S B 451

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 2/8/90

FURTHER: Judiciary

Date of 5-Day Notice: 3/1/90
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 3/8/90

Labor & Commerce Committee considered SB 451

"An Act relating to civil actions; amending Alaska Rules of Civil Procedure 68 and 82; and providing for an effective date."

and recommended:

[ ] replace with _____ CS _____ [ ] same title [ ] new title

[ ] attached amendment(s)

[ ] _____ letter of intent adopted

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

[ ] fiscal note(s) Dept of Commerce 3/6/90

[ ] appropriation-no fiscal note

Department(s)/Date:

[ ] zero fiscal note(s) _____

[ ] Governor's bill w/fiscal note

SIGNING ~~DO PASS~~:

OTHER RECOMMENDATIONS:

Chair: Signature and Recommendation

M E M O R A N D U M February 5, 1990

SUBJECT: Civil Actions - Work Order No. 6-2081

TO: Senator Jan Faiks

FROM: Michael F. Ford
Legislative Counsel

The following is a sectional analysis of Work Order No. 6-2081:

Section 1 - Findings and purpose.

Section 2 - Requires that an action for personal injury, death, or property damage be brought within six years of the date of injury, if caused by a product or by construction, or within six years of the last act alleged to be the cause of the injury. Periods of disability, such as minority, incompetency, or imprisonment do not extend the six year period. This section does not apply if the personal injury, death, or property damage was caused intentionally, or if another shorter period of limitation applies.

Section 3 - Removes actions for personal injury, death, or property damage, from the existing two year statute of limitations.

Section 4 - Requires that an action for personal injury, death, or property damage be brought within two years of the time the person had the right to bring the action. The two year period is not extended for any period of disability, such as minority, incompetency, or imprisonment. The section does not apply if a shorter period of limitation is imposed.

Section 5 - Requires that clear and convincing evidence of malice, bad motive, or reckless indifference to the interests of another exist before punitive damages may be awarded.

Section 6 - Prohibits a person from recovering damages for personal injury or death if the injury or death occurred while the person was committing a crime and the person has been convicted of the crime. Crime includes a felony or a misdemeanor.

Section 7 - Provides that a person who commits a crime that results in personal injuries to that person is not prevented from recovering damages for personal injury or death, if the person liable was also engaged in the commission of a crime and has been convicted of the crime. Also defines the term "crime", to include a felony or a misdemeanor.

Section 8 - Requires that if a portion of a judgment is owed to an attorney under a contingent fee agreement, that portion must be reduced to a present value and paid in a lump sum, rather than as a part of periodic payments ordered by the court.

Section 9 - Requires that the court include an amount for inflation, when ordering that future damages be paid by periodic payments.

Section 10 - Prohibits recovery of damages for personal injury, death, or property damage caused by an act or omission within the official duties of a member of the board of directors or an officer of a public corporation, or electric or telephone cooperative, unless the act or omission constituted gross negligence.

Section 11 - Allows a person to only recover damages that are in excess of compensation received from other sources, such as private or government insurance. Also requires the court or jury to be informed of the tax implications of an award of damages.

Section 12 - Lowers the legal rate of interest that may be awarded on judgments from 10.5% to eight percent, unless otherwise agreed by contract.

Section 13 - Prohibits the award of prejudgment interest for future economic or noneconomic damages.

Section 14 - Technical amendment.

Section 15 - Prohibits an award of nonmonetary damages in excess of $50,000, in a wrongful death action.

Section 16 - Prohibits the court from awarding attorney fees in a civil action for personal injury, death, or property damage, unless specifically authorized by statute or by agreement of the parties.

Section 17 - Limits the liability of a hospital for civil damages caused by a person who is not an employee. Requires the hospital to post notice that certain individuals are not employees. Provides that the limitation does not apply to liability based on the hospital's own negligence or intentional misconduct. Adds certain definitions.

Section 18 - Requires the director of the division of insurance to annually report to the legislature regarding medical malpractice insurance rate changes occurring as a result of certain court decisions.

Section 19 - Limits the right of a person to bring an action against a peace officer or member of the emergency service patrol when taking an intoxicated person into custody, unless the act or commission was grossly negligent, reckless or intentional.

Section 20 - Repeals (1) a limit on recovery of noneconomic damages contained in AS 09.17.010(c),(2) an exception to the award of future damages contained in AS 09.17.040(c), and (3) a section regarding consideration of collateral benefits in a medical malpractice action contained in AS 09.55.548.

Section 21 - Requires the Department of Commerce and Economic Development to report to the legislature regarding the effect of certain insurance claims on the civil justice system.

Section 22 - Notice of amendment to the civil rules of court.

Section 23 - Notice of amendment to the civil rules of court.

Section 24 - Applicability.

Section 25 - Effective date.

MFF:lmb
L9/092

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March 12, 1990

Senator Richard Eliason
P. O. Box V
Juneau, Alaska 99811

Dear Senator Eliason,

I appreciate the fact that you have requested my comments on SB 451 and specifically on the provisions in the bill that have not been a part of past tort reform legislation. I will review the most significant sections of the bill here and specify which parts are new and which have been a part of previous bills.

Section 1 contains the same kinds of legislative "findings" concerning the relationship between the existing tort system and high insurance rates that have been included in past bills. One unique aspect of this bill, however, is that even though Section 1 includes the "findings," section 21 of this same bill includes a requirement that the Department of Commerce and Economic Development "study closed insurance claims" and report to the legislature on "the extent to which the legal system has or has not been the cause of dramatic liability insurance increases or decreases and coverage reduction in crisis lines in the state." Generally speaking, this kind of internal contradiction in a bill would not be worth mentioning. I do it here only because the

"study" requested has now, in fact, been completed. A massive amount of data has been compiled and summarized by the House interim committee to study tort reform and that data is available now. The information demonstrates that national efforts at tort reform, even when they have included major changes in the tort system have had little impact on insurance rates. I urge the members of the committee, before they vote on a final bill, to at least review the information that this bill acknowledges is necessary to legislative deliberations.

Section 2 of SB 451 is probably the major change from previous legislation. That section provides that no claims for death or injury may be filed more than six years after the purchase of a product that causes an injury, the completion of construction that causes death or injury, or the last act of any kind that causes the death or injury. This kind of prohibition is called a statute of repose. It is not like a statute of limitation, which sets some period (presently two years) after which a person who has been injured can file a lawsuit. Statutes of limitation insure that people who claim damages must sue within some reasonable time period following injury. Statutes of repose have nothing to do with the time that someone is injured; they stand as absolute bars to suits against contractors, architects, doctors, lawyers and anyone else six years after they have done whatever it is that was alleged to have been negligent whether or not anyone finds out about the negligence or is

injured during the six year period. For instance, suppose an architect designs a house for a certain maximum snow load. Seven years later, for the first time the house is subjected to that maximum snow load and the roof collapses. The architect has been fully compensated for a faulty design, yet there is no remedy for the homeowner. Similarly, suppose you hire a lawyer to draw a will leaving everything to your wife. Ten years later you die and your wife finds out that the lawyer didn't know that witnesses were required. The will is void. Your wife now only receives half of your estate but she has no remedy against the attorneys. A drug company manufactures and sells IUDs and after eight years, 60% of the women who used them have developed cervical cancer or have become sterile. They have no remedy, even though there is no way they could have even understood there was anything wrong until after the period when they could have sought damages from the manufacturer.

I could conceive of this kind of bill finding some support in a state that produces large numbers of products and consumes very little. But in Alaska, why would we want to bar people from seeking damages for negligence solely on the basis that six years has passed since the product was manufactured or the service performed. Many products, treatments or services are supposed to last much longer than six years. People who sell products, services or treatments are compensated on the assumption that what they sell will last longer than six years. Should they not

bear responsibility for the quality of that product or service beyond six years? Statutes of repose have been a part of the law in this state only briefly; one was passed to insulate "design professionals" years ago and was struck down as unconstitutional. Even that statute only tried to protect a few people from their own negligence -- this one is a wholesale violation of the rights of injured parties.

Sections 3 and 4 of SB 451 attempt to make a major change in the existing statute of limitations by depriving infants and incompetents of their right to sue. Existing law provides that once people are injured and know of their injury, they have two years to bring a suit. If they sleep on their rights, they lose them. But to my knowledge everywhere in the country, the rule has been that the two years starts to run only when the injured party has the ability to do something to enforce their rights in court. In the case of minors or incompetents, that means when they reach the age of majority or when they cease to be incompetent. Section 4 provides that the two year statute of limitation (rewritten in section 3) will apply "notwithstanding AS 09.10.140." AS 09.10.140 is the present law that authorizes minors and incompetents to bring suits two years after they are capable of bringing suit. If AS 09.10.140 is eliminated, it will mean that a child who is injured at birth will have to bring a lawsuit before he is two or he will forever lose his rights. A person who is in a coma, as a result of another's negligence,

also will have the obligation to bring a suit within two years, or he will lose his rights. That is a drastic limitation on the rights of injured infants and incompetent individuals.

Section 5 of the bill makes it more difficult to obtain punitive damages. As a general rule, "reckless indifference to the interest of another" is the test for punitive damages. If somebody knows that a product is defective and sells it under the assumption that maybe they will get away with it or possibly make enough money to handle any lawsuits, he is obviously "recklessly indifferent" and is subject to have punitive damages assessed. This bill adds the requirement that the "recklessly indifferent" individual also have "malice" and perform "conscious acts" showing "deliberate disregard," whatever that means. I think if you bought a car with a fuel tank that the manufacturer knew could explode under certain unusual but nonetheless "anticipated" conditions, and the manufacturer kept that information quiet so he could sell the product and people you cared for died as a result, you would agree with me that something more than simple damages would be required to make sure that manufacturers didn't put products like that on the market. That's all that punitive damages are about. They almost never occur, but when "reckless indifference" does exist, juries should act be able to act punitively.

Sections 6 & 7 deal with people being injured or injuring others while committing crimes. Section 7 is new and allows

people who are injured while they are committing crimes to recover against defendants who are also committing crimes when they cause the injury. The number of real cases like this are minimal; the passage of these sections will have little or no impact on insurance or the tort system as a whole. The only moral we can perhaps draw from these two sections is that in these limited instances, two wrongs somehow make a right.

Section 8 contains one provision that you have seen before and one that is new. The first portion of Section 8, like previous legislation, authorizes the defendant in a civil action to make the decision as to whether he will pay his judgment to the plaintiff in periodic payments rather than in a lump sum. The section also includes a new provision -- one that provides that if payments are made on a periodic basis, the portion of the judgment owed to an attorney under a contingent fee will be "reduced to present value" and paid in a lump sum. This latter provision simply makes no sense. Under changes previously made by the legislature, the judgment is always reduced to present value regardless of whether the attorney is paid a contingent fee, or an hourly basis. Accordingly an attorney fee based on a percentage of the present value has, itself, already been reduced to present value. I frankly don't know what this section means, nor do I think the drafters really understand what it means.

The part in section 8 that allows the defendant who must pay damages to determine that the plaintiff will receive that payment

in periodic payments rather than a lump sum is also inconsistent with what the legislature has previously done in this area of law. The initial fight over periodic payments was, in part, to insure that the plaintiff would not get a lump sum judgment today of inflated dollars, which were really intended to compensate him for future loss. The tort reform bill enacted in 1986 included a requirement that all lump sum judgments which are in part composed of payments for future losses must be reduced to present value. Accordingly, there is no longer any economic justification for insisting that the payments be periodic. Even with periodic payments, the plaintiff is always entitled to the full amount of the judgment; that is, even if he dies, the remaining amount due must be made to his estate. Therefore, whether payments are made periodically or in one lump sum, they will always equal the same amount. The only basis for requiring periodic payments then is the view that the plaintiff really can't be trusted with all that money at once and steps must be taken to dole it out to him bit by bit. But if that is such a good idea, why can't a plaintiff be trusted to act in his own best interest? Why is this situation different from any other in which one obtains a lump sum of money? And equally important, when payments are periodic, there is always a chance they won't actually be paid. Insurance companies that sell annuities to pay future periodic payments, do go broke; those who sell annuities cheaply to defendants who look for cheap annuities to pay

judgments go broke faster. Why should the injured party have to take that risk?

Section 11 of the bill is a new provision that deals with collateral sources -- those received from parties other than the defendant as a result of the injury. This section replaces the collateral benefits statute enacted by the Legislature in 1986. Under this new proposal, instead of being considered at a post-trial hearing, collateral benefits would now be considered by the jury so they could reduce the recovery. The 1986 statute allowed a judge to reduce compensation to victims, but it at least directed the judge to consider not only collateral benefits but countervailing costs to the claimant such as the actual costs and fees he had to incur to bring litigation in the first place. Those can reach 40% of the award. This section makes no allowance for a plaintiff's costs -- it only focuses on what he receives with the result that the jury will get a distorted picture of what benefits he will really receives when a case is all over.

Section 11 also requires the jury to be instructed about the tax implications of any damage awards. The IRS does not tax injury damages because they are compensation that simply replaces what the victim lost. If your house burns down, the insurance money you collect is not taxable. Damages are replacement of capital, not new income. The judge or jury decides the amount of the loss. Taxability or non-taxability has nothing to do with

that loss. This provision seeks to confuse juries with irrelevant information so they will impose their own "tax" on that which is not legally taxable, by reducing the damages they award. It also allows juries to make assumptions about what taxes will be in the future -- the period for which they are awarding damages. Those assumptions would be nothing but pure speculation.

Section 12 reduces the interest rate on judgments from 10.5% to 8%. It's only common sense to insist that the rate of interest paid by insurers or other defendants on money owed to an injured party be at the prevailing market rate -- that rate that you could earn if you lent your money to others. If it is not that rate, insurance companies have no incentive to pay the money. The longer they can hold your money and invest it, at say 12% and subsequently pay you 8%, the better it is for them. The provision is not only unfair, it will make it much more difficult to settle claims and will clog the court system with delays.

Sections 14 and 15 of this bill allows survivors to collect damages in lawsuits related to wrongful death for the full amount of lost wages and other pecuniary loss but limits damages in a wrongful death case for non-pecuniary loss to $50,000. The idea of limiting non-pecuniary damages is not unique to this bill, but the $50,000 limit is way out of line with anything the legislature has seriously considered in the past. I, frankly, do not totally understand this section. It is unclear to me just

what is limited by the $50,000 and what is not. But it appears to me that the limits would apply to the value of any services performed by the deceased for his dependents that were not in the form of cash. If that is true, this proposal takes no account of the large number of people who live in villages in Alaska that do not have cash economies and who support others through subsistence. If a twenty-five year old resident of Kiana is killed by a defective kerosene stove that explodes he may have little earning history, so the wrongdoer will pay medical expenses plus $50,000 and the state will pick up the rest of the enormous loss to his dependents through welfare and other state programs. Housewives also have no wage history so they are worth no more than $50,000 either, even though their death will mean that much more than $50,000 will be spent by survivors to replaced the "non-pecuniary" services they have lost. This appears to be a blatantly discriminatory and unfair provision.

Section 17 is a new provision that attempts to overrule the Alaska Supreme Court's decision in Jackson v. Powers. In Jackson, the court held that a hospital that maintains an emergency room is liable for the negligence of the doctors who work there, regardless of the efforts of the hospital to separate the emergency room from its general operation through such mechanisms as separate incorporation and other legal devices. This section attempts to reverse that decision by allowing the hospital to avoid liability if it posts a notice on its emergency

room that states that certain doctors in the emergency room are "independent contractors" and not hospital employees.

If you believe that someone who has a broken arm or leg, or is bleeding profusely from a wound and is rushed to the hospital can make a reasoned decision after reading the sign to either stay where he is or take his problem elsewhere (assuming there is an "elsewhere") then this section makes sense. Even if you do believe that, how do infants read the sign? How do people who are unconscious make intelligent decisions? I don't profess to be an expert on hospital liability or physician care in emergency rooms, but this section makes no logical sense. If hospitals should be liable, posting a sign should make no difference unless people can make reasonable decisions on the basis of the signs. In an emergency room setting, that is often impossible.

Having said my peace about the general tort bill, let me say something about the problems which give rise to bills like SB 451. I have listened to testimony for nearly six years on this subject. It is the same every year. Doctors, and sometimes other professionals, come and testify about the outrageous costs of insurance and how it is hurting their practice or their business. In many cases, I have not been particularly impressed. If a doctor is making $500,000 or $600,000 a year as a surgeon, it does not offend me that $50,000 or $100,000 of his profits should be dedicated to insuring that people who pay him fees for his services should be protected against his negligence. It

seems to me in those kind of situations, that doctors, architects or other successful professionals are not really complaining about insurance; they are complaining about their unhappiness with lawsuits. I can certainly understand their concern but that without more should not justify drastic reductions in the rights of injured parties.

There is a group of physicians, however, who obviously have serious problems beyond mere irritation with lawyers. These are physicians who either practice a high risk specialty without corresponding great rewards in an urban setting, or physicians who practice in some communities where the amount of revenue generated by the practice simply cannot sustain the high rates for malpractice insurance. The alternative for these doctors is to either terminate their practice, which leaves the community without any medical assistance or to practice uninsured, which means that if someone really is badly injured by negligence, the injured party will have no source of recovery. Neither of these options is acceptable, in my view.

The testimony I have heard from doctors in these high risk specialties and in rural communities concerns insurance rates that are not merely high -- they are prohibitive. People who testify are not asking that rates hold steady or be reduced by amounts like 5% or 6%; they are looking for massive reductions. People have not used percentage reduction figures in their testimony, but it's clear when they talk about the staggering

increases from what they believe were reasonable in the past that these people are looking for reductions of 50% or even more. The difficulty here is that, even if you believe fervently in tort reform and even if you pass everything even remotely reasonable that has been suggested, none of the studies I have seen, pro or con, suggests that there will be anything more than a minimal reduction in insurance rates. Insurance rates are driven by so many other factors that changing the rules of liability simply will not have that great of an impact unless you literally destroy the rights of injured parties. Each year the legislature hears about very real problems from people in real trouble, but they spend hours debating legislation, which even if accepted, will not solve the problem. When I first got involved in this matter, that seemed curious; now it seems like a colossal waste of everyone's time. And more important, it precludes any real effort to deal with something that is obviously wrong.

I have no simple answers, but I do have a few suggestions. The first and most obvious would be some kind of subsidization of medical insurance rates in areas where the state believe it is in the public interest to do so. If, for instance, the legislature believes that it is in the public interest to make sure that there are doctors in rural areas or doctors practicing certain specialties in any area and present insurance rates are preventing that, then there could be some mechanism set up to assist those doctors in obtaining insurance in specified

situations. The legislature could specify, for instance, that communities of a particular size would qualify for assistance programs for doctors, and that certain specialties would receive assistance. Legislation could establish an administrative system to provide different levels of assistance depending on the financial situation of the doctors who seek the assistance. Considering the number of doctors who might need assistance, there would not be much money involved here. In addition, this type of approach has already been used in different forms in Alaska. Many communities, including Juneau, have sought doctors in specialties of one sort or another for years and have provided incentives to encourage physicians to move to the community. This suggestion is simply another form of incentive -- in this case, a direct subsidy for insurance rates for those who need it.

A second suggestion would be to change the basic nature of the tort system, but only in those areas where it is absolutely required. The Governor, for instance, has introduced HB 345, which sets up a no-fault system for all medical malpractice cases. I think the Governor's bill is seriously flawed in many ways, but at least it represents some new thinking on the problem. I do not know the extent to which one medical specialty may be separated from another, whether different types of medical situations could be treated differently by the law or how a no fault system would work in practice or how physicians would feel about a no-fault system, but it is at least an idea worthy of

consideration. Worker's compensation took years to achieve, but we know that it does work. If the traditional tort system creates social consequences that are undesirable in the sense that we lose physicians' care, a no fault system may be one way of dealing with the situation. The tort reform measures put forward in SB 451, however, will not change the situation; they will simply lessen an injured party's ability to receive adequate compensation while leaving the basic problem exactly where it is, and that will do no one any good.

Thank you for requesting my comments on this bill. I hope they are of some assistance to you and other members of the committee.

Yours very truly,

GROSS & BURKE

Avrum M. Gross

AMG:ddp