HB

19

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

No. 2
Bill Version: HB 19
(H) Publish Date: 2/8/95

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
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: 465-2160
Date:

Approved by Commissioner: Mark Boyer
Agency: Department of Administration
Date: 1/30/95

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Rev. 01/94

No. 1

FISCAL NOTE

Bill Version: HB 19
(H) Publish Date: 2/8/95

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date:
Title: "...relating to the definition of "fault"...determining the liabilities of parties in civil actions..."
Sponsor: Representative Therriault
Requester: Representative Therriault

Dept. Affected: Department of Law
BRU: Legal Services
Component: Operations
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						
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1005 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.

Prepared by: Richard I. Peques, Director — Phone 465-3673
Division: Administrative Services Division — Date 1/30/95
Approved by Commissioner: Bruce M. Botelho, Attorney General, Department of Law — Date 1/30/95

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(Rev 10/94) 93/fnbasis/OBA

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.

Brian D. Porter — 2-6-95

Representative Brian Porter, Chairman — Date

HOUSE adopted 3/1/95

Alaska State Legislature

Sen. Robin Taylor, Chairman
Sen. Lyda Green, Vice Chairman
Sen. Mike Miller
Sen. Al Adams
Sen. Johnny Ellis

State Capitol
Juneau, Alaska 99801-1182
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Senate Judiciary Committee

MEMORANDUM

TO: Representative Gene Therriault

FROM: Senator Robin L. Taylor, Chairman RLT.
Senate Judiciary Committee

DATE: 1/25/96
REF: Hearing Requests

I apologize for the delay in responding to the requests you submitted for hearings on HB 18 and HB 19.

Regarding HB 18, I would appreciate clarification on how you feel the system would be improved by this change. Who is hurt by the current law and who would benefit by the proposed change?

Regarding HB 19, please cite any case in which a court has upheld this bizarre argument. Unless such a ruling exists, I fail to see the need for a legislative fix to a situation the court seems to have under control. An expansion on your statement referring to "costly court proceedings" might help clarify the issues.

I would be happy to discuss these bills with you at any time.

TONY KNOWLES, GOVERNOR

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 2, 1996

Hon. Gene Therriault
Alaska State Legislature
State Capitol, Room 421
Juneau, AK 99801-1182

Re: Cases involving apportionment of fault with intentional tortfeasors.

You have asked about actual cases in which there is resistance to having intentional tortfeasors receive a percentage of fault under AS 09.17.900 and its application to AS 09.17.080.

In Kerr v. State, 3AN-93-6531 the survivor of a bomb blast has made the argument. The family members of convicted murderers crafted a mail bomb and sent it to the chief witness for the prosecution. A claim was later made that the negligence of the Department of Corrections caused the injuries. The state added the bombers to the suit, and asked that the bombers be apportioned a significant measure of fault for the injuries. The plaintiff opposed, and has argued that the explicit terms of AS 09.17.900 excludes intentional tortfeasors from her suit. The jury ultimately found the state 12% at fault, with the bombing conspirators 88% responsible. The difference between collecting from the state and not collecting from the bombers is over $14,000,000.00. The time has not yet run for appeal, but plaintiffs have declared there will be an appeal.

In addition to the Kerr case, which went to trial in December 1995, the state has other pending suits which involve criminal actions where the state is alleged to have some fault because of its negligence. In Noblett v. Sta[illegible] children who were abused by a parent have sued the state's Department of Health and Social Services, alleging its negligence permitted the abuse. The state has asked for the parent to also bear a percentage of the fault, and the plaintiffs have opposed including the parent, pointing to the express words of AS 09.17.900.

BJC:lm

The possibility of the argument excluding intentional tortfeasors is not merely theoretical. A clarification that the ruling by the trial court in the Kerr case is not a change, but codification of what was always intended, would certainly resolve a lot of arguments as well as help the Supreme Court resolve the issue when an inevitable appeal reaches it.

BRUCE BOTELHO
ATTORNEY GENERAL

By: Randy M. Olsen
Randy M. Olsen
Assistant Attorney General

RMO/jac

c: Susan Cox
Chrystal Smith

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

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April 29, 1996

The Honorable Drue Pearce
President of the Senate
State Capitol, Room 111
Juneau, Alaska 99801

The Honorable Gail Phillips
Speaker of the House
State Capitol, Room 208
Juneau, Alaska 99801

Re: *Kerr v. State of Alaska, et al.*,
Case No. 3AN-93-6531 Civil

Dear Senator Pearce and Representative Phillips:

This will respond to your letter, delivered to my office on April 25, requesting more information about the *Kerr* case. As you are aware, we participated in a settlement conference with Superior Court Judge Brian Shortell on Friday, April 19, 1996, and agreed on a final settlement of the case in the amount of $2,600,000. The court approved of the settlement by an order entered on April 19. We are pleased to respond to your questions about this case and the settlement.

I. General Background

The *Kerr* case stemmed from a criminal conspiracy between inmates incarcerated in state Department of Corrections facilities and inmate family members. In visits and phone calls, the inmates instructed their co-conspirators how to obtain bomb materials and how to construct a mail bomb. The target of the bomb was a witness in a

murder prosecution against the inmates. However, the target was out of state when the bomb was delivered, and in his absence his parents opened the package. The bomb instantly killed David Kerr and seriously injured his wife, Michelle Kerr. The extent of Ms. Kerr's injuries was extreme. Most of her face was destroyed. Doctors testified that she was struck by 2000 to 3000 projectiles. Bits of her husband were taken from her body. She nearly died many times over the next several months.

The co-conspirators were criminally prosecuted in federal court. The criminal prosecution consisted in part of the statements of other inmates, who were enthusiastic in their willingness to give evidence in return for leniency on their own cases. These other inmates recounted seeing the conspirator inmates, R.D. Cheely and Doug Gustafson, having discussions in prison hallways while waiting for visitors, conversing together at religious services, speaking through air vents when in adjoining inmate housing units, and also assisting them pass notes to each other. The federal prosecutors also presented evidence that these inmates received visitors and made phone calls to co-conspirators in violation of prison policies.

Gustafson confessed, on condition his sister and brother receive lenient sentences and he would not have to testify against Cheely. The sister and brother also confessed, and testified at the criminal trial of Cheely and Joe Ryan. Joe Ryan was the individual Cheely ordered to deliver explosives to Gustafson's sister. Ryan was only convicted of the transportation of explosives in violation of federal law. Cheely was convicted of conspiring to commit murder and attempted murder through the mails.

Michelle Kerr brought a civil suit against the State of Alaska on behalf of herself and the estate of her murdered husband. The state brought the bombing conspirators into the litigation so that their responsibility could be considered in apportionment of fault under AS 09.17.080. Kerr opposed inclusion of the bombing conspirators as parties to the civil suit, and opposed any apportionment of fault to the conspirators. Kerr maintained that the state's duty was to prevent harm by the inmates, and that the state should not be permitted to shift responsibility for breach of that duty to the criminals. In addition to claims of negligent supervision, Kerr alleged that the state was negligent in its security classification procedures, internal search procedures, and telephone monitoring procedures. The state, for its part, argued that the independent criminal actions of the family members outside the walls of the prison were beyond the state's control, and that it should not be held liable for the crime at all. The court rejected the state's argument, but allowed the jury to apportion fault to the criminals.

Immediately before trial the parties attempted to negotiate a settlement of claims against the state, but could not reach an agreement. Attorneys for Kerr opened at $7,000,000, while the state opened at $500,000. Kerr refused to move without a significant move by the state. The state went to $1,000,000, and later 1,250,000 as a show of willingness to negotiate. Kerr refused to make a counter offer at that time and the negotiation session concluded with plaintiff still at $7 million and the state at $1.25 million. The settlement judge advised that he felt the case should settle between $2.5 million and $3.5 million. He also opined that the state could be held for up to 50% of the fault at trial. Without a settlement, a trial was necessary to determine the amount of damages and relative percentages of fault.

At the trial the state demonstrated that the federal trial evidence critical of the state prison operations was generally not credible. The chief postal service bomb investigator testified that he had not looked at all the documents related to visitor records, and that some federal trial exhibits were not accurate. It was demonstrated conclusively that visits were not held in violation of prison regulations. Charts and drawings showed the inmates were not housed in such a manner as to permit communication through air vents, they did not have opportunity to communicate in hallways, the opportunity to communicate while one inmate was in an exercise yard was limited to a total of 6 hours, and that prison operations were generally well within the standards of the prison industry. One witness testified that he heard other inmates comparing information and making up stories for the federal prosecutors to make themselves more attractive as federal witnesses.

Conversations with the jurors following the trial revealed that they rejected or found inconclusive nearly all of the claims of negligence advanced by Kerr. However, the jurors concluded that the state was negligent in one respect, and that was when Gustafson's sister brought into a secured visit at the prison a micro-switch, and Gustafson explained to her how to wire the bomb with the switch. Tests showed that the switch was nearly completely plastic, and would not set off the highly sensitive metal detectors. However, the sister's testimony was that she carried the switch into the prison with her car keys, and the state had no way to refute her claim. Permitting car keys to remain with a visitor, even when the visits are by telephone through a window with no contact, is a violation of prison policies and procedures. The inmates were incarcerated for 18 months before the bombing. The sister never specified the date of the visit, which made it impossible for the Department of Corrections to fully challenge her claim. This vagueness also left Corrections without any identified personnel to discipline, if that were warranted. The jury concluded that for this breach the state's responsibility for the bombing should be set at 12%.

Damages to both victims were set by the jury at $11,864,690.72. With trial costs and fees as of the date of the verdict, December 15, 1995, the judgment against the state was worth approximately $1,800,000. Interest on this amount has been accruing at a rate of approximately $13,000 per month.

Significant post-trial motions were filed by plaintiffs to the end that the state should still be held 100% responsible for all harm. If Kerr were to win these motions in the trial court or prevail on appeal, the resulting total judgment against the state would be approximately $20,000,000.

Although the state's assessment of the risk was vindicated by the jury verdict, we anticipated some significant risks on appeal. First, the supreme court could hold the state 100% at fault for injuries committed by inmates. Second, many close questions were decided in the state's favor by the trial court, and there was no guarantee those rulings would be affirmed on appeal. The trial lasted five weeks. With a trial of that length, there is often a possibility of a reversal on appeal, based on error in the trial court's evidence rulings. If a re-trial were ordered there was a significant possibility the state would not do as well as in the first trial. In a re-trial, the evidence which had earlier been excluded, but because of reversal would then be admitted, could result in a much higher verdict against the state. Further, the jury which heard the civil case was unusually able to put sympathy aside and rule dispassionately on the evidence (their response to Michelle Kerr's testimony was in marked contrast to the weeping response of the federal criminal trial jurors). In a retrial, a different jury panel could well be less favorable to the state.

II. Reasons Supporting the Settlement Figure

Following the trial, Kerr's attorneys communicated a desire to conclude the litigation without an appeal, if the state would pay something above the jury decree to compensate for the risks faced by the state on appeal. With the assistance of the trial judge, Judge Shortell, the parties reached the settlement of $2,600,000. This is $800,000 more than the value of the verdict amount, plus costs, fees, and interest, as of December 15, 1995. Of this amount, approximately $100,000 represents interest on the jury award from the verdict date until July 1. The remaining amount over the value of the jury award -- $700,000 -- represents less than 4% of what the plaintiffs could obtain if they were to win on appeal. The settlement amount can also be considered the equivalent of the jury finding the state's fault to be 17% instead of 12%. Moreover, after discounting for the interest on the award since the jury verdict, the final settlement amount is less than what the settlement judge projected the claim to be worth.

The settlement also fully resolves all liability the state has with respect to Kerr's health care providers and insurer. Kerr is responsible for satisfying all liens and outstanding issues with her insurer.

III. Corrective Measures

As indicated above, no negligent DOC employee was identified, either in our background investigation or at trial. The department has taken measures to assure that its policies and procedures are reviewed and followed. However, many of Kerr's claims were explained away as inherent in a prison setting that complies with United States Supreme Court and Alaska court orders. For instance, the prisoners have rights to worship, and unless the prison has reason to restrict access to religious services, and can back up its reasons in a grievance hearing, inmates must be permitted to attend religious services. Visitation restrictions can only be imposed upon a showing that the visit is detrimental to the rehabilitation of the inmate or a danger to the public. Gustafson's sister was pregnant and brought her 5-year-old child to prison visits. She had no prior criminal history. There was no reason to restrict her visits. Cheely and Gustafson were incarcerated as 19-year-olds for their first criminal convictions. They did not warrant special security measures.

IV. Alternative Courses of Action

The only alternative to settlement would be to process an appeal. There appeared to be no chance of the state obtaining a reversal and being excused from all liability. On appeal the court would view the evidence in a way to support the jury verdict. Although in conversations with the jury the jury declared that it only found the one instance of negligence, at trial Kerr presented expert witnesses and other testimony which claimed that the state was negligent in multiple ways. On those facts the state would not be able to avoid <u>some</u> fault. The state was then, at a minimum, obligated to the extent of the jury verdict. The settlement prevents the risks of a much greater obligation on appeal, or by following a new trial. It also avoids the attorney costs associated with the appeal and a new trial, should one be ordered.

V. Assessment of Plaintiff's Chance of Success on Appeal

We believe Kerr's chances on appeal are also not good, although possibly somewhat better than the state's. The idea that, when the state has a duty to protect its citizens from inmates, it should not be allowed to blame the inmates when it breaches that duty has some support in court decisions from other states. Even if Kerr's chances on appeal were only 10%, at stake was the difference between the jury verdict ($1.8 million) and 100%

($20 million). The settlement negotiated is less than 5% of what Kerr would stand to gain if her appeal were successful.

VI. Length of Appeal

The time for receiving a decision on an appeal is a matter completely in the hands of the court. It would not be uncommon for the case to take two to three years for preparation of the record, briefing, oral argument, and decision. Even if the Alaska Supreme Court affirmed the trial court outcome, post-judgment interest would accrue on the judgment at the rate of 10.5% per year until paid.

Please let me know if we can be of further assistance on this matter.

Sincerely,

Bruce M. Botelho
Attorney General

BMB:SDC:pch

cc: Theodore W. Popely, Chief Counsel
William M. Bankston, Esq.
Nancy Slagle, Budget Director

I:\RITCHIE\KERR.MEM

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Alaska State Legislature

House Of Representatives

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House District 33

HB 19: "An act amending the definition of 'fault' as that term is used for the purposes of determining the liabilities of parties in civil actions; amending the definition of 'fault' as it relates to setting limitations on civil liability; and amending the definition of 'fault' as it relates to 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 individuals to argue that parties who acted intentionally are not liable for damages. The need arises from Alaska court cases in which the argument has been made 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.

STEVEN B. GILLETT
Post Office Box 91180
Anchorage, Alaska 99509
Telephone 907/345-8529

March 19, 1995

REPRESENTATIVE GENE THERRIAULT
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: HB 19 -- DEFINITION OF "FAULT" FOR CIVIL LIABILITY

REF: House Judiciary Committee Letter of Intent;
House Journal Page 266;
House Judiciary Committee Hearing Minutes, Feb. 1, 1995

Dear Representative Therriault:

I have been following HB 19, with interest and with the gracious assistance of Ms. Whitaker, in order to help insure that the current law is revised without the creation of unintended consequences. It is with that purpose that I offer a substitute for the current House Judiciary Committee Letter of Intent.

The current Letter of Intent attempts to address the stated concerns of Mr. Winters and Rep. Finkelstein, that the revised statute may be read in implied derogation of the common law thus prescribing that an intentional tortfeasor escape with less than full liability for a tortious event. The current Letter encompasses the issue,

but does not expressly preclude the feared predicament from coming about.

Clearly Mr. Winters and Rep. Finkelstein are not concerned with the consideration of intentional fault under the revised statute since that is the very essence of the revision. What does concern them is the potential issuance of a jury instruction incorrectly prescribing the nature of that consideration; namely, "members of the jury, AS 09.17.080 requires that fault be apportioned among the parties, therefore you may not apportion 100% of the total to the intentional tortfeasor."

To effectively preclude this possibility I recommend that the following Letter of Intent be substituted during the upcoming Senate Judiciary Committee hearings:

> In adding "intentional" conduct to the definition of fault in this chapter, the committee intends to make it clear that an alleged tortfeasor whose actions were arguably intentional may be joined as a party to a litigation already comprising alleged tortfeasors whose conduct was arguably negligent or reckless, in order to properly apportion the total fault among all alleged tortfeasors involved in the tortious event. By the inclusion of "intentional" conduct within this chapter, the committee does not however intend that it be prescribed that the intentional tortfeasor be apportioned less than 100% of the total fault merely because alleged unintentional tortfeasors are parties to the litigation. On the other hand, the committee does not intend that such a multilateral apportionment be precluded. Apportionment continues to be a question for the trier of fact.

If you have any questions or comment concerning my offer of this substitute, do not hesitate to contact me.

Very truly yours,

Steven B. Gillett

cc: Rep. Finkelstein
Rep. Brian Porter, Chmn. House Jud. Comm.
Sen. Robin Taylor, Chmn. Senate Jud. Comm.

TONY KNOWLES, GOVERNOR

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 2, 1996

Hon. Gene Therriault
Alaska State Legislature
State Capitol, Room 421
Juneau, AK 99801-1182

Re: Cases involving apportionment of fault with intentional tortfeasors.

You have asked about actual cases in which there is resistance to having intentional tortfeasors receive a percentage of fault under AS 09.17.900 and its application to AS 09.17.080.

In Kerr v. State, 3AN-93-6531 the survivor of a bomb blast has made the argument. The family members of convicted murderers crafted a mail bomb and sent it to the chief witness for the prosecution. A claim was later made that the negligence of the Department of Corrections caused the injuries. The state added the bombers to the suit, and asked that the bombers be apportioned a significant measure of fault for the injuries. The plaintiff opposed, and has argued that the explicit terms of AS 09.17.900 excludes intentional tortfeasors from her suit. The jury ultimately found the state 12% at fault, with the bombing conspirators 88% responsible. The difference between collecting from the state and not collecting from the bombers is over $14,000,000.00. The time has not yet run for appeal, but plaintiffs have declared there will be an appeal.

In addition to the Kerr case, which went to trial in December 1995, the state has other pending suits which involve criminal actions where the state is alleged to have some fault because of its negligence. In Noblett v. State children who were abused by a parent have sued the state's Department of Health and Social Services, alleging its negligence permitted the abuse. The state has asked for the parent to also bear a percentage of the fault, and the plaintiffs have opposed including the parent, pointing to the express words of AS 09.17.900.

The possibility of the argument excluding intentional tortfeasors is not merely theoretical. A clarification that the ruling by the trial court in the Kerr case is not a change, but codification of what was always intended, would certainly resolve a lot of argument, as well as help the Supreme Court resolve the issue when an inevitable appeal reaches it.

BRUCE BOTELHO
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