SB

219

(7)

HOUSE COMMITTEE REPORT

Date Referred: May 13, 1991 FURTHER REFERRALS:

Date of Committee Action: 5-16-91

The JUDICIARY Committee considered: CSSB 219(L&C)

CS FOR SENATE BILL NO. 219 (L&C) WORKERS' COMPENSATION: MISC. CHANGES

"An Act relating to workers' compensation and civil liability for workplace safety inspections; and providing for an effective date."

RECOMMENDATIONS:
be replaced with HCS CSSB 219 (Jud) [X] the same title [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ 2 [X] zero fiscal note(s) Labor 5-3-91 CED 5-3-91

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Wanda Dooley	✓				
J. Elders	✓	Terry Mackey		✓	
D. Shapleigh	✓	Mark Stanley		X	

Wanda Dooley
CHAIRMAN'S SIGNATURE

FISCAL NOTE

No. 2

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill Version: CSSB 219(L&C)

(S) Publish Date: 5/3/91

Revision Date: 4/29/91

Department Affected: Commerce & Economic Dev.

Title: An Act relating to Workers' Compensation

BRU: Insurance

Component: Operations

Sponsor:

Requestor: Senate Labor & Commerce

COMPONENT SERIAL NO. 0 3 5 4

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Don Koch, Chief of Market Surveillance Phone: 465-2515

Division: Insurance Date: 4/29/91

Approved by Commissioner: Glenn A. Olds for Asst. Comm

Agency: Department of Commerce & Economic Development Date: 4/29/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90
DK/dg19479D/042991a

FISCAL NOTE No. 3

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO Bill Version: CSSB 219 (L&C)
(S) Publish Date: 5/3/91

Revision Date:
Title: " An Act relating to workers' compensation ..."
Sponsor: Senate Labor & Commerce
Requestor: Senate Labor & Commerce

Department Affected: Labor
BRU: Workers' Compensation
Component: Workers' Compensation
COMPONENT SERIAL NO. 344

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Linda Rexwinkel, Director
Division: Workers' Compensation
Phone : 465-2790
Date : 4/22/91

Approved by Commissioner: Nancy Bear Usera
Agency: Department of Labor
Date: 4/22/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

RECEIVED MAY 1 3 1991

Alaska State Legislature

During Session
P.O. Box V
Juneau, Alaska 99811
(907) 465-2828

During Interim
3111 C Street, Suite 510
Anchorage, Alaska 99503
(907) 561-2040

Senator Virginia Collins

May 13, 1991

Representative Dave Donley
House Judiciary Chair
Room 122
Capitol Building
Juneau, Alaska 99811

Dear Representative Donley:

I would appreciate the scheduling of a teleconference on todays' House Judiciary meeting. There are people in Anchorage who want to hear and testify on the Workers Compensation Bill. This bill affects these people and I ask that you allow them this public process.

I have made arrangements for all who want to testify to be notified at the time of the Judiciary hearing. My staff, Nanci Spear, will be available to monitor the equipment in the Committee room if necessary.

Thank you for your consideration.

Sincerely,

Senator Virginia Collins

5/13/91

(7)

HOUSE COMMITTEE REPORT

Judiciary

Date Referred: May 7, 1991 FURTHER REFERRALS:

Date of Committee Action: 5-11-91

The LABOR AND COMMERCE Committee considered: CSSB 219(L&C)

CS FOR SENATE BILL NO. 219 (L&C) WORKERS' COMPENSATION: MISC. CHANGES

"An Act relating to workers' compensation and civil liability for workplace safety inspections; and providing for an effective date."

RECOMMENDATIONS: [X] the same title
be replaced with HCS CS SB 219 (L&C) [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[X] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ (2) [X] zero fiscal note(s) Senate DC FN 5/3/91 / 5/3/91 CA Sen.

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Bruckman	✓				
Danley	✓				
		Parnell		✓	
		Finkelstein		✓	
		Duncan		✓	

CHAIRMAN'S SIGNATURE Finkelstein

HOUSE CS FOR CS FOR SENATE BILL NO. 219 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered: 5/13/91
Referred: Judiciary

Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to workers' compensation and civil liability for workplace safety inspections; and providing for an effective date."

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

* Section 1. PURPOSE OF SECTIONS 10 AND 13. (a) It is the purpose of sec. 10 of this Act to amend AS 23.30 to provide that an insurer is not liable for providing or failing to provide safety inspections or safety advisory services; this amendment would decide a public policy question concerning the liability of an insurer for the performance of a safety inspection or safety advisory service raised in Van Biene v. ERA Helicopters, Inc., 779 P.2d 315 (Alaska 1989).

(b) It is the purpose of sec. 13 of this Act to amend AS 23.30.265(15) to reaffirm the original intent of changes made to this definition in sec. 24, ch. 93, SLA 1980, to include prior temporary total disability payments within the definition of gross wages.

* Sec. 2. AS 23.30.041(k) is repealed and reenacted to read:

(k) The employer shall pay compensation to an employee eligible for reemployment benefits, as follows:

(1) until the employee reaches medical stability or the reemployment plan is completed or terminated, whichever comes first, temporary disability benefits shall be paid;

(2) if the employee reaches medical stability or has been found eligible for reemployment benefits, temporary disability benefits shall cease and permanent impairment benefits shall then be paid biweekly at the employee's temporary total disability rate until plan completion, termination, or exhaustion of permanent impairment benefits; permanent impairment benefits remaining unpaid upon completion or termination of the plan shall be paid to the employee in a single lump sum;

(3) if the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall pay, on a biweekly basis, an amount equal to 60 percent of the employee's spendable weekly wage as determined under AS 23.30.220, not to exceed $525, until the completion or termination of the plan;

(4) if the employee reaches medical stability before an impairment rating is given as provided in AS 23.30.190, except for the first 30 days the employee shall be paid 60 percent of the employee's spendable weekly wage until an impairment rating is given; benefits paid more than 30 days after medical stability but before an impairment rating is given shall be offset from the total sum of permanent impairment benefits due to the employee; after the employee reaches medical stability and an impairment rating is given, all benefits paid shall be included as permanent impairment benefits;

(5) benefits related to the reemployment plan may not extend past two years from the date of the initiation of the 60 percent payment of the employee's spendable weekly wage, plan approval, or plan acceptance, whichever date occurs first, at which time the benefits expire;

(6) if the employer controverts the employee's claim or appeals a ruling of the administrator or the board and the controversion or appeal delays completion of an evaluation, development, commencement or completion of a plan

(A) the employer shall pay the employee 60 percent of the spendable weekly wage during the period of controversion or appeal, except that temporary disability benefits shall be paid until the employee reaches medical stability;

(B) the two-year limitation on payment of benefits in (5) of this subsection does not begin to run or is tolled; and

(C) payments made at 60 percent of the employee's spendable weekly

wage during controversion or appeal may not be offset from permanent impairment benefits due to the employee.

* Sec. 3. AS 23.30 is amended by adding a new section to read:

Sec. 23.30.047. BENEFITS FOR HEALTH INSURANCE. (a) An employer who pays compensation to an injured employee under AS 23.30.041(k), 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, and who provided health insurance to the employee at the date of injury shall also reimburse the employee for health insurance coverage for the employee and covered dependents, as provided in this section.

(b) Payment required under this section is equal to the employer's current contribution for health insurance or the amount paid by the employee for replacement coverage, whichever amount is less. Payment required under this section commences when the employee's health insurance provided by the employer's contribution ceases and shall continue until the employee is no longer receiving compensation described in (a) of this section, or for 18 months, whichever period is shorter.

(c) Payment is not required under this section until the employee provides proof of health insurance coverage. In this subsection, "health insurance" includes

(1) an individual policy of health insurance; or

(2) a notice of self-payment for continuance of coverage required under 29 U.S.C. 1161 (Consolidated Omnibus Budget Reconciliation Act of 1985) or under a union health or welfare trust agreement.

(d) If benefits required under this section are not paid within 30 days after the employer receives a request for payment, the employer shall pay a penalty equal to 25 percent of the amount due.

* Sec. 4. AS 23.30.075(b) is amended to read:

(b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the board, upon conviction, the court <u>may</u> [SHALL] impose a fine of <u>up to</u> $10,000 and may impose a sentence of imprisonment for not more than one year. <u>In addition, the board may impose a civil penalty of up to three times the manual rate that would have been charged for the employer's insurance premium during the period the employer failed to obtain insurance.</u> If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or

apply for a certificate of self-insurance [,] and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

* Sec. 5. AS 23.30.095 is amended by adding a new subsection to read:

(l) The employer shall provide to the employee one round trip coach fare airline ticket to the place at which an examination described under (e) of this section is performed and two days per diem at the rate paid to state employees who travel outside the state if the examination requires the employee to travel outside the state. If the employee objects to the physician's report of the examination, takes the deposition of the physician and the deposition is taken outside the state, or if the employer takes the deposition of the physician who performs the examination and the deposition is taken outside the state, the employer shall provide one round trip coach fair airline ticket to the location of the deposition and two days per diem at the rate paid to state employees who travel outside the state.

* Sec. 6. AS 23.30.107 is amended to read:

Sec. 23.30.107. RELEASE OF INFORMATION; CONFIDENTIALITY. Upon request, an employee shall provide written authority to the employer, carrier, rehabilitation provider, or rehabilitation administrator to obtain medical and rehabilitation information relative to the employee's injury and any prior injury. Except for medical records released to the employer, carrier, rehabilitation provider, rehabilitation administrator, or other person selected by the employee, the employee's medical records in the possession of the division of workers' compensation are confidential and are not subject to the public records inspection requirements of AS 09.25.110 - 09.25.121.

* Sec. 7. AS 23.30.110 is amended by adding a new subsection to read:

(h) If the board determines that the employee's injury resulted from the employer's wilful, serious, and repeated violation of state or federal occupational safety or health guidelines, the board shall report the violation to the Occupational Safety and Health Review Board (AS 18.60.057).

* Sec. 8. AS 23.30.155(o) is amended to read:

(o) The division of workers' compensation [BOARD] shall promptly notify the division

of insurance if the division of workers' compensation [BOARD] determines that the employer's insurer, including an adjuster for a self-insured employer, has filed a notice of controversion for a frivolous or unfair reason. Notice of frivolous or unfair controversion is required even if a hearing is not held or compensation is not awarded by the board [FRIVOLOUSLY OR UNFAIRLY CONTROVERTED COMPENSATION DUE UNDER THIS CHAPTER]. After receiving notice from the division of workers' compensation [BOARD], the division of insurance shall determine if the insurer or adjuster has committed an unfair claim settlement practice under AS 21.36.125. If the division of workers' compensation determines that an adjuster for a self-insured employer has filed a notice of controversion for a frivolous or unfair reason, the board shall consider the self-insured employer's claims adjusting practices and may cancel or fail to renew the employer's self-insurance certificate.

* Sec. 9. AS 23.30.155 is amended by adding a new subsection to read:

(p) Compensation due an employee under this chapter shall be paid by negotiable bank check that can be cashed not more than three business days after being issued.

* Sec. 10. AS 23.30 is amended by adding a new section to read:

Sec. 23.30.232. CIVIL LIABILITY FOR WORKPLACE SAFETY INSPECTIONS. A carrier, an insurance service agent to a self-insured employer, or a trade association is not liable for civil damages as a result of an act or omission in performing or failing to perform a workplace safety inspection or a safety advisory service~~, unless the carrier's, agent's, or association's act or failure to act constitutes reckless or intentional misconduct.~~

* Sec. 11. AS 23.30 is amended by adding a new section to read:

Sec. 23.30.238. VOLUNTEER EMERGENCY MEDICAL TECHNICIANS AS EMPLOYEES. (a) A person who is injured during the course and within the scope of providing service as a volunteer emergency medical technician is an employee of the state for purposes of this chapter if the person

(1) is certified by the state under AS 18.08 as an emergency medical technician;

(2) provides emergency medical service outside an incorporated city or borough; and

(3) is not otherwise covered for that injury by an employer's workers' compensation insurance policy or self-insurance certificate.

(b) The gross weekly earnings for a person receiving benefits under this section shall be

the gross weekly earnings paid a full-time emergency medical technician employed in the city or borough nearest to the place where the injury occurred, or, if the nearest city or borough has no full-time emergency medical technician, at a reasonable figure previously set by the nearest city or borough to make this determination, but in no case may the gross weekly earnings for calculating compensation be less than the minimum wage computed on the basis of 40 hours of work a week.

* **Sec. 12.** AS 23.30.265(2) is amended to read:

(2) "arising out of and in the course of employment" includes employer-required or supplied travel to and from a remote job site; activities performed at the direction or under the control of the employer; and employer-sanctioned activities at employer-provided facilities; but excludes **recreational activities sponsored by the employer that are performed at facilities not provided by the employer, unless participation is required as a condition of employment, and** activities of a personal nature away from employer-provided facilities;

* **Sec. 13.** AS 23.30.265(15) is amended to read:

(15) "gross earnings" means periodic payments [,] by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer, including **wages** [COMPENSATION THAT IS] deferred at the option of the employee **and temporary disability compensation for an occupational injury or illness**, and excluding irregular bonuses, reimbursement of expenses, expense allowances, and any benefit or payment to the employee that is not fully taxable to the employee during the pay period, except that the total amount of contributions made by an employer to a qualified pension or profit sharing plan during the two plan years preceding the injury, multiplied by the percentage of the employee's vested interest in the plan at the time of injury, shall be included in the determination of gross earnings; the value of room and board if taxable to the employee may be considered in determining gross earnings; however, the value of room and board that would raise an employee's gross weekly earning above the state average weekly wage at the time of injury may not be considered;

* **Sec. 14.** AS 23.30.265 is amended by adding a new paragraph to read:

(34) "volunteer emergency medical technician" means a person who is certified by the state as an emergency medical technician under AS 18.08 and who provides emergency medical services on a voluntary basis.

* Sec. 15. DIVISION OF INSURANCE REPORT. The division of insurance shall prepare a report on the feasibility of implementing a contracting classification premium adjustment program to provide premium credits for employers who purchase workers' compensation insurance. The report must include comments and recommendations from labor and management representatives in the state. The division of insurance shall submit the report to the Second Session of the Seventeenth Alaska State Legislature by January 31, 1992.

* Sec. 16. DIVISION OF WORKERS' COMPENSATION REPORT. The division of workers' compensation shall report to the Alaska State Legislature by January 1, 1992, with the following:

(1) recommendations for changes to AS 23.30 that will promote workplace safety;

(2) recommendations for increasing workplace safety;

(3) a discussion of the effect, if any, of the enactment of ch. 79, SLA 1988, on workers' compensation;

(4) a determination of the effectiveness of AS 23.30.145 in ensuring that employees who file claims are receiving adequate legal representation;

(5) a survey of claims filed in 1989 and 1990 to determine

(A) how many employees were not represented by an attorney in making the claim; and

(B) how many employees who were not represented by an attorney tried but failed to find legal representation;

(6) a determination of whether the procedures used by the board in granting a "blanket" release of medical information are adequate to avoid the release of nonmedical information that is not relevant to the claim;

(7) a determination of whether employers or carriers are routinely requesting a "blanket" release of medical information in an effort to discourage injured employees from filing a claim, and if this is occurring, recommendations for legislation to halt this practice; and

(8) recommendations for reducing fees charged by attorneys who represent employees and carriers.

* Sec. 17. This Act takes effect immediately under AS 01.10.070(c).

MAY 15 1991

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM May 14, 1991

SUBJECT: Workers' compensation - (HCS CSSB 219(Jud))

TO: Senator Virginia Collins

FROM: Michael F. Ford
Legislative Counsel

As discussed in an earlier memo, the amendment to AS 23.30.120(a) concerning demonstration of a "preliminary link" before an injury is compensable would place a requirement into statute that is already imposed by the courts. See Burgess Const. Co. v. Smallwood, 623 P.2d 312 (Alaska 1981). Therefore, the proposed amendment would not enact new law in the sense that a new requirement would be imposed on a claimant. This "preliminary link" simply requires that the employee present some evidence that the claim arose out of or in the course of employment. If the employee can show this "preliminary link" then the presumption contained in AS 23.30.120(a)(1) would apply.

Please contact me if you have further questions.

MFF:pl
91-368.plm

7-LS1004\P.1
Ford
05/14/91

AMENDMENT

OFFERED IN THE HOUSE

TO: HCS CSSB 219 (JUDICIARY)

Page 1, line 4:

Delete "12, 15, AND 16. (a)"

Insert "10, 11, 14, 17, AND 18. (a) It is the purpose of secs. 10 and 11 of this Act to amend AS 23.30.120 to assure that the presumption of compensability continues to be applied only to the question of whether an injury is related to employment.

(b)"

Delete "12"

Insert "14"

Reletter the following subsections accordingly.

Page 1, line 9:

Delete "15"

Insert "17"

Page 1, line 12:

Delete "16"

Insert "18"

Page 6, after line 7:

Insert new bill sections to read:

"* Sec. 10. AS 23.30.120(a) is amended to read:

(a) **After a preliminary link has been established by the claimant between the claimant's injury and the claimant's employment,** [IN A PROCEEDING FOR THE ENFORCEMENT OF A CLAIM FOR COMPENSATION UNDER THIS CHAPTER] it is

3

presumed, in the absence of substantial evidence to the contrary, that

(1) the initial injury arose out of or occurred in the course and scope of employment [CLAIM COMES WITHIN THE PROVISIONS OF THIS CHAPTER];

(2) sufficient notice of the claim has been given;

(3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;

(4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

* Sec. 11. AS 23.30.120(c) is amended to read:

(c) The presumption of compensability established in (a) of this section does not apply to

(1) a mental injury resulting from work-related stress; or

(2) other aspects of a claim for compensation or other benefits under this chapter."

Renumber the following bill sections accordingly.

Statement
of
Mary A. Nordale
in behalf of
American Insurance Association

My name is Mary A. Nordale. I am an attorney with Robertson, Monagle & Eastaugh in Juneau, and I represent the American Insurance Association. The AIA is an insurance industry group representing approximately 240 insurers primarily engaged in property and casualty insurance, but a number of the companies write workers' compensation policies. AIA members account for almost 38 percent of the Alaska market for workers' compensation.

AIA opposes Section 10 of CS for SB 219 (L&C) for the reason that its members do not believe that the language of the section accords with the intent of overruling the case of Van Biene v. Era Helicopters, Inc., 779 P.2d 315 (Alaska 1989). Rather, AIA is of the opinion that Section 10 would codify the holding of Van Biene and, instead of discouraging litigation, would impose a duty upon attorneys representing workers' compensation claimants to sue.

The determination of "reckless or intentional misconduct" requires a finding of fact by a court. In every case in which arguably there might exist an issue of fact as to a safety inspection, litigation by the claimant against the insurer could be expected to be brought. Canon 7 of the Code of Professional Responsibility provides that "a lawyer should represent a client zealously within the bounds of the law." In representing a client, a lawyer may not fail to seek the lawful objectives of his client through reasonably available means. If Canon 7 is to be adhered to, a lawyer could not fail to sue a person conducting a safety inspection unless his contract of representation explicitly provided that he would not represent the client in such a suit. Thus, labor organizations, insurers, and independent engineers conducting safety inspections should, if the language of Section 10 is adopted in its present form, be prepared to defend suits involving all injuries occurring in the workplaces inspected. Only an employer who conducts its own safety inspections will have the protection of the exclusivity of remedy provisions of law.

An argument has been advanced that "reckless or intentional misconduct" raises the level of proof to a degree that the likelihood of a claimant's being successful in his suit is remote. That is not the point. The point is that any person performing a safety inspection in connection with workers' compensation insurance can expect to be sued and can expect to incur the expense of litigation. A person being sued not only has the direct expenses of suit--the judgment, if he loses, attorney fees and other costs--but also has the indirect expenses of participating in the litigation--loss of time, inconvenience, loss of productivity. Indirect costs are sufficiently onerous that many defendants settle simply to buy peace with plaintiffs. The incentive to sue contained in the language of Section 10 is

Attachment #1
5-13 B-1991

reinforced by the prospect that a monetary settlement will be reached with the defendant simply because the defendant wants to limit all of its costs, direct and indirect.

If the language of Section 10 is incorporated into law, members of AIA and, probably, other companies writing workers' compensation policies will have to take measures to limit their exposure to such suits. Two possible means would be to require the employer to conduct its own safety inspection or to require the employer to contract with a person or persons to conduct the inspection. Each of these measures would impose significant costs upon employers to obtain services that are now furnished at no cost. For large employers the added cost may not impose a financial burden. For small employers, the cost may be prohibitive. Persons contracting to perform safety inspections must cover themselves with errors and omissions insurance, a very expensive form of insurance. Their fees will have to reflect their added costs of doing business and the small employers will find their total costs for workers' compensation coverage significantly increased.

Section 10 of CSSB 219 also creates an ambiguity. Since liability would attach for a failure to act, presumably an insurer or other person capable of performing a safety inspection could be sued for not having performed, or for not having caused to be performed, a safety inspection.

AIA recommends that Section 10 be amended either by placing a period after "service" on page 5, line 19, and deleting the balance of the sentence, or by deleting the language of Section 10 in its entirety and substituting the language of Section 5 of SB 508, a bill that was before the legislature in 1990. The language in the 1990 bill was agreed to by all parties last year as effectively overruling Van Biene. Section 5 of SB 508 would have amended AS 23.30.055, the section that provides that the liability of an employer under AS 23.30.045 is exclusive, and would have added language as follows: "In this section, 'employer' includes the employer's carrier, an insurance service agent to a self-insured employer, or a labor organization, if the carrier, insurance service agent, or labor organization provides or fails to provide safety inspection or safety advisory services."

Workers' compensation legislation imposes strict liability on employers for work-related injuries. Fault, in whatever degree, is not an issue. In order to overrule the holding of Van Biene and retain the services provided by insurers and labor organizations with respect to safety inspections, the same

protection should be extended to those entities with respect to the inspections. After all, it is the employer's duty to provide a safe workplace. Inspections are performed to assist the employer in fulfilling that duty. To subject an inspector to suit while protecting the employer is patently unfair and patently contrary to the goal of encouraging concern for safety.

AIA was specifically excluded from the deliberations and negotiations of the Ad Hoc Committee drafting the present Section 10. It is my understanding that the Ad Hoc Committee was composed of persons representing only management and labor and, therefore, they did not have the benefit of the views of those insurers writing workers' compensation policies for over a third of Alaska employers required to provide workers' compensation coverage for their employees.

AIA urges this committee to solve the Van Biene problem for the protection of Alaska's workers in a way that will be of benefit to both workers and their employers.

ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 25512 Juneau, Alaska 99802-5512

F.G. PATTERSON,
Employee,
Applicant,

v.

STATE OF ALASKA,
DEPARTMENT OF LABOR,
(self-insured) Employer,
Defendant.

FILED with
ALASKA WORKERS'
APR 24 1991
COMPENSATION BOARD
FAIRBANKS, ALASKA

DECISION AND ORDER
CASE NO. 8101238

We are deciding this case on the basis of the written record on April 23, 1991 in Fairbanks, Alaska. Attorney Randall Weddle represents the defendant employer, and attorney Michael Stepovich represents the applicant employee. We proceed under AS 23.30.005 as a two-member quorum of the Board as Joe Thomas, Board member representing labor, is out of state.

ISSUE

Should we cancel the hearing on the employee's claim for benefits?

CASE HISTORY AND SUMMARY OF THE EVIDENCE

The employee was injured in a motor vehicle accident on November 9, 1981 while on a worksite inspection tour in the course of his work as a safety compliance officer for the employer. He suffered injury to his back, shoulder, neck, chest and right leg, and developed shortness of breath. The employee's respiratory difficulties continued, and he was eventually diagnosed to have right diaphragm weakness or paralysis and sleep apnea. The breathing stoppages from the sleep apnea may have damaged the employee's

heart. He claims he took early retirement from his work on October 1, 1986 because of his respiratory difficulties.

The employer paid the employee temporary total disability (TTD) benefits intermittently through January 13, 1985. The employer controverted further benefits on December 15, 1987. The employee filed an Application for Adjustment of Claim on November 12, 1987, requesting additional TTD benefits, permanent total disability (PTD) benefits, medical benefits, transportation costs, penalties, interest, attorney fees, and legal costs. In a prehearing conference held on February 8, 1991, the hearing was set for Tuesday, April 23, 1991.

On Friday, April 19, 1991, the attorney for the employer telephoned the Fairbanks Workers' Compensation office to indicate that he had tentatively settled all aspects of the claim with the employee. The attorney was instructed to present the proposed settlement at the scheduled hearing as provided in AS 23.30.110(c). When the employer objected to that procedure, the staff consulted the hearing officer who was the designated chairman for the Board panel with jurisdiction over the case. The designated chairman agreed that the proposed settlement should be presented at the hearing as required by the statute and regulations.

Shortly after the designated chairman refused to cancel the hearing, the Director of the Workers' Compensation Division telephoned him to order him to cancel the hearing, and to continue the case at the request of the employer's attorney. The designated chairman indicated that this was not in keeping with his understanding of the law, but agreed as a state employee to follow his Director's orders. Board member representing labor, Joe Thomas, was not available to consider the matter. Board member representing employers, Steve Thompson, agreed to approve the cancellation and continuance, considering the circumstances. The designated chairman telephoned the Director once again to report that two members of the panel would cancel the hearing and continue the case as ordered. The Director indicated she would contact the employer's attorney to convey the message. No one appeared for the scheduled hearing. We closed the record at the time of the scheduled hearing to cancel the employee's hearing and to continue the case as directed. We have not yet received a written proposed Compromise and Release agreement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DESIGNATED CHAIRMAN

AS 23.30.110(c) provides, in the pertinent part:

If a settlement agreement is reached by the parties less than 14 days before the hearing, the parties shall appear at the time of the scheduled hearing to state the terms of the settlement agreement.

8 AAC 45.070 provides, in part:

(d) If an agreed settlement is reached less than 14 days before a scheduled hearing and

. . . .

(2) it is not in accordance with AS 23.30.012, 8 AAC 45.160 and this subsection, the parties must appear before the board or its designee at the scheduled hearing time to state the terms of the settlement agreement; after the parties have stated the terms of the settlement, a request to continue, postpone, cancel, or change the scheduled hearing may be made in accordance with 8 AAC 45.074; if the board or its designee denies the request to continue, postpone, cancel, or change the scheduled hearing, the hearing will proceed as scheduled.

AS 23.30.012 provides, in part:

The agreement shall be approved by the board only when the terms conform to the provisions of this chapter and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. The board may approve lump-sum settlements when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

8 AAC 45.160 provides, in part:

(a) The board will review settlement agreements which provide for the payment of compensation due or to become due and which undertake to release the employer from any or all future liability. Settlement agreements will be approved by the board only where a dispute exists concerning the rights of the parties or where clear and convincing evidence demonstrates that approval would be for the best interests of the employee or his beneficiaries.

. . . .

(c) Agreed settlements in which the employee waives medical benefits or benefits during rehabilitation training are presumed unreasonable and will not be approved absent a showing that the waiver is in the employee's best interest.

> In addition, lump-sum settlements of board-ordered permanent total disability claims are presumed unreasonable and will not be approved absent a showing that the lump-sum settlement is in the employee's best interests.

The settlement was proposed by the employer approximately four calendar days before the scheduled hearing. Under section 110(c) of the Alaska Workers' Compensation Act the parties are required to appear to present an agreed settlement for Board review by the panel in the venue of their case on the date of the scheduled hearing. Regulation 70(d) lays out the procedure for the Board to use in reviewing a settlement proposed in this way, providing for the continuance of the hearing after the terms of settlement have been reviewed. The standards for reviewing the proposed settlement are detailed in section 012 of the statute and section 160 of our regulations.

Considering the specific language of AS 23.30.110(c) I must conclude that under the terms of the statute the employee's hearing should not have been cancelled. Nevertheless, I am an employee of the Workers' Compensation Division and I have been ordered to cancel the hearing and continue the case by the Division Director. In compliance with those orders, I will cancel the hearing and continue the case.

The best evidence available to us indicates that the proposed settlement would eliminate the employee's claim to future medical care and PTD benefits. Waiver of these entitlements are presumed unreasonable under 8 AAC 45.160, and we will retain jurisdiction over the case to permit the parties to request a hearing to present clear and convincing evidence that this settlement is in the best interest of the employee. AS 23.30.012. 8 AAC 45.160(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF BOARD MEMBER STEVE THOMPSON

Board member Thompson makes no findings of fact or conclusion of law but concurs in the order below.

ORDER

The hearing on the employee's claim for benefits is cancelled. We retain jurisdiction over the case to allow the parties to request a hearing

F.G. Patterson v. State of Alaska

to present a proposed Compromise and Release together with supporting evidence showing the settlement to be in the employee's best interest.

DATED at Fairbanks, Alaska, this 24th day of April, 1991.

ALASKA WORKERS' COMPENSATION BOARD

William S.L. Walters

William S.L. Walters, Designated Chairman

Steve M. Thompson

Steve M. Thompson, Member

WSLW/ml

If compensation is payable under terms of this decision, it is due on the date of issue and penalty of 20 percent will accrue if not paid within 14 days of the due date unless interlocutory order staying payment is obtained in Superior Court.

APPEAL PROCEDURES

A compensation order may be appealed through proceedings in the Superior Court brought by a party in interest against the Board and all other parties to the proceedings before the Board, as provided in the Rules of Appellate Procedure of the State of Alaska.

A compensation order becomes effective when filed in the office of the Board and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of F.G. Patterson, employee/respondent v. State of Alaska, employer; and Surety of Alaska, insurer/petitioners, Case No. 8101238; dated and filed in the office of the Alaska Workers' Compensation Board at Fairbanks, Alaska this 24th day of April, 1991.

Marci Lynch

Clerk

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A PROFESSIONAL CORPORATION

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May 14, 1991

VIA FAX: 463-3611

David Hutchens
Executive Director
Alaska Rural Electric Cooperative
Association, Inc.
703 W. Tudor Road, Suite 200
Anchorage, AK 99503

Re: Van Biene Legislation

Dear David:

You have asked me where the legal concept of "reckless" falls on the continuum of legal liability. The answer is that the "reckless" standard requires more than "negligence" but much less than "intentional" and seems to be defined by the Alaska courts as little different than "gross negligence."

In 1968, the Supreme Court of the State of Alaska in the case of Leavitt v. Gillaspie, 443 P.2d 61, 65, defined gross negligence:

> In order for one to be guilty of gross negligence, the evidence must show that he had full knowledge of the hazards he was creating by his actions, such as to evidence a reckless disregard of possible consequences and indifference to the rights of others.

In continuing to define gross negligence, the court stated:

> Gross negligence is different from ordinary negligence in several important particulars.

The court then went on to immediately cite Section 500 of the Restatement (2d) of Torts, which is entitled "Reckless Disregard of Safety Defined" and is found in Chapter 19 entitled "Reckless Disregard of Safety." In fact, the Alaska Supreme Court, quoting the Restatement (2d) of Torts, stated that:

> It [reckless misconduct or gross negligence] differs from that form of negligence . . . .

I have attached a full copy of the above case from which I have been quoting the Alaska Supreme Court at page 65.

The above case is to be contrasted with Stores v. Lutheran Hospitals, 661 P.2d 632, which, in a footnote at page 634, while stating that "gross negligence" has "no generally accepted meaning," implies that it may fall somewhat below the "reckless disregard" standard.

In conclusion, however, it appears that the Alaska courts find little difference between the legal standards of "gross negligence" and "reckless."

If you have any further questions, please feel free to contact me.

Sincerely yours,

KEMPPEL, HUFFMAN AND GINDER, P.C.

Roger R. Kemppel

Roger R. Kemppel

RRK:lka
Enclosure

In my opinion *Schaible* is dispositive of the materiality issue in the case at bar. Here the perjury section of the 1899 Act of Congress "was almost identical with the like provision" in the laws of Oregon.[2] Prior to the 1899 congressional enactment, the Supreme Court of Oregon had consistently construed the Oregon perjury statute as requiring the element of materiality.[3] To my knowledge, this same construction had been accorded Alaska's perjury statute by Alaska's territorial courts and state trial courts until the superior court's ruling in the case at bar. Before holding that AS 11.30.010(a), with its severe penalty, is a false swearing statute, I believe a stronger showing should have been made that the *Schaible* canon of statutory construction is inapplicable. I concur in all other aspects of the court's opinion.

Herbert LEAVITT, Individually and as Administrator of the Estate of William Leavitt, Deceased, Appellant,

v.

Russell E. GILLASPIE, Jr., and Cripple Creek Resort, Inc., Appellees.

Russell E. GILLASPIE, Jr., Appellant,

v.

Herbert LEAVITT, Individually and as Administrator of the Estate of William Leavitt, Deceased, Appellee.

Nos. 800, 803.

Supreme Court of Alaska.

June 24, 1968.

Action for death of passenger in automobile accident. The Superior Court, The Supreme Court, Dimond, J., held that giving of instruction on host driver's affirmative defense of assumption of risk, which instruction was not limited by notion of what reasonably prudent man would have done under the circumstances in which passenger found himself was improper, and passenger's administrator was entitled to new trial without instruction on assumption of risk.

Reversed and remanded for new trial.

Nesbitt, C. J., dissented in part.

1. Trial ⇐252(8)

Allegation in complaint of passenger's administrator that driver of host automobile was guilty of gross negligence was not sufficient to justify instruction on subject of gross negligence in absence of evidentiary basis for such instruction.

2. Negligence ⇐136(14)

If reasonable minds could justifiably have different views on question of whether defendant was guilty of gross negligence, then issue of gross negligence should be submitted to jury for determination, but if evidence is such that reasonable minds might reach only the conclusion that there is no showing of gross negligence, then instruction on such issue is not justified.

3. Negligence ⇐13

In order for one to be guilty of "gross negligence," evidence must show that he had full knowledge of hazards he was creating by his actions, such as to evidence reckless disregard of possible consequences and indifference to rights of others, and there must be facts which would lead reasonable man to realize that actor's conduct under circumstances not only creates unreasonable risk of harm to another but also involves high degree of probability that such harm will result.

4. Negligence ⇐13

"Gross negligence" differs from "ordinary negligence" in that latter consists in mere inadvertence, incompetence, unskillfulness, or failure to take precautions and gross negligence requires conscious choice of course of action with knowledge that it contains risk of harm to others.

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

5. Automobiles ⇐181(7)

Driver of host automobile who was not shown to be incapable of driving because of beer he had drunk was not grossly negligent in losing control of automobile on curve with resulting death of passenger.

6. Evidence ⇐207(4), 265(11)

Normally, plea of guilty of defendant in criminal action is admissible against him in civil action growing out of the same offense and would constitute evidence by way of admission which would tend to prove truth of matter admitted by the guilty plea.

7. Trial ⇐261

Where it was not clear what driver of host automobile did admit by his plea of guilty to reckless driving in criminal action, and request of passenger's administrator for instruction upon effect of driver's plea of guilty did not specify which of the alternate grounds in reckless driving statute applied to driver's case, instruction was properly refused. AS 28.35.040.

8. Automobiles ⇐246(58)

Evidence that passenger killed in automobile accident willingly, without protest, rode with driver who had had several glasses of beer and who was driving at speeds of from 60 to 70 miles per hour supported giving of instruction upon issue of contributory negligence.

8. Appeal and Error ⇐1050(1)

Allowing officer of corporation owning bar where driver of automobile and plaintiff's decedent purchased and consumed beer prior to accident to testify in wrongful death law suit was not shown to have prejudiced plaintiff's case or to have influenced jury to return verdict for driver.

10. Negligence ⇐105

Concept of assumption of risk, which could result in situation where accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of negligently created risk, is disapproved; the just concept should be whether reasonably prudent man in exercise of due care would have incurred the risk despite that knowledge, and if so, whether he would have conducted himself in manner in which he acted in light of all circumstances, including the appreciated risk.

11. Appeal and Error ⇐1177(5)
Automobiles ⇐246(36)

Giving of instruction on host driver's affirmative defense of assumption of risk, which instruction was not limited by notion of what reasonably prudent man would have done under the circumstances in which passenger found himself was improper, and passenger's administrator was entitled to new trial without instruction on assumption of risk.

12. Death ⇐95(2)

In death action where measure of damages is amount by which decedent's estate has been diminished because of his death, future loss of earnings should not be reduced to present worth.

13. Automobiles ⇐243(1)

Whether corporation owning bar where driver and deceased passenger purchased and consumed beer prior to accident had executed confession of judgment in favor of passenger's administrator prior to trial of action against driver was not relevant to determination of issues between administrator and driver, and refusal to permit driver to elicit testimony from officer of corporation respecting confession of judgment was not error.

14. Evidence ⇐508

can receive appreciable help from the expert witness on the subject on which he testifies.

13. Evidence ⇐361

Statistical data introduced through expert witness for purpose of proving lifetime income expectations of plaintiff's decedent presented to jury reasonable basis for assisting them in estimating probable future earnings, and admission of charts in evidence was not error.

Millard F. Ingraham and Barry W. Jackson, Fairbanks, for appellant and appellee Herbert Leavitt.

Edward A. Merdes and Howard Staley, of Merdes, Schaible, Staley & DeLisio, Fairbanks, for appellee and appellant Russell E. Gillaspie, Jr.

Before NESBETT, C. J., and DIMOND and RABINOWITZ, JJ.

OPINION

DIMOND, Justice.

William Leavitt died from injuries received when an automobile, driven by Russell E. Gillaspie, Jr., left the highway and overturned. This action for wrongful death was brought by the decedent's administrator, Herbert Leavitt, against Gillaspie and the Cripple Creek Resort, Inc.[1] The jury returned a verdict in favor of Gillaspie and Leavitt has appealed.

Leavitt's Appeal

Gross Negligence.

In his opening statement, Gillaspie's counsel admitted that Gillaspie was negligent. Leavitt requested the court to instruct the jury as follows:

> Ordinary contributory negligence on the part of plaintiff is not a defense to an action for injury or death caused by the defendant's reckless or wanton misconduct. Only if the Plaintiff's own conduct is willful or wanton will it be recognized as a defense.

The court refused to give this instruction. Leavitt contends that by refusing to give this instruction the court refused to submit to the jury the issue of whether Gillaspie had been guilty of gross negligence, or to put it in other words meaning the same thing, willful, wanton or reckless misconduct. The evidence from which it must be determined whether or not this contention is correct may be briefly summarized as follows:

Gillaspie, the decedent and Mike Sheehan, and two other persons, were drinking beer at the Malemute Saloon in Ester, Alaska, at approximately 1:30 a. m., the night of the fatal accident. They drank beer together for one and a half or two hours taking turns buying pitchers of beer, each of which held about three glasses. The amount of beer consumed by the five persons amounted to four or five pitchers. Sheehan, the decedent and Gillaspie then rode to the University of Alaska in Gillaspie's car with Gillaspie driving. After spending about fifteen minutes at the University, the three returned to the Malemute Saloon. There they each purchased a pitcher of beer, and taking the pitchers with them, started back to the University with Gillaspie driving. On the way to the University defendant's car failed to make a curve, left the road, and rolled or flipped over two or three times throwing decedent from the car where he suffered fatal injuries.

Gillaspie testified that on the first trip back to the University he felt "high" but "not intoxicated," that the beer he consumed never impaired his ability to drive, and that he kept control of the car at all times. He described his driving as "good." He estimated his speed on the second and fatal trip back to the University at "over

1. Prior to trial, Cripple Creek Resort, Inc., after first denying the allegations of the complaint for wrongful death in its answer to the complaint, executed a confession of judgment for the sum of $100,000, and a judgment in that amount was entered in favor of decedent's administrator against Cripple Creek Resort, Inc.

50," although he admitted telling a police officer right after the accident that he was going from 65 to 70 miles an hour. Nobody said anything to Gillaspie about his driving on the fatal trip, and he did not think that his driving was impaired by his drinking. As regards the accident, Gillaspie testified that he "just lost control of the car * * * instead of * * * making the turn, the car kept on going straight." He knew of the steep shoulders of the curve and the lack of banking. He claimed to have a "pretty good capacity for drinking."

Mike Sheehan, the other passenger on the fatal trip, testified that other than each of the five persons buying a round of beer, he "couldn't say" how much beer the group consumed. He estimated Gillaspie's speed on both trips to the University at "60 and 70." He described Gillaspie as "the least intoxicated" and "intoxicated," and said "I don't remember" in response to questioning about Gillaspie's driving.

Donald Pearson, vice president and stockholder of Cripple Creek Resort, Inc., testified to Gillaspie's presence at the Malemute Saloon the night of the fatal accident but denied remembering serving him anything to drink. He did remember that the decedent "seemed to be sober enough," but denied noticing the condition of the rest of the group. Pearson also denied giving the group permission to take the pitchers of beer out of the bar.

Dr. Raymond Evans testified on the basis of his autopsy of decedent that "something like a beer can or a beer mug or something of that nature or anything round, of that magnitude" pushed in decedent's abdominal wall and crushed his liver.

Sergeant Schlichtig of the Alaska State Police, the investigating officer of the accident, testified as to his observations of the car on the scene of the accident, of the condition of the road, and a reconstruction of the accident. Sergeant Schlichtig's reconstruction of how the accident occurred, based on his observation and experience, was that Gillaspie's car went into a sideways skid on the pavement, being lifted off of the right wheels onto the left. It continued along the shoulder, with the edge of the pavement scraping the paint off the car under the bottom of the door. It then left the ground at the end of the tracks to the first impact point, where it hit on its right rear, flipped again to the second impact point where it hit on its nose, and flipped over onto the railroad track, where it came to rest upside down pointing in the opposite direction of travel. The sergeant also testified that the road condition was good blacktop, free of ice and snow, moisture or loose gravel. The sergeant also testified that the odor of alcohol on all three persons in the car was quite strong.

[1] Leavitt alleged in his complaint that Gillaspie was guilty of gross negligence. This allegation alone is not sufficient to justify an instruction on that subject. There must be an evidentiary basis for such an instruction.[2]

[2] Where the question has arisen as to whether a directed verdict or a judgment notwithstanding the verdict should be entered with respect to an issue of negligence or contributory negligence, we have held that such issues are for the jury to determine where there is room for diversity of opinion among reasonable men as to whether a defendant is guilty of negligence or a plaintiff is guilty of contributory negligence.[3] We apply that same rule where the question is whether an instruction on the issue of gross negligence should be submitted to the jury for its consideration. If reasonable minds could justifiably have different views on the question of whether plaintiff was guilty of gross negligence, then the issue of gross negligence should

2. Grouth v. Ness, 421 P.2d 624, 629 n. 14 (Alaska 1966).

3. Mallonee v. Finch, 413 P.2d 159, 162 (Alaska 1966); McCoy v. Alaska Brick Co., 389 P.2d 1009, 1010 (Alaska 1964).

be submitted to the jury for determination. On the other hand, if the evidence is such that reasonable minds might reach only one conclusion, i. e., that from the facts presented there is no showing of gross negligence, then an instruction on such an issue is not justified.[4]

[3, 4] In order for one to be guilty of gross negligence, the evidence must show that he had full knowledge of the hazards he was creating by his actions, such as to evidence a reckless disregard of possible consequences and indifference to the rights of others.[5] There must be facts which would lead a reasonable man to realize that the actor's conduct under the circumstances not only creates an unreasonable risk of physical harm to another, but also involves a high degree of probability that such harm will result.[6] Gross negligence differs from ordinary negligence in several important particulars. As stated in the Restatement of the Law of Torts, Second:

> It [reckless misconduct or gross negligence] differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.[7]

[5] We do not believe that the evidence shows a conscious choice of a course of action by Gillaspie with full knowledge of a serious danger to others such as to evidence a reckless disregard of possible consequences and indifference to the rights of other persons. Gillaspie was shown to have drunk some beer and to have travelled at a high rate of speed between the Malemute Saloon and the University of Alaska. There is no evidence showing that he was incapable of driving because of the beer he drank; and since he made the first trip to the University and back to the Malemute Saloon without incident, there was no reason to believe that when he started on the fatal trip there was a high degree of probability that the car would fail to make a curve and turn over. We believe that there was no room for diversity of opinion among reasonable men as to whether Gillaspie was guilty of gross negligence, and that reasonable minds could come to only one conclusion, i. e., that Gillaspie was not grossly negligent. The court did not err in declining to give the jury an instruction concerning gross negligence.

During his testimony Gillaspie admitted having entered a plea of guilty to a charge of reckless driving. With respect to such a plea, Leavitt requested the court to instruct the jury that "A plea of guilty is a confession on the part of a defendant of the truth of the material facts of the charge." The court refused to give the

4. Rocky Mtn. Prod. Trucking Co. v. Johnson, 78 Nev. 44, 369 P.2d 198, 202 (1962).

5. McLemore v. Harris, 374 P.2d 410, 412 (Alaska 1962).

6. Nichols v. Baker, 101 Ariz. 151, 416 P.2d 534, 538 (1966).

7. Restatement (Second) of Torts § 500 comment g at 590 (1965).

requested instruction and Leavitt assigns this as error.

[6,7] Normally, a plea of guilty of a defendant in a criminal action is admissible against him in a civil action growing out of the same offense.[8] It would constitute evidence by way of an admission by a defendant which would tend to prove the truth of the matter admitted by the guilty plea. But here it is not clear what Gillaspie did admit by his plea of guilty to reckless driving. That offense is defined by statute as consisting of driving "carelessly, heedlessly or in willful or wanton disregard of the rights or safety of others", or in driving "without due caution or circumspection", or in driving "at a speed or in a manner so as to endanger or be likely to endanger a person or property."[9] The requested instruction did not specify which of the alternate grounds in the statute defining reckless driving applied to Gillaspie's case. Because it is not clear just what Gillaspie pled guilty to, the instruction was properly refused.[10]

Contributory Negligence.

The court instructed the jury on Gillaspie's affirmative defense of contributory negligence on the part of decedent. Leavitt claims this was error.

In Saslow v. Rexford, 395 P.2d 36, 41 (Alaska 1964), we defined contributory negligence as:

> "conduct which involves an undue risk of harm to the person who sustains it." It is one's failure to exercise reasonable prudence for his own safety when he perceives danger to himself created by another's negligence.

Leavitt concedes that riding with a driver whom a reasonable man should know to be intoxicated may be contributory negligence. The question here is whether the evidence is such that reasonable minds could differ on the question of whether decedent knew or should have known that Gillaspie's capacity for driving had been impaired by reason of intoxication.

In Meade v. Meade,[11] the Virginia Supreme Court of Appeals stated:

> [T]he fact that the host had been drinking and the guest had knowledge of this fact is not sufficient to establish contributory negligence as a matter of law. * * * The evidence must go beyond this and show that because of his drinking the driver's ability to drive was impaired, that the guest knew, or in the exercise of ordinary care should have known, this and yet entered or continued to ride in the car. Whether the guest knew or should have known that the intoxicated condition of the driver impaired his ability to drive is ordinarily a question for the jury.

Here the situation is one where decedent willingly, without protest, drove with a driver who had had several glasses of beer and, in the words of one witness, was "the least intoxicated," and who was driving at speeds of from 60 to 70 miles per hour. The question is whether, under these circumstances, decedent by staying with Gillaspie in his car acted with the care that a reasonably prudent person would have used under those circumstances.

In Zumwalt v. Lindland,[12] the Supreme Court of Oregon held that the issue of contributory negligence was properly submitted to the jury where there was evidence of the driver's drinking a substantial amount of beer, known to the plaintiff, and nothing more. The court said:

> We need not decide, at this time, how much or how little beer at either end of the scale will require the court to

8. Monsma v. Williams, 385 P.2d 107, 110 (Alaska 1963).

9. AS 28.35.040.

10. Zenuk v. Johnson, 114 Conn. 383, 158 A. 910, 911-912 (1932); Sothern v. Vandyke, 114 N.J.L. 500, 174 A. 877, 879 (1934).

11. 206 Va. 823, 147 S.E.2d 171, 174 (1966).

12. 229 Or. 28, 366 P.2d 205, 210 (1964).

withdraw the question from the jury. We do hold, however, that upon the evidence in the case at bar a jury could say that the amount of alcohol consumed was sufficient to put a reasonable man upon inquiry concerning the fitness of his driver to convey him safely home. Upon such evidence, the jury could have found that the plaintiff failed to exercise that degree of care that a reasonable person would have exercised for his own safety.

There was no contention that the defendant was intoxicated. However, a jury could have considered from the youthfulness of the parties and from the manner in which they had been spending their time immediately prior to the accident that the defendant's ability to operate his vehicle safely had become impaired and that a reasonable person in the plaintiff's position should have known that it was unsafe to ride with the defendant under all the circumstances.

[8] As in the foregoing case, we believe that the issue of decedent's contributory negligence was properly submitted to the jury for its determination. Considering the facts relating to Gillaspie's beer drinking and the speeds at which he drove his car on the first trip from the Malemute Saloon to the University, we believe that reasonable minds could differ as to whether decedent failed to exercise reasonable prudence for his own safety when he decided to ride with Gillaspie on the second, and fatal trip from the saloon to the University. The court's instruction to the jury on contributory negligence was not error.

Testimony of Pearson.

Gillaspie called as a witness, Donald Pearson, vice president and manager of Cripple Creek Resort, Inc., the corporation owning the bar where Gillaspie and decedent purchased and consumed beer prior to the accident. After questioning Pearson on other matters, Gillaspie's counsel asked this question: "Mr. Pearson, has Cripple Creek, Inc., been a defendant in this law suit?" Over plaintiff's objections, following a conference in chambers, the trial court allowed the witness to answer this question but prohibited further inquiry into the matter. The court said:

> I am going to, as it stands, allow him to be—to answer the fact of whether or not he has been a defendant in this lawsuit. I think that maybe the defendant Gillaspie didn't understand what he was coming up to, and I don't think—I don't want this jury to be misled by the statements of this person if in fact they would find that he may have had some interest in to discolor the truth. But I'm not going to allow any more of those and—

Leavitt alleges error on the part of the trial court in allowing the question and in refusing to give an instruction cautioning the jury, in determining any liability or damages, not to consider the fact that Cripple Creek Resort, Inc., may have been a defendant in the action. Leavitt argues that the question was, alone, irrelevant to the issues before the jury, and that it was likely to invite improper speculation.

[9] We need not decide whether it was proper to allow the question and answer, because Leavitt has not shown that such evidence prejudiced his case or was such as to have influenced the jury to return a verdict for Gillaspie.

Assumption of Risk.

The court instructed the jury on Gillaspie's affirmative defense of assumption of risk. Leavitt claims this was error.

The concept of assumption of risk was developed from the common law action of a servant against his master. The master was held to be not negligent if he provided a reasonably safe place to work, and the servant was said to have assumed the inherent risks that remained. In this sense assumption of risk was not an affirmative defense, but rather was another way of

saying the master was not negligent; for the servant had the burden of proving that his injury resulted from a risk other than one inherent in a place that was a reasonably safe place to work.

As the doctrine developed, however, it became an affirmative defense, with the burden of pleading and proof on the master. Thus, even if the servant could show that the master was negligent because he had failed to provide a reasonably safe place to work, the master could escape liability if he could establish that the servant had voluntarily exposed himself to a risk negligently created by the master. As the Supreme Court of New Jersey has pointed out, "Thus two utterly distinct thoughts bore the same label with inevitable confusion." [13]

But the matter did not stop here. The courts came to use the doctrine of assumption of risk, as an affirmative defense, in a way that was different in essence from the defense of contributory negligence. Where contributory negligence was a defense, the question was whether the plaintiff had acted for his own safety as a reasonably prudent man would have acted under the circumstances. But where assumption of risk was a defense, the question was whether plaintiff had voluntarily entered into a situation involving obvious danger, with knowledge of the danger, and without regard to whether he had acted in such a situation as a reasonably prudent man would have acted. The effect of this concept was to exculpate a negligent defendant upon the notion that a plaintiff assumed the risk of that negligence even though he was not contributorily at fault, i. e., even though he had exercised the care of the reasonably prudent man under all the circumstances.[14]

This is the sense in which the doctrine was used by the trial court in this case. The court instructed the jury that Gillaspie would be relieved from liability if he proved that decedent had freely and voluntarily entered into a situation involving danger of personal harm from Gillaspie's conduct, with the knowledge of facts which created the danger and a realization of the risk of harm to decedent from that danger. Such an instruction had the effect of creating the potential of a verdict for Gillaspie, despite the fact that the jury may have found under the issue of contributory negligence that decedent, in the face of the danger of which he had knowledge, still had exercised the care of a reasonably prudent person under all the circumstances. Thus, even though the decedent may have been found to be not contributorily negligent, he would be barred from recovery by reason of assumption of risk.

[10] As a matter of policy we disapprove of a concept which could result in a situation where an accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of a negligently created risk. The just concept should be whether a reasonably prudent man in the exercise of due care would have incurred the risk despite that knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.[15] This means that only the traditional notions of negligence and contributory negligence should govern cases such as we have here and that the defense of assumption of risk should not be a defense and should not be used.[16]

13. Meistrich v. Casino Arcon Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 93, 82 A.L.R.2d 1208, 1214 (1959).

14. Id., 155 A.2d at 94, 82 A.L.R.2d at 1214–1215.

15. Id., 155 A.2d at 95, 82 A.L.R.2d at 1216.

16. Folgner v. Anderson, 375 Mich. 20, 133 N.W.2d 130, 141–154 (1965); McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963); Zumwalt v. Lindland, 239 Or. 20, 396 P.2d 205, 207 (1964); II F. Harper & F. James, The Law of Torts § 21.3 at 1191–92 (1956).

[11] If the instruction on assumption of risk had been limited by the notion of what a reasonably prudent man would have done under the circumstances in which decedent found himself, with knowledge of the danger that might have been involved, then such an instruction would have dealt with nothing more than another phase of contributory negligence.[17] But as we have pointed out, the instruction was not so limited. It was entirely possible, under the instructions on contributory negligence and assumption of risk, for the jury to have found that decedent was free from contributory negligence but nevertheless could not recover because he had exposed himself to a negligently created risk, without regard to whether a reasonably prudent man may have done so in the same circumstances. Because of such a possibility and because we disapprove of such a concept, a new trial must be ordered with instructions not to give the jury an instruction on assumption of risk.

Reduction of Damages to Present Worth.

The court instructed the jury that if they found for Leavitt, in computing the amount by which decedent's estate had been diminished because of his wrongful death, the jury must determine the present cash value of such amount. In other words, the jury was instructed to reduce damages to present worth. Leavitt admits that since he lost the case on the question of liability, he is in no position to claim any prejudice from the court's instruction. But he asks us, in the event a new trial is ordered, to hold that such an instruction was erroneous and not a correct statement of the law.

[12] Since the judgment was entered in this case, we decided the case of Beaulieu v. Elliott.[18] There we held that in computing future loss of earnings a reduction should not be made to present worth.[19] The reasoning used there would apply in a wrongful death case where the measure of damages is the amount by which the decedent's estate had been diminished because of his death. We assume that on a retrial of this case the trial court will take cognizance of the *Beaulieu* case and give appropriate instructions to the jury as to the computation of damages.

Gillaspie's Appeal

Gillaspie appeals on two grounds. The first has to do with the permissible scope of his counsel's examination of Gillaspie's witness, Donald Pearson, vice president and manager of Cripple Creek Resort, Inc., the corporation owning the bar where Gillaspie and decedent and others in the party purchased and consumed beer prior to the accident. Pearson testified that he recalled speaking to decedent on the fatal night and that decedent "seemed to be sober enough." Pearson did not recall the state of sobriety of Gillaspie and the others, except to say that if they had been drunk he would have thrown them out.

Gillaspie's counsel was permitted by the court to inquire of Pearson as to whether the corporation had been a defendant in this action, to which question the answer was "yes." Counsel was not permitted, however, to show by further questioning that the corporation had executed a confession of judgment in Leavitt's favor for $100,000 prior to the trial of this action. The court held that evidence as to a confession of judgment was not relevant to the determination of the issue between Leavitt and Gillaspie.

Gillaspie claims this ruling was error. His argument is that the state of decedent's sobriety was a material factor to be considered by the jury in determining whether or not decedent was contributorily negligent, that Pearson's testimony that Leavitt appeared to be sober was adverse to the interest of Gillaspie who stood to gain by showing that decedent was not sober, that Pearson may have been motivated in so

17. Molstrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 95, 82 A.L.R.2d 1208, 1216 (1959).

18. 434 P.2d 665 (Alaska 1967).

19. Id., at 671-672.

testifying by his bias against Gillaspie and in favor of Leavitt, that such bias would be shown by establishing that Pearson's corporation had a financial interest in the case adverse to the interest of Gillaspie, and that such a financial interest would be demonstrated by showing that the corporation had confessed judgment in Leavitt's favor for $100,000. Gillaspie's reasoning in support of his contention that the corporation had a financial interest in the outcome of the dispute between Leavitt and Gillaspie, is that it was in the interest of the corporation that Leavitt obtain judgment against Gillaspie because this would decrease the possibility that Leavitt would seek to collect the full $100,000 judgment from the corporation by reason of its confession of judgment in that amount.

[13] This is nothing more than speculation. There was no way of knowing to what extent Leavitt would attempt to collect a judgment from the corporation if a judgment had also been rendered against Gillaspie. Evidence as to the corporation's confession of judgment was, as the trial court correctly held, irrelevant as to the issues between Leavitt and Gillaspie. There was no error in excluding such testimony.

Based upon testimony regarding decedent's educational background, grades[20] and character, the court allowed the introduction in evidence by Leavitt of certain charts prepared by Professor Haring, an economist at the University of Alaska, from income figures contained in the 1960 Alaska census. These charts contained statistical data showing the average annual income of males in Alaska in certain age groups, certain areas, and in certain educational levels. Gillaspie claims this was error on the ground that it was so speculative as to decedent's lifetime income expectations as to be useless to the jury.

[14,15] The charts introduced in evidence reflected Professor Haring's opinion as to the statistical data contained therein. The criterion for determining whether such an expert opinion is admissible is whether the jury can receive appreciable help from the expert witness on the subject on which he testifies.[21] We believe that the jury could receive such help in this case. In determining the loss to an estate in a wrongful death action, the jury at some point must make an estimate as to the decedent's lifetime income expectations. This must be arrived at largely through probabilities, and any evidence that would reasonably tend to indicate the decedent's earning capacity in the future had he lived would be of assistance to the jury.[22] We believe that Professor Haring's data presented to the jury a reasonable basis for assisting them in estimating the probable future earnings of decedent.[23] The admission of the charts in evidence was not error.

The judgment is reversed and the case remanded for a new trial.

NESBETT, Chief Justice (concurring and dissenting).

I concur in the result. It is my opinion that the court erred in giving an instruction on assumption of risk because there was no evidence that Leavitt comprehended the dangers. In Evans v. Buchner[1] this court said:

> The general rule is that the defense of assumption of risk is not applicable unless the facts which create a dangerous condition or situation are known and the danger itself comprehended by the person against whom the defense is being exerted.

In *Buchner* the court adopted a subjective test. The question in each case was to be

20. Decedent was a student at the University of Alaska at the time of his death.

21. Pedersen v. State, 420 P.2d 827, 835 (Alaska 1966); Crawford v. Rogers, 400 P.2d 189, 192 (Alaska 1965).

22. See Turrietta v. Wyche, 54 N.M. 5, 212 P.2d 1041, 1047, 13 A.L.R.2d 407 (1949).

23. Krohmer v. Dahl, 145 Mont. 491, 402 P.2d 979, 981-982 (1965).

1. 390 P.2d 630, 637 (Alaska 1963) (footnote omitted).

whether the plaintiff had a knowledge of the facts and an actual comprehension of the danger. Under *Buchner* it would not be enough to invoke the doctrine of assumption of risk to argue that Leavitt must have had an awareness of the fact that Gillaspie had drunk a lot of beer; that his judgment may have been impaired; that it was dangerous to ride with him and that because he did ride with Gillaspie he comprehended the danger and elected to assume the risk.[2]

Although I concur in the result reached by the majority I do not agree that the defense of assumption of risk should be entirely abolished. Whether the doctrine is entitled assumption of risk or given an appropriate label as a variation of the doctrine of contributory negligence, I believe that it has a place in our jurisprudence in some factual situations.

As was aptly stated by the Supreme Court of California in Prescott v. Ralph's Grocery Co.[3]:

> The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. (See Prosser on Torts [1941], p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made *with knowledge and appreciation of the risk.* (See Rest., Torts, § 893).

Assumption of risk has been abolished as a defense in the master servant relationship in Alaska, as it has in many other states.[4] It has also been abolished in many states in automobile guest statutes. It appears that the defense has been entirely abolished in at least three states.[5] Although some of the legal aspects of the defense may duplicate those of contributory negligence in some factual situations, this is not generally so where there has been a voluntary acceptance of a *comprehended risk.*[6] It is significant that in the cases cited in the preceding note, two of which are relied on by the majority, the plaintiff in Bolduc v. Crain had no appreciation whatever of the unusual risk involved in attempting to assist the handler of a particularly "lively" team of horses; that in Feigner v. Anderson there was, as far as can be learned from the opinion, no evidence that plaintiff had an appreciation of any danger involved in hunting ducks out of the same blind as defendant; and that in Meistrich v. Casino the only evidence that plaintiff had an appreciation of the danger involved in skating on arena ice which defendant operator had frozen so hard that it became slippery, was that he "noted that his skates slipped on turns". The requirement that there be evidence showing a comprehension of the danger involved would, in my opinion, have made the defense of assumption of risk in

2. The subjective test adopted by Buchner is the rule in the majority of jurisdictions. See Guerrero v. Westgate, 164 Cal.App.2d 012, 331 P.2d 107, 110 (1958); Prescott v. Ralph's Grocery Co., 42 Cal.2d 138, 265 P.2d 904, 905-906 (1954); Dean v. Martz, 329 S.W.2d 371, 374 (Ken.1959); Evans v. Johns Hopkins Univ., 224 Md. 284, 167 A.2d 501, 504 (1961); Fitzpatrick v. Maraatoni, 234 Or. 102, 370 P.2d 1022, 1023 (1963); Shoemaker v. Floor, 117 Utah 484, 217 P.2d 382, 387 (1950); Kingwell v. Hart, 45 Wash.2d 401, 275 P.2d 431, 434-435 (1954); Restatement of Torts § 893 (1939); Restatement (Second) of Torts §§ 400 A-G (1965).

3. 42 Cal.2d 105, 265 P.2d 904, 909 (1954) (emphasis added).

4. AS 23.30.055, 23.30.080.

5. Feigner v. Anderson, 375 Mich. 28, 133 N.W.2d 130, 141-154 (1965) (except in employment relationships and where there has been an express contractual assumption of risk.); Bolduc v. Crain, 104 N.H. 103, 181 A.2d 641, 644 (1962); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 95, 82 A.L.R.2d 1208 (1959).

6. See W. Prosser, The Law of Torts § 67 (3d ed. 1964).

the foregoing cases inapplicable in Alaska and in other jurisdictions requiring an actual comprehension of the danger.

Section 893 of the *Restatement of Torts* contains numerous factual illustrations of where the doctrine of voluntary acceptance of a comprehended danger has logical application. One example is Hunt v. Portland Baseball Club[7] where the court held that a spectator could not recover from the ball club for injuries received when struck by a foul ball because he was intimately familiar with the game of baseball and the risks inherent in being a spectator and had knowingly placed himself in an area of appreciated risk.[8]

Under the majority holding, even though the evidence may show a voluntary acceptance of an appreciated risk, the question would be

> whether a reasonably prudent man in the exercise of due care would have incurred the risk despite that [actual] knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.

The new doctrine is intended to simplify and clarify the law of negligence and eliminate incompatible defenses by subsuming assumption of risk under contributory negligence, but I doubt if this will be the ultimate effect. If the new test were applied to the facts of the Oregon baseball case just mentioned, the jury would be asked to determine first whether a reasonably prudent person in the exercise of due care would have purchased a seat not behind a screen even though he comprehended the danger. The evidence would ordinarily have established that seats behind a screen were available and that management could have made the balance of the seats safer by screening,[9] but at the expense of visibility. The jury would be aware of the fact that hundreds of thousands of baseball, hockey and other sports fans daily and knowingly sit in areas of danger as spectators. If the jury conscientiously applied the objective test of the average man, and based its judgment on what it knew the average man was doing daily throughout the country, it might very well conclude that the spectator had acted with "due care" in purchasing a ticket for an unprotected seat, even though he knew there was a danger that he might be injured while occupying the seat.

What appears to be an unrealistic aspect of the new test is at once apparent. Why should any controlling effect be given to the question of whether a reasonably prudent man would have incurred the comprehended risk if the evidence has established that the particular plaintiff did in fact voluntarily incur the comprehended risk? How can it be logically said that a person has acted with "due care" when it has become apparent from the evidence that he deliberately and knowingly chose to place himself in a position of danger? If the jury should find that the spectator had not acted with due care, in spite of the fact that a large segment of the population daily engaged in identical conduct, can it be said that the objective test of the average, or reasonably prudent man, has been realistically applied?

If the jury finds that the plaintiff spectator has acted with due care, the next question it would be asked to decide under the new test would be whether he

> would have conducted himself in the manner in which the plaintiff acted in

7. 207 Or. 337, 290 P.2d 405, 406-508 (1956).

8. Footnote 18 of the majority opinion cites the Oregon case of Zumwalt v. Madland, 230 Or. 26, 366 P.2d 205, 207 (1904), as authority for the complete abolition of the doctrine of assumption of risk, but since the Oregon automobile guest statute was involved it would appear that the case has a limited application.

9. In which case the jury would experience little difficulty in finding management negligent, particularly if there was insurance in the background.

the light of all the circumstances, including the appreciated risk.

This aspect of the test must mean that the jury must next decide whether the spectator, after having knowingly and without negligence placed himself in an area of danger, thereafter conducted himself in such a manner as not to increase the danger to himself. In other words, was he contributorily negligent after having taken his seat? Judging by the wording of the new test, this question would be asked in every case where the jury had found initially that the spectator was not negligent in purchasing an unprotected seat, even though no evidence may have been introduced during the trial which would tend to show that he had done anything to increase the existing danger. In my opinion, it is unrealistic to ask a jury to determine the answer to a question which has no factual basis in the evidence. For example, if the evidence showed that the spectator had merely occupied his seat until he was hit in the head by a foul ball, the judge would be obligated, it would seem, to set aside a verdict for the defendant management because of lack of any evidence that the spectator had done anything to increase the risk of injury. The question might be appropriate if there was evidence that the spectator had remained seated in a fixed posture until struck by the ball when he could have avoided being struck by ducking to one side or the other, or downward, or perhaps could have even caught the ball in his hands. Evasive or protective action of this sort is regularly employed by the average fan who must, at times, be an athlete of sorts himself in order to exercise the judgment and agility necessary to avoid injury.

The foregoing discussion demonstrates, in my opinion, the impracticability of attempting to determine the usual assumption of risk situation by the rules of negligence. For other examples see a discussion with illustrations in Restatement of Torts § 893 (1939).

Noe Q. FLORES, Appellant,
v.
STATE of Alaska, Appellee.
No. 879.

Supreme Court of Alaska.
July 10, 1968.

Homicide prosecution. The Superior Court, Third Judicial District, Anchorage District, Ralph E. Moody, J., rendered judgment on verdict finding defendant guilty of murder in one case and manslaughter in another, and defendant appealed. The Supreme Court, Rabinowitz, J., held that indictment charging defendant with first-degree killing of victim "by a method and means unknown" was sufficient.

Affirmed.

1. Homicide ⇐7

Means or manner by which victim met death are not elements of murder. AS 11.15.010.

2. Indictment and Information ⇐69

Indictment charging defendant with first-degree killing of victim "by a method and means unknown" was sufficient. Rules of Criminal Procedure, rule 7(c); AS 11.15.010, 12.40.100

3. Witnesses ⇐44

Sworn witness was not rendered incompetent by his statement on cross-examination that he did not believe in God. Rules of Civil Procedure, rule 43(b, d), (g) (5); Rules of Criminal Procedure, rule 26(a).

4. Criminal Law ⇐699(3), 759(2), 887

Sworn witness' statement on cross-examination that he did not believe in God did not entitle defendant to have testimony stricken, to a mistrial, or to judgment of acquittal.

5. Witnesses ⇐78

In absence of showing that witness was unaware of his serious obligation to re-