face. The limit facially discriminates against aged and noneconomically injured plaintiffs. While there may be a rational relationship between the classification and the declared purpose of the statute, the lack of a substantial relationship is indicated by the fact that a reduction in awards of noneconomic damages cannot force insurers to offer coverage at reasonable rates.

*c. Public Policy Considerations*

Public policy considerations also compel the use of an intermediate standard of review. First, courts should carefully scrutinize legislation that supports a special interest at the expense of a disadvantaged class. Second, severely injured victims whose noneconomic damages are limited might as a result receive less than full compensation even for their economic damages. Noneconomic damages often are that part of the plaintiff's award that pays the attorney's fee. A reduction in noneconomic damages may mean that the attorney's share of the total judgment must be paid from monies that were allocated by the court to economic damages, such as past and future medical expenses.

*2. Application of Review*

The discriminatory classifications that Washington's damages limit creates, rather than the statute's aggregate effect on those it regulates, render the statute unconstitutional under intermediate scrutiny. In other words, a court should hold that the statute violates the Washington Constitution's equal protection guarantee but not the substantive due process guarantee.

A statute satisfies the substantive due process requirement when it is substantially related<sup>128</sup> to the promotion of a legitimate governmental

126. 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977).

127. 555 P.2d at 411. The court invoked an intermediate standard of review in weighing an equal protection challenge to Idaho's damages limit, but seemed to invoke only a rational basis standard to consider a substantive due process challenge to the limit. See *id.* at 409-10. This comports with the United States Supreme Court's omission to apply intermediate scrutiny in the context of substantive due process.

128. "Substantially" means materially, importantly, or essentially. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1981).

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interest.<sup>129</sup> The stated object of the Tort Reform Act was to create a more equitable tort compensation system and increase the availability and affordability of liability insurance.<sup>130</sup> This appears to be a legitimate governmental interest.<sup>131</sup>

The statute probably is not substantially related to that interest. Although there is evidence that damages ceilings reduce damages awards,<sup>132</sup> and while it may be rational to believe that a reduction in damages will lead to an eventual reduction in rates,<sup>133</sup> there is no apparent substantial relationship between a reduction in damages judgments and an increase in insurance availability and affordability. The mid-1980's insurance crisis was caused in part by bad insurance company management practices.<sup>134</sup> Further, insurance companies are not obliged to increase availability and decrease rates as their uncertainties and liabilities decrease. In view of these other influences on insurance availability and rates, the relationship between the statute's means and end seems rational but not substantial.

Yet even if there is not a substantial relationship between the statute and the legislature's purpose, courts are likely to discredit a substantive due process challenge for three reasons. First, courts may refuse to apply intermediate scrutiny to the challenge, even while applying such scrutiny to an equal protection challenge.<sup>135</sup> Second, courts may avoid substantive due process challenges if they can dispose of a case on equal protection grounds. Washington courts rarely in recent years have invalidated legislation on substantive due process grounds.<sup>136</sup> Third, Washington courts may defer to the decisions of courts in other

129. Recent Washington decisions appear not to have applied the substantial relationship test to a substantive due process challenge. The stated test is based on the test applied in *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

130. 1986 Wash. Laws ch. 305, § 100.

131. See *supra* text accompanying note 88.

132. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 416 (1987). Professor Danzon found that "[t]he average impact of statutes to limit all or part of the plaintiff's recovery has been to reduce average severity by twenty-three percent." *Id.*

133. See *supra* text accompanying notes 89-90.

134. See *supra* note 28 and accompanying text.

135. E.g., *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). But see *supra* notes 60-61 and accompanying text. There appear to be no recent Washington decisions in which a court applied intermediate scrutiny to a statute challenged on substantive due process grounds.

136. See *Aetna Life Ins. v. Washington Life & Disability Guar.*, 83 Wash. 2d 523, 533-34, 520 P.2d 162, 169 (1974); *Seattle Times v. Tielsch*, 80 Wash. 2d 502, 512, 495 P.2d 1366, 1371 (1972) (Finley, J., dissenting).

states, which courts have consistently rejected substantive due process challenges to medical malpractice damages limits.<sup>137</sup>

These considerations probably will influence a court not to find a substantive due process violation but will not interfere with the determination of the equal protection challenge. Under the equal protection guarantee of the state constitution, the statute should be stricken. The state equal protection test is whether the statute's classifications have a fair and substantial relation to the object of the legislation.<sup>138</sup> This test differs slightly from due process intermediate scrutiny. It examines whether the statute's discriminatory effect, rather than the statute's aggregate effect, bears a substantial relationship to the statute's purpose.

Courts that have used intermediate scrutiny to review medical malpractice damages limits either have found that the limits failed the substantial relationship test<sup>139</sup> or have remanded the cases to the trial courts for further factual determinations.<sup>140</sup> The North Dakota court in *Arneson v. Olson*<sup>141</sup> applied intermediate scrutiny to that state's medical malpractice damages ceiling and found the ceiling violative of the state equal protection guarantee. The court found that the limit benefited physicians but denied adequate compensation to plaintiffs with proven meritorious claims and did nothing toward the elimination of nonmeritorious claims.<sup>142</sup>

The New Hampshire Supreme Court in *Carson v. Maurer*,<sup>143</sup> in applying intermediate scrutiny to a medical malpractice damages cap challenged under the New Hampshire equal protection guarantee, also found no substantial relationship between the cap and the legislative purpose. The court rather found that "[i]t is simply unfair and unrea-

137. See, e.g., *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244 (Tex. Ct. App. 1987). The courts in *Fein* and *Rose* applied minimal, rather than intermediate, scrutiny.

138. See *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975).

139. See *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980). *Contra Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (purported to invoke substantial relationship test but in fact decided equal protection challenge under rational basis test).

140. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977); *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985). On at least one of these remands, the limit was held unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing *Jones v. State Bd. of Medicine*, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

141. 270 N.W.2d 125, 135 (N.D. 1978).

142. *Id.* at 135-36.

143. 120 N.H. 925, 424 A.2d 825, 837 (1980).

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sonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."<sup>144</sup>

Washington's cap denies equal protection for similar reasons. The cap denies adequate compensation to the most seriously injured plaintiffs, plaintiffs with proven meritorious claims, and imposes on them the burden of supporting the insurance industry. The legislative object of preserving insurance availability and affordability is not substantially related to the classifications of plaintiffs according to whether their damages are economic or noneconomic, whether their noneconomic damages are above or below an arbitrary limit, or whether they are young or old.<sup>145</sup> The difference between economic loss and noneconomic loss is that economic loss is quantified by doctors, hospitals, and employers, who establish the monetary value of past and future medical care and lost wages, whereas noneconomic loss is quantified by laypersons who sit on juries. There is no substantial relationship between the distinction and the legislative purpose. The distinction merely enforces a suspicion of claims for noneconomic loss.

The statute's classifications may not even have a substantial relationship to a reduction in insurer uncertainty and liability. Although the statute forbids the instruction of juries as to the existence of a limit, it seems likely that citizens eventually will learn that the limit exists.<sup>146</sup> Such knowledge might encourage juries that wish to avoid the statute to categorize their awards as economic damages, which are unlimited under the statute.

Additionally, the legislature cannot guarantee that a reduction in insurer uncertainty and liability will be passed along to the entities

144. 424 A.2d at 837. There are many analogies between automobile guest statutes—and the reasons for abolishing such statutes—and contemporary tort reform legislation. Consider the discussion of guest statutes in W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 215-17 (5th ed. 1984). Washington repealed its guest statute in 1974. *Id.* at 216 n.84.

145. A 55-year-old male who has suffered severe and permanent injuries is limited to \$177,610 in noneconomic damages, whereas a 25-year-old male who has suffered severe injuries from which he will completely recover within a year can recover as much as \$399,102 in noneconomic damages. See WASH. REV. CODE § 4.56.250 (1987); WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32; WASH. STATE EMPLOYMENT SEC. DEP'T LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. "There is no substantial relationship or rational basis asserted which the court could accept for that difference in classification." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987).

146. For example, a front-page newspaper story in the *Seattle Times* recently announced that a trial court judge had ruled the Washington limit unconstitutional. *Judge Rules Lid on Injury Awards Unconstitutional*, *Seattle Times*, Feb. 20, 1988, at 1, col. 4.

that must buy liability insurance. Aggregate awards may have dropped after medical malpractice damages caps were imposed in the mid-1970's, but there might be no relationship between the drop in awards and the promise of available and affordable liability insurance.

The classifications are not substantially related to the legislative end. While a rational relationship might exist between the classifications and the end, this relationship does not rise to the level of substantiality. The damages limit therefore denies the equal protection of the laws guaranteed by the Washington Constitution.<sup>147</sup>

### C. *Washington Constitution: Right of Trial by Jury*

Washington's limit on damages requires the trial court to reduce the jury's determination of noneconomic damages when the jury's award exceeds the statute's ceiling. This interference with the jury function raises another constitutional challenge. The Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate."<sup>148</sup> The word "inviolate" in the provision means "freedom from substantial impairment" but does not prohibit modification of administrative details that do not affect the enjoyment of the right to a jury trial.<sup>149</sup>

Washington's noneconomic damages limit abridges the jury trial guarantee.<sup>150</sup> The guarantee limits the authority of the legislature to take away the right to a jury trial.<sup>151</sup> The damages limit does more than modify administrative details; it substantially impairs the jury trial right.

More than one court already has invalidated a damages limit on right to jury trial grounds. In *Boyd v. Bulala*<sup>152</sup> a federal district court judge held that both the federal and Virginia constitutional guarantees of the right to a jury trial were violated by Virginia's \$750,000 limit on

147. Because Washington's equal protection guarantee does not prohibit the grant of special privileges or immunities to municipal corporations, the damages limit probably is not unconstitutional on state equal protection grounds when applied to a municipality. See WASH. CONST. art I, § 12.

148. *Id.* art. I, § 21.

149. *State v. Furth*, 5 Wash. 2d 1, 18-19, 104 P.2d 925, 933 (1940).

150. *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987); accord *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (Virginia damages ceiling violates federal and Virginia guarantees of right to jury trial). *Contra Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (Indiana damages cap does not violate jury trial provision of Indiana constitution).

151. *State v. Ellis*, 22 Wash. 129, 131, 60 P. 136, 137 (1900), *overruled on other grounds*, *State v. Lane*, 40 Wash. 2d 734, 246 P.2d 474 (1952).

152. 647 F. Supp. 781 (W.D. Va. 1986).

### Washington's Noneconomic Damages Limit

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damages recoverable in medical malpractice actions.<sup>153</sup> The court found that the federal jury trial guarantee provided the right to have the jury determine not only liability but damages.<sup>154</sup> According to the court, the statutory limit, which required "entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury," had no permissible basis.<sup>155</sup> At least two Washington trial courts, on pre-trial motions, have rejected the defense of the damages limit partly on right of trial by jury grounds.<sup>156</sup>

The determination of the plaintiff's damages, including noneconomic damages,<sup>157</sup> is a question of fact for the jury.<sup>158</sup> The statutory cap, in effect, permits the legislature to reexamine and modify the findings of the jury. This interference is especially inappropriate in view of the authority of a judge to set aside an excessive verdict and order a new trial, enter judgment notwithstanding the verdict, or order remittitur where the evidence does not support the verdict. This authority is well-established both at common law and in modern court rules.<sup>159</sup> Unlike a statutory damages cap, these judicial interventions are exercised neither arbitrarily nor in disregard of the facts proved at trial.

Washington's damages cap ignores facts proved at trial. It takes into account only the plaintiff's age and the average annual state wage and not the seriousness of either the injury or the loss. The statute

153. *Id.* at 789; see also *Smith v. Department of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987) (Florida tort reform damages cap invalidated partly because it denies plaintiff constitutional benefit of jury trial). The *Boyd* court later refused to reconsider its holding. *Boyd v. Bulala*, 672 F. Supp. 915 (W.D. Va. 1987).

154. 647 F. Supp. at 788 ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935))).

155. *Id.* at 789.

156. *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987); *Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 30 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988). In *Foster*, King County Superior Court Judge Ellington declared that the limit "renders the right to a jury trial not substantive, not fully extended." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987).

157. *Power v. Union Pac. R.R.*, 655 F.2d 1380, 1388 (9th Cir. 1981) (under Washington law, amount of damages for loss of companionship is left to trier of fact); *Farman v. Farman*, 25 Wash. App. 896, 611 P.2d 1314 (1980) (amount of damages for intentional infliction of emotional distress is question for trier of fact).

158. *Shea v. City of Spokane*, 17 Wash. App. 236, 562 P.2d 264 (1977) (proof of damages is question of fact for jury). *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1888) (where amount of damages is not fixed, agreed upon, or liquidated, jury must be called unless waived).

159. Some such common-law rules have become court rules. *E.g.*, WASH. SUPER. CT. CIV. R. 59(a)(5) (judge may set aside excessive verdict and order new trial).

"invades the province of the jury and restricts the jury's ability to assess damages."<sup>160</sup> It is therefore unconstitutional under the Washington Constitution.<sup>161</sup>

### III. CONCLUSION

Washington's damages limit violates the state equal protection and right of trial by jury guarantees. Under the state equal protection provision, courts should give the statute intermediate scrutiny. This standard of review is supported by Washington case law, case law in other states, and public policy considerations. Because the statute's classifications are not substantially related to a legitimate legislative interest, the statute denies tort plaintiffs the equal protection of the laws. The statute denies the right of trial by jury because it materially invades the province of the jury to find facts.

State constitutional guarantees of due process and equal protection should not be understood by courts merely to restate the fourteenth amendment. Washington courts can and do grant greater protections of individual rights under the state constitution. Such protection is warranted in the review of legislation that classifies and affects the rights of tort victims.

*Marco de Sa e Silva*

160. *Boyd v. Bulala*, 647 F. Supp. 781, 789 (W.D. Va. 1986).

161. The limit by its terms applies to all "action[s] seeking damages for personal injury or death." WASH. REV. CODE § 4.56.250(2) (1987). Nevertheless, the limit is not unconstitutional on jury trial grounds as to all such actions, but rather only to actions for personal injury. Whether a person is entitled to a jury trial under the Washington Constitution depends on whether the right existed in 1889, when the Washington Constitution was adopted. *Firchau v. Gaskill*, 88 Wash. 2d 109, 558 P.2d 194 (1977). The right to a jury trial in a civil action existed in Washington in 1889. See *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1888) (breach of warranty action); *Northern Pac. R.R. v. Holmes*, 3 Wash. Terr. 543, 18 P. 76 (1888) (negligence action). The state constitution therefore preserves the right. On the other hand, the cause of action for wrongful death did not exist until created by the legislature in 1917, 1917 Wash. Laws ch. 123, § 1. Although parties to a claim for wrongful death have a right to a jury trial, that right is statutory and not constitutional.

The distinction may cause a court to sever the application of the damages limit as to personal injury actions but leave intact the limit as to wrongful death. *Contra Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 31 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988) (jury trial right exists regardless of "whether the right was created by statute or existed at common law"). Severance would, in effect, amend Washington's wrongful death act to provide for a limit on noneconomic damages. Such a limit is probably constitutional under the Washington jury trial guarantee. See *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958). *But see White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983).

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## Washington's Noneconomic Damages Limit

TABLE: REPORTED DECISIONS ON THE CONSTITUTIONALITY OF MEDICAL MALPRACTICE AND TORT REFORM DAMAGES LIMITS. This Table gathers in chronological order recent decisions on the constitutionality of medical malpractice and tort reform damages limits. The Table does not include cases that have been overruled or that merely follow binding precedent. Where both a state and federal court have decided the constitutionality of the same statute, the Table reports both decisions. For citations to the following cases, see footnotes 38-49.

CASE	LIMIT	STANDARD OF REVIEW	HELD	FOUNDATIONS
Wright v. Central DuPage Hosp. (Ill. 1976)	\$500,000 <sup>A</sup>	Q	UC	SL <sup>3</sup>
Jones v. State Bd. of Medicine (Idaho 1976)	Variable <sup>A</sup>	NA	C	AC <sup>3</sup>
Simon v. St. Elizabeth Med. Cntr. (Ohio C.P. 1976)	\$200,000 <sup>G</sup>	RB/I	R	DP, <sup>B</sup> EP <sup>B</sup>
Prendergast v. Nelson (Neb. 1977)	\$500,000 <sup>A</sup>	Q	UC <sup>D</sup>	EP <sup>B</sup>
Arneson v. Olson (N.D. 1978)	\$300,000 <sup>A</sup>	RB	C	SP <sup>3</sup>
Johnson v. St. Vincent Hosp. (Ind. 1980)	\$500,000 <sup>A</sup>	I	UC	EP <sup>B</sup>
Carson v. Maurer (N.H. 1980)	\$250,000 <sup>NE</sup>	Q	C	DP, <sup>B</sup> EP, <sup>B</sup> JT <sup>3</sup>
Baptist Hosp. v. Baber (Tex. App. 1984)	\$500,000 <sup>NM</sup>	I	UC	EP <sup>3</sup>
Malone & Hyde, Inc. v. Hobrecht (Tex. App. 1985)	\$500,000 <sup>NM</sup>	RB	UC	EP <sup>Q</sup>
Fein v. Permanente Medical Group (Calif. 1985)	\$250,000 <sup>NE</sup>	NA	UC	Baptist Hosp.
Detar Hosp. v. Estrada (Tex. App. 1985)	\$500,000 <sup>NM</sup>	RB	C	DP, <sup>B</sup> EP <sup>Q</sup>
Hoffman v. United States (9th Cir. 1985)	\$250,000 <sup>NE</sup>	RB	UC	EP, <sup>B</sup> AC <sup>3</sup>
Duren v. Suburban Comm'y Hosp. (Ohio C.P. 1985)	\$200,000 <sup>G</sup>	RB	C	EP <sup>F</sup>
Sibley v. Board of Supervisors (La. 1985)	\$500,000 <sup>NM</sup>	Q	UC	Q <sup>B</sup>
Waggoner v. Gibson (N.D. Tex. 1986)	\$500,000 <sup>NM</sup>	Q	R	EP <sup>3</sup>
Boyd v. Bulala (W.D. Va. 1986)	\$750,000 <sup>A</sup>	RB	UC	DP, <sup>B</sup> EP, <sup>B</sup> AC <sup>3</sup>
Lucas v. United States (5th Cir. 1986)	\$500,000 <sup>NM</sup>	RB	C	DP, <sup>Q</sup> EP <sup>B</sup>
Smith v. Dep't of Ins. (Fla. 1987)	\$450,000 <sup>NE</sup>	RB	UC	JT <sup>B</sup>
Lucas v. United States (Tex. 1988)	\$500,000 <sup>NM</sup> \$150,000 <sup>NE</sup>	RB	C	DP, <sup>F</sup> EP <sup>F</sup>

### Explanation of symbols:

Type of damages limited: A = All damages; G = General damages; NE = Noneconomic damages; NM = Nonmedical damages

Standard of review: I = Intermediate; RB = Rational basis; NA = Not applicable; Q = Unclear

Holding: C = Constitutional or not unconstitutional; UC = Unconstitutional; D = Dictum; R = Not decided in reported case, remanded to trial court for decision as to constitutionality

Grounds for court's decision: AC = Right of access to courts; DP = Due process; EP = Equal protection; JT = Right of trial by jury; SL = Special legislation; SP = Special privilege; Q = Unclear

Constitution relied on by court: B = Both federal and state constitutions; F = Federal constitution only; S = State constitution only; Q = Unclear

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March 27, 1990

Rep. Peter Goll, Co-Chairman  
House Judiciary Committee  
Alaska State Legislature  
P.O. Box V  
Juneau, Alaska 99811

Re: House Bill 166 -- Jackson vs. Power

Dear Representative Goll:

I have been advised that the hospital and medical profession are requesting that the Committee adopt Section 17 of House Bill 166 as originally introduced by Representative Cotten, which would for all practical purposes provide the hospitals in our state with immunity for medical negligence to patients in the hospitals' emergency rooms. While members of the medical profession represent that this section of the bill would merely place the law in the same status as before the Alaska Supreme Court decision of Jackson v. Power, nothing could be further from the truth.

The effect of this bill would be to grant virtual immunity to the hospitals for liability, an area where extreme care and vigilance is necessary if quality patient care is to be achieved. Not only would this legislation abolish the hospitals' liability for emergency room negligence based upon nondelegable duty as established in Jackson v. Power, but it would, for all practical purposes, abolish recovery based upon theories of apparent authority and ostensible agency.

Since the Jackson v. Power decision, the hospitals of this state have had no problems covering the risk for negligent patient care in their emergency rooms through insurance. The hospitals have the option, if they so choose, to pass any additional costs incurred to the doctors utilizing these facilities. What should not be permitted is for the hospitals to have uninsured doctors operating their emergency services and

Rep. Peter Goll  
March 27, 1990  
Page TWO

leaving patients with no recourse to recover for the negligent injuries that have received. I have enclosed for your review a position paper which I have prepared on the Jackson v. Power issue and a copy of the Alaska Supreme Court decision.

I will be glad to answer any further questions concerning this matter, as I represented Mr. Brett Jackson, who lost both of his kidneys and sustained other horrible injuries as the result of negligent medical care in the hospital's emergency room, against Fairbanks Memorial Hospital. I further had the opportunity of handling Mr. Jackson's case upon appeal to the Alaska Supreme Court. These issues were extensively debated before the House Labor and Commerce Committee during the last session and Representative Donley felt that this section of the Bill did not have sufficient merit to include in the Labor and Commerce substitute that was forwarded for the consideration of the Judiciary Committee.

Very truly yours,

LAW OFFICES OF LUCE & HENSLEY



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## HOSPITAL LIABILITY IN THE EMERGENCY ROOM

### HB-166 AND JACKSON V. POWER

Various hospital and medical special interest groups have supported legislation contained in Section 17 of HB 166 which would invalidate the Alaska Supreme Court's decision in Jackson v. Power, 743 P.2d 1376 (Alaska 1987). This decision held that a hospital would be financially responsible for negligent acts committed in the hospital emergency room, unless done by a physician of the patient's "own choice." This theory of liability is based upon the premise that a business should be financially responsible for the civil injury that is caused as a result of the business operation. Further, that when involved in areas of high risk of injury to the public, and where duties are mandated by statute and public policy considerations, a business should not be permitted to delegate the civil responsibility for injury caused to a citizen to another person who may not be financially responsible.

What the Alaska Supreme Court specifically held in Jackson was that the hospital, having assumed the duty to staff an emergency room, should not be allowed to avoid legal responsibility to patients injured there as the result of doctor negligence by claiming that its emergency room doctors were "independent contractors." As a matter of public policy, the patient was looking to the hospital and not to a specific doctor of the patient's choice for emergency room care.

The Supreme Court applied the law as it existed in other sectors of our society to the modern hospital situation. The Supreme Court had previously ruled in Alaska Airlines v. Sweat, 586 P.2d 916 (Alaska 1977), that an airline could not disclaim liability for injury or death to passengers when it had hired someone else other than one of its "employees" to operate its air routes or fly its planes. The risk of injury or death from negligent operation was too great to permit, as a matter of public policy, such a delegation of responsibility and with it the concern for safety of the passengers.

In 1990 it can no longer be argued with any validity that modern hospitals are mere sanitary waysides for the convenience of the doctor and the patient. The modern hospital is at the center of our modern health care system. It is in the business

of providing quality health care and sets the health care standards for the community. It is required to maintain and staff emergency rooms not only by State statute, but by the requirements of its own bylaws and its certification from the Joint Commission on the Accreditation of Hospitals (JCAH).

Prior to the decision in Jackson v. Power, various courts in the United States had utilized different legal theories under which to hold hospitals liable for negligent physician care when the physician was "not chosen by the patient." Irrespective of the legal theories applied, the overwhelming majority of the recently reported cases have held the hospital responsible. Such situations usually occur either in the emergency room, in the providing of anesthesia, or in the providing of radiology or pathology services. These areas of health care delivery are the responsibility of the modern hospital. The theories of recovery against the hospital have included implied agency, ostensible agency, apparent authority, estoppel, and like doctrines. They required various degrees of proof on the part of an injured patient, and often led to uneven and unjust results.

Hospitals outside of Alaska have dealt with these issues of civil liability by simply requiring that physicians with staff medical privileges carry liability insurance and by insuring their own remaining risk. Alaska hospitals are unique in this respect, in that they did not require mandatory insurance from physicians who are members of their medical staff. (The refusal of many of the doctors in Alaska to carry liability insurance is also unique.) Indeed, Providence Hospital and Humana Hospital in Anchorage are the only hospitals, in their respective nationwide hospital systems, which do not have such a requirement. They have not done so in Alaska because of the resistance of the same doctors that are the leaders in the tort reform movement! They have now joined forces to attempt to not only nullify the effect of the Jackson decision, but to also do away with the theories of ostensible agency and apparent authority. Such a law would leave at risk the better than 75,000 citizens of this state who yearly seek and obtain care from hospital emergency rooms.

Providence Hospital is the fourth largest private sector employer in the State of Alaska and has an annual budget that substantially exceeds \$100 million. Even though it is a "nonprofit institution", it has an advertising budget in excess of several hundreds of thousands of dollars annually. It is simply unconscionable for Providence and Humana Hospitals not to require their physicians to be insured, and then to spend thousands of dollars in an effort to reverse the decision of Jackson v. Power, which protects the civil rights of their patients. Since the date of the Jackson decision, the hospitals of the state have insured for the risk of injury to patients in their emergency rooms. The state hospitals now seek to shift this risk to the injured patient.

The passage of Section 17 of HB 166 will either deny or substantially increase the burdens and difficulties upon injured patients obtaining a just recovery. It will not promote quality health care in the hospital setting in this state and would constitute horrible public policy.

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This case presents an issue of first impression in this state, concerning health care delivery in hospital emergency rooms. The question that we must resolve is whether a hospital may be held vicariously liable for negligent health care rendered by an emergency room physician who is not an employee of the hospital, but is, instead, an independent contractor. We hold that the hospital in this case had a non-delegable duty to provide non-negligent physician care in its emergency room and, therefore, may be liable.

I

On the evening of May 22, 1981, sixteen year old Brett Jackson was seriously injured when he fell from a cliff. Jackson was airlifted to Fairbanks Memorial Hospital (FMH). Shortly after midnight, he was received in the hospital's emergency room.

Jackson was examined by respondent John Power, M.D., one of two emergency room physicians on duty at the time. Dr. Power's examination revealed multiple lacerations and abrasions of the patient's face and scalp, multiple contusions and lacerations of the lumbar area, several broken vertebrae and gastric distension, suggesting possible internal injuries. Dr. Power ordered several tests, but did not order certain procedures that could have been used to ascertain whether there had been damage to the patient's

kidneys. Jackson had, in fact, suffered damage to the renal arteries and veins which supply blood to and remove blood from the kidneys. This damage, undetected for approximately 9 to 10 hours after Jackson's arrival at FMH, ultimately caused Jackson to lose both of his kidneys.

## II.

Jackson and his mother, Linda Estrada, (hereinafter referred to collectively as Jackson) filed suit. In their complaint they alleged negligence in the diagnosis, care and treatment Jackson received at FMH. Jackson moved for partial summary judgment seeking to hold FMH vicariously liable as a matter of law for the care rendered by Dr. Power. In support of his motion, Jackson advanced three separate theories: (1) enterprise liability; (2) apparent authority; and (3) non-delegable duty.

After briefing and argument, the superior court held, as a matter of law, that FMH could not be held liable under an enterprise liability theory, and that genuine issues of material fact precluded summary judgment on the two remaining theories.<sup>1</sup> We subsequently granted Jackson's petition for review of the court's ruling.

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1. The superior court also rejected three motions for summary judgment by various respondents seeking to have Linda Estrada's claim against them dismissed on the

(Footnote Continued)

### III

Initially, it is important to clarify the exact issue that we have been asked to resolve. Jackson has conceded, for purposes of this appeal, that Dr. Power was not an employee of FMH, but an independent contractor employed by respondent Emergency Room, Inc. (ERI), and that ERI and FMH are separate legal entities. Traditional rules of respondeat superior are, therefore, inapposite. Jackson also makes no claim that FMH was itself negligent in its selection, retention, or supervision of Dr. Power. Consequently, we have no occasion to consider the doctrine of corporate negligence.<sup>2</sup> Jackson asks us to resolve only whether a hospital should be vicariously liable, as a matter

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(Footnote Continued)

ground that it was time barred by the statute of limitations. None of the respondents cross-petitioned for review of that issue.

2. The doctrine of corporate negligence holds that a hospital owes an independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise the medical treatment provided by members of its medical staff. See Tucson Medical Center v. Miserch, 545 P.2d 958, 960 (Ariz. 1976); Darling v. Charleston Community Mem. Hosp., 211 N.E.2d 253 (Ill. 1965); Pedroza v. Bryant, 677 P.2d 166, 170 (Wash. 1984); Johnson v. Misericordia Community Hosp., 301 N.W.2d 156 (Wis. 1981). See generally, Janulis & Hornstein, Damned If You Do, Damned If You Don't: Hospitals' Liability for Physicians' Malpractice, 64 Neb. L. Rev. 689, 702-08 (1985); Note, Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence, 32 Rutgers L.J. 342, 360-72 (1979).

of public policy, for the negligence or malpractice<sup>3</sup> of an independent contractor/physician, committed while treating a patient in the hospital's emergency room, under theories of (1) enterprise liability; (2) apparent authority; or (3) non-delegable duty.

#### IV

As previously noted, this case presents this court with an issue of first impression.<sup>4</sup>

The generally accepted rule is that, where an employment relationship exists between the physician and the hospital, the hospital will be liable, under the traditional rule of respondeat superior, for any negligence or malpractice which results in injury to a hospital patient. E.g., Binq v. Thuning, 143 N.E.2d 3, 9 (N.Y. 1957); Weldon v. Seminole Municipal Hospital, 709 P.2d 1058, 1059 (Okla. 1985). Conversely, no liability attaches to the hospital

---

3. Jackson has yet to prove that any negligence or malpractice did in fact occur. In order to resolve the issue presented here, however, we must assume negligence. We, of course, express no opinion as to the actual merits of Jackson's claim.

4. In Baker v. Werner, 654 P.2d 263, 267 n.6 (Alaska 1982), Baker appealed the trial court's rejection of his theory of vicarious liability in a wrongful death action against a physician, hospital and attending nurse. Because we upheld the jury's finding that the defendants were not negligent, we did not reach the merits of the issue, "any theory of vicarious liability [being] irrelevant." Id.

when the physician is an independent contractor. E.g. Greene v. Rogers, 498 N.E.2d 867, 871 (Ill. App. 1986); Hill v. St. Clare's Hosp., 490 N.E.2d 823, 827 (N.Y. 1986). See generally Comment, The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians, 50 Wash. L. Rev. 385 (1975) (hereinafter "Comment, Hospital Responsibility").

Jackson concedes that Dr. Power was an independent contractor; however, he asserts that Alaska's law of respondeat superior mandates a result different than that which would be reached under the general rule.<sup>5</sup> Jackson argues that our decision in Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972), establishes that the law of "vicarious legal responsibility" in Alaska is "enterprise liability." Thus, he contends, if the enterprise impacts society and the negligent act occurred during an activity performed for the benefit or in the interest of the enterprise, the enterprise is liable.

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5. The trial court decided the issue of the applicability of enterprise liability as a matter of law. We scrutinize questions of law under a de novo or independent judgment standard of review. Hicklin v. Orbeck, 565 P.2d 159, 163 n.6 (Alaska 1977), rev'd on other grounds, 437 U.S. 518, 57 L. Ed. 2d 397 (1978). When reviewing a question of law, it is our "duty to adopt the rule of law that is most persuasive in light of precedent, reason and policy." Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

Jackson's argument proves unpersuasive. First, Jackson's interpretation of Fruit is flawed. A close reading of that case shows that we did not view "enterprise liability" as a separate theory of liability or a distinct cause of action. Rather, enterprise liability was seen as one of two widely accepted theories used by courts to justify imposition of vicarious liability in an established employer/employee context. Id. at 138-39. As was noted in Fruit:

[T]he "enterprise" theory . . . finds liability whenever the enterprise of the employer would have benefited by the context of the act of the employee but for the unfortunate injury.

The rule of respondeat superior however, . . . is limited to requiring an enterprise to bear the loss incurred as a result of the employee's negligence. The acts of the employee need be so connected to his employment as to justify requiring that the employer bear that loss.

Id. at 140-41 (emphasis added) (footnotes omitted). See generally Morris, Enterprise Liability and the Actuarial Process -- the Insignificance of Foresight, 70 Yale L. J. 554 (1961).

Additionally, our decisions since Fruit show that we have applied the theory of respondeat superior only in an employer/employee context, unless one of the well established exceptions to that rule exists. See, Parker

Drilling v. O'Neill, 674 P.2d 770, 775 (Alaska 1983);  
Williams v. Alyeska Pipeline Service Co., 650 P.2d 343, 349  
(Alaska 1982); Hammond v. Bechtel Inc., 606 P.2d 1269, 1273  
(Alaska 1980); Barton v. Lund, 563 P.2d 875, 876 (Alaska  
1977); Luth v. Rogers & Babler Construction, 507 P.2d 761,  
763-64 (Alaska 1973). Jackson's theory presents no such  
exception.

Finally, the cases from other jurisdictions cited  
by Jackson provide little support for his theory; those  
cases deal only with theories of apparent agency or  
corporate negligence. Moreover, although at least two  
courts appear to have implicitly indicated a willingness to  
recognize a theory of enterprise liability, see Alden v.  
Providence Hospital, 382 F.2d 163, 166 (D.C. Cir. 1967);  
Adamski v. Tacoma General Hospital, 579 P.2d 970, 977 & n.5  
(Wash. App. 1978), to date, no court has explicitly embraced  
that concept.<sup>6</sup>

In short, Jackson's theory of enterprise liability  
is not yet the law in Alaska.

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6. Some commentators have suggested an  
enterprise tort doctrine as a basis for imposing liability  
for any tort occurring as part of the hospital enterprise.  
See Southwick, Hospital Liability: Two Theories Have Been  
Merged, 4 J. Legal Med. 1, 3-5 (1983); Comment, Hospital  
Responsibility, supra at 418-19.

Jackson next argues that the trial court erred in holding that genuine issues of material fact prevented it from granting summary judgment on his theory of apparent authority.

Although we have recognized the doctrine of apparent authority in other contexts, see City of Delta Junction v. Mack Truck, 670 P.2d 1128, 1129-30 (Alaska 1983) (national distributor and local franchise); Perkins v. Willacy, 431 P.2d 141, 142 (Alaska 1967) (husband and wife), this is the first time we have been asked to apply this doctrine to a hospital-independent contractor/physician relationship.

Cases from other jurisdictions show a strong trend toward liability against hospitals that permit or encourage patients to believe that independent contractor/physicians are, in fact, authorized agents of the hospitals.<sup>7</sup> These courts have held hospitals vicariously liable under a

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7. The only exception to this modern trend of which we are aware is Greene v. Rogers, 498 N.E.2d 867 (Ill. App. 1986). In Greene, the court specifically refused to apply apparent agency to a hospital-emergency room doctor relationship because "[t]he absence of the power to control the decision-making of the emergency room physician demands that the independent relationship between hospital and emergency room physician be recognized." Id. at 871. We view Greene as an aberration dependent upon reasoning which is not particularly persuasive.

doctrine labeled either "ostensible" or "apparent" agency or "agency by estoppel." See Porubiansky v. Emory University, 275 S.E.2d 163, 168 (Ga. App. 1981); Paintsville Hospital v. Rose, 683 S.W.2d 255, 257 (Ky. 1985); Mehlman v. Powell, 378 A.2d 1121 (Md. 1977); Grewe v. Mt. Clemens General Hospital, 273 N.W.2d 429, 432-33 (Mich. 1978); Arthur v. St. Peters Hospital, 405 A.2d 443 (N.J. Super. 1979); Hannola v. City of Lakewood, 426 N.E.2d 1187, 1192 (Ohio App. 1980); Weldon, 709 P.2d at 1060; Themins v. Emanuel Lutheran Charity Bd., 637 P.2d 155, 158-59 (Or. App. 1982); Adamski v. Tacoma General Hospital, 579 P.2d 970, 977 (Wash. App. 1978); see generally Janulis & Hornstein, supra at 696-702. Although courts and commentators often use these terms interchangeably, they are not theoretically identical.

The "ostensible" or "apparent" agency theory is based on Section 429 of the Restatement (Second) of Torts (1965), which provides:

One who employs an independent contractor to perform services for another, which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Two factors are relevant to a finding of ostensible agency:

(1) whether the patient looks to the institution, rather

than the individual physician, for care; and (2) whether the hospital "holds out" the physician as its employee. Simmons v. St. Clair Memorial Hospital, 481 A.2d 870, 874 (Pa. Super. 1984); see also Irving v. Doctors Hospital of Lake Worth, 41 So. 2d 55, 60-61 (Fla. App. 1982); Smith v. St. Francis Hospital, 676 P.2d 279, 282 (Okla. App. 1984).

"Agency by estoppel," in contrast, is predicated on the arguably stricter standard of the Restatement (Second) of Agency § 267 (1958). Section 267 provides:

One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Under this theory, there must be actual reliance upon the representations of the principal by the person injured. Mehlman, 378 A.2d at 1123.

Thus, theoretically, there need be no causal relationship between the principal's conduct and the plaintiff's reliance to warrant a conclusion of ostensible agency; such a causal relationship and such a change of position, however, is the essence of estoppel to deny agency.

Janulis & Hornstein, supra at 697.

Jackson, in essence, asks us to adopt a rule of ostensible agency. FMH, on the other hand, requests that we follow Greene and refuse to apply this doctrine in the

hospital-physician context or, alternatively, that we adopt a rule which is essentially estoppel by agency. Although we find nothing antithetical about applying the doctrine of apparent authority to a hospital-independent contractor/physician relationship, we perceive no reason to adopt a special rule in this area. We believe that traditional rules of apparent authority provide sufficient guidelines.

In City of Delta Junction, we defined the doctrine of apparent authority in Alaska as follows:

Apparent authority to do an act is created as to third persons by written or spoken word or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

670 P.2d at 1130 (quoting Restatement (Second) of Agency § 27, at 103 (1958)). We went on to emphasize that it is the principal's conduct that gives rise to his liability and not the conduct of the alleged agent; "one dealing with an alleged agent must prove that the principal was responsible for the appearance of authority, by doing something or permitting the alleged agent to do something that led others, including the plaintiff, to believe that the agent had the authority he purported to have." Id. (quoting W. Seavy, Handbook of The Law of Agency § 8, at 13 (1964)).

Relying on City of Delta Junction, the trial court held that existing factual disputes required Jackson to

submit his apparent authority theory to the jury. When reviewing the denial of a motion for summary judgment, we must determine whether genuine issues of material fact exist, and if not, whether the moving party is entitled to judgment as a matter of law. Alaska R. Civ. P. 56(c); Shattin v. Dillingham City School District, 617 P.2d 9, 11 (Alaska 1980). In reaching this decision we must draw all reasonable inferences in favor of the non-moving party and against the movant. Id.

Drawing all reasonable inferences in the light most favorable to FMH, the record shows the following: at the time of Jackson's accident, FMH was the only civilian hospital north of Anchorage providing emergency room services in Alaska. Two road signs in Fairbanks note the location of the hospital. However, neither of these signs specifically refer to the existence of emergency room services. The signs were not constructed or situated by FMH. In fact, FMH does no advertising at all.

From the time of its establishment in 1972, FMH has never staffed its emergency room with its own physician employees, but has always relied upon local physicians to provide that service. Prior to the formation of ERI in 1977, FMH's emergency room was serviced by three local clinics, each providing one physician on a nightly basis. After 1977, ERI provided one physician on a nightly basis who

worked a 14-hour graveyard shift (6:00 p.m. to 8:00 a.m.).<sup>8</sup> While on duty in the emergency room, the ERI physician was "in charge" and no FMH personnel were responsible for either scheduling or monitoring the emergency room physicians. No contractual arrangement existed between FMH and ERI for the provision of emergency room physicians.

In apparent non-life threatening situations the first person an incoming patient sees at the emergency room is the admissions clerk. Immediately adjacent to the clerk's desk is a sign which indicated that physicians from ERI were working in the emergency room. Although the exact state of Jackson's awareness is not entirely clear, there is evidence suggesting that he was admitted in a conscious state.<sup>9</sup> Neither Jackson nor his mother selected FMH as the place of treatment nor Dr. Power as Jackson's physician.

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8. The clinics continued to provide an additional physician for the graveyard shift on a rotation basis.

9. Jackson testified at his deposition that he recalled being placed in the helicopter but had no recollection of being removed from it, being taken to FMH, or of meeting the doctor who treated him. On the other hand, the medical records indicate that Jackson appeared to be neurologically stable, completely oriented and gave no indication that he was unconscious or in distress. Moreover, at his deposition, Dr. Power testified that "Jackson was talking" and "completely oriented."

From the above, a jury could conclude that FMH held itself out as providing emergency care services to the public. A jury could also find that Jackson reasonably believed that Dr. Power was employed by the hospital to deliver emergency room service. It is also possible, however, that a jury could find to the contrary.<sup>10</sup>

Unless the evidence allows but one inference, the question of apparent authority is one of fact for the jury. City of Delta Junction, 670 P.2d at 1131; Themins, 637 P.2d at 159; Adamski, 579 P.2d at 978. In the case at bar, the record is not susceptible to a single inference. Thus, the trial court properly denied summary judgment on this issue.

#### VI

Jackson's final point is that the trial court erred in refusing to rule, as a matter of law, that FMH, as a general acute care hospital, has a non-delegable duty to provide non-negligent physician care in its emergency room. In essence, Jackson's position is that when a hospital

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10. In this regard, we agree with the weight of authority that application of apparent authority in the hospital/emergency room physician situation does not require an express representation to the patient that the treating physician is an employee of the hospital. Nor is direct testimony as to reliance required absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was rendered. See cases cited supra p. 10.

undertakes to operate an emergency room as an integral part of its health care enterprise, public policy dictates that it not be allowed to insulate itself from liability by shunting that responsibility onto another.

FMH, on the other hand, argues that a hospital does not have a non-delegable duty to guarantee safe treatment in its emergency room. Physicians, not hospitals, FMH asserts, have a duty to practice medicine non-negligently. Thus, according to FMH, a hospital cannot be held to have delegated away a duty it never had.

The trial court ruled that "[t]here cannot be a non-delegable duty if there is no contractual relationship." Since it was unclear from the evidence whether or not there was any contractual relationship between ERI and FMH, the court denied Jackson's motion for summary judgment. Initially, we note the trial court's erroneous characterization of the issue. By holding that there can be no "non-delegable duty if there is no contractual relationship," the court confused the question of the existence of a duty with the issue of whether a duty is non-delegable. The flaw in this reasoning is self-evident. As FMH points out, a party cannot be held to have delegated away a duty it never had. Thus, the threshold question is whether FMH had a duty to

provide emergency room care. Only if it did, is it necessary to determine what that duty entailed.

FMH is licensed as a "general acute care hospital."<sup>11</sup> As such, it is required to comply with state regulations designed to promote "safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." AS 18.20.060. These regulations provided, at the time of Jackson's accident, that an acute care hospital shall "insure that a physician is available to respond to an emergency at all times." Former 7 AAC 12.110(c)(2).<sup>12</sup> Thus, at a minimum, the law imposed a duty on FMH to provide emergency care physicians on a 24-hour basis.

FMH, however, voluntarily assumed a much broader duty. At the time of Jackson's accident, FMH was accredited by the Joint Committee on the Accreditation of Hospitals

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11. A general acute care hospital is a "facility which provides hospitalization for inpatient medical care of acute illness or injury and obstetric care." 7 AAC 12.100.

12. In 1983, this regulation was amended to provide that "[a] general acute care hospital must provide . . . [among other services not relevant here] emergency care services." 7 AAC 12.105 (emphasis added).

(JCAH).<sup>13</sup> In order to receive and maintain accreditation,<sup>14</sup> FMH had to comply with the JCAH's standards promulgated in the Accreditations Manual For Hospitals, Emergency Services. Standard I mandates that all accredited hospitals implement a well defined plan for emergency care based on community need and the capability of the hospital. The JCAH standards also mandate, among other things, that: (1) FMH's emergency room be directed by a physician member of the active medical staff (Standard II); (2) FMH's emergency room be integrated

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13. The JCAH was formed in the early 1950's by the American College of Surgeons, the American College of Physicians, the American Hospital Association, and the American Medical Association. Its purpose was to establish minimum hospital standards for patient care. For details of the program, see Dornette, The Legal Impact on Voluntary Standards in Civil Actions Against the Health Care Provider, N.Y.L. Sch. L. Rev. 925, 925-28 (1977); Holbrook & Dunn, Medical Malpractice Litigation: The Discoverability and Use of Hospitals' Quality Assurance Committee Records, 16 Washburn L.J. 54, 57 (1976).

14. Hospitals voluntarily seek accreditation for financial and professional prestige reasons. First, accreditation by the JCAH means the hospital qualifies to participate in the federal Medicare and Medicaid programs. Accreditation by JCAH is deemed substantial compliance with the Medicare conditions of participation. 42 U.S.C. § 1395bb (1982); 42 C.F.R. § 405.1901(d) (1986). See generally, Dornette, supra n.13 at 927, Holbrook & Dunn, supra n.13, at 58. Second, JCAH accreditation is often a prerequisite to obtaining approval of internship and residency programs. See generally, American Medical Association Directory of Accredited Residencies 3 (1975-76), quoted in Dornette, supra n.13, at 928. Finally, the institution's reputation and standing in the community is affected by whether it receives JCAH accreditation. See Holbrook & Dunn, supra n.13.

with other units and departments of the hospital (Standard III); (3) that emergency care be guided by written policies and procedures; and (4) that the quality of care be continually reviewed, evaluated and assured through establishment of quality control mechanisms (Standard V).

Additionally, FMH's own bylaws provided for the establishment and maintenance of an emergency room. Article X, section 1(d) (1) (b) of FMH's Medical Bylaws provides for an emergency room as one of the services of the hospital. Article XI, section 3(e) provides for the creation of an emergency room committee which is required among other things to:

- (a) formulate rules and regulations for the continuous coverage of the emergency room; and
- (b) supervise the clinical work in that department.

Based upon the above, it cannot seriously be questioned that FMH had a duty to provide emergency room services and that part of that duty was to provide physician care in its emergency room. Having so determined, we must next ascertain whether FMH's duty to provide physician care in the emergency room is non-delegable. That is, we must determine whether, having assumed the duty to staff an emergency room, FMH should be allowed to avoid responsibility for the care rendered therein by claiming that

the physicians it provides are not its employees. We conclude that it cannot.

A non-delegable duty is an established exception to the rule that an employer is not liable for the negligence of an independent contractor. W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on The Law of Torts, § 71 at 511-12 (5th ed. 1984). According to the late Professor Prosser, such a duty "may be imposed by statute, by contract, by franchise or by charter, or by the common law." Id. Among the duties considered non-delegable are the following:

[T]he duty of a carrier to transport its passengers in safety, of a railroad to fence its tracks properly or to maintain safe crossings, and of a municipality to keep its streets in repair; the duty to afford lateral support to adjoining land, to refrain from obstructing or endangering the public highway, to keep premises reasonably safe for business visitors, to provide employees with a safe place to work; the duty of a landlord to maintain common passageways, to make repairs according to covenant, or to use proper care in making them, and no doubt others.

Id. (footnotes omitted). However:

It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.

Id. at 512 (emphasis added). Accord, Alaska Airlines v. Sweat, 568 P.2d 916, 925-26 (Alaska 1977).

Our principal decision on non-delegable duty is Sweat, 568 P.2d 916. In that case, Sweat sued Alaska Airlines for injuries sustained in an air crash while traveling aboard a Chitina Air Service plane. Id. at 922. Chitina had been engaged under a contract with Alaska Airlines to service a portion of Alaska Airlines' regularly scheduled routes. Id. at 921, 922. Alaska Airlines contended that Chitina was an independent contractor and therefore it was not liable for Chitina's negligence. Id. at 923. The trial court found Alaska Airlines vicariously liable based on Restatement (Second) of Torts § 428. Id. On appeal, we affirmed the trial court's decision on the alternative ground that Alaska Airlines owed a common law non-delegable duty of safety to its passengers. Id. at 925. We reasoned:

We believe that the responsibility of a common carrier for the safety of its passengers is so important that the carrier should not be permitted to transfer it to another. A scheduled common carrier such as Alaska is given a monopoly or semi-monopoly primarily for the purpose of furnishing safe and reliable scheduled air transportation. It should not be permitted to barter away its responsibility to the traveling public by means of contracts with other carriers. If this were permissible, an air carrier could avoid liability by engaging in independent contracts for furnishing food, maintenance of its planes and

conceivably even for supplying crews. Regardless of whether such contracts may be permitted by regulatory authorities, the traveling public is entitled to look for protection to the certificated carrier responsible for the scheduled route.

Id. at 926.

We have little trouble concluding that patients, such as Jackson, receiving treatment at a hospital emergency room are as deserving of protection as the airline passengers in Sweat. Likewise, the importance to the community of a hospital's duty to provide emergency room physicians rivals the importance of the common-carriers' duty for the safety of its passengers. We also find a close parallel between the regulatory scheme of airlines and hospitals. Undoubtedly, the operation of a hospital is one of the most regulated activities in this state. Besides the license,<sup>15</sup> and certificate of need,<sup>16</sup> requirements mentioned above, a hospital must comply with state regulations promulgated to control its activities, AS 18.20.070, 7 AAC 12.610; adopt a state approved risk management program "to minimize the risk of injury to patients," AS 18.20.075; and undergo "annual inspections and investigations" of its facilities, AS

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15. See AS 18.02.020.

16. See AS 18.07.031.

mandates the rule we adopt today. Not only is this rule consonant with the public perception of the hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered, it also treats tort liability in the medical arena in a manner that is consistent with the commercialization of American medicine. Finally, we simply cannot fathom why liability should depend upon the technical employment status of the emergency room physician who treats the patient. It is the hospital's duty to provide the physician, which it may do through any means at its disposal. The means employed, however, will not change the fact that the hospital will be responsible for the care rendered by physicians it has a duty to provide.

This holding is necessarily limited. We do not change the standard of care with which a physician must comply, nor do we extend the duty which we find non-delegable beyond its natural scope. Our holding does not extend to situations where the patient is treated by his or her own doctor in an emergency room provided for the convenience of the doctor. Such situations are beyond the scope of the duty assumed by an acute care hospital. Rather our holding is limited to those situations where a patient comes to the hospital, as an institution, seeking emergency room services and is treated by a physician provided by the hospital. In such situations, the hospital shall be

Brett JACKSON and Linda Estrada, Petitioners,

v.

John POWER, M.D.; Fairbanks Memorial Hospital; Lutheran Hospital and Homes Society of America, Inc.; Emergency Room, Inc.; William H. Montano, M.D.; and George Vrablick, M.D., Respondents.

No. S-1677.

Supreme Court of Alaska.

Oct. 16, 1987.

Medical malpractice action was brought against hospital. The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., denied patient summary judgment and petition for review was filed. The Supreme Court, Burke, J., held that: (1) hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician under enterprise liability; (2) genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public precluded summary judgment for patient on apparent authority theory; and (3) general acute care hospital's duty to provide physicians for emergency room care was nondelegable.

Affirmed in part, reversed in part, and remanded.

#### 1. Hospitals ⇌7

Doctrine of corporate negligence holds that hospital owes independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise medical treatment provided by members of its medical staff.

#### 2. Hospitals ⇌7

Generally accepted rule is that where employment relationship exists between physician and hospital, hospital will be liable, under traditional rule of respondeat superior, for any negligence or malpractice which results in injury to hospital patient,

and conversely, no liability attaches to hospital when physician is independent contractor.

#### 3. Hospitals ⇌7

Hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician, ~~contractor~~ while treating patient in hospital's emergency room under theory of enterprise liability.

#### 4. Hospitals ⇌7

Two factors are relevant to finding of ostensible agency in hospital context, including whether patient looks to institution, rather than individual physician, for care and whether hospital holds out physician as its employee.

#### 5. Principal and Agent ⇌137(2)

Under theory of agency by estoppel, there must be actual reliance upon representation of principal by person injured.

#### 6. Principal and Agent ⇌99

Traditional rules of apparent authority are applicable to hospital-independent contractor/physician relationship.

#### 7. Judgment ⇌181(33)

Genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public and whether patient reasonably believed that physician was employed by hospital to deliver emergency room service precluded summary judgment for patient in medical malpractice action against hospital on theory of apparent authority.

#### 8. Principal and Agent ⇌159(1)

Application of apparent authority in hospital/emergency room physician situation does not require express representation to patient that treating physician is employee of hospital; nor is direct testimony as to reliance required absent evidence that patient knew or should have known that treating physician was not hospital employee when treatment was rendered.

#### 9. Hospitals ⇌7

Hospital licensed as general acute care hospital had duty to provide emergency

room services and provide physician care.

#### 10. Hospitals ⇌7

General acute care was nondelegable; hospital could not shield itself by claiming that it was not responsible for results of negligence when law imposed duty to provide that health care.

#### 11. Master and Servant ⇌7

Nondelegable duty to rule that hospital is liable for negligence of its employees.

#### 12. Hospitals ⇌7

Rule that general acute care hospital's duty to provide patient room care is nondelegable standard of care which hospital must comply and does not vary where patient is treated by independent contractor/physician in emergency room.

#### 13. Hospitals ⇌7

Acute care hospital's duty to provide emergency room care as a matter of public policy is nondelegable; hospital's duty to provide emergency room care to patient who came to hospital as a matter of public policy is nondelegable; hospital's duty to provide emergency room care to patient who came to hospital as a matter of public policy is nondelegable.

Michael Cohn, I  
Law Office  
Anchorage, for petitioner.

James J. Delaney, Wiles, Hay  
Anchorage, for respondent.  
Memorial Hosp. and  
Inc.

Peter J. Maass,  
Anchorage, for  
M.D. and Emergency  
Room.

David C. Cross,  
Anchorage, for hospital.  
Anchorage.

JACKSON v. POWER

Cite as 743 P.2d 1376 (Alaska 1987)

Alaska 1377

room services and part of duty was to provide physician care in emergency room.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

10. Hospitals ⇐7

General acute care hospital's duty to provide physicians for emergency room care was nondelegable, and thus hospital could not shield itself from liability by claiming that it was not responsible for results of negligently performed health care when law imposed duty on hospital to provide that health care.

11. Master and Servant ⇐315

Nondelegable duty is established exception to rule that employer is not liable for negligence of independent contractors.

12. Hospitals ⇐7

Rule that general acute care hospital's duty to provide physicians for emergency room care is nondelegable does not change standard of care with which physician must comply and does not extend to situations where patient is treated by his or her own doctor in emergency room provided for convenience of doctor.

13. Hospitals ⇐7

Acute care hospital was vicariously liable as a matter of law for negligence or malpractice committed by physician on a patient who came to hospital seeking emergency room services; physician was provided by hospital as part of its nondelegable duty to provide nonnegligent physician care in emergency room.

Michael Cohn, Dan A. Hensley, L. Ames Luce, Law Offices of L. Ames Luce, Anchorage, for petitioners.

James J. Delaney, Howard A. Lazar, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, for respondents Fairbanks Memorial Hosp. and Lutheran Hosp. & Homes Soc.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for respondents John Power, M.D. and Emergency Room, Inc.

David C. Crosby, Council & Crosby, Juneau, for Health Ass'n of Alaska, amicus curiae.

OPINION

BURKE, Justice.

This case presents an issue of first impression in this state, concerning health care delivery in hospital emergency rooms. The question that we must resolve is whether a hospital may be held vicariously liable for negligent health care rendered by an emergency room physician who is not an employee of the hospital, but is, instead, an independent contractor. We hold that the hospital in this case had a non-delegable duty to provide non-negligent physician care in its emergency room and, therefore, may be liable.

I

On the evening of May 22, 1981, sixteen year old Brett Jackson was seriously injured when he fell from a cliff. Jackson was airlifted to Fairbanks Memorial Hospital (FMH). Shortly after midnight, he was received in the hospital's emergency room.

Jackson was examined by respondent John Power, M.D., one of two emergency room physicians on duty at the time. Dr. Power's examination revealed multiple lacerations and abrasions of the patient's face and scalp, multiple contusions and lacerations of the lumbar area, several broken vertebrae and gastric distension, suggesting possible internal injuries. Dr. Power ordered several tests, but did not order certain procedures that could have been used to ascertain whether there had been damage to the patient's kidneys. Jackson had, in fact, suffered damage to the renal arteries and veins which supply blood to and remove blood from the kidneys. This damage, undetected for approximately 9 to 10 hours after Jackson's arrival at FMH, ultimately caused Jackson to lose both of his kidneys.

II

Jackson and his mother, Linda Estrada, (hereinafter referred to collectively as Jack-

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son) filed suit. In their complaint they alleged negligence in the diagnosis, care and treatment Jackson received at FMH. Jackson moved for partial summary judgment seeking to hold FMH vicariously liable as a matter of law for the care rendered by Dr. Power. In support of his motion, Jackson advanced three separate theories: (1) enterprise liability; (2) apparent authority; and (3) non-delegable duty.

After briefing and argument, the superior court held, as a matter of law, that FMH could not be held liable under an enterprise liability theory, and that genuine issues of material fact precluded summary judgment on the two remaining theories.<sup>1</sup> We subsequently granted Jackson's petition for review of the court's ruling.

### III

[1] Initially, it is important to clarify the exact issue that we have been asked to resolve. Jackson has conceded, for purposes of this appeal, that Dr. Power was not an employee of FMH, but an independent contractor employed by respondent Emergency Room, Inc. (ERI), and that ERI and FMH are separate legal entities. Traditional rules of *respondent superior* are, therefore, inapposite. Jackson also makes no claim that FMH was itself negligent in its selection, retention, or supervision of Dr. Power. Consequently, we have no occasion to consider the doctrine of corporate

1. The superior court also rejected three motions for summary judgment by various respondents seeking to have Linda Estrada's claim against them dismissed on the ground that it was time barred by the statute of limitations. None of the respondents cross-petitioned for review of that issue.
2. The doctrine of corporate negligence holds that a hospital owes an independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise the medical treatment provided by members of its medical staff. See *Tucson Medical Center v. Musevch*, 113 Ariz. 34, 545 P.2d 958, 960 (1976); *Darling v. Charleston Community Mem. Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166, 170 (1984); *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156 (1981). See generally, Janulis & Hornstein, *Damned If You Do, Damned If*

negligence.<sup>2</sup> Jackson asks us to resolve only whether a hospital should be vicariously liable, as a matter of public policy, for the negligence or malpractice<sup>3</sup> of an independent contractor/physician, committed while treating a patient in the hospital's emergency room, under theories of (1) enterprise liability; (2) apparent authority; or (3) non-delegable duty.

### IV

As previously noted, this case presents this court with an issue of first impression.<sup>4</sup>

[2] The generally accepted rule is that, where an employment relationship exists between the physician and the hospital, the hospital will be liable, under the traditional rule of *respondent superior*, for any negligence or malpractice which results in injury to a hospital patient. *E.g.*, *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 11, 143 N.E.2d 3, 9 (N.Y.1957); *Weldon v. Seminole Municipal Hospital*, 709 P.2d 1058, 1059 (Okla.1985). Conversely, no liability attaches to the hospital when the physician is an independent contractor. *E.g.* *Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 547, 498 N.E.2d 867, 871 (1986); *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 499 N.Y.S.2d 904, 908, 490 N.E.2d 823, 827 (1986). See generally Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Phy-*

*You Don't: Hospitals' Liability for Physicians' Malpractice*, 64 Neb.L.Rev. 689, 702-08 (1985); Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence*, 32 Rutgers L.J. 342, 360-72 (1979).

3. Jackson has yet to prove that any negligence or malpractice did in fact occur. In order to resolve the issue presented here, however, we must assume negligence. We, of course, express no opinion as to the actual merits of Jackson's claim.
4. In *Baker v. Werner*, 654 P.2d 263, 267 n. 6 (Alaska 1982), Baker appealed the trial court's rejection of his theory of vicarious liability in a wrongful death action against a physician, hospital and attending nurse. Because we upheld the jury's finding that the defendants were not negligent, we did not reach the merits of the issue, "any theory of vicarious liability [being] irrelevant." *Id.*

*sicians*, 50 Wash after "Comment ty").

Jackson conceded independent contractor asserts that Alaska superior mandates that which would general rule.<sup>5</sup> decision in *Fruit*, 133 (Alaska 1972 of "vicarious liability" is "enterprise liability", if the negligent act performed for est of the enterprise.

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icians, 50 Wash.L.Rev. 385 (1975) (hereinafter "Comment, *Hospital Responsibility*")

Jackson concedes that Dr. Power was an independent contractor; however, he asserts that Alaska's law of *respondent superior* mandates a result different than that which would be reached under the general rule.<sup>5</sup> Jackson argues that our decision in *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972), establishes that the law of "vicarious legal responsibility" in Alaska is "enterprise liability." Thus, he contends, if the enterprise impacts society and the negligent act occurred during an activity performed for the benefit or in the interest of the enterprise, the enterprise is liable.

[3] Jackson's argument proves unpersuasive. First, Jackson's interpretation of *Fruit* is flawed. A close reading of that case shows that we did not view "enterprise liability" as a separate theory of liability or a distinct cause of action. Rather, enterprise liability was seen as one of the widely accepted theories used by courts to justify imposition of vicarious liability in an established employer/employee context. *Id.* at 138-39. As was noted in *Fruit*: [T]he "enterprise" theory ... finds liability whenever the enterprise of the employer would have benefited by the context of the act of the employee but for the unfortunate injury.

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The rule of *respondent superior* however, ... is limited to requiring an enterprise to bear the loss incurred as a result of the employee's negligence. The acts of the employee need be so connected to his employment as to justify requiring that the employer bear that loss.

5. The trial court decided the issue of the applicability of enterprise liability as a matter of law. We scrutinize questions of law under a *de novo* or independent judgment standard of review. *Hicklin v. Orbeck*, 565 P.2d 159, 163 n. 6 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). When reviewing a question of law, it is our "duty to adopt the rule of law that is most persuasive in light of precedent, reason and policy." *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

*Id.* at 140-41 (emphasis added) (footnotes omitted). See generally Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 Yale L.J. 554 (1961).

Additionally, our decisions since *Fruit* show that we have applied the theory of *respondent superior* only in an employer/employee context, unless one of the well established exceptions to that rule exists. See, *Parker Drilling v. O'Neill*, 674 P.2d 770, 775 (Alaska 1983); *Williams v. Alyeska Pipeline Service Co.*, 650 P.2d 343, 349 (Alaska 1982); *Hammond v. Bechtel Inc.*, 606 P.2d 1269, 1273 (Alaska 1980); *Barton v. Lund*, 563 P.2d 875, 876 (Alaska 1977); *Luth v. Rogers & Babler Construction*, 507 P.2d 761, 763-64 (Alaska 1973). Jackson's theory presents no such exception.

Finally, the cases from other jurisdictions cited by Jackson provide little support for his theory; those cases deal only with theories of apparent agency or corporate negligence. Moreover, although at least two courts appear to have implicitly indicated a willingness to recognize a theory of enterprise liability, see *Alden v. Providence Hospital*, 382 F.2d 163, 166 (D.C. Cir.1967); *Adamaki v. Tacoma General Hospital*, 20 Wash.App. 98, 579 P.2d 970, 977 & n. 5 (1978), to date, no court has explicitly embraced that concept.<sup>6</sup>

In short, Jackson's theory of enterprise liability is not yet the law in Alaska.

v

Jackson next argues that the trial court erred in holding that genuine issues of material fact prevented it from granting summary judgment on his theory of apparent authority.

6. Some commentators have suggested an enterprise tort doctrine as a basis for imposing liability for any tort occurring as part of the hospital enterprise. See Southwick, *Hospital Liability: Two Theories Have Been Merged*, 4 J. Legal Med. 1, 3-5 (1983); Comment, *Hospital Responsibility*, *supra* at 418-19.

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d 263, 267 n. 6 the trial court's ous liability in a a physician, hos- tance upheld nd were not ie merits of the liability [being]

Although we have recognized the doctrine of apparent authority in other contexts, see *City of Delta Junction v. Mack Trucks*, 670 P.2d 1128, 1129-30 (Alaska 1983) (national distributor and local franchise); *Perkins v. Willacy*, 431 P.2d 141, 142 (Alaska 1967) (husband and wife), this is the first time we have been asked to apply this doctrine to a hospital-independent contractor/physician relationship.

Cases from other jurisdictions show a strong trend toward liability against hospitals that permit or encourage patients to believe that independent contractor/physicians are, in fact, authorized agents of the hospitals.<sup>7</sup> These courts have held hospitals vicariously liable under a doctrine labeled either "ostensible" or "apparent" agency or "agency by estoppel." See *Porubiansky v. Emory University*, 156 Ga. App. 602, 275 S.E.2d 163, 168 (1981); *Paintsville Hospital v. Rose*, 683 S.W.2d 235, 257 (Ky.1985); *Mehlman v. Powell*, 378 A.2d 1121 (Md.1977); *Greue v. Mt. Clemens General Hospital*, 404 Mich. 240, 273 N.W.2d 429, 432-33 (1978); *Arthur v. St. Peters Hospital*, 169 N.J.Super. 575, 405 A.2d 443 (1979); *Hannola v. City of Lakewood*, 68 Ohio App.2d 61, 426 N.E.2d 1187, 1192 (1980); *Weldon*, 709 P.2d at 1060; *Themins v. Emanuel Lutheran Charity Bd.*, 54 Or.App. 901, 637 P.2d 155, 158-59 (1982); *Adamski v. Tacoma General Hospital*, 20 Wash.App. 98, 579 P.2d 970, 977 (1978); see generally Janulia & Hornstein, *supra* at 696-702. Although courts and commentators often use these terms interchangeably, they are not theoretically identical.

[4] The "ostensible" or "apparent" agency theory is based on Section 429 of the Restatement (Second) of Torts (1965), which provides:

One who employs an independent contractor to perform services for another which are accepted in the reasonable be-

7. The only exception to this modern trend of which we are aware is *Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 498 N.E.2d 867 (1986). In *Greene*, the court specifically refused to apply apparent agency to a hospital-emergency room doctor relationship because "[t]he absence of the power to control the decision mak-

ing of the emergency room physician demands that the independent relationship between hospital and emergency room physician be recognized." *Id.* 101 Ill.Dec. at 547, 498 N.E.2d at 871. We view *Greene* as an aberration dependent upon reasoning which is not particularly persuasive.

Two factors are relevant to a finding of ostensible agency: (1) whether the patient looks to the institution, rather than the individual physician, for care; and (2) whether the hospital "holds out" the physician as its employee. *Simmons v. St. Clair Memorial Hospital*, 332 Pa.Super. 444, 481 A.2d 870, 874 (1984); see also *Irving v. Doctors Hospital of Lake Worth*, 415 So.2d 55, 60-61 (Fla.App.1982); *Smith v. St. Francis Hospital*, 676 P.2d 279, 282 (Okla.App.1984).

[5] "Agency by estoppel," in contrast, is predicated on the arguably stricter standard of the Restatement (Second) of Agency § 267 (1953). Section 267 provides:

One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Under this theory, there must be actual reliance upon the representations of the principal by the person injured. *Mehlman*, 378 A.2d at 1123.

Thus, theoretically, there need be no causal relationship between the principal's conduct and the plaintiff's reliance to warrant a conclusion of ostensible agency; such a causal relationship and such a change of position, however, is the essence of estoppel to deny agency. *Janulia & Hornstein, supra* at 697.

[6] Jackson, in essence, asks us to adopt a rule of ostensible agency. FMH.

ing of the emergency room physician demands that the independent relationship between hospital and emergency room physician be recognized." *Id.* 101 Ill.Dec. at 547, 498 N.E.2d at 871. We view *Greene* as an aberration dependent upon reasoning which is not particularly persuasive.

on the other hand *Greene* and rest of the hospital-physician relationship, that we find estoppel to find nothing and doctrine of apparent agency, we perceive special rule in traditional rules provide sufficient.

In *City of L* the doctrine of Alaska as follows:

Apparent authority is to be applied as to the spoken word of a principal who causes the third party to believe that the principal has done on his behalf.

ing to act for 670 P.2d at (Second) of Agency. We went on to find that the principal's conduct was a liability and no agent; "one defendant must prove that the plaintiff is liable for the damage done by the agent to do so including the plaintiff's agent had the defendant." *Id.* (quoting *The Law of*

Relying on the trial court help of the parties required the court to review the defendant's authority reviewing the defendant's judgment or genuine issue and if not, we are entitled to judge Alaska R.Civ.P.

8. The clinic of the physician for the basis.

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on the other hand, requests that we follow *Greene* and refuse to apply this doctrine in the hospital-physician context or, alternatively, that we adopt a rule which is essentially estoppel by agency. Although we find nothing antithetical about applying the doctrine of apparent authority to a hospital-independent contractor/physician relationship, we perceive no reason to adopt a special rule in this area. We believe that traditional rules of apparent authority provide sufficient guidelines.

In *City of Delta Junction*, we defined the doctrine of apparent authority in Alaska as follows:

Apparent authority to do an act is created as to third persons by written or spoken word or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

670 P.2d at 1130 (quoting Restatement (Second) of Agency § 27, at 103 (1958)). We went on to emphasize that it is the principal's conduct that gives rise to his liability and not the conduct of the alleged agent: "one dealing with an alleged agent must prove that the principal was responsible for the appearance of authority, by doing something or permitting the alleged agent to do something that led others, including the plaintiff, to believe that the agent had the authority he purported to have." *Id.* (quoting W. Seavy, *Handbook of The Law of Agency* § 8, at 13 (1964)).

Relying on *City of Delta Junction*, the trial court held that existing factual disputes required Jackson to submit his apparent authority theory to the jury. When reviewing the denial of a motion for summary judgment, we must determine whether genuine issues of material fact exist, and if not, whether the moving party is entitled to judgment as a matter of law. Alaska R.Civ.P. 56(c); *Shatting v. Dilling-*

8. The clinics continued to provide an additional physician for the graveyard shift on a rotation basis.

9. Jackson testified at his deposition that he recalled being placed in the helicopter but had no recollection of being removed from it, being

ham City School District, 617 P.2d 9, 11 (Alaska 1980). In reaching this decision we must draw all reasonable inferences in favor of the non-moving party and against the movant. *Id.*

Drawing all reasonable inferences in the light most favorable to FMH, the record shows the following: at the time of Jackson's accident, FMH was the only civilian hospital north of Anchorage providing emergency room services in Alaska. Two road signs in Fairbanks note the location of the hospital. However, neither of these signs specifically refer to the existence of emergency room services. The signs were not constructed or situated by FMH. In fact, FMH does no advertising at all.

From the time of its establishment in 1972, FMH has never staffed its emergency room with its own physician employees, but has always relied upon local physicians to provide that service. Prior to the formation of ERI in 1977, FMH's emergency room was serviced by three local clinics, each providing one physician on a nightly basis. After 1977, ERI provided one physician on a nightly basis who worked a 14-hour graveyard shift (6:00 p.m. to 8:00 a.m.).<sup>8</sup> While on duty in the emergency room, the ERI physician was "in charge" and no FMH personnel were responsible for either scheduling or monitoring the emergency room physicians. No contractual arrangement existed between FMH and ERI for the provision of emergency room physicians.

In apparent non-life threatening situations the first person an incoming patient sees at the emergency room is the admissions clerk. Immediately adjacent to the clerk's desk is a sign which indicated that physicians from ERI were working in the emergency room. Although the exact state of Jackson's awareness is not entirely clear, there is evidence suggesting that he was admitted in a conscious state.<sup>9</sup> Nei-

taken to FMH or of meeting the doctor who treated him. On the other hand, the medical records indicate that Jackson appeared to be neurologically stable, completely oriented and gave no indication that he was unconscious or in distress. *Muremer*, at his deposition, Dr.

ther Jackson nor his mother selected FMH as the place of treatment nor Dr. Power as Jackson's physician.

[7, 8] From the above, a jury could conclude that FMH held itself out as providing emergency care services to the public. A jury could also find that Jackson reasonably believed that Dr. Power was employed by the hospital to deliver emergency room service. It is also possible, however, that a jury could find to the contrary.<sup>10</sup>

Unless the evidence allows but one inference, the question of apparent authority is one of fact for the jury. *City of Delta Junction*, 670 P.2d at 1131; *Themins*, 637 P.2d at 159; *Adamski*, 579 P.2d at 978. In the case at bar, the record is not susceptible to a single inference. Thus, the trial court properly denied summary judgment on this issue.

#### VI

Jackson's final point is that the trial court erred in refusing to rule, as a matter of law, that FMH, as a general acute care hospital, has a non-delegable duty to provide non-negligent physician care in its emergency room. In essence, Jackson's position is that when a hospital undertakes to operate an emergency room as an integral part of its health care enterprise, public policy dictates that it not be allowed to insulate itself from liability by shunting that responsibility onto another.

FMH, on the other hand, argues that a hospital does not have a non-delegable duty to guarantee safe treatment in its emergency room. Physicians, not hospitals, FMH asserts, have a duty to practice medicine non-negligently. Thus, according to FMH,

Power testified that "Jackson was talking" and "completely oriented."

10. In this regard, we agree with the weight of authority that application of apparent authority in the hospital/emergency room physician situation does not require an express representation to the patient that the treating physician is an employee of the hospital. Nor is direct testimony as to reliance required absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was rendered. See cases cited *supra* p. 1380.

a hospital cannot be held to have delegated away a duty it never had.

The trial court ruled that "[t]here cannot be a non-delegable duty if there is no contractual relationship." Since it was unclear from the evidence whether or not there was any contractual relationship between ERI and FMH, the court denied Jackson's motion for summary judgment. Initially, we note the trial court's erroneous characterization of the issue. By holding that there can be no "non-delegable duty if there is no contractual relationship," the court confused the question of the existence of a duty with the issue of whether a duty is non-delegable. The flaw in this reasoning is self-evident. As FMH points out, a party cannot be held to have delegated away a duty it never had. Thus, the threshold question is whether FMH had a duty to provide emergency room care. Only if it did, is it necessary to determine what that duty entailed.

[9] FMH is licensed as a "general acute care hospital."<sup>11</sup> As such, it is required to comply with state regulations designed to promote "safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." AS 18-20.060. These regulations provided, at the time of Jackson's accident, that an acute care hospital shall "insure that a physician is available to respond to an emergency at all times." Former 7 AAC 12.110(c)(2).<sup>12</sup> Thus, at a minimum, the law imposed a duty on FMH to provide emergency care physicians on a 24-hour basis.

FMH, however, voluntarily assumed a much broader duty. At the time of Jackson's accident, FMH was accredited by the

11. A general acute care hospital is a "facility which provides hospitalization for inpatient medical care of acute illness or injury and obstetric care." 7 AAC 12.100.

12. In 1983, this regulation was amended to provide that "[a] general acute care hospital must provide ... [among other services not relevant here] emergency care services." 7 AAC 12.105 (emphasis added).

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Joint Committee on the Accreditation of Hospitals (JCAH).<sup>13</sup> In order to receive and maintain accreditation,<sup>14</sup> FMH had to comply with the JCAH's standards promulgated in the *Accreditations Manual For Hospitals, Emergency Services*. Standard I mandates that all accredited hospitals implement a well defined plan for emergency care based on community need and the capability of the hospital. The JCAH standards also mandate, among other things, that: (1) FMH's emergency room be directed by a physician member of the active medical staff (Standard II); (2) FMH's emergency room be integrated with other units and departments of the hospital (Standard III); (3) that emergency care be guided by written policies and procedures; and (4) that the quality of care be continually reviewed, evaluated and assured through establishment of quality control mechanisms (Standard V).

Additionally, FMH's own bylaws provided for the establishment and maintenance of an emergency room. Article X, section 1(d)(1)(b) of FMH's Medical Bylaws provides for an emergency room as one of the services of the hospital. Article XI, section 3(e) provides for the creation of an emergency room committee which is required among other things to:

- (a) formulate rules and regulations for the continuous coverage of the emergency room; and
- (b) supervise the clinical work in that department.

[10] Based upon the above, it cannot seriously be questioned that FMH had a

13. The JCAH was formed in the early 1950's by the American College of Surgeons, the American College of Physicians, the American Hospital Association, and the American Medical Association. Its purpose was to establish minimum hospital standards for patient care. For details of the program, see Dornette, *The Legal Impact on Voluntary Standards in Civil Actions Against the Health Care Provider*, N.Y.L.Sch.L.Rev. 925, 925-28 (1977); Holbrook & Dunn, *Medical Malpractice Litigation: The Discoverability and Use of Hospitals' Quality Assurance Committee Records*, 16 Washburn L.J. 54, 57 (1976).

14. Hospitals voluntarily seek accreditation for financial and professional prestige reasons. First, accreditation by the JCAH means the hos-

pital qualifies to participate in the federal Medicare and Medicaid programs. Accreditation by JCAH is deemed substantial compliance with the Medicare conditions of participation. 42 U.S.C. § 1395bb (1982); 42 C.F.R. § 405.1901(d) (1986). See generally, Dornette, *supra* n. 13 at 927; Holbrook & Dunn, *supra* n. 13, at 58. Second, JCAH accreditation is often a prerequisite to obtaining approval of internship and residency programs. See generally, *American Medical Association Directory of Accredited Residencies 3* (1975-76), quoted in Dornette, *supra* n. 13, at 928. Finally, the institution's reputation and standing in the community is affected by whether it receives JCAH accreditation. See Holbrook & Dunn, *supra* n. 13.

[11] A non-delegable duty is an established exception to the rule that an employer is not liable for the negligence of an independent contractor. W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on The Law of Torts*, § 71 at 511-12 (5th ed. 1984). According to the late Professor Prosser, such a duty "may be imposed by statute, by contract, by franchise or by charter, or by the common law." *Id.* Among the duties considered non-delegable are the following:

[T]he duty of a carrier to transport its passengers in safety, of a railroad to fence its tracks properly or to maintain safe crossings, and of a municipality to keep its streets in repair; the duty to afford lateral support to adjoining land, to refrain from obstructing or endangering the public highway, to keep premises reasonably safe for business visitors, to provide employees with a safe place to work; the duty of a landlord to maintain common passageways, to make repairs according to covenant, or to use proper

duty to provide emergency room services and that part of that duty was to provide physician care in its emergency room. Having so determined, we must next ascertain whether FMH's duty to provide physician care in the emergency room is non-delegable. That is, we must determine whether, having assumed the duty to staff an emergency room, FMH should be allowed to avoid responsibility for the care rendered therein by claiming that the physicians it provides are not its employees. We conclude that it cannot.

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*Id.* (footnotes omitted). However:

It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.

*Id.* at 512 (emphasis added). *Accord, Alaska Airlines v. Sweat*, 568 P.2d 916, 925-26 (Alaska 1977).

Our principal decision on non-delegable duty is *Sweat*, 568 P.2d 916. In that case, *Sweat* sued Alaska Airlines for injuries sustained in an air crash while traveling aboard a Chitina Air Service plane. *Id.* at 922. Chitina had been engaged under a contract with Alaska Airlines to service a portion of Alaska Airlines' regularly scheduled routes. *Id.* at 921, 922. Alaska Airlines contended that Chitina was an independent contractor and therefore it was not liable for Chitina's negligence. *Id.* at 923. The trial court found Alaska Airlines vicariously liable based on Restatement (Second) of Torts § 428. *Id.* On appeal, we affirmed the trial court's decision on the alternative ground that Alaska Airlines owed a common law nondelegable duty of safety to its passengers. *Id.* at 925. We reasoned:

We believe that the responsibility of a common carrier for the safety of its passengers is so important that the carrier should not be permitted to transfer it to another. A scheduled common carrier such as Alaska is given a monopoly or semi-monopoly primarily for the purpose of furnishing safe and reliable scheduled air transportation. It should not be permitted to barter away its responsibility to the traveling public by means of contracts with other carriers. If this were permissible, an air carrier could avoid liability by engaging in independent contracts for furnishing food, maintenance of its planes and conceivably even for

supplying crews. Regardless of whether such contracts may be permitted by regulatory authorities, the traveling public is entitled to look for protection to the certificated carrier responsible for the scheduled route.

*Id.* at 926.

We have little trouble concluding that patients, such as Jackson, receiving treatment at a hospital emergency room are as deserving of protection as the airline passengers in *Sweat*. Likewise, the importance to the community of a hospital's duty to provide emergency room physicians rivals the importance of the common-carriers' duty for the safety of its passengers. We also find a close parallel between the regulatory scheme of airlines and hospitals. Undoubtedly, the operation of a hospital is one of the most regulated activities in this state. Besides the license,<sup>15</sup> and certificate of need,<sup>16</sup> requirements mentioned above, a hospital must comply with state regulations promulgated to control its activities, AS 18.20.070, 7 AAC 12.610; adopt a state approved risk management program "to minimize the risk of injury to patients," AS 18.20.075; and undergo "annual inspections and investigations" of its facilities, AS 18.20.080. Failure to comply with these statutory requirements can lead to suspension or revocation of the hospital's license. AS 18.20.050.

The hospital regulatory scheme and the purpose underlying it (to "provide for the development, establishment, and enforcement of standards for the care and treatment of hospital patients that promote safe and adequate treatment" AS 18.20.010), along with the statutory definition of a hospital, (an institution devoted primarily to providing diagnosis, treatment or care to individuals, AS 18.20.130(3)), manifests the legislature's recognition that it is the hospital as an institution which bears ultimate responsibility for complying with the mandates of the law. It is the hospital that is required to ensure compliance with the regulations and thus, relevant to the instant case, it is the hospital that bears final ac-

countability for the patient's care. We hold that a general duty to provide physical room care is non-delegable such as FMH may be liable by claiming responsibility for the results of the health care provided on the hospital's emergency room care.

We are persuaded that the holding under which emergency room care is provided in a modern hospital is the rule we adopt today. It is consonant with the public policy of a hospital as a multifaceted institution responsible for the care and treatment of patients. Tort liability in the manner that is consistent with the regulation of American hospitals simply cannot fathom a rule that depend upon the technical expertise of the emergency room physician who treats the patient. It is the hospital's duty to provide the physical care through any means available, however the fact that the hospital is responsible for the care rendered has a duty to provide

[12] This holding does not change the rule with which a physician is held liable. We extend the duty of care beyond its natural scope. If a patient is treated by a physician in an emergency room, the convenience of the doctor is beyond the scope of the duty. The holding is limited to the patient who comes to the

15. See AS 18.20.020.

16. See AS 18.07.031.

accountability for the provision of physicians for emergency room care. We, therefore, hold that a general acute care hospital's duty to provide physicians for emergency room care is non-delegable. Thus, a hospital such as FMH may not shield itself from liability by claiming that it is not responsible for the results of negligently performed health care when the law imposes a duty on the hospital to provide that health care.

We are persuaded that the circumstances under which emergency room care is provided in a modern hospital mandates the rule we adopt today. Not only is this rule consonant with the public perception of the hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered, it also treats tort liability in the medical arena in a manner that is consistent with the commercialization of American medicine. Finally, we simply cannot fathom why liability should depend upon the technical employment status of the emergency room physician who treats the patient. It is the hospital's duty to provide the physician, which it may do through any means at its disposal. The means employed, however, will not change the fact that the hospital will be responsible for the care rendered by physicians it has a duty to provide.

[12] This holding is necessarily limited. We do not change the standard of care with which a physician must comply, nor do we extend the duty which we find non-delegable beyond its natural scope. Our holding does not extend to situations where the patient is treated by his or her own doctor in an emergency room provided for the convenience of the doctor. Such situations are beyond the scope of the duty assumed by an acute care hospital. Rather our holding is limited to those situations where a patient comes to the hospital, as an institu-

tion, seeking emergency room services and is treated by a physician provided by the hospital. In such situations, the hospital shall be vicariously liable for damages proximately caused by a physician's negligence or malpractice.

[13] In the instant case, Jackson came to FMH as an institution seeking emergency room services. Dr. Power was a physician FMH had a non-delegable duty to provide. FMH is, therefore, vicariously liable as a matter of law for any negligence or malpractice that Dr. Power may have committed. Accordingly, the trial court's ruling on this issue must be reversed. Jackson is entitled to partial summary judgment on the issue of FMH's vicarious liability.

#### VII

For the reasons outlined above, the trial court's denial of summary judgment on Jackson's theories of enterprise liability and apparent authority are AFFIRMED. However because we hold that FMH has a non-delegable duty to provide non-negligent physician care in its emergency room, the trial court's denial of summary judgment on the theory of non-delegable duty, is REVERSED and REMANDED with instructions to enter partial summary judgment on the issue of FMH vicarious liability in favor of Jackson.

AFFIRMED in part; REVERSED in part; and REMANDED.

MOORE, J., not participating.



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HOUSE BILL 166

EXPLANATION OF SECTION 17 SUBMITTED BY HEALTH ASSOCIATION OF ALASKA

I. Sections 17(a), 17(b), 17(d) and 17(e)(1).

These sections repeal the holding of Jackson v. Power, 743 P.2d 1376 (Alaska Supreme Court, October 21, 1987), that a general acute care hospital is vicariously liable for the negligence of independent contractor emergency room physicians (and, by inference, all other members of an independent medical staff).

These sections are identical to SB 461, sections (a)-(d), introduced by Senators Jones, Fischer, Coghill, Faiks and Kelly during the last session. With minor changes, the substance of SB 461 was incorporated in Section 11 of CSHB 85, which passed the Senate. Attached are summary materials submitted by the Health Association of Alaska in support of SB 461.

II. Section 17(c).

This section is new and creates a "safe harbor" provision enabling hospitals that comply with the public notice requirements set forth in the section to avoid liability on a theory of ostensible, apparent or implied agency.

This section deals with two problems. First, some opponents of SB 461 felt that hospitals should be vicariously liable for the negligence of independent

contractor health care providers because the public reasonably looks to the hospital (not the individual physicians) as the health care provider, and the hospitals do nothing to dispel this belief. This was characterized by some opponents as a "truth in advertising issue."

Secondly, although hospitals may be held liable for the acts of independent contractor health care providers on an implied agency theory only upon a showing that the hospital "held itself out" as the employer of the provider, there were no guidelines to assist hospitals in determining what steps they might take to avoid this characterization. Since the issue of implied agency is one of fact, plaintiffs routinely name hospitals as "deep pocket" defendants in the hope that they can convince a jury that the plaintiff had no way of knowing that the negligent provider was in fact an independent contractor.

Section 17(c) solves both problems by permitting hospitals that wish to avoid vicarious liability on a "holding out" theory to give the form of public notice required by the subsection. The public receives fair notice that it must look to the provider, not the hospital, in the event of injury. The hospital knows exactly what it must do to avoid liability on this theory.

HEALTH ASSOCIATION OF ALASKA  
February 1988

LEGISLATIVE SUMMARY -- SB 461, LIABILITY OF HOSPITALS FOR  
NON-EMPLOYED PHYSICIANS AND OTHER HEALTH PERSONNEL

By: Senators Jones, Coghill, Faiks and Kelly

On October 16, 1987, the Alaska Supreme Court ruled in Jackson v. Power (no. 3237) that a general acute care hospital has a nondelegable duty to provide emergency room services, and therefore, the hospital is vicariously liable for the negligence of an emergency room physician.

\*\* The Jackson decision imposes liability on hospitals for the negligence of non-employee emergency room physicians solely because the hospital is required by law to provide emergency room services and is regulated in the provision of those services, without requiring the plaintiff to show that the hospital has been negligent or that it has violated any specific regulatory requirement.

\*\* The implications of the Jackson decision extend far beyond the emergency room. Although the Jackson case dealt only with the relationship between the hospital and non-employee emergency room physicians, the rationale of the case logically extends to other non-employee physicians and health care providers. Under the common law prior to the Jackson decision a hospital was not vicariously liable for the negligence of the non-employees if the hospital itself was not negligent and had complied with all applicable statutory and regulatory requirements.

\*\* The Jackson decision runs counter to modern trends of apportioning liability according to fault. Recent tort reforms were designed to provide some relief to public entities, which were often named as "deep pocket" defendants, even though their share of the responsibility for the injury was negligible. The Jackson case insures that municipally owned and non-profit hospitals will be named as deep pocket defendants in every case involving physicians negligence, even though the hospital was not negligent and has done everything within its power to comply with statutory and regulatory requirements. In one recent case, for example, the plaintiff dismissed all of the allegedly negligent physician defendants and went to trial solely against the corporate hospital.

\*\* The ruling will not improve hospital and emergency room care because, by definition, the Jackson rule applies where there is no fault on the part of the hospital. Hospitals have always been liable for their own negligence, and would continue to be so liable if Jackson were legislatively repealed.

\*\* The Jackson ruling could decrease hospital and emergency room response time if hospitals react to the ruling by requiring emergency room physicians to practice more "legal" or "defensive medicine" -- more tests, more consultations, etc. Emergency

(over)

situations are inherently risky. The legislature, for example, has granted immunity to EMTs, paramedics and ordinary citizens acting in emergency situations. These legislative choices reflect a policy decision that the need for swift action in emergency situations outweighs the policy of compensating injured plaintiffs. The Jackson decision undercuts this legislative policy.

\*\* Hospital and Emergency room operating costs could be increased also if hospitals react to Jackson by imposing more "defensive medicine" requirements.

\*\* Unless hospitals dramatically restructure their relationship to physicians (by requiring them to become hospital employees, for example) the net result of the Jackson decision probably will be to increase insurance costs as both hospital and doctor insure to cover the same risk.

\*\* There is no showing that medical malpractice plaintiffs have experienced difficulty collecting their judgments. Most physicians carry adequate malpractice insurance. The addition of a "deep pocket" corporate hospital to the cast of defendants, however, will probably increase the size of jury verdicts.

\*\* The burden of the Jackson decision will fall on municipally owned and non-profit hospitals, which are already caught in a cost squeeze from state and federal regulatory and rate requirements.

\*\* SB 461 corrects the Supreme Court ruling by clarifying that hospitals are not liable for acts or omissions of non-employed physicians or other health professionals, solely for the reason that they must provide those services under Alaska Statute or regulations. It returns the law to where it was prior to the decision, with the hospital liable for its negligence or intentional misconduct.

\*\* The Medicaid Rate Commission reports that hospital malpractice insurance premiums increased from a total of \$3,147,262.00 in 1986 to \$5,377,918.00 for 1988. An increase of over \$2 million dollars.

The passage of SB 461 will prevent an even a greater escalation of hospital liability insurance costs.

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# **Claim File Data Analysis: Overview**

## ISO DATA, INC.

INSURANCE SERVICES OFFICE, INC. (20-MIN)

December 1988

To: Readers of the Claim File Data Analysis

During the past several years, a national debate has focused on the perceived advantages and disadvantages of tort reform. As a matter of course, insurers make available to regulators and the public vast amounts of financial and statistical information. Nonetheless, insurers, regulators, public policymakers, and others have expressed a need to obtain relevant information from claim files to assist in evaluating the complex issues associated with changes to tort law.

In 1986, ISO announced its sponsorship of two high priority claim studies. The first study, the Claim Evaluation Project, was conducted by the independent policy and management consulting firm of Hamilton, Rabinovitz & Alschuler, Inc., under ISO's sponsorship. It was completed in May 1987.

The second study, the Claim File Data Analysis, is now completed. It analyzes detailed information gathered from over 13,000 actual commercial liability claim files, submitted by 24 participating insurer groups. The study was conducted by ISO DATA, Inc., a subsidiary of Insurance Services Office, Inc.

The report contains extensive information that will help interested parties better understand the issues surrounding the ongoing public policy debate.

Among the key findings of this second study are the following:


- On average, a claimant's liability insurance compensation represented several times his or her compensable economic loss.
- Insurer total claim costs are driven by a small minority of larger claims that involve more serious injury, are reported later, and characteristically require years to resolve after extended litigation.
- Current application of tort law doctrines (such as joint and several liability and the collateral source rule) contribute significantly to higher insurer claim costs.
- Plaintiffs and courts frequently treat governmental entities as "deep pockets." Governments are more likely than other insureds to make settlement payments exceeding their percentage of fault.

The types of risks any one insurer covers may vary from the average. Therefore, the aggregated results of the sample claims may not reflect any individual insurer's claim portfolio in whole or in part. Thus, although the study is based upon the best and most comprehensive information that could be collected and evaluated, the study was not designed for, nor does it result in, a pricing of tort reform.

Nevertheless, the two ISO claim studies clearly suggest that meaningful tort reform may reduce the number and dollar value of insurance losses. The size of this reduction will vary depending on the package of reforms enacted in a state and an individual insurer's book of business.

However, tort reform is only one of many events and forces that affect insurance prices. Such factors as court decisions and the responses to those decisions by claimants, lawyers, juries, and the judiciary, as well as inflation in health care costs and wage levels, interact continually to influence insurers' loss costs. Despite the enactment of tort reform by many jurisdictions in 1986 and 1987, underlying insurer claims costs have continued to rise.

The property and casualty insurance industry is highly dynamic and intensely competitive in pricing, in product, and in marketing strategies. An operational reality of the business is that anything likely to increase profitability for insurers is very soon converted by competitive pressures into reduced premium levels designed to increase or retain market share. The actual impact of tort reforms will be reflected in insurers' loss experience over time. Until then, informed judgment, supplemented by the information in this and other studies, will assist insurers in continuing to make the difficult pricing judgments necessary to estimate cost savings attributable to tort reform.



Fred R. Marcon  
Chairman

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# I. Background

## A. Introduction

The recent problems in the liability insurance marketplace produced hardship and dislocation for some businesses, local governments, and professionals. These entities need affordable liability insurance to protect their operations. Not surprisingly, a highly charged public debate arose over the root causes of the problems, with some observers focusing on the effects of rising costs and unpredictability within the tort system—and others arguing that primary responsibility for the problems lay with the behavior of the property and casualty insurance industry itself.

A major by-product of that debate has been a surge in efforts to obtain more data about insurer claim costs. In 1986 alone, 17 states enacted a wide range of data reporting bills, with a diversity of requirements that has virtually precluded a uniform response.

Expanded interest in insurer claim cost information appears to reflect a multiplicity of forces. In some cases, the data requests indicate a desire to improve understanding of the sources of claims and the dynamics of the claim negotiation process. Other requests reflect an understandable impulse to evaluate the cost effects of traditional tort law doctrines and recently enacted and potential new tort reforms. Sometimes, the specific objectives behind the data requests are less clear. In general, the new data reporting laws seem to be based on the assumption that more information will, in some undefined way, inevitably lead to better informed public policy.

Supporters of these laws appear to presume that the social value of more information exceeds the cost of producing that information—or that those costs are irrelevant.

Before enactment of the recent legislation, property and casualty insurers were already subject to extensive data reporting requirements. (See ISO Insurance Issues Series, *Insurance Data: A Close Look*.) The recent legislation has imposed a massive new burden on insurer data reporting and claim functions. Nonetheless, from time to time, insurers have supplemented traditional financial and statistical data with information from other sources. Where specific claim information appeared useful in enhancing public debate, insurers have undertaken claim studies, such as in the areas of medical malpractice and product liability.

To address in an effective manner the perceived needs for more data, Insurance Services Office, Inc. (ISO), sponsored two claim data studies.

The first study, the *Claim Evaluation Project*, was conducted by the independent public policy and management consulting firm of Hamilton, Rabinowitz & Alschuler, Inc., under ISO's sponsorship. It was completed in May 1987. The study involved the evaluation by experienced claims personnel of six typical, but hypothetical, claim situations. The *Claim Evaluation Project* provided an early look at the direction and relative size of the effects of various tort reforms on bodily injury indemnity costs. The study identified the likely effects of major tort reforms in the claim situations tested. In the opinion of the experts who participated in the *Claim Evaluation Project*, the qualifications and exceptions incorporated into many of the tort reform statutes largely eliminated the effects of those tort reforms in reducing claim costs. The study also concluded that enactment of a three-point program<sup>1</sup> of rela-

<sup>1</sup>The three-point program consisted of the abolition of the rule of joint and several liability, relaxation of the collateral source rule (including set off of collateral benefits), and establishment of a ceiling of \$250,000 on awards of non-economic damages.

tively straightforward tort reforms would produce significant cost reductions in virtually all of the claim situations tested.

This Overview presents key findings from the second study, the *Claim File Data Analysis* (hereafter, "the study").

## B. Study Objectives and Limitations

The *Claim File Data Analysis* is a longer-term analysis by ISO DATA, Inc., of 13,316 actual commercial liability claim files submitted by 24 insurer groups. In the aggregate, the participating insurers write a significant portion of the general liability coverage written in the United States. A Technical Analysis of the study is also available from ISO DATA, Inc., for those seeking a more complete understanding of the issues highlighted in this Overview. The Technical Analysis presents an in-depth review of the findings and includes presentations of 14 major groups of reports.

Because the requests for more insurer claim data have been motivated by a variety of concerns, this study sought to meet a wide range of objectives. The study represents the broadest survey of commercial liability claim files ever undertaken, and thus the most detailed picture ever produced of the commercial liability compensation process. The study includes the first claim file analysis of claims against governmental and municipal insureds. It also contains a broad-based analysis of the effects on insurer claim costs of several important tort law doctrines, including joint and several liability, the collateral source rule, and punitive damages.

The *Claim File Data Analysis* addresses a series of important issues—compensation levels relative to claimant losses, the size distribution of claims, the effects of litiga-

tion on the length of time a claim is open, and others. These topics are critical for understanding the workings of the insurance mechanism and evaluating tort law policy. The commercial liability claims universe is not monolithic—large and small claims, for example, exhibit sharply different characteristics—and the study delineates such distinctions.

The objective of this study is not to present the case for or against any particular policy initiative. Rather, the goal is to assist interested parties in making difficult judgments about tort law policy issues. ISO DATA, Inc., hopes the study will encourage a more informed public policy debate and avoid the need for further, less useful, but expensive state and federal government demands for data.

Any claim file study must be reviewed in light of the limitations of such studies. A complete discussion of the availability, uses, and limitations of claim file information can be found in *The Report of the Statistical Information Advisory Committee to the NAIC Legal Liability Insurance (D) Task Force*, dated December 1986. These limitations include the following:

- Information needed to study public policy issues may not be available in the claim file, or may be available only when a claim actually goes to verdict.
- Claim studies contain information only from primary insurers in the admitted market.<sup>1</sup>

<sup>1</sup> Claim File Data Analysis did collect information from the plus lines subsidiaries of the participating insurer groups, but they are a minority of the non-admitted market.

- Claim file information does not measure trends or changing conditions or the effects of future change. A claim study is a "snapshot" at one point in time.

These limitations, inherent to all claim studies, put certain constraints on the uses of the *Claim File Data Analysis*.

*First*, the study is about claim costs, not prices. The study provides no information on premium collected or on exposures insured. Both elements are necessary to measure the appropriateness of premiums. More important, during periods when tort laws are in great flux, a claim file study can never yield precise quantitative judgments about current prices.

Current insurance prices reflect judgments about future claim costs—specifically, the costs of paying the claims expected in the years ahead under a policy written today. But commercial liability losses "mature" slowly. That is, the higher valued claims producing the preponderance of insurer claim costs tend to be litigated and settled years after they are first reported. Therefore, claims that have actually closed are predominantly those reported years in the past. To the extent that the tort system is in ferment, this study could not capture information on the recent changes that will determine future claim costs.

*Second*, even at a single point in time, a study like the *Claim File Data Analysis* cannot produce a precise, definitive finding on the effects of particular tort law reforms. Insurer claim costs are, by definition, the best measure of the effects of tort law trends on insurer costs. And over time, the aggregate effects of tort law changes—increased valuations of injury or expansion of liability that raise costs or meaningful tort reforms that reduce costs—are reflected in insurer claim cost data regularly submitted to regulators.

In settling claims, however, insurers do not typically calculate how claim payments would have differed if some tort law element had been different. Insurers, claimants, and attorneys negotiate settlements on the basis of existing law within a jurisdiction; they do not make a record of what the settlement would have been had the law been different, nor do they specify how particular doctrines of existing law contributed to their final settlement figure. The best a claim file study can do in measuring the impact of specific tort law changes is to ask claims professionals to offer a subjective estimate of how the outcome of a multifaceted negotiation might change if one or more elements of the law were different.

### C. Scope of the Study

The usual insurance claims survey is a study of closed claims, in which all outstanding contractual obligations of the insurance company have been satisfied. Analysts value closed claim studies because all payment information is fully developed, and closed claims present a composite picture of claims that have been resolved. But cases settle slowly—it may take a decade or more to resolve a disputed commercial claim—and the data collected in many case files may be stale by the time the claims for a given period of time have all closed. This problem is compounded by the effects of a dynamic environment, in which law, social attitudes, scientific knowledge, and, as a result, claim frequency and severity change rapidly. To minimize this problem, the *Claim File Data Analysis* looked at three separate samples of claims, as described below.

Professional claims personnel from a sample of insurers representing at least 50% of the premium volume in each of the 27 states filled out a detailed questionnaire for each eligible claim. A complete description of the specifications and scope of the study can be found in the Technical Analysis of the *Claim File Data Analysis*. See Section IV of this Overview for lists of the participating insurers, states surveyed, and lines of business included.

### **Study Part 1—Policy Year 1983 Claims of \$25,000 or More**

To allay the concern about old claims in a dynamic environment, Study Part 1 surveyed claims—both open and closed—that arose out of policies written during 1983. This is a relatively recent policy year, considering that a long settlement process is common for large commercial liability claims. The study collected information on all eligible commercial liability claims (other than medical malpractice) with a bodily injury indemnity of \$25,000 or more. The evaluation date for these claims was December 31, 1986. Claims closed before July 1, 1985, were excluded, because the claim files were too old or too difficult to locate. Claims reported after January 1, 1986, that were still open were also excluded, because they were too immature to produce meaningful information. Thus, this sample does not represent all claims from policies written during 1983.

These requirements permitted the collection of information on recent large claims, yet assured that the claims were mature enough to permit meaningful analysis.

### **Study Part 2—August 1987 Closed Claim Sample**

Small claims in general close quickly, and the information required for this study might not be routinely maintained in

claim files. Therefore, a retrospective study of small claim files may not provide as much meaningful information as a study conducted as the claims close—while the information is still fresh in the minds of the claims handlers.

Thus, Study Part 2 examined all commercial liability bodily injury claims (other than medical malpractice) that closed during the first week of August 1987, regardless of size, date of accident, or when the underlying policy was written. The survey forms were completed as the claims closed or soon thereafter.

### **Study Part 3—Policy Year 1983 Governmental Claims under \$25,000**

A key policy concern has been the availability of liability insurance to governmental entities at an affordable cost. Therefore, Study Part 3 collected information on identifiable bodily injury claims under \$25,000 against governmental entities that arose from policies written during 1983. (Governmental claims of \$25,000 or more were reported in Study Part 1, with the non-governmental claims.) Both open and closed claims were surveyed with the same exceptions as noted above for Study Part 1.

## **D. NAIC Review**

Once the initial study design was prepared, ISO DATA, Inc., invited the National Association of Insurance Commissioners (NAIC) to review the technical specifications and methodology of the *Claim File Data Analysis*. On January 5, 1987, the NAIC sponsored a meeting in Washington, DC, at which 13 organizations reviewed the study specifications. As a consequence of that review, ISO DATA, Inc., made various modifications in the survey form. The NAIC confirmed that the study specifications met its concerns and those of the organizations that participated in its review. In addition, to assure that the study would gain broad acceptance, the Illinois Department of Insurance engaged the independent public accounting firm of Ernst & Whinney to review the study.

The objective and scope of Ernst & Whinney's review, as defined by the Illinois Department of Insurance and the NAIC, was to determine whether the data collection process had been performed in a manner sufficient to provide a reasonable degree of assurance that the compiled data was free of material errors or irregularities. To accomplish this objective, Ernst & Whinney:

- reviewed a random sample of survey forms and compared the data to the participating insurer's claim files
- performed a general computer controls review as related to the inputting, editing, processing, and output of the study data
- recomputed the study's output processing for a sample of output reports

Based on the procedures performed, Ernst & Whinney reported to the Illinois Department of Insurance and the NAIC that nothing came to their attention that caused them to believe that the compiled data was not collected in a reasonable manner within the *Claim File Data Analysis* specifications.

## II. Major Findings

### A. Adequacy of Compensation

For the vast majority of claimants in the study, liability insurance compensation covered at least their fault-adjusted economic loss (such as medical costs, past and future wage losses, and rehabilitation costs). On average, claimants received several times their compensable economic losses.

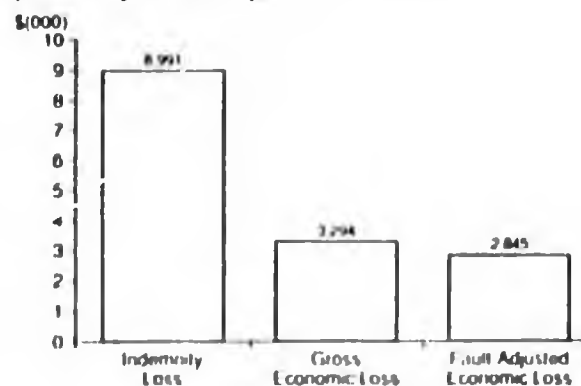
These findings suggest that many claimants received substantial compensation for non-economic damages, including such intangible injuries as pain and suffering, mental distress, and loss of consortium.

Since non-economic damages are intangible, a quantitative analysis cannot say whether compensation for non-economic damages is adequate or inadequate. Therefore, the *Claim File Data Analysis* focuses on whether claimants received compensation greater or less than their economic losses. Specific findings include the following:

- Over 90 percent of claimants were compensated for at least their fault-adjusted economic loss. (Fault-adjusted economic loss is the claimant's economic loss reduced by the estimated percentage of fault attributable to the claimant.) On average, in Study Part 2 (closed claim sample), claimants received more than 3 times their fault-adjusted economic loss. Even when not fault-adjusted, claimants received an average of 2½ times their economic loss.
- Claimants with small claims received, on average, several times their fault-adjusted economic loss. The tendency toward compensation exceeding economic loss declined as the level of economic loss increased.

Figure 1

### Average Compensation Compared to Economic Loss Study Part 2 - Closed Claim Sample (With Payment Only)



- The great majority of claimants had relatively small medical, wage, and "other" economic losses. Medical expenses predominated at the lower levels of economic loss, and lost wages predominated at the higher levels.

The real compensation received by many plaintiffs may be overstated because plaintiffs' legal fees were not reflected. Although many small claims did not involve an attorney, almost all large claims did.

On the other hand, the findings understate the total recovery received by many claimants. Claimants often received payments from collateral sources (such as health insurance, Workers' Compensation, and no-fault insurance) as well as reimbursements from other liability policies (such as excess and umbrella policies) and direct payments from the liable parties (because of self-retentions, settlements exceeding policy limits, and payments from non-insurers). However,

- Considering known collateral source payments (with no lien attached) as well as liability compensation, claimants, on average, received a total recovery several times their level of fault-adjusted economic loss. In Study Part 1 (claims of \$25,000 or more) claimants received a total average recovery of 2½ to 3 times their fault-adjusted economic loss. In Study Part 2 (closed claim sample), reflecting all claim sizes, the average multiplier was about 4 times the fault-adjusted economic loss.

An example will clarify these findings. Assume that a claimant suffered a \$10,000 economic loss (\$5,000 in medical costs and \$5,000 in lost wages) and that the claimant was 25 percent responsible for his or her own injury. The claimant's fault-adjusted loss was 75 percent of \$10,000, or \$7,500. Assume that the claimant received \$20,000 in liability compensation and \$10,000 from collateral sources, for a total recovery of \$30,000. The multiple of total recovery (excluding legal fees) to fault-adjusted economic loss was \$30,000 divided by \$7,500, or 4 to 1.

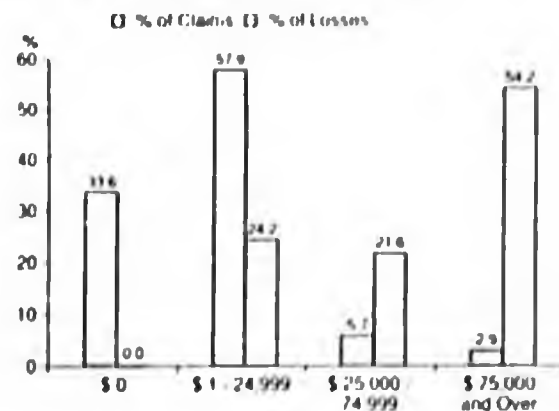
### B. Claim Size Distribution

The claims in the study can be divided into two groups—large claims and small claims. The study found that these groups exhibited very different characteristics.

The vast majority of claims were relatively small. In Study Part 2 (which had a size-of-loss distribution similar to the overall commercial liability bodily injury claims universe), more than 90 percent of the claims were settled for less than \$25,000.

Figure 2

**Size of Loss Distribution by Percentage Of Claims and Percentage of Losses**  
Study Part 2 - Closed Claim Sample



A relatively small number of large claims accounted for the vast preponderance of total liability insurance compensation dollars. In Study Part 2, claims of \$25,000 or more accounted for only 9 percent of the claims but 78 percent of all compensation paid. Fewer than 3 percent of the largest claims were responsible for 54 percent of the total compensation paid. In Study Part 1 (claims of \$25,000 or more), the same pattern held. Claims of \$150,000 or more accounted for only 16 percent of all Study Part 1 claims but represented 51 percent of total Study Part 1 compensation.

Table 1 displays the size distributions of claims and average loss levels.

Table 1

**Average Losses by Study Part**

	<u>Number of Claims</u>	<u>Average Loss per Claim<sup>a</sup></u>	<u>Average Loss per Incident<sup>a</sup></u>
Study Part 1—Policy Year 1983—			
Claims of \$25,000 or More	6,707	\$91,026	\$128,114
Study Part 2—Closed Claim Sample			
No Payment	1,965	0	0
Payment under \$25,000	3,390	4,495	4,646
Payment of \$25,000 or More	499	95,394	109,817
Study Part 3—Policy Year 1983—			
Governmental Claims under \$25,000	755	6,903	13,748

<sup>a</sup> Throughout this study, a claim refers to a demand for compensation from a particular insured. Thus, if two parties who were injured in a single event each seek compensation from each of three insureds, there are six claims. An incident refers to the number of injured parties seeking compensation, regardless of the number of insureds. Thus in the prior case there are two incidents.

The fact that a small number of large claims drive total insurer claim costs has several implications:

- The frequency of litigation involving small claims is less critical in determining total insurer claim costs than the frequency of litigation and award levels in the larger cases.
- Tort reforms that target the high cost cases can play a critical role in determining total insurer claim costs.
- To the extent that liability doctrines continue to change while the larger claims remain subject to years of litigation before settlement, insurers will confront a systemic problem of unpredictability in gauging future claim costs.

Just as the claims in this study do not fully reflect total compensation received by claimants, neither do they provide a full picture of insurer costs. The study was limited to bodily injury claims and excluded claims for property damage. While the study did examine allocated loss adjustment expenses (insurer legal expenses and other expenses that can be allocated to a specific claim), these costs are not included in Table 1. Also the study did not include some types of claims referred to in the Institute of Civil Justice report, *Trends in Tort Litigation: The Story Behind the Statistics*, such as some high stakes personal injury suits (for example, medical malpractice) and mass tort class action suits. Had such high cost claims been included, the phenomenon of large claims playing a prominent role in driving total insurer costs would have been even more evident.

### C. Settlement Patterns and the Role of Litigation

An analysis of claim settlement patterns and the frequency of litigation extends and reinforces the striking picture of two very different worlds within the commercial liability claims universe.

Most claims involved relatively modest sums of money, minor injuries, and a single insured. By and large, smaller claims were reported shortly after the accident, did not produce litigation, and were settled quickly.

By contrast, a small minority of larger claims accounted for the overwhelming preponderance of total liability insurance compensation dollars. These claims generally involved more serious injuries and often had multiple defendants. They tended to be reported more slowly, usually led to litigation, and were resolved slowly. Indeed, even among litigated claims, those involving the largest sums of money were resolved the slowest.

The study's findings on settlement patterns and litigation include the following:

- Within a year of the accident, more than 90 percent of all claims were reported, but claims reported later involved higher levels of compensation.
- In Study Part 2 (closed claim sample), 56 percent of the claims were closed within a year of the first report, but those claims accounted for only 14 percent of the total liability compensation insurers ultimately paid. Three years after the first report, only 12 percent of all claims remained open, but they represented 40 percent of the liability compensation that insurers ultimately paid. Looked at another way, average compensation for claims closed within 6 months of the first report was about \$2,000. By contrast, average compensation for claims closed 3 to 4 years after the first report was \$7,000.

Figure 3

**Average Compensation by Time from Accident to First Report**  
Study Part 2 - Closed Claim Sample  
(With Payment Only)

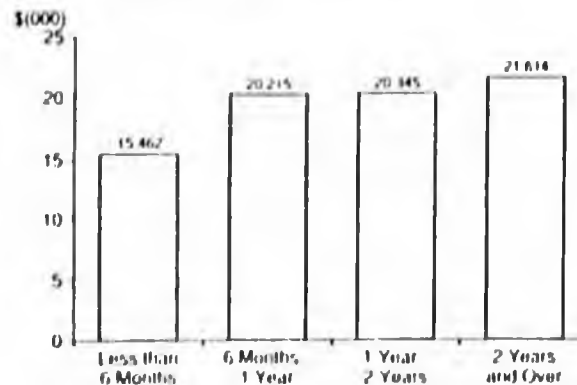
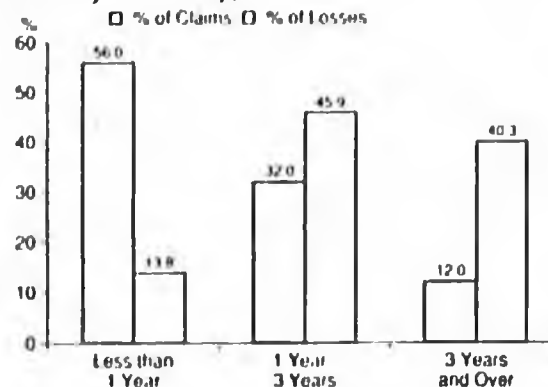


Figure 4

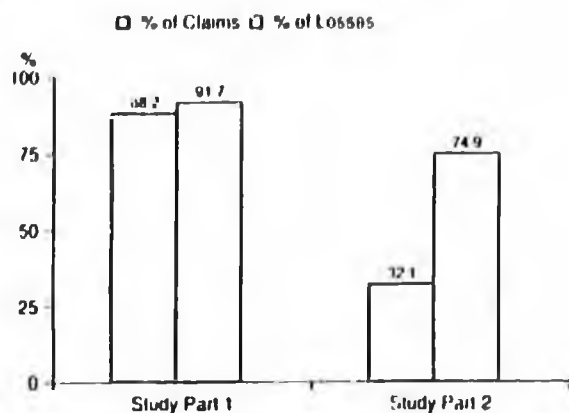
**Percentage of Claims and Losses by Time From First Report to Case Closed**  
Study Part 2 - Closed Claim Sample  
(With Payment Only)



- Within Study Part 1 (claims of \$25,000 or more), 88 percent of all claimants filed lawsuits. But in Study Part 2 (closed claim sample), where 90 percent of the claims were under \$25,000, only 32 percent filed lawsuits. Those claims accounted for 75 percent of the total liability compensation ultimately paid. Similarly, while 98 percent of all Study Part 1 claimants were represented by an attorney, only 64 percent of Study Part 2 claimants had an attorney.
- In commercial automobile accident cases, claims involving a lawsuit remained open twice as long after the accident date as claims without a lawsuit. In "all other liability" cases, claims with a lawsuit remained open almost three times as long. Moreover, longer periods of litigation corresponded to higher claim costs ultimately being paid. The average compensation rose from \$12,000 for claims closed within 6 months after the suit was filed to \$77,000 for claims closed from 48 to 60 months after the suit was filed. Claims involving multiple defendants and greater severity of injury understandably took longer to settle than simpler cases. The consequences for insurers were higher legal costs and delay in determining claim costs.
- Fewer than 2 percent of the claims went all the way to verdict.

Figure 5

**Percentage of Claims and Losses With Lawsuit Filed**



Study Part 1 - Claims of \$25,000 or More  
Study Part 2 - Closed Claim Sample (with Payment Only)

Figure 7

**Average Compensation by Time from Suit Filed to Case Closed**  
Study Part 2 - Closed Claim Sample (With Payment Only)

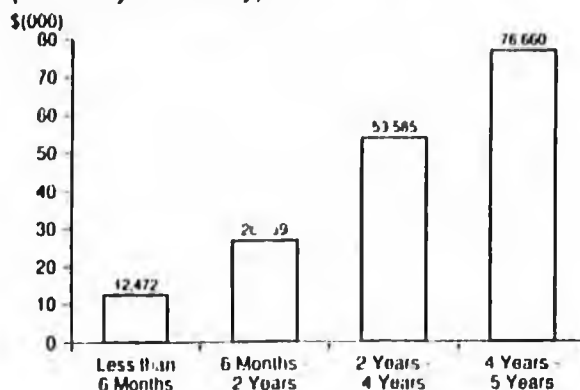
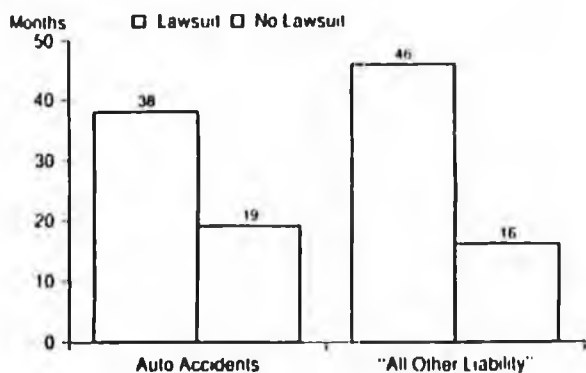


Figure 6

**Average Time from Accident Date to Case Closed**  
Study Part 2 - Closed Claim Sample (With Payment Only)



These findings have significant implications for insurers and for the tort law policy debate. Some observers have discounted the effects of recent tort law trends on the insurance mechanism by making two assertions. First, some have said that, while tort awards for serious injuries may be rapidly rising, median tort awards for typical, small tort actions have remained relatively constant. Second, some have noted that, as a practical matter, most claims are settled through negotiations rather than through litigation.

In fact, the study suggests that tort trends producing increased dollar valuations of serious injury cases will have a very real effect on the insurance mechanism. The litigated claims constitute the majority of insurer claim costs and thus drive the insurer claim cost base. The vast preponderance of those litigated claims are indeed settled before verdict, but the parties reach their settlements in the context of lawsuits. The litigants' expectations of how those claims would be resolved if the suits went to verdict have a strong influence on the amounts of the settlements. In short, the study indicates that insurer claim costs will be largely determined by tort law trends affecting the crucial minority of cases involving serious injuries and large awards or settlements.

Because the claims driving insurer claim costs typically take many years to close, an analysis of recent policy years cannot quantify external factors that may change total claim costs. The lengthy claim settlement process described by this study constitutes a severe obstacle to efforts to quantify the costs of tort reforms in advance or to predict future claim cost levels with precision.

## D. Implications of Tort Doctrines

The study provides evidence that current applications of some tort law doctrines contribute to higher claim costs. This section examines three tort law issues and related findings of the *Claim File Data Analysis*.

### 1. Joint and Several Liability

Under the traditional rule of joint and several liability, a plaintiff injured by more than one defendant may seek and receive full payment of any court award from any liable defendant, regardless of the share of the fault assigned by the court to that defendant. Critics assert that it is unfair to force a defendant who played a minor role in causing an injury to pay all or most of a large judgment. As an alternative, these observers have suggested—and several states have adopted—a rule of several liability only. Under such a rule, each defendant is liable only for the percentage of the total award corresponding to that defendant's percentage of fault.

The study does not assess the merits of any side in the policy debate over joint and several liability. Rather, the study provides a firmer factual basis for that debate. Specifically, the study addresses the issue of how often defendants pay a percentage of the total settlement larger than their indicated percentage of fault. The study also identifies some of the key characteristics of multi-defendant claims, including their cost implications.

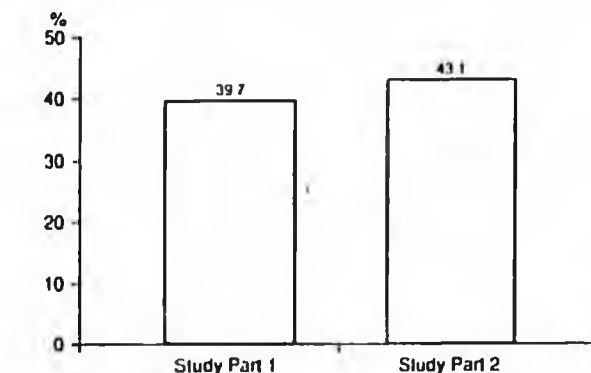
In addition, the study addresses the extent to which claimants are responsible for their own injuries, an issue arising in the context of both single- and multi-defendant claims.

The study's findings on joint and several liability and claimant fault include the following:

- Insureds in multi-defendant situations frequently paid a larger percentage of the settlement than their percentage of fault. The insured's estimated percentage of the settlement was larger than the insured's estimated percentage of fault in about 40 percent of the multi-defendant cases.

Figure 8

### Percentage of Multi-defendant Cases In Which Insured's Percentage of Settlement Exceeded Percentage of Fault

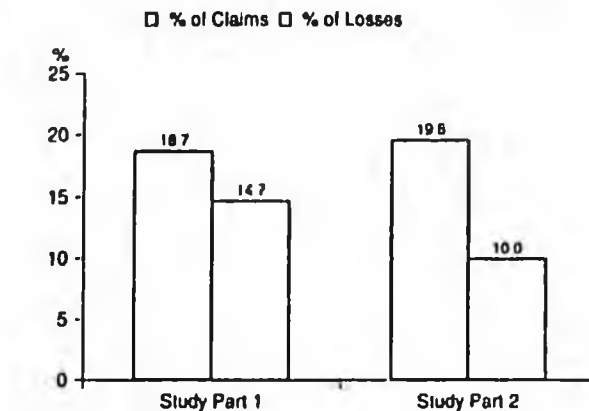


Study Part 1 - Claims of \$25,000 or More  
Study Part 2 - Closed Claim Sample (with Payment Only)

- In both Study Part 1 (claims of \$25,000 or more) and Study Part 2 (closed claim sample), the claimant was estimated to be 50 percent or more responsible for his or her own injury in almost 20 percent of the claims. In Study Part 1, 15 percent of the total liability insurance costs went to claimants who were estimated to be 50 percent or more responsible for their own injuries. The average compensation for those claims was more than \$70,000.

Figure 9

### Percentage of Claims and Losses With Claimant 50% or More Responsible

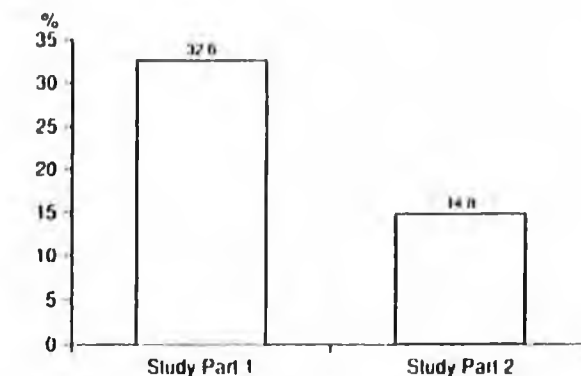


Study Part 1 - Claims of \$25,000 or More  
Study Part 2 - Closed Claim Sample (with Payment Only)

- Average compensation in multi-defendant cases significantly exceeded compensation in single-defendant cases. About one third of the larger claims (Study Part 1) were multi-defendant cases, whereas only about 15 percent of the Study Part 2 claims, mostly small claims, were multi-defendant cases. In Study Part 1, insurers paid an average of 2.4 times more in multi-defendant cases than in single-defendant cases. In Study Part 2, insurers paid an average of 3.7 times more in multi-defendant cases than in single-defendant cases.
- Multi-defendant cases also generated disproportionately higher legal costs than single-defendant cases. When allocated loss adjustment expenses (insurers, legal costs, and other claim expenses) were calculated as a percentage of compensation paid to claimants, those expenses were more than 75 percent greater in multi-defendant cases than in single-defendant cases.

Figure 10

**Multi-defendant Cases As Percentage of All Cases**



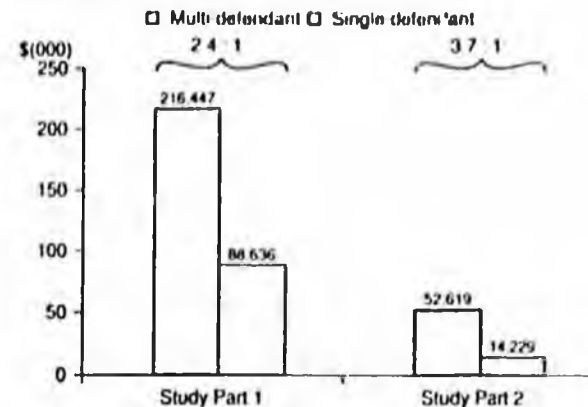
Study Part 1 - Claims of \$25,000 or More  
Study Part 2 - Closed Claim Sample (with Payment Only)

**2. Collateral Sources**

Under the collateral source rules in effect in most jurisdictions, the fact that a claimant has received—or is entitled to receive—benefits from a collateral source (such as no-fault or private health or disability insurance) does not reduce any settlement or court award. Indeed, in many jurisdictions, the availability of collateral source payments may not even be introduced as evidence at trial. Critics say that it is unfair for some claimants to recover twice for the same injuries. In some jurisdictions alternatives to these rules have been proposed or enacted. These alter-

Figure 11

**Ratio of Average Losses in Multi-defendant Cases to Average Losses in Single-defendant Cases**



Study Part 1 - Claims of \$25,000 or More  
Study Part 2 - Closed Claim Sample (with Payment Only)

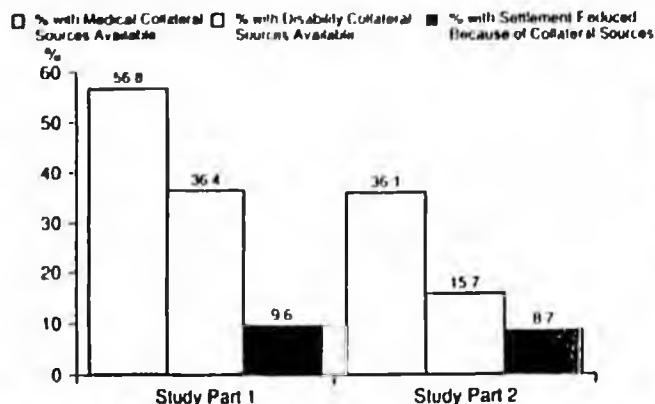
natives either permit collateral source benefits to be introduced as evidence or more directly mandate that the amount of the settlement or court award be reduced by the amount of collateral benefits already received by the claimant.

The *Claim File Data Analysis* sheds light on a number of issues related to collateral sources:

- Many claimants did, in fact, receive recoveries from collateral sources as well as from liability insurance. In Study Part 1 (claims of \$25,000 or more), 57 percent of the claimants were reported to have medical collateral sources available and 36 percent of the claimants were reported to have disability collateral sources available. In Study Part 2 (closed claim sample), claimants were reported to have medical collateral sources available in 36 percent of the cases and disability collateral sources in 16 percent of the cases.
- The study also indicated the potential for cost reduction: that the relaxation of the traditional collateral source rule would permit. Despite the wide availability of collateral source benefits, only 9 percent of all claims in both study parts had settlements or court verdicts reduced because of the availability of collateral sources.

Figure 12

**Percentage of Claims with Collateral Sources Available and Percentage with Settlement Reduced Because of Collateral Sources**



Study Part 1 - Claims of \$25,000 or More  
Study Part 2 - Closed Claim Sample (with Payment Only)

- In cases where collateral sources did reduce the settlement or court awards, the dollar effect was significant. In Study Part 1 (claims of \$25,000 or more), in claims that were reduced because of collateral sources, the average reduction was 20 percent. In Study Part 2 (closed claim sample), the average reduction was 28 percent for affected claims.
- For Study Part 1, Workers' Compensation was the most prevalent collateral source of benefits reported. Almost 40 percent of Study Part 1 claimants who had a collateral source reported and almost 20 percent of Study Part 2 claimants who had a collateral source reported had Workers' Compensation benefits. This is consistent with the proportion of claimants whose injuries were related to their employment. Among the employed claimants in Study Part 1, 41 percent of the injuries were work related, and among the employed claimants in Study Part 2, 16 percent of the injuries were work related.

Figure

**Distribution of Claims by Type of Collateral Source**  
Study Part 1 - Claims of \$25,000 or More

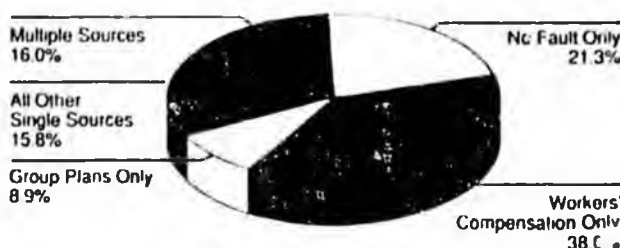
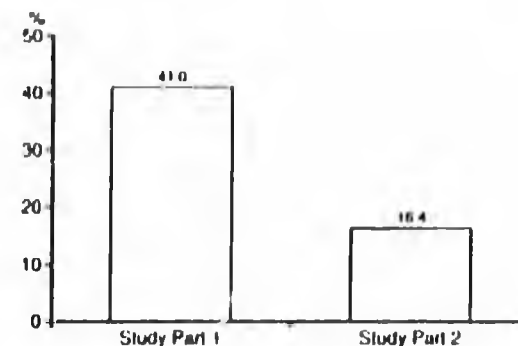


Figure 14

**Work-Related Injuries as Percentage of Employed Claimants**



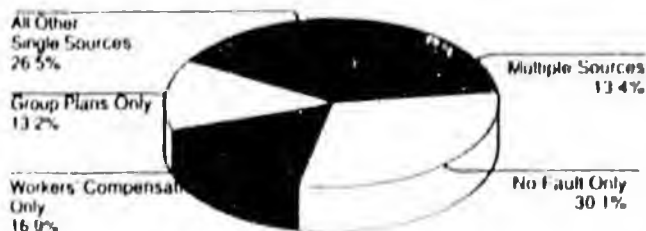
Study Part 1 - Claims of \$25,000 or More  
Study Part 2 - Closed Claim Sample (with Payment Only)

- In Study Part 2, no fault was the most prevalent collateral source reported, covering over 30 percent of all claimants who had a collateral source reported.

Because of difficulties in collecting collateral source data, the study probably understated the significance of collateral sources. Claimants are generally not required by law to disclose collateral sources—either to insurers or to the courts—and the process of negotiating settlements strongly discourages plaintiffs from volunteering this information.

Figure 15

**Distribution of Claims by Type of Collateral Source**  
 Study Part 2 - Closed Claim Sample  
 (With Payment Only)



Thus, collateral source benefits were probably far more widely available than the study found. For example, in 1983, 80 percent of all Americans had private health insurance for hospital expenses, 76 percent had coverage for surgical expenses, and 73 percent had coverage for physicians' expenses. Over 134 million Americans belonged to some form of employer- or union-provided group coverage plan. (See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1987* (107th edition) Washington, DC, 1986, p. 89)

**3. Punitive Damages**

Awards for punitive damages are not designed to compensate for injury but to penalize the defendant for conduct that a court finds to be beyond ordinary negligence. The standards vary from state to state. Some jurisdictions provide damages for gross negligence, others for reckless misconduct, and others for conduct deemed wanton, willful, or malicious.

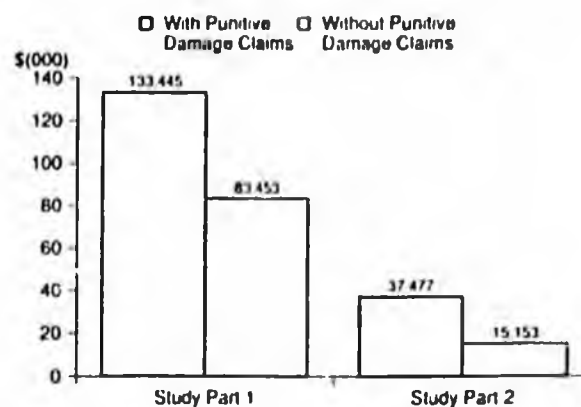
Since a very small minority of claims actually go to verdict, many observers have argued that award levels as such do not reveal the primary effect of punitive damages. Instead, their main effect comes in the upward ratcheting of settlements negotiated with a threat of potentially large punitive damage awards. In effect, to protect insureds against the risk of large punitive awards, insurers are agreeing to bigger settlements than they would without the threat of punitive damages. The *Claim File Data Analysis* makes an effort to quantify this "shadow effect" of punitive damages awards on actual claim settlements. The relevant findings include the following:

- On average, respondents reported that claim settlements rose about 10 percent when claimants sought punitive damages. In Study Part 1 (claims of \$25,000 or more), where claimants sought punitive damages, survey participants reported that the punitive damage claims influenced the settlement in 13 percent of the cases. Among that 13 percent, the respondents reported that compensation would have been 55 percent lower on average if the claimants had not sought punitive damages.

- In Study Part 1, claim settlements where claimants sought punitive damages were about 60 percent higher than those where claimants did not seek punitive damages (\$133,000 compared with \$83,000). In Study Part 2 (closed claim sample), claim settlements where claimants sought punitive damages were nearly 150 percent higher than those where claimants did not seek punitive damages (\$37,000 compared with \$15,000). Much of the difference in claim settlement value between claims with and without the threat of punitive damages may have resulted from the inherent characteristics of these claims, rather than the threats. Nevertheless, as the respondents reported, punitive damage claims do have some effect on claim settlements.

Figure 16

**Average Losses with and without Punitive Damage Claims**



Study Part 1: Claims of \$25,000 or More (Closed Claims Only)  
 Study Part 2: Closed Claim Sample (with Payment Only)

## E. Governmental and Municipal Claims

State and local governments have asserted that changes in the legal climate have, in effect, converted governments into "deep pockets" for potential claimants. The study, which collected information on approximately 1,000 claims against local governments and municipalities, suggests that this contention has merit. The study found that governmental entities were more likely than other insureds to make settlement payments in excess of their percentages of fault. Claimants against governmental entities were more likely than other claimants to sue and to receive compensation greater than their economic losses.

Specifically for the "all other liability" claims:

- In multi-defendant cases, when the insured was a municipal or governmental entity, the insured's estimated percentage of settlement exceeded its estimated percentage of fault in 46 percent of the cases, compared with 36 percent of the cases for all multi-defendant cases.
- Claimants filed suits in the vast majority of governmental claims—in 75 percent of the small governmental claims and in 88 percent of the large governmental claims. By contrast, in the general claim population, claimants filed suits in only about one third of the claims. The frequency of suits against governmental and municipal entities may be attributable in part to the tight statutory time limits for filing suits against such public entities. Claimants are forced to sue early in the claims process or forgo the right to sue later.

Figure 17

**Percentage of Cases in Which Insured's Percentage of Settlement Exceeded Percentage of Fault**  
"All Other Liability"

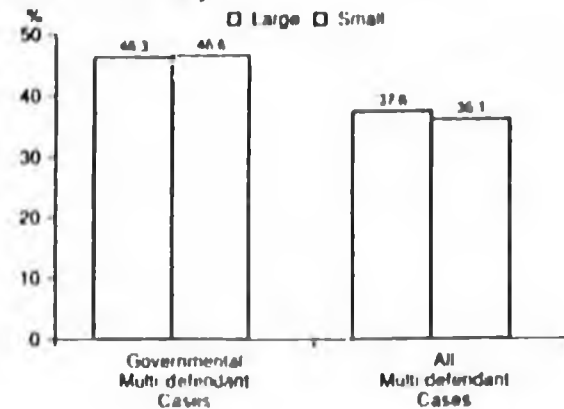
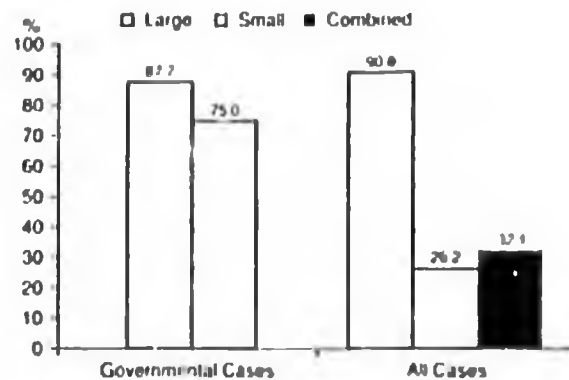


Figure 18

**Percentage of Cases with Lawsuit Filed**  
"All Other Liability"

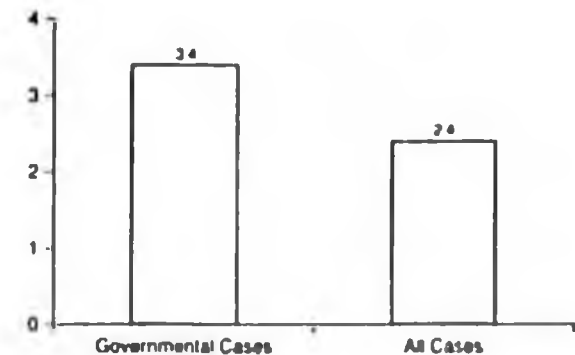


- The tendency for the insurance payment to exceed the claimant's economic loss was significantly stronger for claims against governmental entities than for the general claims population. For governmental claims, average compensation was 3.4 times the average fault-adjusted economic loss, while for the general claim population, compensation was only 2.4 times the fault-adjusted economic loss.

The study may not have captured a representative sample of governmental and municipal claims because of two limitations. First, insurers that participated in the study were not necessarily the ones that wrote the majority of governmental business during the sample periods. And second, many companies did not segregate claims against governmental entities in their claim files.

Figure 19

**Ratio of Compensation to Fault-Adjusted Economic Loss**  
"All Other Liability"



## F. Reserving Practices

Insurer reserving practices have been an issue in the recent public debate over the availability and affordability of liability insurance. The study does not address the adequacy of current insurer reserves. It does, however, review differences between initial case reserves and the ultimate payments made by insurers.

Insurers continually review and update their case reserves as better information becomes available. In addition to the individual case reserves, insurers have "bulk" reserves for the expected development of open claims and for claims that have been incurred but have not yet been reported, known as incurred but not reported, or IBNR. Those "bulk" reserves are not included in this analysis.

Findings on reserving practices include the following:

- In the aggregate, Study Part 2 (closed claim sample) claims were initially under-reserved by 26 percent. About 61 percent of the claims were over-reserved by a total of more than \$169 million. (Of these claims, about half were closed without payment.) For some claims (11 percent), the initial case reserves exactly equaled the ultimate insurance loss. The remaining 28 percent of claims were under-reserved by a total of more than \$33.3 million.

Table 2

### *Adequacy of Initial Reserves* *Study Part 2—Closed Claim Sample*

	<u>% of Claims</u>	<u>Initial Reserve minus Ultimate Insurance Loss</u>
Reserve > Loss	60.7%	\$16,995,988
Reserve = Loss	11.4	0
Reserve < Loss	27.9	(33,332,663)
Total	100.0%	\$(16,336,675)

### III. Tort Reform Opinion Survey

In addition to the analysis outlined in Section II, the study also collected the opinions of the participating claims professionals on the effects of tort reforms enacted in recent years.

#### A. Scope of Survey and Methodology

The opinion survey covered 24 states that enacted some form of tort law change. Each participant was given a description of the relevant tort reforms enacted in the state. The participant was then asked to indicate separately for each statutory provision whether the provision would affect the claim and, if so, to estimate the dollar effect within a broad range.

#### B. Objectives and Limitations

A full understanding of the conclusions and limitations of the opinion survey requires a reading of Chapter V of the underlying study. Briefly, the objective of the opinion survey was to determine the relative effect and direction of the states' tort law changes on bodily injury indemnity losses and allocated loss adjustment expenses. The study analyzed the percentage of claims estimated to be affected by each tort reform in each state and the estimated dollar effect on individual affected claims.

No attempt was made to quantify a precise dollar impact of each reform. The primary reasons for this are the lack of statistical credibility caused by the small number of claims in most states, the variation in results that could be caused by the presence or absence of a few large claims in a state, and the subjective nature of the judgments requested in the survey forms. The only overall opinions quoted in the study about the effect on total bodily injury indemnity losses are for a few states and tort reforms with a reasonably credible number of claims affected.

Because of the enormous variations in the tort reform laws enacted in the different states, the opinion survey does not permit countrywide generalizations. In addition, in most of the states surveyed, the data is limited and is not credible for drawing precise conclusions.

Nonetheless, particularly when viewed in conjunction with the findings from the *Claim Evaluation Project*, this opinion survey provides valuable insights. The survey represents the first quantitative measure of the percentage of claims likely to be affected by the recent tort reform legislation. Moreover, the term "tort reform" has taken on generic meaning and has come to cover an extraordinary variety of actions. This survey and its predecessor can help distinguish reforms likely to have a powerful effect from those likely to have little effect. Finally, different tort reforms affect different sectors of the claims universe. This survey helps delineate those different effects.

Studies of this nature should help deepen awareness that no simple mathematical formula can calculate the prospective cost implications of tort law changes.

#### C. Findings

In the aggregate, the study participants estimated that nearly 15% of the claims studied would have been affected by the enacted tort reforms. Moreover, for each category of tort reform—joint and several liability, collateral source rule, and others—at least some states enacted a variant that would have had a meaningful effect in a substantial number of cases. For example, in seven of the states that amended the collateral source rule, 20 percent or more of the large claims studied would have been affected. Furthermore, while the study does not quantify the cost reductions associated with each tort reform, the participants' responses suggest that in claims that would have been affected, the potential cost reduction often would have been substantial.

These findings, coupled with an analysis of the percentages of claims affected, carry several implications. First, the study reinforces the finding of the 1987 *Claim Evaluation Project* that many of the legislative actions falling under the category of tort reform were heavily encumbered by exceptions and qualifications. Whatever their public policy merits, these exceptions and qualifications limit the cost effects of the reforms. Second, while certain classes of tort reform can influence indemnity levels across a broad spectrum of claims, others may have a

powerful effect in a limited range of cases. Certain tort reforms may play an insignificant role in the typical small claim situation—for example, modifications of joint and several liability, restrictions on punitive damages, and ceilings on non-economic damages. However, these same reforms may have greater force in the larger claims, where cost predictability is a special problem for insurers.

The opinion survey indicates that the enacted tort reforms generally would have had a greater effect on large claims (Study Part 1) than on small claims. That disparity was less pronounced in connection with reforms aimed at modifying the collateral source rule. The survey found that changes in the collateral source rule produced the broadest effect in the largest number of states. This finding does not imply that modifications of the collateral source rule are inherently the most powerful tort reform tool for reducing indemnity costs. The survey did not address which hypothetical tort reforms might have produced the greatest cost reductions.

Among the large claims, tort reforms in the area of joint and several liability had powerful effects in two states that repealed the doctrine outright. In those two states, Colorado and Wyoming, participants found that over 15% of all Study Part 1 claims would have been affected.

In most instances, the caps on non-economic damages and restrictions on punitive damages, as enacted, would have affected relatively fewer cases, although in some individual cases the dollar effects appeared potentially large.

The findings about limitations to punitive damages illustrate why aggregate data on the percentage of claims influenced by a given tort reform can understate the effect of the reform. The participants estimated that the enacted punitive damage provisions would have affected only a small sliver of the total claims studied. In the large claim sample (Study Part 1) for the two states reporting the greatest effects, Iowa and Montana, respondents estimated that under 10% of all claims would have been affected. However, claimants sought punitive damages in 10% of the Study Part 1 closed claims. So the projected effects of the recent legislation appear far more impressive. In short, in the states that enacted strong laws on punitive damages, the opinion survey finds powerful effects among the small, but important, minority of claims where punitive damages are an issue.

## IV. Additional Study Specifications

### A. Participating Insurer Groups

Listed below are the 24 insurer groups whose submissions make up the data base underlying this study.

Aetna Life & Casualty  
American International Group, Inc.  
Chubb Group of Insurance Companies  
CIGNA Property and Casualty Companies  
CNA Insurance Companies  
Continental Insurance  
Crum & Forster Insurance Companies  
Fireman's Fund Insurance Companies  
General Accident Insurance Company of America  
Great American Insurance Company  
The Hartford Insurance Group  
Home Insurance Company  
Imperial Casualty and Indemnity Company

The Kemper National Property and Casualty Companies  
Liberty Mutual Insurance Company  
Lincoln National Corporation  
Nationwide Insurance Companies  
(including Wausau Insurance Companies)  
The Reliance Insurance Companies  
Royal Insurance USA  
St. Paul Companies  
State Farm Insurance Companies  
The Travelers Insurance Company, Inc.  
United States Fidelity & Guaranty Company  
Zurich American Insurance Group

### B. States Surveyed

Listed below are the 27 states surveyed in this study. During 1986, 24 of the states enacted some modification to their tort laws affecting the settlements of commercial liability claims other than medical malpractice. Three states—Kansas, Massachusetts, and South Dakota—were surveyed to balance the geographic mix of states.

Alaska	Iowa	New York
California	Kansas	Ohio
Colorado	Louisiana	Oklahoma
Connecticut	Maryland	South Carolina
Florida	Massachusetts	South Dakota
Georgia	Michigan	Utah
Hawaii	Minnesota	Washington
Illinois	Montana	West Virginia
Indiana	New Hampshire	Wyoming

### C. Lines of Business Included

The study included all direct business, including, but not limited to, monoline, package, national accounts, and surplus lines written by the 24 participating insurers. Umbrella and excess policies were excluded. The bodily injury liability portions of the following lines of insurance were examined: premises/operations (e.g., OL&T, M&C Businessowners), product liability, and commercial automobile.

STATE OF ALASKA  
1989 LEGISLATIVE SESSION

BILL VERSION: HB 166  
PUBLISH DATE: \_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Commerce & Economic Dev.  
Title: An Act relating to civil actions BRU: Division of Insurance  
amending Civil Rules 68 and 82  
Sponsor: Cotten Components: Operations  
Requester: Labor & Commerce

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		350.0	300.0	250.0	100.0	100.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		350.0	300.0	250.0	100.0	100.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of dollars)

GENERAL FUND	350.0	300.0	250.0	100.0	100.0
FEDERAL FUNDS					
OTHER					
TOTAL	350.0	300.0	250.0	100.0	100.0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

See attached

Prepared by: Don Koch, Chief of Market Surveillance Phone: 465-2515  
Division: Insurance Date: \_\_\_\_\_

Approved by Commissioner: Larry Merculieff Phone: 465-2500  
Agency: Department of Commerce & Economic Development Date: \_\_\_\_\_

Distribution (by preparer):

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

3527D-2/031089a

## ANALYSIS:

Section 18 requires an analysis of medical malpractice rate changes occurring as a result of court decisions in the state involving personal injury or death. This requires a review that present staff lacks the needed expertise to conduct. We estimate that such a review could be conducted by an independent actuarial firm. This review is structured as ongoing, hence, we have estimated \$110,000 per year for this work. The depth of review would be subject to negotiation and design.

Section 21 requires an extensive review with a report due by February 1992. The report would review closed insurance claims to determine the impact of the legal system on increased insurance rates or coverage decreases in crisis lines which are not defined. It would further evaluate how victims are faring under the present system and the actual impact of tort reform measures adopted. It would review actual impact on this legislation on insurance rates.

Section 21 also provides for a study of insurance finances to evaluate the cost justification of insurance rates for fault based on personal injury, death or property damage awards, settlements and court decisions. This requires considerable actuarial, economic, and legal evaluation which the Division of Insurance is not capable of providing. Initial design will result in increased expense in the first year. These figures are estimates that can only be refined through a proposal from persons capable of conducting such a study.

## FISCAL NOTE

**REQUEST:**

Revision Date: 3/5/90  
Title: An Act relating to civil actions amending Civil Rules 68 and 82  
Sponsor: Cotten  
Requestor: Judiciary

Agency Affected: Commerce & Economic Dev.  
BRU: Insurance  
Components: Operations

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	350.0	300.0	250.0	110.0	110.0	110.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>350.0</b>	<b>300.0</b>	<b>250.0</b>	<b>110.0</b>	<b>110.0</b>	<b>110.0</b>
<b>CAPITAL</b>						
<b>REVENUE</b>						

**FUNDING:** (Thousands of Dollars)

GENERAL FUND	350.0	300.0	250.0	110.0	110.0	110.0
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>350.0</b>	<b>300.0</b>	<b>250.0</b>	<b>110.0</b>	<b>110.0</b>	<b>110.0</b>

**POSITIONS:**

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

**ANALYSIS :** (Attach a separate page if necessary) No fiscal impact in FY 90.

See attached

Prepared by: Joan Brown, Administrative Officer  
Division: Insurance

Phone: 465-2597  
Date: \_\_\_\_\_

Approved by Commissioner: Larry Merculieff  
Agency: Department of Commerce & Economic Development

Date: 3/6/90

Distribution (by preparer):  
Legislative Finance  
Legislative Sponsor  
Requestor  
Office of Management and Budget  
Impacted Agency(ies)

## ANALYSIS:

Section 12 requires an analysis of medical malpractice rate changes occurring as a result of court decisions in the state involving personal injury or death. This requires a review that present staff lacks the needed expertise to conduct. We estimate that such a review could be conducted by an independent actuarial firm. This review is structured as ongoing, hence, we have estimated \$110,000 per year for this work. The depth of review would be subject to negotiation and design.

Section 14 requires an extensive review with a report due by February 1992. The report would review closed insurance claims to determine the impact of the legal system on increased insurance rates or coverage decreases in crisis lines which are not defined. It would further evaluate how victims are faring under the present system and the actual impact of tort reform measures adopted. It would review actual impact on this legislation on insurance rates.

Section 14 also provides for a study of insurance finances to evaluate the cost justification of insurance rates for fault based on personal injury, death or property damage awards, settlements and court decisions. This requires considerable actuarial, economic, and legal evaluation which the Division of Insurance is not capable of providing. Initial design will result in increased expense in the first year. These figures are estimates that can only be refined through a proposal from persons capable of conducting such a study.

# Ketchikan General Hospital

3100 TONGASS AVE.  
KETCHIKAN, ALASKA 99901  
PHONE 907-225-5171  
FAX 907-225-2173

DATE: March 16, 1990  
TO: Representative Gruenberg  
Chairman House Judiciary Committee  
FROM: Governing Board - Ketchikan General Hospital  
RE: TORT REFORM - House Bill 166

The Governing Board of Ketchikan General Hospital strongly supports HB 166.

We have reviewed documents from Medical Insurance Exchange of California, which indicates that meaningful tort reform expressed by California's Medical Injury Compensation Reform Act has moderated rate increases in Alaska. The tort reforms which have moderated malpractice claims are MICRA's changes to the collateral source rule, limits on non-economic damages, periodic payments of awards, and limits on attorneys' contingency fees.

The Governing Board of Ketchikan General Hospital goes on record supporting HB 166

Edward Mahn, Chairman  
Maxine Robertson, Vice Chair  
Judge Henry Keene, Secretary  
Walter Shuham  
Ethelbelle Kondzela  
Roger Stone

KGH

# KETCHIKAN MEDICAL SOCIETY

3100 TONGASS AVENUE - KETCHIKAN, ALASKA 99901

DATE: March 16, 1990

TO: Representative Gruenberg  
Chairman House Judiciary Committee

FROM: Philip Zeidner, M. D., Vice Chairman, Ketchikan  
Medical Society

RE: TORT REFORM - HB 166

I appreciate the opportunity to have given testimony supporting passage of HB166. Enclosed is a copy of MIEC's letter to Alaska physicians dated May 10, 1989. MIEC's loss ratio clearly indicates a large differential between Alaska claims frequency and size of award compared to their overall loss ratio for policy holders in different states. It is MIEC's opinion, as expressed in paragraph two, page two, that California's Medical Injury Compensation Reform Act has been a factor in moderating rate increases for California. "The tort reforms which have moderated malpractice claims are MICRA's changes to the collateral source rule, limits on non-economic damages, periodic payment of awards, and limits on attorneys' contingency fees".

I strongly urge the committee to recognize that part of the high cost of medical liability insurance in the State of Alaska is due to our current tort system. Meaningful tort reform has been shown to have mitigated insurance rates for physicians in California.

*Philip Zeidner*

**MIEC****Medical Insurance Exchange of California  
Medical Underwriters of California**

May 10, 1989

**MEMORANDUM TO ALASKA POLICYHOLDERS REGARDING RENEWAL RATES****(Policy Year August 1, 1989 to July 31, 1990)**

This is to inform you that effective August 1, 1989, MIEC's basic rates for Alaska will be increased 11.7%. MIEC's recent loss experience in Alaska shows a continuing increase in the frequency and severity of claims, to the point where Alaska's claims now average almost twice the size, and about 35% greater frequency than for the company as a whole. Attached are graphs which compare Alaska's and MIEC's overall claims frequencies, severities and loss ratios for two recent five-year blocks of time.

In addition to this increase in basic rates, those doctors insured less than five years also will receive the step rate increases which occur as claims-made discounts diminish each year until the fifth, when the mature claims-made rate is attained. Some step-rate increases, and the 11.7% basic rate increase, will be modified by the following company-wide specialty classification changes:

- Cardiologists who do not perform catheterization or angioplasty by a 13% reduction. Rates of cardiologists who do perform these procedures will increase by 30.4%, in addition to the 11.7% basic rate increase. Cardiologists who conduct invasive procedures have incurred 90% of claims costs of all cardiologists MIEC insures. Over six years of combined claims experience, cardiology losses have been 39% higher than those of all non-surgical specialties. MIEC continues loss-prevention activities with this specialty through claims analysis, on-site visits, and office consultations.
- Family and general practitioners who do no surgery will receive a 10% rate reduction; those who do limited surgery and assist, a 14.3% reduction; and those who do surgery but no obstetrics, a 30.6% reduction.
- Physical medicine and rehabilitation specialists will receive a 10% rate reduction.
- Industrial medicine specialists will receive a 30.6% rate reduction.

The changes in classification result from MIEC's continuing analysis of loss patterns among specialties and MIEC's long-standing policy to adjust premiums to the relative losses of various specialties.

We are pleased to announce that because of reduced reinsurance costs, MIEC is able to lower the charges for limits of liability in excess of \$1,000,000/\$3,000,000 in many classifications. If you are interested in obtaining a quotation for either the \$2,000,000/\$4,000,000 or \$5,000,000/\$5,000,000 limits options, please call MIEC's Underwriting Department.

MIEC has been insuring Alaska physicians since 1978, and is Alaska's only doctor-owned, medical society-sponsored carrier. Physician ownership means physician direction of policy, physician peer review, active loss prevention, policy control over claims and underwriting, equitable treatment of policyholders, proper investigation, and vigorous, steadfast defense of claims through knowledge and experience in medical professional liability. MIEC is rated A+ by A.M. Best Company, the insurance industry rating service.

MIEC supports Alaska State Medical Association's ongoing efforts to achieve more meaningful tort reform. California's Medical Injury Compensation Reform Act (MICRA), combined with MIEC's loss prevention activities, have moderated rate increases there. The tort reforms which have moderated malpractice claims are MICRA's changes to the collateral source rule, limits on noneconomic damages, periodic payments of awards, and limits on attorneys' contingency fees.

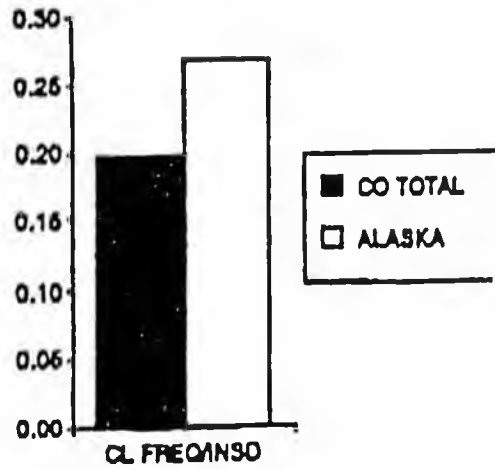
Upon approval of the new rates by the Alaska Insurance Division, premium invoices for renewal will be sent to policyholders in late June. If you have questions about these changes or wish to change your coverage limits or classification, please contact MIEC's Underwriting Department.

Sincerely,

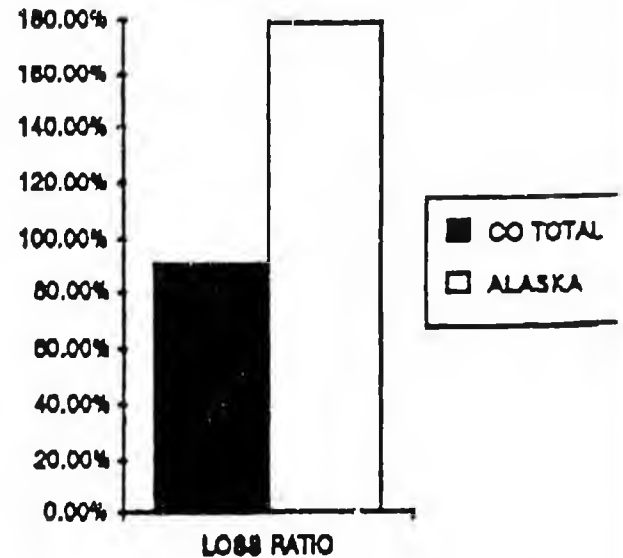
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Board of Directors, Medical Underwriters of California

# MIEC

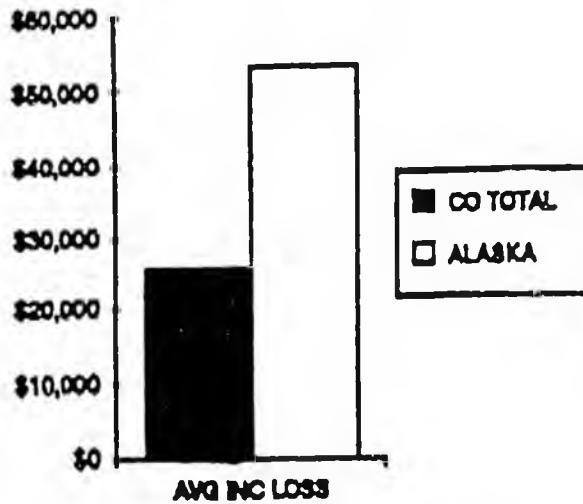
Medical Insurance Exchange of California  
Medical Underwriters of California



1982/86 POLICY YEARS COMBINED  
CLAIM FREQUENCY PER INSURED PER YEAR:  
MIEC TOTAL AND ALASKA COMPARED



1982/86 POLICY YEARS COMBINED  
LOSS RATIOS: MIEC TOTAL  
AND ALASKA COMPARED



1982/86 POLICY YEARS COMBINED  
AVERAGE INCURRED LOSS: MIEC TOTAL  
AND ALASKA COMPARED



**STRUCTURED  
FINANCIAL  
ASSOCIATES, INC.\***

**A. L. TAMAGNI, SR.**

ANCHORAGE, ALASKA OFFICE  
714 H STREET • SUITE 100  
ANCHORAGE, ALASKA 99501  
907-276-1971 • WITHIN ALASKA 800-478-1971

**OFFICES:**

ANCHORAGE March 22, 1990

ATLANTA

BALTIMORE

Representative Peter Goll  
Alaska State Legislature  
P.O. Box V (MS 3100)  
Juneau, Alaska 99811

BOSTON

BUTTE

RE: HB 166  
VERSION 6-0628A

CARMEL

HB 166  
CS L&C VERSION 6-0628D

CHICAGO

Dear Representative Goll:

COLUMBIA

I appreciate the opportunity in testifying to your committee during the past week in regards to the above bill and its amended versions. I have some recommended changes on certain portions of the bill. I believe that version 6-0628A is the better version.

COLUMBUS

DENVER

DETROIT

In addition to the language, we have stated the recommendations and reasons. Accordingly, the following is in order:

HAWAII

I

COMMENTS OF THE NATIONAL STRUCTURED SETTLEMENT  
TRADE ASSOCIATION OF HB 166 DRAFT 60628A

KANSAS CITY

MILL VALLEY

The section numbers below correspond to the section numbers of the proposed bill:

ORLANDO

SECTION 1 (G) ADDITION

Statement of purpose

PHILADELPHIA

Recommendation. The legislative finds should be expanded. For example, the legislature should find that the compensation to victims should be paid at the time future damages accrue in order to reduce the burden on public assistance programs caused by the dissipation of lump-sum awards. As a further example, the legislature should find that the United States Internal Revenue Code and the State of Alaska allows the plaintiff to exclude from income the entire amount of future periodic payments so that the amount recovered can have greater recovery effect, and the cost to make such payments be reduced through periodic payments, particularly those utilizing qualified funding assets.

PHOENIX

PITTSBURGH

RICHMOND

SAN DIEGO

*Hayden  
Acknowledged*

Reasons. The proposed legislative findings are directed to the relief of defendant's costs and obligations. The additional findings will enhance the constitutionality of the legislation. Constitutional attacks on periodic payment legislation often focus on the equal protection clause of the Constitution. In examining legislative classifications for equal protection purposes, courts ask whether those classifications are reasonable and have a fair and substantial relation to the object of the legislation. For those legislators and courts that wish to see greater benefits articulated in order to justify the restriction on recoveries of future damages to periodic payments, the enumeration of the additional findings will increase the likelihood of a finding of constitutionality.

II

SECTION 8. AS 09.17.040(D) Changed to read as follows:

In an action to recover future damages the trier of fact at the request of any party, enter judgment ordering that amounts be paid to the maximum extent feasible by periodic payments, rather than by a lump sum payment. If a portion of the judgment awarded is owed to an attorney under a contingent fee agreement, that portion of the judgment shall be reduced to present value and paid in a lump sum.

A. Reasons For due process reasons, the section is elective by either the defendant or plaintiff. If the plaintiff elects to utilize the request, then the defendant can defeat the request unless the plaintiff shows that future damages will be awarded. The defendant can elect to utilize the section with a showing that funding for the periodic payments can be provided.

B. Reasons  
These changes will achieve the intent of the legislature, to allow due process by all parties and allow Judges and Juries to hear evidence and types of offers for settlement that is now lacking under the current process. It will expedite the settlement of cases, help reduce the court backlog, reduce legal costs, and allow a greater percentage of the total recovery to injured parties.



C. Reasons

For taxation purposes, both parties have equal access to request the trier of fact to order future payments on a favorable tax basis under Section 104(A)(2), attached Exhibit "A".

III

SECTION 9 AS 09.17.040 (f) Changed to read as follows:

A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, including any fixed increases in future payments for anticipated inflation, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will.

Recommendation. The inflation indexing concept should be replaced by a stated percentage to be fixed by the trier of fault.

A. Reasons. First, the inflation index will fluctuate with economic conditions. Annuity underwriters are accustomed to a fixed index, the effect of which can be calculated with certainty when the annuity is issued. There may be little or no market available to Casualty Insurers, Plaintiffs, and Self-Insured Defendants for the type of annuity needed to fund a judgment that is adjusted by an unknown factor.

B. Reasons. Section 130(c)(2)(A) of the Internal Revenue Code of 1986, as amended, requires that periodic payments be fixed and determinable in order for an assignee to enjoy the exclusion described in that section. Payments that increase by a stated percentage are fixed and determinable while payments that increase by an index are not. Thus, the court



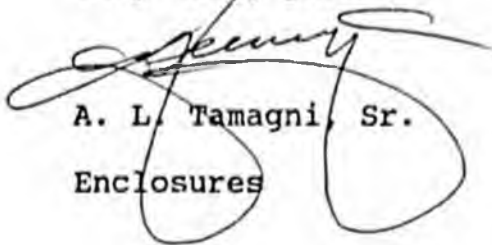
Representative Goll  
March 22, 1990  
Page 4

should be allowed to make adjustments only by a stated percentage, to be determined based upon the facts of each case.

C. See attached Section 104.A.2 IRS Code. Exhibit "A".

I would appreciate your considering these recommendations in the output of your final bill. I would be available for any questions you might have regarding these recommendations, either personally or by committee.

Very truly yours,



A. L. Tamagni, Sr.

Enclosures



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## § 103A

## INCOME TAXES

"(2) First time homebuyer requirement.—The amendments made by subsection (c) (amending subsec. (e)) shall also apply to obligations incurred after April 24, 1979, and before the date of the enactment of this Act [Sept. 3, 1982] but only to the extent that the proceeds of such obligations are not committed as of the date of the enactment of this Act [Sept. 3, 1982]."

For effective dates of further amendments to this section by Pub. L. 97-248, § 221(c)(2), provided that, except as otherwise provided in section 1104(a)(2) through (c)(2) of Pub. L. 96-499, this section shall apply to obligations issued after Apr. 24, 1979.

Effective Date of 1980 Amendment. Pub. L. 96-595, § 5(c), provided that the amendment by Pub. L. 96-595 shall take effect as if included in the amendments made by section 1102 of Pub. L. 96-499.

Effective Date. Pub. L. 96-499, § 1104, as amended, by Pub. L. 97-248, § 221(c)(2), provided that, except as otherwise provided in section 1104(a)(2) through (c)(2) of Pub. L. 96-499, this section shall apply to obligations issued after Apr. 24, 1979.

## § 104. Compensation for injuries or sickness

(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980; and

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a violent attack which the Secretary of State determines to be a terrorist attack and which occurred while such individual was an employee of the United States engaged in the performance of his official duties outside the United States.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee.

(b) Termination of application of subsection (a)(4) in certain cases.—

(1) In general.—Subsection (a)(4) shall not apply in the case of any individual who is not described in paragraph (2).

(2) Individuals to whom subsection (a)(4) continues to apply.—An individual is described in this paragraph if—

(A) on or before September 24, 1975, he was entitled to receive any amount described in subsection (a)(4),

(B) on September 24, 1975, he was a member of any organization (or reserve component thereof) referred to in subsection (a)(4) or under a binding written commitment to become such a member,

(C) he receives an amount described in subsection (a)(4) by reason of a combat-related injury, or

(D) on application therefor, he would be entitled to receive disability compensation from the Veterans' Administration.

(3) Special rules for combat-related injuries.—For purposes of this subsection, the term "combat-related injury" means personal injury or sickness—

(A) which is incurred—

(i) as a direct result of armed conflict,

(ii) while engaged in extrahazardous service, or

(iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

In the case of an individual who is not described in subparagraph (A) or (B) of paragraph (2), except as provided in paragraph (4), the only amounts taken into account under subsection (a)(4) shall be the amounts which he receives by reason of a combat-related injury.

(4) Amount excluded to be not less than veterans' disability compensation.—In the case of

## § 103A

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For effective dates of further amendments to this section by Pub. L. 97-248 with respect to applicability to obligations issued after December 31, 1982, see section 310(d) of Pub. L. 97-248.

Effective date of 1980 Amendment. Pub. L. 96-593, § 5(c), provided that the amendment by Pub. L. 96-593 shall take effect as if included in the amendments made by section 1102 of Pub. L. 96-499.

Effective Date. Pub. L. 96-499, § 1104, as amended, by Pub. L. 97-248, § 221(c)(2), provided that, except as otherwise provided in section 1104(a)(2) through (c)(2) of Pub. L. 96-499, this section shall apply to obligations issued after Apr. 24, 1979.

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(4) Amount excluded to be not less than veterans' disability compensation.—In the case of



OCCUPATIONAL MEDICAL ASSOCIATES

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3710 East 20th Avenue  
Anchorage, Alaska 99508  
Telephone: (907) 258-5800

Jennifer H. Christian, M.D., M.P.H.

*J. Christian*  
March 14, 1990

Rep. Peter Goll  
Co-Chair, House Judiciary Committee  
P. O. Box V (MS 3100)  
Juneau, AK 99811

Dear Representative Goll:

We met during the Alaska State Medical Association's visit to Juneau in February. I enjoyed talking with you then, and hope our conversation was the beginning of an on-going dialogue.

✓ Today, my request is simple: Please pass the Tort Reform Bill out of your committee and let the House vote on it. It seems inconsistent for a person of your ethical principles to allow the bottling up of this issue. The voters of Alaska gave you a clear mandate to reform the tort law at the polls last November. Please let the House, which represents all the people, and all the "Interests" act on HB 166.

I also would like to share my personal viewpoint on tort reform. As I see it, tort reform will help keep Alaska doctors committed to their patients and to good medicine. A national study showed that 44% of doctors today say they wouldn't enter medicine if they had it to do over again.

✓ Please find enclosed an editorial I wrote recently for Alaska Medicine. We in organized medicine are trying to develop coping mechanisms and support physicians under pressure. We would rather prevent unmerited or inflated attacks on physicians who

are merely mortal and trying to do their best. Eighty to ninety percent, roughly, of malpractice suits are without merit. That means four out of five doctors who are sued may become frightened, excessively cautious, and distrustful of their other patients unnecessarily. The reality is that malpractice suits have emotional reverberations that far exceed their financial ones. To look at malpractice as a financing mechanism or a social justice issue is to ignore its powerful impact on physicians' willingness to make commitments, make decisions, and take the right action on behalf of patients and society.

This is the other element of tort reform I'm interested in. The ease and lucrativeness of lawsuits makes doing the "right thing" more difficult.

- \* Would you risk displeasing a patient by denying them a medicine or a treatment or an unnecessary operation they insist they need? That kind of demanding patient may sue.

- \* Would you speak out publicly against another doctor with unethical or unsound practices? That doctor may sue. Better to let the public take its chances than to protect the public and pay the costs of a lawsuit out of your own pocket.

- \* Would you serve on a board, a panel, or a committee to confront some difficult problem, (like reviewing the quality of other doctor's work, or setting minimum standards for membership or other privileges, or confronting alcoholic or drug-addicted physicians) when the price of your public service may be the costs of defending yourself against a lawsuit?

- \* Would you agree to take care of social deviant or poor or mentally ill or other unfortunate patients who cannot pay, who may be unattractive or difficult to deal with, or may not be grateful, or will not follow orders and cooperate with treatment, and then will sue you because they didn't like how you treated them?

If you would do all these things, despite the threats, how long could you keep it up? These days, each of us expects an average

of at least one lawsuit. Could you keep trusting and doing the right thing even after you were sued by a patient you had done your fallible best for?

Malpractice insurance rates vary widely from state to state. It is not biology, or human nature or physician competency that varies across states -- it is the law, and the culture of litigiousness. Please see the attached xerox of a chart showing malpractice premiums by state.

As we shared with you in Juneau, 24% of Alaskan physicians are now practicing medicine "bare", mostly because their practice cannot absorb the fee raises that the additional overhead of a malpractice premium would add. In the bush, 56% are practicing "bare". Many more doctors have stopped doing important procedures or delivering babies because of the increased cost of malpractice insurance coverage for those things. In many cases, the premium would add \$1000 or more per operation or delivery. Most of these doctors will not remain in practice if they are sued. Can we lose more physicians in Alaska, especially in the bush? We already have one of the worst physician/population ratios in the country.

The main reason we need tort reform in Alaska is because Alaska needs doctors. Alaska is competing with 50 other states for new physicians. Will those new physicians look favorably to Alaska? Alaska is a tough place to recruit high quality doctors for. Some doctors make high incomes here, but many do not. The state needs doctors who want to establish a good steady practice in a community that needs them, not temporary doctors who are lured by high incomes and punitive conditions. Alaska cannot change its climate, or isolation, or population distribution, but we can make practicing here more comfortable and certain, both financially and emotionally.

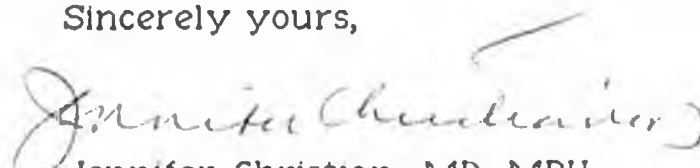
Perhaps it would put my statements in better context if I tell you a bit more about myself. I have been in Anchorage for three years. I am the public health physician for the Municipality of

Anchorage, and work about half time. I am also in parttime private practice as the only certified specialist in occupational medicine in the state. I see patients with work-related injuries and toxic or chemical exposures. My private practice is tiny (about one patient per week), and has not broken even financially after a year and a half of effort. The cost of my malpractice insurance last year was \$2230. I pay such a low rate because I see patients less than 12 hours per week and occupational physicians have a very low risk of being sued. The combined income from these two activities is less than what I would earn working full time for the city, but I have a skill (occupational medicine) the community needs and I love working with my patients. My husband contributes most of the support to our family, so that I can keep practicing and doing what I love. I am also this year's Anchorage Medical Society president, and secretary-treasurer for the Alaska State Medical Association.

The purpose of the above personal information is for you to see that I am not a rich doctor complaining about my own high overhead. By luck, I sit in several chairs that have let me see the social consequences of unrestrained litigiousness, as well as feel the personal and emotional drain that it produces, and foretell the impact on the health of Alaskans in the future.

Do you want to talk to me? If so, please give me a call at 343-6718 in the mornings at the Anchorage Department of Health and Human Services.

Sincerely yours,

  
Jennifer Christian, MD, MPH

Enclosures - 2

### MICRA: Thirteen Years of Experience Who Needs More Proof?

A recent study of mature claims-made rates of 34 doctor-owned insurance companies in 33 states and the District of Columbia by Dick Layton, consultant to Physicians' Insurers Association of America, shows a striking difference between California's rate trends and those of the rest of the country, and dramatically demonstrates the efficacy of California's "MICRA" tort reforms enacted in 1975. In that year, California's rates were among the highest in the nation, and most commercial insurers fled the state.

The study compared 1987 and 1988 rates nationwide for internists, general surgeons, and Ob/Gyns. The companies studied are doctor-owned, not-for-profit. They set rates taking investment income into consideration and to cover no more than losses and expenses.

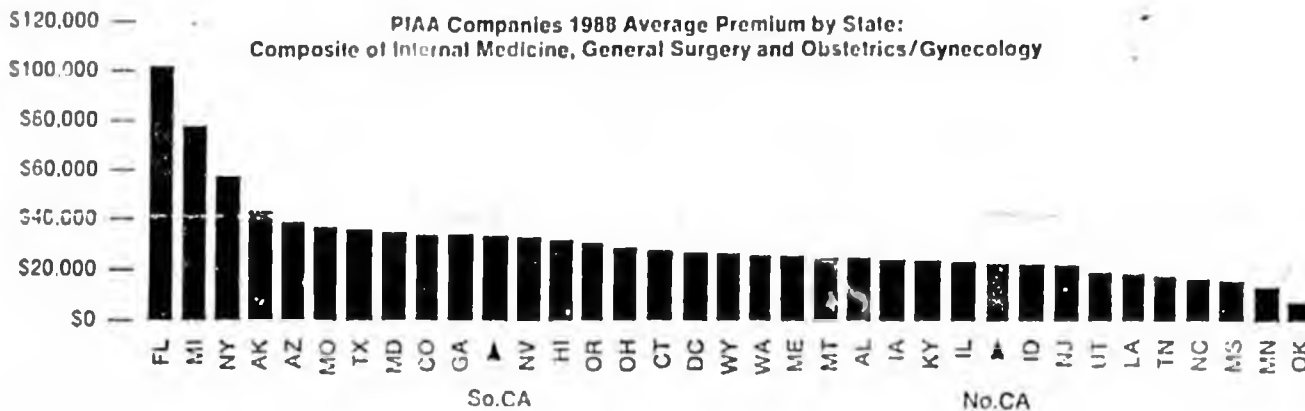
In 1988, rates of the California doctor-owned companies combined for all three specialties fall generally into the bottom half of the nationwide range of rates. Actual net costs to California doctors are still lower than reflected in this comparison because the California companies are

paying dividends to long-term policyholders. In MIEC's case, current dividends reduce fifth-year California premiums by an average of 24%.

California internists pay \$5,400 to \$5,900 for \$1 million/\$3 million coverage, about half what Arizona and Alaska internists pay, and less than a third of Michigan, Florida, and New York rates.

The differences are wider in the surgical categories: California general surgeons pay an average of \$25,000 in 1988 (prior to dividends). General surgeons in Miami, Florida pay \$99,503, a difference of almost \$75,000! New York's surgeons pay \$59,088, Michigan's \$81,209. Missouri and Texas rates exceed \$50,000. Some states regarded as "lower risk" pay rates over \$30,000, including Ohio, Georgia, Maine, Colorado, Kentucky and Oregon.

While California Ob/Gyn rates have remained in the \$40,000-range for several years, premiums over \$150,000 exist in Florida, \$136,000 in Michigan and \$100,000 in New York. Many other states' Ob/Gyn rates have climbed beyond \$50,000, as illustrated in the chart below.



### Another California Dividend:

The MIEC Board of Governors at its August meeting declared a \$2-million dividend to be paid to individual California policyholders who were insured by MIEC during the period August 1, 1979 to December 31, 1984, and who remain insured on February 1, 1989. The dividend will be credited against February and May 1989 quarterly premiums and will reduce net premium costs of eligible California policy-

holders by an average of 24%. MIEC's current loss ratio for California during the five-year base period used to determine dividend allocation was 69.74%, as opposed to 83.75% for MIEC as a whole. Loss ratios in MIEC's other states are now beginning to drop due to increased premiums, and probably due to loss prevention activities and public attention to tort reform.

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## Guest Editorial

### A REFUGE FROM IMPOSSIBLE EXPECTATIONS

Even though they promise us excellent work, we don't persecute good carpenters who hang an occasional door backwards. We ask them to pay for the replacement and hang it again. We don't impeach the politicians who include loopholes in even good laws. We don't blackball stockbrokers who give us one bum suggestion along with the good ones. And yet, the public repudiates physicians who cannot bat 1.000. And what's worse, we physicians agree with these impossible expectations by deluding ourselves that we are different, and can extract continuous perfect performance from ourselves.

Biologically we are made of the same material that carpenters, politicians and stockbrokers are. Our span of concentration is prone to the same lapses. We can be overconfident or distracted. We can mishear, misunderstand, misread. We can be too proud to admit we don't know or understand. We can be dulled by alcohol, drugs, or other compulsions. Money troubles or similar "outside" influences can pressure us to compromise our own standards. We can be too tired to make a good decision, or too emotionally involved to see the situation fairly.

The standards set for us are higher than for other professions, but we are made of the same fallible stuff. In fact, the harder we try to be perfect, the more we increase the probability of certain types of failure. Excessive internal pressure pushes us to chemicals for relaxation; the zeal not to miss a possibility results in exorbitant charges, and so on.

Lawyers, insurers, and the public refuse to accept the inevitability of our frailties. We are exhorted, goaded, expected and even ordered to meet "minimum standards." And if we claim that peak performance at every moment cannot be a "minimum" standard, we are looked at with suspicion. Why are we unwilling to assure all patients such a "simple" thing as this reasonable "minimum" of care? Who can disagree that each patient deserves a caring and competent and attentive physician at all times. But where can we find human beings who can be that way 100% of the time?

Other areas of our culture have zero tolerance for error, like the Defense Department and NASA. Those areas now use duplicate and triplicate systems, with fail-safe overrides. Medical decision-making does not fit that model. The medical culture has reacted to the need for unerring performance by expecting more of the same basic equipment. We merely tighten up our rear ends, and look behind our shoulder all the time.

Constantly on guard against mistakes, we feel surrounded by dangers:

- the danger of errors of omission, forgetting something;
- the danger of errors of commission, doing something incorrectly;
- the danger of careless speech, of admitting error, vulnerability, uncertainty or guilt;
- the danger of attack, by vengeful or crazy patients, predatory lawyers, or merciless automaton bureaucrats;
- the danger of one moment of inattention, that hurts someone, and that eventually wipes out EVERYTHING.

One moment of inattention could destroy our reputation, our livelihood, our social standing and material security, our own sense of competence, our self-worth and "peace of mind." It can invalidate a lifetime of sincere effort and good work.

Society's loss of respect for physicians weighs on us heavily. We feel used as scapegoats for the inescapable raw deals of life--pain, loss and death. Our motives are suspect, with our commitment to money overestimated and our commitment to healing underestimated. Those who feel vulnerable, powerless and dependent on us resent us. Those who think we are rich, arrogant and immune from the inconveniences of everyday life look for opportunities to bring us low.

And here's the sad part: We do not support one another and admit the impossibility of society's expectations. We rail against lawyers, bureaucrats and society, but we do not give comfort and protection to each other. Instead, we keep so busy on the perfection treadmill, that we have no time to spend with those who are in trouble.

Few physicians say they are happy to be in medicine these days. Most seem to be overcommitted and drained of energy. How can we keep our courage up, be proud of our choice of an honorable and fulfilling profession, and find ways to work around our natural inability to be perfect?

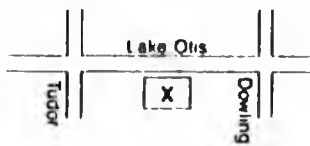
In my opinion, the Alaska State Medical Association, and its component local societies have an obvious but neglected role to play in tending to the emotional tension and spiritual near-exhaustion of the state's physicians. The major growth in ASMA in the last few years has been focussed outward--developing ties with the legislature, the bureaucracy, and the public. That work is essential and will continue. But perhaps we need to focus new efforts inward as well. By inward, I mean more than traditional member services like directories, newsletters and informational meetings.

By inward, I mean that ASMA could serve as solace for us, and provide a place and people we can come to for acceptance, help, and a sympathetic ear. Our

Impaired Physicians Program has had a good start, but it is aimed at the small group that has become clinically ill. Some other states have formed malpractice support groups, acknowledging that a law suit may be as much or more of a crisis as divorce or death. At least one state society has a group that meets monthly for mutual support at breakfast. The ASMA Council meeting in October will hear more about this new "therapeutic" role for ASMA. The Anchorage Medical Society meeting in February will feature a medical ethicist who will help us talk about our human frailty, and the pressures for perfection. If these beginnings are successful, more events will be planned.

Those of us who are active in organized medicine in Alaska are seeking ways to serve our constituents--Alaskan physicians--better. In order to improve our healing of others, perhaps we can begin by healing ourselves.

Jennifer Christian, M.D.  
Municipality of Anchorage  
Department of Health and Human Services

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March 14, 1990

Hon. Max F. Gruenberg Jr., Co-Chairman  
Hon. Peter Goll, Co-Chairman  
House Judiciary Committee  
P.O. Box V  
Juneau, AK 99811

Dear Co-Chairmen Gruenberg and Goll:

It is with pride that I write on behalf of the some 2,300 people and over 30 organizations who are the Citizens' Coalition for Tort Reform. It was just a few days ago I was chosen, together with Frank Turpin and Dr. David A. McGuire, to be the leadership for the Coalition.

Shortly after its formation in October of 1985, the Coalition took a close look at how the tort reparations system worked. It revealed that it wasn't working. It was inefficient, not cost effective and the bulk of its caseload was not addressed in a timely and fair fashion. The tort reparations system needed a thorough overhaul then and it does today.

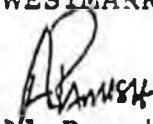
Sixteen proposals were set out to address the major faults of the system. Since that time, several significant proposals were put forth by others to deal with other major faults. Only one issue has been clearly deal with, that is, through Ballot Measure No. 2, the voters on November 8, 1988, voted by a margin of 72% to 28% to change the doctrine of joint and several liability to several liability.

HB 166 addresses most of the proposals, but not all. Further, HB 166 contains significant modifications to the original concepts. I submit that the Citizens' Coalition for Tort Reform has already compromised its agenda in order to be fair.

Much of the body of tort law by which issues are now judged has come about through the judicial process. We believe it is time for public debate. We urge movement of HB 166 from your committee to the floor of the House where that debate can occur.

Sincerely,

WESTMARK HOTELS, INC.

  
Al Parrish  
Co-Chairman



# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Committee  
 committee name  
 committee on HB 349, HB 350, HB 336, dated March 15, 1990  
 bill/subject

The Alaska State Medical Association and the Health Association of Alaska with its member hospitals and nursing homes in a news release state that they both OPPOSE this legislation. These two organizations have the most information regarding medical malpractice issues and I feel our State Legislature should take into consideration their combined members knowledge and expertise in this field before considering legislation in this area.

The Federal Government provides the Federal Tort Claims Act which covers physicians practicing in Indian Health Service facilities, Federal Hospitals and federal contractors as well as other providers affiliated with the Federal Government. This makes malpractice insurance unnecessary for physicians and hospitals so affiliated.

Most non federal hospitals require their physicians to maintain medical malpractice insurance as a prerequisite to attaining medical staff priviledges. The dis-incentive to practice in Alaska is no greater than to set up a practice anywhere else because of the malpractice costs associated with practicing medicine.

Are any other states subsidizing physician's malpractice insurance costs? This would appear to be a tax on all Alaskans to provide a subsidy for a few of the upper income residents.

Malpractice rates are figured like automobile insurance rates, the more frequent claims are filed, the greater the cost of the insurance. Will this subsidy encourage a high quality supply of physicians? Will this alone increase availability of physicians in Alaska? Or will it tend to attract those relatively few physicians who have numerous malpractice claims against them, thus have high malpractice insurance rates in the states where they are currently residing? By subsidizing a physician with numerous claims in their background, this protects the negligent physician against the economic penalty of their past malpractice involvements. This could result in a lower quality of care being provided for Alaskans than would have occurred if some other enticement to practice here had had been used, for example: student loan payback funds for years of service, loan forgiveness, etc.

Signed: Dianne Rabb

Testifier

Norton Sound Health Corp.

Representing (Optional)

Nome Alaska

Address

907 443-3311

Phone No.

KETCHIKAN MEDICAL CLINIC, INC.

3612 Tongass  
Ketchikan, Alaska 99901

H.J. Henrickson, M.D., F.A.A.F.P.  
D.E. Johnson, M.D., F.A.A.F.P.

Phone 225-5144

March 16, 1990

*Hayden*

The Honorable Peter Goll  
Alaska State Legislature  
P.O. Box V (MS 3100)  
Juneau, Alaska 99811

Dear Representative Goll:

I am writing regarding House Bill 166, heard yesterday in the House Judiciary Committee. I am writing specifically in response to your questions regarding the Statute of Limitations language on pages 3 and 4.

As a pediatrician, I am certainly in support of special measures to protect children. As I said in my testimony, I believe that in Alaska children are safeguarded by a system of public and personal health care that would discover any real problems. Language in other states where this issue has been addressed has often dealt with the person's sixth or eighth birthday, the former being after they are already in one year of school, the second after they have been in three years of school.

Holding a physician responsible for parental actions is a strange way to proceed, and opens the door for all sorts of mischief and cross actions between parents and children. I am not sure that that is what is intended, but I see it as a likely outcome if you pass the language in lines 6-7 on page 4. I cannot see that you would harm the intent of that protection for children by simply deleting the words "a parent, guardian." and simply substitute "an" so that it would read, "fraud or collusion by an insurer or physician, resulting in failure".

*Hayden  
note*

You mentioned the fact that chiropractors can now do school entrance physical examinations. I would hasten to remind you that that change was not supported by the medical association, and was enacted by the legislature against the advice of both the physicians and the Department of Health and Social Services.

*and  
over  
my  
sped*

Thank you for scheduling more hearings on House Bill 166 in the House Judiciary Committee. I am hopeful that you will complete your committee deliberations promptly, and send this measure to the House for deliberations by the full body.

If there is other information or other opinion that I could provide, please do not hesitate to contact me. I will be following the deliberations of your committee with considerable interest.

Yours truly,

*David E. Johnson*

David E. Johnson, M.D.

DEJ:bjh



# Alaska State Legislature

Please enter into the record my testimony to the Labor + Commerce  
committee name

committee on HB 166 / Tort Reform dated 3/15/90  
bill/subject

Chairman + Committee members:

I would like to support HB 166 and its moving from committee to the floor for general debate. The provision of this bill help address several issues which would contribute to reducing the litigious climate which affects the conduct of business, the provision of health care, and the operation of non-profit organizations. It is in changing this climate that the legislature can provide leadership, and we can be less at the mercy of narrowly derived case law, in manging the legal environment of our state.

Provisions to reduce frivolous but expensive litigation, may to some extent reduce insurance costs for all, but more important will reduce the costs of health care as it has evolved in this litigious climate. Much time, effort and expense is currently devoted by hospitals, hospital medical staffs and individual physicians to the practice of "defensible" medicine. This bears little resemblance to high quality, innovative or human practice of medicine or provision of healthcare. It is not an "us versus them" issue, nor one of physicians economics. Support of this bill will contribute to, as one small step, an improvement in the legal environment which

Signed:

Testifier

Scott Emery SCOTT EMERY MD.

Representing (Optional)

President, Medical Staff, Fairbanks Memorial Hosp.

Address

1650 Cowles St. Fairbanks, AK 99701

Phone No.

452-1739



# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary  
 committee name  
 committee on HB 336 , dated 3/15/90  
 bill/subject

I am opposed to HB 336.

Expanding the Medical advisory panel to include 3 lay people

(who would then constitute a majority) would totally undermine the credibility & effectiveness of what is supposed to be an expert panel on medical conditions & conduct.

Signed: \_\_\_\_\_

Testifier ROBERT L. F. GUNDEL (M)

Representing (Optional) 1905 CLEVELAND ST

Address FBI'S, AK 99701

Phone No. 457-6502

(WV)



# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary  
committee name

committee on HB-166, Tort Reform, dated 3-15-90  
bill/subject

I encourage the Interior Delegation to support Bill HB-166 - The high malpractice insurance premiums are discouraging local physicians in continuing their practice in Fbks.

I am asking all the following representatives:

Boyer - Sharp - Koponen - Davis & Miller to support HB-166.

Thank you very much and I am expecting your efforts.

Signed: Maria C Rundquist  
Testifier

Fairbanks Medical Community of 100  
Representing (Optional)

1633 Market St Fairbanks 99709  
Address

474-0963 - home      452-8181 work  
Phone No.

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---

1813 East First Avenue  
Suite 207  
Anchorage, Alaska 99501  
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March 14, 1990

Rep. Max Gruenberg  
Co-Chairman  
House Judiciary Committee  
Alaska State Legislature  
P.O. Box V (MS 3100)  
Juneau, Alaska 99811

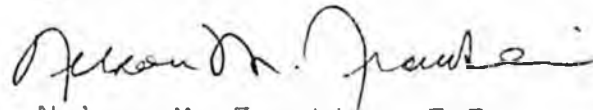
Dear Representative Gruenberg:

The people of this state left little doubt about their attitude on tort reform when they voted for pure several liability, Ballot Measure No. 2, in the November 1988 General Election. The 70% vote for the issue means nearly three quarters of Alaskans want tort reform.

Representatives Cotten (D), Larson (D), Hoffman (D), Pettyjohn (R), Grussendorf (D), Foster (D), Collins (R), and Roucher (D) are sponsors of HB 166, a comprehensive tort reform bill. They are doing something about an issue which their constituents support strongly.

HB 166 was passed out of the House Labor and Commerce Committee. It is now stuck in the Judiciary Committee. Please pass HB 166 out of the Judiciary Committee without further delay.

Sincerely,



Nelson M. Franklin, P.E.

# LEGISLATIVE TELECONFERENCE NETWORK



## SIGN-IN SHEET

SPONSOR: HOUSE JUDICIARY  
 SUBJECT: HB 1166 CIVIL LIABILITY  
 START/END TIME: 1:15 p. DATE: 3-14-90

PLEASE PRINT

	NAME/REPRESENTING	ADDRESS	PHONE #	TESTIFY	ONSTAFF	BILL #
1	Debra Grano / AATL & AAT	540 L Street Suite 102	258-4040	X		166
2	DOUG STARK / ANC. CH. of COM.	437 E ST # 300	272-2401	X		166
3	GENE ROGUSKA	4320 O'MALLEY RD 99516	346-1024		X	166
4	Adrienne Jynal	3200 Providence Dr 99519-6604	562-2211	X		166
5	Daniel Monaghan	1650 S Broadway AK 99508	277-1522		X	166
6	Mike Schneider	880 N St # 202 Anch AK 99501	277-4551			
7	FRANK THOMAS-MOIRAS	12541 AHECTON 99516	345-7101		X	166
8	AMY CHAFFIN RN	3200 PROVIDENCE DR 99508	261-3007		✓	
9	Barbara SUMMERS	4900 Eadie St Anchorage	562-2281		✓	
10	Margaret R. Wolfe	Midtown Day Care Center 1677 Juneau Dr 99501	274-8424	X		166
11	with Barbara Roberts	3200 Providence Dr 99501	261-3007		X	166
12	Lois Papp RW	3200 Providence Dr	261-3141		X	
13	Luise Heltain	PO Box 14-2694 Anch	272-3434		X	
14	Shirley Martin	15711 Stearns Circle Anch AK 99516	345-7741		X	166
15	Karl Garber	3801 Robin Anch AK 99504	337-2937		X	166
16	Janet Oates	9291 Hiland Rd Eagle River	676-2344		X	
17	Terry Willie	4210 PASSAGEWAY 99515	267-7111		X	166
18	MANUEL A. WALLACE Pawnee Hospital	12930 ADAMANTY PL ANCH AK 99515 3724	(w) 265-2416 (h) 345-0363		X	

# LEGISLATIVE TELECONFERENCE NETWORK



## SIGN-IN SHEET

SPONSOR: House Judiciary  
 SUBJECT: HB 1668: Civil Liability  
 START/END TIME: 1:15 p DATE: 3-14-90

### PLEASE PRINT

	NAME/REPRESENTING	ADDRESS	PHONE #	TESTIFY	ONSITE	PH 1
1	Sen. Anthony Donato/Plum	232 Rockwell Gold Pt	262-2515	✓		166
2	Ruth Lutz	3600 LC St #742	561-9377		X	166
3	Mary Pierce/MICA	4000 OH Seward Hwy <sup>Suite 203</sup> Anchorage, AK	563-3411		X	166
4	NELSON M. FRANKLIN	1813 E First St #201 ANCH	99501 277-1631	X		166
5						
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# Alaska State Legislature

Please enter into the record my testimony to the Judiciary  
committee name

committee on HB 166 - , dated 3/14/02  
bill/subject

*see attached*

Signed: Ross F. Harding  
Testifier

Representing (Optional)

235 View Ave  
Address

452-2967  
Phone No.

March 14, 1990

Dear Gentlemen:

The more I study the question of tort reform, the more concerned I become.

The first point that disturbs me seems to be that we have blurred the concept of fault. As legal issues become more complex, determining precise fault has become more difficult. Today, the emphasis is being placed on providing the injured party with some sort of redress regardless of blame, especially in the area of non-economic damages. The ability to pay becomes more crucial than who is at fault. We badly need a return to fairness in apportioning the award according to apportionment fault, regardless of the ability to pay. Insurance companies, I believe, justly calculate their projections based on the assumption that claims are legitimate only when their client is at fault. When the courts abandon fault as an element of liability, the concept of insurance becomes one of back-breaking social engineering. It will be interesting to note the effect of the recently passed public initiative on the system.

Much of House Bill 166 seems to concern insurance matters. To my mind, the insurance dilemma is merely a symptom of an underlying deep-seated predicament with its roots in the public's perception of society and how we use the system. Our society is becoming evermore litigious and the courts are overburdened, costs are skyrocketing, and incentives for big bucks for attorneys and successful plaintiffs are fanning the flames at public expense. It is time for the pendulum to swing back lest we ruin the clock.

-2-

We have developed the most expensive legal system in the world. Rising compensation awards, contingency fees, and court delays are escalating this expense. While the health care industry, manufacturers, design professionals, state and local governments, and other deep pockets, are the most often saddled with these suits, it must be remembered that these costs are passed on to the consumer and to the tax payer. As Pogo says, "we have met the enemy and he is us".

The effect of this expensive legal system is that so little of the award reaches the plaintiff. I have seen an estimate that \$.28 of every dollar of the direct costs goes to the victim. The rest goes to lawyers on both sides. We really do have to do better. No system can survive such overhead. I believe that House Bill 166 addresses this problem and should be supported in its entirety.

One thing that is often forgotten is the cost of the court system itself. One estimate that I have seen, albeit very old, is that in 1982, the Institute for Civil Justice estimated that the public taxpayer funneled \$320 million into the court system just to process civil suits related to personal injury, death, and property damage. In addition, one must remember that when the government itself is the defendant, "that a few less cops get hired, a fire engine isn't bought, the pipes leak longer, the streets deteriorate, it all comes out of the same kitty".

-3-

Punitive damages, if any, should be paid to the State or Federal Treasury. The prospect of receiving this bonus offers tremendous incentives for lawyers and plaintiffs to sue. (2) Additionally and finally, I am concerned about the concept of non-economic damages. I ask myself if I would accept a large award to be paralyzed for the rest of my life and, honestly, my answer would be, I would rather not. However, when reflecting on this issue, I remember an incident when my property was condemned for a highway. I felt the same way. That is, no amount of money could compensate me for the traffic, the noise, the drunks stopping at my door, my car being hit while parked outside my house, people staring in the windows while waiting for a light, etc. Nor did I receive any. While not an identical situation, I believe that there is a parallel. My conclusion is that there is no reasonable compensation for non-economic damages. And further, I believe, that society as a payor, has an interest in limiting the cost. It certainly limited it in my case.

According to a Gallup poll, the public urgently believes the system needs pruning. It believes the system is too expensive and fraught with too many lawsuits. In addition, the public feels that change is appropriate for containing court costs and more equitably shifting the burden of a lawsuit expense among the parties concerned. The public would like as part of the verdict the courts to apportion court and legal representation costs among the parties based on the actual hours worked, actual hours of court time, and other expenses as accounted for, and to eliminate contingency fees. I would, therefore, ask you to pass House Bill 166 as originally written, and I would further ask you to encourage

-4-

people to settle their differences outside of court by providing for mandatory and binding arbitration of small claim, eliminating punitive damages as an incentive, limiting the awards for non-economic damages, and limiting contingency fees. I would further ask you to allow for a rational verdict by considering alternate sources of reimbursement in order to avoid duplication (as is included in House Bill 166), eliminate → ad damnum clauses and apportion liability taking into account the extent that the plaintiff is responsible for any injuries or damages to himself. To my mind, all of these provisions are necessary and none should be ignored.

Sincerely yours,

Roger F. Harding, M.D.

RFH:ms

5



# Alaska State Legislature

Please enter into the record my testimony to the Judiciary Committee  
committee name

committee on HB 166 dated 3/19/90  
bill/subject

I ~~have~~ <sup>been</sup> a physician in Fairbanks for 10 years. I am convinced Tort Reform really is needed in Alaska because of experience in other states where meaningful tort reform has occurred. An example is my malpractice insurance. I've never had a claim. Yet, since 1985 my insurance premium has increased by 553%. (from 2748/year in 1985 to \$15,196/year in 1991) In 1989 my premium increased by 11% while doctors insured by the same company in California received a 5% rebate. The difference is attributed wholly to Tort Reform that has occurred in California.

Last year 70% of Alaskan voters supported tort reform. I urge you to act on this mandate and pass HB 166

Signed: Richard J Burger M.D.  
Testifier

Self  
Representing (Optional)

2009 Cowles St, Fairbanks AK 99701  
Address

907-452-6610  
Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary  
committee name  
 committee on House 146, dated 3/14/97  
bill/subject

*see attached*

Signed: Mary Wing MD  
Testifier

Representing (Optional)  
8 Bonnie Ave, Fairbanks AK 99701  
Address

456-5711  
Phone No.

*Terry P. 3/14*

*Mary C. Wing, M.D.*

LEMETA MEDICAL CLINIC, INC.  
#8 BONNIE STREET  
FAIRBANKS, ALASKA 99701  
TELEPHONE (907) 486-8711

TESTIMONY FOR HOUSE BILL 166  
3-14-90

The cost of medical liability insurance is causing a crisis in health care in America. In the last 3 - 4 years, one third of the Family Practice and Obstetric physicians have quit doing obstetrics. Currently MICA rates are \$89,000 year. When doctors stop delivering babies, they must then purchase a tail policy that covers future lawsuits for past events. That policy costs 3 times the last year's rate. That is \$267,000 at current rates in Alaska. That's why doctors are quitting delivers or retiring early. Unless doctors add \$1000 - 4000 to the cost of each delivery (depending on the Number done each year), they can not recover the expense. They are forced to raise rates uniformly or stop delivering babies. <sup>Local</sup> Two Family Practice physicians raised their rates 40% in order to continue obstetrics. These events are occurring in other specialties thereby limiting services to the public.

People who have been injured deserve compensation but there is not enough money in the world to pay everyone what they feel they deserve. We need a mechanism to make awards more uniform and fair, and we need restrictions on awards so we don't bankrupt the system or drive the cost of medical care beyond the price of the average family.

House bill 166 does not limit the ability to sue. 70% of your fellow Alaskans voted for the tort reform referendum. I ask your support for this bill.

*Mary C. Wing*

*Mary C. Wing, M.D.*

LEMYTA MEDICAL CLINIC, INC.  
88 BONNIE STREET  
FAIRBANKS, ALASKA 99701  
TELEPHONE (907) 486-8711

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3-14-90

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*Mary C. Wing*

P. 10/14  
Johnny Ellis

*Mary C. Wing, M.D.*

LENETA MEDICAL CLINIC, INC.  
88 BONNIE STREET  
FAIRBANKS, ALASKA 99701  
TELEPHONE (907) 486-8711

TESTIMONY FOR HOUSE BILL 166  
3-14-90

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*Mary C. Wing*

*Cliff Davidson* P. 12/14

*Mary C. Wing, M.D.*

LEMETA MEDICAL CLINIC, INC.  
#6 BONNIE STREET  
FAIRBANKS, ALASKA 99701  
TELEPHONE (907) 456-5711

TESTIMONY FOR HOUSE BILL 166  
3-14-90

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House bill 166 does not limit the ability to sue. 70% of your fellow Alaskans voted for the tort reform referendum. I ask your support for this bill.

*Mary Wing*

*Mike Miller* P 13/14*Mary C. Wing, M.D.*LEMETA MEDICAL CLINIC, INC.  
#8 BONNIE STREET  
FAIRBANKS, ALASKA 99701  
TELEPHONE (907) 488-8711TESTIMONY FOR HOUSE BILL 166  
3-14-90

The cost of medical liability insurance is causing a crisis in health care in America. In the last 3 - 4 years, one third of the Family Practice and Obstetric physicians have quit doing obstetrics. Currently MICA rates are \$89,000 year. When doctors stop delivering babies, they must then purchase a tail policy that covers future lawsuits for past events. That policy costs 3 times the last year's rate. That is \$267,000 at current rates in Alaska. That's why doctors are quitting delivers or retiring early. Unless doctors add \$1000 - 4000 to the cost of each delivery (depending on the Number done each year), they can not recover the expense. They are forced to raise rates uniformly or stop delivering babies. Two <sup>local</sup> Family Practice physicians raised their rates 40% in order to continue obstetrics. These events are occurring in other specialties thereby limiting services to the public.

People who have been injured deserve compensation but there is not enough money in the world to pay everyone what they feel they deserve. We need a mechanism to make awards more uniform and fair, and we need restrictions on awards so we don't bankrupt the system or drive the cost of medical care beyond the price of the average family.

House bill 166 does not limit the ability to sue. 70% of your fellow Alaskans voted for the tort reform referendum. I ask your support for this bill.

*Mary Wing*

*Mike Davis**Mary C. Wing, M.D.*LEMETA MEDICAL CLINIC, INC.  
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