

HB

19

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 19

Revision Date: _____ Dept. Affected: Department of Law
 Title: "...relating to the definition of "fault"...determining BRU: Legal Services
the liabilities of parties in civil actions..." Component: Operations
 Sponsor: Representative Therriault
 Requester: Representative Therriault COMPONENT SERIAL NO. 0093

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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 EXPENDITURES						
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CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends the definition of fault, in AS 09.17.900 (Civil Damages and Apportionment of Fault) to include intentional acts. Current state law defines fault as acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subjects a person to strict tort liability. There have been recent instances where persons have attempted to avoid liability for their acts, where a court apportions fault in a personal injury suit, by claiming that their contributory acts were intentional and not negligent or reckless and should therefore be excluded from apportionment. This bill will cure this problem and reduce litigation costs for the time and effort that must now be expended to overcome this line of defense. The bill will not have a fiscal impact.

Richard I. Peques
Richard I. Peques, Director

Prepared by: Richard I. Peques, Director
 Division: Administrative Services Division
 Approved by Commissioner: Bruce M. Botelho, Attorney General
 Agency: Department of Law

Phone: 465-3672
 Date: 1/30/95
 Date: 1/30/95

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 19

Revision Date: _____
Title: "An Act Relating to the Definition of 'Fault'"
Sponsor: Therriault
Requestor: _____

Department Affected: Administration
BRU: Risk Management
Component: Risk Management
COMPONENT SERIAL NO. 71

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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 EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 95) cost: \$ -0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact to the Division of Risk Management.

Prepared by: Brad Thompson
Division: Risk Management

Phone: 465-2180
Date: _____

Approved by Commissioner: Mark Bover
Agency: Department of Administration

Date: 1/30/95

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Annie —

2/3/95

One other idea that would stop short of saying there can never be apportionment between intentional and unintentional tortfeasors, but would still allow the unintentional to argue that intentional tortfeasors' acts preclude liability against unintentional tortfeasors, would be:

Notwithstanding AS 09.17.080 and AS 09.17.900, the inclusion of intentional tortfeasors as parties does not preclude consideration of whether the intentional tortfeasor's acts ~~relieve~~ relieve unintentional tortfeasors of liability.

Susan

Post-It™ brand fax transmittal memo 7671		# of pages
To: Annie C.	From: Susan C.	1
Co: House Ind.	Co: Bureau AGO	
Dept:	Phone # 3600	
Fax # 3034	Fax # 6735	

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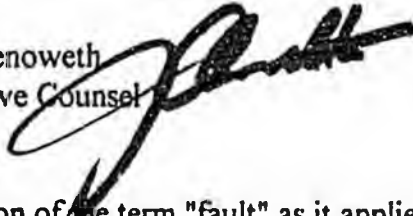
MEMORANDUM

January 19, 1995

SUBJECT: House Bill 19: sectional analysis (Work Order No. 9-LS0103\A)

TO: Representative Gene Therriault
ATTN: Wilda Whittaker

FROM: Jack Chenoweth
Legislative Counsel



AS 09.17.900 provides a definition of the term "fault" as it applies to civil actions to recover damages and to the apportionment of damages when more than one party may have been at fault. The current definition identifies "fault" in terms of the defendant's conduct if that conduct was "negligent" or "reckless." The referenced bill expands the definition to add, as a third element, conduct of a defendant that was "intentional." The revision is made applicable to causes of action that accrue on or after the bill's effective date. The change implicates references to "fault" that appear in, and relate to, the liabilities of parties in joint recoveries.

AS 09.60.010, directing the courts to determine, by rule, the award of attorney fees, precludes payment of fees in certain civil actions based upon "fault," incorporating a reference to the definition of "fault" in AS 09.17.900. The bill extends the definition in that section and, by the cross-reference, implicates the attorney fee provision, hence the reference to those fees in the bill's title.

JBC:pl
95-006.plm

Letter of Intent

In adding "intentional" to the definition of "fault" in this chapter, the committee intends to make it clear that intentional tortfeasors may be ^{parties whose actions were arguably} named or joined ^{in the litigation, as well as parties who were allegedly} and found liable in actions brought under this chapter.

^{negligent or reckless. Thus parties may not avoid being named or joined}
~~The committee is concerned that tortfeasors are attempting to remove themselves from several liability in cases brought under this chapter by claiming that they acted intentionally, and that intentional acts or omissions are not included in the definition of "fault". The committee does not, in making this amendment, intend to address the common law tradition of holding intentional wrongdoers wholly responsible for their actions.~~

AS 09.17.080. is amended by adding a new section to read:

(e) Notwithstanding Sec. 09.17.900 there is no right of ~~contribution~~ ^{apportionment} in favor of persons who act with the specific intent to cause the resultant harm.

(of damage)

Alaska State Legislature



House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

LETTER OF INTENT

In adding "intentional" to the definition of fault in this chapter, the committee intends to make it clear that parties whose actions were arguably intentional may be named or joined in the litigation, as well as those who were allegedly negligent or reckless. The inclusion of intentional tortfeasors does not preclude consideration of whether the intentional tortfeasor's acts relieve unintentional tortfeasors of liability.

Representative Brian Porter, Chairman

Date

Memo to Annie Carpeneti
House Judiciary Committee

February 3, 1995

From Susan Cox

re: HB 19

Post-It™ brand fax transmittal memo 7671		# of pages » 2
To Annie C.	From Susan C.	
Co. House Jud.	Co. JUDICIAL ADO	
Dept.	Phone # 3090	
Fax # 3034	Fax # 6735	

Annie:

Please excuse my informal note, but my secretary is out and we are short staffed today. We have been mulling over your suggested amendment to AS 09.17.080, and considered the Alaska case law. We have several thoughts.

As introduced, HB 19 would include intentional torts within the definition of fault, and therefore remove any impediment to defendants who desire to add as parties to a case any intentional tortfeasors who were not sued by the plaintiff. The policy question is whether intentional and unintentional tortfeasors should then be subjected to apportionment of fault under AS 09.17.080, or whether that statute should be amended in some way to prevent such an allocation. Stated another way, should intentional tortfeasors be required to bear 100% of fault and prevented from shifting any liability to unintentional tortfeasors?

The two Alaska cases that come closest to addressing the issue of intentional fault vs. negligence both predate the current version of tort reform. In Borg-Warner v. Avco Corp., 850 P.2d 628, 633 (Alaska 1993), the Alaska Supreme Court determined that intentional tortfeasors "who act with the specific intent to cause the resultant harm" could not seek contribution from any other tortfeasor. This result was based on statutory language then in existence which provided that, "There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." Id., citing AS 09.16.090(c). That statute was repealed by the 1989 tort reform measure. In Wilson v. City of Kotzebue, 627 P.2d 623, 631 (Alaska 1981), a plaintiff who was injured in a fire that he started while incarcerated argued against the giving of comparative negligence instructions. In addressing this issue, the court made the following observation:

The evidence submitted in this case regarding Wilson's conduct reasonably lent itself to either of two conclusions: (1) Wilson committed an intentional tort, injuring himself in the process; or (2) Wilson was so intoxicated as to be incapable of acting intentionally. The first conclusion bars Wilson's recovery regardless of any negligence on the part of Kotzebue, for a person may not recover for injuries resulting from his own intentional conduct.

Id. (emphasis added).

Neither of these cases stands for the broader proposition that the common law requires an intentional tortfeasor to bear full responsibility for all damages flowing from their conduct, nor prohibits an apportionment of fault under several liability among intentional and unintentional tortfeasors.' If that is what the House Judiciary Committee wants to accomplish, then the language you propose would meet this goal. Your proposal would add a subsection to AS 09.17.080 that borrows from the language in the Borg-Warner decision regarding contribution and would provide, "Notwithstanding AS 09.17.900, there shall be no right to apportionment of fault in favor of a party who acts with the specific intent to cause the resultant harm." We note that this language would not cover parties who intended to act, but did not intend the resultant harm (as in Wilson, where the plaintiff may have intended to start a fire, but presumably did not intend to hurt himself).

It is conceivable that critics may complain that this provision does not correctly reflect the common law position of an intentional tortfeasor vs. others who are merely negligent. Because we have not extensively researched the law, we cannot say whether this argument has merit. However, if the committee wanted to avoid such criticism, an alternative might be to amend AS 09.17.080 to provide that it does not require allocation of fault between intentional and unintentional tortfeasors. Legislative intent language or a statement of purpose could clarify that the change being made in AS 09.17.900 is not intended to relieve intentional tortfeasors of any portion of their liability under common law, and that unintentional tortfeasors are free to argue that the intentional torts of other parties preclude any finding or sharing of liability on their part. Another way to say this could be

"It is the intent that defendants be allowed to bring in third parties whose actions were arguably intentional as well as those who were allegedly negligent or reckless in order to have all responsible parties participate in the litigation. However, it is not intended that the inclusion of any intentional tortfeasor in the litigation result in a reduction of the intentional tortfeasor's liability at common law."

Either of these approaches presumably would satisfy the concern raised by State Farm's lobbyist. The choice is essentially a policy one. Thanks for the opportunity to have input in this issue. Please call me if you want to discuss this further.

¹Due to the shortness of time, we have not conducted a review of tort law treatises or statutory plans extant in other states.

Sec. 09.17.070. Collateral benefits. (a) After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract.

(b) If the defendant elects to introduce evidence under (a) of this section, the claimant may introduce evidence of

(1) the amount that the actual attorney fees incurred by the claimant in obtaining the award exceed the amount of attorney fees awarded to the claimant by the court; and

(2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the total award the amount by which the value of the nonsubrogated sum awarded under (a) of this section exceeds the amount of payments under (b) of this section.

(d) Notwithstanding (a) of this section, the defendant may not introduce evidence of

(1) benefits that under federal law cannot be reduced or offset;

(2) a deceased's life insurance policy; or

(3) gratuitous benefits provided to the claimant.

(e) This section does not apply to a medical malpractice action filed under AS 09.55. (§ 1 ch 139 SLA 1986)

Sec. 09.17.080. Apportionment of damages. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the

damages claimed and the separate act or omission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault. (§ 1 ch 139 SLA 1986; am §§ 15, 16 ch 14 SLA 1987; am 1987 Initiative Proposal No. 2, § 1)

Cross references. — For effect of this section on Alaska Rules of Civil Procedure 49, 52, and 58, see §§ 5-7, ch. 139, SLA 1986, in the Temporary and Special Acts; for advance payments in medical malpractice actions, see AS 09.55.546.

Editor's notes. — 1987 Initiative Proposal No. 2, § 4 provides: "Sections 1 — 2 of this Act apply to all causes of action accruing after the effective date of this Act [March 5, 1989]."

1987 Initiative Proposal No. 2, § 5 provides: "If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

AS 09.16.040, referred to in subsections (a) and (c), was repealed by 1987 Initiative Proposal No. 2, § 2.

NOTES TO DECISIONS

"Party" construed. — The term "party to an action" in subsection (a) should be construed to mean a litigant or other joint tortfeasor involved in the same accident. *Carriere v. Cominco Alaska, Inc.*, 823 F. Supp. 680 (D. Alaska 1993).

"Party" for purposes of subsection (d) means parties to an action, including third-party defendants and settling parties; court did not err in refusing to allow the jury to consider the negligence of nonparties. *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994).

Workers' Compensation Act provisions unaffected. — When the legislature enacted this section, it left intact the exclusive liability and employer reimbursement provisions of the Workers' Compensation Act. *Lake v. Construction Mach., Inc.*, 787 P.2d 1027 (Alaska 1990).

Criminal context precluded. — This provision has no direct bearing in the criminal context, where a court's authority to require payment of restitution exists independently of its authority to order payment of damages in civil matters. *Noffsinger v. State*, 850 P.2d 647 (Alaska Ct. App. 1993).

Joinder of potentially liable actors. — Because the allocation of a portion of

fault to nonparties is not permitted by this section, nor practical in the courtroom, the defendant must join any potentially liable actors and articulate in third-party complaints the manner in which those actors caused the plaintiff's injuries. This having been done, the trier of fact will then be able to accurately allocate a portion of fault to each party. *Robinson v. U-Haul Co.*, 785 F. Supp. 1378 (D. Alaska 1992).

Equitable apportionment is available as a means of bringing other tortfeasors into an action. *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994).

No contribution between joint tortfeasors. — Subsection (d) expressly and unambiguously terminated all provision for contribution between joint tortfeasors, as it was intended to create a pure several liability obligation as to each individual tortfeasor, with fault to be allocated amongst all whom the evidence in the case demonstrates to have had some percentage of fault irrespective of their party status. *Carriere v. Cominco Alaska, Inc.*, 823 F. Supp. 680 (D. Alaska 1993).

Separate trial for contribution issues. — Although a single trial allocating fault among all potentially liable parties

may promote judicial economy, nothing in the legislative history of this section indicates that the legislature intended to require a single trial for both first-party and third-party claims. The traditional two-step system of first establishing liability and then seeking contribution is not inconsistent with the comparative negligence principles underlying the Tort Reform Act. *Borg-Warner Corp. v. Avco Corp.*, 850 P.2d 628 (Alaska 1993).

Liability allocation among all unintentional tortfeasors. — The Tort Reform Act clearly contemplates a relative allocation of fault between all unintentional tortfeasors, whether negligent, grossly negligent or willful and wanton. *Borg-Warner Corp. v. AVCO Corp.*, 850 P.2d 628 (Alaska 1993).

Divisible liability for vehicular negligence. — The superior court did not err in its refusal to treat fleeing arrestee motorist, pursuing police officer and municipal department as one party for purposes of fault apportionment, where it was abundantly clear that the acts and omissions of fleeing arrestee, at all relevant times, were easily distinguishable from the acts and omissions of officer and the department which had trained him. *Hildebrandt v. City of Fairbanks*, 863 P.2d 240 (Alaska 1993).

Employee's action against third-party tortfeasors. — Evidence of an employer's negligence may be relevant and admissible in an employee's action against third-party tortfeasors to prove that the employer was entirely at fault, or that the employer's fault was a superseding cause of the injury. Under this section, the finder of fact may allocate all or none

of the total fault to the employer. It may not allocate only a portion of the total fault to the employer. Jury instructions must be carefully prepared to prevent a panel from attributing to the employee any negligence of the employer. *Lake v. Construction Mach., Inc.*, 787 P.2d 1027 (Alaska 1990).

Contribution claims to which Act applicable. — The Tort Reform Act of 1986 applies only when plaintiff's injury occurred on or after June 11, 1986, the effective date of that act. It does not apply to contribution claims accruing after that date, arising from torts which occurred prior to June 11, 1986. *Ogle v. Craig Taylor Equip. Co.*, 761 P.2d 722 (Alaska 1988).

Contribution against joint tortfeasors. — For cases construing former AS 09.16, see *Vertecs Corp. v. Fiberchem, Inc.*, 669 P.2d 958 (Alaska 1983); *Foss Alaska Line v. Northland Servs., Inc.*, 724 P.2d 523 (Alaska 1986); *Fellows v. Tlingit-Haida Regional Elec. Auth.*, 740 P.2d 428 (Alaska 1987); *Tommy's Elbow Room, Inc. v. Kavorkian*, 754 P.2d 243 (Alaska 1988); *Ogle v. Craig Taylor Equip. Co.*, 761 P.2d 722 (Alaska 1988); *Providence Wash. Ins. Co. v. McGee*, 764 P.2d 712 (Alaska 1988); *Bohna v. Hughes*, 828 P.2d 745 (Alaska 1992).

Unless a settlement is shown to be unreasonable and thereafter set aside, a settling tortfeasor must not be considered in determining the number of pro rata shares available for each remaining tortfeasor's individual liability. *Colt Indus. Operating Corp. v. Frank W. Murphy Mfr., Inc.*, 822 P.2d 925 (Alaska 1991).

Collateral references. — Apportionment of punitive or exemplary damages as between joint tortfeasors, 20 ALR3d 666.

Propriety and effect of jury's apportionment of damages as between tortfeasors

jointly and severally liable, 46 ALR3d 801.

Contribution or indemnity between joint tortfeasors on basis of relative fault, 53 ALR3d 184.

Sec. 09.17.090. Effect of release. [Repealed, § 17 ch 14 SLA 1987.]

Alaska State Legislature

REPRESENTATIVE
GENE THERRIAULT

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House District 33

House Of Representatives

HB 19: "An act relating to the definition of "fault" as that term is used for the purposes of determining the liabilities of parties in civil actions, setting limitations on civil liability, and authorizing the award, in conformance with applicable court rule, of attorney fees in civil actions."

Sponsor: Representative Gene Therriault

Sponsor Statement:

This legislation is intended to clarify a gray area of state civil liability law that allows defendants to argue they are not liable for offenses they have committed intentionally. The need arises from Alaska court cases in which defendants have argued that because the law refers only to acts that are "negligent or reckless" and not specifically to acts that are "intentional," it does not allow for the apportionment of fault to those who have committed offenses intentionally. Particularly in cases in which more than one person contributes to the injuries or could be sued, the law is unclear as to whether or not the person who committed an offense intentionally can be held responsible for any of the fault. In the cases that have been heard so far, the judge has found the argument to be without merit, however, tightening the law would eliminate the need for these costly court proceedings.

SPONSOR STATEMENT

DEPARTMENT OF LEGAL SERVICES
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MEMORANDUM

January 19, 1995

SUBJECT: House Bill 19: sectional analysis (Work Order No. 9-LS0103\A)

TO: Representative Gene Therriault
ATTN: Wilda Whittaker

FROM: Jack Chenoweth
Legislative Counsel 

AS 09.17.900 provides a definition of the term "fault" as it applies to civil actions to recover damages and to the apportionment of damages when more than one party may have been at fault. The current definition identifies "fault" in terms of the defendant's conduct if that conduct was "negligent" or "reckless." The referenced bill expands the definition to add, as a third element, conduct of a defendant that was "intentional." The revision is made applicable to causes of action that accrue on or after the bill's effective date. The change implicates references to "fault" that appear in, and relate to, the liabilities of parties in joint recoveries.

AS 09.60.010, directing the courts to determine, by rule, the award of attorney fees, precludes payment of fees in certain civil actions based upon "fault," incorporating a reference to the definition of "fault" in AS 09.17.900. The bill extends the definition in that section and, by the cross-reference, implicates the attorney fee provision, hence the reference to those fees in the bill's title.

JBC:pl
95-006.plm

SECTIONAL ANALYSIS