REPORT

OF THE

GOVERNOR'S ADVISORY TASK FORCE ON CIVIL JUSTICE REFORM

December 1996

REPORT

OF THE

GOVERNOR'S ADVISORY TASK FORCE ON CIVIL JUSTICE REFORM

December 1996

Office of The Governor
Box 110001
Juneau, Alaska 99811-0001

Governor's Advisory Task Force on Civil Justice Reform

TASK FORCE MEMBERS

Chair — Judge Thomas B. Stewart, Retired Superior Court Judge
Vice Chair — Marlene A. Johnson, Huna Totem Heritage Foundation

- Bill J. Allen, VECO
- Judith M. Brady, Alaska Oil and Gas Association
- David H. Bundy, Bundy & Christianson
- Michael J. Burns, Key Bank
- Charlie Cole, former Attorney General
- Jeffrey M. Feldman, Young & Feldman
- Roger F. Holmes, Biss & Holmes
- Julie Kitka, Alaska Federation of Natives
- Julian L. Mason. Ashburn & Mason
- Don Slone, P.E., Livingston Slone, Inc
- Stephan H. Williams - Law Office of Stephan H. Williams
- Mark R. Williams, Carr Gottstein Foods Co.
- Rodman Wilson, M.D. - Procedures Committee

EX OFFICIO

- Bruce M. Botelho, Attorney General
- Jeffrey W. Bush, Department of Commerce & Economic Development
- Senator Johnny Ellis
- Representative Brian Porter
- Brad Thompson, Division of Risk Management

Procedures Committee: Roger F. Holmes, Chair; Jeffrey W. Bush, Julie Kitka, Don Slone, Stephan H. Williams, Rodman Wilson

Liability Committee: Julian L. Mason, Chair; Bill J. Allen, Judith M. Brady, Charlie Cole, Representative Brian Porter, Brad Thompson

Damages Committee: Michael J. Burns, Chair; David H. Bundy, Senator Johnny Ellis, Jeffrey W. Feldman, Mark R. Williams

Table of Contents

- an alternative dispute resolution project, to resolve cases without the expense of trial
- streamlined district court procedures, to increase access by hearing smaller cases faster and less expensively
- changes in superior court procedures, to encourage active judicial management of cases and thus decrease overall litigation expense
- a floating rate of interest on judgments that more accurately reflects current conditions, to promote prompt settlement of cases and payment of damages
- changes in court procedures for offers of judgment, to encourage early settlement offers by both plaintiffs and defendants
- shorter statutes of limitation in contract cases, to decrease risk and increase predictability in the modern business environment
- improvements in the expert advisory panel for medical malpractice cases, so doctors can provide quicker and more useful advice to the courts
- collection of information on cases that are settled, to obtain a full picture of the impact of civil liability laws
- collection of information on insurance premiums, claims paid, and investments, to allow a more accurate assessment of insurance rates and the effects of civil justice reforms on those rates

The task force also reviewed and rejected a number of ideas from previous tort reform efforts. It found that some of these ideas did not address real problems in Alaska's civil justice system, while others were unfair or created more problems than they solved. The task force considered but did not recommend:

- a shorter statute of repose for the negligence of architects and construction contractors, limiting the right of Alaskans to sue for injuries when a building more than 10 years but less than 15 years old collapses
- a statute of repose for other kinds of negligence, limiting the right to sue for injuries that are not immediately apparent, particularly for injured children
- allowing fault to be allocated to people who are not joined in the lawsuit, increasing the number of persons added to cases and reducing the likelihood of full compensation for innocent victims
- allowing hospitals to avoid responsibility for the negligence of doctors working in the hospital emergency room
- creating new, complex grounds for claiming that a lawsuit is frivolous, which would complicate and increase the costs of litigation and might also discourage valid claims

- allowing defendants found liable for damages to delay payment of the full judgment once a plaintiff is awarded the money, unless the plaintiff agrees to accept periodic installment payments
- changing the way benefits or payments from other sources, such as the individual's health care benefits, are considered at trial
- restrictions on contingency fees that might limit access to the courts for injured people with difficult or risky cases
- further restrictions on the qualifications of expert witnesses, resulting in parties having to retain more expensive and possibly non-Alaskan experts

The task force labored to create workable solutions to problems with the civil liability system, while sorting out recurring ideas that will not improve the process. It worked by consensus whenever possible, requiring a two-thirds majority to adopt any proposal, to make sure that its recommendations were responsive to the broad range of mainstream concerns. It presents its work as a balanced set of proposals designed to decrease the costs of resolving cases, discourage frivolous litigation, promote fair compensation for injured parties, promote the predictability of outcomes, improve information available to decision-makers, and increase access to justice for all Alaskans.

Chapter 1

Task Force Process

The Governor's Advisory Task Force on Civil Justice Reform was created to provide Governor Knowles with proposals for a fair and legally sound tort reform bill to submit to the Alaska legislature. During the 1995-96 legislature, tort reform issues received a great deal of attention. The legislature passed a bill (referred to in this report as HB 158)[1] that included provisions on civil liability for commercial recreational activities, a ten-year statute of repose, a cap on punitive damages, a lower cap on noneconomic damages, allocation of fault to nonparties, mandatory arbitration of personal injury actions, a new cause of action for false claims and improper legal practice, limits on damages resulting from commission of a felony, and changes affecting offers of judgment, expert witness qualifications, hospital liability, and periodic payments. The legislature passed the final version of HB 158 by narrow margins in the final days of the session.

Governor Knowles vetoed the legislation, finding that it was the product of a flawed public process, dictated poor public policy, and contained serious legal defects and constitutional problems. He found that its provisions would complicate instead of streamline the civil justice system and would limit the rights of innocent Alaskans to reasonable and just compensation for injuries caused by others. He considered that the statute of repose and retroactive limitations on punitive damage awards would probably be unconstitutional.

To produce meaningful tort reform, the Governor appointed the task force to develop a new bill through an open public process that would meet the goals of fairness, efficiency, and reduction of insurance rates. The Governor appointed 16 public members and 5 ex officio members to represent the interests of large and small businesses, doctors and architects, plaintiff and defense lawyers, Alaska Natives, the Alaska legislature, and state departments responsible for law,

---

[1] The version adopted by the legislature was SCS CSHB 158(RLS) amS (ct rls fld S).

insurance, and litigation against the state.[2] The Governor appointed Judge Thomas Stewart, a retired superior court judge from Juneau, as task force chair.

The Governor charged the task force with four goals: to make the civil liability system more efficient and reduce frivolous litigation; to provide for fair but not excessive compensation for injured victims; to lower liability insurance rates; and to provide for reasonable punitive damages awards to deter practices that harm innocent Alaskans, without chilling the business environment or allowing windfall recoveries. He asked the task force to consider all options and develop a proposal for meaningful, responsible tort reform.

The twenty members of the task force worked through the fall of 1996 to meet these goals. The full task force met for a total of six days from early September to early December. Judge Stewart divided the work of the task force into committees on damages, procedures, and liability. These committees each conducted five half-day meetings in October and November to discuss the issues and to make and revise recommendations.

The Governor addressed the task force at its first meeting, urging members to take this opportunity to work out a reasonable set of proposals that would solve real problems and work to the benefit of all Alaskans. He urged the group to work by consensus as much as possible, to make sure that its recommendations were responsive to mainstream concerns. Accordingly, the task force adopted a voting procedure calling for a super- majority vote to pass a proposal out of committee or to adopt a full task force recommendation.[3] For most of its recommendations, the task force was able to achieve a broad consensus.

The task force learned about the tort reform efforts in Alaska and other states. The task force received presentations from experts from the RAND Institute and Cornell School of Law. The members also conducted interviews, reviewed studies of civil justice reform efforts nationwide, and commissioned additional research and analysis of Alaska data. They conducted a series of hearings around the state to explain their proposals and obtain public testimony, and all of their meetings were open to and attended by the public. They met in committees, and as a group, to argue, listen, and work out their recommendations.

---

[2] The Governor also appointed a member of the Alaska Teamsters Union to represent the concerns of Alaska working people, but this member was unable to serve due to illness in his family.

[3] At the committee level, it took four votes to pass out a recommendation to the full task force. Any member was free to request that an issue that had died in committee be reconsidered by the full task force, but no such request was ever made. With only a few exceptions, the committees made their recommendations by consensus. For full task force votes, a super majority meant 14 of 20 votes.

The task force members learned of a variety of concerns about the Alaska civil justice system. They heard that litigation is often prohibitively expensive and time-consuming. Many individuals and businesses with smaller claims are unable to find lawyers to take their cases, while defendants often agree to settle dubious claims to avoid the costs of going to court. Injured individuals find it difficult to receive what they consider fair and timely compensation for their injuries, while many individual and business defendants feel unfairly targeted because of their assets, not their responsibility for the injuries.

The task force recognized the inherent conflict between the need of injured parties for individualized justice that fits the circumstances of their cases and the need of members of the business community for a level of predictability that will allow them to know the value of cases and to purchase reasonably priced insurance.

The task force studied court statistics on cases filed in Alaska courts and commissioned a special study of tort cases that went to jury trial. This information showed no explosion in the number of tort cases filed, nor did it reveal a large number of juries returning high noneconomic or punitive damages. However, this information does not reveal the entire picture of tort case outcomes, because most claims are settled out of court. The task force concluded that further information is necessary for an informed public policy debate on tort reform. The task force did not find evidence of large numbers of frivolous lawsuits and concluded that, with some strengthening, the existing court rules are adequate to address the problem of lawyers who present frivolous claims or defenses.

The Governor asked the task force to consider liability insurance rates and ways to reduce them. The task force looked into how insurance rates are set and regulated, and into insurance reforms and rate rollbacks in other states. The task force found no evidence of a crisis in insurance cost or availability, nor did it hear from the insurance industry in the course of its debate. Because Alaska is a small market, rates for most lines of liability insurance are set according to the overall claims experience of an insurance company, not its experience within Alaska. Accordingly, the task force found no evidence that changes in Alaska law would affect Alaska insurance rates. The task force recommended enhanced data collection and reporting to provide the legislature and the public with the information they need to evaluate the effect of proposed civil justice reforms.

Based on its findings, the task force made a number of proposals it considered important to civil justice reform. The commentary and draft language of these proposals are found in Chapter 4 of this report. The task force also reviewed and rejected a number of ideas from previous tort reform efforts. It found that some of these ideas did not address real problems in Alaska's civil justice system, while others were unfair or created more problems than they solved.

Discussion of these proposals is found in Chapters 5 and 6 of this report. The task force worked hard, in a short period of time, to create workable solutions to problems with the civil liability system, while sorting out recurring ideas that would not improve the process. The task force finalized its recommendations and presented them to the Governor on December 16, 1996.

Chapter 2

Previous Alaska Tort Reform Efforts

Most of the current tort statutes were enacted in 1962 to operate in conjunction with principles of common law. Many reforms have been made in the intervening years.

For injuries related to the design, planning, or construction of improvements to real estate, a statute of repose[4] was enacted in 1967 as an exception to the general two-year statute of limitations. Under the 1967 statute of repose, a claim was barred unless brought within six years of the date of substantial completion of construction. An exception was made if the injury occurred in the sixth year – the claimant would have two years to file for that injury.[5] Provisions specific to medical malpractice were added as Article 6 of AS 09.55. The new provisions listed the elements that needed to be proved to establish malpractice. A physician's standard of care was established to be that of physicians with the same expertise practicing in the same or a similar locality.

In 1970, the legislature passed the Uniform Contribution Among Joint Tortfeasors Act, AS 09.16.010 - 09.16.060, which provided for contribution so that each person who contributed to an injury (joint tortfeasor) was liable for an equal

---

[4] A statute of repose cuts off the right of a claimant to bring a lawsuit after a specified time measured from the delivery of a product or the completion of work. A statute of limitation is the period of time after an injury has occurred in which a lawsuit must be filed.

[5] In 1988, the Alaska Supreme Court invalidated the 1967 law on equal protection grounds because the statute discriminated between different kinds of defendants "based on their occupation or the nature of the work they perform." *Turner Construction Co. v. Scales*, 752 P.2d 467, 470 (Alaska 1988). The court mentioned but did not reach two additional issues: discrimination among classes of plaintiffs and due process issues under the Alaska Constitution. In 1994, the legislature passed a bill amending the statute of repose, AS 09.10.055. The bill contained findings of legislative purpose to justify the distinctions that the Alaska Supreme Court had criticized among classes of defendants. The bill extended the statute of repose to fifteen years. The state supreme court has not evaluated the current AS 09.10.055.

share of the damages despite the person's percentage of fault.[6] Previously, each joint tortfeasor could be liable for paying all of a claimant's damages, without a right of contribution from other liable persons. In 1975, the supreme court changed the existing rule that a claimant could not recover any damages if the claimant was contributorily negligent; that is, if a claimant was also at fault for causing his injuries. Under the new rule, the claimant's damages were reduced by the percentage of the claimant's negligence (termed "comparative negligence.") *Kaatz v. State,* 540 P.2d 1037 (Alaska 1975) *appeal after remand* 572 P.2d 775 (1977)

The next flurry of activity took place during the 1975-76 legislative session. In 1975, after Governor Hammond vetoed a medical insurance bill, he created the Governor's Medical Malpractice Commission. The following year, a comprehensive bill was enacted. The Medical Indemnity Corporation of Alaska (MICA) was established as a public corporation. As a condition of licensure, physicians were required to obtain insurance from MICA; various other medical professions were also required to obtain insurance, but only from MICA if other insurance was found to be unavailable.[7] The burden of proof for malpractice was amended to remove the "locality" restriction; AS 09.55.535 provided for voluntary arbitration of medical malpractice claims; and AS 09.55.556 addressed the liability of a health care provider who fails to adequately inform a patient of the risks and alternative treatments or procedures ("informed consent"). Expert advisory panels were established to provide the superior court with findings on medical malpractice cases. The bill required hospital peer review systems with attendant confidentiality and immunity for reviewers. Additionally, the new law provided for payment of future damages by periodic payment and allowed evidence of compensation from other sources ("collateral sources") to be considered by the court after the jury reached a verdict.

During the 1979-80 legislative session, the three tort-related bills that were filed all passed. AS 09.65.200 provides that a landowner of unimproved land is not responsible for injuries to a person who is not compensating the owner for use of the land and who is injured as a result of the natural condition of the land.[8]

---

[6] In 1979, the supreme court invited the legislature to amend the law to provide for proportionate liability where each person would be responsible for the damages in proportion to their liability. *Arctic Structures, Inc. v. Wedmore,* 605 P.2d 426 (Alaska 1979).

[7] Under ch. 177, SLA 1978, the mandatory insurance provisions were made voluntary. MICA was abolished in 1991. Ch. 14, SLA 1991.

[8] The statute was amended by ch. 168, SLA 1988 to expand the definition of unimproved land to allow certain improvements, to preclude liability to a person who uses the land for free recreational use, and to exclude from this statutory immunity acts of gross negligence or intentional

(continued...)

Under another bill, skiers assumed the inherent risks of skiing if the ski resort posted prominent signs warning of the inherent risks that were enumerated in the statute.[9] Additionally, a bill was passed that suspends the running of the statute of limitations for persons who were incompetent as a result of mental illness.

Major tort reform occurred during 1986. The bill that passed was one of five "omnibus" bills filed that session. The most significant change was a cap on noneconomic damages[10] of $500,000, except for damages related to disfigurement or severe physical impairment. The bill provided for jury itemization of damages between past and present, and among economic, noneconomic, and punitive types of damages.[11] It also modified joint and several liability to apply some proportionality between the amount to be paid and the degree of fault, precluded damages for injuries during a claimant's commission of a felony, limited liability of nonprofit directors and officers, allowed reduction of a verdict by collateral source payments, limited awards of attorney fees to prevailing parties in certain contested cases, and provided for periodic payments of damage awards. The bill also amended provisions on offers of judgment, costs and attorney fees, and interest on judgments, including a new section on prejudgment interest. The bill codified the standard of proof for punitive damage awards of "clear and convincing evidence" that the state supreme court set in 1962 and the court's ruling on contributory fault.

During the 1987-88 session, Governor Cowper introduced a bill advancing further tort reform. The significant differences between the House and Senate versions could not be resolved. Two other "omnibus" bills failed to move out of committee.

In November 1988 the voters approved an initiative to eliminate "joint and several" liability – the common law doctrine by which multiple defendants are held both jointly and individually liable for the entire amount of damages awarded to a plaintiff, irrespective of each defendant's percentage of fault. The initiative repealed AS 09.16.010, which provided for a right to contribution among co-tortfeasors, and amended AS 09.17.080(d) to read, "[T]he court shall enter

---

[8](...continued)
misconduct.

[9] Ski area liability is now governed by the Alaska Ski Safety Act of 1994, AS 05.45.010 - 05.45.210. (Ch. 63, SLA 1994) The fourteen sections of the act precisely define the duties and responsibilities of skiers and operators. If a ski area fulfills all of its responsibilities, it is immune from liability for any accident in which a contributing factor was an inherent risk of skiing or the skier's failure to follow the enumerated skier duties.

[10] Noneconomic damages include such losses as pain and suffering, loss of enjoyment of life, and disfigurement.

[11] Punitive damages are a separate amount of money awarded to punish or deter the defendant for outrageous conduct. They may be awarded in addition to an award of compensatory damages which are intended to restore the injured party to his or her position prior to the injury.

judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."[12] A provision in the initiative limiting attorney continency fees was not placed on the ballot after it was disallowed by the Lieutenant Governor. (See *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162 (Alaska 1991).)

In 1989, the House of Representatives created the "Liability Insurance Task Force" for the purpose of reviewing controversies concerning tort reform and to "determine how the state may more effectively regulate insurance and provide civil justice." In March 1990, the task force issued a final report containing findings but no recommendations. An "omnibus" bill filed in both the House and the Senate failed to make it to the floor for consideration.

In 1993, the state supreme court adopted a civil rule allowing the court to order mediation at the request of a party or on its own motion. Alaska R. Civ. P. 100. Mediation is intended to achieve informal resolution of legal disputes. The rule did not apply to certain matters involving domestic abuse.

Another "omnibus" tort bill, HB 292, was filed in 1993. After extensive hearings by the House Labor and Commerce Committee, it was not reported out of the House Finance Committee. The most recent "omnibus" tort bill, HB 158, was filed in 1995. This bill was passed by the legislature in 1996 and vetoed by Governor Knowles. This task force was then appointed by the Governor to develop proposals for changes to the current civil justice system.

A chronology of legislative tort reform bills from 1967 to 1996 is found in Appendix D of this report.

---

[12] In *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994), the Alaska Supreme Court analyzed the changes to AS 09.17.080 and held that fault could only be allocated among parties who had been joined to the action. Thus, defendants may still be held liable for the fault of any tortfeasors who have not been joined in an action.

Chapter 3

Research and Public Comment

The task force worked to develop a strong base of information before making its recommendations. Governor Knowles asked the task force to

1) evaluate any changes in the volume and type of civil liability case filings in the Alaska Court System and in amounts awarded by juries as damages;

2) review statutory civil liability and insurance reform measures in other states and assess the effects of those reforms;

3) analyze recent proposals for civil liability and insurance reform in Alaska;

4) review Alaska case law and statutes and assess the need to amend existing statutes and court rules; and

5) invite written public comment and hold public hearings on civil liability, insurance reform, and related topics.

Studies and papers: A great deal has been written on the subject of civil justice reform. The task force staff assembled several notebooks of materials, including court system data, statutes and bills, journal and newspaper articles, empirical research results, scholarly analyses, governmental audits, advocacy from interest organizations, and results from previous task forces. The staff contacted a wide range of organizations and individuals: university professors, plaintiff and defense attorneys, consumer groups, research organizations, insurance groups, and lobbyists. The task force gave particular attention to prior Alaska tort reform proposals, Alaska statutes and rules, and recent tort reform efforts in other states.

Those who sent information included the Institute for Civil Justice at RAND, the Brookings Institute, the National Center for State Courts, the Alaska Judicial Council, the Alaska Legislative Research Agency, the American Bar Association,

the Alaska Bar Association, the American Medical Association, the Alaska State Medical Association, the Association of Trial Lawyers of America, the Defense Research Institute, the American Tort Reform Association, Alaskans for Liability Reform, Public Citizen, the Alaska Public Interest Research Group, the Insurance Research Council, the Insurance Information Institute, and the American Bar Foundation.

Tort reform experts: Two nationally recognized experts on civil justice reform addressed the task force at its first meeting. Dr. Deborah Hensler is the Director of the Institute for Civil Justice at RAND, an independent private research institute in California, and is also a professor of law and social science at the University of Southern California. Her research has focused on trends in civil justice litigation, alternative dispute resolution, mass torts, and compensation for physical injury. She holds a Ph.D. in political science from MIT.

Dr. Hensler discussed the three goals of tort law: compensation of losses from injuries; deterrence of the behavior which leads to injuries; and fairness or corrective justice. With respect to compensation, she described a 1989 RAND study of 26,000 households showing that only 10 percent used the liability system to deal with medical losses following accidental injury. The rate of claiming was up to 50 percent in auto accidents, and down to 5 percent in products cases. She said that some studies show the claiming rate was gradually increasing. In the 1980s, the greatest increase in litigation was in "mass torts" such as asbestos and silicone breast implants. The rate of compensation is uneven; generally, the higher the loss, the lower the percentage of recovery. Transaction costs, court costs, attorney fees, and other litigation expenses range from 33 percent for auto accidents to 60 percent for mass torts.

Dr. Hensler discussed the balance between the social costs and benefits of using the court system for deterrence of unsafe behavior, finding a mix of good and bad effects. With respect to fairness, the public's attitude toward tort reform reflects an ambivalent attitude toward the civil justice system in general: while people disapprove of frivolous lawsuits and greedy lawyers, they still feel that individuals who are at fault should pay, and people look to lawyers and the courts to make them do so.

Dr. Hensler also provided an overview of civil justice reform in the United States. She divided it into three parts: the tort reform movement, which concentrates on reducing incentives to litigate and reducing uncertainty about the outcomes; the procedural reform movement, which concentrates on reducing delays and the costs to all litigants; and the alternative dispute resolution movement, which attempts to increase access and reduce delay by providing alternatives to litigation. She discussed ongoing research efforts, particularly with respect to alternative dispute resolution.

Theodore Eisenberg is a professor of law at Cornell University. Professor Eisenberg has conducted a number of studies of the civil justice system, including recent work on punitive damages and litigation models. Professor Eisenberg spoke about research on jury behavior and the size of awards. He said some jury behavior does not follow popular perceptions: for instance, jury cases are on the court docket a shorter time than judge-tried cases, and plaintiffs are more likely to win in front of a judge than in front of a jury. He said that in studies of medical malpractice, the rate of claiming was much lower than the rate of negligence, as determined by independent panels of doctors. Professor Eisenberg also reviewed studies on punitive damages, showing that punitive damages are requested most frequently in business and contract cases and least frequently in medical malpractice and auto cases. In a study of federal cases where punitive damages were awarded, he found that they were closely related to compensatory awards, increasing as compensatory awards increase.

Alaska judges and practitioners: At the first meeting, Judge Brian Shortell, of the Anchorage Superior Court, discussed allocation of fault, statutes of limitation, medical malpractice cases, and damages. Supreme Court Justice Dana Fabe, chair of the court's civil rules committee, discussed the new Alaska Rules of Court pertaining to discovery and disclosure rules, including automatic disclosure of certain information, limitations on depositions and interrogatories, pretrial procedures, and sanctions. Teresa Williams, Assistant Attorney General, gave an overview of prior Alaska proposals to revise tort law, dating back to 1967.[13]

A number of other Alaska practitioners assisted the three committees in their work. The damages committee was aided in its discussion of wrongful discharge cases by Thomas M. Daniel and Barbara A. Jones, co-chairs of the Alaska Bar Association Employment Law Committee, who discussed current Alaska law and the Model Wrongful Termination Act. Daniel T. Quinn and John Suddock debated various proposed changes to the law regarding allocation of fault with the liability committee. The liability committee also met with Marianne Burke, director of the Division of Insurance, to learn about insurance rate-making and regulation and insurance reforms in other states. The procedures committee was assisted in many areas by Chris Christensen, staff counsel to the Alaska Court System, and Susanne DiPietro, staff attorney for the Alaska Judicial Council.

Court system data: The task force staff analyzed court system annual reports to determine if there have been any recent changes in filing The number of personal injury and property damage filings has stayed fairly constant since

[13] This history is included in this report in Chapter 2 and Appendix D.

1988.[14] There has been a slight increase in the number of personal injury cases, while property damage, death, and malpractice claims have remained level. When the increase in personal injury claims is adjusted for the recent increase in the state's population, there is no apparent change in filing patterns. In 1993, Alaskans filed tort lawsuits at a rate of 159 per 100,000 population. This figure was at the low end of 28 states that the National Center for State Courts studied that year. The majority of personal injury cases filed in 1995 (58 percent) arose out of automobile accidents. Another 37 percent were general personal injury cases, and 5 percent were malpractice cases.[15]

Special study of Alaska tort trials: The task force asked the Alaska Judicial Council to study jury verdicts and awards of damages in Alaska tort cases. Teresa Carns and Susanne Di Pietro presented information on the type of cases that usually go to trial: 37 percent were automobile cases, 17 percent premises liability cases, and 13 percent medical malpractice cases, with the rest a mixture of employment, intentional tort, and product liability cases. They found that most plaintiffs were individuals or families, rather than organizations, while defendants were split between individuals and organizations.

The Judicial Council found that plaintiffs won at trial about half the time, although the rate at which plaintiffs won varied according to the location of the trial. They found that plaintiffs were more likely to win automobile and employment cases, while defendants were more likely to win malpractice and premises liability cases. They also found that Alaskan juries seldom allocate much fault to plaintiffs.

The Judicial Council looked in detail at damage awards: economic and noneconomic, past and future, and punitive. They found that damages are most frequently awarded for past economic losses, most commonly lost wages and medical expenses. Noneconomic damages constituted about one-third of the awards studied, about half of which was for past pain and suffering. Juries seldom made awards for loss of consortium, loss of enjoyment of life, or emotional distress. Punitive damages were requested in 27 percent of the cases, but awarded in 6 percent. In many cases, the amount of damages was quite low. In 58 percent of

---

[14] Because of changes in the way the courts have categorized their cases, it is difficult to determine the number of tort filings before 1988. As the court computer system has come on- line, better data have become available. Since 1991, the courts have kept track of tort cases by eight different categories: automobile personal injury, automobile property damage, other personal injury, other property damage, wrongful death, medical malpractice, legal malpractice, and other malpractice.

[15] Charts summarizing Alaska tort filings from 1988 to 1995 are found in Appendix B of this report.

superior court cases in which the juries returned awards of damages, each award was under $50,000 (the superior court jurisdictional limit).[16]

Public opinion: The task force involved the public in its deliberations in a number of ways. All task force and committee meetings were open to the public, and time for public testimony was allowed at most of the meetings. Members of the public were present at all meetings, particularly staff and volunteers from the Alaska Public Interest Research Group. Many task force members heard comments from the public directly, and written comments were encouraged throughout the process.

After the committees made their draft recommendations, the task force scheduled a series of community forums to present the preliminary recommendations and hear public comment on them. Task force members held three- to four-hour community forums in Juneau, Bethel, Anchorage, and Fairbanks. They also held a statewide teleconference to receive comment from areas where no meeting was scheduled. The community forums were designed to serve multiple purposes: to give Alaskans a chance to learn more about civil law and litigation, to discuss the task force recommendations and other tort reform proposals, and to allow people to share their experiences and views with members of the task force. Approximately 120 people attended the forums.

The community forums were designed to encourage give-and-take between the task force members and the public. The first hour of each forum was a videotape of excerpts from the presentations of Dr. Hensler and Professor Eisenberg at the first meeting of the task force, providing a national overview of civil liability research. The videotape was followed by a brief introduction to the task force process and an overview of the preliminary recommendations.

Audience members were then asked to break into groups to discuss three typical litigation situations that raised many of the issues in front of the task force. There was a hypothetical building collapse that raised questions about limits on noneconomic damages and the statute of repose; a medical malpractice case that raised questions about hospital liability for emergency room physicians, whether children should be able to bring suit on their own behalf when they reach adulthood, and how frivolous lawsuits can be discouraged; and an automobile accident that raised questions about the ability of alcohol-impaired plaintiffs to sue for injuries they incurred as a result of their own intoxication and whether there should be limits on awards of punitive damages.[17] After discussion, the groups shared their conclusions with each other. They learned about each other's differing

---

16 The full text of the Judicial Council study is found in Appendix C of this report.

17 The three situations, public comment on them, and summaries of general public testimony are found in Appendix A of this report.

perspectives and began to appreciate the difficult challenge facing those who are considering changes to Alaska civil liability law.

The group discussions were followed by public testimony. Fifty-six people testified in the various locations. Although the time for individual testimony had to be limited in Anchorage and Fairbanks because of the number of people signed up to speak, the task force stayed each night until all those who wished to speak had their chance. The audiences were a mix of people who had suffered negligent injuries, small business owners, doctors, engineers, lawyers, and interested citizens. Summaries of public testimony are found in Appendix A.

Most of the task force members attended at least one of the public meetings; some attended all of them. The results were reported back to the full task force before the task force voted on the committee recommendations. With the public comment in mind, as well as the results of prior research, reading, and group discussions, the task force made the recommendations found in the next three sections of this report.

Chapter 4

Proposals Adopted by Task Force

This chapter contains the affirmative recommendations of the task force to improve the civil justice system. Each of these recommendations was adopted by at least a two-thirds majority of the task force, in many instances by a unanimous vote. The recommendations are grouped by their primary purpose, although many address more than one goal.

To increase the predictability of case outcomes, the task force recommends

- structured caps on punitive damages
- further limitation on noneconomic damages
- a market rate of interest on judgments
- shorter statutes of limitation

To improve efficiency of the courts and access to justice, the task force recommends

- an alternative dispute resolution program
- improved superior court fast-track procedures
- streamlined district court procedures and higher jurisdictional limits
- provisions to encourage offers of judgment
- medical advisory panel improvements
- access to the medical advisory panel for state health care providers

To reduce frivolous lawsuits and defenses, the task force recommends

- increased fines for litigation misconduct by lawyers
- restrictions on suits for injuries suffered during a felony
- clarification of liability for intentional acts

To provide information for future public policy debate, the task force recommends

- collection of settlement information
- collection of more-detailed insurance information

Each of these recommendations is presented in specific statutory language, as it would appear in a bill to amend the Alaska Statutes or the Alaska Rules of Court. The statutory language is followed by commentary describing the intended effect of the change and the reasons for the task force recommendation. Purpose and effective date provisions are also included.

The task force members discussed a number of issues regarding wrongful termination from employment. In the short time it had available, the task force was unable to develop concrete recommendations, but it recommends further inquiry in this area.

Statutory language for the purpose section of the proposed legislation follows:

PURPOSE OF PROPOSED LEGISLATION

*** Sec. 1.** PURPOSE. It is the purpose of this Act to

(1) reduce the time and costs associated with civil litigation for civil litigants;

(2) improve access to justice for individuals and small businesses;

(3) provide for fair but not excessive compensation for persons injured through the fault of others;

(4) increase the predictability of case outcomes to reduce inappropriate litigation and settlement behavior;

(5) collect information on the civil justice system to inform the public policy debate on tort reform-related issues;

(6) collect information on the insurance industry to inform the public policy debate on tort reform-related issues.

STRUCTURED CAPS ON PUNITIVE DAMAGES

*** Sec. 6.** AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020.PUNITIVE DAMAGES. (a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrent with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded.

(b) In the initial phase of a trial in which punitive damages are claimed, the fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

(1) was outrageous;

(2) was the result of malicious or hostile feelings towards the plaintiff; or

(3) evidenced reckless indifference to the rights or safety of others.

(c) At the separate proceeding to determine the amount of punitive damages to be awarded, the fact finder may consider

(1) the likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;

(2) the degree of the defendant's awareness of that likelihood;

(3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's misconduct;

(4) the duration of the misconduct and any intentional concealment of it;

(5) the attitude and conduct of the defendant upon discovery of the misconduct;

(6) the financial condition of the defendant; and

(7) the total deterrence of other damages and punishment imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

(d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of punitive damages to be awarded and the court shall enter judgment for that amount.

(e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of punitive damages under (c)(3) or (c)(6) of this section may not be conducted until after the fact finder has determined that an award of punitive damages is allowed under (a) and (b) of this section. The court may issue such orders as necessary, including directing the parties to have the information relevant to the amount of punitive damages under (c)(3) or (c)(6) of this section available for production immediately at the close of the initial trial, so as to minimize the delay between the initial trial and the separate proceeding to determine the amount of punitive damages.

(f) Except as provided in (g) or (h) of this section or otherwise provided by law, an award of punitive damages may not exceed the greater of

(1) three times the amount of compensatory damages awarded to the plaintiff; or

(2) the sum of $500,000.

(g) Except as provided in (h) of this section, if the fact finder finds that the conduct proven under (b) of this section was motivated by financial gain, it may award an amount of punitive damages not to exceed the greater of the limitation provided under (f) of this section or

(1) the average net annual income earned by the defendant for the five years before the date of the trial; or

(2) two times the amount of financial gain that the defendant received or expected to receive as a result of the defendant's misconduct.

(h) Notwithstanding the provisions of (g) of this section, if the fact finder finds that the conduct proven under (b) of this section was employment-related, including hiring, firing, transferring, promoting, demoting, or terminating an employee or employees, and

(1) affected one person, an award of punitive damages shall be subject to the limitation of (f) of this section;

(2) the employer engaged in a pattern or practice affecting more than one person, an award of punitive damages shall not exceed the greater of the limitations provided under (f) or (g) of this section.

(I) Punitive damages may not be awarded against a person or entity that is immune by law from awards of punitive damages.

*** Sec. 31.** AS 09.17.020, as repealed and reenacted by sec. 6 of this Act, has the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to conduct a separate proceeding for the

determination of a punitive damages award after it has determined that punitive damages are allowed in a case.

Commentary

This proposal makes changes to AS 09.17.020 regarding punitive damages.

The task force considered at great length whether the law should cap punitive damages and at what level such a cap might operate. Some members felt that punitive damages have no place in today's judicial system, while others felt that punitive damages are an important part of the existing system. The damages committee heard evidence supporting both positions. Although punitive damages are infrequently assessed in Alaska, they create a sense of unpredictability for the parties. This unpredictability affects settlement behavior in a way that is not reflected in the judicial statistics.

The damages committee considered but did not reach consensus on the advisability of a simple multiplier of compensatory damages or a fixed dollar cap. These limitations met the predictability test, but seemed less valuable in meeting the fairness test, in certain situations. The task force believes strongly that any cap needs to account for the varying circumstances in which punitive damages are awarded. In some cases the profit earned by an individual's misconduct might be a proper measure of punishment. In others, however, profit is not a component of the wrongdoer's decision-making or actions.

Borrowing from the law of the State of Kansas, the task force's proposal provides multiple caps for various situations. The basic cap is three times the compensatory damages or $500,000, whichever is greater (section (f)). This cap would be applied in most cases. However, in cases in which the defendants' offending conduct was clearly motivated by financial gain, the cap would be measured differently. It would be twice the profit earned from the misconduct, one year's net income based upon a five-year average, or the cap provided under section (f), whichever is higher. These alternative caps are more appropriate, fair, and predictable where a defendant conducted a business scheme or conspiracy to evade the law for financial gain.

The proposal also crafts an exception to exempt employment situations such as hiring, firing, and promoting. Conduct affecting a single employee would fall under the basic cap (three times compensatory or $500,000). However, if a company had a pattern or practice affecting multiple employees, then either the alternative cap (one year's income or two times profit) or the basic cap, whichever is larger, could be used.

The task force considered whether part of any punitive damages award should be given to state government. The argument in favor of this proposal was that punitive damages exist to deter and punish the wrongdoer, not to compensate the injured person. It is important that the injured person receive enough of the award to have an incentive to pursue punitive damages when appropriate, but not receive enough to constitute a windfall. The argument against this proposal was that it is financially and psychologically very difficult for a plaintiff to bring a lawsuit and see it through to a verdict. Suits for punitive damages are already very complex and difficult cases to bring, and the task force was unwilling to make it more difficult to do so. It opted instead for the increased predictability that comes with the proposed cap.

FURTHER LIMITATION ON NONECONOMIC DAMAGES

*** Sec. 5.** AS 09.17.010 is amended to read:

Sec. 09.17.010. NONECONOMIC DAMAGES. (a) In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, and other nonpecuniary damage.

(b) The amount of damages awarded by a court or a jury under (a) of this section may not exceed $500,000 for each claim based on a separate incident or injury.

(c) The limit under (b) of this section does not apply to damages for **severe** disfigurement or severe physical impairment.

Commentary

This proposal makes changes to AS 09.17.010 regarding noneconomic damages.

Since 1988, Alaska law has imposed a $500,000 limit on most jury verdicts for noneconomic damages, which include compensation for pain, suffering, loss of consortium, loss of enjoyment of life, and other noneconomic injuries. The cap may be exceeded only in instances of disfigurement or severe physical impairment.

The task force evaluated alternatives to the current cap and whether to impose an absolute cap that cannot be exceeded. It considered whether to delete the word "disfigurement" and whether "impairment" could be defined by statute. It looked at caps from other states, particularly a recent Ohio statute that ties noneconomic damages to life expectancy, imposing a cap for severe injuries of $35,000/year times the person's life expectancy, or $1 million, whichever is less.

Only nine states impose any cap on noneconomic damages, so Alaska already imposes greater restrictions on plaintiffs and provides greater certainty for defendants than most states. Studies of the effect of caps on insurance rates, particularly the California medical malpractice cap, have shown mixed results. The task force found no evidence that Alaska plaintiffs are receiving excessive compensation for noneconomic damages under the current cap, but it was concerned that lowering the cap might accord insufficient compensation to individuals with the most severe injuries.

While the terms "disfigurement and severe physical impairment" lack precision, the task force believed that attempting to define those terms (e.g., loss of two limbs, combination of deafness and blindness, etc.) inevitably would omit

injuries that warrant substantial compensation and create irrational distinctions between classes of injured victims. There is no evidence that Alaska courts have construed these terms in a manner that allows recovery of excessive damages for nonserious injuries.

While the full task force recommends no major change in the current cap, it agrees that adding the word "severe" to describe the word "disfigurement" would clarify that the cap can be exceeded only for very serious injuries.

MARKET RATE OF INTEREST ON JUDGMENTS

*** Sec. 9.** AS 09.30.070(a) is amended to read:

(a) **Notwithstanding the provisions of AS 45.45.010, the** [THE] rate of interest on judgments and decrees for the payment of money**, including prejudgment interest, shall be determined in accordance with (c) of this section** [IS 10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

*** Sec. 10.** AS 09.30.070 is amended by adding a new subsection to read:

(c) Except as otherwise provided in (a) of this section, the rate of interest on judgments and decrees for the payment of money is the rate for a five year constant maturity U.S. Treasury note published in the applicable Federal Reserve H.15 Statistical Release, plus one and one-half percent. This rate shall be the rate in effect as of the first business day of the month during which prejudgment interest begins to accrue under (b) of this section, and shall remain constant with respect to such claims until the judgment is satisfied. This rate of interest shall be determined by the Alaska Court System as of the first business day of every month.

*** Sec. 12.** AS 09.50.280 is amended to read:

Sec. 09.50.280. JUDGMENT FOR PLAINTIFF; PUNITIVE DAMAGES. If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with **interest as provided under AS 09.30.070** [LEGAL INTEREST FROM THE DATE IT BECAME DUE] and without punitive damages.

Commentary

This proposal makes changes to AS 09.30.070 and AS 09.50.280 regarding interest on judgments.

The current statutory rate for interest on judgments is a fixed rate of 10.5 percent simple interest. This rate applies to both prejudgment interest (interest due to the plaintiff from the time the claim is filed until the court enters a judgment in the plaintiff's favor) and postjudgment interest (interest due from the time judgment is entered until it is satisfied).

The task force concluded that a fixed rate can create inappropriate incentives to delay or accelerate payment of a judgment or settlement, depending on the current interest rate environment. The task force considered various proposed changes to the award of interest, including eliminating prejudgment interest awards on future damages. Rather than change the structure of the various types of awards, the task force decided to change the fixed rate to a floating rate more responsive to current market conditions. The interest rate for an individual case is determined according to AS 09.30.070(b) and stays constant until the judgment is satisfied. It remains a simple interest rate.

The task force chose the five-year U.S. Treasury Note rate plus 150 basis points (1.5 percent) as the appropriate measure of interest. The five-year Treasury Note rate is a published rate that may be established by judicial notice and is a medium-term rate corresponding to the duration of many lawsuits. With the addition of 150 basis points, it fairly reflects the value of money to the plaintiff under prevailing market conditions. It equates to 7.35 percent as of December 2, 1996. The Alaska Court System shall post this rate as of the first business day of each month.

SHORTER STATUTES OF LIMITATION

*** Sec. 2.** AS 09.10.050 is repealed and reenacted to read:

Sec. 09.10.050. CERTAIN PROPERTY ACTIONS TO BE BROUGHT IN SIX YEARS. Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property.

*** Sec. 3.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. CONTRACT ACTIONS TO BE BROUGHT IN THREE YEARS. Unless an action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, excepting those described in AS 09.10.040 or as otherwise provided by law.

*** Sec. 4.** AS 09.10.070 is amended to read:

Sec. 09.10.070. ACTIONS FOR TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. A person may not bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) **for taking, detaining, or injuring personal property, including an action for its specific recovery; (3)** upon a statute for a forfeiture or penalty to the state; or **(4)** [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

Commentary

This proposal makes changes to AS 09.10 regarding statutes of limitation.

The task force recommends two changes in the statute of limitations found in AS 09.10.050. It recommends reducing the time to bring an action on a contract from six to three years, to promote the quick resolution of business matters in modern society. It also recommends reducing the time to bring an action for damage to personal property from six to two years, to bring it into line with actions for personal injury.

The task force recognizes that these statutes of limitations begin to run from "accrual" of the cause of action, the time the plaintiff knew or should have known of the injury, as governed by the discovery concept as it currently exists in Alaska case law. The task force does not recommend any changes with respect to tolling the statute of limitations during the minority or mental incompetence of the plaintiff.

The liability committee recommended that the time to bring an action for waste or trespass upon real property be reduced from six years to four years. Members of the task force, however, expressed concern about the difficulty of detecting trespass on remote lands and enforcing actions against trespassers in remote areas. After discussion, the task force decided to retain the current six-year statute of limitations for bringing an action for waste or trespass upon real property.

Alaska case law holds that legal malpractice actions are governed by the statute of limitations for contracts (currently six years), not the statute of limitations for negligence (currently two years). The liability committee recommended that the statute of limitations for legal malpractice actions be reduced to two years, to bring it into line with the statute of limitations for malpractice by doctors and other professionals. However, reducing the statute of limitations for contracts to three years would effectively reduce the statute for legal malpractice actions. Therefore, the task force concluded that no additional change in the statute of limitations for legal malpractice was necessary.

ALTERNATIVE DISPUTE RESOLUTION PROGRAM

*** Sec. 11.** A.S. 09 is amended to add a new chapter to read:

CHAPTER 42. ALTERNATIVE DISPUTE RESOLUTION.

Sec. 09.42.010. PURPOSE. The legislature finds that providing a formalized program of alternative dispute resolution procedures within the existing civil litigation system can promote the timely and efficient resolution of many civil disputes. To that end, the legislature enacts AS 09.42.010 - 09.42.050 to provide for an initial pilot program of alternative dispute resolution of certain civil cases.

Sec. 09.42.020. PILOT PROGRAM FOR ALTERNATIVE DISPUTE RESOLUTION. (a) The supreme court shall provide for a pilot program of no less than five years' duration for the submission of civil cases filed in the superior court, third judicial district, to alternative dispute resolution procedures. The program shall operate in accordance with the provisions of AS 09.42.010 - 09.42.050.

(b) The following types of cases shall not be included in the pilot program:

(1) divorce and dissolution;
(2) child custody and visitation;
(3) other children's matters;
(4) probate;
(5) cases where no answer is filed.

Sec. 09.42.030. STRUCTURE OF PILOT PROGRAM. (a) The program established under AS 09.42.020 shall provide criteria for the screening of covered cases to determine if they are appropriate for referral to alternative dispute resolution. The criteria shall be constructed so that at least 50 percent of the covered cases filed in a calendar year are referred.

(b) The program shall provide for a list of qualified persons to whom cases may be referred and a schedule of the fees charged by these individuals. The court shall establish minimum qualifications for those persons. Under the program, parties shall be permitted by mutual agreement to choose a person from the panel or to choose a person not on the panel to conduct the alternative dispute resolution procedure. In the event that the parties cannot agree, the person to conduct the procedure shall be appointed from the panel by the trial court.

(c) The program shall provide that the parties to an alternative dispute resolution procedure shall share the costs of the procedure equally. A party found indigent under guidelines established by the supreme court shall be eligible to have that party's share of the costs borne at public expense. The costs borne

at public expense on behalf of an indigent party shall constitute a lien on any recovery by that party to be paid first out of the recovery.

(d) The program shall provide procedures and rules promoting the timely referral to and conclusion of the alternative dispute resolution procedure. The time from the filing of defendant's answer to the conclusion of the alternative dispute resolution procedure shall not exceed 100 days unless permitted by the trial court in exceptional cases and for good cause shown. Unless a longer period is agreed to by mutual consent of the parties, the alternative dispute resolution session shall be limited to no more than 12 hours.

(e) A person appointed to conduct an alternative dispute resolution procedure under the program established pursuant to AS 09.42.010 - 09.42.050 shall have judicial immunity to the same extent as a judge and shall abide by applicable rules of confidentiality established by the supreme court.

Sec. 09.42.040. EVALUATION OF PILOT PROGRAM. (a) The Alaska Judicial Council shall evaluate the efficacy of the program established pursuant to AS 09.42.010 - 09.42.050 annually. The evaluation shall address factors such as the speed with which cases are resolved, the satisfaction of the litigants, the expenditure of court resources, and the expenditure of litigant resources.

(b) The council shall work with the court system to create a system for efficient collection of information needed to evaluate the program. The council shall report the results of its evaluation to the legislature each year by March 31.

Sec. 09.42.050. DEFINITION. As used in AS 09.42.010 - 09.42.050, "alternative dispute resolution procedure" includes mediation and early neutral evaluation.

*** Sec. 33.** AS 09.42, as enacted by sec. 11 of this Act, has the effect of amending Alaska Rule of Civil Procedure 100 by making the mediation process mandatory for certain civil cases in the superior court, third judicial district, and by expanding the scope of the rule to include other forms of alternative dispute resolution in addition to mediation.

Commentary

This proposal adds a new chapter to Alaska Statutes Title 9 regarding alternative dispute resolution.

In evaluating changes to the Alaska civil justice system, the task force had as primary goals a fairer and more efficient system more easily accessible by all Alaskans. With these goals in mind, the procedures committee reviewed research on alternative dispute resolution (ADR) programs around the country. Task force members were impressed by the results of programs in several jurisdictions and recommend that the legislature establish a pilot project to develop effective ADR programs in Alaska.

ADR programs seek resolution of disputes before they get to trial, and may use mediation, early neutral evaluation, or various forms of arbitration. Mediation is a non-binding form of dispute resolution in which a mediator helps the parties analyze their dispute and encourages them to reach an agreement. Early neutral evaluation is a process in which a well-informed neutral person evaluates the merits of a lawsuit and gives a frank assessment to the parties.

The reports the committee reviewed strongly indicated that ADR participants considered the programs helpful. Most were pleased with the process and would recommend it. Although ADR sometimes leads to early settlement of cases, it is not consistently cheaper for the courts or the litigants. However, the participants did not seem deterred by the costs of the program, and participant satisfaction was high. ADR is most successful if initiated as early in the litigation as possible.

Although the task force supports adding ADR programs to the options available to Alaskan litigants, it did not attempt to design a permanent program of alternative dispute resolution for the whole state. Not all cases are appropriate for ADR, and some types of cases may require different ADR approaches.

Instead, the task force decided to give the court system a chance to try some ADR approaches, to evaluate them relative to traditional trial-based dispute resolution, and to design a program that would best fit Alaska's system. Thus the task force recommends that a five-year pilot program be set up in the Third Judicial District, during which no fewer than 50 percent of the cases filed in superior court will be referred for mediation or early neutral evaluation. During the pilot program, the Alaska Judicial Council will be directed to evaluate the program annually and report its findings to the legislature. Since the Third Judicial District has the largest population and number of civil cases, and also has a diverse geographical area, limiting the pilot program to this area will provide a range of situations for evaluation.

The pilot program is being limited to the superior court and will exclude the following types of cases: divorce and dissolution, child custody and visitation, other children's matters, probate, and cases where no defendant answers the complaint. This limitation will give the court system an opportunity to evaluate the

impact of another task force recommendation, early civil trials in district court, before deciding whether ADR would be appropriate at the district court level.

One task force member voiced concern that this proposal would violate the equal protection clause of the Constitution and unfairly discriminate against some litigants by requiring some litigants to pay for ADR as part of the litigation, while litigants whose cases were not referred would not be required to bear those costs.

IMPROVED SUPERIOR COURT FAST-TRACK PROCEDURES

***Sec. 20.** The lead-in to Alaska Rule of Civil Procedure 16.1(c) is amended to read:

(c) **Motion to Set Trial and Certificate.** **Unless otherwise ordered by the court, a** [A] motion to set trial may not be filed until **after the meeting of parties under Rule 16.1(n) has occurred and the scheduling order under Rule 16(b) has been issued** [105 DAYS AFTER SERVICE OF THE SUMMONS AND COMPLAINT]. A party seeking to obtain a trial date must serve and file a motion to set trial together with a certificate, signed by counsel, stating:

***Sec. 21.** Alaska Rule of Civil Procedure 16.1(k)(4) is repealed.

***Sec. 22.** Alaska Rule of Civil Procedure 16.1(n) is repealed and reenacted to read:

(n) **Meeting of Parties.** Except when otherwise ordered, the parties shall, as soon as practicable after the exchange of initial disclosures required under Civil Rule 26(a)(1) and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Civil Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or forms of subsequent disclosures under the rules including a statement as to when the disclosures required under Civil Rule 26(a) were made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(4) whether a scheduling conference is unnecessary;

(5) whether there will be dispositive or partially dispositive motions filed in the case and whether other deadlines should be set aside pending resolution of the dispositive or partially dispositive motions by the court; and

(6) any other orders that should be entered by the court under Civil Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and

being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

Commentary

This proposal amends Alaska Rule of Civil Procedure 16.1 to provide for a meeting of the parties and a pretrial conference.

The Alaska Rules of Court include new civil rules designed to streamline discovery and decrease the costs of litigation. The new rules provide for pretrial judicial conferences to assist in management of cases (Civil Rule 16) and for meetings of the parties to outline issues in the case and other matters requiring judicial attention (Civil Rule 26(f)). These rules help resolve pending disputes over discovery, jury instructions, trial exhibits, and deadlines. In cases where summary judgment is appropriate, the court can schedule resolution of the motion prior to imposing other pretrial deadlines. By requiring early judicial management and communication between the parties, these procedures encourage early resolution of issues without unnecessary expenditure of time.

However, Civil Rule 16.1 has preempted these rules for most Anchorage cases. Civil 16.1, the "fast-track" rule, is designed to reduce delay. Under Rule 16.1, the court gives fast-track cases little management or attention until the day of trial. Since most Anchorage civil cases are now assigned to fast-track procedures, the other rules are ineffective in reducing delay.

The task force believes that increasing the efficiency and reducing the cost of litigation are important steps in reforming the civil justice system. Therefore, the task force recommends amendment of Civil Rule 16.1 to provide for a meeting of the parties and a comprehensive pretrial conference.

STREAMLINED DISTRICT COURT PROCEDURES AND HIGHER JURISDICTIONAL LIMITS

***Sec. 19.** AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed **$100,000** [$50,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed **$100,000** [$50,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding **$100,000** [$50,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death or cause and manner of death of any person in the manner prescribed in AS 09.55.020 - 09.55.069;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the arrears and damage to the property does not exceed **$100,000** [$50,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed **$100,000** [$50,000];

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest, and attorney fees does not exceed **$100,000** [$50,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.030;

(10) over cases involving protective orders for domestic violence under AS 18.66.100 - 18.66.180.

*** Sec. 27.** District Court Civil Rule 1(a)(1) is amended to read:

(1) The procedure in civil actions and proceedings before district judges and magistrates shall be governed by the rules governing the procedure in the superior court to the extent that such rules are applicable. **However, unless otherwise agreed by all parties or permitted by order of the court in exceptional cases and for good cause shown, discovery shall be limited to the disclosures**

required under Civil Rule 26(a) and to the taking by each party of the deposition of the opposing party (or parties) and of one additional person.

*** Sec. 28.** District Court Civil Rule 4 is amended by adding a new subsection to read:

(b) Unless otherwise permitted by order of the court in exceptional cases and for good cause shown, all parties shall file a memorandum to set the case for trial, as set forth in Civil Rule 40(b), no later than 180 days after service of the complaint on all parties to the case. The parties shall submit a joint memorandum to set the case for trial, which may state their separate positions if they do not agree concerning the information or estimates to be provided in the memorandum. The court shall set the trial to commence on a date no less than 30 and no more than 90 days after the filing of the memorandum to set the case for trial, unless a continuance is granted by the court pursuant to Civil Rule 40(e).

Commentary

This proposal makes changes to AS 22.15.030 and District Court Civil Rules 1 and 4 regarding district court procedure and jurisdiction.

The expense of civil litigation effectively restricts access to the justice system for many plaintiffs and defendants, particularly in cases involving relatively small claims. This provision streamlines the district court pretrial process, with the intention of reducing the cost of litigating such claims. It also increases the district court's jurisdictional limit to encourage more litigants to use that streamlined process and its strict accelerated trial schedule.

A substantial portion of litigation costs are incurred in pretrial discovery. The amendment to District Court Civil Rule 1(a)(1) would significantly limit discovery, absent agreement of the parties or order of the court. This limitation should reduce not only discovery costs but also the costs of other aspects of trial preparation and trial.

The requirement that trial be set for a date no later than 270 days after the service of the complaint is also partly intended to reduce litigation costs. The parties or their counsel cannot extend this trial deadline by agreement; only the court may grant a trial continuance, and only in exceptional circumstances. With a shortened pretrial period, parties will have to be more focused and economical in their pre-trial and trial efforts; they will also have to consider settlement possibilities with a sense of dispatch. Prompt judicial resolution of claims will provide numerous other benefits as well. Parties will have their day in court

sooner; the period of disruption of lives and business by litigation will be reduced; and the efficiency of the civil justice system will improve.

Finally, this provision increases the civil jurisdiction of district court to $100,000 from its present $50,000. This increase is considered appropriate given the economics of litigation and the desire to encourage plaintiffs to avail themselves of a more streamlined district court process.

Plaintiffs with limited financial resources may be unable to obtain representation in many cases – even those with substantial merit – involving potential recovery of less than $100,000. Many defendants feel that they are coerced by the prospect of significant ligation costs into settling claims which they view as having little or no merit. To the extent streamlined district court procedures reduce litigation costs, they will alleviate these problems. Moreover, since many cases currently brought in superior court result in recoveries less than $100,000, plaintiffs will have an incentive to accept that jurisdictional limit on their recovery and file more claims in district court to take advantage of a faster, less costly process. In those cases, defendants will have the benefit of greater certainty concerning their potential exposure and better defined boundaries for any settlement discussions.

PROVISIONS TO ENCOURAGE OFFERS OF JUDGMENT

*** Sec. 8.** AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be **adjusted as follows:**

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), the interest rate shall be reduced by five percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), but more than 90 days before the trial began, the interest rate shall be reduced by three percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be reduced by two percent [REDUCED BY FIVE PERCENT A YEAR];

(2) if the offeree is the party defending against the claim, the interest rate shall be **adjusted as follows:**

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), the interest rate shall be increased by five percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), but more than 90 days

before the trial began, the interest rate shall be increased by three percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be increased by two percent [INCREASED BY FIVE PERCENT A YEAR].

*** Sec. 24.** Alaska Rule of Civil Procedure 68 is repealed and reenacted to read:

Rule 68. **Offer of Judgment.**

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065;

(2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065.

(c) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the court's award of attorney's fees under Civil Rule 82 shall be adjusted as follows:

(1) if the offeree is the party making the claim, the court shall adjust its award of attorney's fees to the offeree as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), the attorney's fees award shall be reduced by 50 percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), but more than 90 days before the trial began, the attorney's fees award shall be reduced by 30 percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the attorney's fees award shall be reduced by 20 percent;

(2) if the offeree is the party defending against the claim, the court shall adjust its award of attorney's fees to the offeror as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), the attorney's fees award shall be increased by 50 percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), but more than 90 days before the trial began, the attorney's fees award shall be increased by 30 percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the attorney's fees award shall be increased by 20 percent.

(d) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made 90 days or less but more than 10 days before trial begins, if it is served not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

*** Sec. 32.** AS 09.30.065, as amended by sec. 8 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by altering the manner in which interest under AS 09.30.070 is adjusted when a judgment is not more favorable to the offeree than the offer.

Commentary

The proposal makes changes to AS 09.30.065 and Alaska Rule of Civil Procedure 68 regarding offers of judgment.

Under present law, either a party making a claim or the party defending against a claim may make an offer to the adverse party to allow judgment to be entered in complete satisfaction of the claim. If the adverse party rejects the offer, and the judgment ultimately rendered is less favorable than the offer, present law imposes a penalty on the party by increasing the rate of prejudgment interest for successful plaintiffs by 5 percent and decreasing it for successful defendants by 5 percent. It also provides for additional attorney fees for defendants who prevail on an offer of judgment but provides no corresponding attorney fee provision for a

prevailing plaintiff. The offer of judgment enhancements or penalties are the same whether the offer is made early or late in the case.

The task force's proposal attempts to equalize the attorney fee provisions for prevailing plaintiffs and defendants. It also makes the attorney fee enhancements or penalties greater when the offer is made earlier in the process to induce parties to make their best offers early rather than on the eve of trial.

MEDICAL ADVISORY PANEL IMPROVEMENTS

*** Sec. 14.** AS 09.55.536(c) is amended to read:

(c) Not more than 30 days after selection of the panel, it shall make a written report to the parties and to the court, answering the following questions and other questions submitted to the panel by the court **in sufficient detail to explain the case and the reasons for the panel's answers:**

(1) **Why did the claimant come to medical care** [WHAT WAS THE DISORDER FOR WHICH THE PLAINTIFF CAME TO MEDICAL CARE]?

(2) **Was a correct diagnosis made? If not, what was incorrect about the diag nosis** [WHAT WOULD HAVE BEEN THE PROBABLY OUTCOME WITHOUT MEDICAL CARE]?

(3) Was the treatment **or lack of treatment** [SELECTED] appropriate [FOR THE CASE]? **If not, what was inappropriate about the treatment or lack of treatment?**

(4) **Was the claimant harmed (injured) during the course of evaluation or treatment or by failure to diagnose or treat** [DID AN INJURY ARISE FROM THE MEDICAL CARE]?

(5) **If the answer to Question 4 is "yes", what** [WHAT] is the nature and extent of the medical injury?

(6) What specifically caused the medical injury?

(7) Was the medical injury caused by unskillful care? **Explain.**

(8) If a medical injury had not occurred, **what would have been the likely outcome of the case** [HOW WOULD THE PLAINTIFF'S CONDITION DIFFER FROM THE PLAINTIFF'S PRESENT CONDITION]?

*** Sec. 15.** AS 09.55.536(f) is amended to read:

(f) Discovery may not be undertaken in a case until the report of the expert advisory panel is received **or 60 days after selection of the panel, whichever first occurs**. However, the court may relax this prohibition upon a showing of good cause by any party. If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant it an additional 30 days.

*** Sec. 25.** Alaska Rule of Civil Procedure 72.1(g) is amended to read:

(g) **Discovery.** Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until **60 days after selection of the panel** [80 DAYS HAVE ELAPSED FROM THE DATE THE CASE IS AT ISSUE], whichever is first to occur,

unless discovery is further stayed for good cause by order of the court.

*** Sec. 34.** AS 09.55.536(f), as amended by sec. 15 of this Act, has the effect of amending Alaska Rule of Civil Procedure 72.1(g) by changing the duration of the stay on further discovery when an expert advisory panel is appointed to evaluate a health care malpractice claim.

Commentary

This proposal makes changes to AS 09.55.536 and Alaska Rule of Civil Procedure 72.1 regarding the reporting requirements of expert advisory panels.

Under present law, in a personal injury or death action based on negligent provision of services by a health care provider, the court may appoint a three-person panel to help it understand the health care practices at issue. The panel may examine medical records, interview witnesses, consult with specialists and medical treatises, and physically examine the injured person. It then makes a report to the court, attempting to answer certain questions set out in the statute.

Some task force members interviewed a number of concerned people who generally agreed that the statutory questions should be revised, particularly to cover omissions. The task force determined also that panels must be assembled and report more quickly if the report is to be useful to the court. Despite imperfections, the Alaska State Medical Association does not want the system of expert advisory panels abandoned. Accordingly, the task force recommends revised questions and expedited reporting of answers to improve the usefulness of the panel system.

The task force also recommends that the Alaska State Medical Association, the Alaska Bar Association, and the Alaska Court System work together to review the process of recruiting and selecting panel members in order to speed the process.

ACCESS TO THE MEDICAL ADVISORY PANEL FOR STATE HEALTH CARE PROVIDERS

*** Sec. 13.** AS 09.55.536(a) is amended to read:

(a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider**, including a person providing services on behalf of a governmental entity,** when the parties have not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after filing of answer to a summons and complaint a three-person expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. When the action is filed the court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions.

*** Sec. 16.** AS 09.55.536 is amended by adding a new subsection to read:

(l) This section applies regardless of whether the parties in the action or the health care provider whose professional services are the subject of the action is in the public or private sector.

Commentary

This proposal makes changes to AS 09.55.536 regarding the availability of expert advisory panels to state health care providers.

The State of Alaska Department of Corrections and its employees are frequently sued for alleged medical malpractice stemming from the health care provided to inmates while incarcerated. This proposal clarifies existing law that the State and its employees and health care providers have the same access to an expert advisory panel in these medical malpractice actions as medical malpractice defendants in the private sector. This clarification is sought because some trial courts do not refer such cases to expert advisory panels.

INCREASED FINES FOR LITIGATION MISCONDUCT BY LAWYERS

*** Sec. 26.** Alaska Rule of Civil Procedure 95(b) is amended to read:

(b) In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed **$10,000.00** [$1,000.00] against any attorney who practices before it for willful failure to comply with these rules or any rules promulgated by the supreme court.

Commentary

This proposal makes changes to Alaska Rule of Civil Procedure 95(b), regarding fines for attorney misconduct.

Public discussion of tort reform often has focused on a need to deter "frivolous" lawsuits. Alaska law already provides significant deterrents to such cases. Under Alaska court rules and cases, if a claim is frivolous, the court can require the person asserting it to pay the other party's full, reasonable attorney fees incurred in defending against the claim.

The task force considered and rejected the provisions of the final version of HB 158[18], passed by the legislature last year, which were put forward for the purpose of deterring frivolous litigation. None of those provisions would likely have had any significant additional deterrent effect. Each provision had fundamental flaws and, if enacted and used by litigants, would seriously complicate and expand litigation, imposing additional burdens and expenses on the parties.

The task force also considered and rejected provisions of Section 21 of final HB 158, which would have required mandatory sanctions for purported attorney misconduct. The federal courts adopted a similar mandatory sanction requirement as part of Federal Civil Rule 11 in 1983. After a few years' experience and an explosion of related litigation over sanctions, the federal courts eliminated that mandatory sanction requirement. Alaska would likely experience the same problems if it were to adopt such a mandatory sanction requirement.

The consensus of the task force is that little litigation is wholly frivolous, lacking a reasonable basis in law and fact. However, some litigation conduct –

---

[18] The version vetoed by the Governor was SCS CSHB 158(RLS) amS (ct rls fld S).

e.g., motions made or positions taken – lacks substantial merit or is otherwise improper. Judges polled thought that sanctions currently available to punish such conduct are adequate. Under the current rules a court may require a party (or his or her attorney) to pay costs and attorney fees to another party faced with frivolous or otherwise improper litigation conduct; the court also may punish litigants and attorneys with contempt sanctions for such conduct.

The current rules also allow a court to impose a fine of up to $1,000 on an attorney for his or her misconduct. This provision amends Civil Rule 95(b) to increase the maximum fine to $10,000. The purpose of the increase is to allow a court greater discretion to impose a fine appropriate to the seriousness of the misconduct, in an amount sufficient to punish and deter appropriately a particular offending attorney.

RESTRICTIONS ON SUITS FOR INJURIES SUFFERED DURING A FELONY

*** Sec. 17.** AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210. DAMAGES RESULTING FROM THE COMMISSION OF A FELONY. (a) A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person

(1) was engaged in the commission of a felony, and the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the felony substantially contributed to the personal injury or death;

(2) was engaged in the commission of an unclassified felony or a class A or class B felony for which the person was not convicted if

(A) the felony substantially contributed to the injury or death;

(B) the person was not acquitted of the felony; and

(C) the felony is proven by the defendant in the civil trial by clear and convincing evidence; or

(3) was fleeing from the commission of an unclassified felony or a class A or class B felony, or was being apprehended for an unclassified felony or class A or class B felony, if

(A) the felony or flight or the person's conduct during the apprehension, as the case may be, substantially contributed to the injury or death;

(B) the person was not acquitted of the felony; and

(C) the felony is proven by the defendant in the civil trial by clear and convincing evidence.

(b) This section does not affect a right of action under 42 U.S.C. § 1983.

Commentary

This proposal makes changes to AS 09.65.210 to expand the affirmative defense against plaintiffs injured during or after commission of a felony.

State law currently provides an affirmative defense against convicted felons suing to recover for injuries they suffered while committing felonies. Recently, however, cases have arisen that are not covered by this defense; for example, cases involving persons who were fleeing from commission of felonies, or were being

apprehended for felonies, when the flight or the persons' conduct during apprehension substantially contributed to their injuries. Cases have also arisen in which felonies were committed and were substantial causes of the injuries, but the persons were never charged because of death or reasons unrelated to the criminality of their conduct.

This amendment extends the affirmative defense to this type of case if the defendant in the civil trial proves the felony in the civil trial by clear and convincing evidence. If the defendant can prove the injured person was involved in a felony, the injured person cannot get a judgment against him or her. The task force chose a standard of proof higher than the ordinary civil burden because of the serious nature of the accusation and the substantial shift in the burden of proof that an affirmative defense creates. The task force limited its amendments to more serious felonies to avoid creating a disproportion between the seriousness of the offense and the seriousness of the injury in some cases. The task force decided that the affirmative defense should not apply to persons who are actually acquitted at trial.

CLARIFICATION OF LIABILITY FOR INTENTIONAL ACTS

*** Sec. 7.** AS 09.17.900 is amended to read:

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent, [OR] reckless, **or intentional** toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Commentary

This proposal amends AS 09.17.900 to clarify its applicability to intentional acts.

This proposal clarifies that a percentage of fault in civil lawsuits may be allocated to intentional acts as well as to negligent or reckless acts. Because the current statute speaks of negligent or reckless acts, plaintiffs have argued that fault cannot be allocated to intentional tortfeasors.

For example, plaintiffs sometimes sue the State for negligent supervision of a probationer who intentionally shoots the plaintiff. The plaintiff may fail to name the probationer as a defendant and attempt to allocate all fault to the State. This amendment clarifies the State's right to name the probationer as a third-party defendant and to have fault allocated against him or her for his or her intentional acts. This avoids the incongruous result of allocating fault to those who are negligent, but not to those who act intentionally.

SETTLEMENT INFORMATION

*** Sec. 18.** AS 09.68 is amended by adding a new section to read:

Sec. 09.68.130. COLLECTION OF SETTLEMENT INFORMATION. (a) Except as provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate information relating to the compromise or other settlement of all civil litigation. The information, including the case name and file number, a general description of the claims being settled, the dollar amount of the settlement, to whom it is to be paid, and any nonmonetary terms, shall be collected on a form developed by the council for that purpose.

(b) The information received by the council under (a) of this section is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow identification of particular cases or parties.

(c) The requirements of (a) of this section do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.

*** Sec. 29.** Alaska Rule of Appellate Procedure 511 is amended by adding a new subsection to read:

(e) **Settlement Information.** When a dismissal under (a) or (b) of this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A dismissal by agreement under (a) of this rule must be accompanied by a certification signed by the attorneys of record for all parties that the information required under AS 09.68.130 has been submitted to the Judicial Council. A dismissal by the appellant or petitioner under (b) of this rule must be accompanied by such a certification signed by the appellant's or petitioner's attorney of record. The requirements of this subsection do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.

*** Sec. 23.** Alaska Rule of Civil Procedure 41(a) is amended by adding a new paragraph to read:

(3) Scheduling Order. When a voluntary dismissal under this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A notice of dismissal under (1)[a] of this subsection must be accompanied by a certification signed by or on behalf of the plaintiff that the

information required under AS 09.68.130 has been submitted to the Judicial Council. A stipulation of dismissal under (1)[b] of this subsection must be accompanied by such a certification signed by or on behalf of all parties who have appeared in the action. The requirements of this paragraph do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.

Commentary

This proposal makes changes to AS 09.68, Alaska Rule of Civil Procedure 41(a), and Alaska Rule of Appellate Procedure 511 regarding collection of settlement information.

This proposal requires most civil litigants who settle cases to file information about the settlements before the courts will formally dismiss their cases. The vast majority of cases are settled without trial, and the task force recognizes the importance of understanding the effect of civil liability laws on settlement behavior. Accordingly, it recommends that the Alaska Judicial Council collect and analyze settlement information in a strictly confidential manner.

The outcome of cases that proceed to trial or to final resolution on appeal is a matter of public record. As a result, interested persons can learn about the size of liability verdicts in tort cases and analyze their significance in considering tort reform strategies. In fact, the Judicial Council conducted such a study at the task force's request. However, cases that end with verdicts comprise only a small part of the total tort cases, and thus may not accurately reflect the effect of tort liability laws on case outcomes in Alaska.

In considering various tort reform-related proposals, the task force was frustrated by the lack of settlement data. Recognizing that no enforceable mechanism presently exists by which data on settlements in civil litigation can be collected and analyzed, the task force adopted the recommendation of the procedures committee to require mandatory submission of settlement information before a case can be formally closed. To assure confidentiality and for administrative simplicity, the parties will file this information directly with the Judicial Council, with a separate certification to the court that the information was filed. The Judicial Council is directed to perform its analysis in a way that provides the legislature, the courts, and the public with useful information about civil cases in general or in the aggregate, without revealing identifying characteristics of individual cases.

Although the task force recognizes that state legislation cannot require parties litigating in federal court in Alaska to make comparable disclosures of settlement information, the task force suggests that the Judicial Council explore whether the Federal District Court might consider adopting changes to its local rules of practice to allow collection of the same information in federal cases.

COLLECTION OF MORE-DETAILED INSURANCE INFORMATION

*** Sec. 30.** INSURANCE REPORT. (a) The division of insurance shall compile information necessary to evaluate

(1) the impact of the measures enacted in this bill on the availability and cost of insurance in the state; and

(2) the financial health and profitability of the insurers' business in the state.

(b) Beginning June 1, 1999, the information compiled under (a) of this section shall be reported to the legislature annually.

(c) The division of insurance shall adopt regulations requiring insurers doing business in the state to provide information necessary for the division to carry out its responsibilities under (a) of this section. Information shall be for Alaska and shall include premiums, claims paid, expenses of claims, and an allocation of investment profits or losses by line of business written in Alaska. Information shall be compiled in a way that protects the identity of individual insureds.

(d) The division of insurance may consult with the Alaska Judicial Council when determining what information to require under (c) of this section and when carrying out the compilation required under (a) of this section.

Commentary

This proposal creates a new, uncodified provision requiring compilation of insurance information.

One of the Governor's stated goals for the task force was to develop recommendations that would lower liability insurance rates, and the task force developed many of its proposals with the goal of lower insurance rates in mind. The task force found no evidence of an insurance crisis in cost or availability, nor did it hear from the insurance industry during the course of its debate. Because Alaska is a small market, rates for most lines of insurance are set according to the overall claims experience of an insurance company, not its experience within Alaska. The task force found no evidence that changes in Alaska law would affect Alaska insurance rates. However, it concluded that more information was needed to judge whether any correlation exists between the measures enacted and the liability insurance rates charged to Alaska individuals and businesses.

Therefore, the task force recommends that the Division of Insurance adopt regulations requiring most insurers to report information regarding premiums and claims, by line of business written in Alaska. Recognizing that looking only at

procedures. This delay gives the court system time to develop screening criteria for cases and a pool of qualified mediators. The Alaska Judicial Council has until March 31, 1998, to make its first report on the program.

The change in pre- and postjudgment interest (secs. 9, 10, and 12) applies to those cases for which prejudgment interest first begins to run under AS 09.30.070(b) on or after the immediate effective date of those provisions. The rate of postjudgment interest is the same as the rate of prejudgment interest for each case.

Under the proposal for collection of settlement data, the requirement that the Judicial Council develop a form to receive this information (sec. 18) will apply on or after the immediate effective date of the proposal. However, it will take the Judicial Council some period of time to develop the form and establish the internal procedures it needs to collect this information. Accordingly, the effective date of the related court rule changes (secs. 23 and 29) is delayed until January 1, 1998, so that the council can establish its procedures in an orderly fashion. The requirement will apply to all cases dismissed on or after that date, regardless of when they were filed or when the cause of action accrued.

Under the proposal for collection of insurance data (sec. 30), the Division of Insurance is required to adopt regulations requiring insurers to provide information to the division and to present that information in an annual report to the legislature. The division's duty to start the regulatory process begins on the immediate effective date of the proposal, while the first report is scheduled for June 1, 1999.

WRONGFUL DISCHARGE - WARRANTS FURTHER INQUIRY

A suit for wrongful discharge from employment can be based on contract theories, on state and federal laws governing discrimination and harassment, and on related tort theories such as intentional infliction of emotional distress. The task force considered whether state law should impose a cap on the number of years for which a discharged employee can collect lost future wages ("front pay").

Members of the damages and liability committees met with the co-chairs of the Employment Law Committee of the Alaska Bar Association, who represented employee and management concerns. The task force considered the Model Wrongful Termination Act and the complex interaction of current state and federal laws affecting employment. It saw no compelling reason to address the front pay issue in isolation, but concluded that the ancillary claims that often accompany employment-related litigation may impose unwarranted burdens on employers.

Accordingly, the task force recommends that the issue of a cap on front pay in wrongful discharge employment cases be addressed in the broader context of employment law, along with the collateral and intangible claims that plaintiffs often raise in such cases. Avenues of future inquiry might include statutory language similar to provisions of the federal civil rights law, a statutory definition of employment at will, review of issues related to the covenant of good faith and fair dealing, and consideration of the collateral claims of protected classes.

Chapter 5

Proposals Rejected by Task Force

This chapter contains three proposals that were approved by the liability committee or taken up directly by the task force, but were rejected in a vote by the full task force. The commentaries describe each proposal, the arguments in support of it, and the reasons the task force voted against it.

These proposals recommended

- imposition of a 10-year statute of repose for design and construction defects and other forms of negligence
- allowing allocation of fault to people who are not parties to the action
- barring recovery by intoxicated plaintiffs who were at least half the cause of their own injuries

STATUTES OF REPOSE

AS 09.10.055(a) currently provides for a 15-year statute of repose for personal injury, death, or property damage actions based on a defect in the design or construction of a building. In a split vote, the liability committee recommended reducing the period of repose for design and construction actions from 15 to 10 years. It also recommended extending the protections of the statute to most other tort actions, with exceptions for actions relating to exposure to hazardous substances, intentional acts or acts of gross negligence, fraud or fraudulent misrepresentation, defective products, intentional concealment of the potential cause of action, and undiscovered foreign objects in the body having no therapeutic purpose, as well as where longer periods were provided by contract.

At the public hearings, the task force presented a hypothetical scenario in which a negligently designed building collapsed 12 years after construction, severely injuring a person inside. Although most people commenting on this scenario supported the general concept of a statute of repose, the sentiment of the majority was that the period of liability should be the same as the reasonable useful life of the building, which in most cases would be longer than 10 years. The public did not consider important the fact that a potential defendant might not be able to obtain insurance to cover accidents occurring many years after the negligent acts; the general sentiment was that professionals who face potential liability must accept that risk as a cost of doing business.

A chart summarizing the current statutes of repose for design and construction in other states was distributed to the task force, showing that the statutory period in most states is 10 years or less. Nonetheless, several members had serious reservations about reducing the statute of repose for design and construction actions from 15 to 10 years, in part because the 15-year statute of repose was recently enacted. While recognizing that any statute of repose is arbitrary by nature, several members expressed concern with the proposed reduction, especially given the hardship this could cause to children injured at a young age who would lose their right to recovery while still quite young. It was also noted that the Alaska Supreme Court has called into question the validity of any statute of repose. *See Hanebuth v. Bell Helicopter Int'l*, 694 P.2d 143, 147 (Alaska 1984), in which the court stated: "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has a reasonable opportunity to do so."

For purposes of discussion, the task force considered an amended proposal that would apply both to design and construction and to other torts based on negligence, but would remain at 15 years and would be tolled during periods of minority and incompetence. Members continued to express concern about the

fairness of any statute of repose. After extensive discussion and consideration of the issue, the motion to adopt the amended changes to the statute of repose failed.

ALLOCATION OF FAULT

The current law governing the allocation of fault in a tort action derives from a ballot initiative the voters approved in 1988, which eliminated joint and several liability and provided for liability based on each person's percentage share of fault for the injury. Defendants are responsible for a plaintiff's injuries only in proportion to their fault. If a careless driver of a car with incorrectly designed steering injures someone, the jury might find the careless driver 80 percent responsible and the car manufacturer 20 percent responsible. Assuming that both defendants were able to pay, the injured person would collect 80 percent from the driver and 20 percent from the car manufacturer. If the careless driver had no insurance or other resources, the injured person would collect only 20 percent. Under this law, the Alaska Supreme Court has held that fault may be allocated only to parties to the suit. The injured person sues the person or business he believes is responsible. If the defendant thinks someone else is wholly or partially at fault, the defendant adds that person to the suit as a defendant.

Some on the task force believed that defendants should be allowed to allocate fault to other people responsible for the injuries, regardless of whether those people could be required to appear in court and defend the lawsuit. The fundamental argument for the proposal is that the principle of paying in proportion to fault is sound, and fault must be allocable to nonparties (people not involved in the lawsuit) to make the principle work. In some cases, the person or entity at fault cannot be added to the suit. Examples are employers (suits are sometimes barred by workers' compensation statutes), the State (the State has sovereign immunity against some claims), bankrupt individuals and businesses (suits are barred by an automatic stay), and people outside the jurisdiction of the court (for instance, a potential defendant in another state). In other cases, the plaintiff may have chosen not to name the person most at fault if that person is unable to pay any judgment. The named defendant must then bring that person into the lawsuit and thus run the risk of paying for attorney fees and costs if the person is found not to be at fault. Based on these arguments, the liability committee recommended that fault be allocable to nonparties, provided that the defendant identify them early in the litigation so that the plaintiff could choose to add them.

However, others on the task force felt that an additional wrongdoer should be added to the lawsuit by the defendant, not the innocent victim. Allocation of fault to nonparties is a foreign concept to American courts, which depend on the adversarial process to arrive at the truth. If a defendant is allowed to argue that

someone not present in court is responsible for the harm to the plaintiff, the plaintiff is forced to present his own case and to defend the "empty chair." Some members were also concerned that the proposal would increase the number of additional defendants, thus increasing the cost and complexity of litigation for all concerned.

Under the committee's proposal, a defendant could name as many additional defendants as the defendant chose. The plaintiff would feel compelled to sue as many of them as possible, even if he or she felt they were only tangentially involved, to avoid having to defend the empty chair. Yet if the plaintiff then added these defendants and lost (because he or she was right and their involvement was minimal), the plaintiff would be responsible for paying the costs and attorney fees of people he or she did not want to sue. Many task force members felt that if the primary defendant thought others were partially responsible for the injury, that defendant should bear the costs and risks of suing.

The law is particularly complicated with respect to workers' compensation. For example, an employee injured on the job by a defective machine cannot make a claim against the employer if covered by workers' compensation, but can claim against the machine manufacturer. The manufacturer may believe that the primary cause of the injury was the employer's failure to maintain the machine, not the fault of the machine itself. Since fault cannot be allocated to the employer in this case, the machine manufacturer might have to pay all the damages even if only partially at fault. However, the injured employee is also barred from suing the employer. If the manufacturer were allowed to allocate fault to the employer, and the employer had no reason to defend against the allocation, the injured worker would receive only a partial recovery even though not at fault at all. The problem is compounded by the fact that workers' compensation laws give the employer a lien on any recovery the injured worker receives from the manufacturer.

Under the complicated configuration of the current law, the task force faced a choice between the risk that some wrongdoers may be required to pay more than their fair shares of the fault and the risk that an innocent victim may be denied a full recovery. Given this choice, the task force felt that the law should be left as is and did not adopt this proposal.

ALCOHOL- AND DRUG-IMPAIRED PLAINTIFFS

The liability committee considered the problem of lawsuits filed by people who are partly responsible for their own injuries because their judgment or coordination was impaired by alcohol or drugs. It discussed whether a new section should be added to AS 09.65 to create a defense to such lawsuits, but ran out of

time to finalize a proposal. The full task force asked staff to develop such a proposal, but ultimately rejected it.

The proposal was based on a Michigan statute creating an absolute defense to a lawsuit where the plaintiff was impaired by alcohol or drugs. If the defendant could show that the accident was more than half the fault of the intoxicated plaintiff, the plaintiff would recover nothing. The proposal incorporated the presumption of .10 for alcohol intoxication. The defense applied only to operation of motor vehicles, snowmachines, boats, and aircraft. Members rejected an amendment to broaden the defense to cover all injuries. The proposal did not allow this defense to be used by license holders selling alcoholic beverages.

Some members believed that ordinary rules of comparative negligence are appropriate for this situation, and that a jury would not be sympathetic to such a plaintiff. Others thought that there could be a number of situations where good public policy would hold the defendants responsible for at least part of the intoxicated plaintiffs' injuries. Accordingly, the task force did not adopt this proposal.

Chapter 6

Proposals Rejected in Committee

This chapter contains proposals that were discussed by the committees and rejected. The commentary describes the issues the committees considered and the reasons why they decided not to recommend changes in the current law.

These issues were

- setting standards for qualifications of expert witnesses
- imposing a sliding scale for contingency fees
- converting claims against state employees to claims against the state
- changes relating to collateral benefits
- changes relating to periodic payments

This chapter also includes one proposal, limiting hospital liability for contractors, that was originally approved by the liability committee and later withdrawn. The commentary describes the proposal and the reasons it was withdrawn by the committee.

SETTING STANDARDS FOR QUALIFICATIONS OF EXPERT WITNESSES

Current law generally restricts the jury to consideration only of testimony by expert witnesses in determining whether the standard of care has been breached in a malpractice case. The judge determines if a proposed witness has sufficient expertise to qualify as an expert. The proposed expert must have enough knowledge, skill, experience, training, or education to help the jury understand the evidence or determine a fact at issue. A witness need not possess a particular license or academic degree to qualify as an expert.

The procedures committee considered various proposals that would have set standards for expert witnesses, including requiring board certification and state licensing. The committee determined that the courts already have an appropriate amount of discretion to determine who is an expert in a particular field and heard no evidence indicating that the courts are not exercising this discretion appropriately. Restrictions on testimony might result in parties having to retain more expensive, possibly non-Alaskan, experts. The committee unanimously recommended no change in current law; as a result, the task force did not take up this issue.

IMPOSING A SLIDING SCALE FOR CONTINGENCY FEES

The procedures committee considered whether to implement a sliding scale for contingency fees by plaintiffs' lawyers. Some states employ a sliding scale for contingency fees in all personal injury cases, while others use one for medical malpractice cases only. These scales are graduated by the size of the award (allowing the attorney a lower percentage as the award gets bigger) and sometimes by the stage to which the case proceeds (allowing a higher percentage for a case that goes to trial than for one that settles early on). The committee looked at studies on the effect of such limitations and found no conclusive evidence of any positive impact on the civil justice system.

The committee discussed the difficulty of devising a scale sufficiently flexible to govern the different levels of risk, time, and expense involved in different types of cases. The committee also noted the complexity of litigation, where work tends to be done in spurts that may not correspond to the stages used in the sliding scales. The committee unanimously agreed not to pursue a sliding scale for contingency fees in Alaska; as a result, the task force did not take up this issue.

CONVERTING CLAIMS AGAINST STATE EMPLOYEES TO CLAIMS AGAINST THE STATE

The procedures committee considered a proposal to provide that claims against state employees be converted to claims against the state, similar to the procedure used under the Federal Tort Claims Act. The effect of this provision would be to make claims against the state the sole avenue for pursuing claims based on the actions or inactions of individual state employees, provided the employee acted within the scope of employment.

The State often must defend lawsuits against state employees for actions or inactions taken as part of their employment, even where the State cannot otherwise be sued. For example, state employees are not immune from actions for assault or false arrest, while the State is immune under AS 09.50.250(a)(3). The Federal Tort Claims Act cures a parallel dichotomy by substituting the United States for the employee upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident. Claims against the responsible employee individually then become claims against the government, and defenses available to the government become applicable, as long as the employee was acting within the scope of employment.

The procedures committee had concerns about the claims that could be lost under this proposal, particularly possible punitive damages claims against a state employee. The committee did not have sufficient time to consider the issue and did not pass it out of committee; as a result, the task force did not take up the issue.

CHANGES RELATING TO COLLATERAL BENEFITS

Under AS 09.17.070, a jury determines the plaintiff's losses without knowing that the plaintiff's insurance company already has paid some expenses (like medical bills). A subrogation clause in the insurance policy often requires a plaintiff to repay the insurance company, and state law similarly requires repayment of workers' compensation and Medicaid. When the plaintiff recovers from sources that do not have a right to subrogation, the defendant may ask the court to reduce the plaintiff's recovery by that amount. The plaintiff may then request an offset for insurance premiums paid and for attorney fees spent in obtaining the recovery. The court performs the calculation, after the verdict.

The damages committee considered whether the jury should be informed that someone else already has paid the plaintiff's medical bills and lost wages. The committee saw no evidence that the existing law leads to injustice through double recoveries or windfalls to plaintiffs, nor any inherent benefit in having juries

perform a calculation that judges now do as a matter of law. The committee also saw no reason to interfere with the subrogation rights of insurers and state programs. The committee noted that although restricting recovery of collateral benefits might reduce the costs of liability insurance, it would be at the cost of increasing the price of health insurance and other forms of coverage. The committee unanimously concluded that the current law should be left as it is; as a result, the task force did not take up the issue.

CHANGES RELATING TO PERIODIC PAYMENTS

The damages committee considered whether to revise AS 09.17.040(d) and (e) governing the award of periodic payments for future damages. Periodic payments, also called "structured settlements," are commonly used in settling litigation as a compromise between the parties' perception of the present value of the case. Periodic payments allow the defendant to purchase an annuity or pay in installments, while providing the plaintiff with a steady source of assured income.

When a court or jury awards damages, a prevailing plaintiff may request that future damages be made by periodic payments to the maximum extent feasible, rather than by a lump sum payment. The court may require the losing defendant to post security to ensure that funds are available as periodic payments come due, although the court may not require security if an "authorized insurer" acknowledges its obligation to discharge the judgment. Although a losing defendant may negotiate for future damages to be paid in installments, it has no right to insist that the judgment be paid that way.

The damages committee considered whether current law should be changed with respect to the posting of security, and discussed whether defendants should have the right to insist on periodic payments of future damages. The committee concluded that once a judgment is entered, it should be paid after judgment or appeal. The committee agreed that a plaintiff should not be forced to accept payments in installments, due to the risk of nonpayment and uncertainty over future needs. After considering the relative risk to both parties under current practices, the committee unanimously concluded that no change was needed in the current law; as a result, the task force did not take up the issue.

HOSPITAL LIABILITY FOR CONTRACTORS

Under current law, hospitals are liable for the negligent acts of emergency room physicians working on contract. Many emergency room physicians are independent contractors, not employees of the hospital, and it has been suggested

that the hospital should not have to bear the responsibility of directly supervising them. The liability committee considered the nature of the work and the employment relationship, the reasonable expectations of patients, the costs of malpractice insurance, and public comment on the issue.

The committee initially recommended that hospitals be relieved of liability for the negligence of contract emergency room physicians, but be required to require the physicians to carry malpractice insurance as a condition of their contracts. The liability committee recommended that the physicians be required to purchase malpractice insurance with limits of $1 million per claim, $3 million annual total claims. The hospitals would also have been required to exercise reasonable care in determining whether the physicians were qualified to practice in the hospitals and to review the physicians' standards of practice on a regular basis. The committee considered whether the hospitals should be required to post or publish notices explaining the limits of their liability. It concluded that such a requirement would be meaningless, given that patients use emergency rooms when they need immediate attention and their options for going elsewhere are usually limited.

However, questions were raised about whether the insurance limits were high enough and whether they would remain appropriate under changing economic conditions. The committee was also concerned about exonerating hospitals of liability in the emerging environment of managed care and the changing relationships between doctors and hospitals. The committee reconsidered its recommendation and asked consent that it be withdrawn. The task force therefore did not take up the issue.

Chapter 7

Considerations for the Future

The task force has labored to create several improvements to the civil liability system, while sorting out recurring ideas that will not improve the process. However, the task force had limited time available and was unable to address comprehensively all the issues raised. Areas of continuing concern include the following.

Access: The time and expense of civil litigation effectively restrict access to the justice system. Individuals and businesses with smaller claims are often unable to find lawyers to take their cases, while defendants often agree to settle dubious claims to avoid the cost of going to court. Although a number of task force recommendations are designed to promote faster, less expensive litigation and alternatives to litigation, the concern remains that many people with legal problems will be unable to solve them in an appropriate way. Continuing efforts are needed to increase the flexibility of the civil justice system and to expand the options available to people seeking help with a legal problem. Efforts are also needed to increase the affordability of legal services, so that individuals and small businesses with valid claims and defenses can afford to pursue them.

Workers' compensation and employment: The task force in its public hearings heard a significant amount of concern over the ability of the workers' compensation system to pay injured workers promptly and fairly, as well as concern about the complex interaction between workers' compensation law and general tort law. The task force also heard concern from employers about the number of years for which a discharged employee can claim lost future wages and the number of collateral claims (such as harassment and infliction of emotional distress) that can accompany a suit for wrongful discharge from employment. Employment law involves a number of interrelated state and federal statutes that the task force was unable to address in the short period of time it had available.

Data collection and evaluation: As part of its efforts to improve access to justice, the task force recommended an extensive program of alternative dispute resolution to resolve cases early in the litigation. Although alternative dispute resolution programs are well established in other jurisdictions, the Alaska program will need to be evaluated on a yearly basis to ensure it is serving the purposes for which it was designed, to make modifications, and to see whether it should be made available statewide.

Because settlement information is confidential, little is currently known about how most cases are concluded and why. The task force recommends that settlement data be collected and evaluated on an ongoing basis, to allow a complete understanding of current and future tort reforms. Similarly, the task force was frustrated by the lack of insurance information available and recommends that the Division of Insurance collect the information necessary to evaluate the impact of tort reform measures on the availability and cost of insurance in Alaska. The legislature can then take this information into account as the total picture of civil liability law and insurance becomes available.

The task force confronted a large number of interrelated issues in a short period of time. It has sought a careful balance among the many interests affected by civil liability law. Its proposals are designed to decrease the costs of resolving cases, discourage frivolous litigation, promote fair compensation for injured parties, promote the predictability of outcomes, improve information available to decision-makers, and increase access to justice for all Alaskans. It presents its work as a balanced set of proposals that will solve real problems and work to the benefit of all Alaskans.

Appendix A

Summary of Public Comment - Statewide Call-in and Community Forums

The Task Force on Civil Justice Reform held a statewide call-in and four community forums around the state to give Alaskans a chance to learn more about civil liability law and litigation, discuss key issues and varying perspectives, and share their concerns.

Each community forum included a presentation on the task force activities and preliminary recommendations, small group discussions of typical civil litigation situations that were intended to raise participants' understanding of the competing interests involved in tort law and litigation, and an opportunity for public comment. Task Force Chair Thomas Stewart, Dr. Rodman Wilson, and other members attended each of the community forums, which were held in Juneau, Bethel, Anchorage, and Fairbanks.

The summaries are intended to give a flavor of what the task force heard from the public in the community forums, but they are not comprehensive. The discussion scenarios used in the forums are included at the end of this section.

Statewide Call-In: Wednesday, November 13, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Jeff Feldman, Don Slone, Steve Williams, Dr. Rodman Wilson, Bruce Botelho, Jeff Bush, Brad Thompson
Attendance: 3 testifying, 3 listen-only

Public testimony:

Robert Cowan, Kenai resident – attorney, representing the Exxon Valdez Plaintiffs Committee

- Oil companies may reorganize behind shell companies that have no assets, which makes approaches that base awards on corporate assets ineffective
- In response to concerns about HB 158, legislators had said it would not have applied to federal cases, which he felt should be explicitly stated in any new suggestions for legislation.
- Punitive damage limits should not apply to mass disaster suits; and, the proposed interest rate is not high enough to deter large corporations.
- Allocation of fault gives defense an incentive to "hide in the bushes", would harm the plaintiff.
- Questioned the impact of a statute of repose on situations where there was a continuing trespass or nuisance, e.g., leaking gasoline tanks.

Sylvia Sullivan, Valdez – representing Alaskans for a Just Society

- Concerned about the lack of labor representation on the task force.
- In proposal to limit the ability of felons to sue, there should be and exclusion if excessive force was used.
- Doesn't like the concept of sovereign immunity for the state
- Doesn't agree with caps on awards in wrongful termination cases and the requirement that contracts be written. The Department of Labor is not enforcing existing provisions that require contracts.
- In proposal to limit the right of alcohol-impaired plaintiff to sue, sometimes another party (e.g., bartender) may be partially responsible for the person being alcohol impaired.

Philip Squires, Kenai – president, United Cook Inlet Driftnetters Association

- Expressed concern about insurance rates, particularly for fishermen, who are small business owners operating in a hazardous environment. He noted that the preliminary recommendations include no mandatory decrease in insurance rates, which he thought was supposed to be a selling point of tort reform.
- Concerned about the oil shippers reorganizing under different "corporate veils" and the effect this may have on cases, particularly from the perspective of the Cook Inlet fishery, which is heavily impacted by the oil industry. He indicated there has been inadequate bonding for businesses and that the 13,000 permit holders are not adequately protected.
- [Mr. Feldman asked whether the punitive damages awarded in the Exxon Valdez case are indicative of a problem that needs to be fixed.] The proposed limits on punitives that are related to corporate assets would not have affected the case if there were adequate reporting, good records, etc. Exxon does not seem to be showing much remorse and there do not appear to be major changes in corporate behavior as a result of the punitives.
- Concerned that in cases such as Exxon, if the state gets a share of punitives it is being "doubly compensated" since it had already settled its case with the company.

Juneau Community Forum: Thursday, November 14, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Marlene Johnson, Vice Chair; Dr. Rodman Wilson, Bruce Botelho, Jeff Bush, Brad Thompson
Attendance: About 22 people

Comments on Situations:
Situation A: Earthquake

- Opinion was split on whether there should be a cap on noneconomic damages, but they should not be tied to economic damages – i.e., a person with a higher pre-injury income should not automatically get higher non-economics as well.
- Thought this suit should be allowed, but maybe there should be some repose, such as the normal life of a building.

Situation B: Medical Malpractice

- Patients should have protection one way or another – either by hospital carrying insurance or doctor doing it. Suggested that maybe the hospital could purchase the insurance for the doctor and then charge doctor for it.
- The patient should not be made to suffer because of the labor relationship chosen by the hospital.
- Hospital should have some responsibility for overseeing the work of the doctor.
- Injured children should be allowed to sue for themselves upon majority if there is really a continuing problem. Concern re what the child's parents were doing and why they hadn't sued earlier.
- If the claim against the doctor is found to be frivolous, the burden should be on the lawyer, not on the client.

Situation C : Automobile Accident

- General feeling that car owner was liable – he had a duty to society that he did not meet when he lent his car. There was a question about whether the drunk driver was to be included within that definition of "society".
- Question whether if you know someone has a record you are responsible for his history.
- Discussion of punitive damages and whether criminal law wouldn't take care of a situation like this. Divided on whether the state or other government should get a share of punitives.

Public Testimony:
Everest Wilhelmsen

- Concern that existing statutes, and any proposed changes, shouldn't protect government too much and allow government to act without impunity.

Joe Sonneman – attorney

- Concern re false claims of "frivolousness" – some government agencies say that any dispute is "frivolous." There should be some penalty for false claims of frivolousness.
- Does not think that mandatory dispute resolution will work. Mediation only works when parties are agreeable to it and otherwise is a useless exercise. American society as a whole is competitive and Americans are not prone to compromise.
- Concern re relationship to legislature, particularly in light of Speaker Phillips' comments. Task force should involve legislature early on. [Judge Stewart informed him that Representative Porter and Senator Ellis sit on the task force.]
- Questions whether there is a real problem with tort litigation in Alaska. Cited statistics from the National Center for State Courts that show Alaska's filing rate

dropped from 402 cases/100,000 people in 1985 to 144/100,000 in 1995. Because of previous reforms and because of the "English rule" for attorney fees, filings have dropped. The down side of this is that some meritorious cases may not be filed because of the fear of losing attorney fees and this may interfere with the constitutional right of access to the court system.

- Does not think that government should get a portion of punitive damages. However, if this does happen the plaintiff's attorney should be paid based on the total amount of the award.

Dixie Hood – marriage and family therapist

- Supports ADR strongly and has used it successfully in her practice to help couples avoid court disputes
- Concern re makeup of task force – hadn't know about legislative participation; there are no consumer representatives or persons without a commercial interest in defending reform. [Judge Stewart explained about extensive AKPIRG involvement.]
- In general, she supports no fixed caps and letting juries decide within guidelines and with good instructions from judge, particularly as judge has right to overrule the jury and reduce awards.

Jim Wilson – small business owner, representing Coastal Helicopters

- Thinks there should be a limit on noneconomic damages, but doesn't know what it should be.
- Opposed to any punitive damages – should resort to criminal justice system if necessary.
- Expressed concerns about "ambulance chasing" attorneys and some recent experiences he has had. [Attorney General Botelho informed him about possibility of Bar Association complaints.]

David George – attorney

- Should be no statutorily defined caps; jury should have complete discretion. It is presumptuous of legislators to think they can establish the value of people's lives and disruptions to them. If caps are reduced, the youngest people will be hit hardest.
- Re allocation of fault – the "empty pocket" problem should be that of the defendants, not of the plaintiff. The burden to find all the guilty parties should not lie on the plaintiff.

Bethel Community Forum: Monday, November 18, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Dr. Rodman Wilson, Jeff Bush
Attendance: 11 people

Comments on Situations:
Situation A: Earthquake

- Some people's threshold of pain is higher
- If Grace recovers fully, 5 people think there should be a cap, one opposed
- Grace should recover more damages from an intentional tortfeasor, then just ask what's the maximum amount the tortfeasor can pay
- If Grace permanently injured, 3 think there should be a limit, 3 opposed depends if juries often award too much - if few verdicts over $500,000, would vote against a cap
- If gross negligence, like building code violation, should be no repose

- how long? useful life of house, 30 years
- It's irrelevant whether architect is retired, doesn't have insurance

Situation B: Medical Malpractice

- Hospital receives money for those services – why can't hospital indemnify doctor? let doctor and hospital sort it out, not put burden on plaintiff
- If hospital to be liable, would have to hire someone to watch every operation - acting independently - if review, hospital has done everything it can

[Dr. Wilson: most hospitals require insurance; but the two big Anchorage hospitals don't]

- Hospital shouldn't be responsible in single case, but if multiple instances might indicate a problem
- Half think hospital should be liable, most think doctor should be required to have insurance
- Minors should be allowed to sue when become adults
- I can't bring a lawsuit because I'm not rich
- In the villages, people now prefer using courts instead of elders
- Some of this stuff seems outrageous; above and beyond the good life
- The lawsuit can be as damaging as the injury - I've been a good person, but I could get destroyed by a lawsuit, what I've worked for all my life, maybe divorced

Scenario C : Automobile Accident

Should a drunk driver be able to sue the friend who lends him the car? no

Should the drunk driver be able to sue the State for poor road maintenance? audience split

Should suit be barred if the plaintiff was intoxicated?

- Intoxication raises more questions than it answers
- How significant a role it plays depends on the facts of each case; it already comes in through allocation of fault
- What happens if intoxicated and in jail? they're supposed to be taking care of him
- Maybe same thing could have happened even if he was sober, and how would you know?
- Have to defend the lawsuit anyway to find out comparative fault
- Might not need punitive damages: he's going to jail, so he's not going to be driving anyway
- I'm here to express my displeasure to being called constantly for jury duty, every year, seems out of hand - so, I think there should be a jury trial, but there's too much jury duty here in Bethel - plus jury instructions are hard to understand, need an easier way to explain them [Dr. Wilson: other countries use judges]
- I think it would be better if law weren't so complicated, why ordinary person can't plead his own case
- Too many attorneys in the legislature, making a job for themselves
- Should there be a limit on punitive damages: 1 yes, 3 no
- Should the state get a share: 4 yes, one 100 percent
- Prefer loser pays system - lots of costs to the state to try cases

Public Testimony:

Joerene Hout: - small business owner and senior citizen

- Feel something needs to be done - I like what I heard you addressing - I feel vulnerable to lawsuits
- I'm ambivalent about some of the issues: want people to be adequately compensated, but don't want to see people destroyed in the process
- Insurance is a significant cost, certain amount of anxiety. Have rental income property: did an eviction, immediately hit with slip and fall lawsuit

Gale Power

- Cap on pain and suffering at $300,000 is so minimal - absolutely shouldn't be a cap at all
- Hospitals should be responsible for contractors - could contract out nursing to get out from liability
- Concern is smells like big business and insurance - not for the little guy
- Not sure hospitals should be responsible for everything, but should have some responsibilities

Michele Power

- I just went through a tragedy- if someone said my pain was only worth a certain amount, I'd be outraged - should be a local jury that knows about my situation, not someone sitting in an office 1,000 miles away
- Caps will hurt little people, especially bush people - will make cases less attractive to attorneys, may not be able to recover. Most people in bush are not able to bring lawsuits on their own - don't have the sophistication to shop for an attorney if first one doesn't take the case - same for restrictions on attorney fees
- Hospitals should have responsibility for allowing doctor to be there - you don't choose the doctor, hospital does - might be a long time before you find out that doctor wasn't competent

Myron Angstman - Attorney

- Because I live in a small town, I've taken more fender-benders than most lawyers – often minor injuries, handled through native hospital, few compensatory injuries people I represent will never come here to talk to you. once their cases are closed, they don't want to talk about it - the people who should talk to you are people who will be injured next year
- One of my clients was injured at the Denver airport - reduced maintenance because about to shut down, so they left a hole in the moving walkway - kid fell in, hand mangled, couldn't shut off for two minutes - between caps and immunities, what she's getting for the mangled hand is an insult - allows slipshod work for financial reasons
- We shouldn't create a whole group of people who think they've been taken by the system
- Doctors don't dare testify against each other, because ostracized by other doctors - a few years ago, doctors voted to remove chair of medical association for testifying
- Crucial to note that insurance rates have gone down, no evidence of problems
- Never had a punitive damage case, so too rare to care about
- Lower cap on noneconomic damages - current cap is onerous but can be lived with, but certainly shouldn't be lowered
- Bush Alaska - not a huge cash economy - subsistence losses have been treated as noneconomic losses - can convert to economic losses, but it's really about not living the way you used to live
- No problem with flexible interest rate
- People pay for their collateral benefits, shouldn't be punished for foresight - although not a big issue in Bethel
- Periodic payments: plaintiff would be stuck with collection, risk of bankruptcy
- ADR: becoming the rule now - rule that sends cases to ADR or settlement conferences would be great - the earlier the better - mediators becoming more professional
- Streamlining bigger cases: great if you can do it, but most of these rules come with their own entanglements - especially here, where have small capacity to absorb a big case

- Frivolous lawsuits: not a big problem, what we have is adequate
- Smaller cases should be streamlined, smaller jury would be OK
- Here we abuse our jurors, see the same ones year after year - anything to reduce that burden would be good - six enough for a civil case, even in superior court
- Setting attorney fees in contingency fee cases - we often find that our fees are less than those - I've made contingent fees that wouldn't pay your airfare home - it's a special problem here because hard to keep lawyers living in rural Alaska, people can't support private lawyers out of their pockets - only the contingency fee system keeps private lawyers available for the other kinds of cases. also, my clients don't complain - don't dispute my fees, so why should state interfere? already can't keep up with high-priced defense lawyers in Anchorage
- Allocation of fault: 1986 tort reform has forced defendants to sue as many people as they can, so I sue one person, wait to see who's still standing at the end. Plaintiff used to go find the culprit, now defense has to do it, makes cases longer and far more complicated. Defendants will go after 5 percent contribution, plaintiff won't do it.
- Criminal suing for injury: very tough cases to win, but sometimes the wrong to the criminal is worse than the crime, but won't make much difference
- Alcohol impaired: hard to hit right percentage, juries usually see through that
- Statute of limitations: drop a couple for contract doesn't matter
- Statute of repose: understand some balance, but there are some situations where want extreme care, because expected to last 20-30 years

Lisa Waters – secretary to an attorney

- Described her experience with her 2 ½ year old son, whose hand was caught in an unshielded moving sidewalk at the Denver airport 2 years ago, causing the child to lose three fingers. He received the maximum allowable under Colorado law, $150,000. This left only approximately $23,000 for "pain and suffering" after medical bills and legal expenses were paid. She did not think this was fair. She does not favor limits on awards in any category.

Chris Provost - attorney; wife is a physician

- Thinks that the tort system is faulty because defense attorneys get too much and victims get too little.
- Believes that all emergency room physicians should have insurance.
- Favors early dispute resolution through mediation or mechanisms.

Lucy Jones-Sparck

- In Alaska Native cases, definitions of expert witnesses should be revised to include people who are experts in their culture, not only those with a college degree
- Attorney fees in contingency fee cases should be set by statute.
- Non-discrimination should be the rule in allocating fault among multiple defendants.
- Criminal should not be able to sue unless there were extreme malicious actions.
- Re statute of repose – Natives do not know they have the right to sue because the Western system of justice is alien to them. Until the year 2020 or so, they should have a longer time to bring suit and then after that there should be some limit.
- There should be different ways to deal with dangerous persons, as opposed to those who are known to be responsible but may use drugs socially.

Anchorage Community Forum: Tuesday, November 19, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Julian Mason, Dr. Rodman Wilson, Senator Johnny Ellis, Jeff Feldman, Judy Brady, Steve Williams
Attendance: approx. 65

Comments on Situations:
Situation A: Earthquake
Cap on noneconomic damages

- Generally support no limit on pain and suffering
- Most said no cap - dissent said there needs to be a limit, life not fair, cost of compensation passes loss on to everybody
- Inappropriate for governing body to limit compensation
- Show of hands–
  - cap on pain & suffering if full recovery - 14
  - cap on pain & suffering if permanently disabled - 12
- cap if strict liability, not if gross negligence or intentional

Statute of repose

- Most said not limit to 10, but might stop at 40 or 50
- Depends on useful life of building or other item
- 15 years not enough for a building, unless built for shorter design life
- Depends on what is known at the time .
- Some feel people need an absolute right to go to court: not right to win, but right to sue
- Others feel things wear out, not always designed to last

Loss of consortium

- Should people be able to sue? 20 say yes
- Should there be a cap? 15 say yes

Situation B: Medical Malpractice
Hospital liability for emergency room doctor

- Majority felt should be able to sue hospital, minority felt independent contractor should be responsible; most thought doctor should be required to carry insurance.
- Hospitals are cheap, hire the cheapest doctor to moonlight, not certified
- Suggested alternatives: state pool for malpractice, state consumer review board, malpractice insurance for other professions, health care reform to reduce litigation

Suing when reac adulthood

- All of group, including doctor, said should be able to sue when becomes an adult; audience agrees
- 18-year-old might get $1 million, blows it in a year, ends up an Medicaid - should go into a trust as a matter of law
- Trial lawyer: my clients often like a structured settlement
- nobody wants to be on Medicaid, 18-year-olds don't know their rights, lifestyle radically changed, all family members affected even after child becomes an adult
- Setting up trust discriminates against handicap. we don't have the right to assume we know better than 18-year-old - I know 50-year-olds that blow money too

Situation C : Automobile Accident
Should the victim be able to sue person who lends car to drunk driver? yes
Should drunk driver be able to sue friend for lending him the car? no
Should drunk driver be able to sue the state for negligent maintenance?

- Group 1 says yes, 5-4, but weak case
- Group 2 says no, should drive according to conditions

Should victim be able to sue the drunk driver for punitive damages? unanimously yes
Should victim be able to sue the friend for punitive damages? yes
Should she be able to sue the car manufacturer? yes
Should a share of the punitive damages go to the state? no – only one says yes, 100 percent

- Greater windfall if it goes to the state
- The word "windfall" makes it sound like it's easy to get money, but it's not
- Increasing predictability in California didn't decrease rates

[Mr. Mason: there are two well-documented points of view about what happened in California]

In general, people favored mediation and consumer review board
Favor cap on punitives? about one fourth of audience raise hands
What should it be based on?

- Already has to be outrageous or reckless conduct, clear and convincing evidence
- Corporate America running for cover
- We should address how to reduce frivolous lawsuits
- Attorneys should be liable for half the attorney fees

Public Testimony Comments/Concerns:

Bonnie Nelson - AKPIRG volunteer

- Thanks for your work - would have liked disabled people on task force
- need health care reform - administrative solutions would cut costs, protect consumers
- need to protect good doctors and architects, but can't hurt consumers in doing it
- favor mediation, consumer protection

Daryl Nelson - AKPIRG volunteer

- Have been listening to task force for 3 months - you're not thinking about person who's injured and their families
- Have an injured family member whose wife had to give up her career to take care of him; should take things such as this into account when calculating economic damages
- Child that's hurt should be able to sue once becomes an adult - might be hard for defendant, but child will be dealing with the problem for the rest of their lives
- No cap on noneconomic damages - every situation is different

Frieda & Horace Curtis

- We've had legal problems for last ten years that have cost us over $60,000; have told the state about it, but they don't do anything; insurance division doesn't care
- Not for tort reform at all

Steve Conn - AKPIRG executive director

- Asked crowd, How many in favor of cap on punitive damages? about 2-1 say no
  - cap on noneconomic damages? about 2-1 say no
  - how many know me? about 1/3, so not all from AKPIRG
- Alaska has already have a lot of tort reform – one of only 9 states with a cap on noneconomic damages
- Already have a loser pays system
- Problem is a fundamental lack of access to justice in the civil law system - hope you'll recommend a new task force to governor to study that
- Any barriers to right to jury should be viewed cautiously
- Never seen a process with less allowance for public testimony; glad to see the turnout

Jeff Rubin - Plaintiff and business attorney

- Has reviewed task force work; what concerns him most is allocation of fault provision
- Allocating fault to nonparties violates basic tenets of our justice system – allows people to enter into collusive agreements to shift blame to someone who won't have to pay, because of statute of limitations or some other reason
- Jury assigns fault to person who rolls over and accepts it, to help other defendants get off
- Idea that caps lower insurance rates is erroneous – more important is enforcement of safety standards and regulation of insurers, to prevent accidents and bad-faith conduct

Les Gara - Attorney and AKPIRG board member

- Victim should get full compensation - everybody agrees with that
- What if there's a frivolous lawsuit? you recommend they pay full attorney fees and fine - that's great, so now let's talk about meritorious suits
- Punitive damages: shouldn't put mom-and-pop businesses out of business and your proposal covers that
- Worried about wrongful termination suits: difficult to bring, no reason to make harder, threat to job security of every worker in state - not receiving huge amounts of money - I turn away a lot of legitimate cases
- Allocation of fault: your proposal sets up a shell game – plaintiff will be responsible for attorney fees of people he doesn't think are liable. This won't provide full compensation, but full employment act for attorneys

Scott McIntire - AKPIRG volunteer on workers' compensation issues

- Workers' comp is the original tort reform act; evaluations say it's an abysmal failure; should investigate it, not incorporate it
- Allocation of fault to employer, presumption of compensability don't work
- caps don't go up with inflation

Lee Schlosstein - Board of Trustees of Alaska Medical Association

- Caps do make rates go down, as in California, where insurance costs are half of NY or Florida
- Group submitted written testimony

Donna Brooks

- Task force has failed to look at access to legal help for victims
- Can't get professionals to testify against each other, which increases costs
- ADR a good first step

Ross Brudenell - Alaska State Medical Association, chair of expert advisory panel committee

- We believe the panel system works
- Only have anecdotal information, but would like to analyze the data accumulated over last 20 years, would like to fund a study - have only looked at first 110 cases, not the next 450 - would like to know if it does any good - in the meantime would like to keep it going
- Would like to speed it up, with a little task force with bar association, medical association, courts to look at it
- Most cases get a report in 6 months, which isn't fast enough

Theresa Obermeyer

- Don't see any state troopers here; I'm at a loss without them
- Comments are about federal courts: three federal nonjury trials, jailed 29 days - it's your tax dollars at work

Steve Theno - engineer, Professional Engineers in Private Practice

- PEPP supports responsible tort reform, for citizens and economy

- Support:
  1) should be a certificate of merit to allow lawsuit to proceed
  2) reasonable statute of repose
  3) reasonable cap on punitive damages
- We're small businesses, not corporate America

Paul Lott - welding engineer

- Hope debate doesn't get dominated by political self-interest
- Took nine months to get workers' comp, shouldn't be that difficult
- You should look at NAFTA; you should define medical injuries

Lori Johnston

- Think you should trust the juries, because it's us, your neighbors; if you think we're too stupid, educate us
- It is perverse to lower amount of pain and suffering without finding ways to reduce pain and suffering, because insurance companies don't pay out what they should
- You could keep the pain and suffering and punitives if I could get the medical care
- Look at reason why there are so many lawsuits – because insurance companies are not doing their jobs

Soren Wuerth - citizen, Common Roots

- Disappointed in makeup of task force; all members have financial interest in outcome, no one of color, no one disabled
- Disappointed that only 7 out of 21 members here tonight
- Oppose statutes of limitations and repose, caps

Jim Sykes

- Shouldn't make decisions until everyone understands the issues and have some basis for the decision and can reach consensus
- Time is too limited for testimony, tonight and during task force; don't want to see people's rights limited
- Want to see consumer boards: respect doctors, but citizens should be on boards too
- Caps will be distinct advantage to big business to estimate if cost of wrongdoing is worth the cost of doing harm
- Does that mean that Exxon won't have to worry any more? it might as well use single-hulled tankers
- Recommend that ideas be circulated for another year to let us talk about it, urge legislature not to go forward

Oren Seybert - Alaska Air Carriers Assn. & Peninsula Airways

- Concern is with regional air carriers, who have serious problem getting insurance, because of punitive damages; jury awards are driving insurers out of state
- Settlements are 3 times compensatories to avoid juries
- There is a definite correlation between verdicts and rates
- Many areas totally dependent on our services of the air carriers
- In recent plane crash at Lake Hood: carrier only had $150,000 insurance per seat because couldn't afford any more; if put cap in place, will lower rates, and then those victims could be compensated

John Haxby

- Frivolous lawsuits are hard to define
- Plaintiff and defense attorneys should divide the costs
- Should eliminate or limit contingency fee
- If attorney malpractice statute of limitations is dropped from 6 to 2 years - should reduce everybody else to that too [Mr. Feldman: This just brings statute of limitation for attorney malpractice into line with that for other professionals.]

Catherine Doss - victim of being rear-ended by drunk driver

- Hard to establish economic loss for self-employed person
- Important not to weaken rights of citizens
- When you're sick, hard to fight or advocate for yourself
- My experience is that there aren't a lot of frivolous lawsuits
- Agree you should keep this process open

Sandy Sanderson - President of Alaska Independent Blind & member of national organization doing litigation on behalf of blind

- Why are legislators doing this?
- Professionals always cover for themselves
- My mother was a victim of malpractice; my son is fighting his doctor & his insurance company. He will have to leave the state and see some other doctor to keep from being disabled for the rest of his life
- Why should we protect these people?
- Workers comp has done more harm than good
- Remember who did this tort reform business when you vote

Lynn Correl - VP of Alaska Independent Blind

- Has been interested in this for several years
- Is sure that Rep. Porter, her representative, has good intentions, but he's assuming that everyone is playing fair, and she thinks they're trying to get rich
- This is a disability rights issue, not a get-rich plan for doctors, lawyers and insurance companies
- Have to stop bailing out insurance companies and lawyers, use the money for people who can't afford it - pool of money for people who need to litigate, not settle
- Can be too sick, too much in pain, too much in grief to do anything about it
- Embarrassed how this task force hasn't listened to public

Steve Sims - Plaintiffs' personal injury lawyer

- Concerned about mediation proposals - I don't think I should be told when to do it - maybe I need to talk to witnesses first so the parties know what will say before we mediate
- No fault insurance doesn't work
- Need to trust juries, need to have trials to establish baseline values on cases so 95 percent of cases can be settled - 12 people to really think about the case
- mandatory disclosure (discovery) just adds problems
- My views not necessarily shared by other trial lawyers

Tanya Braslavsky - engineer

- Professional engineers support your work, mandatory mediation
- Not trying to get away with bad practice
- No amount of money can compensate for losing your health; insurance doesn't solve problems, just buys out a poor practitioner
- Money is better spent not on insurance, but on regulatory enforcement and professional boards - higher board fees would be OK - education
- Fear of litigation doesn't make someone a better practitioner; insurance and lawsuits don't make anyone more secure

Denny Victor - car accident victim

- This system not perfect, but better than what's being proposed
- Limits won't help anyone – what would help would be if insurance companies would pay when they're supposed to instead of having to litigate to get paid – my attorney spent 10 years on a contingency fee to get recovery -
- Arbitrary limits would restrict people's right to sue and get paid - not fair

- Let juries decide what an injury is worth, not someone in Juneau to decide

David Booth

- Disabled in 1990: awarded $2500 for bad knee; hard to get workers' comp; went into depression, lost everything
- Showed task force what you get when you depend on workers' comp and the food bank [two rotten carrots and a loaf of bread]

Harry P. Lang

- My purpose here is not to hear what you have done but to say what not to do that I believe is non-equitable and leads to injustice.
- Do not try to fix a good civil legal justice system that woks.
- This was done with the workers' compensation system about 10 years ago and that system does not work at all. The same points of argument were set forth at that time as are now being used for tort reform. None of the promises materialized:
  - Rates did not come down
  - Speedy remedies did not happen
  - Insurers deny medical care
  - Insurers can behave in bad faith
  - Much money in public assistance and medical is expended for insurers to achieve their unjust enrichment.
- Please do not fix what now works.

Fairbanks Community Forum: Wednesday, November 20, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Dr. Rodman Wilson, Bruce Botelho, Charlie Cole
Attendance: approximately 25 people

Comments on Situations:
Situation A: Earthquake
Should there be a limit on recovery for pain and suffering? split vote

- Give juries credit for following instructions, should be individualized and not set by legislature
- Outrageous cases you hear about are few
- Should be a limit in civil law just like for criminal penalties
- Look at McDonald's coffee verdict, what juries can do without accountability

What if permanent paralysis? 5-1 say no limit on loss
Should victim be able to sue architect for negligence?

- Within twelve years is reasonable time to sue
- There needs to be an end to it at some point, but it should be in range of 15-25 years
- Doesn't matter that he retired, whether he has insurance
- Should determine life of construction, carry insurance for that long
- Market should produce tail coverage to meet the need

Situation B: Medical Malpractice
Should person be allowed to sue the hospitals as well as the emergency room doctor? yes

- Hospital provides the service, advertises it
- ER doctors come and go, should be able to find hospital

Should hospital require doctor to carry insurance?

- Some say yes, if hospital not liable
- No incentive for victims to sue if not insured, so doctors shouldn't be forced to carry insurance – it makes them bet against themselves
- Generally feel people shouldn't be forced to purchase insurance, but want patients covered in this situation, so if it's not the hospital, it has to be the doctor
- Individual shouldn't be able to hide behind corporation, but doctors at least are responsible for own actions

Should minor be allowed to sue when she turns 18?

- Yes: children can't initiate lawsuits

Does it matter why her parents decided not to sue?

- Some say yes, some no - depends on the facts
- Doesn't matter if doctor has retired, but hospital should still be on the hook

Should defendants be able to countersue for a frivolous lawsuit?

- Maybe, but it would be like getting blood from a turnip

Situation C : Automobile Accident

Should a friend who lends a car to friend with DWI record and license suspension be liable? yes

Should drunk driver be able to sue his friend? no

Should drunk driver be able to sue state for negligent road maintenance?

- Mostly no - if sober, would be a different story

Should plaintiff be able to sue friend for punitive damages if knows about suspension and record?

- Split – yes, if appears drunk when he borrows the car

Should a portion of punitive damages go to the state?

- One yes: it's punishment, not compensation
- Four no: need incentive to sue, plaintiff bore the brunt of injury and suit

Public Testimony Comments/Concerns:

Mike Prax

- Governor should be taken to task for vetoing a bill, just to create a task force that recommends the same things
- ADR mechanisms already available in the market, no impediments to using them - let people decide through the marketplace whether to use them, although we tend to go to court too soon
- Governor is usurping legislature's function to make these laws
- No mandatory insurance: we get the impression that suing an insurance company, not an individual
- Share of punitive damages to state OK because it's the state's business to punish
- Should be able to countersue attorney for frivolous lawsuit; attorneys use threat of protracted legal process to extract settlements, defendant ought to be able to hold attorney accountable

Bart LeBon - Board of Directors of State Chamber of Commerce

- We supported HB158, disappointed when it was vetoed, we've responded with an initiative to put on ballot [describes provisions of initiative]
- theory behind limiting punitives to $300,000? is to limit exposure for those conducting business in Alaska

[Mr. Cole: why shouldn't businesses be subject to what jury decides?]

- company already suffers loss of reputation, lower company value
- juries can get swayed by emotion of event
- should be limited like length of sentence, which legislature sets

Allan Cheek - attorney

- Initiative doesn't apply to punitive damages award in Exxon Valdez - I view this as an admission that sometimes a large award is appropriate

- Think it's strange that legislature should limit citizens' right to render justice, usurp jury function
- Have any businesses gone out of business as a result of large punitive awards?

[Dr. Wilson: potential for punitive awards affects decisions of physicians, nature and length of practice, although not a crisis in availability][Attorney General Botelho: Judicial Council found no punitive damage awards in medical malpractice suits]

Randy Griffin -

- Insurance rates: governor wanted to be sure that savings of insurance companies would be passed on to consumer - I think the free market will take care of this
- Punitive damages should go to the state: pay back to society, not indenture defendant to the plaintiff

[Mr. Cole: costs of pursuing a punitive damages claim are high - should plaintiff be able to get state help in suing?]

- Cost of lawyers should be returned to the plaintiff, maybe an additional 25 percent, with the rest to the state

Albert Parrish - Plaintiffs' attorney

- Every time you set a limit, a fact situation will come along that will make you feel it's unfair
- Idea is to make person whole - limits don't match that goal, but juries can
- Letting defendant lay off fault on nonparty: shouldn't be able to make an argument with no one there to oppose it
- Currently have mandatory automobile insurance - idea there is not to keep driver from being sued, is there to help injured person get compensated - we're twisting system so it doesn't work to provide the compensation

[AG Botelho: what's inherently more fair about requiring defendant to bring in additional defendants?]

- If defendant can lay off blame on someone who hasn't been sued, will have to prove a negative, that third party defendant is not liable

[AG Botelho: why shouldn't plaintiff bear responsibility to sue someone else if defendant says he's not negligent?]

[Dr. Wilson: appears to AMA that complaints already name everyone in sight, plus John Does]

- Amazed that insurance companies don't bring in more third parties under current law

Robert Bruce Stevenson - burn injury victim [passed around photos of his second and third degree burns]

- Hit by wall of flame from explosion of 500 gallons of propane
  - tank ruptured because of mishandling
  - three of us burned quite badly, several million dollars in damage
- There are a lot of hazards waiting out there for Alaska workers
  - took four years to get a settlement, took even longer to heal
  - I suffered post-traumatic stress syndrome
  - I had to go back to work at the same spot, watch casual handling of tanks again
- System finally worked, but took four years
- Really wanted to go to court, thought that would be psychologically healthy for me, but if defendant or workers' comp had come to me in the hospital and said what can we do to make it right, could have settled it in 6 months
- If anyone thinks there should be a limit to pain and suffering, take a look at these photographs

- Think about what it would be like to get dunked in a hot bath and scrubbed with a wire brush when you have no skin - you wish you were dead - no amount of morphine could do the job

Douglas Yates

- Tort reform gives power to insurance companies and HMOs
- There has been a publicity campaign to convince Alaskans that litigation is out of hand - idea is that reform will lower insurance rates and medical costs
- Only 10 percent of those injured in medical malpractice cases attempt to sue
- Anecdotes about frivolous lawsuits go unquestioned
  - most cases are for very limited damages
  - plaintiff loses half the time
  - punitive damages are rare, often small
- HB 158 is part of a well-coordinated attack designed to strip Alaskans of rights, tilt balance toward corporate defendants, less protection for citizens

April Rodgers

- I agree with the question, should changes be made to state's immunity from suit? But I don't want the answer to be more immunity
- With no accountability there's no caring - individuals are supposed to care about other people, but state doesn't have to

Scott Calder

- This discussion gives only passing mention to state's liability
- I think using these scenarios is a way to use up our time rather than let us testify about what we care about - let us talk about our own real cases
- State should prevent and alleviate injuries, not cause them
  - should set a good example for private enterprise
- Move toward ADR is desirable
- Bad idea for state to be immune
- State shouldn't require mediation, should just provide a good example
- Not all problems can be solved by hiring a lawyer and fighting about it, good to get individuals involved

Lou Anne Maxwell - mediator in private practice

- Don't want to see citizens cut off from civil justice system
- Putting limitations on recovery is unfair
- I don't trust corporations more than courts or juries
- Some corporations don't blink at $300,000; some executives feel they have no personal exposure; corporations should be liable for punitive damages
- Glad to see ADR recommendations – need to be alternatives to court
- Can't force people into it, other than to give it a try
- People don't understand mediation, think it's meditation or medication
- I don't see it as another layer, should work out to be less expensive if more efficient, so parties should pay unless indigent
- Need to have standards for mediators

Janet Baird - Fairbanks board member of AKPIRG

- Public access to meetings: concerned about lack of publicity – tiny notice in newspaper, no coverage by paper
- These are serious issues: real injuries to real people
- Women's health issues often have to do with bad products, need recourse for serious injuries
- Look at whole person: losing your job isn't just a monetary proposition, there are psychological and family issues too - so dividing damages up like this makes no sense

- Opposed to limits on damages
- Punitive damages: information is that this is not a problem
- Case hasn't been made for a cap
- Individuals are at a disadvantage dealing with large corporations, and reform shouldn't restrict people from fair treatment
- Redress of injury should be the goal, not the profits of insurance companies

Chris Bataille - Attorney

- Your videotape confirms my experience in Fairbanks that punitive damages are very rare, reduced on appeal
- This bill removes awards of noncompensatory damages from province of jury; inconsistent with allowing jury to decide who to convict of murder, who to sentence to death
- If award goes to state, plaintiff should get full attorney fees
- If take on Exxon or Texaco, will be an expensive process
- Would still have Pintos on the road without punitive damages
- Outrageous, shocking, fraudulent behavior: should pay for it, or serves no social purpose to find them liable for it
- Judicial settlement conferences effective, results in high rate of settlement, as good as mediation
- Should determine if insurance companies are making excessive profits - this is the third tort reform, and rates haven't gone down yet

[Judge Stewart: nothing we do in Alaska has any effect on insurance rates]

- Then why make these changes? if going to do them a favor, should have something in exchange
- HB 158 allows wrong-doers to escape responsibility
- The accessibility problem is in the fact that insurance companies not evaluating claims fairly, not court costs

Jodi Olmsted - President of Parents Concerned for Reform

- We are parents wronged by social services workers
- State workers are immune, make decisions without any recourse
- Should be video recording of child allegations of abuse
- Like to see more attention to people being dragged through the system; people are paying for abuses of the state
- Need settlement information - people settle for wrong reasons

Sybil Skelton

- Should pay mediators with the punitive damages the state collects

Coert Olmsted

- No crisis in torts, much less in Alaska
- Even if there were, caps aren't the answer
- Runs against many deep principles regarding amount of corporate profits - those are communist ideas and would be immediately rejected
- Cap premiums instead: have a single payer with actuarial rates
- Insurance is a scam, offers no real protection – shouldn't be a private function

Leslie Simmons - member, Alaska Dispute Settlement Association

- Supports the 5-year mediation/early neutral evaluation pilot project.
- ASDA, a nonprofit organization is working on a collaborative effort to develop credentialing and standards for neutrals. The team developing these standards for practitioners represent multiple geographic regions and multiple professions, The subcommittee's goal is to have their practitioner recommendations completed by February 15, 1997.

SITUATION A: AN EARTHQUAKE

An earthquake late in the evening causes an office building to collapse. An employee named Grace is working late and is injured by falling debris. It is later discovered that the architect's design for the building was faulty and did not provide enough structural support to survive a mid-sized earthquake. The building was built twelve years ago. The building was well maintained, and there was no way that the owner of the building could have realized the problem.

1. The lower part of Grace's body is crushed under debris. She cannot walk, needs multiple operations, and is in terrible pain for two months.

   a. Suppose Grace completes intensive physical therapy and eventually recovers the full use of her legs, without many scars. Should there be any limit on the amount of money she can recover for her pain and suffering?

   b. Suppose Grace's injuries result in permanent paralysis from the waist down. Should there be any limit on her recovery for pain and suffering, loss of enjoyment of life, and other noneconomic injuries?

   c. Suppose Grace can no longer have sex with her husband or play with her small children. If you think there should be a limit on the amount she can recover, should this limit include claims by her family for loss of companionship?

2. Suppose the building collapsed in the earthquake because the architect's design did not provide enough structural support to survive a mid-sized earthquake. The architect's design flaw was the direct cause of Grace's injury.

   a. Should Grace and the building owner be able to sue the architect for negligence even though the negligence occurred twelve years ago? Is it fair to ever end the architect's liability at some point after building completion? If so, when?

   b. Suppose this was the architect's last project before he retired. When he retired, he bought a malpractice insurance policy to cover any claims that might be made in the years following his retirement, but he could only find a policy good for seven years, so he is currently uninsured. Should the building owner and Grace still be able to sue him?

   c. Suppose that in addition to the inadequate structural support, a cable broke during the earthquake. This allowed a heavy light fixture to fall on top of Grace, adding to her injuries. It is later discovered that the cable was defective and would not have broken if it had been manufactured properly. Should there be a time limit on how long Grace has to sue the manufacturer? When should the time start – when the building is built, or when the cable breaks?

   d. Should Grace be able to sue the building's owner? Why or why not?

SITUATION B: MEDICAL MALPRACTICE

Maggie falls down and hits her head. Her head hurts, so she goes to the emergency room at an Alaska hospital. The doctor there, Dr. Johnson, examines her, decides she is all right, and sends her home. After two weeks, Maggie goes to her own doctor, who finds a large pool of blood around her brain and drains it, relieving the pressure that was causing the headaches. Because of the prolonged pressure, Maggie now has occasional seizures.

1. Dr. Johnson is an independent contractor at the hospital where Maggie went, as are many emergency room doctors in Alaska. They are not employees of the hospital but offer their services to patients who come to the emergency room under a contract with the hospital. The hospital reviews their credentials before it allows them to practice there and reviews their practice periodically, but it does not directly supervise their work.

   a. Assume that Maggie can file a lawsuit against Dr. Johnson. Should Maggie be prohibited from suing the hospital for what she says was Dr. Johnson's negligence because he was not a hospital employee?

   b. Should the hospital require the emergency room doctor to carry malpractice insurance?

   c. Should the hospital be required to carry malpractice insurance to cover the emergency room doctor?

2. Suppose Maggie is only 10 years old when this happens, and her parents do not file a lawsuit against Dr. Johnson or the hospital. By the time Maggie reaches age 18, it is clear that her family cannot support her need for specialized care for the rest of her life.

   a. Should Maggie be allowed to bring a lawsuit on her own behalf, even though 8 years have passed since Dr. Johnson treated her?

   b. Does it matter why her parents didn't file the lawsuit at the time?

   c. What if Dr. Johnson retired from practicing medicine two years after this event?

3. Suppose Dr. Johnson's examination was thorough and competent, and that he followed standard medical procedure in discharging Maggie when he did. Under current law, if Maggie loses the lawsuit she may be required to pay part of Dr. Johnson's attorney fees and costs.

   a. Should Dr. Johnson be able to sue Maggie for damages, if Maggie did not have reasonable grounds for suing him?

   b. Should Maggie pay all of Dr. Johnson's attorney fees and costs?

   c. What other methods could the courts use to discourage weak lawsuits without discouraging meritorious ones?

SITUATION C: AUTOMOBILE ACCIDENT

Frank has just been released from jail after serving a sentence for his third conviction for drunk driving. His driver's license has been suspended. One night, he borrows a car from his friend Bill, gets drunk, and goes driving. At a slippery intersection, he loses control and rear-ends a car driven by Mrs. Smith. Her gas tank explodes on impact, and Mrs. Smith is badly injured.

1. Mrs. Smith sues both Frank and Bill. Assume that Mrs. Smith will win her lawsuit against Frank, because his behavior does not meet the standard of care that society expects from people.

   a. Suppose Bill knew about Frank's DWI record and his license suspension. Should Mrs. Smith be able to sue Bill?

   b. What if Frank appeared obviously drunk to Bill when he asked to borrow Bill's car?

   c. Suppose Frank is also injured in the accident. Should he be able to sue Bill for lending him the car? Should he be permitted to sue the State of Alaska for poor road maintenance?

2. In certain situations current law allows those bringing the suit (the plaintiffs) to sue for punitive damages – i.e., damages designed to punish the defendant and discourage future misconduct. In Alaska, punitive damages can be awarded only if the conduct of the defendant is outrageous, or the result of hostile feelings toward the plaintiff, or shows reckless indifference to the rights or safety of others.

   a. Do you think it makes sense to allow Mrs. Smith to sue Frank for punitive damage, to deter or punish him?

   b. Does it make sense to allow her to sue Bill for punitive damages, to deter or punish him, if Bill knew about Frank's record and suspension? If Bill knew Frank was drunk when he borrowed the car?

   c. Should there be a limit on the amount of punitive damages that can be awarded?

   d. If Mrs. Smith is awarded punitive damages by the jury, should part of the award go to the State of Alaska general fund, so Mrs. Smith doesn't receive a windfall recovery?

3. Suppose the gas tank of Mrs. Smith's car exploded on impact because it was improperly designed. The engineers who designed the car suspected the gas tank design might occasionally result in explosions, but management decided that fixing the problem would increase the cost of the car and make it harder to sell. The manufacturer made and sold quite a few of these cars.

   a. Should Mrs. Smith be able to sue the car manufacturer for punitive damages?

b. Should there be a limit on the amount of punitive damages? If so, should it be:

a flat dollar amount?
related to the plaintiff's economic losses (medical bills, lost income)?
related to plaintiff's noneconomic losses (pain & suffering, loss of enjoyment)?
related to the profit the defendant makes on the misconduct?
related to the defendant's income or net worth?
different depending on the situation?

Appendix B

Court System Data

Governor Knowles requested the task force to evaluate any changes in the volume and type of civil liability case filings in the Alaska court system. Task force staff evaluated court system annual reports and computer system records to track case filings from 1988 through 1995.

Before 1988, the court system placed tort cases in a category called "civil damages," along with contracts and many other civil cases, making it impossible to track tort cases by themselves. Since 1988, court system annual reports have separated out the categories of personal injury, property damage, and other civil cases, which include malpractice and business torts, along with nontort cases. Starting at about the same time, the court system began to computerize its records and provide more specific case categories, including automobile personal injury, automobile property damage, other personal injury, other property damage, wrongful death, and malpractice (divided into medical, legal, and other). These categories capture most of the tort cases, although some business and employment-related torts may be found in other categories and are therefore difficult to track. The court computer system came on line gradually from 1988 to 1991, with Anchorage coming on last, so complete computer records using the more detailed categories are available only from 1991.

Only very basic filing information is available from court system records. The rate of total tort filings has remained relatively constant from 1988 to 1995. In 1993, Alaska had 159 tort filings per 100,000 population, which placed it near the lower end of 28 states that the National Center for State Courts studied that year. In 1995, personal injury and property damage cases accounted for 5.5 percent of the civil cases in Alaska superior courts and 4.8 percent of all superior court cases, civil and criminal. In district courts, the category "civil/property damage" (which includes more than torts) accounted for 4.9 percent of the general

civil caseload and 1.0 percent of all district court cases (not including traffic tickets). Additional tort cases may be handled in small claims court, but small claims cases are not categorized in the court reports.

Alaska Court System Filings 1988-1995

Number of Personal Injury and Property Damage Cases

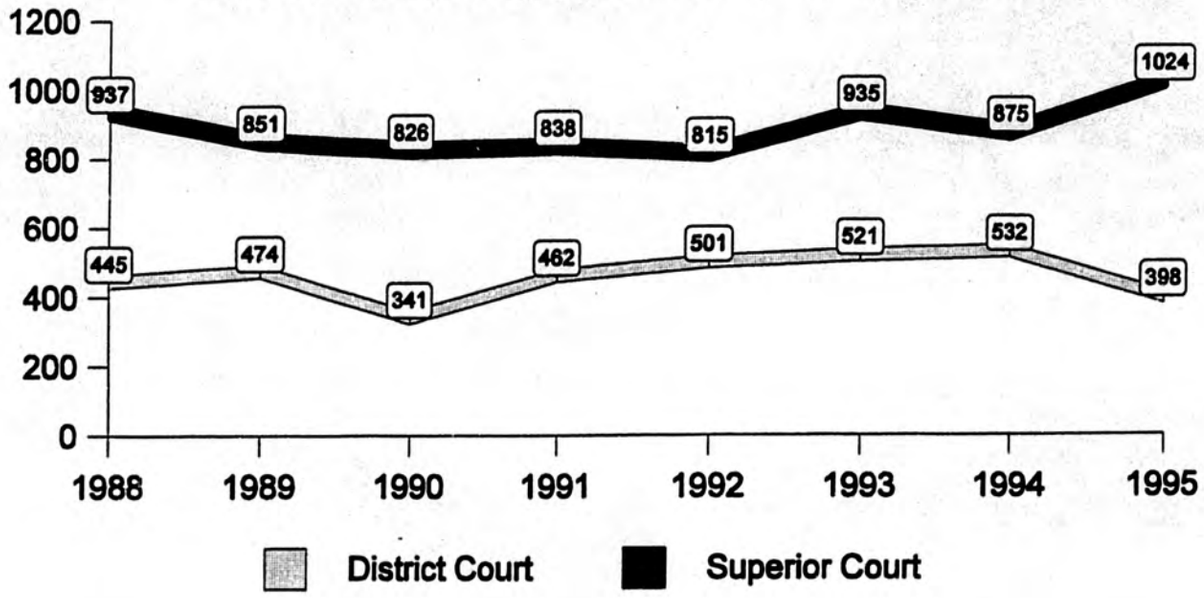


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data taken from Alaska Court System Annual Reports 1988-1995.

Alaska Court System Filings 1988-1995

Personal Injury and Property Damage Filings per 100,000 Population

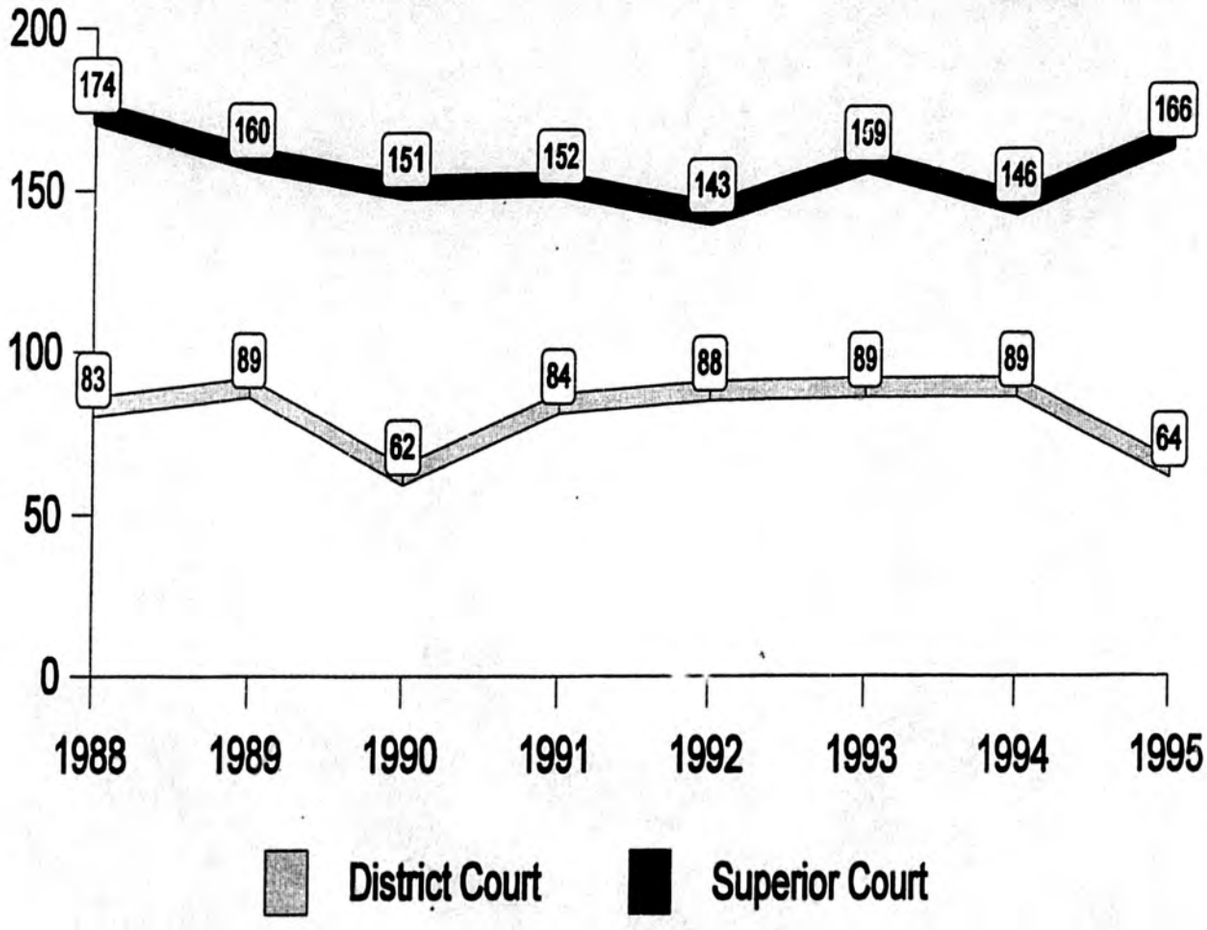


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data taken from Alaska Court System Annual Reports 1988-1995 and Alaska Department of Labor population statistics.

Alaska Court System Filings 1991-1995

Number of Personal Injury and Property Damage Cases

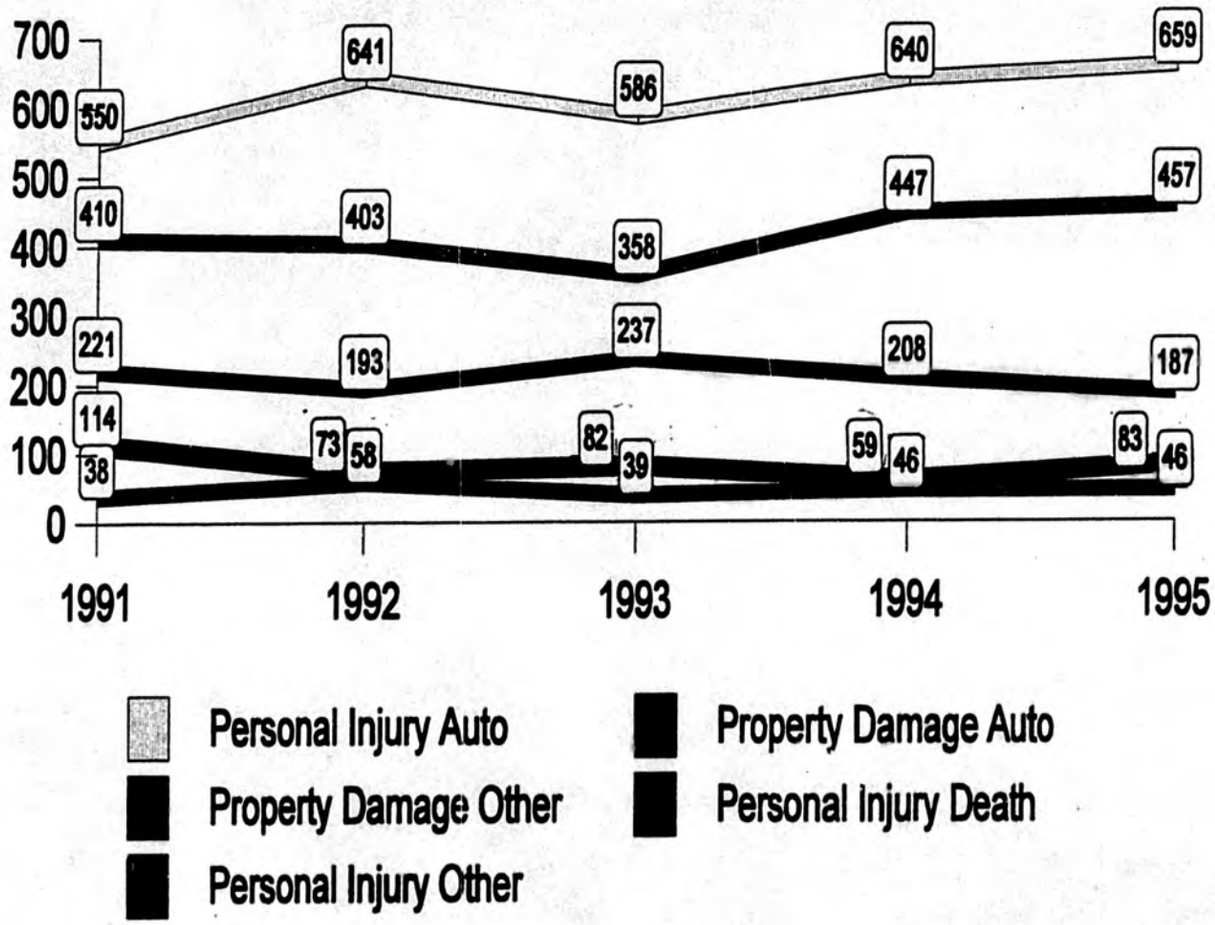


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data supplied by Alaska Court System Technical Operations August 9, 1996.

Alaska Court System Filings 1991-1995

Number of Automobile, Malpractice, and Other Personal Injury Cases

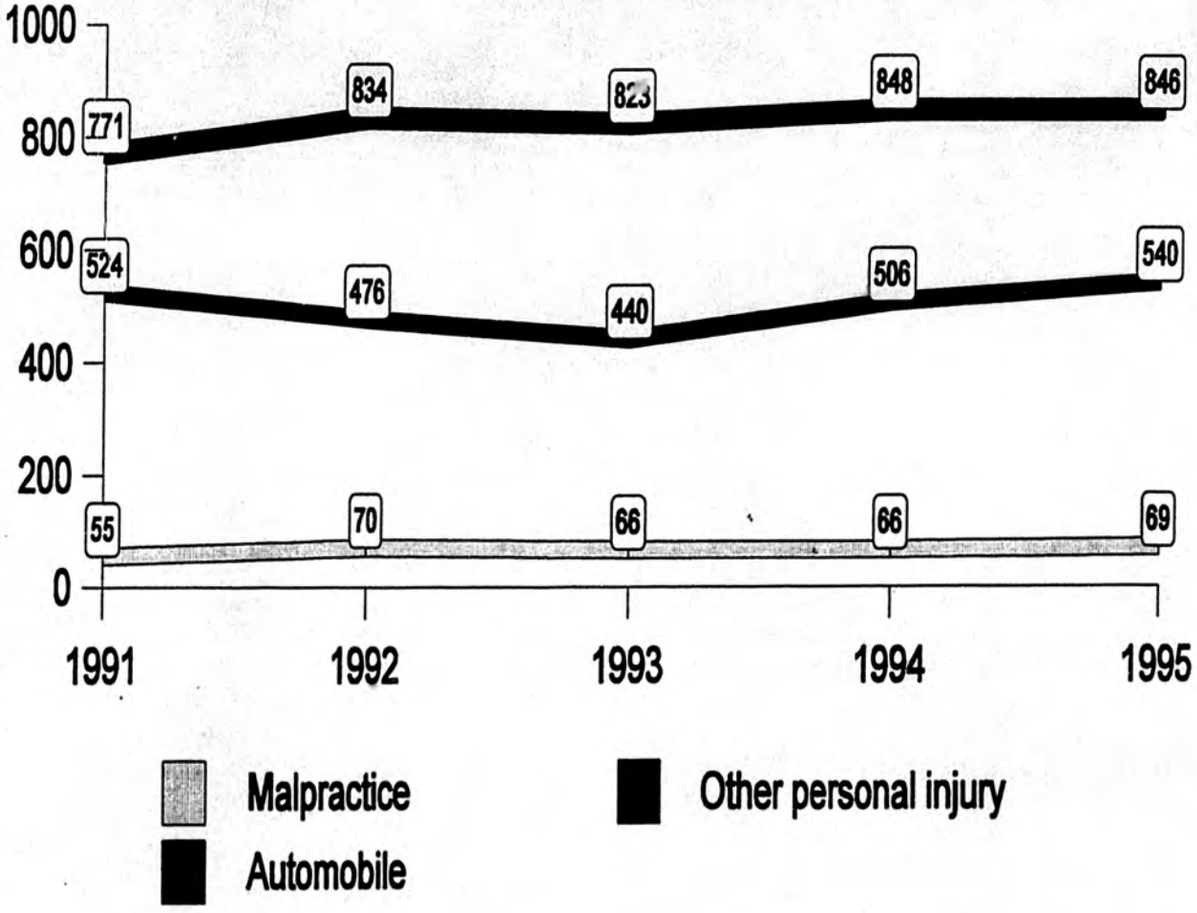


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data supplied by Alaska Court System Technical Operations August 9, 1996.

Alaska Court System Filings 1991-1995

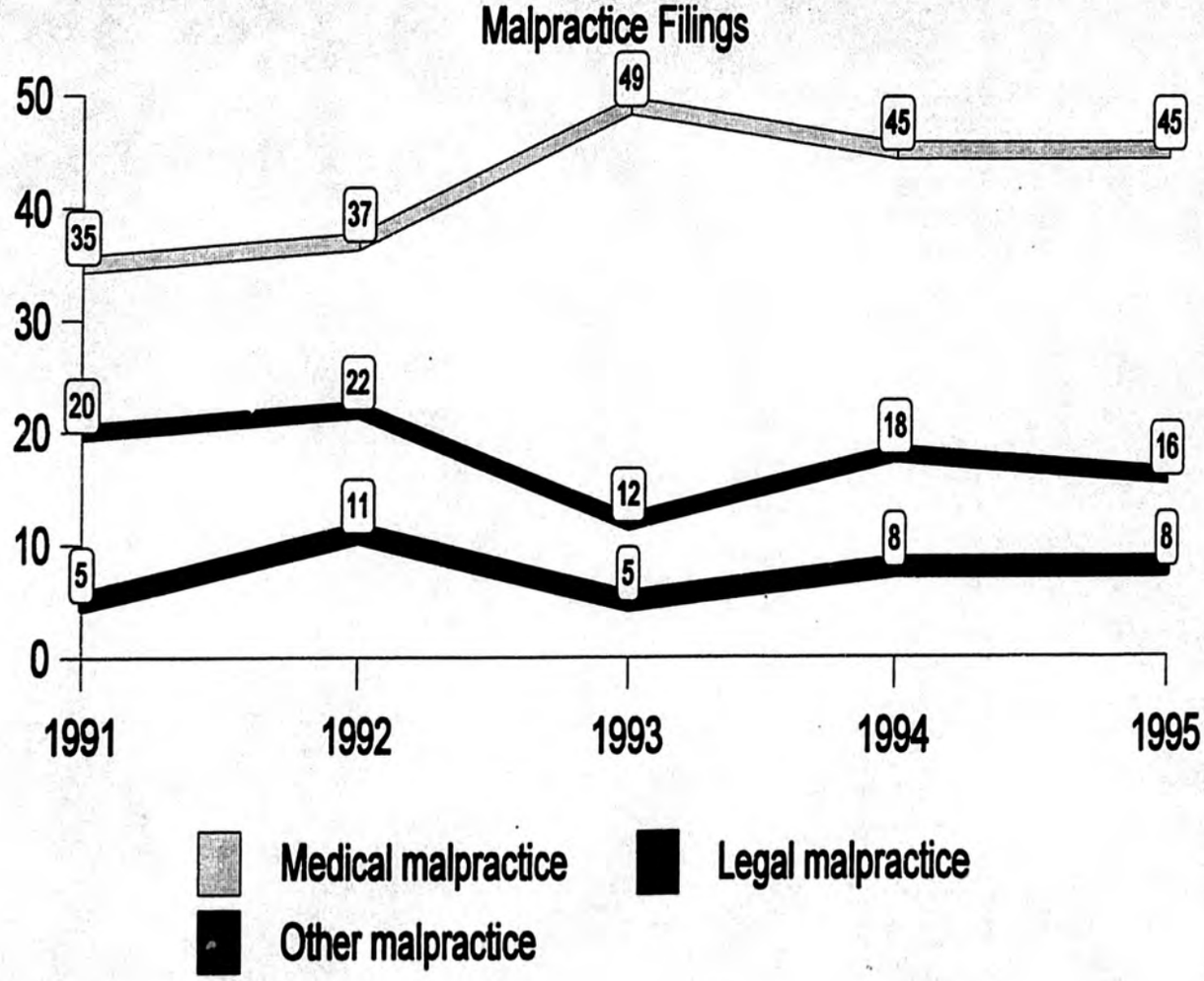


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data supplied by Alaska Court System Technical Operations August 9, 1996.

Appendix C

Report from Alaska Judicial Council

To address the Governor's request that it evaluate changes in the amounts awarded by juries as damages, the task force sought assistance from the Alaska Judicial Council. The council prepared an analysis of case file data for jury trials of tort claims in Alaska from 1985 to 1995.

The council identified 233 closed, jury verdict cases for the study and analyzed them in terms of case type, parties to the case, plaintiff and defendant verdicts, liability/outcomes, allocation of fault, damages, costs and fees, offers of judgment, appeals, and length of case. The task force used this information as it assessed the need for change in current civil liability law.

The appendix contains the report of the Judicial Council followed by a table showing average jury awards by year from 1988 to 1996..

alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501-1981 (907) 279-2526 FAX (907) 276-5046
http://www.state.ak.us/local/akpages/COURTS/AJC/home.htm E-Mail: 72302.1261@compuserve.com

EXECUTIVE DIRECTOR
William T. Cotton

NON-ATTORNEY MEMBERS
David A. Dapcevich
Janice Lienhart
Vicki A. Otte

ATTORNEY MEMBERS
Thomas G. Nave
Robert H. Wagstaff
Christopher E. Zimmerman

CHAIRMAN, EX OFFICIO
Allen T. Compton
Chief Justice
Supreme Court

MEMORANDUM

TO: Governor's Task Force on Civil Justice Reform

FROM: Susanne Di Pietro SDD and Teri Carns TWC by SDD

DATE: November 13, 1996

RE: Analysis of Case File Data: Alaska Tort Jury Verdicts, 1985-1995

The Task Force asked the Judicial Council to gather data on jury verdicts in tort cases from five state court locations for the previous decade. Because of the Task Force's accelerated schedule and limited research budget, the Council concentrated on the subjects most relevant to the Task Force's work. The study was not intended to be comprehensive, although it should give a reasonably accurate snapshot of jury awards in tort trials in Alaska in the past ten years. This memo reports the data and gives a general analysis of the results.[1] Task Force members interested in additional analysis may contact Judicial Council staff.

I. Methodology

The Judicial Council asked the Alaska Court System's Office of Technical Operations to identify all cases that had gone to jury trial within the past ten years at each of five court locations. Technical Operations gave the Council two different lists of civil cases with jury

---

[1] Available upon request from the Judicial Council are copies of the frequencies and cross-tabulations upon which the following analysis is based.

verdicts.[2] After reconciling the lists as much as possible, the Council's researcher looked at each case that the court system had identified as containing a jury verdict.[3] After discarding non-tort cases and cases that were still open, the Council was left with a data base consisting of 233 closed, tort jury verdict cases: 157 from Anchorage,[4] 57 from Fairbanks, 6 from Bethel and 13 from Juneau.[5] Because the Task Force was particularly interested in large jury verdicts, Council staff also informally polled a number of experienced litigation attorneys on large, tort jury verdicts that they could remember in the past ten years.[6]

Council staff designed a data base using Microsoft Access software to record information about the cases. The Council's researcher took the data from three sources: the complaint, the jury verdict, and the final judgment form. In addition, the researcher recorded information about post-trial motions, whether the case was appealed, and the outcome of the appeal. Council staff then transferred the data base containing the 233 cases into SPSS for Windows (a statistical analysis software program). All analyses were performed with SPSS.

II. Limitations of this Study

As discussed above, this study was not intended to be a comprehensive analysis of tort litigation in Alaska. First, the data base probably does not contain all tort jury verdict cases within the past decade, because the court system's lists of jury verdict cases probably were not complete. Some cases in some communities did not appear on the list. Also, because of the way the court system archives old cases, time and money did not permit the Council's researcher to

---

[2] The trials came from superior court twelve-person and six-person jury panels, and from district court six-person jury panels. About 87% of the cases were superior court matters and 13% were district court.

[3] The Council's researcher, who lives in Anchorage, traveled to Fairbanks to code cases from that location. The Attorney General's office arranged for an attorney and a paralegal, respectively, to code the cases from Bethel and Juneau. The Nome clerk of court reported the two cases from that location.

[4] The 157 Anchorage cases came from a pool of 424 cases identified by the court as potentially containing a civil jury verdict. The Council's researcher examined and discarded 157 other Anchorage jury verdicts that were not tort cases or did not qualify for another reason.

[5] In addition, the Council researched jury verdicts in Nome in the last ten years. The court's records showed four civil trials, two of which did not qualify for the study (one was still on appeal and one was a judge-tried case). Time constraints prevented included the remaining two Nome cases in the data base; however, we discuss them in this memo where relevant.

[6] Based on the attorneys' responses, staff found one case (from Bethel) that was missing from the court system's master lists. Other cases also may be missing from the data base.

review all of the older Anchorage cases. On balance, however, Judicial Council staff believe that the data base offers a reasonably accurate assessment of tort jury trial cases in the five locations.

III. Findings

This section discusses the Council's findings about the 233 tort jury verdict cases. The Council recorded information from the case files about a number of substantive issues, including what types of tort cases went to trial, who the parties were, which party prevailed, and what types and amounts of damages were awarded. The Council also recorded information about a number of procedural issues, including how often judges awarded costs and attorney's fees, how long cases took to resolve, how often cases were appealed, and how often appellate decisions changed the jury's verdict.

A. Case Types

The study grouped cases into twelve substantive categories. Over a third (37%) of the tort cases that went to jury trial in the last decade were automobile accident cases. The second most common type of case was premises liability (17%).The third most common was malpractice (13%).[7] Other types of cases, in descending order of frequency, included employment (7%, or 17 cases) general injury (7%, or 17 cases), general property damage (7%, or 16 cases), intentional torts (5%, or 12 cases) and product liability (3%, or 7 cases). The Council also found a handful of insurance bad faith cases (about 1%), and two common carrier cases (less than 1%).

B. Parties

Most cases were brought by an individual plaintiff or a family. In only six per cent of cases was a plaintiff an organization (organizations included businesses and state and municipal governments). In contrast, defendants often were organizations. In 63% of the cases, the plaintiff named at least one organization as a defendant. Individuals also appeared as defendants in many cases. In 58% of the cases, the plaintiff named at least one individual (excluding professionals) as a defendant. Thirty percent of all individual defendants were adult males, and fourteen per cent were adult females. Plaintiffs named more than one defendant in slightly fewer than half of all cases (44%).

---

[7] Most of the malpractice cases were medical malpractice. Of the thirty-one malpractice cases in the data base, twenty-six (84%) were medical malpractice.

C. Liability/Outcomes

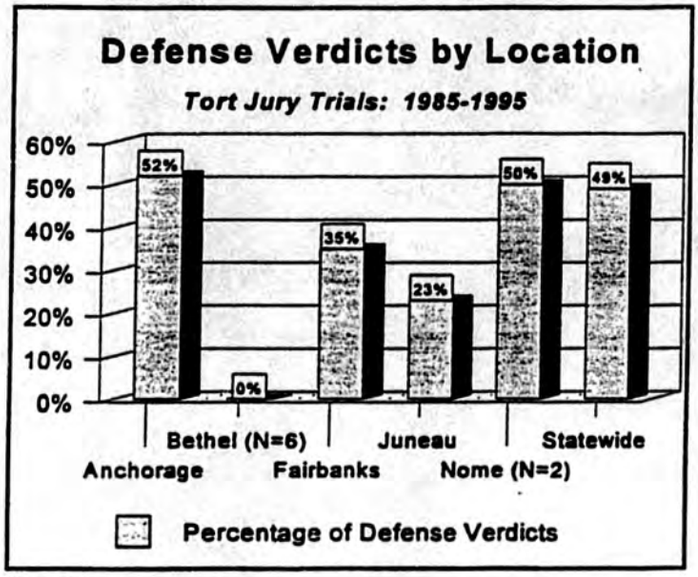


Chart 1
Alaska Judicial Council Jury Verdict Study 1996

Overall, plaintiffs and defendants were about equally likely to prevail at trial. Juries returned plaintiff verdicts in just over half (51%) of all tort trials statewide. In an additional four per cent of the cases (N=10), both the plaintiff and the defendant received awards. Further analysis revealed that plaintiffs' chances of prevailing varied by court location and type of case.

Chart 1 graphically depicts the differences in defense verdicts by location. Bethel was the most plaintiff-friendly forum, with all six jury verdicts going against defendants.[8] Next came Juneau, where juries returned plaintiff verdicts in 77% of the cases examined. In Fairbanks, 56% of verdicts went to plaintiffs. In Anchorage juries returned verdicts for plaintiffs 45% of the time.[9] In the two Nome cases, one was a defense verdict and one was for the plaintiff.

Analyzed by case type, plaintiffs were most likely to prevail in automobile accident trials (66% of the time) and general property (56% of the time). Defendants were most likely to prevail in medical malpractice cases (81% of the time) and premises liability (59% of the time). Outcomes in insurance bad faith, employment and general injury cases appeared to have split about evenly between plaintiffs and defendants. In sum, only 118 of our total of 233 cases involved jury verdicts for plaintiffs.

---

[8] Readers should be very careful about drawing conclusions from the Bethel data, because interview information suggested that defendants prevailed in other Bethel jury cases that were not included in this study.

[9] In about three percent of the cases, juries awarded some to both parties.

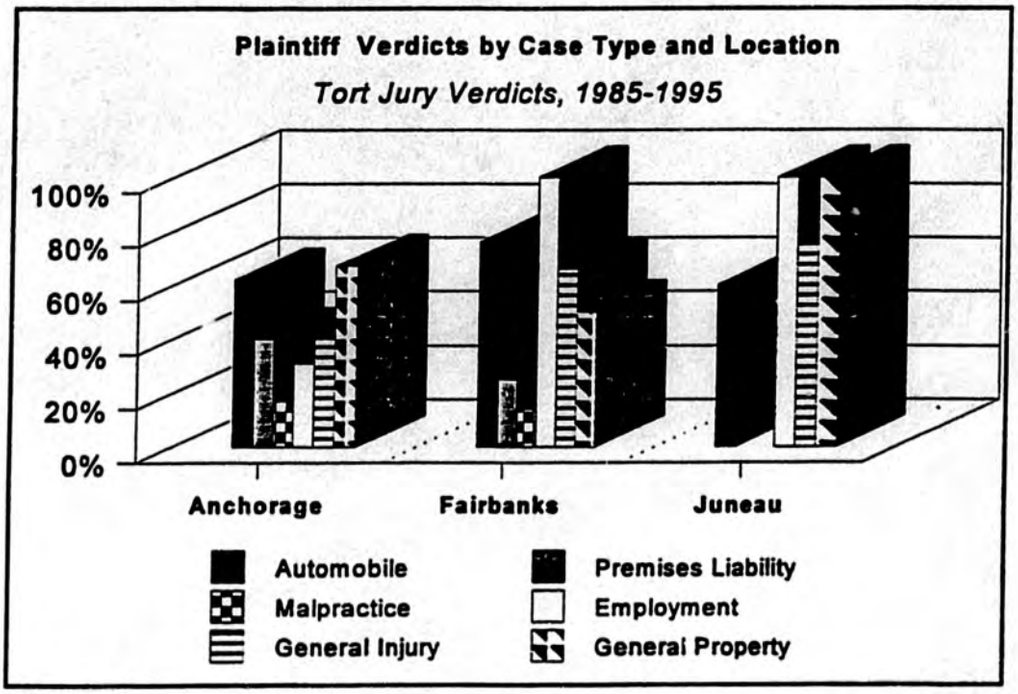


Chart 2
Alaska Judicial Council Jury Verdict Study 1996

Chart 2 depicts the percentages of verdicts juries returned for plaintiffs, broken down by court location and type of case.[10] Consistent with the statewide trends discussed above, plaintiffs in automobile cases prevailed more often in Fairbanks than in Anchorage. However, Juneau plaintiffs bringing automobile accident cases prevailed slightly less often (60% of the time) than did Fairbanks plaintiffs (76% of the time).

D. Allocation of Fault

Juries did not often allocate fault to plaintiffs, and where they did allocate fault, they did not tend to view plaintiffs as contributing substantially to their own injuries. Juries allocated fault in 12% of the cases; in only six of those cases (14%) did they assign half or more of the fault to the plaintiff.

---

[10] Bethel and Nome had too few cases to be included in this chart. This chart does not include cases in which the jury awarded some amount to both parties.

E. Damages

The study distinguished between economic, non-economic and punitive damages, and between amounts awarded by the jury and amounts set out in the final judgment. This section describes the types and amounts of damages awarded.

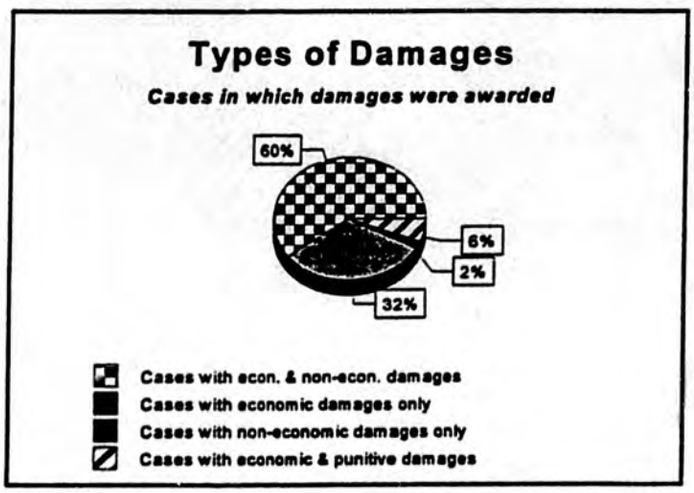


Chart 3
Alaska Judicial Council Jury Verdict Study 1996

1. Types of Damages. The study examined fifteen different types of damages including economic, non-economic and punitive.[11] Economic damages included lost wages, medical bills and property damage. Non-economic damages included pain and suffering, emotional distress, loss of consortium and loss of enjoyment. Damages also were divided by whether they were for past or future losses.

Of the 117 cases in which juries awarded damages, the majority (61%) contained both economic and non-economic awards. About a third (32%) of the cases contained only economic damage awards. Only two cases (2%) contained a non-economic damage award without any other kind of damage award.[12]

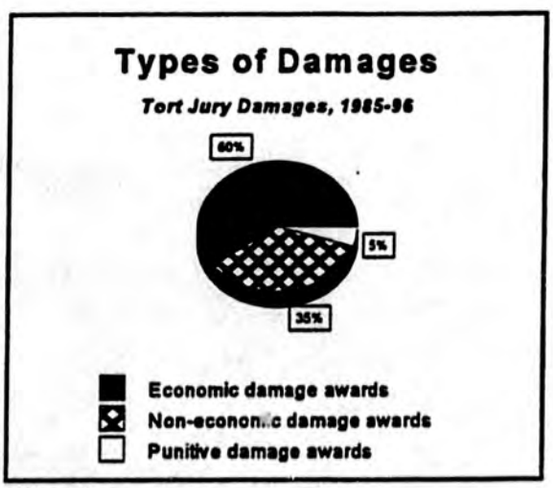


Chart 4
Alaska Judicial Council Jury Verdict Study 1996

[11] This section examines the 358 separate damage awards found in 118 cases. Note that more than one type of damage could have been awarded in a single case.

[12] Six percent of the cases (N=7) contained an economic damage award and a punitive damage award, but no non-economic damage award.

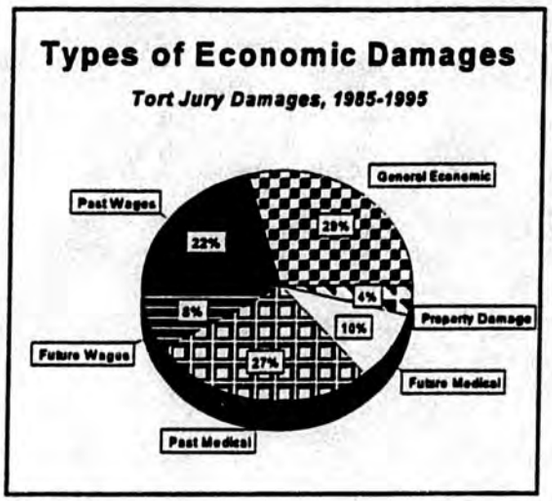


Chart 5
Alaska Judicial Council Jury Verdict Study 1996

The study also counted up the total number of damage awards from all of the cases in which juries awarded damages. Of the 358 damage awards recorded, economic damages were more common than non-economic damages. Chart 4 shows that well over half (60%) of all damage awards were to compensate for economic losses, while 35% were for non-economic losses and 5% were punitive damage awards.

Examining both economic and non-economic damages, the study measured how often juries made awards for losses in the future, as opposed to losses already suffered. Future damages included future lost wages, future medical expenses, future pain and suffering, and future loss of enjoyment. The data showed that juries did not often make awards for future damages. For example, of the 358 damage awards recorded, only twenty were for future medical expenses (about 6% of all damage awards), twenty-three were for future pain and suffering (about 6% of all damage awards) and one was for future loss of enjoyment (0.3% of all damage awards).

Within the category of economic damages, the study examined awards made for six specific types of losses (see Chart 5). The most commonly awarded economic damages included past wages and past medical expenses. Chart 5 shows the details of the economic damage awards.

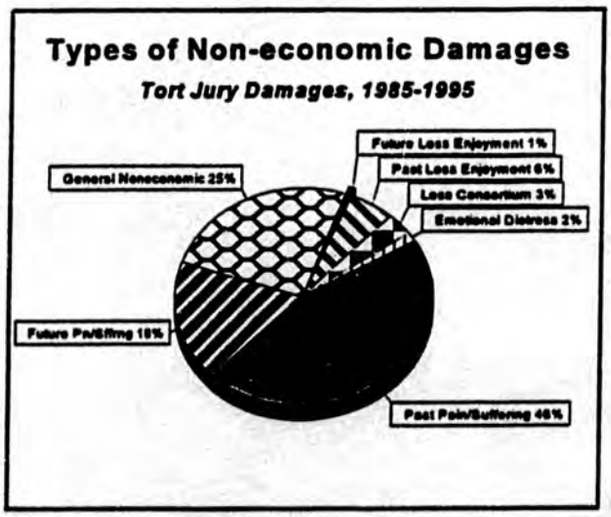


Chart 6
Alaska Judicial Council Jury Verdict Study 1996

The study also examined awards made for eight specific categories of non-economic losses (not including punitive damages). Keeping in mind that non-economic damage awards constituted only about a third of all damage awards, the most commonly awarded non-economic damage was for past pain and suffering. Chart 6 shows the details of the non-economic damage awards.

Further analysis revealed that juries seldom made awards for certain kinds of non-economic losses. Jury awards for loss of consortium constituted only about 3% of all non-economic damages (1% of all damage awards). Awards for past loss of enjoyment constituted about 6% of the non-economic damage awards (about 2% of all damage awards). Awards for emotional distress constituted about 2% of non-economic damage awards (less than 1% of all damage awards).

2. ***Amounts of Damage Awards.*** Many jury verdicts were relatively small. In fact, over half (58%) of all superior court jury verdicts that contained a damage award were less than $50,000 (the jurisdictional amount for superior court). About a third of the superior court verdicts were less than $10,000. Overall, about 61% of all jury verdicts awarded damages under $20,000.

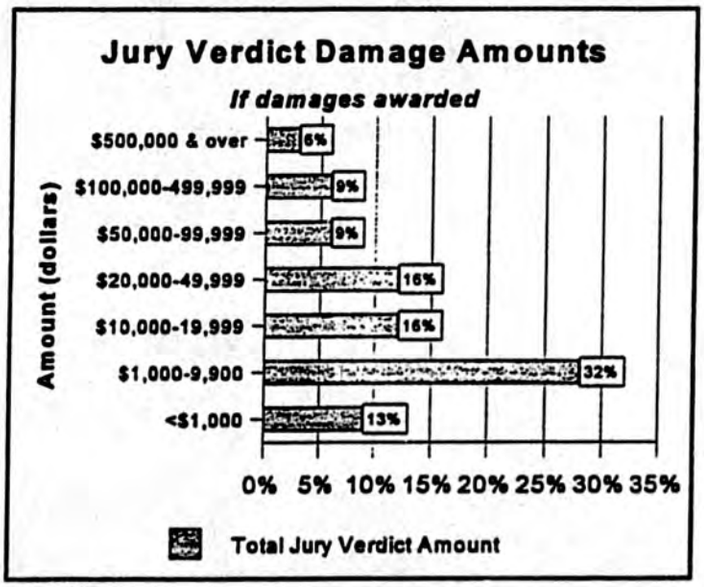


Chart 6
Alaska Judicial Council Jury Verdict Study 1996

A relatively small percentage of damage awards were large. Six percent of all damage awards exceeded $500,000, and an additional nine percent fell between $100,000 and $500,000. Chart 6 summarizes the overall amounts of damage awards for all cases in which damages were awarded.[13]

Some damage amounts varied by location and case type. For example, jury awards in Fairbanks automobile accident cases were somewhat smaller than those in Anchorage auto cases.[14]

3. ***Punitive Damages.*** Plaintiffs requested punitive damages 27% of the time; however, juries awarded them in only about 6% of the cases (17 punitive damage awards were made in 15 cases).[15] Table 1 on the next page shows that while a few punitive damage awards were

[13] The chart does not show whether plaintiffs or defendants received the awards.

[14] One explanation for the discrepancy is that a higher proportion of Fairbanks automobile cases were filed in district rather than superior court.

[15] In one case, the jury made small awards to both the plaintiff and the defendant. In the other case, the jury gave the plaintiff one punitive damage award on each of two separate claims.

very large, about half were under $60,000. Four of the cases in which juries made punitive awards involved intentional torts (for example, tortious interference with business contracts). Juries also awarded punitive damages in two employment cases, two non-auto personal injury cases, one property damage case, one insurance bad faith claim and one automobile accident involving a drunken driver.

Punitive Damage Awards:
Anchorage, Bethel, Fairbanks, Juneau, Nome 1985-1995

Case Type	Jury Compensatory Award (does not include fault allocation)	Jury Punitive Award	Appeal?	Appeal Outcome
Intentional Tort	$3,025	$250 and $100 (one to each)	No	
Property	$8,338	$3,000	No	
Intentional Tort	$4,387	$5,000	No	
Insurance Bad Faith	$1,001,087	$10,000	Yes	Punitive damages reversed
Automobile	$575	$20,000	No	
Intentional Tort	$87,934	$20,000	No	
Intentional Tort	$17,000	$60,000	No	
Employment	$112,273	$132,000	Yes	Settled
General Injury	$692,282	$150,000	Yes	Settled
Personal Injury	$738,765	$150,000	Yes	Settled
Intentional Tort	Pl. won $17,300 against def. 1. Def. 2 won $23,500 against pl.	$250,000	No	
Product Liability	$3,004,500	$500,000	No	
Employment/ defamation	$303,604	$500,000	No	
Insurance Bad Faith (automobile)	$18,008	$1,200,000	Yes	Punitive damages reversed
Intentional Tort (business dispute)	$9,473,770	$25,300,000	Yes	Settled

Table 1
Alaska Judicial Council Jury Verdict Study 1996

F. Costs and Fees

The study collected limited information about costs and attorney's fees. Because cases sometimes settled and were dismissed before judgment or before entry of costs and attorney's fees, some cases included in the study lacked cost and fee awards. Normally, judges award costs and attorney's fees to prevailing parties after trial based on guidelines set out in court rules and statutes.

1. Costs. The awarding of costs is governed by Alaska Rule of Civil Procedure 79. The party entitled to costs must request them within ten days or forfeit the right to recover them. Items allowed to the prevailing party as costs include the expense of taking depositions and producing exhibits, the expense of service, filing fees, fees for transcripts, computerized research, and other expenses necessarily incurred.

The Council found a cost award in about half (54%) of the cases studied. About 16% of all cost awards were $1,000 or less. About 42% of cost awards fell between $1,000 and $5,000, and another 24% fell between $10,000 and $58,000. No cost awards exceeded $58,000.

2. Attorney's Fees. The awarding of attorney's fees is governed by Alaska Rule of Civil Procedure 82 and Alaska Statute § 9.60.010. The statute authorizes the supreme court to determine what attorney's fees, if any, may be awarded to a prevailing party in a civil action. The court rule sets out a schedule for calculating fee awards based on whether the plaintiff or the defendant prevailed. The prevailing party is not entitled to be reimbursed for all its attorney's fees, except in extraordinary circumstances. Thus, the fee award amounts reported below probably represent only a fraction of the amounts spent by parties on their attorneys.[16]

The Judicial Council found an attorneys' fee award in about 64% of the cases in this study.[17] The largest group of fee awards fell between $15,000 and $50,000 (about 29% of fee awards). About 23% of fee awards fell between $4,000 and $10,000. Nineteen percent of the fee awards were under $4,000, and 11% fell between $10,000 and $15,000. A few fee awards were large: 17% fell between $50,000 and $166,000, and the largest award exceeded $166,199.

---

[16] For more information about attorney's fee awards in state and federal civil cases in Anchorage, see the Judicial Council's report: ALASKA'S ENGLISH RULE: ATTORNEY'S FEE SHIFTING IN CIVIL CASES (October, 1995) at 91-97.

[17] Fee awards were made to both plaintiffs and defendants.

G. Offers of Judgment

Alaska Civil Rule 68 and Alaska Statute § 09.30.065 control offers of judgment. An unaccepted offer of judgment made pursuant to Rule 68 in effect changes the time and conditions under which a party can become the prevailing party for purposes of attorney's fee awards.

The Council found evidence of offers of judgment in 53 cases (32% of the cases studied); however, readers should be cautious when interpreting this finding. First, the 32% figure under reports the number of offers which appeared in the cases reviewed, because this study did not systematically search each file for offers of judgment. Second, the 32% figure under reports the frequency with which offers of judgment were made in jury trial cases, because it includes only those offers that were filed with the court.[18] Of the offers of judgment found in the case files, the smallest was $1,000 and the largest was $575,000. About half (53%) of the offers were $10,000 or less. Ten of the offers (19%) were $100,000 or more.

H. Appeals

The Judicial Council found evidence of an appeal in only a quarter of all the cases (N=58), although six out of the fifteen cases involving punitive damage awards were appealed. Of the fifty-eight cases in which an appeal was filed, only twenty completed the entire appeal process; the remaining 67% were settled or otherwise dismissed before the supreme court rendered an opinion. Of the twenty supreme court rulings, only four (20%) changed the amount of the jury verdict. Sixteen of the appellate opinions caused no change in the jury verdict. Thus, with the exception of punitive damage cases, only a relatively small portion of cases are appealed, and only a very few jury verdicts are changed as the result of an appeal.

I. Length of Cases

The study examined three variables related to how long it took to resolve cases. The study measured the amount of time that elapsed from the day the case was filed until it was closed,[19] time elapsed between case filing until trial, and time elapsed between trial and case closing.

---

[18] Rule 68 does not require an offer of judgment to be filed in the court case file.

[19] The court system administratively closes cases after all proceedings are finished; however, we do not know how much time typically elapses between the end of case activity and the official closing date.

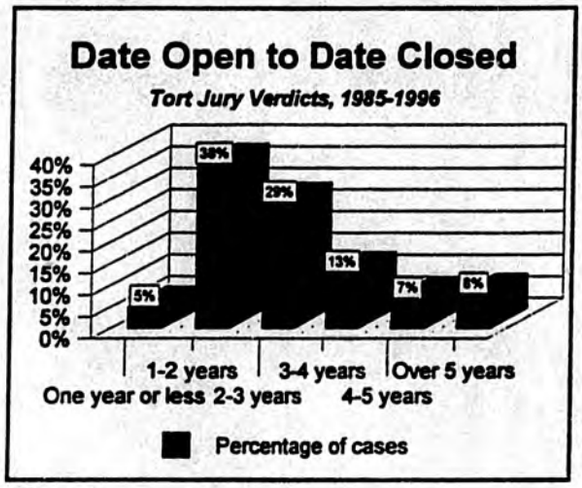


Chart 7
Alaska Judicial Council Jury Verdict Study 1996

Chart 7 gives the data on total time from filing until closing. The chart shows that although few cases were resolved within a year, many were resolved within two to four years. Thirty-eight percent of the cases were opened and closed within two years, and another 42% of the cases were resolved in two to four years. About 8% of the cases took longer than five years to resolve. Because all of these cases had a jury verdict, they do not represent the typical civil case in Alaska's courts.[20]

Chart 8 gives the breakdown of the time that elapsed between filing the cases and the trial. About fourteen percent of all the cases went to trial within one year of filing, while another 21% went to trial between one year and eighteen months after filing. Most (85%) of the cases were tried within three years.

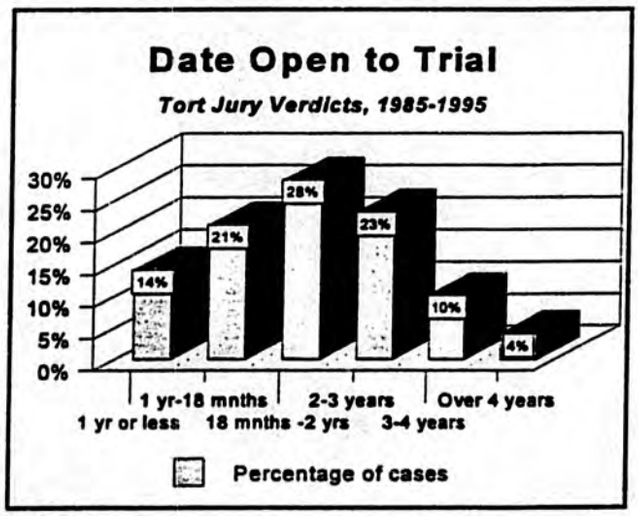


Chart 8
Alaska Judicial Council Jury Verdict Study 1996

The data showed that many of the cases closed relatively soon after the trial was concluded. Over half (59%) of the cases were closed within four months after trial. Seventy percent were closed by six months after trial, and 83% were closed by a year after the trial. A small percentage of cases (17%) remained open more than a year after trial; these may have been awaiting appellate decisions.

J. Conclusion

This review of 233 jury verdicts in tort cases in Anchorage, Fairbanks, Bethel, Juneau and Nome over the past decade by and large showed that Alaska juries found for plaintiffs and

---

[20] About 4% of tort cases went to trial (including judge-tried cases) in a sample of 1993 Anchorage civil cases. ALASKA JUDICIAL COUNCIL, ALASKA'S ENGLISH RULE, *supra* note 15, at 86.

defendants about equally, although variations existed based on the type of case and the location of the jury. When they made awards, juries tended to give less than the amount requested in the complaint: the bulk of superior court awards were less than $50,000. In both superior and district court verdicts, damages for economic losses were more common than those for non-economic losses, and awards for future losses of any kind were relatively rare. Juries awarded punitive damages in only 15 of the 233 cases studied, and many of those awards were less than $60,000.

The study also suggested that parties did not often ask the appellate court to correct mistakes made at trial. Only about a quarter of the jury verdicts were appealed, although six of the fifteen punitive damage cases were appealed. Parties who did appeal seldom waited for the court to render an opinion before settling or otherwise resolving the case. Finally, the data showed that many of these cases were resolved within two to four years of filing.

Alaska Tort Jury Verdicts by Year[1]

Trial Date	Total Number of Cases	Number of Cases With Plaintiff Award	Number of Cases With Verdict Over $1 Million	Average Jury Award in Cases With Plaintiff Award	Average Jury Award Excluding Awards Over $1 Million in Cases With Plaintiff Award
1988	21	10		$215,763	$215,763
1989	26	11		$61,590	$61,590
1990	32	12	2	$272,875	$68,797
1991	23	14	1	$2,590,278	$114,625
1992	22	10	1	$367,264	$52,066
1993	33	24	2	$252,030	$78,183
1994	39	13		$186,100	$186,000
1995	28	14		$66,738	$66,738
1996[2]	9	6	1	$1,177,136	$32,019
Totals	**233**	**114**	**7**	**$576,642**	**$97,309**

Alaska Judicial Council 1996

---

[1] Figures do not reflect any reductions by trial or appellate courts.

[2] Partial year figures.

Appendix D

A CHRONOLOGY OF TORT REFORM EFFORTS IN ALASKA, 1967-1996

This appendix includes information on all bills dealing with tort reform that were filed in the Alaska legislature from 1967 through 1996 (9th-19th Legislatures). Details, including short descriptions of the bills' content, are included for both bills that were enacted and those that did not pass. Tort reform bills filed prior to 1967 are not listed because no search mechanism exists to locate them. Chapter 2 of this report describes significant legislation and other task force efforts during this period.

A CHRONOLOGY OF LEGISLATIVE TORT REFORM EFFORTS IN ALASKA[1]

5TH LEGISLATIVE SESSION - 1967-68

ENACTED

Ch. 61, SLA 1967 - Statute of repose for construction- AS 09.10.055

Ch. 49, SLA 1967 - Medical malpractice burden of proof– AS 09.55.530 - 09.55.550

6TH LEGISLATIVE SESSION - 1969-70

ENACTED

Ch. 80, SLA 1979 - Uniform Contribution Among Joint Tortfeasors Act - AS 09.16.010 - 09.16.060[2]

9TH LEGISLATIVE SESSION - 1975-76

ENACTED

Ch. 102, SLA 1976 - Medical malpractice - amendments to Title 8, additions to AS 09.55.530 - 09.55.560, new AS 18.23 and AS 21.88

Other Bills Filed:

Bill	Sponsor	Brief description	Final Status
HB98	Smith	Medical malpractice - limit on damages	(H) Jud
HB176	Cowper	Comparative negligence	(S) Jud
HB476 SB549	Beirne	Med. malpractice - limit on contingency fees	(H) Jud (S) Jud
HB575 SB523	Gov	Med. Malpractice adjudication board / appeals	(H) Jud (S) Comm
HB636 SB566	Bierne	Med. malpractice: admin. adjudication; clear and convincing evidence; limits on damages; limit on informed consent liability; required insurance	(H) Jud (S) Comm
SB550	Kerttula	Limit on awards against physician or dentist	(S) Jud

[1] Bills filed and not enacted before the 9th Legislative Session are not shown. No search mechanism exists for those bills.

[2] Repealed by 1988 Initiative.

10TH LEGISLATIVE SESSION - 1977-78

ENACTED

Ch. 177, SLA 1978 - mandatory medical malpractice insurance made voluntary - Title 8

Other Bills Filed:

HB124 SB308	Cowper Rodey	Comparative fault	(H) Jud (S) Jud
HB292 SB170	Beirne	Med. malpractice - att'y fees	(H) Comm (S) Jud
HB280 SB171	Bierne	Med. malpractice - limit on awards	(H) Comm (S) Hess
HB309	Beirne	Med. malpractice - requirement of notice of claim	(H) Comm
HB310	Beirne	Med. malpractice - statute of limitations	(H) Comm
HB311	Beirne	Med. malpractice - limit on pain and suffering damages	(H) Comm

11TH LEGISLATIVE SESSION 1979-80

ENACTED

Ch. 46, SLA 1979 - limitations of actions / exemption for mentally ill - AS 09.10.140

Ch. 80, SLA 1980 - inherent risks of skiing - AS 09.10.300 (replaced by AS 05.45.010 - 05.45.210)

Ch. 138, SLA 1980 - injuries on unimproved land - AS 09.65.200

12TH LEGISLATIVE SESSION - 1981-82

Bills Filed:

HB562 SB537	Clocksin (S) Judiciary	Repeal statute of repose on construction	(H) Jud (S) Jud

13TH LEGISLATIVE SESSION - 1983-84

Bills Filed:

HB126	Hurlbert	Liability for aircraft guest	exp. 1st sess.
HB407	Bettisworth	State reimbursement - expenses	(H) Jud

14TH LEGISLATIVE SESSION - 1985-86

ENACTED

Ch. 139, SLA 1986 - "Omnibus" bill - added AS 09.17 and 09.65.120, amended AS 09.30.065, 09.30.070, and AS 09.60.010

Other Bills Filed:

HB97	Duncan	State liability for hazardous recreation	(H) Jud
HB368	Gruenberg	Uniform Comparative Fault Act	(H) Jud
HB481	Reiger	"Omnibus" bill: punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; contributory fault; apportionment of damages; effect of release	(H) Jud
HB490	Szmanski	Periodic payment by state/municipalities	(H) L&C
HB532	Cotten	"Omnibus" bill: cap on noneconomic damages ($250,000); punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; collateral benefits; contributory fault; apportionment of damages; effect of release; limits on contingent fees; mandatory arbitration; offers of judgment; wrongful death; attorney fees	(H) Jud
HB660	Binkley	Recreational use of land	(H) Res
SB382	Kerttula	"Omnibus" bill: cap on noneconomic damages ($750,000); periodic payments; apportionment of damages; limits on contingent fees	(S) L&C
SB392	Josephson	Periodic payment	(S) L&C
SB444	V. Fischer	"Omnibus" bill: cap on noneconomic damages ($500,000); periodic payments; itemized verdict; limits on contingent fees	(S) L&C
SB451	Halford	Apportionment of damages	(S) L&C

15TH LEGISLATIVE SESSION - 1987-88

ENACTED
Ch. 168, SLA 1988 - injuries on unimproved land - amendments to AS 09.65.200

Initiative Proposal No. 2 - abolished joint and several liability - repealed AS 09.16 and replaced with AS 09.17.080(d)

Bills Filed:

HB85	Gov	"Omnibus" bill: cap on noneconomic damages ($250,000); periodic payment; collateral benefits, costs; commission of crime; liability of zoos, liability of hospitals for contractors, liability for hazardous substances, reports on insurance rates and litigation	await conc./ recessed
HB198	Hoffman	Recreational use of land	(S) Rules
HB250	Larson	"Omnibus" bill: cap on noneconomic damages ($100,000); periodic payment; collateral benefits, commission of crime; costs	(H) L&C
HB515	Zawaki	Changes to statue of limitations; statute of repose for manufacturing equipment	(H) L&C
HB517	Ulmer	Liability of certain volunteers	(H) Jud
SB211	Faiks	"Omnibus" bill: commission of crime; partial immunity for nonprofits/gov't; joint and several liability; report on insurance rates	(H) Jud
SB447	Duncan	State liability for hazardous recreation	(S) Jud
SB461	Jones	Liability of hospitals for contractors	(H) L&C

16TH LEGISLATIVE SESSION - 1989-90

Bills Filed:

HB11 SB228	Ulmer	Liability of certain volunteers	(H) L&C (S) Jud
HB166	Cotten, et al	"Omnibus" bill: statute of repose for product liability, construction, and physicians; commission of crime, periodic payments, partial immunity for nonprofits/ gov't/peace officers; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates	w/drawn

HB334	L&C	Require insurance after judgment entered against licensed health professional	(H) Jud
HB345 SB323	Gov	Creation of Health Claims Board; no fault claims for set amounts as exclusive remedy	(H) L&C (S) Jud
HB494	Menard	Recreational land use	(H) Jud
HB597 SB451	L&C Jud	"Omnibus" bill: statute of repose for product liability and construction (6 years); commission of crime, periodic payments, partial immunity for nonprofits/ gov't; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates	(H) Jud (S) Jud
SB229	Duncan	State liability for hazardous recreation	(S) Jud
SB495	Rodey	Statute of repose for product liability and construction (5 years)	(S) Jud

17TH LEGISLATIVE SESSION - 1991-92

Bills Filed:

HB178	Jud	Offers of judgment / costs and fees	(H) Jud
HB302	Jud	Require insurance after judgment entered against licensed health professional	(H) Fin
SB109	Halford	Statute of repose for construction (7 years)	(H) L&C
SB285	Halford	Liability of hospitals for contractors	(H) L&C
SB462	HES	Statute of repose for physicians	(S) Jud

18TH LEGISLATIVE SESSION - 1993-94

ENACTED

Ch. 12, SLA 1993 - good faith disclosure of job performance information - AS 09.65.160

Ch. 17, SLA 1994 - limitation on private nuisance action for pollution - AS 09.45.230

Ch. 28, SLA 1994 - statute of repose for construction - amendments to AS 09.10.055

Ch. 63, SLA 1994 - Alaska Ski Safety Act of 1994 - AS 05.45

Other Bills Filed:

HB274 SB204	HES HES	"Omnibus" bill: limits on statute of limitations for health care; mandatory arbitration for health care; collateral source for health care; cap on noneconomic damages ($250,000); contributory fault; allocation of damages; effect of release; interest; liability of hospitals for contractors	(H) HES (S) HES
HB 292 SB254	L&C Pearce	"Omnibus" bill: general statute of repose (6 years); limits on statute of limitations for health care; expansion of cap on noneconomic damages cap on punitive damages; commission of crime; reduction by equivalent of taxes; wrongful death; collateral benefits; contributory fault; allocation of damages; effect of release; offers of judgment; liability of hospitals for contractors	(H) Fin (S) Jud
HB300	L&C	Liability for comm'l rec. activities	(S) Jud
HB360	Bunde	Liability for air / watercraft guest passenger	(S) Comm
HB414 SB270	Gov Gov	Mandatory arbitration for health care claims	(H) Comm (S) HES
HB492	HES	Limits on liability to insurance coverage and mandatory arbitration for health care claims	(H) HES
HB493	HES	Required insurance for health care providers	(H) HES
SB123	HES	Medical malpractice: limits on statute of limitations; prejudment interest rates; mandatory arbitration	(S) HES
SB184	Frank	Immunity: nonprofit corp. volunteers and employees	(S) Jud
SB367	HES	Mandatory arbitration for health care claims	(S) Rules

19TH LEGISLATIVE SESSION - 1995-96

ENACTED

Ch. 79, SLA 1995 - Prisoner litigation against state - AS 09.19, etc.

Other Bills Filed:

HB19	Therriault	Def. of "fault" to include intentional misconduct	(S) Jud
HB145	Ogan	Proof beyond reasonable doubt: punitive damages	(H) Jud

HB158	Porter	"Omnibus" bill: statute of repose; cap on punitive damages; 75 percent of punitive damages to state; allocation of fault; comm'l recreation activities; hospital liability for contractors; liability for frivolous or improper practice; offers of judgment; expert witnesses in malpractice; mandatory arbitration; periodic payment; effects of release; interest; commission of felony; sanctions; reports on insurance rates	Vetoed
HB161	Bunde	Liability for aircraft/ watercraft guest passenger	(H) Jud
HB252	Sanders	Cap on punitive damages	(H) Sta
HB316	Mulder	Liability for frivolous lawsuits	(S) Jud
HB414	Green	Mandatory conciliation panels for design professionals	(S) Jud
SB72	Frank	Immunity: nonprofit corp. volunteers and employees	(S) Sta
SB324	Jud	Mandatory arbitration; caps on punitive damages for unlawful employment practices	(H) Sta

Appendix E

Tort Law Vocabulary

Allocation of fault - Court procedures for how defendants are brought into lawsuits and how fault is apportioned among those responsible for the injury.

Alternative dispute resolution (ADR) - Ways to resolve legal and nonlegal issues without going to court. Includes arbitration, mediation, and early neutral evaluation.

Caps on Damages - Laws limiting the liability of defendants for the amount of damages recoverable.

Cause of Action - The facts which give a person the right to begin a lawsuit.

Collateral Source Rule - A trial rule where the jury is not told that the injured person has received money for his or her injury from other sources, such as an insurance policy or another defendant.

Comparative Negligence - In Alaska, the jury evaluates the facts of the case and assigns a percentage of fault for the injury to each of the parties, including the plaintiff. Each party is then liable for paying that percentage of the damages.

Contingent Fee - An attorney's fee that is based upon a percentage of the money awarded to the client. If no recovery is obtained, the attorney does not get paid.

Damages - Money awarded to a person injured by the negligent act of another.

Deep Pocket - A slang term for the defendant with the greatest financial assets or insurance and therefore, the ability to pay.

Defendant - The party being sued, from whom monetary relief s sought.

Discovery - The process used by one party in a suit to obtain facts about the case from the other party before the case goes to trial.

Economic Damages - Money awarded to an injured person to compensate for his or her actual monetary loss. For example, economic damages compensate for medical costs, lost wages, and costs of specialized care.

Early Neutral Evaluation - A process in which a neutral person who is well-informed on the subject matter evaluates the merits of a lawsuit and gives a frank assessment to the parties.

Fast Track - A procedure adopted by the Anchorage superior court for expediting certain civil cases.

Mediation - A non-binding form of dispute resolution where a mediator helps the parties analyze their dispute and encourages them to reach an agreement.

Medical advisory panels - Groups of doctors who evaluate medical malpractice cases to offer expert help to the judge.

Noneconomic Damages - Money awarded that compensates the injured person for changes to his or her life, for instance, pain and suffering.

Offer of judgment - During litigation a plaintiff or defendant may offer to settle the case for a certain amount of money. If at the end of the case the verdict comes in higher or lower than that amount, the party who does better than the offer may be awarded partial payment of costs and attorney fees. The interest rate on the judgment is also affected.

Periodic payments - Under a periodic payment system, lawsuit awards are paid to the plaintiff throughout his or her lifetime, for the period of disability or for any other set period, instead of in a lump sum.

Plaintiff - The party who sues and seeks compensation for injuries suffered.

Punitive Damages - Money awarded to punish a defendant for outrageous or reckless acts, and to deter such behavior. This is awarded to plaintiffs in addition to economic compensation.

Several Liability - Under this doctrine, a defendant is liable only to the extent that he or she was responsible for the plaintiff's injury.

Sovereign immunity - The state legislature may set limits on a plaintiff's ability to sue the government. If the legislature decides that plaintiffs may not recover from the government for certain acts, the government is said to be immune.

Statute of Limitations - A law that requires lawsuits to begin within a specified time period from when the plaintiff knew they were injured. When the statute of limitations has expired, the lawsuit can no longer be brought.

Statute of Repose - A statute of repose cuts off the rights of a person to bring a lawsuit after a specified time measured from the delivery of a product or the completion of work.

Strict Liability - The liability of manufacturers and merchandisers for defective products manufactured or sold by them, regardless of fault or negligence. To win this case, a claimant must prove only that the product is defective and that he or she was injured by it, not that the manufacturer was negligent.

Third party - An additional party brought into the lawsuit after the original plaintiffs sue the original defendants. For example, third parties in an automobile accident might include the state for negligently designing or maintaining the road, or the mechanic who last worked on the plaintiff's car.

Tort - A noncriminal wrongful act, done by one party to another, for which monetary compensation is usually sought.

Tortfeasor - A person who commits a tort, or a noncriminal wrongful act.

Wrongful discharge - Firing an employee in violation of a contract or for illegal reasons.

Some of these definitions have been taken from *Outline of a Civil Lawsuit*, from HALT's Everyday Law Series, as revised by Alaskans for Liability Reform, Al Tamagni and Janet Taylor, editors.

Task Force Staff

Staffing for the task force was provided by the Department of Law, Bruce M. Botelho, Attorney General. Funding assistance was provided by the Division of Risk Management, the Department of Law, and the Office of the Governor.

Marcia Vandercook, Temporary Assistant Attorney General, counsel to the Advisory Task Force on Civil Justice Reform
Nancy R. Gordon, Office Chief, Civil Division, Anchorage
Gail T. Voigtlander, Attorney Supervisor, Special Litigation Section, Anchorage
Chrystal Stillings Smith, Legal Administrator, Office of the Attorney General, Juneau
Ann Wilde, Supervising Secretary, Governmental Affairs Section, Anchorage

For Further Information

For information about the task force, its research, and its recommendations, please contact:

Chrystal Smith, Legal Administrator
Office of the Attorney General
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600

For further information about the Alaska Judicial Council report found at Appendix C, please contact:

William T. Cotton, Executive Director
Alaska Judicial Council
1029 West Third Avenue, Suite 201
Anchorage, Alaska 99501-1981
(907) 279-2526

For additional copies of the task force report and status of legislation, please contact:

Office of the Governor
P.O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500

STATEMENT OF PRINTING COSTS
This publication was released by the Governor's Advisory Task Force on Civil Justice Reform and produced at a cost of $3.92 per copy to report the findings and recommendations of the task force. It was printed in Anchorage, Alaska.

BILL J. ALLEN
Chairman & CEO

March 18, 1997

Rep. Brian Porter
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Porter:

I wanted to let you know my reaction to the work of the Governor's Advisory Task Force on Civil Justice Reform on which you and I served last year.

The way the Task Force was made up, with both supporters and opponents of tort reform, it was very hard to get fourteen votes in favor of anything. A lot of good ideas, such as allocation of fault and statutes of repose, did not get through the Task Force process. There is a proposal on punitive damages, a particular concern of mine, but the proposal was watered down in order to get the 14 votes.

I voted for the Task Force report because it was the best we could do with the group, and the recommendations are an improvement on what we have now. However, I don't believe that the report goes nearly far enough, and there was certainly no understanding that tort reform proponents would "settle" for the Task Force recommendations.

Very truly yours,

Bill J. Allen

Bill J. Allen

BA:js

VECO CORPORATION • 813 W. Northern Lights Blvd. • Anchorage, AK 99503-2495 • Tel: (907) 264-8101 • Fax: (907) 264-8130

LAW OFFICE OF
BUNDY & CHRISTIANSON
AN ASSOCIATION OF PROFESSIONAL CORPORATIONS
911 WEST 8TH AVENUE, SUITE 302
ANCHORAGE, ALASKA 99501

DAVID H. BUNDY, P.C.
CABOT CHRISTIANSON, P.C.
MICHELLE L. BOUTIN
GARY A. SPRAKER

TELEPHONE: (907) 258-6016
FAX: (907) 258-2026

March 18, 1997

Rep. Brian Porter
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Porter:

I understand that you have asked for my perspective on the work of the Governor's Advisory Task Force on Civil Justice Reform, on which you and I served along with 18 other Alaskans between September and December, 1996. This Task Force was appointed by Governor Knowles after his veto of the tort reform bill which was enacted by the Legislature in 1996.

In appointing the Task Force, Governor Knowles made an effort to assure that opposing viewpoints were adequately represented, and in this effort he was successful. Some of the members appointed to the Task Force came from or were identified with business interests which generally favor restrictions on civil claims or recoveries, while others generally held or expressed a reluctance or hostility to any further restrictions; in fact some advocated changes in the opposite direction. As may have been inevitable, given the makeup of the Task Force, it was very difficult to reach a consensus on a number of issues. This difficulty was exacerbated by the Task Force's decision that all recommendations needed the endorsement of two-thirds of the entire membership, or 14 members, a super-majority which was even harder to achieve because several members were unable to be present for every session of the Task Force.

As a result, the recommendations of the Task Force fell short of the goals which advocates of tort reform had sought to reach. For instance:

> Three committee proposals, dealing with allocation of fault, statutes of repose, and alcohol- or drug-impaired plaintiffs, were not adopted by the Task Force.
>
> Several proposals, relating to expert witnesses, claims against the State, collateral benefits, and hospital liability, were not approved by the committees which considered them.
>
> The Task Force did not recommend any significant changes in the current limited cap on non-economic damages, such as for pain and suffering or loss of consortium.

The Task Force's proposal for caps on punitive damages is a compromise which in certain cases (perhaps even most cases) could still allow an award of punitive damages to exceed by many multiples the amount of actual loss. In addition, the proposal on punitive damages does not include any recommendation that a percentage of the award go to the State, thus allowing punitive damages to remain in the pocket of the plaintiff who, by definition, has already been fully compensated.

While I cannot speak for every member of the Task Force, I believe that members voted for the proposals which were adopted out of a belief that the recommendations, however inadequate from some perspectives, nevertheless represent an improvement over existing law. But there was no understanding that the Task Force's recommendations satisfactorily addressed all of the issues with which tort reform advocates believe the Legislature should deal.

Very truly yours,

BUNDY & CHRISTIANSON

By _____
David H. Bundy

DHB:mlw
H:\1832\TORTREF\PORTER.LTR

Q: What would 63 vote? ~~Who~~
- Who voted NO?

Q: BRIN - How stacked?
- BRIN get to vote???
Q: Call Roger Holmes!

PT= Q: Are they trying to get free discovery out of their thinking?

PT= ~~Fact~~ that TRIA Atty have contributed several $ to your campaign ~~for~~ Holmes of what you want ~~for~~ reform to be. It could be said that the GOP bill under the guise of tort reform actually increases the problems.

PT= Details in due course. We have very ~~little~~ time to get this done, I hope

(8) Q: Call State Farm Atty re ~~with~~ minor victim work & record for.

1-bl mes

JDS.

DRAFT

REPORT

DRAFT

OF THE

GOVERNOR'S ADVISORY TASK FORCE ON CIVIL JUSTICE REFORM

December 1996

OFFICE OF THE GOVERNOR
BOX 110XXX
JUNEAU, ALASKA
XXX

List of Members and Staff

TASK FORCE MEMBERS

Chair — Judge Thomas Stewart, Retired Superior Court Judge
Vice Chair — Marlene Johnson, Huna Totem Heritage Foundation

Bill Allen, VECO - Liability Committee
Judy Brady, Alaska Oil and Gas Association - Liability Committee
David H. Bundy, Bundy & Christianson - Damages Committee
Mike Burns, Key Bank - Chair, Damages Committee
Charlie Cole, former Attorney General - Liability Committee
Jeffrey M. Feldman, Young, Sanders & Feldman - Damages Committee
Roger Holmes, Biss & Holmes - Chair, Procedures Committee
Jerry Hood, Alaska Teamsters Union *(appointed but unable to serve)*
Julie Kitka, Alaska Federation of Natives - Procedures Committee
Julian L. Mason. Ashburn & Mason - Chair, Liability Committee
Don Slone, PE, Livingston Slone, Inc - Procedures Committee
Stephan H. Williams - Procedures Committee
Mark Williams, Carr Gottstein Foods Co. - Damages Committee
Dr. Rodman Wilson - Procedures Committee

EX OFFICIO

Bruce M. Botelho, Attorney General - Steering Committee
Jeff Bush, Deputy Commissioner, Department of Commerce & Economic Development - Procedures Committee
Senator Johnny Ellis - Damages Committee
Representative Brian Porter - Liability Committee
Brad Thompson, Director, Division of Risk Management - Liability Committee

STAFF

Staffing for the task force was provided by the Department of Law, Bruce M. Botelho, Attorney General. Funding assistance was provided by the Division of Risk Management, the Department of Law, and the Office of the Governor.

Nancy R. Gordon, Office Chief, Civil Division, Anchorage
Gail T. Voigtlander, Assistant Attorney General, Special Litigation section
Marcia Vandercook, Temporary Assistant Attorney General, counsel to the Advisory Task Force on Civil Justice Reform
Chrystal Stillings Smith, Legal Administrator
Ann Wilde, Legal Secretary

Table of Contents

Executive Summary

The Governor's Advisory Task Force on Civil Justice Reform was created to provide Governor Knowles with proposals for a fair and legally sound tort reform bill to submit to the Alaska Legislature, including changes to current civil liability laws and consideration of insurance reform proposals.

The Governor charged the task force with four goals: to make the civil liability system more efficient and reduce frivolous litigation; to provide for fair but not excessive compensation for injured victims; to lower liability insurance rates; and to provide for reasonable punitive damages awards to deter practices that harm innocent Alaskans, without chilling the business environment or allowing windfall recoveries. He asked the task force to consider all options and develop a proposal for meaningful, responsible tort reform.

The twenty members of the task force worked through the fall of 1996 to meet these goals. They learned about tort reform efforts in Alaska and other states. They spoke with experts, conducted interviews, reviewed studies of civil justice reform efforts nationwide, and commissioned additional research and analysis of Alaskan data. They conducted a series of hearings around the state to explain their proposals and obtain public testimony, and all of their meetings were open to and attended by the public. They met in committees, and as a group, to argue, listen, and work out a set of proposals that will solve real problems and work to the benefit of all Alaskans.

The task force learned of a variety of concerns about the Alaska civil justice system. They heard that litigation is often prohibitively expensive and time-consuming. Many individuals and businesses with smaller claims are unable to find lawyers to take their cases, while defendants often agree to settle dubious claims to avoid the costs of going to court. Injured individuals find it difficult to receive what they consider fair and timely compensation for their injuries, while many individual and business defendants feel unfairly targeted because of their assets, not their responsibility for the injuries.

The task force recognized the inherent conflict between the need of injured parties for individualized justice that fits the circumstances of their cases

and the need of members of the business community for a level of predictability that will allow them to know the value of cases and to purchase reasonably priced insurance.

The task force studied court statistics on cases filed in Alaska courts and commissioned a special study of tort cases that went to jury trial. This information showed no explosion in the number of tort cases filed, nor did it reveal a large number of juries returning high noneconomic or punitive damages. However, this information does not reveal the entire picture of tort case outcomes, because most claims are settled out of court. The task force concluded that further information is necessary for an informed public policy debate on tort reform. The task force did not find evidence of significant numbers of frivolous lawsuits and concluded that, with some strengthening, the existing court rules are adequate to address the problem of lawyers who present frivolous claims or defenses.

The Governor asked the task force to consider liability insurance rates and ways to reduce them. The task force looked into how insurance rates are set and regulated, and into insurance reforms and rate rollbacks in other states. The task force found no evidence of a crisis in insurance cost or availability, nor did it hear from the insurance industry in the course of its debate. Because Alaska is a small market, rates for most lines of liability insurance are set according to the overall claims experience of an insurance company, not its experience within Alaska. Accordingly, the task force found no evidence that changes in Alaska law would affect Alaska insurance rates. The task force recommended enhanced data collection and reporting to provide the legislature and the public with the information they need to evaluate the effect of proposed civil justice reforms.

Based on its findings, the task force makes the following proposals for civil justice reform:

- a cap on punitive damages of three times compensatory damages or $500,000, whichever is greater, with an alternative cap for cases in which conduct was motivated by financial gain or a defendant has systematically injured a number of people
- clarification of the existing cap on noneconomic damages, to assure that it may be exceeded only for severe injuries or severe disfigurement
- allowing increased fines against attorneys who bring frivolous lawsuits
- restrictions on the rights of a felon to recover for injuries suffered in the course of the crime or arrest
- clarification that people who intentionally hurt others will be held liable for their fair share of the harm
- an alternative dispute resolution project, to resolve cases without the expense of trial

- streamlined district court procedures, to increase access by hearing smaller cases faster and less expensively
- changes in superior court procedures, to encourage active judicial management of cases and thus decrease overall litigation expense
- a floating rate of interest on judgments that more accurately reflects current conditions, to promote prompt settlement of cases and payment of damages
- changes in court procedures for offers of judgment, to encourage early settlement offers by both plaintiffs and defendants
- shorter statutes of limitation in contract cases, to decrease risk and increase predictability in the modern business environment
- improvements in the expert advisory panel for medical malpractice cases, so doctors can provide quicker and more useful advice to the courts
- collection of information on cases that are settled, to obtain a full picture of the impact of civil liability laws
- collection of information on insurance premiums, claims paid, and investments, to allow a more accurate assessment of insurance rates and the effects of civil justice reforms on those rates

The task force also reviewed and rejected a number of ideas from previous tort reform efforts. It found that some of these ideas did not address real problems in Alaska's civil justice system, while others were unfair or created more problems than they solved. The task force considered but did not recommend:

- a shorter statute of repose for the negligence of architects and construction contractors, limiting the right of Alaskans to sue for injuries when a building more than 10 years old collapses
- a statute of repose for other kinds of negligence, limiting the right to sue for injuries that are not immediately apparent, particularly for injured children
- allowing fault to be allocated to people who are not joined in the lawsuit, increasing the number of persons added to cases and possibly reducing the likelihood of full compensation for innocent victims
- allowing hospitals to avoid responsibility for the negligence of doctors working in the hospital emergency room
- creating new, complex grounds for claiming that a lawsuit is frivolous, which would complicate and increase the costs of litigation and might also discourage valid claims
- allowing defendants to delay payment of the full judgment once a plaintiff is awarded the money, unless the plaintiff agrees to accept periodic installment payments
- changing the way benefits or payments from other sources, such as the individual's health care benefits, are considered at trial

- restrictions on contingency fees that might limit access to the courts for injured people with difficult or risky cases
- further restrictions on the qualifications of expert witnesses, resulting in parties having to retain more expensive and possibly non-Alaskan experts

The task force labored to create workable solutions to problems with the civil liability system, while sorting out recurring ideas that will not improve the process. It worked by consensus whenever possible, requiring a two-thirds majority to adopt any proposal, to make sure that its recommendations were responsive to the broad range of mainstream concerns. It presents its work as a balanced set of proposals designed to decrease the costs of resolving cases, discourage frivolous litigation, promote fair compensation for injured parties, promote the predictability of outcomes, improve information available to decision-makers, and increase access to justice for all Alaskans.

Chapter 1

Task Force Process

The Governor's Advisory Task Force on Civil Justice Reform was created to provide Governor Knowles with proposals for a fair and legally sound tort reform bill to submit to the Alaska legislature. During the 1995-96 legislature, tort reform issues received a great deal of attention. The legislature passed HB 158, containing provisions on civil liability for commercial recreational activities, a ten-year statute of repose, a cap on punitive damages, a lower cap on noneconomic damages, allocation of fault to nonparties, mandatory arbitration of personal injury actions, a new cause of action for false claims and improper legal practice, limits on damages resulting from commission of a felony, and changes affecting offers of judgment, expert witness qualifications, hospital liability, and periodic payments. The legislature passed HB 158 by narrow margins in the final days of the session.

Governor Knowles vetoed HB 158, finding that it was the product of a flawed public process, dictated poor public policy, and contained serious legal defects and serious constitutional problems. He found that its provisions would complicate instead of streamline the civil justice system and would limit the rights of innocent Alaskans to reasonable and just compensation for injuries caused by others. He considered that the statute of repose and retroactive limitations on punitive damage awards would probably be unconstitutional.

To produce meaningful tort reform, the Governor appointed the task force to develop a new bill through an open public process that would meet the goals of fairness, efficiency, and reduction of insurance rates. The Governor appointed 16 public members and 5 ex officio members to represent the interests of large and small businesses, doctors and architects, plaintiff and defense lawyers, Alaska Natives, the Alaska legislature, and state departments responsible for law,

insurance, and litigation against the state.[1] The Governor appointed Judge Thomas Stewart, a retired superior court judge from Juneau, as task force chair.

The Governor charged the task force with four goals: to make the civil liability system more efficient and reduce frivolous litigation; to provide for fair but not excessive compensation for injured victims; to lower liability insurance rates; and to provide for reasonable punitive damages awards to deter practices that harm innocent Alaskans, without chilling the business environment or allowing windfall recoveries. He asked the task force to consider all options and develop a proposal for meaningful, responsible tort reform.

The twenty members of the task force worked through the fall of 1996 to meet these goals. The full task force met for a total of six days from early September to early December. Judge Stewart divided the work of the task force into committees on damages, procedures, and liability. These committees each conducted five half-day meetings in October and November to discuss the issues and to make and revise recommendations.

The Governor addressed the task force at its first meeting, urging members to take this opportunity to work out a reasonable set of proposals that would solve real problems and work to the benefit of all Alaskans. He urged the group to work by consensus as much as possible, to make sure that its recommendations were responsive to the broad range of mainstream concerns. Accordingly, the task force adopted a voting procedure calling for a super-majority vote to pass a proposal out of committee or to adopt a full task force recommendation.[2] For most of its recommendations, the task force was able to achieve a broad consensus.

The task force learned about the tort reform efforts in Alaska and other states. The members spoke with experts, conducted interviews, reviewed studies of civil justice reform efforts nationwide, and commissioned additional research and analysis of Alaskan data. They conducted a series of hearings around the state to explain their proposals and obtain public testimony, and all of their meetings were open to and attended by the public. They met in committees, and as a group, to argue, listen, and work out their recommendations.

---

[1] The Governor also appointed a member of the Alaska Teamsters Union to represent the concerns of Alaska working people, but this member was unable to serve due to illness in his family.

[2] At the committee level, it took four votes to pass out a recommendation to the full task force. Any member was free to request that an issue that had died in committee be reconsidered by the full task force, but no such request was ever made. With only a few exceptions, the committees made their recommendations by consensus. For full task force votes, a super majority meant 14 out of 20 votes.

The task force members learned of a variety of concerns about the Alaska civil justice system. They heard that litigation is often prohibitively expensive and time-consuming. Many individuals and businesses with smaller claims are unable to find lawyers to take their cases, while defendants often agree to settle dubious claims to avoid the costs of going to court. Injured individuals find it difficult to receive what they consider fair and timely compensation for their injuries, while many individual and business defendants feel unfairly targeted because of their assets, not their responsibility for the injuries.

The task force recognized the inherent conflict between the need of injured parties for individualized justice that fits the circumstances of their cases and the need of members of the business community for a level of predictability that will allow them to know the value of cases and to purchase reasonably priced insurance.

The task force studied court statistics on cases filed in Alaska courts and commissioned a special study of tort cases that went to jury trial. This information showed no explosion in the number of tort cases filed, nor did it reveal a large number of juries returning high noneconomic or punitive damages. However, this information does not reveal the entire picture of tort case outcomes, because most claims are settled out of court. The task force concluded that further information is necessary for an informed public policy debate on tort reform. The task force did not find evidence of large numbers of frivolous lawsuits, but it identified abuses in several common types of cases.

The Governor asked the task force to consider liability insurance rates and to look into ways to reduce them. The task force looked into how insurance rates are set and regulated, and into insurance reforms and rate rollbacks in other states. Because Alaska is a small market, there is a delicate balance between careful regulation of existing insurers and the risk that existing insurers will withdraw from the market, leaving Alaska consumers and businesses without the protection of insurance. The task force recommended enhanced data collection and reporting, to provide the Division of Insurance and the legislature with the information they need to evaluate the effect of proposed civil justice reforms, without disruption to the existing market.

Based on its findings, the task force made a number of proposals it considered important to fair, necessary civil justice reform. The commentary and draft language of these proposals are found in Chapter 4 of this report. The task force also reviewed and rejected a number of ideas from previous tort reform efforts. It found that some of these ideas did not address real problems in Alaska's civil justice system, while others were unfair or created more problems than they solved. Discussion of these proposals is found in Chapters 5 and 6 of this report. The task force worked hard, in a short period of time, to create workable solutions to proble with the civil liability system, while sorting out

recurring ideas that would not improve the process. The task force finalized its recommendations and presented them to the Governor on December 16, 1996.

Chapter 2

Previous Alaska Tort Reform Efforts

Most of the current tort statutes were enacted in 1962 to operate in conjunction with principles of common law. Many reforms have been made in the intervening years.

For injuries related to the design, planning, or construction of improvements to real estate, a statute of repose[3] was enacted in 1967 as an exception to the general two-year statute of limitations. Under the 1967 statute of repose, a claim was barred unless brought within six years of the date of substantial completion of construction. An exception was made if the injury occurred in the sixth year – the claimant would have two years to file for that injury.[4] Provisions specific to medical malpractice were added as Article 6 of AS 09.55. The new provisions listed the elements that needed to be proved to establish malpractice. A physician's standard of care was established to be that of physicians with the same expertise practicing in the same or a similar locality.

In 1970, the legislature passed the Uniform Contribution Among Joint Tortfeasors Act, AS 09.16.010 - 09.16.060, which provided for contribution so that each person who contributed to an injury (joint tortfeasor) was liable for an

---

[3] A statute of repose cuts off the right of a claimant to bring a lawsuit after a specified time measured from the delivery of a product or the completion of work. A statute of limitation is the period of time after an injury has occurred in which a lawsuit must be filed.

[4] In 1988, the Alaska Supreme Court invalidated the 1967 law on equal protection grounds because the statute discriminated between different kinds of defendants "based on their occupation or the nature of the work they perform." *Turner Construction Co. v. Scales*, 752 P.2d 467, 470 (Alaska 1988). The court mentioned but did not reach two additional issues: discrimination among classes of plaintiffs and due process issues under the Alaska Constitution. In 1994, the legislature passed a bill amending the statute of repose, AS 09.10.055. The bill contained findings of legislative purpose to justify the distinctions that the Alaska Supreme Court had criticized among classes of defendants. The bill extended the statute of repose to fifteen years. The state supreme court has not evaluated the current AS 09.10.055.

equal share of the damages despite the person's percentage of fault.[5] Previously, each joint tortfeasor could be liable for paying all of a claimant's damages, without a right of contribution from other liable persons. In 1975, the supreme court changed the existing rule that a claimant could not recover any damages if the claimant was contributorily negligent; that is, if a claimant was also at fault for causing his injuries. Under the new rule, the claimant's damages were reduced by the percentage of the claimant's negligence (termed "comparative negligence.") *Kaatz v. State,* 540 P.2d 1037 (Alaska 1975) *appeal after remand* 572 P.2d 775 (1977)

The next flurry of activity took place during the 1975-76 legislative session. In 1975, after Governor Hammond vetoed a medical insurance bill, he created the Governor's Medical Malpractice Commission. The following year, a comprehensive bill was enacted. The Medical Indemnity Corporation of Alaska (MICA) was established as a public corporation. As a condition of licensure, physicians were required to obtain insurance from MICA; various other medical professions were also required to obtain insurance, but only from MICA if other insurance was found to be unavailable.[6] The burden of proof for malpractice was amended to remove the "locality" restriction; AS 09.55.535 provided for voluntary arbitration of medical malpractice claims; and AS 09.55.556 addressed the liability of a health care provider who fails to adequately infrom a patient of the risks and alternative treatements or procedures ("informed consent"). Expert advisory panels were established to provide the superior court with findings on medical malpractice cases. The bill required hospital peer review systems with attendant confidentiality and immunity for reviewers. Additionally, the new law provided for payment of future damages by periodic payment and allowed evidence of compensation from other sources ("collateral sources") to be considered by the court after the jury reached a verdict.

During the 1979-80 legislative session, the three tort-related bills that were filed all passed. AS 09.65.200 provides that a landowner of unimproved land is not responsible for injuries to a person who is not compensating the owner for use of the land and who is injured as a result of the natural condition of the land.[7] Under another bill, skiers assumed the inherent risks of skiing if the ski

---

[5] In 1979, the supreme court invited the legislature to amend the law to provide for proportionate liability here each person would be responsible for the damages in proportion to their liability. *Arctic Structures, Inc. v. Wedmore,* 605 P.2d 426 (Alaska 1979).

[6] Under ch. 177, SLA 1978, the mandatory insurance provisions were made voluntary. MICA was abolished in 1991. Ch. 14, SLA 1991.

[7] The statute was amended by ch. 168, SLA 1988 to expand the definition of unimproved land to allow certain improvements, to preclude liability to a person who uses the land for free recreational use, and to exclude from this statutory immunity acts of gross negligence or intentional misconduct.

resort posted prominent signs warning of the inherent risks that were enumerated in the statute.[8] Additionally, a bill was passed that suspends the running of the statute of limitations for persons who were incompetent as a result of mental illness.

Major tort reform occurred during 1986. The bill that passed was one of five "omnibus" bills filed that session. The most significant change was a cap on noneconomic damages[9] of $500,000, except for damages related to disfigurement or severe physical impairment. The bill provided for jury itemization of damages between past and present, and among economic, noneconomic, and punitive types of damages.[10] It also modified joint and several liability to apply some proportionality between the amount to be paid and the degree of fault, precluded damages for injuries during a claimant's commission of a felony, limited liability of nonprofit directors and officers, allowed reduction of a verdict by collateral source payments, limited awards of attorney fees to prevailing parties in certain contested cases, and provided for periodic payments of damage awards. The bill also amended provisions on offers of judgment, costs and attorney fees, and interest on judgments, including a new section on prejudgment interest. The bill codified the standard of proof for punitive damage awards of "clear and convincing evidence" that the state supreme court set in 1962 and the court's ruling on contributory fault.

During the 1987-88 session, Governor Cowper introduced a bill advancing further tort reform. The significant differences between the House and Senate versions could not be resolved. Two other "omnibus" bills failed to move out of committee.

In November 1988 the voters approved an initiative to eliminate "joint and several" liability – the common law doctrine by which multiple defendants are held both jointly and individually liable for the entire amount of damages awarded to a plaintiff, irrespective of each defendant's percentage of fault. The initiative repealed AS 09.16.010, which provided for a right to contribution among co-tortfeasors, and amended AS 09.17.080(d) to read, "[T]he court shall

---

[8] Ski area liability is now governed by the Alaska Ski Safety Act of 1994, AS 05.45.010 - 05.45.210. (Ch. 63, SLA 1994) The fourteen sections of the act precisely define the duties and responsibilities of skiers and operators. If a ski area fulfills all of its responsibilities, it is immune from liability for any accident in which a contributing factor was an inherent risk of skiing or the skier's failure to follow the enumerated skier duties.

[9] Noneconomic damages include such losses as pain and suffering, loss of enjoyment of life, and disfigurment.

[10] Punitive damages are a separate amount of money awarded to punish or deter the defendant for outrageous conduct. They may be awarded in addition to an award of compensatory damages which are intended to restore the injured party to his or her position prior to the injury.

enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."[11] A provision in the initiative limiting attorney continency fees was not placed on the ballot after it was disallowed by the Lieutenant Governor. (See *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162 (Alaska 1991).)

In 1989, the House of Representatives created the "Liability Insurance Task Force" for the purpose of reviewing controversies concerning tort reform and to "determine how the state may more effectively regulate insurance and provide civil justice." In March 1990, the task force issued a final report containing findings but no recommendations. An "omnibus" bill filed in both the House and the Senate failed to make it to the floor for consideration.

In 1993, the state supreme court adopted a civil rule allowing the court to order mediation at the request of a party or on its own motion. Alaska R. Civ. P. 100. Mediation is intended to achieve informal resolution of legal disputes. The rule did not apply to certain matters involving domestic abuse.

Another "omnibus" tort bill, HB292, was filed in 1993. After extensive hearings by the House Labor and Commerce Committee, it was not reported out of the House Finance Committee. The most recent "omnibus" tort bill, HB158, was filed in 1995. This bill was passed by the legislature in 1996 and vetoed by Governor Knowles. This task force was then appointed by the Governor to develop proposals for changes to the current civil justice system.

A chronology of legislative tort reform bills from 1967 to 1996 is found in Appendix D of this report.

[11] In *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994), the Alaska Supreme Court analyzed the changes to AS 09.17.080 and held that fault could only be allocated among parties who had been joined to the action. Thus, defendants may still be held liable for the fault of any tortfeasors who have not been joined in an action.

Chapter 3

Research and Public Comment

The task force worked to develop a strong base of information before making its recommendations. Governor Knowles asked the task force to

1) evaluate any changes in the volume and type of civil liability case filings in the Alaska Court System and in amounts awarded by juries as damages;

2) review statutory civil liability and insurance reform measures in other states and assess the effects of those reforms;

3) analyze recent proposals for civil liability and insurance reform in Alaska;

4) review Alaska case law and statutes and assess the need to amend existing statutes and court rules;

5) invite written public comment and hold public hearings on civil liability, insurance reform, and related topics.

Studies and papers: A great deal has been written on the subject of civil justice reform. The task force staff assembled two notebooks of materials, including court system data, statutes and bills, journal and newspaper articles, empirical research results, scholarly analyses, governmental audits, advocacy from interest organizations, and results from previous task forces. The staff contacted a wide range of organizations and individuals: university professors, plaintiff and defense attorneys, consumer groups, research organizations, insurance groups, and lobbyists. The task force gave particular attention to prior Alaska tort reform proposals, Alaska statutes and rules, and recent tort reform efforts in other states.

Those who sent information included the Institute for Civil Justice at RAND, the Brookings Institute, the National Center for State Courts, the Alaska

Judicial Council, the Alaska Legislative Research Agency, the American Bar Association, the Alaska Bar Association, the American Medical Association, the Alaska State Medical Association, the Association of Trial Lawyers of America, the Defense Research Institute, the American Tort Reform Association, Alaskans for Liability Reform, Public Citizen, the Alaska Public Interest Research Group, the Insurance Research Council, the Insurance Information Institute, and the American Bar Foundation.

Tort reform experts: Two nationally recognized experts on civil justice reform addressed the task force at its first meeting. Dr. Deborah Hensler is the Director of the Institute for Civil Justice at RAND, an independent private research institute in California, and is also a professor of law and social science at the University of Southern California. Her research has focused on trends in civil justice litigation, alternate dispute resolution, mass torts, and compensation for physical injury. She holds a Ph.D. in political science from MIT.

Dr. Hensler discussed the three goals of tort law: compensation of losses from injuries; deterrence of the behavior which leads to injuries; and fairness or corrective justice. With respect to compensation, she described a 1989 RAND study of 26,000 households showing that only 10 percent used the liability system to deal with medical losses following accidental injury. The rate of claiming was up to 50 percent in auto accidents, and down to 5 percent in products cases. She said that some studies show the claiming rate was gradually increasing. In the 1980s, the greatest increase in litigation was in "mass torts" such as asbestos and silicone breast implants. The rate of compensation is uneven; generally, the higher the loss, the lower the percentage of recovery. Transaction costs range from 33 percent for auto accidents to 60 percent for mass torts. Dr. Hensler discussed the balance between the social costs and benefits of using the court system for deterrence of unsafe behavior, finding a mix of good and bad effects. With respect to fairness, the public's attitude toward tort reform reflects an ambivalent attitude toward the civil justice system in general: while people disapprove of frivolous lawsuits and greedy lawyers, they still feel that individuals who are at fault should pay, and people do look to lawyers and the courts to right those wrongs.

Dr. Hensler also provided an overview of civil justice reform in the United States. She divided it into three parts: the tort reform movement, which concentrates on reducing incentives to litigate and reducing uncertainty about the outcomes; the procedural reform movement, which concentrates on reducing delays and the costs to all litigants; and the alternative dispute resolution movement, which attempts to increase access and reduce delay by providing alternatives to litigation. She discussed ongoing research efforts, particularly with respect to alternative dispute resolution.

Theodore Eisenberg is a professor of law at Cornell University. Professor Eisenberg has conducted a number of studies of the civil justice system, including recent work on punitive damages and litigation models. Professor Eisenberg spoke about research on jury behavior and the size of awards. He said some jury behavior does not follow popular perceptions: for instance, jury cases are on the court docket a shorter time than judge cases, and plaintiffs are more likely to win in front of a judge than in front of a jury. He said that in studies of medical malpractice, the rate of claiming was much lower than the rate of negligence, as determined by independent panels of doctors. Professor Eisenberg also reviewed studies on punitive damages, showing that punitive damages are requested most frequently in business and contract cases and least frequently in medical malpractice and auto cases. In a study of federal cases where punitive damages were awarded, he found that they were closely related to compensatory awards, increasing as compensatory awards increase.

Alaska judges and practitioners: At the first meeting, Judge Brian Shortell, former presiding judge of the Anchorage Superior Court, discussed allocation of fault, the statutes of limitations, medical malpractice cases, and damages. Supreme Court Justice Dana Fabe, chair of the court's civil rules committee, discussed the new Alaska Rules of Court pertaining to discovery and disclosure rules, including automatic disclosure of certain information, limitations on depositions and interrogatories, pretrial procedures, and sanctions. Teresa Williams, Assistant Attorney General, gave an overview of prior Alaska proposals to revise tort law, dating back to 1967.[12]

A number of other Alaska practitioners assisted the three committees in their work. The damages committee was aided in its discussion of wrongful discharge cases by Thomas M. Daniel and Barbara A. Jones, co-chairs of the Alaska Bar Association Employment Law Committee, who discussed current Alaska law and the Model Wrongful Termination Act. Daniel T. Quinn and John Suddock debated various proposed changes to the law regarding allocation of fault with the liability committee. The liability committee also met with Marianne Burke, director of the Division of Insurance, to learn about insurance rate-making and regulation and insurance reforms in other states. The procedures committee was assisted in many areas by Chris Christensen, staff counsel to the Alaska Court System, and Susanne DiPietro, staff attorney for the Alaska Judicial Council.

[12] This history is included in this report in Chapter 2 and Appendix D.

Court system data: The task force staff analyzed court system annual reports to determine if there have been any recent changes in filing patterns.[13] The number of personal injury and property damage filings have stayed fairly constant since 1988. There has been a slight increase in the number of personal injury cases, while property damage, death, and malpractice claims have remained level. When the increase in personal injury claims is adjusted for the recent increase in the state's population, there is no apparent change in filing patterns at all. In 1993, Alaskans filed tort lawsuits at a rate of 159 per 100,000 population. This figure was at the low end of 28 states that the National Center for State Courts studied that year. The majority of personal injury cases filed in 1995 (58 percent) arose out of automobile accidents. Another 37 percent were general personal injury cases, and 5 percent were malpractice cases.[14]

Special study of Alaska tort trials: The task force asked the Alaska Judicial Council to study jury verdicts and awards of damages in Alaska tort cases. Teresa Carns and Susanne Di Pietro presented information on the type of cases that usually go to trial: 37 percent were automobile cases, 17 percent premises liability cases, and 13 percent medical malpractice cases, with the rest a mixture of employment, intentional tort, and product liability cases. They found that most plaintiffs were individuals or families, rather than organizations, while defendants were split between individuals and organizations.

The Judicial Council found that plaintiffs won at trial about half the time, although the rate at which plaintiffs won varied according to the location of the trial. They found that plaintiffs were more likely to win automobile and employment cases, while defendants were more likely to win malpractice and premises liability cases. They also found that Alaskan juries seldom allocate much fault to plaintiffs.

The Judicial Council looked in detail at damage awards: economic and noneconomic, past and future, and punitive. They found that damages are most frequently awarded for past economic losses, most commonly lost wages and medical expenses. Noneconomic damages constituted about one-third of the awards studied, about half of which was for past pain and suffering. Juries seldom made awards for loss of consortium, loss of enjoyment of life, or emotional distress. Punitive damages were requested in 27 percent of the cases,

---

[13] Because of changes in the way the courts have categorized their cases, it is difficult to determine the number of tort filings before 1988. As the court computer system has come on-line, better data have become available. Since 1991, the courts have kept track of tort cases by eight different categories: automobile personal injury, automobile property damage, other personal injury, other property damage, wrongful death, medical malpractice, legal malpractice, and other malpractice.

[14] Charts summarizing Alaska tort filings from 1988 to 1995 are found in Appendix B of this report.

but awarded in 6 percent. As a general rule the amount of damages was quite low. In 58 percent of superior court cases in which the juries returned awards of damages, each award was under $50,000 (the superior court jurisdictional limit).[15]

Public opinion: The task force involved the public in its deliberations in a number of ways. All task force and committee meetings were open to the public, and time for public testimony was allowed at most of the meetings. Members of the public were present at all meetings, particularly staff and volunteers from the Alaska Public Interest Research Group. Many task force members heard comments from the public directly, and written comments were encouraged throughout the process.

After the committees made their draft recommendations, the task force scheduled a series of community forums to present the preliminary recommendations and hear public comment on them. Task force members held three- to four-hour community forums in Juneau, Bethel, Anchorage, and Fairbanks. They also held a statewide teleconference to receive comment from areas where no meeting was scheduled. The community forums were designed to serve multiple purposes: to give Alaskans a chance to learn more about civil law and litigation, to discuss the task force recommendations and other tort reform proposals, and to allow people to share their experiences and views with members of the task force. Approximately 120 people attended the forums.

The community forums were designed to encourage give-and-take between the task force members and the public. The first hour of each forum was a videotape of excerpts from the presentations of Dr. Hensler and Professor Eisenberg at the first meeting of the task force, providing a national overview of civil liability research. The videotape was followed by a brief introduction to the task force process and an overview of the preliminary recommendations.

Audience members were then asked to break into groups to discuss three typical litigation situations that raised many of the issues in front of the task force. There was a hypothetical building collapse that raised questions about limits on noneconomic damages and the statute of repose; a medical malpractice case that raised questions about hospital liability for emergency room physicians, whether children should be able to bring suit on their own behalf when they reach adulthood, and how frivolous lawsuits can be discouraged; and an automobile accident that raised questions about the ability of alcohol-impaired plaintiffs to sue for injuries they incurred as a result of their own intoxication and whether

[15] The full text of the Judicial Council study is found in Appendix C of this report.

there should be limits on awards of punitive damages.[16] After discussion, the groups shared their conclusions with each other. They learned about each other's differing perspectives and began to appreciate the difficult challenge facing those who are considering changes to Alaska civil liability law.

The group discussions were followed by public testimony. Fifty-six people testified in the various locations. Although the time for individual testimony had to be limited in Anchorage and Fairbanks because of the number of people signed up to speak, the task force stayed each night until all those who wished to speak had their chance. The audiences were a mix of people who had suffered negligent injuries, small business owners, doctors, engineers, lawyers, and interested citizens. Summaries of public testimony are found in Appendix A.

Most of the task force members attended at least one of the public meetings; some attended all of them. The results were reported back to the full task force before the task force voted on the committee recommendations. With the public comment in mind, as well as the results of prior research, reading, and group discussions, the task force made the recommendations found in the next three sections of this report.

[16] The three situations, public comment on them, and summaries of general public testimony are found in Appendix A of this report.

Chapter 4

Proposals Adopted by ~~Full~~ Task Force

This chapter contains the affirmative recommendations of the task force to improve the civil justice system. Each of these recommendations was adopted by at least a two-thirds majority of the task force, most often by a unanimous vote. The recommendations are grouped by their primary purpose, although many address more than one goal.

To increase the predictability of case outcomes, the task force recommends

- structured caps on punitive damages,
- a stronger cap on noneconomic damages,
- a market rate of interest on judgments, and
- shorter statutes of limitation

To improve efficiency of the courts and access to justice, the task force recommends

- an alternative dispute resolution program,
- improved superior court fast track procedures,
- streamlined district court procedures and higher jurisdictional limits,
- encouraging offers of judgment,
- medical advisory panel improvements, and
- access to the medical advisory panel for state health care providers

To reduce frivolous lawsuits and defenses, the task force recommends

- increased fines for frivolous behavior by lawyers,
- restricting suits for injuries suffered during a felony, and
- clarifying liability for intentional acts

To provide information for future public policy debate, the task force recommends

- collection of settlement information and
- collection of more-detailed insurance information

Each of these recommendations is presented in specific statutory language, as it would appear in a bill to amend the Alaska Statutes or the Alaska Rules of Court. The statutory language is followed by commentary describing the intended effect of the change and the reasons for the task force recommendation. Purpose and effective date provisions are also included.

PURPOSE OF PROPOSED LEGISLATION

*** Sec. 1.** PURPOSE. It is the purpose of this Act to

(1) reduce the time and costs associated with civil litigation for civil litigants;

(2) improve access to justice for individuals and small businesses;

(3) provide for fair but not excessive compensation for persons injured through the fault of others;

(4) increase the predictability of case outcomes to reduce inappropriate litigation and settlement behavior;

(5) collect information on the civil justice system to inform the public policy debate on tort reform-related issues;

(6) collect information on the insurance industry to inform the public policy debate on tort reform-related issues.

STRUCTURED CAPS ON PUNITIVE DAMAGES

* **Sec. 6.** AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020. PUNITIVE DAMAGES. (a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrent with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded.

(b) In the initial phase of a trial in which punitive damages are claimed, the fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

(1) was outrageous;

(2) was the result of malicious or hostile feelings towards the plaintiff; or

(3) evidenced reckless indifference to the rights or safety of others.

(c) At the separate proceeding to determine the amount of punitive damages to be awarded, the fact finder may consider

(1) the likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;

(2) the degree of the defendant's awareness of that likelihood;

(3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's misconduct;

(4) the duration of the misconduct and any intentional concealment of it;

(5) the attitude and conduct of the defendant upon discovery of the misconduct;

(6) the financial condition of the defendant; and

(7) the total deterrent of other damages and punishment imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

(d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of punitive damages to be awarded and the court shall enter judgment for that amount.

(e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of punitive damages under (c)(3) or (c)(6) of this section may not be conducted until after the fact finder has determined that an award of punitive damages is allowed under (a) and (b) of this section. The court may issue such orders as necessary, including directing the parties to have the information relevant to the amount of punitive damages under (c)(3) or (c)(6) of this section available for production immediately at the close of the initial trial, so as to minimize the delay between the initial trial and the separate proceeding to determine the amount of punitive damages.

(f) Except as provided in (g) or (h) of this section or otherwise provided by law, an award of punitive damages may not exceed the greater of

(1) three times the amount of compensatory damages awarded to the plaintiff; or

(2) the sum of $500,000.

(g) Except as provided in (h) of this section, if the fact finder finds that the conduct proven under (b) of this section was motivated by financial gain, it may award an amount of punitive damages not to exceed the greater of the limitation provided under (f) of this section or

(1) the average net annual income earned by the defendant for the five years before the date of the trial; or

(2) two times the amount of financial gain that the defendant received or expected to receive as a result of the defendant's misconduct.

(h) Notwithstanding the provisions of (g) of this section, if the fact finder finds that the conduct proven under (b) of this section was employment-related, including hiring, firing, transferring, promoting, demoting, or terminating an employee or employees, and

(1) affected one person, an award of punitive damages shall be subject to the limitation of (f) of this section;

(2) the employer engaged in a pattern or practice affecting more than one person, an award of punitive damages shall not exceed the greater of the limitations provided under (f) or (g) of this section.

(I) Punitive damages may not be awarded against a person or entity that is immune by law from awards of punitive damages.

*** Sec. 32.** AS 09.17.020, as repealed and reenacted by sec. 6 of this Act, has the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to conduct a separate proceeding for the

determination of a punitive damages award after it has determined that punitive damages are allowed in a case.

Commentary

This proposal makes changes to AS 09.17.020 regarding punitive damages.

The task force considered at great length whether the law should cap punitive damages and at what level such a cap might operate. Some members felt that punitive damages have no place in today's judicial system, while others felt that punitive damages are an important part of the existing system. The damages committee heard evidence supporting both positions. Although punitive damages are infrequently assessed in Alaska, they create a sense of unpredictability for the parties. This unpredictability affects settlement behavior in a way that is not reflected in the judicial statistics.

The damages committee considered but did not reach consensus on the advisability of a simple multiplier of compensatory damages or a fixed dollar cap. These limitations met the predictability test, but seemed less valuable in meeting the fairness test, in certain situations. The task force believes strongly that any cap needs to account for the varying circumstances in which punitive damages are awarded. In some cases the profit earned by an individual's misconduct might be a proper measure of punishment. In others, however, profit is not a component of the wrongdoer's decision-making or actions.

Borrowing from the law of the State of Kansas, the task force's proposal provides multiple caps for various situations. The basic cap is three times the compensatory damages or $500,000, whichever is greater. This cap would be applied in most cases. However, in cases in which the defendants' offending conduct was clearly motivated by financial gain, the cap would be measured differently. It would be twice the profit earned from the misconduct, one year's net income based upon a five-year average, or the cap provided under section (f), whichever is higher. These alternate caps are more appropriate, fair, and predictable where a defendant conducted a business scheme or conspiracy to evade the law for financial gain.

The proposal also crafts an exception to exempt employment situations such as hiring, firing, and promoting. Conduct affecting a single employee would fall under the basic cap (three times compensatory or $500,000). However, if a company had a pattern or practice affecting multiple employees, then either the alternate cap (one year's income or two times profit) or the basic cap, whichever is larger, could be used.

The task force considered whether part of any punitive damages award should be given to state government. The argument in favor of this proposal was

that punitive damages exist to deter and punish the wrongdoer, not to compensate the injured person. It is important that the injured person receive enough of the award to have an incentive to pursue punitive damages when appropriate, but not receive enough to constitute a windfall. The argument against this proposal was that it is financially and psychologically very difficult for a plaintiff to bring a lawsuit and see it through to a verdict. Suits for punitive damages are already very complex and difficult cases to bring, and the task force was unwilling to make it more difficult to do so. It opted instead for the increased predictability that comes with the proposed cap.

Atty? Answer is to exempt Atty fee cap recoveries from cap how does this? OR 1/2 to State 1/2 to injured person.

STRONGER CAP ON NONECONOMIC DAMAGES

*** Sec. 5.** AS 09.17.010 is amended to read:

Sec. 09.17.010. NONECONOMIC DAMAGES. (a) In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, and other nonpecuniary damage.

(b) The amount of damages awarded by a court or a jury under (a) of this section may not exceed $500,000 for each claim based on a separate incident or injury.

(c) The limit under (b) of this section does not apply to damages for **severe** disfigurement or severe physical impairment.

Commentary

This proposal makes changes to AS 09.17.010 regarding noneconomic damages.

Since 1988, Alaska law has imposed a $500,000 limit on most jury verdicts for noneconomic damages, which include compensation for pain, suffering, loss of consortium, loss of enjoyment of life, and other noneconomic injuries. The cap may be exceeded only in instances of disfigurement or severe physical impairment.

The task force evaluated alternatives to the current cap and whether to impose an absolute cap that cannot be exceeded. It considered whether to delete the word "disfigurement" and whether "impairment" could be defined by statute. It looked at caps from other states, particularly a recent Ohio statute that ties noneconomic damages to life expectancy, imposing a cap for severe injuries of $35,000/year times the person's life expectancy, or $1 million, whichever is less.

Only nine states impose any cap on noneconomic damages, so that Alaska already imposes greater restrictions on plaintiffs and provides greater certainty for defendants than most states. Studies of the effect of caps on insurance rates, particularly the California medical malpractice cap, have shown mixed results. The task force found no evidence that Alaska plaintiffs are receiving excessive compensation for noneconomic damages under the current cap, but was concerned that lowering the cap might accord insufficient compensation to individuals with the most severe injuries.

While the terms "disfigurement and severe physical impairment" lack precision, the task force believed that attempting to define those terms (e.g., loss

of two limbs, combination of deafness and blindness, etc.) inevitably would omit injuries that warrant substantial compensation and create irrational distinctions between classes of injured victims. There is no evidence that Alaska courts have construed these terms in a manner that allows recovery of excessive damages for nonserious injuries.

While the full task force recommends no major change in the current cap, it agrees that adding the word "severe" to describe the word "disfigurement" would clarify that the cap can be exceeded only for very serious injuries.

MARKET RATE OF INTEREST ON JUDGMENTS

*** Sec. 9.** AS 09.30.070(a) is amended to read:

(a) **Notwithstanding the provisions of AS 45.45.010, the** [THE] rate of interest on judgments and decrees for the payment of money **, including prejudgment interest, shall be determined in accordance with (c) of this section** [IS 10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

*** Sec. 10.** AS 09.30.070 is amended by adding new subsections to read:

(c) Except as otherwise provided in (a) of this section, the rate of interest on judgments and decrees for the payment of money is the rate for a five year constant maturity U.S. Treasury note published in the applicable Federal Reserve H.15 Statistical Release, plus one and one-half percent. This rate shall be the rate in effect as of the first business day of the month during which prejudgment interest begins to accrue under (b) of this section, and shall remain constant with respect to such claims until the judgment is satisfied. This rate of interest shall be determined by the Alaska Court System as of the first business day of every month.

*** Sec. 12.** AS 09.50.280 is amended to read:

Sec. 09.50.280. JUDGMENT FOR PLAINTIFF; PUNITIVE DAMAGES. If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with **interest as provided under AS 09.30.070** [LEGAL INTEREST FROM THE DATE IT BECAME DUE] and without punitive damages.

Commentary

This proposal makes changes to AS 09.30.070 and AS 09.50.280 regarding interest on judgments.

The current statutory rate for interest on judgments is a fixed rate of 10.5% simple interest. This rate applies to both prejudgment interest (interest due to the plaintiff from the time the claim is filed until the court enters a judgment in the plaintiff's favor) and post judgment interest (interest due from the time judgment is entered until it is satisfied).

The task force concluded that a fixed rate can create inappropriate incentives to delay or accelerate payment of a judgment or settlement, depending on the current interest rate environment. The task force considered various proposed changes to the award of interest, including eliminating prejudgment interest awards on future damages. Rather than change the structure of the various types of awards, the task force decided to change the fixed rate to a floating rate more responsive to current market conditions. The interest rate for an individual case is determined according to AS 09.30.070(b) and stays constant until the judgment is satisfied. It remains a simple interest rate.

The task force chose the five-year U.S. Treasury Note rate plus 150 basis points (1½ percent) as the appropriate measure of interest. The five-year Treasury Note rate is a published rate that may be established by judicial notice and is a medium-term rate corresponding to the duration of many lawsuits. With the addition of 150 basis points, it fairly reflects the value of money to the plaintiff under prevailing market conditions. It equates to 7.35 percent as of December 2, 1996.

SHORTER STATUTES OF LIMITATION

*** Sec. 2.** AS 09.10.050 is repealed and reenacted to read:

Sec. 09.10.050. CERTAIN PROPERTY ACTIONS TO BE BROUGHT IN SIX YEARS. Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property.

*** Sec. 3.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. CONTRACT ACTIONS TO BE BROUGHT IN THREE YEARS. Unless an action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, excepting those described in AS 09.10.040 or as otherwise provided by law.

*** Sec. 4.** AS 09.10.070 is amended to read:

Sec. 09.10.070. ACTIONS FOR TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. A person may not bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) **for taking, detaining, or injuring personal property, including an action for its specific recovery; (3)** upon a statute for a forfeiture or penalty to the state; or **(4)** [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

Commentary

This proposal makes changes to AS 09.10 regarding statutes of limitation.

The task force recommends two changes in the statute of limitations found in AS 09.10.050. It recommends reducing the time to bring an action on a contract from six to three years, to promote the quick resolution of business matters in modern society. It also recommends reducing the time to bring an action for damage to personal property from six to two years, to bring it into line with actions for personal injury.

The task force recognizes that these statutes of limitations begin to run from "accrual" of the cause of action, the time the plaintiff knew or should have known of the injury, as governed by the discovery concept as it currently exists in Alaska case law. The task force does not recommend any changes with respect to tolling the statute of limitations during the minority or mental incompetence of the plaintiff.

The liability committee recommended that the time to bring an action for waste or trespass upon real property be reduced from six years to four years. Members of the task force, however, expressed concern about the difficulty of detecting trespass on remote lands and enforcing actions against trespassers in remote areas. After discussion, the task force decided to retain the current six-year statute of limitations for bringing an action for waste or trespass upon real property.

OK

Alaska case law holds that legal malpractice actions are governed by the statute of limitations for contracts (currently six years), not the statute of limitations for negligence (currently two years). The liability committee recommended that the statute of limitations for legal malpractice actions be reduced to two years, to bring it into line with the statute of limitations for malpractice by doctors and other professionals. However, reducing the statute of limitations for contracts to three years would effectively reduce the statute for legal malpractice actions. Therefore, the task force concluded that no additional change in the statute of limitations for legal malpractice was necessary.

OK

ALTERNATIVE DISPUTE RESOLUTION PROGRAM

*** Sec. 11.** A.S. 09 is amended to add a new chapter to read:

CHAPTER 42. ALTERNATIVE DISPUTE RESOLUTION.

Sec. 09.42.010. PURPOSE. The legislature finds that providing a formalized program of alternative dispute resolution procedures within the existing civil litigation system can promote the timely and efficient resolution of many civil disputes. To that end, the legislature enacts AS 09.42.010 - 09.42.050 to provide for an initial pilot program of alternative dispute resolution of certain civil cases.

Sec. 09.42.020. PILOT PROGRAM FOR ALTERNATIVE DISPUTE RESOLUTION. (a) The supreme court shall provide for a pilot program of no less than five years' duration for the submission of civil cases filed in the superior court, third judicial district, to alternative dispute resolution procedures. The program shall operate in accordance with the provisions of AS 09.42.010 - 09.42.050.

(b) The following types of cases shall not be included in the pilot program:

(1) divorce and dissolution;
(2) child custody and visitation;
(3) other children's matters;
(4) probate;
(5) cases where no answer is filed.

Sec. 09.42.030. STRUCTURE OF PILOT PROGRAM. (a) The program established under AS 09.42.020 shall provide criteria for the screening of covered cases to determine if they are appropriate for referral to alternative dispute resolution. The criteria shall be constructed so that at least 50 percent of the covered cases filed in a calendar year to be referred.] rewrite

(b) The program shall provide for a list of qualified persons to whom cases may be referred and a list of the fees charged by these individuals. The court shall establish minimum qualifications for those persons. Under the program, parties shall be permitted by mutual agreement to choose a person from the panel or to choose a person not on the panel to conduct the alternative dispute resolution procedure. In the event that the parties cannot agree, the person to conduct the procedure shall be appointed from the panel by the trial court.

(c) The program shall provide that the parties to an alternative dispute resolution procedure shall share the costs of the procedure equally. A party found indigent under guidelines established by the supreme court shall be eligible to have that party's share of the costs borne at public expense. The costs borne

at public expense on behalf of an indigent party shall constitute a lien on any recovery by that party to be paid first out of the recovery.

(d) The program shall provide procedures and rules promoting the timely referral to and conclusion of the alternative dispute resolution procedure. The time from the filing of defendant's answer to the conclusion of the alternative dispute resolution procedure shall not exceed 100 days unless permitted by the trial court in exceptional cases and for good cause shown. Unless a longer period is agreed to by mutual consent of the parties, the alternative dispute resolution session shall be limited to no more than 12 hours.

(e) A person appointed to conduct an alternative dispute resolution procedure under the program established pursuant to AS 09.42.010 - 09.42.050 shall have judicial immunity to the same extent as a judge and shall abide by applicable rules of confidentiality established by the supreme court.

Sec. 09.42.040. EVALUATION OF PILOT PROGRAM. (a) The Alaska Judicial Council shall evaluate the efficacy of the program established pursuant to AS 09.42.010 - 09.42.050 annually. The evaluation shall address factors such as the speed with which cases are resolved, the satisfaction of the litigants, the expenditure of court resources, and the expenditure of litigant resources.

(b) The council shall work with the court system to create a system for efficient collection of information needed to evaluate the program. The council shall report the results of its evaluation to the legislature each year by March 31.

Sec. 09.42.050. DEFINITION. As used in AS 09.42.010 - 09.42.050, "alternative dispute resolution procedure" includes mediation and neutral evaluation.

*** Sec. 34.** AS 09.42, as enacted by sec. 11 of this Act, has the effect of amending Alaska Rule of Civil Procedure 100 by making the mediation process mandatory for certain civil cases in the superior court, third judicial district, and by expanding the scope of the rule to include other forms of alternative dispute resolution in addition to mediation.

Commentary

This proposal adds a new chapter to Alaska Statutes Title 9 regarding alternative dispute resolution.

In evaluating changes to the Alaska civil justice system, the task force had as primary goals a fairer and more efficient system more easily accessible by all Alaskans. With these goals in mind, the procedures committee reviewed research on alternative dispute resolution (ADR) programs around the country. Task force members were impressed by the results of programs in several jurisdictions and recommend that the legislature establish a pilot project to develop effective ADR programs in Alaska.

ADR programs seek resolution of disputes before they get to trial, and may use mediation, early neutral evaluation, or various forms of arbitration. Mediation is a non-binding form of dispute resolution in which a mediator helps the parties analyze their dispute and encourages them to reach an agreement. Early neutral evaluation is a process in which a well-informed neutral person evaluates the merits of a lawsuit and gives a frank assessment to the parties.

The reports the committee reviewed strongly indicated that ADR participants considered the programs helpful. Most were pleased with the process and would recommend it. Although ADR sometimes leads to early settlement of cases, it is not consistently cheaper for the courts or the litigants. However, the participants did not seem deterred by the costs of the program, and participant satisfaction was high. ADR is most successful if initiated as early in the litigation as possible.

Although the task force supports adding ADR programs to the options available to Alaskan litigants, it did not attempt to design a permanent program of alternative dispute resolution for the whole state. Not all cases are appropriate for ADR, and some types of cases may require different ADR approaches.

Instead, the task force decided to give the court system a chance to try some ADR approaches, to evaluate them relative to traditional trial-based dispute resolution, and to design a program that would best fit Alaska's system. Thus the task force recommends that a five-year pilot program be set up in the Third Judicial District, during which no less than 50 percent of the cases filed in superior court will be referred for mediation or early neutral evaluation. During the pilot program, the Alaska Judicial Council will be directed to evaluate the program annually and report its findings to the legislature. Since the Third Judicial District has the largest population and number of civil cases, and also has a diverse geographical area, limiting the pilot program to this area will provide a range of situations for evaluation.

The pilot program is being limited to the superior court and will exclude the following types of cases: divorce and dissolution; child custody and visitation; and cases where no defendant answers the complaint. This limitation will give the court system an opportunity to evaluate the impact of another task

force recommendation, early civil trials in district court, before deciding whether ADR would be appropriate at the district court level.

One task force member voiced concern that this proposal would violate the equal protection clause of the Constitution and unfairly discriminate against some litigants by requiring some litigants to pay for ADR as part of the litigation, while litigants whose cases were not referred would not be required to bear those costs.

IMPROVED SUPERIOR COURT FAST-TRACK PROCEDURES

***Sec. 21.** The lead-in to Alaska Rule of Civil Procedure 16.1(c) is amended to read:

(c) **Motion to Set Trial and Certificate.** **Unless otherwise ordered by the court, a** [A] motion to set trial may not be filed until **after the meeting of parties under Rule 16.1(n) has occurred and the scheduling order under Rule 16(b) has been issued** [105 DAYS AFTER SERVICE OF THE SUMMONS AND COMPLAINT]. A party seeking to obtain a trial date must serve and file a motion to set trial together with a certificate, signed by counsel, stating:

*** Sec. 22.** Alaska Rule of Civil Procedure 16.1(k)(4) is repealed.

*** Sec. 23.** Alaska Rule of Civil Procedure 16.1(n) is repealed and reenacted to read:

(n) **Meeting of Parties; Scheduling Order.** Except when otherwise ordered, the parties shall, as soon as practicable after the exchange of initial disclosures required under Civil Rule 26(a)(1)and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Civil Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or forms of subsequent disclosures under the rules including a statement as to when the disclosures required under Civil Rule 26(a) were made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(4) whether a scheduling conference is unnecessary;

(5) whether there will be dispositive or partially dispositive motions filed in the case and whether other deadlines should be set aside pending resolution of the dispositive or partially dispositive motions by the court; and

(6) any other orders that should be entered by the court under Civil Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good

faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

Commentary

This proposal amends Alaska Rule of Civil Procedure 16.1 to provide for a meeting of the parties and a pretrial conference.

The Alaska Rules of Court include new civil rules designed to streamline discovery and decrease the costs of litigation. The new rules provide for pretrial judicial conferences to assist in management of cases (Civil Rule 16) and for meetings of the parties to outline issues in the case and other matters requiring judicial attention (Civil Rule 26(f)). These rules help resolve pending disputes over discovery, jury instructions, trial exhibits, and deadlines. In cases where summary judgment is appropriate, the court can schedule resolution of the motion prior to imposing other pretrial deadlines. By requiring early judicial management and communication between the parties, these procedures encourage early resolution of issues without unnecessary expenditure of time.

However, Civil Rule 16.1 has preempted these rules for most Anchorage cases. Civil 16.1, the "fast-track" rule, is designed to reduce delay. Under Rule 16.1, the court gives fast-track cases little management or attention until the day of trial. Since most Anchorage civil cases are now assigned to fast-track procedures, the other rules are ineffective in reducing delay.

The task force believes that increasing the efficiency and reducing the cost of litigation are important steps in reforming the civil justice system. Therefore, the task force recommends amendment of Civil Rule 16.1 to provide for a meeting of the parties and a comprehensive pretrial conference.

STREAMLINED DISTRICT COURT PROCEDURES AND HIGHER JURISDICTIONAL LIMITS

***Sec. 20.** AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed **$100,000** [$50,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed **$100,000** [$50,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding **$100,000** [$50,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death or cause and manner of death of any person in the manner prescribed in AS 09.55.020 - 09.55.069;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the arrears and damage to the property does not exceed **$100,000** [$50,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed **$100,000** [$50,000];

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest, and attorney fees does not exceed **$100,000** [$50,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.030;

(10) over cases involving protective orders for domestic violence under AS 18.66.100 - 18.66.180.

*** Sec. 28.** District Court Civil Rule 1(a)(1) is amended to read:

(1) The procedure in civil actions and proceedings before district judges and magistrates shall be governed by the rules governing the procedure in the superior court to the extent that such rules are applicable. **However, unless otherwise agreed by all parties or permitted by order of the court in exceptional cases and for good cause shown, discovery shall be limited to the disclosures required under Civil Rule 26(a) and to the taking by**

each party of the deposition of the opposing party (or parties) and of one additional person.

* **Sec. 29.** District Court Civil Rule 4 is amended by adding a new subsection to read:

(b) Unless otherwise permitted by order of the court in exceptional cases and for good cause shown, all parties shall file a memorandum to set the case for trial, as set forth in Civil Rule 40(b), no later than 180 days after service of the complaint on all parties to the case. The parties shall submit a joint memorandum to set the case for trial, which may state their separate positions if they do not agree concerning the information or estimates to be provided in the memorandum. The court shall set the trial to commence on a date no less than 30 and no more than 90 days after the filing of the memorandum to set the case for trial, unless a continuance is granted by the court pursuant to Civil Rule 40(e).

Commentary

This proposal makes changes to AS 22.15.030 and District Court Civil Rules 1 and 4 regarding District Court procedure and jurisdiction.

The expense of civil litigation effectively restricts access to the justice system for many plaintiffs and defendants, particularly in cases involving relatively small claims. This provision streamlines the district court pretrial process, with the intention of reducing the cost of litigating such claims. It also increases the district court's jurisdictional limit to encourage more litigants to use that streamlined process and its strict accelerated trial schedule.

A substantial portion of litigation costs are incurred in pretrial discovery. The amendment to District Court Civil Rule 1(a)(1) would significantly limit discovery, absent agreement of the parties or order of the court. This limitation should reduce not only discovery costs but also the costs of other aspects of trial preparation and trial.

The requirement that trial be set for a date no later than 270 days after the service of the complaint is also partly intended to reduce litigation costs. The parties or their counsel cannot extend this trial deadline by agreement; only the court may grant a trial continuance, and only in exceptional circumstances. With a shortened pretrial period, parties will have to be more focused and economical in their pre-trial and trial efforts; they will also have to consider settlement possibilities with a sense of dispatch. Prompt judicial resolution of claims will provide numerous other benefits as well. Parties will have their day in court sooner; the period of disruption of lives and business by litigation will be reduced; and the efficiency of the civil justice system will improve.

Finally, this provision increases the civil jurisdiction of district court to $100,000 from its present $50,000. This increase is considered appropriate given the economics of litigation and the desire to encourage plaintiffs to avail themselves of a more streamlined district court process.

Plaintiffs with limited financial resources may be unable to obtain representation in many cases – even those with substantial merit – involving potential recovery of less than $100,000. Many defendants feel that they are coerced by the prospect of significant ligation costs into settling claims which they view as having little or no merit. To the extent streamlined district court procedures reduce litigation costs, they will alleviate these problems. Moreover, since many cases currently brought in superior court result in recoveries less than $100,000, plaintiffs will have an incentive to accept that jurisdictional limit on their recovery and file more claims in district court to take advantage of a faster, less costly process. In those cases, defendants will have the benefit of greater certainty concerning their potential exposure and better defined boundaries for any settlement discussions.

ENCOURAGING OFFERS OF JUDGMENT

*** Sec. 8.** AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be **adjusted as follows:**

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), the interest rate shall be reduced by five percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), but more than 90 days before the trial began, the interest rate shall be reduced by three percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be reduced by two percent [REDUCED BY FIVE PERCENT A YEAR];

(2) if the offeree is the party defending against the claim, the interest rate shall be **adjusted as follows:**

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), the interest rate shall be increased by five percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), but more than 90

days before the trial began, the interest rate shall be increased by three percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be increased by two percent [INCREASED BY FIVE PERCENT A YEAR].

*** Sec. 25.** Alaska Rule of Civil Procedure 68 is repealed and reenacted to read:

Rule 68. **Offer of Judgment.**

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065;

(2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065.

(c) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the court's award of attorney's fees under Civil Rule 82 shall be adjusted as follows:

(1) if the offeree is the party making the claim, the court shall adjust its award of attorney's fees to the offeree as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), the attorney's fees award shall be reduced by 50%;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), but more than 90 days before the trial began, the attorney's fees award shall be reduced by 30%;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the attorney's fees award shall be reduced by 20%;

(2) if the offeree is the party defending against the claim, the court shall adjust its award of attorney's fees to the offeror as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), the attorney's fees award shall be increased by 50%;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), but more than 90 days before the trial began, the attorney's fees award shall be increased by 30%;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the attorney's fees award shall be increased by 20%.

(d) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made 90 days or less but more than 10 days before trial begins, if it is served not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

*** Sec. 33.** AS 09.30.065, as amended by sec. 8 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by altering the manner in which interest under AS 09.30.070 is adjusted when a judgment is not more favorable to the offeree than the offer.

Commentary

The proposal makes changes to AS 09.30.065 and Alaska Rule of Civil Procedure 68 regarding offers of judgment.

Under present law, either a party making a claim or the party defending against a claim may make an offer to the adverse party to allow judgment to be entered in complete satisfaction of the claim. If the adverse party rejects the offer, and the judgment ultimately rendered is less favorable than the offer, present law imposes a penalty on the party by increasing the rate of prejudgment interest for successful plaintiffs by 5 percent and decreasing it for successful defendants by 5 percent. It also provides for additional attorney fees for defendants who prevail on an offer of judgment but provides no corresponding attorney fee provision for a prevailing plaintiff. The offer of judgment

enhancements or penalties are the same whether the offer is made early or late in the case.

The task force's proposal attempts to equalize the attorney fee provisions for prevailing plaintiffs and defendants. It also makes the attorney fee enhancements or penalties greater when the offer is made earlier in the process to induce parties to make their best offers early rather than on the eve of trial.

OK

MEDICAL ADVISORY PANEL IMPROVEMENTS

*** Sec. 14.** AS 09.55.536(c) is amended to read:

(c) Not more than 30 days after selection of the panel, it shall make a written report to the parties and to the court, answering the following questions and other questions submitted to the panel by the court **in sufficient detail to explain the case and the reasons for the panel's answers:**

(1) **Why did the claimant come to medical care** [WHAT WAS THE DISORDER FOR WHICH THE PLAINTIFF CAME TO MEDICAL CARE]?

(2) **Was a correct diagnosis made? If not, what was incorrect about the diagnosis** [WHAT WOULD HAVE BEEN THE PROBABLY OUTCOME WITHOUT MEDICAL CARE]?

(3) Was the treatment **or lack of treatment** [CHOSEN] appropriate [FOR THE CASE]? **If not, what was inappropriate about the treatment or lack of treatment?**

(4) **Was the claimant harmed (injured) during the course of evaluation or treatment or by failure to diagnose or treat** [DID AN INJURY ARISE FROM THE MEDICAL CARE]?

(5) **If the answer to Question 4 is "yes", what** [WHAT] is the nature and extent of the medical injury?

(6) What specifically caused the medical injury?

(7) Was the medical injury caused by unskillful care? **Explain.**

(8) If a medical injury had not occurred, **what would have been the likely outcome of the case** [HOW WOULD THE PLAINTIFF'S CONDITION DIFFER FROM THE PLAINTIFF'S PRESENT CONDITION]?

*** Sec. 15.** AS 09.55.536(f) is amended to read:

(f) Discovery may not be undertaken in a case until the report of the expert advisory panel is received **or 60 days after selection of the panel, whichever first occurs**. However, the court may relax this prohibition upon a showing of good cause by any party. If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant it an additional 30 days.

*** Sec. 26.** Alaska Rule of Civil Procedure 72.1(g) is amended to read:

(g) **Discovery.** Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until **60 days after selection of the panel** [80 DAYS HAVE ELAPSED FROM THE DATE THE CASE IS AT ISSUE], whichever is first to occur, unless discovery is further stayed for good cause by order of the court.

* **Sec. 35.** AS 09.55.536(f), as amended by sec. 15 of this Act, has the effect of amending Alaska Rule of Civil Procedure 72.1(g) by changing the duration of the stay on further discovery when an expert advisory panel is appointed to evaluate a health care malpractice claim.

Commentary

This proposal makes changes to AS 09.55.536 and Alaska Rule of Civil Procedure 72.1 regarding the reporting requirements of expert advisory panels.

Under present law, in a personal injury or death action based on negligent provision of services by a health care provider, the court may appoint a three-person panel to help it understand the health care practices at issue. The panel may examine medical records, interview witnesses, consult with specialists and medical treatises, and physically examine the injured person. It then makes a report to the court, attempting to answer certain questions set out in the statute.

Some task force members interviewed a number of concerned people who generally agreed that the statutory questions should be revised, particularly to cover omissions. The task force determined also that panels must be assembled and report more quickly if the report is to be useful to the court. Despite imperfections, the Alaska State Medical Association does not want the system of expert advisory panels abandoned. Accordingly, the task force recommends revised questions and expedited reporting of answers to improve the usefulness of the panel system.

The task force also recommends that the Alaska State Medical Association, the Alaska Bar Association, and the Alaska Court System work together to review the process of recruiting and selecting panel members in order to improve the current practice.

ACCESS TO THE MEDICAL ADVISORY PANEL FOR STATE HEALTH CARE PROVIDERS

*** Sec. 13.** AS 09.55.536(a) is amended to read:

(a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider**, including a person providing services on behalf of a governmental entity,** when the parties have not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after filing of answer to a summons and complaint a three-person expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. When the action is filed the court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions.

*** Sec. 16.** AS 09.55.536 is amended by adding a new subsection to read:

(i) This section applies regardless of whether the parties in the action or the health care provider whose professional services are the subject of the action is in the public or private sector.

Commentary

This proposal makes changes to AS 09.55.536 regarding the availability of expert advisory panels to state health care providers.

The State of Alaska Department of Corrections and its employees are frequently sued for alleged medical malpractice stemming from the health care provided to inmates while incarcerated. This proposal clarifies existing law that the State and its employees and health care providers have the same access to an expert advisory panel in these medical malpractice actions as medical malpractice defendants in the private sector. This clarification is sought because some trial courts do not refer such cases to expert advisory panels.

INCREASED FINES FOR FRIVOLOUS BEHAVIOR BY LAWYERS

* **Sec. 27.** Alaska Rule of Civil Procedure 95(b) is amended to read:

(b) In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed **$10,000.00** [$1,000.00] against any attorney who practices before it for willful failure to comply with these rules or any rules promulgated by the supreme court.

Commentary

This proposal makes changes to Alaska Rule of Civil Procedure 95(b), regarding fines for attorney misconduct.

Public discussion of tort reform often has focused on a need to deter "frivolous" lawsuits. Alaska law already provides significant deterrents to such cases. Under Alaska court rules and cases, if a claim is frivolous, the court can require the person asserting it to pay the other party's full, reasonable attorney fees incurred in defending against the claim.

The task force considered and rejected the provisions of the final version of HB 158[17], passed by the legislature last year, which were purportedly aimed at further deterring frivolous litigation. None of those provisions would likely have had any significant additional deterrent effect. Each provision had fundamental flaws and, if enacted and used by litigants, would seriously complicate and expand litigation, imposing additional burdens and expenses on the parties.

The task force also considered and rejected provisions of Section 21 of final HB 158, which would have required mandatory sanctions for purported attorney misconduct. The federal courts adopted a similar mandatory sanction requirement as part of Federal Civil Rule 11 in 1983. After a few years' experience and an explosion of related litigation over sanctions, the federal courts eliminated that mandatory sanction requirement. Alaska would likely experience the same problems if it were to adopt such a mandatory sanction requirement.

In short, the frivolous litigation sanction and deterrent provisions in the final version of HB 158 would have the principal effect of creating more trouble

---

[17] The version vetoed by the Governor was SCS CSHB158(RLS) amS (ct rls fld S).

and expense for civil litigants. That result would not further the cause of civil justice reform.

The consensus of the task force is that little litigation is wholly frivolous, lacking a reasonable basis in law and fact. However, some litigation conduct – e.g., motions made or positions taken – lacks substantial merit or is otherwise improper. Judges polled thought that sanctions currently available to punish such conduct are adequate. Under the current rules a court may require a party (or his or her attorney) to pay costs and attorney fees to another party faced with frivolous or otherwise improper litigation conduct; the court also may punish litigants and attorneys with contempt sanctions for such conduct.

The current rules also allow a court to impose a fine of up to $1,000 on an attorney for his or her misconduct. This provision amends Civil Rule 95(b) to increase the maximum fine to $10,000. The purpose of the increase is to allow a court greater discretion to impose a fine appropriate to the seriousness of the misconduct, in an amount sufficient to punish and deter appropriately a particular offending attorney.

RESTRICTING SUITS FOR INJURIES SUFFERED DURING A FELONY

*** Sec. 17.** AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210. DAMAGES RESULTING FROM THE COMMISSION OF A FELONY. (a) A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person

(1) was engaged in the commission of a felony, and the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the felony substantially contributed to the personal injury or death;

(2) was engaged in the commission of an unclassified felony or a class A or class B felony for which the person was not convicted if

(A) the felony substantially contributed to the injury or death;

(B) the person was not acquitted of the felony; and

(C) the felony is proven by the defendant in the civil trial by clear and convincing evidence; or

(3) was fleeing from the commission of an unclassified felony or a class A or class B felony, or was being apprehended for an unclassified felony or class A or class B felony, if

(A) the felony or flight or the person's conduct during the apprehension, as the case may be, substantially contributed to the injury or death;

(B) the person was not acquitted of the felony; and

(C) the felony is proven by the defendant in the civil trial by clear and convincing evidence.

(b) This section does not affect a right of action under 42 U.S.C. § 1983.

Commentary

This proposal makes changes to AS 09.65.210 to expand the affirmative defense against plaintiffs injured during or after commission of a felony.

State law currently provides an affirmative defense against convicted felons suing to recover for injuries they suffered while committing felonies. Recently, however, cases have arisen that are not covered by this defense; for example, cases involving persons who were fleeing from commission of felonies, or were being apprehended for felonies, when the flight or the persons' conduct during

apprehension substantially contributed to their injuries. Cases have also arisen in which felonies were committed and were substantial causes of the injuries, but the persons were never charged because of death or reasons unrelated to the criminality of their conduct.

This amendment extends the affirmative defense to this type of case if the defendant in the civil trial proves the felony in the civil trial by clear and convincing evidence. If the defendant can prove the injured person was involved in a felony, the injured person cannot get a judgment against him or her. The task force chose a standard of proof higher than the ordinary civil burden because of the serious nature of the accusation and the substantial shift in the burden of proof that an affirmative defense creates. The task force limited its amendments to more serious felonies to avoid creating a disproportion between the seriousness of the offense and the seriousness of the injury in some cases. The task force decided that the affirmative defense should not apply to persons who are actually acquitted at trial.

CLARIFYING LIABILITY FOR INTENTIONAL ACTS

*** Sec. 7.** AS 09.17.900 is amended to read:

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent, [OR] reckless, **or intentional** toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Commentary

This proposal amends AS 09.17.900 to clarify its applicability to intentional acts.

This proposal clarifies that a percentage of fault in civil lawsuits may be allocated to intentional acts as well as to negligent or reckless acts. Because the current statute speaks of negligent or reckless acts, plaintiffs have argued that fault cannot be allocated to intentional tortfeasors.

For example, plaintiffs sometimes sue the State for negligent supervision of a probationer who intentionally shoots the plaintiff. The plaintiff may fail to name the probationer as a defendant and attempt to allocate all fault to the State. This amendment clarifies the State's right to name the probationer as a third-party defendant and to have fault allocated against him or her for his or her intentional acts. This avoids the incongruous result of allocating fault to those who are negligent, but not to those who act intentionally.

SETTLEMENT INFORMATION

*** Sec. 19.** AS 09.68 is amended by adding a new section to read:

Sec. 09.68.130. COLLECTION OF SETTLEMENT INFORMATION. (a) Except as provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate information relating to the compromise or other settlement of all civil litigation. The information, including the case name and file number, a general description of the claims being settled, the dollar amount of the settlement, to whom it is to be paid, and any nonmonetary terms, shall be collected on a form developed by the council for that purpose.

(b) The information received by the council under (a) of this section is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow the identification of particular cases or parties.

(c) The requirements of (a) of this section do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.

*** Sec. 30.** Alaska Rule of Appellate Procedure 511 is amended by adding a new subsection to read:

(e) **Settlement Information.** When a dismissal under (a) or (b) of this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A dismissal by agreement under (a) of this rule must be accompanied by a certification signed by the attorneys of record for all parties that the information required under AS 09.68.130 has been submitted to the Judicial Council. A dismissal by the appellant or petitioner under (b) of this rule must be accompanied by such a certification signed by the appellant's or petitioner's attorney of record. The requirements of this subsection do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.

*** Sec. 24.** Alaska Rule of Civil Procedure 41(a) is amended by adding a new paragraph to read:

(3) *Scheduling Order.* When a voluntary dismissal under this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A notice of dismissal under (1)[a] of this subsection must be accompanied by a certification signed by or on behalf of the plaintiff that the

information required under AS 09.68.130 has been submitted to the Judicial Council. A stipulation of dismissal under (1)[b] of this subsection must be accompanied by such a certification signed by or on behalf of all parties who have appeared in the action. The requirements of this paragraph do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.

Commentary

This proposal makes changes to AS 09.68, Alaska Rule of Civil Procedure 41(a), and Alaska Rule of Appellate Procedure 511 regarding collection of settlement information.

This proposal requires most civil litigants who settle cases to file information about the settlements before the courts will formally dismiss their cases. The vast majority of cases are settled without trial, and the task force recognizes the importance of understanding the effect of civil liability laws on settlement behavior. Accordingly, it recommends that the Alaska Judicial Council collect and analyze settlement information in a confidential manner.

The outcome of cases that proceed to trial or to final resolution on appeal is a matter of public record. As a result, interested persons can learn about the size of liability verdicts in tort cases and analyze their significance in considering tort reform strategies. In fact, the Judicial Council conducted such a study at the task force's request. However, cases that end with verdicts comprise only a small part of the total tort cases, and thus may not accurately reflect the effect of tort liability laws on case outcomes in Alaska.

In considering various tort reform-related proposals, the task force was frustrated by the lack of settlement data. Recognizing that no enforceable mechanism presently exists by which data on settlements in civil litigation can be collected and analyzed, the task force adopted the recommendation of the procedures committee to require mandatory submission of settlement information before a case can be formally closed. To assure confidentiality and for administrative simplicity, the parties will file this information directly with the Judicial Council, with a separate certification to the court that the information was filed. The Judicial Council is directed to perform its analysis in a way that provides the legislature, the courts, and the public with useful information about civil cases in general, without revealing identifying characteristics of individual cases.

Although the task force recognizes that state legislation cannot require parties litigating in federal court in Alaska to make comparable disclosures of

settlement information, the task force suggests that the Judicial Council explore whether the Federal District Court might consider adopting changes to its local rules of practice to allow collection of the same information in federal cases.

COLLECTIONOF MORE DETAILED INSURANCE INFORMATION

* **Sec. 31.** INSURANCE REPORT. (a) The division of insurance shall compile information necessary to evaluate

(1) the impact of the measures enacted in this bill on the availability and cost of insurance in the state; and

(2) the financial health and profitability of the insurers' business in the state.

(b) Beginning June 1, 1999, the information compiled under (a) of this section shall be reported to the legislature annually.

(c) The division of insurance shall adopt regulations requiring insurers doing business in the state to provide information necessary for the division to carry out its responsibilities under (a) of this section. That information shall be for Alaska and shall include premiums, claims paid, expenses of claims, and an allocation of investment profits or losses by line of business written in Alaska. The information shall be compiled in a way that protects the identity of individual insureds.

(d) The division of insurance may consult with the Alaska Judicial Council when determining what information to require under (c) of this section and when carrying out the compilation required under (a) of this section.

Commentary

This proposal creates a new, uncodified provision requiring compilation of insurance information.

One of the Governor's stated goals for the task force was to develop recommendations that would lower liability insurance rates, and the task force developed many of its proposals with the goal of lower insurance rates in mind. The task force found no evidence of an insurance crisis in cost or availability, nor did it hear from the insurance industry during the course of its debate. Because Alaska is a small market, rates for most lines of insurance are set according to the overall claims experience of an insurance company, not its experience within Alaska. The task force found no evidence that changes in Alaska law would affect Alaska insurance rates. However, it concluded that more information was needed to judge whether any correlation exists between the measures enacted and the liability insurance rates charged to Alaska individuals and businesses.

Therefore, the task force recommends that the Division of Insurance adopt regulations requiring most insurers to report information regarding premiums and claims, by line of business written in Alaska. Recognizing that looking only at premiums collected and claims paid does not provide a complete picture of an insurer's profitability in doing business in Alaska, the task force also proposes that the division obtain information regarding that portion of the insurers' investment

experience attributable to their Alaska business. The legislature can use this information to evaluate the impact of tort reform-related measures on the availability and cost of insurance in Alaska, as well as the financial well-being of insurers doing business in the state. The Division of Insurance is expected to compile the information and make it publicly available, but is not required to perform the analysis.

The task force recognizes that there is a delicate balance between careful regulation of existing insurers and the risk that existing insurers will withdraw from the market, leaving Alaska consumers and businesses without the protection of insurance. The Division of Insurance should develop its regulations to avoid significant disruption to the existing market. In developing the regulations, the division may consult the Alaska Judicial Council on civil justice research issues.

MISCELLANEOUS PROVISIONS, INCLUDING EFFECTIVE DATES [TO BE REPLACED BY RON LORENSEN]

*** Sec. 36.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

*** Sec. 37.** APPLICABILITY. (a) Secs. 8 — 16, 20 — 23, and 25 — 29 of this Act apply to all civil actions filed on or after the effective date of this Act.

(b) Secs. 8 — 16, 20 — 23, and 25 — 29 of this Act apply to all causes of action accruing on or after the effective date of this Act.

*** Sec. 38.** Secs. 24 and 30 of this Act take effect on January 1, 1998.

*** Sec. 39.** Except as provided in sec. 38 of this Act, this Act takes effect immediately under AS 01.10.070(c).

Commentary

The task force proposals become applicable on different dates. Some proposals apply to cases that are filed on or after the effective date of the proposed legislation. These are proposals that do not affect the parties' substantive rights, but are designed to streamline court processes, improve access, and cut costs. These include the proposals for superior court fast track pretrial procedures (secs. 21, 22,and 23), encouraging offers of judgment (secs. 8 and 25), streamlined district court procedures and higher jurisdictional limits (secs. 20, 28,and 29), medical advisory panel improvements (secs. 14, 15, and 26), access to medical advisory panels for state health care providers (secs. 13 and 16), and increased fines for frivolous behavior by lawyers (sec. 27).

Some proposals apply to causes of action that accrue on or after the effective date of the proposed legislation. These are proposals that affect substantive rights to bring a cause of action, to seek a certain amount of damages, or to be subject to a certain defense. These include the proposals for restricting suits for injuries suffered during felonies (sec. 17), structured caps on punitive damages (sec. 6), liability for intentional acts (sec. 7), shorter statutes of limitations (secs. 2, 3, and 4), and a stronger cap on noneconomic damages (sec. 5).

The proposal on alternative dispute resolution (sec. 11) contemplates that cases filed on or after January 1, 1998, will be subject to assignment to ADR procedures. This delay gives the court system time to develop screening criteria for cases and a pool of qualified mediators. The Alaska Judicial Council has until March 31, 1998, to make its first report on the program.

Dept F.- Please review

The change in the rate of interest on judgments (secs. 9, 10, and 12) applies to cases in which the defendant receives service of process or other written notice of the claim on or after the effective date of the proposed legislation. This date is intended to be consistent with the date on which prejudgment interest begins to run under AS 09.30.070. The rate of postjudgment interest is the same as the rate of prejudgment interest for each case.

Under the proposal for collection of settlement data, the requirement that the Judicial Council develop a form to receive this information (sec. 19) will apply on or after the effective date of the proposed legislation. However, it will take the Judicial Council some period of time to develop the form and establish the internal procedures it needs to collect this information. Accordingly, the effective date of the related court rule changes (secs. 24 and 30) is delayed until January 1, 1998, so that the council can establish its procedures in an orderly fashion. The requirement will apply to all cases dismissed on or after that date, regardless of when they were filed or when the cause of action accrued.

Under the proposal for collection of insurance data (sec. 31), the Division of Insurance is required to adopt regulations requiring insurers to provide information to the division and to present that information in an annual report to the legislature. The division's duty to start the regulatory process begins on or after the effective date of the proposed legislation, while the first report is scheduled for June 1, 1999.

WRONGFUL DISCHARGE - [note, where does this go??]

A suit for wrongful discharge from employment can be based on contract theories, on state and federal laws governing discrimination and harassment, and on related tort theories such as intentional infliction of emotional distress. The task force considered whether state law should impose a cap on the number of years for which a discharged employee can collect lost future wages ("front pay").

Members of the damages and liability committees met with the co-chairs of the Employment Law Committee of the Alaska Bar Association, who represented employee and management concerns. The task force considered the Model Wrongful Termination Act and the complex interaction of current state and federal laws affecting employment. It saw no compelling reason to address the front pay issue in isolation, but concluded that the ancillary claims that often accompany employment-related litigation may impose unwarranted burdens on employers.

Accordingly, the task force recommends that the issue of a cap on front pay in wrongful discharge employment cases be addressed in the broader context of employment law, along with the collateral and intangible claims that plaintiffs often raise in such cases. Avenues of future inquiry might include statutory language similar to 42 U.S.C. § 1981(a), a statutory definition of employment at will, review of issues related to the covenant of good faith and fair dealing, and consideration of the collateral claims of protected classes.

Chapter 5

Proposals Rejected by Task Force

This chapter contains three proposals that were approved by the liability committee or taken up directly by the task force, but were rejected in a vote by the full task force. The commentaries describe each proposal, the arguments in support of it, and the reasons the task force voted against it.

These proposals recommended

- imposition of a 10-year statute of repose for design and construction defects and other forms of negligence,
- allowing allocation of fault to people who are not parties to the action, and
- barring recovery by intoxicated plaintiffs who were at least half the cause of their own injuries

STATUTES OF REPOSE

AS 09.10.055(a) currently provides for a 15-year statute of repose for personal injury, death, or property damage actions based on a defect in the design or construction of a building. In a split vote, the liability committee recommended reducing the period of repose for design and construction actions from 15 to 10 years. It also recommended extending the protections of the statute to most other tort actions, with exceptions for actions relating to exposure to hazardous substances, intentional acts or acts of gross negligence, fraud or fraudulent misrepresentation, defective products, intentional concealment of the potential cause of action, and undiscovered foreign objects in the body having no therapeutic purpose, as well as where longer periods were provided by contract.

At the public hearings, the task force presented a hypothetical scenario in which a negligently designed building collapsed 12 years after construction, severely injuring a person inside. Although most people commenting on this scenario supported the general concept of a statute of repose, there was a sentiment that the period of liability should be the same as the reasonable useful life of the building, which in most cases would be longer than 10 years. The public did not consider important the fact that a potential defendant might not be able to obtain insurance to cover accidents occurring many years after the negligent acts; the general sentiment was that professionals who face potential liability must accept that risk as a cost of doing business.

A chart summarizing the current statutes of repose for design and construction in other states was distributed to the task force, showing that the statutory period in most states is 10 years or less. Nonetheless, several members had serious reservations about reducing the statute of repose for design and construction actions from 15 to 10 years, in part because the 15-year statute of repose was enacted as a compromise reduction in 1994. While recognizing that any statute of repose is arbitrary by nature, several members expressed concern with the proposed reduction, especially given the hardship this could cause to children injured at a young age who would lose their right to recovery while still quite young. It was also noted that the Alaska Supreme Court has called into question the validity of any statute of repose. *See Hanebuth v. Bell Helicopter Int'l*, 694 P.2d 143, 147 (Alaska 1984), in which the court stated: "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has a reasonable opportunity to do so."

For purposes of discussion, the task force considered an amended proposal that would apply both to design and construction and to other torts based on negligence, but would remain at 15 years and would be tolled during periods of minority and incompetence. Members continued to express concern about the fairness of any statute of repose. After extensive discussion and consideration of

the issue, the motion to adopt the amended changes to the statute of repose failed.

ALLOCATION OF FAULT

The current law governing the allocation of fault in a tort action derives from a ballot initiative the voters approved in 1988, which eliminated joint and several liability and provided for liability based on each person's percentage share of fault for the injury. Defendants are responsible for a plaintiff's injuries only in proportion to their fault. If a careless driver of a car with incorrectly designed steering injures someone, the jury might find the careless driver 80 percent responsible and the car manufacturer 20 percent responsible. Assuming that both defendants were able to pay, the injured person would collect 80 percent from the driver and 20 percent from the car manufacturer. If the careless driver had no insurance or other resources, the injured person would collect only 20 percent. Under this law, the Alaska Supreme Court has held that fault may be allocated only to parties to the suit. The injured person sues the person or business he believes is responsible. If the defendant thinks someone else is wholly or partially at fault, the defendant adds that person to the suit as a defendant.

Some on the task force believed that defendants should be allowed to allocate fault to other people responsible for the injuries, regardless of whether those people could be required to appear in court and defend the lawsuit. The fundamental argument for the proposal is that the principle of paying in proportion to fault is sound, and fault must be allocable to nonparties (people not involved in the lawsuit) to make the principle work. In some cases, the person or entity at fault cannot be added to the suit. Examples are employers (suits are sometimes barred by workers' compensation statutes), the State (the State has sovereign immunity against some claims), bankrupt individuals and businesses (suits are barred by an automatic stay), and people outside the jurisdiction of the court (for instance, a potential defendant in another state). In other cases, the plaintiff may not name the person most at fault if that person is unable to pay any judgment. The named defendant must then bring that person into the lawsuit and thus run the risk of paying for attorney fees and costs if the person is found not to be at fault. Based on these arguments, the liability committee recommended that fault be allocable to nonparties, provided that the defendant identify them early in the litigation so that the plaintiff could choose to add them.

However, others on the task force felt that an additional wrongdoer should be added to the lawsuit by the defendant, not the innocent victim. Allocation of fault to nonparties is a foreign concept to American courts, which depend on the adversarial process to arrive at the truth. If a defendant is allowed to argue that someone not present in court is responsible for the harm to the plaintiff, the plaintiff is forced to present his own case and to defend the "empty chair." Some members were also concerned that the proposal would increase the number of

additional defendants, thus increasing the cost and complexity of litigation for all concerned.

Under the committee's proposal, a defendant could name as many additional defendants as the defendant chose. The plaintiff would feel compelled to sue as many of them as possible, even if he or she felt they were only tangentially involved, to avoid having to defend the empty chair. Yet if the plaintiff then added these defendants and lost (because he or she was right and their involvement was minimal), the plaintiff would be responsible for paying the costs and attorney fees of people he or she did not want to sue. Many task force members felt that if the primary defendant thought others were partially responsible for the injury, that defendant should bear the costs and risks of suing.

The law is particularly complicated with respect to workers' compensation. For example, an employee injured on the job by a defective machine cannot make a claim against the employer if covered by workers' compensation, but can claim against the machine manufacturer. The manufacturer may believe that the primary cause of the injury was the employer's failure to maintain the machine, not the fault of the machine itself. Since fault cannot be allocated to the employer in this case, the machine manufacturer might have to pay all the damages even if only partially at fault. However, the injured employee is also barred from suing the employer. If the manufacturer were allowed to allocate fault to the employer, and the employer had no reason to defend against the allocation, the injured worker would receive only a partial recovery even though not at fault at all. The problem is compounded by the fact that workers' compensation laws give the employer a lien on any recovery the injured worker receives from the manufacturer.

Under the complicated configuration of the current law, the task force faced a choice between the risk that some wrongdoers may be required to pay more than their fair shares of the fault and the risk that an innocent victim may be denied a full recovery. Given this choice, the task force felt that the law should be left as is and did not adopt this proposal.

ALCOHOL- AND DRUG-IMPAIRED PLAINTIFFS

The liability committee considered the problem of lawsuits filed by people who are partly responsible for their own injuries because their judgment or coordination was impaired by alcohol or drugs. It discussed whether a new section should be added to AS 09.65 to create a defense to such lawsuits, but ran out of time to finalize a proposal. The full task force asked staff to develop such a proposal, but ultimately rejected it.

The proposal was based on a Michigan statute creating an absolute defense to a lawsuit where the plaintiff was impaired by alcohol or drugs. If the defendant could show that the accident was more than half the fault of the

intoxicated plaintiff, the plaintiff would recover nothing. The proposal incorporated the presumption of .10 for alcohol intoxication. The defense applied only to operation of motor vehicles, snowmachines, boats, and aircraft. Members rejected an amendment to broaden the defense to cover all injuries. The proposal did not allow this defense to be used by license holders selling alcoholic beverages.

Some members believed that ordinary rules of comparative negligence are appropriate for this situation, and that a jury would not be sympathetic to such a plaintiff. Others thought that there could be a number of situations where good public policy would hold the defendants responsible for at least part of the intoxicated plaintiffs' injuries. Accordingly, the task force did not adopt this proposal.

Chapter 6

Proposals Rejected in Committee

This chapter contains proposals that were discussed by the committees but failed to advance for consideration by the full task force. The commentary describes the issues the committees considered and the reasons why they decided not to recommend changes in the current law.

These issues were

- setting standards for qualifications of expert witnesses,
- imposing a sliding scale for contingency fees,
- converting claims against state employees to claims against the state, and
- changes relating to collateral payments and periodic payments

This chapter also includes one proposal, limiting hospital liability for contractors, that was originally approved by the liability committee and later withdrawn. The commentary describes the proposal and the reasons it was withdrawn by the committee.

SETTING STANDARDS FOR QUALIFICATIONS OF EXPERT WITNESSES

Current law generally restricts the jury to consideration only of testimony by expert witnesses in determining whether the standard of care has been breached in a malpractice case. The judge determines if a proposed witness has sufficient expertise to qualify as an expert. The proposed expert must have enough knowledge, skill, experience, training, or education to help the jury understand the evidence or determine a fact at issue. A witness need not possess a particular license or academic degree to qualify as an expert.

The procedures committee considered various proposals that would have set standards for expert witnesses, including requiring board certification and state licensing. The committee determined that the courts already have an appropriate amount of discretion to determine who is an expert in a particular field and heard no evidence indicating that the courts are not exercising this discretion appropriately. Restrictions on testimony might result in parties having to retain more expensive, possibly non-Alaskan, experts. The committee unanimously recommended no change in current law; as a result, the task force did not take up this issue.

IMPOSING A SLIDING SCALE FOR CONTINGENCY FEES

The procedures committee considered whether to implement a sliding scale for contingency fees by plaintiffs' lawyers. Some states employ a sliding scale for contingency fees in all personal injury cases, while others use one for medical malpractice cases only. These scales are graduated by the size of the award (allowing the attorney a lower percentage as the award gets bigger) and sometimes by the stage to which the case proceeds (allowing a higher percentage for a case that goes to trial than for one that settles early on). The committee looked at studies on the effect of such limitations and found no conclusive evidence of any positive impact on the civil justice system.

The committee discussed the difficulty of devising a scale sufficiently flexible to govern the different levels of risk, time, and expense involved in different types of cases. The committee also noted the complexity of litigation, where work tends to be done in spurts that may not correspond to the stages used in the sliding scales. The committee unanimously agreed not to pursue a sliding scale for contingency fees in Alaska; as a result, the task force did not take up this issue.

CONVERTING CLAIMS STATE EMPLOYEES TO CLAIMS AGAINST THE STATE

The procedures committee considered a proposal to provide that claims against state employees be converted to claims against the state, similar to the procedure used under the Federal Tort Claims Act. The effect of this provision would be to make claims against the state the sole avenue for pursuing claims

based on the actions or inactions of individual state employees, provided the employee acted within the scope of employment.

The State often must defend lawsuits against state employees for actions or inactions taken as part of their employment, even where the State cannot otherwise be sued. For example, state employees are not immune from actions for assault or false arrest, while the State is immune under AS 09.50.250(a)(3). The Federal Tort Claims Act cures a parallel dichotomy by substituting the United States for the employee upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident. Claims against the responsible employee individually then become claims against the government, and defenses available to the government become applicable, as long as the employee was acting within the scope of employment.

The procedures committee had concerns about the claims that could be lost under this proposal, particularly possible punitive damages claims against a state employee. The committee did not have sufficient time to consider the issue and did not pass it out of committee; as a result, the task force did not take up the issue.

CHANGES RELATING TO COLLATERAL BENEFITS

Under AS 09.17.070, a jury determines the plaintiff's losses without knowing that the plaintiff's insurance company already has paid some expenses (like medical bills). A subrogation clause in the insurance policy often requires a plaintiff to repay the insurance company, and state law similarly requires repayment of workers' compensation and Medicaid. When the plaintiff recovers from sources that do not have a right to subrogation, the defendant may ask the court to reduce the plaintiff's recovery by that amount. The plaintiff may then request an offset for insurance premiums paid and for attorney fees spent in obtaining the recovery. The court performs the calculation, after the verdict.

The damages committee considered whether the jury should be informed that someone else already has paid the plaintiff's medical bills and lost wages. The committee saw no evidence that the existing law leads to injustice through double recoveries or windfalls to plaintiffs, nor any inherent benefit in having juries perform a calculation that judges now do as a matter of law. The committee also saw no reason to interfere with the subrogation rights of insurers and state programs. The committee noted that although restricting recovery of collateral benefits might reduce the costs of liability insurance, it would be at the cost of increasing the price of health insurance and other forms of coverage. The committee unanimously concluded that the current law should be left as it is; as a result, the task force did not take up the issue.

PERIODIC PAYMENTS

The damages committee considered whether to revise AS 09.17.040(d) and (e) governing the award of periodic payments for future damages. Periodic payments, also called "structured settlements" are commonly used in settling litigation as a compromise between the parties' perception of the present value of the case. Periodic payments allow the defendant to purchase an annuity or pay in installments, while providing the plaintiff with a steady source of assured income.

When a court or jury awards damages, a prevailing plaintiff may request that future damages be made by periodic payments to the maximum extent feasible, rather than by a lump sum payment. The court may require the losing defendant to post security to ensure that funds are available as periodic payments come due, although the court may not require security if an "authorized insurer" acknowledges its obligation to discharge the judgment. Altnough a losing defendant may negotiate for future damages to be paid in installments, it has no right to insist that the judgment be paid that way.

The damages committee considered whether current law should be changed with respect to the posting of security, and discussed whether defendants should have the right to insist on periodic payments of future damages. The committee concluded that once a judgment is entered, it should be paid after judgment or appeal. The committee agreed that a plaintiff should not be forced to accept payments in installments, due to the risk of nonpayment and uncertainty over future needs. After considering the relative risk to both parties under current practices, the committee unanimously concluded that no change was needed in the current law; as a result, the task force did not take up the issue.

HOSPITAL LIABILITY FOR CONTRACTORS

Under current law, hospitals are liable for the negligent acts of emergency room physicians working on contract. Many emergency room physicians are independent contractors, not employees of the hospital, and it has been suggested that the hospital should not have to bear the responsibility of directly supervising them. The liability committee considered the nature of the work and the employment relationship, the reasonable expectations of patients, the costs of malpractice insurance, and public comment on the issue.

The committee initially recommended that hospitals be relieved of liability for the negligence of contract emergency room physicians, but be required to require the physicians to carry malpractice insurance as a condition of their contracts. The liability committee recommended that the physicians be required to purchase malpractice insurance with limits of $1 million per claim, $3 million

annual total claims. The hospitals would also have been required to exercise reasonable care in determining whether the physicians were qualified to practice in the hospitals and to review the physicians' standards of practice on a regular basis. The committee considered whether the hospitals should be required to post or publish notices explaining the limits of their liability. It concluded that such a requirement would be meaningless, given that patients use emergency rooms when they need immediate attention and their options for going elsewhere are usually limited.

However, questions were raised about whether the insurance limits were high enough and whether they would remain appropriate under changing economic conditions. The committee was also concerned about exonerating hospitals of liability in the emerging environment of managed care and the changing relationships between doctors and hospitals. The committee reconsidered its recommendation and asked consent that it be withdrawn. The task force therefore did not take up the issue.

Chapter 7

Recommendations for the Future

The task force has labored to create several improvements to the civil liability system, while sorting out recurring ideas that will not improve the process. However, the task force had limited time available and was unable to address comprehensively all the issues raised. Areas of continuing concern include the following.

Access: The time and expense of civil litigation effectively restrict access to the justice system. Individuals and businesses with smaller claims are often unable to find lawyers to take their cases, while defendants often agree to settle dubious claims to avoid the cost of going to court. Although a number of task force recommendations are designed to promote faster, less expensive litigation and alternatives to litigation, the concern remains that many people with legal problems will be unable to solve them in an appropriate way. Continuing efforts are needed to increase the flexibility of the civil justice system and to expand the options available to people seeking help with a legal problem. Efforts are also needed to increase the affordability of legal services, so that individuals and small businesses with valid claims and defenses can afford to pursue them.

Workers' compensation and employment: The task force in its public hearings heard a fair amount of concern over the ability of the workers' compensation system to pay injured workers promptly and fairly, as well as concern about the complex interaction between workers' compensation law and general tort law. The task force also heard concern from employers about the number of years for which a discharged employee can claim lost future wages and the number of collateral claims (such as harassment and infliction of emotional distress) that can accompany a suit for wrongful discharge from employment. Employment law involves a number of interrelated state and federal statutes that the task force was unable to address in the short period of time it had available.

Data collection and evaluation: As part of its efforts to improve access to justice, the task force recommended an extensive program of alternative dispute resolution to resolve cases early in the litigation. Although alternative

dispute resolution programs are well established in other jurisdictions, the Alaska program will need to be evaluated on a yearly basis to ensure it is serving the purposes for which it was designed, to make modifications, and to see whether it should be made available statewide. Because settlement information is confidential, little is currently known about how most cases are concluded and why. The task force recommends that settlement data be collected and evaluated on an ongoing basis, to allow a complete understanding of current and future tort reforms. Similarly, the task force was frustrated by the lack of insurance information available and recommends that the Division of Insurance collect the information necessary to evaluate the impact of tort reform measures on the availability and cost of insurance in Alaska. The legislature can then take this information into account as the total picture of civil liability law and insurance becomes available.

The task force has confronted a large number of interrelated issues in a short period of time. It has sought a careful balance among the many interests affected by civil liability law. Its proposals are designed to decrease the costs of resolving cases, discourage frivolous litigation, promote fair compensation for injured parties, promote the predictability of outcomes, improve information available to decision-makers, and increase access to justice for all Alaskans. It presents its work as a balanced set of proposals that will solve real problems and work to the benefit of all Alaskans.

Appendix A

Summary of Public Comment - Statewide Call-in and Community Forums

The Task Force on Civil Justice Reform held a statewide call-in and four community forums around the state to give Alaskans a chance to learn more about civil liability law and litigation, discuss key issues and varying perspectives, and share their concerns.

Each community forum included a presentation on the task force activities and preliminary recommendations, small group discussions of typical civil litigation situations that were intended to raise participants' understanding of the competing interests involved in tort law and litigation, and an opportunity for public comment. Task Force Chair Thomas Stewart, Dr. Rodman Wilson, and other members attended each of the community forums, which were held in Juneau, Bethel, Anchorage, and Fairbanks.

The summaries are intended to give a flavor of what the task force heard from the public in the community forums; they are not comprehensive. The discussion scenarios used in the forums are also included.

MARCIA IS GOING TO WORK ON THIS SECTION TO TIGHTEN IT UP SOMEWHAT

Appendix B

Court System Data

Governor Knowles requested the task force to evaluate any changes in the volume and type of civil liability case filings in the Alaska court system. Task force staff evaluated court system annual reports and computer system records to track case filings from 1988 through 1995.

Before 1988, the court system placed tort cases in a category called "civil damages," along with contracts and many other civil cases, making it impossible to track tort cases by themselves. Since 1988, court system annual reports have separated out the categories of personal injury, property damage, and other civil cases, which include malpractice and business torts, along with nontort cases. Starting at about the same time, the court system began to computerize its records and provide more specific case categories, including automobile personal injury, automobile property damage, other personal injury, other property damage, wrongful death, and malpractice (divided into medical, legal, and other). These categories capture most of the tort cases, although some business and employment-related torts may be found in other categories and are therefore difficult to track. The court computer system came on line gradually from 1988 to 1991, with Anchorage coming on last, so complete computer records using the more detailed categories are available only from 1991.

Only very basic filing information is available from court system records. Tort cases represent about @ percent of the civil case load, and less than @ percent of the total court case load, civil and criminal. The rate of total tort filings has remained relatively constant from 1988 to 1995. In 1993, Alaska had 159 tort filings per 100,000 population, which placed it near the lower end of 28 states that the National Center for State Courts studied that year. In 1995, personal injury and property damage cases accounted for 5.5 percent of the civil cases in Alaska superior courts and 4.8 percent of all superior court cases, civil and criminal. In district courts, the category "civil/property damage" accounted for 4.9 percent of the civil cases (including small claims) and 1.0 percent of all district court cases (including small claims and traffic tickets).

Appendix C

Report from Alaska Judicial Council

To address the Governor's request that it evaluate changes in the amounts awarded by juries as damages, the task force sought assistance from the Alaska Judicial Council. The council prepared an analysis of case file data for jury trials of tort claims in Alaska from 1985 to 1995. In addition, because the task force was particularly interested in large jury verdicts, council staff informally polled a number of experienced litigation attorneys on large, tort jury verdicts they could remember in the past ten years.

The council identified 233 closed, jury verdict cases for the study and analyzed them in terms of case type, parties to the case, liability/outcomes, allocation of fault, damages, costs and fees, offers of judgment, appeals, and length of case. The task force used this information as it assessed the need for change in current civil liability law.

The report of the Judicial Council follows.

Appendix D

A CHRONOLOGY OF TORT REFORM EFFORTS IN ALASKA, 1967-1996

This appendix includes information on all bills dealing with tort reform that were filed in the Alaska legislature from 1967 through 1996 (9th-19th Legislatures). Details, including short descriptions of the bills' content, are included for both bills that were enacted and those that did not pass. Tort reform bills filed prior to 1967 are not listed because no search mechanism exists to locate them. Chapter 2 of this report describes significant legislation and other task force efforts during this period.

Governor's Advisory Task Force on Civil Justice Reform

Overview of Alaska Tort Law

Honorable Dana A. Fabe
Alaska Supreme Court

Honorable Brian C. Shortell
Alaska Superior Court

September 3, 1996

RHSC Background
Life.

Alaska Court System
303 K Street
Anchorage, Alaska 99501

Table of Contents

Part One.

Part Two.

THE EVOLUTION OF ALASKA LAW UNDER TORT REFORM

BEFORE TORT REFORM	TORT REFORM STATUTES. EFFECTIVE 6-11-86	TORT REFORM BALLOT INITIATIVE OF NOVEMBER 1988. EFFECTIVE 3-5-89.
LIABILITY STANDARDS		
1) Common law negligence.	1) Common law negligence.	1) Common law negligence.
2) Common law strict product liability.	2) Common law strict product liability.	2) Common law strict product liability.
3) Medical malpractice governed by separate statutes. AS 09.55.530 et seq. and Civil Rule 72.1.	3) Medical malpractice governed by statute and separate rule. AS 09.55.530 et seq. and Civil Rule 72.1.	3) Medical malpractice governed by statute and separate rule. AS 09.55.530 et seq. and Civil Rule 72.1.
4) Wrongful death action governed by statute. AS 09.55.580 et seq.	4) Wrongful death statute. AS 09.55.580 et seq.	4) Wrongful death statute. AS 09.55.580 et seq.
5) "Pure" comparative negligence, adopted by common law. Plaintiff's percentage of negligence determined by the jury and is an offset to damages. Kaatz v. State, 540 P.2d 1037 (Alaska 1975).	5) Pure comparative negligence. AS 09.17.060.	5) Pure comparative negligence. AS 09.17.060.
6) Percentage of fault of each defendant is irrelevant. AS 09.16.020.	6) Percentage of fault of all "parties," including those previously released, is to be determined by the jury. AS 09.17.080.	6) Jury determines each party's percentage of fault. AS 09.17.080.
7) Joint and several liability.	7) Joint and several liability continues except that a party is jointly liable for only twice its percentage of assessed fault. For example, a party that is found to be 10 percent at fault would pay no more than 20 percent of the total damages. The term "fault" includes strict liability. AS 09.17.090.	7) Joint liability abolished. A party is only severally, or individually liable for its own percentage of fault. AS 09.17.080.

BEFORE TORT REFORM	TORT REFORM STATUTES EFFECTIVE 6-11-86	TORT REFORM BALLOT INITIATIVE OF NOVEMBER 1988. EFFECTIVE 3-5-89.
DAMAGES		
1) Common law personal injury damages including loss of past earnings, loss of future earning capacity, medical expenses, pain and suffering, and other common law forms of damages.	1) Categories of damages are set by statute: -non-economic limited to $500,000, except in serious injury -pain -suffering -inconvenience -physical impairment -disfigurement -loss of enjoyment of life -past and future economic loss AS 09.17.010-040.	1) Remain the same.
2) Future damages are not offset or reduced to present value under the rule of Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967).	2) Future economic damages are to be reduced to present value unless counsel stipulates to the Beaulieu rule. AS 09.17.040(c).	2) Remain the same.
3) Punitive damages under common law. Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979).	3) Punitive damages must be shown by clear and convincing evidence. AS 09.17.020.	3) Remain the same.
4) Prejudgment interest from date of accident.	4) Prejudgment interest begins from time of written notice of claim, or filing of suit, not time of accident. AS 09.30.070.	4) Remain the same.
5. Rule 82 attorney fees.	5) Remain the same.	5) Remain the same.
	6) Collateral benefit evidence is allowed to reduce the judgment where certain types of insurance or other payments have been made. AS 09.17.070.	6) Remain the same.
	7) Judgment may be entered as to future amounts for periodic payments, rather than a lump sum, at the request of plaintiff. AS 09.17.040.	7) Remain the same.

BEFORE TORT REFORM	TORT REFORM STATUTES EFFECTIVE 6-11-86	TORT REFORM BALLOT INITIATIVE OF NOVEMBER 1988. EFFECTIVE 3-5-89.
RIGHTS AND LIABILITIES BETWEEN CO-DEFENDANTS AND JOINT TORT FEASORS		
1) Pro rata contribution pursuant to contribution statute, between joint tort feasors. AS 09.16.010 et seq.	1) Contribution statute, AS 09.010, continues in force. (Note that the contribution statute was not amended. It still provided for pro rata contribution even though the liability of each party was to be found in a specific percentage.)	1) Contribution statute is abolished.
2) No equitable or implied indemnity in the absence of a contract. Vertecs Corp. v. Riechhold Chem. Inc., 661 P.2d 619 (Alaska 1982). Equitable indemnity may be allowed without a written contract, only where there is a preexisting contractual or other duty between the parties, such as manufacturer - retailer, etc. See Providence Washington Ins. Co. v. DeHavilland Aircraft Co., 699 P.2d 355 (Alaska 1985).	2) No equitable indemnity, without contract, between joint tort feasors.	2) The future of any equitable rights and liabilities between co-defendants or parties whose actions contribute to an injury remains to be determined.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

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.

Court Rules Related to Apportionment of Damages

Civil Rule 14. Third-Party Practice.

* * * *

(c) **Equitable Apportionment.** For purposes of apportioning damages under AS 09.17.080, a defendant, as a third-party plaintiff, may follow the procedure of paragraph (a) to add as a third-party defendant any person whose fault may have been a cause of the damages claimed by the plaintiff. Judgment may be entered against a third-party defendant in favor of the plaintiff in accordance with the third-party defendant's respective percentage of fault, regardless of whether the plaintiff has asserted a direct claim against the third-party defendant.

Civil Rule 82. Attorney's Fees.

* * * *

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

Civil Rule 79. Costs—Taxation and Review.

* * * *

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, costs must be apportioned and awarded according to the provisions of Civil Rule 82(e).

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.060. Effect of contributory fauit.

In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.040. Award of damages.

(a) In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

(1) past economic loss;

(2) past noneconomic loss;

(3) future economic loss;

(4) future noneconomic loss; and

(5) punitive damages.

(b) The fact finder shall reduce future economic damages to present value. In computing the portion of a lump-sum award that is attributable to future economic loss, the fact finder shall determine the present amount that, if invested at long-term future interest rates in the best and safest investments, will produce over the life expectancy of the injured party the amount necessary to compensate the injured party for

(1) the amount of wages the injured party could have been expected to earn during future years, taking into account future anticipated inflation and reasonably anticipated increases in the injured party's earnings; and

(2) the amount of money necessary during future years to provide for all additional economic losses related to the injury, taking into account future anticipated inflation.

(c) Subsection (b) of this section does not apply to future economic damages if the parties agree that the award of future damages may be computed under the rule adopted in the case of Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967).

(d) In an action to recover damages, the court shall, at the request of an injured party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment.

(e) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be

posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

(f) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will.

(g) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments required under (d) of this section, the court shall, in addition to the required periodic payments, order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees.

20.05 INFLATION AND PRESENT VALUE/FUTURE ECONOMIC LOSSES

Plaintiff claims that (he/she) will have economic losses in the future, consisting of [future medical expenses] [and] [loss of future earning capacity]. I will now instruct you on two principles you must apply to calculate an award for a future economic loss.

The first principle is that an award for future economic loss must account for the effect that any future inflation would have on the amount of the future economic loss. [Any award for future medical expenses must be based on the cost of the medical expenses when they are incurred in the future.] [Any award for future loss of earning capacity must account for reasonably probable increases in wages due to inflation.]

The second principle is that any award that you make for future economic loss must be equal to the amount of money that the plaintiff would need to invest <u>today</u> so that the total of the amount invested today plus future investment earnings equals the amount of the future economic loss when it will occur in the future. To make this calculation, you must make three assumptions: (1) that the money you award to the plaintiff for a future economic loss would be available to (him/her) today; (2) that the plaintiff would invest the money immediately; and (3) that the plaintiff would invest the money in investments that would pay the long-term future interest rates that would be obtained in the best and safest investments.

Use Note

This instruction must be given whenever the plaintiff claims a future economic loss in a personal injury case, and where the parties have not agreed pursuant to AS 09.17.040(c) to compute damages under the Beaulieu rule. If the parties have agreed to use the Beaulieu rule, this instruction should not be given.

The appropriate bracketed language in the second paragraph should be used depending upon whether the plaintiff claims future medical expenses, loss of future earning capacity or both.

Comment

In personal injury cases, AS 09.17.040(b) requires the fact finder to reduce future economic damages to present value, and to consider the effect of future anticipated inflation. This instruction is intended to convey these concepts to the jury.

Richard BEAULIEU, Appellant,
v.
James V. ELLIOTT, Appellee.

James V. ELLIOTT, Appellant,
v.
Richard BEAULIEU, Appellee.

Nos. 765, 766.

Supreme Court of Alaska.

Dec. 5, 1967.

Action for damages for personal injuries sustained in automobile accident. The Superior Court, Third Judicial District, Hubert A. Gilbert, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Dimond, J., held that record which disclosed implicit finding that plaintiff's wage earning capacity had been impaired for remainder of his work life of 29 years and disclosing testimony that plaintiff's inability to work would only continue from one to five years did not set forth findings of fact to enable reviewing court to have clear understanding of basis of trial court's decision that plaintiff sustained permanent 50 percent impairment of earning capacity and case would be remanded for more detailed and explicit findings of fact.

Judgment set aside and case remanded with directions.

1. Administrative Law and Procedure ⇐501

Findings or judgment of quasi-judicial administrative agency in proceedings before it are not admissible in subsequent action against person not a party to such proceedings.

2. Attorney and Client ⇐86

Admissions of fact by counsel during course of trial are binding on his client if made with express purpose of dispensing with formal proof of some fact at trial and are thus used as substitute for legal evidence of the fact.

3. Evidence ⇐264

Even if statement in defendant's brief filed subsequent to close of trial suggesting award to be made plaintiff for damages from personal injuries and containing computation based on 50 percent disability rating for next five years did constitute admission of fact binding on defendant, it admitted only that plaintiff's earning capacity had been 50 percent impaired for period of five years and not for plaintiff's remaining work life.

4. Trial ⇐388(1)

Trial court must comply meticulously with requirements of rule with respect to making of findings of fact in order to give reviewing court clear understanding of basis of trial court's decision and to enable reviewing court properly to appraise elements which entered into award of damages. Rules of Civil Procedure, rule 52(a).

5. Appeal and Error ⇐1177(8)
Trial ⇐395(1)

Record which disclosed implicit finding that plaintiff's wage earning capacity had been impaired for remainder of his work life of 29 years and disclosing testimony that plaintiff's inability to work would only continue from one to five years did not set forth findings of fact to enable reviewing court to have clear understanding of basis of trial court's decision that plaintiff sustained permanent 50 percent impairment of earning capacity and case would be remanded for more detailed and explicit findings of fact. Rules of Civil Procedure, rule 52(a).

6. Appeal and Error ⇐1176(1)

Whether trial court improperly used Air Force physical evaluation board's findings to award plaintiff $16,088 for impaired earning potential caused by depressive reaction could not be determined where trial court in awarding total of $169,937.25 made no mention of award for $16,088 for depressive reaction and trial court would be directed to make more detailed and explicit findings of fact on remand. Rules of Civil Procedure, rule 52(a).

7. Damages ⇐15

General principle underlying assessment of damages in tort cases is that injured person is entitled to be replaced as nearly as possible in position he would have occupied had it not been for defendant's tort.

8. Damages ⇐226

Damages awarded for future loss of earnings should not be reduced to present value.

9. Damages ⇐60

Disability retirement pay which plaintiff became entitled to upon retirement from Air Force by reason of injuries sustained in automobile accident would not be used to mitigate damages and reduce award for loss of future earnings.

10. Damages ⇐100

Damage award for impairment of earning capacity should not be reduced by amount representing estimated income taxes that injured party would have to pay on future income.

11. Damages ⇐99

Amount of income taxes which injured party would have had to pay had he earned amount awarded prior to trial should be deducted from the award for past loss of wages.

12. Damages ⇐60

Damages in form of past loss of wages sustained by serviceman as result of automobile accident could not be diminished or mitigated on account of payments received by serviceman from Air Force by virtue of contractual arrangement between serviceman and government for payment during periods of physical incapacity from performing his duty.

13. Damages ⇐132(9)

Evidence that osteomyelitis had developed in bone of plaintiff's ankle injured in automobile accident and testimony that it was reasonable medical probability that osteomyelitis would remain with plaintiff for rest of his life supported award of $71,244 for pain and suffering that plaintiff would experience for expected 29 years remaining of his life.

14. Damages ⇐97

In determining amount of award for pain and suffering, juror or judge should necessarily be guided by some reasonable and practical consideration and should endeavor to make reasonable or sane estimate.

15. Damages ⇐97

There is no fixed measure of compensation in awarding damages for pain and suffering.

16. Damages ⇐97

Assessing damages for future pain and suffering by using per diem formula was not manifestly unfair or unjust.

17. Appeal and Error ⇐1013

Ultimate question for decision on review of award for damages for pain and suffering is whether sum awarded is reasonable and not how it was arrived at.

18. Appeal and Error ⇐1013

Award of damages will not be set aside on claim of excessiveness unless it is so large as to appear manifestly unjust or result of passion or prejudice or disregard of evidence or rules of law.

19. Damages ⇐226

Amount awarded for future pain and suffering will not be reduced to present worth.

20. Damages ⇐185(1)

Record disclosing no testimony by plaintiff's physician that he told plaintiff to bear as much weight as possible on injured ankle and disclosing that physician prescribed that plaintiff use crutches to tolerance by testing how much weight he would be able to put on his foot would not substantiate defendant's claim that plaintiff's pain and suffering were attributable to plaintiff's failure to follow orders of his doctor in not bearing as much weight as possible on his ankle.

21. Appeal and Error ⇐1176(1)

Record which failed to disclose why trial court used plaintiff's military pay rather than civilian pay scales in computing

plaintiff's impairment of future earning capacity as result of injury to ankle, where plaintiff indicated that he might have retired from military service if he had not received medical discharge because of injury, was insufficient to enable reviewing court to determine whether award for impairment of future earning capacity was inadequate and trial court would be directed to make further findings on remand.

22. Appeal and Error ⇐1177(8)

Findings disclosed by record were not sufficient for purpose of determining whether evidence established that impairment of plaintiff's earning capacity was total or near total rather than 50 percent as determined by trial court.

23. Appeal and Error ⇐984(5)

Where liability is admitted but amount of damages is contested, question of which category of rule pertaining to computation of attorney fees is applicable is matter within discretion of trial court. Rules of Civil Procedure, rule 82(a)(1).

24. Costs ⇐173(1)

Where liability for injury to plaintiff's ankle was admitted but question of damages was contested in four-day trial resulting in award of $169,937.25 compensatory damages, trial court's assessing attorney's fees at rate prescribed by rule for cases concluded without trial was not abuse of discretion. Rules of Civil Procedure, rule 82(a)(1).

25. Appeal and Error ⇐984(1)
Costs ⇐12

Taxing of costs rests largely in sound discretion of trial court and reviewing court will not interfere with exercise of that discretion except in cases of abuse.

26. Costs ⇐154

Refusal to include in costs assessed against defendant certain expenses incident to taking of depositions which allegedly were necessary to establish liability, where plaintiff did not point out what depositions were involved, how they related to liability, when they were taken, or when concession of liability was made by defendants, was not abuse of discretion.

James J. Delaney, Jr., and James K. Singleton, of Delaney, Wiles, Moore & Hayes, Anchorage, for appellant in No. 765 and appellee in 766.

Robert M. Libbey, of Kay, Miller, Jacobs & Libbey, Anchorage, for appellee in No. 765 and appellant in 766.

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

OPINION

DIMOND, Justice.

As a result of an automobile accident on April 13, 1963, James Elliott suffered a fracture dislocation of his right ankle. He brought this action for damages against Richard Beaulieu. Liability was conceded by Beaulieu, and the issue of damages was tried by the court without a jury. The trial court filed findings of fact and conclusions of law and entered judgment awarding Elliott $169,937.25 compensatory damages, costs of $82.40, and attorney's fees in the amount of $13,870.29. Both parties have appealed. We shall consider first Beaulieu's appeal.

Beaulieu's Appeal

In his brief on appeal Beaulieu states 21 specifications of error. These resolve themselves into six principal issues to be reviewed and determined by this court.

1. *Impairment of Earning Capacity.*

There is no question but that Elliott suffered a permanent injury. The fracture dislocation of his right ankle, after several unsuccessful operations, resulted in a lack of a true ankle joint per se. As Dr. Scholtens said: "There is simply a ragged margin of rather schlerotic bone." He also stated, "It's not a joint any more but it's just a couple of pieces of bone grating against each other." Dr. Wichman testified that the joint was such that Elliott's ankle could be used only as a "peg". In

addition, osteomyelitis developed in the ankle bone and both Shelton and Foster testified that the reasonable medical probabilities were that such disease would continue for the remainder of Elliott's life.

In its third conclusion of law the trial court stated:

> That plaintiff will suffer a future wage loss in the amount of $80,440.40, after taking into consideration the fact that his wage earning capacity has been impaired to the extent of fifty (50%) per cent plus the further fact that his rate of pay at the time of discharge was $462.30 per month and plus the further fact that he has a remaining work life of twenty-nine (29) years.[1]

Beaulieu contends that there is no evidence to support the court's determination that Elliott suffered an impairment of earning capacity which would result in a loss of future wages.

On this point we must remand the case to the trial court for the making of more explicit findings of fact. The court's conclusion as to loss of future wages contains the impicit finding that Elliott's wage earning capacity had been impaired for the remainder of his work life of 29 years. The court gives no indication, however, of the factual basis for such an ultimate finding, nor does it indicate how it reconciles such a finding with the testimony of two physicians who spoke on the subject of Elliott's capacity to be gainfully employed. Dr. Foster testified that in his opinion, while Elliott was unable to work at the time of the trial in 1966, this inability would at the most only continue from one to five years, and that the condition of Elliott's ankle would steadily improve so that within that period of time he would be able to engage in a sedentary type of occupation that would not involve prolonged walking, running or heavy lifting. It was Dr. Foster's opinion that Elliott's future earning capacity was impaired only to the extent that he must now do clerical work rather than truck driving which he had done prior to 1963. Dr. Wichman testified that the prognosis of the condition of Elliott's ankle was satisfactory, that he would be limited in many activities because he would have to use his ankle as a peg and would be deprived of the movements that a normal ankle offers, that it would be possible for him to be gainfully employed in a sedentary type of occupation, but that he could not give an estimate as to when that might be because he did not know how much dead bone was present in the ankle.

As to the extent of impaired earning capacity, the court reached the conclusion that there was a 50% impairment. But the court does not say how it arrived at that figure. And we are unable to tell from our review of the record.

Conceivably, the court's determination of a percentage impairment was influenced by Elliott's testimony that he had received a medical discharge from the United States Air Force in January of 1966, and that he was receiving from the government a 60% disability compensation, 40% of which was attributable to his ankle, and the remaining 20% to other medical problems not related to the accident. That this may have influenced the court appears to be a possibility, because the court made Finding of Fact No. 19 which provided as follows:

> That on October 17, 1964, plaintiff was discharged from the hospital to "travel status"; that on January 14, 1966, plaintiff was given a medical discharge from the Air Force, as above mentioned; that the physical evaluation board, found plaintiff to be 60% disabled, assigning a 40% disability because of the injuries

1. The pertinent part of Conclusion of Law No. 3 originally read:
   That plaintiff will suffer a future wage loss in the amount of $80,440.40, after taking into consideration the fact *that his disability is 50%*. * * * [Emphasis added.]
   The italicized words were amended by the court on Elliott's motion to read: "that his wage earning capacity has been impaired to the extent of fifty (50%) per cent."

to plaintiff's right ankle, a 10% disability to a "depressive reaction" and a 10% disability due to an impairment of vision; that the latter disability is not related to the accident of April 13, 1963.[2]

[1] If the court based its conclusion as to degree of impairment of earning capacity upon certain findings of an Air Force physical evaluation board, this would have been error. The findings or judgment of a quasi-judicial administrative agency in proceedings before it are not admissible in a subsequent action against a person not a party to such proceedings.[3]

The trial court also may have been influenced in its determination of the existence of a 50% impairment of earning capacity by what Elliott characterizes as admissions made by Beaulieu's trial counsel. In his opening statement at the trial, counsel for Beaulieu admitted that Elliott had sustained a "permanent injury", that this did not render him 100% disabled, and that the question for determination was just how much "he will lose in the future because of the injury." In his brief filed subsequent to the close of the trial Beaulieu's counsel said this:

> In summary, it is suggested by the defense that the Court make its award to the Plaintiff on the basis of the figures set forth below. These figures take into consideration: The prognosis established by the medical experts; the 60% disability rating established by the Air Force, of which 50% is attributable to Plaintiff's ankle injury; and, the Plaintiff's ability to be gainfully employed in the future as a clerk or transportation specialist in the transportation industry, or as a travel agent.
>
> * * * [I]t is * * * suggested that the following award be made:

For past lost wages	$10,000.00
For future "lost wages", or diminution of earning capacity, based on 50% disability rating for the next five years ...	11,500.00
For past pain and suffering	5,000.00
For future pain and suffering	10,000.00
For permanent disability and injury to ankle	25,000.00
Total	$61,500.00

[2,3] It is true that admissions of fact by counsel during the course of the trial are binding on his client,[4] if they are made with the express purpose of dispensing with the formal proof of some fact at the trial, and are thus used as a substitute for legal evidence of the fact.[5] It does not appear that this was the purpose of counsel's statement in his brief filed subsequent to the trial. But even if it did constitute an admission of fact binding on Beaulieu, it is an admission only that Elli-

2. Apart from Elliott's testimony just mentioned, we do not know where the trial court obtained information regarding the findings of the Air Force physical evaluation board. Such findings were not introduced into evidence at the trial.

3. Cady v. Fraser, 122 Colo. 252, 222 P.2d 422, 425 (1950).

4. Ferroline Corp. v. General Aniline & Film Corp., 207 F.2d 912, 916-917 (7th Cir. 1953), cert. denied, 347 U.S. 953, 74 S.Ct. 678, 98 L.Ed. 1098 (1954), reh. denied, 347 U.S. 979, 74 S.Ct. 784, 98 L.Ed. 1118 (1954), reh. denied, 348 U.S. 851, 75 S.Ct. 19, 99 L.Ed. 671 (1954).

5. Dodge v. Stencil, 48 Wash.2d 619, 296 P.2d 312, 314 (1956); Humble Oil & Refining Co. v. Sun Oil Co., 191 F.2d 705, 714 (5th Cir. 1951), cert. denied, 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 687 (1952).

ott's earning capacity had been 50% impaired for a period of five years, and not for the remaining work life of Elliott of 29 years as found by the trial court. Consequently, what Beaulieu's counsel said in his brief does not satisfactorily explain or establish the basis for the trial court's Conclusion of Law No. 3 which dealt with impairment of earning capacity.

[4, 5] It is most important that the trial court comply meticulously with the requirements of Civil Rule 52(a) [6] with respect to the making of findings of fact in order to give us a clear understanding of the basis of the trial court's decision, and to enable us to properly appraise the elements which entered into the court's award of damages.[7] This was not done in this case. Our review of the record leaves us with the conclusion that the trial court's findings with respect to damages for future impairment of earning capacity are not sufficiently detailed to afford us a clear understanding of the basis for the court's award.[8] We therefore will remand this case to the trial court for the purpose of making detailed and explicit findings as to Elliott's earning capacity and the degree of impairment in respect thereto.[9]

In his Finding of Fact No. 19 the trial court referred to the fact that the Air Force physical evaluation board had found Elliott to be 60% disabled, and that 10% of that disability was due to a "depressive reaction". In Finding of Fact No. 22 the court stated that a psychiatric evaluation of Elliott had been made, that the psychiatric findings were that Elliott had developed a depressive reaction attributable to permanent crippling, deformity of the lower extremity, semi-isolation, and a protracted period of surgery and recovery, and that such depressive reaction was proximately caused by the accident of April 13, 1963. Beaulieu contends that the judge used the Air Force physical evaluation board's findings to award Elliott $16,088.00 for that part of his impaired earning potential caused by a depressive reaction, and that this was error.

[6] We are unable to review this point because nowhere in the court's finding of fact or conclusions of law or judgment is there any mention of an award of $16,088.00 for a depressive reaction as an element of Elliott's impaired earning capacity. It may be that the trial court intended that of the 50% impairment of earning capacity which is found to exist, 10% was due to a depressive reaction. However, we are unable to determine if that is the case from the record as it now exists. This point should be clarified on a remand of the case for more detailed and explicit findings of fact.

2. *Future Wage Loss—Present Value.*

The trial court did not reduce the amount it found as damages for future impairment of earning capacity to present value. Instead, the court stated that "The interest rate reduction and decline in purchasing power of the dollar is off-set by pay increases plaintiff could have expected in the future from his military service." Beaulieu contends that the failure to reduce the damages to present value was prejudicial error.

[7] The general principle underlying the assessment of damages in tort cases is that an injured person is entitled to be

6. Civ.R. 52(a) provides in part:
In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *.

7. Patrick v. Sedwick, 413 P.2d 169, 174–176 (Alaska 1966); Hamilton v. Lotto, 391 P.2d 948, 949 (Alaska 1964); Spenard Plumbing & Heating Co. v. Wright Const. Co., 370 P.2d 519, 525–526 (Alaska 1962); Merrill v. Merrill, 368 P.2d 546, 548 (Alaska 1962); Dickerson v. Geiermann, 368 P.2d 217, 219 (Alaska 1962).

8. Patrick v. Sedwick, note 7 supra, 413 P.2d at 175.

9. Patrick v. Sedwick, note 7, supra, 413 P.2d at 176.

replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort.[10] In the case of impairment of future earning capacity, it is reasoned that a failure to reduce damages to present value would be to place the injured person in a better position than he would have occupied except for the defendant's tort, because the injured person would get all of his future wages long in advance and would be able to invest the lump sum and realize earnings on such investment during the intervening period.[11] For this reason—that money has the power to earn money—it has become the generally accepted rule that damages awarded for future loss of earnings should be reduced to present worth.[12]

[8] In applying the general rule, the Supreme Court of Washington has stated a formula for reducing awards of future earnings to present value which involves the "rate of interest (which) could fairly be expected from safe investments which a person of ordinary prudence, but without particular financial experience or skill, could make in that locality."[13] This formula, although empirical at best, is probably as definite as any that has been devised. But we believe that the rule for reducing awards, including the formula applied by the Washington court, ignores facts which should not be ignored. Annual inflation at a varying rate is and has been with us for many years. There is no reason to expect that it will not be with us in the future. This rate of depreciation offsets the interest that could be earned on government bonds and many other "safe" investments. As a result the plaintiff, who through no fault of his own is given his future earnings reduced to present value must, in order to realize his full earnings and not be penalized by reduction of future earnings to present value, invest his money in enterprises, other than those which are considered "safe" investments, which promise a return in interest or dividends greater than the offsetting rate of annual inflation. But ours is a competitive economy. By their very nature some enterprises backed by investors' money are going to fail with resulting loss to individuals. Thus, instead of being assured of earnings at rates greater than the annual rate of inflation, the injured plaintiff stands a chance of entirely losing his future earnings by unlucky or unwise investments. Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without reduction to present value. The plaintiff is more likely to be restored to his original condition under the rule we adopt than under the prevailing rule which calls for a discounting of the award for future earnings.

Our conclusion is fortified by another factor which also may not be ignored. This is the factor, relied upon by the trial judge, which involves wage increases that the injured plaintiff might have expected to receive in the future had he not been injured.

10. Hill v. Varner, 4 Utah 2d 166, 290 P. 2d 448, 449 (1955); Restatement, Torts § 924 comment d, at 634–35 (1939); McCormick, Damages § 86, at 304 (1935). Accord United States v. Hatahley, 257 F.2d 920, 923, 79 A.L.R.2d 668 (10th Cir. 1958); Hughett v. Caldwell County, 313 Ky. 85, 96, 230 S.W.2d 92, 21 A.L.R.2d 373 (1950).

11. McCormick, Damages § 86, at 304 (1935).

12. Wentz v. T. E. Connolly, Inc., 45 Wash. 2d 127, 273 P.2d 485, 491 (1954); Borcherding v. Eklund, 156 Neb. 196, 55 N. W.2d 643, 650 (1952); Daughtry v. Cline, 224 N.C. 381, 30 S.E.2d 322, 324, 154 A.L.R. 789 (1944); Rigley v. Prior, 290 Mo. 10, 233 S.W. 828, 832 (1921); Restatement, Torts § 924 comment d, at 634–35 (1939); McCormick, Damages § 86, at 304 (1935); Annots., 77 A.L.R. 1439, 1446 (1932) 154 A.L.R. 796, 797 (1945).

13. Wentz v. T. E. Connolly, Inc., supra note 12, 273 P.2d at 492.

It is a matter of common experience that as one progresses in his chosen occupation or profession he is likely to increase his earnings as the years pass by. In nearly any occupation a wage earner can reasonably expect to receive wage increases from time to time. This factor is generally not taken into account when loss of future wages is determined, because there is no definite way of determining at the time of trial what wage increases the plaintiff may expect to receive in the years to come. However, this factor may be taken into account to some extent when considered to be an offsetting factor to the result reached when future earnings are not reduced to present value. Thus, if there is any fear that failure to reduce the present value will give the plaintiff more than he is entitled to because of the possibility of his making successful investments of the sum awarded at returns greater than the annual rate of inflation, such fear is obviated by the fact that the award may well be deficient in that it does not take into account probable wage increases that the plaintiff would ordinarily be expected to receive in the future.

3. *Retirement Pay.*

Elliott testified that he would receive disability retirement pay from the Air Force in the amount of $191.00 a month for the remainder of his life. Beaulieu contends that the trial judge committed prejudicial error in refusing to deduct the net present value of future retirement pay from the award for future loss of earnings. Beaulieu's argument is that to allow Elliott damages for future wage loss, in addition to his retirement pay, is to unjustly enrich Elliott by allowing him double compensation for his injuries.

[9] The general principle underlying the assessment of damages in tort cases is that an injured person is entitled to be replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort.[14] Elliott had been in the Air Force for about 18 years at the time of his discharge and he testified that he had intended to remain in the service for at least 20 years. If he had not been injured, Elliott could have continued to earn to his full capacity and, in addition, after 20 years' service, would have been entitled to retire and draw retirement pay.[15] By reason of his injuries, Elliott was entitled under law to be retired early for disability and draw retirement pay in lieu of retirement on a regular basis after completion of 20 years' service.[16] The award of damages for impaired earning capacity has the effect of putting Elliott in the same position he would have occupied had it not been for the injury, because the damages represent what Elliott could have earned had he not been injured and the disability retirement pay represents that which Elliott had earned and become entitled to under law by reason of his years of service in the Air Force. In other words, Elliott now receives an amount representing wages he could have earned were it not for the injury, plus retirement pay; had he not been injured, he would have received the full wages he could have earned during his remaining work life, in addition to receiving the retirement pay to which he would become entitled by reason of his years of service in the Air Force. Thus, Elliott, under the court's award, is getting no more than he would have gotten had he not been injured. The disability retirement pay Elliott is receiving should not be used to mitigate damages and reduce the award for loss of future earnings.

4. *Income Taxes.*

Beaulieu argues that the trial judge erred in failing to deduct from the damages awarded for impairment of future earning capacity an amount representing income taxes that Elliott would have had to pay on future income.

The courts are divided on this question. It is the more general view, supported by a

14. Note 10 supra.

15. 10 U.S.C.A. §§ 8914, 8889, 8991 (1959).

16. 10 U.S.C.A. §§ 1201, 1401 (1959).

majority of American decisions, that an amount representing future income taxes should not be deducted from the award.[17] As was stated by the Supreme Court of Rhode Island:

> This view has been adopted by the various courts on diverse grounds but primarily on the ground that the quantum of such taxation is of necessity in the realm of conjecture.[18]

[10] We adopt the majority rule. Income tax rates, provisions relating to deductions and exemptions, and other aspects of income tax laws and regulations are so subject to change in the future that we believe that a court cannot predict with sufficient certainty just what amounts of money a plaintiff would be obliged to pay in federal and state income taxes on income that he would have earned in the future had it not been for a defendant's tortious conduct. We hold that a damage award for impairment of earning capacity should not be reduced by an estimated amount representing income taxes that the injured party may be required to pay on future income. In awarding damages to Elliott for impaired earning capacity, the court did not err in failing to take income tax consequences into consideration.

[11] The rule we adopt has no application, however, as to the court's award of past wages in the amount of over $10,000.00. The reason for the rule—inability to predict with sufficient certainty what taxes would have to be paid—does not exist here, because taxes on income earned prior to trial can be easily calculated based on income tax laws and regulations as they existed at the time the wages would have been earned. The court erred in failing to deduct from the award for past loss of wages the income taxes Elliott would have had to pay had he earned the amount awarded prior to the trial.

5. *Past Loss of Wages.*

Elliott testified that he had not lost any military pay or allowances between the date of the accident in April 1963 and the date of his military discharge in January 1966. During that period of time Elliott was either hospitalized or on leave, except for the period January to August, 1964, when he was on duty status. The trial court awarded $10,752.85 for a partial past wage loss covering the period from the date of the accident to the day of Elliott's discharge from the Air Force, but excepting the period between January and August, 1964, when Elliott was on duty status.

Beaulieu contends that this award for past wages was error. His argument in essence is that the general principle underlying the assessment of damages in tort cases is that the injured person is entitled to be replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort, and that since Elliott suffered no loss of wages during the period involved he should be awarded none.

[12] In arguing that the award should be sustained, Elliott urges the adoption of the collateral source rule, which provides that damages may not be diminished or mitigated on account of payments received by plaintiff from a source other than the defendant.[19] We applied this rule as to workmen's compensation benefits in Ridgeway v. North Star Terminal & Stevedoring Co.[20] We apply the rule in this instance. By entering the military service, Elliott in effect agreed to perform certain duties and func-

17. Annot., 63 A.L.R.2d 1393, 1396 (1959).

18. Oddo v. Cardi, 218 A.2d 373, 377 (R.I. 1966). See also Dixie Feed & Seed Co. v. Byrd, 52 Tenn.App. 619, 376 S.W.2d 745, 749 (1963); appeal dismissed, 379 U.S. 15, 85 S.Ct. 147, 13 L.Ed.2d 84 (1964); Cunningham v. Rederiet Vindeggen, 333 F.2d 308, 313-315 (2d Cir. 1964); Spencer v. Martin K. Eby Const. Co., 186 Kan. 345, 350 P.2d 18, 22-25 (1960); Kawamoto v. Yasutake, 49 Haw. 42, 410 P.2d 976, 981 (1966).

19. Bell v. Primeau, 104 N.H. 227, 183 A.2d 729, 730, 7 A.L.R.3d 512, 514 (1962). The collateral source rule is followed in most jurisdictions. Annot., 7 A.L.R.3d 516, 520 (1966).

20. 378 P.2d 647, 650 (Alaska 1963).

tions in exchange for certain benefits to be given him by the government. One of those benefits was that he was to receive military pay and allowances during periods of physical incapacity from performing his duties. This was in the nature of a contractual arrangement between Elliott and the government when he became a member of the armed forces, and which he may have paid for by accepting wages lower than those he might have obtained from the performance of like duties in civilian life. The income that Elliott received from the government is not the result of earnings, but of such previous contractual arrangement.[21] Such a contractual arrangement was made for Elliott's own benefit, and not for the benefit of a tort feasor, such as Beaulieu. The latter has no right to claim the benefit of such an arrangement by having the damages awarded against him reduced by the amount that Elliott was paid by the government during the period of his disability. The trial court did not err in awarding damages for loss of wages during the period of Elliott's disability while he was still in the military service.

6. *Future Pain and Suffering.*

The court awarded Elliott $71,244.00 for pain and suffering that he would experience for the remainder of his life. Beaulieu contends that the evidence does not justify such an award.

An infection, osteomyelitis, had developed in the bone of Elliott's injured ankle. Elliott testified that from the time of the onset of the osteomyelitis he was required to keep his ankle in an upright position for a period of from four to five days on an average of once a month to alleviate the pain he experienced, that he suffered pain of a sufficient intensity to keep him awake the better part of the night on an average of one night per week, and that there was an open, draining sinus on his ankle. Beaulieu concedes that Elliott's testimony was sufficient to justify an award for past pain and suffering.[22] However, Beaulieu contends that there is a lack of substantial medical evidence to justify an award for pain and suffering in the future.

Dr. Wichman testified that the osteomyelitis would cause the sinus tract in Elliott's ankle to become obliterated or plugged by bone particles in the drainage fluid—osteomyelitis being the type of infection caused by the healing process in draining away or discarding dead bone—and that this caused a pressure build-up and a swelling with resulting pain.

Dr. Foster testified that the probable source of Elliott's pain was the presence of injured tissues which, throughout the injury, operation and infection, became so altered that with use they became sore. It is true, as Beaulieu points out, that Dr. Foster said that within approximately five years from the time of trial, Elliott would be able to return to work and would no longer be limited by the infection. But the doctor also testified that at the end of the five-year period Elliott would still have some pain, and that it was a reasonable medical probability that the osteomyelitis would remain with Elliott the rest of his life.

Dr. Scholtens gave his opinion as to the reasonable medical probability of the infection in Elliott's ankle continuing for the remainder of his life. He said:

> Yes, I have an opinion, and my opinion is that the infection present, by all odds, will continue, there's an excellent possibility for the rest of his life, no matter what medical attempts are made to clear the infection in the ankle. Present—the experience with osteomyelitis indicates that it's very, very difficult to treat, that cures are relatively infrequent. Recurrences of those that appear to be cured are frequent. For those reasons, I would feel that he, at present, has a chronic infection. He has the fuel for the infection, dead bone, and I think that this

21. Restatement, Torts § 920 comment e (1930).

22. The trial judge awarded Elliott $7,500 for past pain and suffering.

will continue in the future for as far as I can see.

And as to the reasonable medical probability of the general condition of the ankle improving or remaining the same, Dr. Scholtens said:

I'd say that the chances are that his ankle will stay very much the same as it is, with no appreciable change. This is by far the greatest probability. * * * There's—there's a slight chance that it could get worse. There's a slight chance that it could get better, but—and I'm not talking in terms that if he never sees a doctor again. I mean if he's treated, I think the chances of this appreciably improving are slim or really of getting a great deal worse, that's what I'm saying.

[13] The trial court found that it was a reasonable medical probability that Elliott's condition, including the infection in the ankle and the pain, would continue for the remainder of his life. The medical evidence supports such a finding; we cannot say that it is clearly erroneous. Such a finding, in turn, justifies the court's conclusion that Elliott should be awarded damages for pain and suffering for the remainder of his life. An award of such damages was not error.

The trial court used a per diem formula in assessing damages for future pain and suffering. In its Conclusion of Law No. 5 the court said:

That plaintiff is entitled to recover from defendant the sum of $78,636.00 for past and future pain and suffering, for his general physical disability and permanent crippling and for the fact that he will no longer be able to lead that sort of life to which he had become accustomed. The past pain and suffering is set at the sum of $7,500.00. The future pain and suffering of $71,244.00 is based upon a finding of $20.00 per day for 52 days per year and an additional $3.00 per day for 313 days per year for a total sum of $1,979.00 per year multiplied by 36 years.

Beaulieu contends that such a method of ascertaining damages constituted prejudicial error.

A similar contention was made by a defendant in Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956), cert. denied, 352 U.S. 941, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956), where the trial court had used a per diem formula in awarding damages for pain and suffering. It was argued there that damages for pain and suffering cannot be properly computed by using a mathematical formula. In answer to this argument, the Court of Appeals said:

It remains to be considered whether the method used by the District Judge in determining the total amount was error as a matter of law. It may be that it was a novel one but it does not follow that it invalidates the award. In determining the amount of an award for pain and suffering a juror or judge should necessarily be guided by some reasonable and practical considerations. It should not be a blind guess or the pulling of a figure out of the air. At the same time there is no exact or precise measuring stick. Exact compensation is impossible in the abstract but the juror or judge should endeavor to make a reasonable or sane estimate. The practical considerations influencing a particular juror or judge or the reasoning used by him may very well differ with the method used by another juror or judge, yet each of such different methods or modes of reasoning may be a reasonable method of reaching the desired result. We are more concerned with the result, reached by a reasonable process of reasoning and consistent with the evidence, than we are with which one of several suitable formulas was actually used by the juror or judge. It is not necessary for us to adopt the method used by the District Judge as a rule of law for the proper disposition of such an issue, and we do not do so. In our opinion, it was not an arbitrary or unreasonable approach to the problem presented and its application was so adjusted in the present case as to be consistent

with the evidence and to reach a result which does not appear to us to be manifestly unjust. United States v. Pusceda, 5 Cir., 224 F.2d 5; City of Knoxville, Tenn. v. Bailey, 6 Cir., 222 F.2d 520, 531.[23]

[14–17] We agree with the foregoing. As we stated in Patrick v. Sedwick,[24] there is no fixed measure of compensation in awarding damages for pain and suffering, and such an award necessarily rests in the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation. We can see nothing manifestly unfair or unjust about the method used by the trial court in assessing damages for future pain and suffering. In fact, as was suggested in the dissenting opinion in the Kansas case of Caylor v. Atchison, Topeka & Santa Fe Ry. Co.,[25] it appears to be a fair argument and a rational approach to treat damages for pain the way it is endured—day by day, month by month, year by year. Ultimately, however, the question for decision is whether the total sum is reasonable or not, regardless of how it was arrived at. We find no error in the method used by the trial court in awarding damages for future pain and suffering.

[18] Beaulieu contends that the total sum awarded is unreasonable and is grossly excessive. We shall not set aside an award on a claim of excessiveness unless it is so large as to strike us that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law.[26] Considering the evidence of permanent damage to Elliott's ankle, the osteomyelitis, and the pain and suffering that he is likely to endure for the remainder of his life, it is our opinion that the award for future pain and suffering was not manifestly unjust.[27] And Beaulieu did not contend in his brief or in oral argument that the trial court acted through passion or prejudice.

Beaulieu contends that the court erred in not reducing the future pain and suffering award to present value. He relies principally on the case of Affett v. Milwaukee & Suburban Transp. Corp.,[28] where the court, after disapproving of the use of a mathematical formula for computing damages for pain and suffering, said: Logically, if this method were followed, the gross amount arrived at should be discounted to its present worth."[29]

[19] If an award for future pain and suffering must be reduced to present value when a mathematical formula is used, it must be for the same reason that an award for future earnings is discounted under the prevailing rule—i. e., because the plaintiff receives his damages for the future long in advance and is able to invest the sum awarded and realize earnings during the intervening period. But we have held that as to impairment of future earning capacity, the award should not be reduced to present value. The same reasoning applies here as to an award for future pain and suffering. Because of the annual rate of inflation offsetting dividends or interest that may be expected on "safe" investments, and of the risk of loss involved in making other investments, a plaintiff is more likely to be restored to his original condition had defendant not committed his tort by allowing the plaintiff his award for future pain and

23. 234 F.2d at 11. See Annot., Per Diem or similar mathematical basis for fixing damages for pain and suffering, 60 A.L.R.2d 1347 (1958).

24. 413 P.2d 169, 176 n. 21 (Alaska 1966).

25. 190 Kan. 261, 374 P.2d 53, 64 (1962).

26. Imperial Oil, Ltd. v. Drilk, 234 F.2d 4, 11 (6th Cir. 1956), cert. denied, 352 U.S. 941, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956).

27. Accord, Peters v. Benson, 425 P.2d 149, 152 (Alaska 1967); National Bank of Alaska v. McHugh, 416 P.2d 239, 244 (Alaska 1966); Patrick v. Sedwick, 413 P.2d 169, 175 (Alaska 1966).

28. 11 Wis.2d 604, 106 N.W.2d 274, 279, 86 A.L.R.2d 227, 236 (1960).

29. See also Rigley v. Prior, 290 Mo. 10, 233 S.W. 828, 832 (1921); Comment, 60 Mich.L.Rev. 612, 629–30 (1962).

suffering without reduction to present worth.

Finally, Beaulieu contends that the greater part of Elliott's pain and suffering was attributable to his failure to follow his doctor's orders in not bearing as much weight as possible on his ankle, and therefore that such pain and suffering cannot be the basis for the recovery of damages.

Dr. Wichman did state that if he were asked by Elliott for treatment, he would suggest as much ambulation as possible, and that it was his opinion that complete ambulation would be his suggestion or prescription. However, there is no evidence that Dr. Wichman ever told Elliott to bear as much weight as possible on his ankle. All that Wichman said was that this is what he would prescribe if he were to treat Elliot for his injury.

[20] There is also no testimony by Dr. Foster that he told Elliott to bear as much weight as possible on his ankle. The doctor stated that he prescribed crutches and advised Elliott to use them to tolerance by testing how much weight he would be able to put on his foot, absorbing the rest with the crutches. When Dr. Foster was asked what his suggested course of procedure would be, based on his examination of Elliott's ankle, he stated:

> My suggested course of procedure is for Sergeant Elliott to continue bearing what—weight he can on his foot, to treat it when it becomes inflamed and sore and red by warm soaks and elevation, to continue on the use of the crutches up to the limits of comfort, to maintain his brace on his ankle as he is.

There is nothing in the evidence to show that Elliott had not done what Dr. Foster suggested that he do. The record does not substantiate Beaulieu's claim that Elliott's pain and suffering was attributable to his failure to follow the orders of his doctor.

Elliott's Appeal

As a basis for computing Elliott's impairment of future earnings for the remainder of his work life of 29 years, the court used Elliott's wage scale in the Air Force at the time of his discharge in the amount of $462.30 a month. On his appeal, Elliott claims that his future wage loss was greater than that determined by the court. The basis for his claim is that, considering evidence of his experience in truck driving and traffic management, the court ought to have determined what earnings Elliott probably would and could have received in civilian life—the wage scale there being higher for the same type of work than in the military service.

[21] We have held that this case must be remanded to the trial court for the purpose of making detailed and explicit findings as to Elliott's earning capacity and the degree of impairment in respect thereto. Such findings may contain the answer to the question as to why the court used Elliott's military pay, rather than civilian pay scales for equivalent work, as a basis for computing future wage loss for the entire period of 29 years, when Elliott had indicated that he may have retired from the Air Force at the end of 20 years of service which would have been approximately two years after his discharge if he had not received a medical discharge. In the absence of adequate findings and a clear understanding of the basis for the court's award, we are unable to pass upon Elliott's contention that the award for impairment of future earning capacity was inadequate.

[22] Similarly, we are unable to pass upon Elliott's contention that the evidence established that the impairment of his earning capacity was total, or near total, rather than 50% as determined by the court. Adequate findings as to Elliott's degree of impairment of earning capacity may afford a clear understanding of the basis for the court's determination. The findings are not sufficient for that purpose now.

Elliott's next point has to do with attorney's fees allowed by the court. Civil Rule 82(a) (1) provides as follows:

> Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered

to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

ATTORNEY'S FEES IN AVERAGE CASES

	Contested	Without Trial	Non-Contested
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

The court awarded Elliott $13,870.29 attorney's fees based on the percentages listed in the "without trial" category of the above rule. Elliott claims that this was an erroneous application of the rule, and that a correct computation of attorney's fees should have been under the "contested" category[30] because even though liability was admitted, the question of damages was in issue and was contested in a four-day trial.

[23] In a case like this where liability is admitted but the amount of damages is contested, the question of which category of Civil Rule 82(a) (1) is applicable in computing attorney's fees is a matter within the discretion of the trial court. We limit our review in matters of this type to the question of whether the court exceeded the bounds of such discretion—whether such discretionary authority has been abused.[31]

[24] The court's reasons for assessing attorney's fees as it did was that liability was admitted, that the total recovery of damages was large, and that the attorney's fees allowed were adequate. Considering the character of this litigation and the amount of recovery,[32] we cannot say that the court's reasoning was not sound and that the manner of applying the rule amounted to an abuse of discretion.[33]

Costs were assessed against Beaulieu in the amount of $82.40. Elliott claims that it was error to not include in the costs certain expenses incident to the taking of depositions necessary to establish liability.[34]

[25, 26] The taxing of costs rests largely in the sound discretion of the trial court, and we shall not interfere with the exercise of that discretion except in cases of abuse.[35] Elliott claims that the depositions taken were necessary to establish liability. But he does not point out what depositions were involved, how they related to liability, when they were taken, or when the concession of liability was made by Beaulieu.

30. Attorney's fees computed under the "Contested" category of the rule would have amounted to $17,843.73.

31. McDonough v. Lee, 420 P.2d 459, 465 (Alaska 1966); Kenai Power Corp. v. Strandberg, 415 P.2d 659, 661 (Alaska 1966); Patrick v. Sedwick, 413 P.2d 169, 178–179 (Alaska 1966); Preferred Gen. Agency v. Raffetto, 391 P.2d 951, 954 (Alaska 1964); Davidsen v. Kirkland, 362 P.2d 1068, 1070–1071 (Alaska 1961).

32. Elliott's total recovery, in addition to costs and attorney's fees, was $169,937.25.

33. McDonough v. Lee, 420 P.2d 459, 465 (Alaska 1966).

34. Civ.R. 79(b) provides that "A party entitled to costs may be allowed * * * the necessary expenses of taking depositions for use at trial * * *."

35. Euler v. Waller, 295 F.2d 765, 766, 97 A.L.R.2d 135, 137–138 (10th Cir. 1961).

In these circumstances we cannot find any abuse of discretion in the court's refusal to allow as costs the expenses incident to the taking of such depositions.

The judgment is set aside. The case is remanded to the superior court for the purpose of making appropriate findings as to the damage issues referred to in this opinion and for the further purpose of entering an appropriate judgment thereon.

Warren A. TAYLOR, Appellant,

v.

DISTRICT COURT FOR the FOURTH JUDICIAL DISTRICT, AT FAIRBANKS, Appellee.

No. 764.

Supreme Court of Alaska.

Dec. 8, 1967.

The Superior Court, Fourth Judicial District, Everett W. Hepp, J., affirmed judgment of the district court which held attorney in contempt for failure to appear for trial at time set. Upon the attorney's appeal, the Supreme Court, Dimond, J., held that action of the attorney in agreeing to a trial setting in the superior court two days before date previously set for trial of another case in the district court, with result that the attorney was unable to appear for the district court trial when the superior court trial extended longer than two days, did not give rise to an inference, which would support judgment of contempt, of a willful disregard or disobedience by the attorney of the district court order in setting the district court case for trial.

Reversed and remanded with directions.

1. Contempt ⇐2

In order for there to be contempt, it must appear that there has been a willful disregard or disobedience of the authority or orders of the court. Rules of Civil Procedure, rule 90.

2. Contempt ⇐20

Attorney's failure to appear in court at time specified by order of the court may amount to an indirect, but not a direct, contempt of court. Rules of Civil Procedure, rule 90.

3. Contempt ⇐54(1)

Purpose of civil rule relating to contempt in requiring a motion in indirect contempt proceedings to be supported by affidavits is to afford one charged with contempt the procedural due process requirement of notice of the charge against him. Rules of Civil Procedure, rule 90(b).

4. Contempt ⇐54(1)

In proceeding by district court judge to hold attorney in contempt of court for failure to appear for trial at time required, it was unnecessary under rule for judge to have filed in his own court his affidavit stating that the attorney had failed to appear at the time required, in view of fact that the attorney was duly apprised of the charge against him by the district court's order directing the attorney to show cause why he should not be punished for the alleged contempt. Rules of Civil Procedure, rule 90(b).

5. Contempt ⇐20

Action of attorney in agreeing to a trial setting in the superior court two days before date previously set for trial of another case in the district court, with result that the attorney was unable to appear for the district court trial when the superior court trial extended longer than two days, did not give rise to an inference, which would support a judgment of contempt, of a willful disregard or disobedience by the attorney of the district court order in setting the district court case for trial. Rules of Civil Procedure, rule 90.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.010. Noneconomic damages. (a) In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, and other nonpecuniary damage.

(b) The amount of damages awarded by a court or a jury under (a) of this section may not exceed $500,000 for each claim based on a separate incident or injury.

(c) The limit under (b) of this section does not apply to damages for disfigurement or severe physical impairment.

20.06 NON-ECONOMIC LOSSES

The (first, second, etc.) item of loss claimed by plaintiff is for non-economic losses. You may award the plaintiff a fair amount to compensate plaintiff for [pain and suffering] [loss of enjoyment of life] [disfigurement] [physical impairment] [and] [inconvenience] resulting from the injury. Such an award should fairly compensate the plaintiff for the non-economic losses (he/she) has experienced from the date of the injury until the date of trial [and for non-economic losses that he/she is reasonably probable to experience in the future.] [In deciding how long the plaintiff may experience such losses in the future, you may need to consider his/her current life expectancy].

The law does not establish a definite standard for deciding the amount of compensation for non-economic losses, and the law does not require that any witness testify as to the dollar value of non-economic losses. You must exercise your reasonable judgment to decide a fair amount in light of the evidence and your experience.

Use Note

This instruction should be used with Instruction 20.01A or 20.01B. Instruction 20.07A (Limitation on Non-Economic Damages) must also be given unless the plaintiff claims disfigurement or severe physical impairment. In that case, Instruction 20.07B, C or D must be given.

The list of items included in the concept of non-economic damages may be tailored for the particular case. The consolidation of these items in a single non-economic loss instruction is not intended to suggest that evidence or argument may not focus on particular items rather than on a general category of "non-economic loss."

The bracketed language concerning future non-economic losses should be given in cases where future losses are alleged. In such a case, Instruction 20.10 (Future Damages) should also be given.

The bracketed sentence on life expectancy should be given only when it is claimed that the injury is permanent. In that event, Instruction 20.13 should be given.

Comment

This instruction replaces former Instructions 20.05 (Physical Impairment) and 20.06 (Pain and Suffering). The list of items included in the concept of non-economic loss is derived from AS 09.17.010(a), which states that "damages for non-economic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other non-pecuniary damage." It is not clear what additional concepts are included in the category of "other non-pecuniary damage." In a case where the evidence supports an additional descriptive term, and where the law permits such a recovery, other terms could be added.

The category of non-economic loss most frequently discussed in the Alaska cases is pain and suffering. The plaintiff is not required to prove pain and suffering damages with great precision. Morrison v. State, 516 P.2d 402, 406 (Alaska 1973). There is no fixed measure for the amount of an award, and its calculation rests with the good sense and deliberate judgment of the fact finder. Patrick v. Sedwick, 413 P.2d 169 (Alaska 1966); see also Beaulieu v. Elliott, 434 P.2d 665, 676 (Alaska 1967). A per diem formula may be used. Id.

Where the evidence of pain and suffering is uncontradicted, it is error for the court not to make an award. Walker v. Alaska Road Commission, 388 P.2d 406 (Alaska 1964); Morrison v. State, 516 P.2d 402, 406 (Alaska 1973); Martinez v. Bullock, 535 P.2d 1200 (Alaska 1975). Cf. Bullard v. BP Alaska, 650 P.2d 402, ___ (Alaska 1982) (affirming zero verdict when issue was

contraverted); Hayes v. Xerox Corp., 718 P.2d 929 (Alaska 1986) (rejecting argument for new trial based in part on alleged absence of award for pain and suffering).

Among the other Alaska cases discussing pain and suffering awards are: Patrick v. Sedwick, 413 P.2d 169, 175 (Alaska 1966); National Bank of Alaska v. McHugh, 416 P.2d 239, 244 (Alaska 1966); Peters v. Benson, 425 P.2d 149, 152 (Alaska 1967); City of Fairbanks v. Nesbett, 432 P.2d 607 (Alaska 1967); Maddocks v. Bennett, 456 P.2d 453 (Alaska 1969); City of Kotzebue v. Ipalook, 482 P.2d 75 (Alaska 1969); Transamerica Title Insurance Co. v. Ramsey, 507 P.2d 492, 496-97 (Alaska 1973); City of Fairbanks v. Smith, 525 P.2d 1095 (Alaska 1974); Northern Lights Motel, Inc. v. Sweaney, 561 P.2d 1176 (Alaska 1977); American National Watermattress Corp. v. Manville, 642 P.2d 1330 (Alaska 1982); and Hutchins v. Schwartz, 724 P.2d 1194 (Alaska 1986).

Alaska cases also discuss awards for the other categories of non-economic loss mentioned in this instruction. The terms or concepts are sometimes discussed in conjunction with the discussion about an award for pain and suffering (particularly in cases involving lump sum verdicts). Examples include: Walker v. Alaska Road Commission, 388 P.2d 406 (Alaska 1964) (pain, suffering and inconvenience); Peters v. Benson, 425 P.2d 149 (Alaska 1967) (pain and suffering and physical impairment); Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967) (pain and suffering, physical disability, and inability to lead life to which accustomed); Morrison v. State, 516 P.2d 402 (Alaska 1973) (diminished enjoyment of life, including pain and suffering); Martinez v. Bullock, 535 P.2d 1200 (Alaska 1975) (pain and suffering caused by disfigurement); Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1986) (loss of enjoyment of life) and American National Watermattress Corp. v. Manville, 642 P.2d 1330, 1341 (Alaska 1982) (loss of enjoyment of life). Cf. Buoy v. ERA Helicopters, Inc., 771 P.2d 439 (Alaska 1989); Hutchins v. Schwartz, 724 P.2d 1194 (Alaska 1986); Hayes v. Xerox Corp., 718 P.2d 929 (Alaska 1986) (affirming judgments denying claims for loss of enjoyment of life).

A separate award may be appropriate for loss of non-market services, such as performance of household chores. Such an award does not necessarily duplicate an award for loss of enjoyment of life. Dura Corp. v. Harned, 703 P.2d 396, 412 (Alaska 1986).

20.07A LIMITATION ON NON-ECONOMIC DAMAGES WHERE NEITHER SEVERE PHYSICAL IMPAIRMENT NOR DISFIGUREMENT ARE CLAIMED

In this case plaintiff is claiming non-economic loss. You are instructed that an award for non-economic loss may not exceed $500,000. [**] This limitation on the total award for non-economic loss does not apply to any other award you may make to the plaintiff for any of the other items of loss claimed by the plaintiff.

Use Note

This instruction deals with the $500,000 limit on awards for non-economic loss. See AS 09.17.010. Before using this instruction, the trial court must first resolve a question not yet addressed by the Alaska Supreme Court: should the cap be imposed by the judge after the verdict, if necessary, or should the jury be instructed on the cap? See Comment 5 below. If the trial judge concludes that the cap will be imposed by the judge as necessary after the verdict, Instructions 20.07A, B, C and D must not be given.

If the trial judge concludes that the jury should be instructed on the "cap," Instruction 20.07A should be given only if: (1) the plaintiff does not allege disfigurement or severe physical impairment and (2) comparative negligence of the plaintiff is not at issue. In any case in which plaintiff alleges either severe physical impairment or disfigurement, Instruction 20.07A must not be given. Instead, Instruction 20.07B, C or D must be given.

[**] In any case in which comparative negligence of the plaintiff is at issue, there are significant issues regarding the calculation of the damage award and the effect of the "cap," and it may be necessary to modify this instruction. See Comment 6 below.

This instruction should ordinarily be given immediately after the instruction on non-economic losses [20.06].

Comment

This instruction is intended to inform the jury concerning the limitations on recovery for non-economic losses required by AS 09.17.010.

00039

A number of unanswered questions exist concerning AS 09.17.010. A description of some of the issues raised by this statute follows:

1. AS 09.17.010(a) refers to actions "for personal injury based on negligence." As a result, it is not clear whether the cap applies in personal injury cases based on warranty or strict liability in tort.

2. AS 09.17.010(c) states that the cap does not apply to damages for disfigurement or severe physical impairment. While the adjective "severe" was used with reference to physical impairment, it was not used with reference to disfigurement. As drafted, Instructions 20.07B and 20.07D allow the jury to conclude that in any case in which the plaintiff has been disfigured, regardless of severity, the cap does not apply.

3. The Alaska Supreme Court has not decided whether the existence of "disfigurement" or a "severe" physical impairment is solely a question for the jury or involves a threshold determination by the judge. Assuming that these are questions for the jury, nothing in AS 09.17.010 appears to alter the usual standards for motions for directed verdict. As a result, it appears that the judge could enter a directed verdict on whether the plaintiff was disfigured or severely physically impaired, leaving it to the jury to decide any disputed issues as to liability, causation or damages.

4. Instructions 20.07A-20.07D are drafted on the assumption that if the fact finder finds that there is disfigurement or severe physical impairment, there is no cap on any of the non-economic damages described in AS 09.17.010(a). In other words, these instructions were drafted on the assumption that upon a finding of disfigurement or severe physical impairment, the "cap" disappears entirely. An alternative interpretation suggested by the language of AS 09.17.010(c) is that in cases of disfigurement or severe physical impairment, damage awards for only those two elements would be exempt from the $500,000 cap, and all other elements of non-economic loss listed in AS 09.17.010(a) would remain subject to the $500,000 cap. Under this alternative interpretation, even with a finding of disfigurement or severe physical impairment, the cap remains effective for all elements of non-economic loss other than compensation for the specific elements of severe physical impairment or disfigurement. Under this alternative interpretation, it may be difficult to isolate elements of disfigurement and sev ce physical impairment that are distinct from other categories of non-econo ic loss such as pain and suffering, "ordinary" physical impairment, loss of non-market services, etc.

5. Another open question is the division of responsibility between the judge and jury in applying the "cap." Two possible approaches are apparent to the Committee. Under the first approach, the jury is instructed: (1) to decide whether the cap applies, i.e., whether plaintiff is disfigured or severely physically impaired; and (2) if the cap applies, to limit the non-economic loss award to $500,000. Under the second approach, application of the cap is the post-verdict responsibility of the judge. Under this approach, the jury would receive special interrogatories asking for "yes" or "no" answers concerning whether the defendant's conduct caused disfigurement and/or severe physical impairment of the plaintiff. After the verdict, the judge would use the answers to the special interrogatories to decide whether the cap applies. If the cap applies and if the jury's award for non-economic loss exceeds $500,000, the judge would reduce the non-economic loss award to $500,000.

The Committee expresses no view on which approach is correct. If the first approach is followed, Instruction 20.07A, B, C or D must be given. If the second approach is taken, none of these instructions should be given. Instead, the special verdict form must include special interrogatories concerning whether plaintiff suffered disfigurement or severe physical impairment.

6. Under AS 09.17.010, the "amount awarded [for non-economic loss]" cannot exceed $500,000. Another issue raised by this statute is whether the "amount awarded" refers to the non-economic loss calculation before or after reduction for comparative negligence. The effect on the judgment can be significant. For example, assume that the plaintiff has non-economic losses of $600,000, economic losses of $400,000, and that plaintiff's comparative negligence is 20%. Under the "before" approach, the fact finder will limit the non-economic loss award to $500,000 before reduction for comparative negligence. The judgment will then be calculated as follows:

Non-Economic Loss (per "cap")	$500,000
Economic Loss	+400,000
Total Damages	900,000
-20% Comparative Negligence	-180,000
Total Judgment	$720,000

Under the "after" approach, the "cap" is triggered only if the non-economic loss exceeds $500,000 after it has been adjusted for comparative negligence. Under this approach, in the same example the judgment would be computed as follows:

00041

Non-Economic Loss	$600,000
-20% Comparative Negligence	-120,000
Non-Economic Loss Award	480,000
Economic Loss	$400,000
-20% Comparative Negligence	- 80,000
Economic Loss Award	320,000
Total Judgment	$800,000

(Under this approach the "cap" was not a factor because after the adjustment for comparative negligence, the non-economic loss award was below the $500,000 cap.)

The significance of this issue with respect to the instructions and verdict forms depends upon whether the cap is to be applied by the judge on a post-verdict basis or whether the jury is to apply the cap based on the court's instructions. If the judge is to apply the cap on a post-verdict basis, the jury is simply asked to (1) calculate total damages, (2) calculate the percentage of comparative negligence, and (3) answer special interrogatories on whether the defendant's conduct caused disfigurement or severe physical impairment of the plaintiff. The judge will use this information to calculate the judgment, and the jury will not be instructed on how or when to apply the cap or the comparative negligence percentage. However, if the jury applies the cap during its deliberations, it must be instructed on how to do so. Creative counsel may see other possibilities, but here are two possible approaches:

Option One: If the cap is applied by the jury before reduction of the award for comparative negligence, the court will give Instruction 20.07A, B, C or D as appropriate to the facts of the case. The jury will then enter an amount on the verdict form for non-economic loss. If the jury has concluded that the cap applies, this amount cannot exceed $500,000. The jury will also make an entry on the verdict form for the percentage of plaintiff's negligence, if any. As in current practice, neither the instructions nor the verdict form will ask the jury to apply the comparative negligence percentage to reduce any awards; this reduction will be made by the judge in computing the judgment.

Option Two: If the cap is applied by the jury after it reduces the award for comparative negligence, Instructions 20.07A, B, C or D must be given. However, these instructions and the special verdict form must be modified to tell the jury to take three steps in computing an award for non-economic loss: (1) compute the amount

of the award, (2) reduce this amount by a percentage reflecting the plaintiff's own negligence, if any, and (3) if the award after reduction for plaintiff's negligence exceeds $500,000, reduce it to $500,000.

20.10 FUTURE DAMAGES--NO REDUCTION TO PRESENT VALUE

As I have instructed you, you may decide it is reasonably probable that the plaintiff will have some future [non-economic] losses resulting from the (accident). In fixing an amount for future [non-economic] losses, you must disregard the fact that any amount you award the plaintiff may be paid before the actual loss occurs. You must also disregard the fact that the value of money may change over time.

Use Note

Instruction 20.10 is intended for use in cases in which future losses are claimed, but some or all of the damage awards are not to be reduced to present value.

Under AS 09.17.040, the ordinary rule is that future economic losses must be reduced to present value. In such a case, Instruction 20.04 (Inflation and Present Value) must be given. Future non-economic losses are not reduced to present value. Therefore, if future non-economic losses are also being claimed, Instruction 20.10 must also be given and the bracketed language must be used.

Cases may arise in which none of the future damages are to be reduced to present value. For example, plaintiff may not claim any future economic losses, but only future non-economic losses. Alternatively, the parties may have agreed pursuant to AS 09.17.040(c) to use the Beaulieu rule in awarding future economic loss. In such a case, Instruction 20.04 will not be given. Instruction 20.10 will be given and the bracketed language must be omitted.

Comment

In 1967, the Alaska Supreme Court held that damage awards for loss in future earning capacity should not be reduced to present value. Beaulieu v. Elliott, 434 P.2d 665, 670-71 (Alaska 1967). The court reasoned that the annual inflation rate would offset any earnings from investments. The court also held that damage awards for future pain and suffering are not to be reduced to present value. Id. at 676.

AS 09.17.040(b), enacted in 1986, provides that future economic damages shall be reduced to present value, unless the parties stipulate to use the Beaulieu rule. This statute does not affect future non-economic loss.

A damage award for loss of retirement benefits may result in a double recovery if not reduced to present value. This is so because a figure for total retirement benefits is based on the result of the investment and return upon employer contributions over many years. The plaintiff would have the opportunity to invest an award, the size of which is based on projected investment. See Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 933 (Alaska 1977).

The court has suggested that in a case in which the award of damages for loss in earning capacity is to be based on the difference in earning potential between pre- and post-injury employment of the plaintiff, the award might be reduced to present value if it can be shown that the actual gap in earnings between the jobs will remain constant in the future, as then inflation would have no effect. Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 934 (Alaska 1977). If both sets of wages were to increase by the same percentage, the actual gap in wages would increase and a reduction to present value would be improper. Id. at 934.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.020. Punitive damages.

Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence.

20.20 PUNITIVE DAMAGES

The plaintiff has requested that you award (him/her/it) a separate amount of money in order to punish the defendant and to deter the defendant and others from repeating similar acts. You may award the plaintiff such an amount of money only if you decide that the defendant's conduct which forms the basis of your verdict was outrageous. The defendant's conduct was outrageous if it was the result of maliciousness or hostile feelings toward the plaintiff, or was undertaken with reckless indifference to the interests, rights or safety of others.

Plaintiff must prove the outrageousness of defendant's conduct by clear and convincing evidence. I will now define what it means to prove something by clear and convincing evidence. An alleged fact is established by clear and convincing evidence if the evidence induces belief in your minds that the alleged fact is highly probable. It is not necessary that the alleged fact be certainly true or true beyond a reasonable doubt or conclusively true. However, it is not enough to show that the alleged fact is more likely true than not true.

The law provides no fixed measure as to the amount of such damages, but leaves it to you to decide an amount that will fairly accomplish the purposes of punishment and deterrence. In assessing such damages you may consider the magnitude and flagrancy of the defendant's offense, the importance of the

policy violated, the wealth of the defendant, and the amount of compensatory damages.

Use Note

This instruction is for use when punitive damages are claimed.

For defamation cases see Instruction 16.06.

Comment

Punitive damages are a remedy, not a cause of action. Doe v. Colligan, 753 P.2d 144, 145 n.2 (Alaska 1988). They are considered a harsh remedy not favored in law. Ross Laboratories v. Thies, 725 P.2d 1076, 1081 (Alaska 1986); Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986). Punitive damages are to be allowed only with caution and within narrow limits. Id.

The purpose of punitive damages is two-fold: to punish the wrongdoer and to deter the wrongdoer and others from repeating the offensive act. Doe v. Colligan, 753 P.2d 144, 145 (Alaska 1988); Providence Washington Ins. Co. v. City of Valdez, 684 P.2d 861 (Alaska 1984).

The Alaska Supreme Court has recognized two requirements for the recovery of punitive or exemplary damages. First, since punitive damages are a remedy and not an independent cause of action, it is essential that the plaintiff prevail on one or more causes of action. In other jurisdictions this requirement has occasionally been expressed by the statement that the plaintiff must recover compensatory damages as a prerequisite to recovery of punitive damages. In Alaska, punitive damages may be recovered even though the plaintiff has only received an award of nominal damages. The Alaska Supreme Court first addressed this issue in Haskins v. Shelden, 558 P.2d 487, 492-93 (Alaska 1976). In Haskins the plaintiff sought damages for wrongful repossession of a tractor. He also sought return of the tractor. The trial court concluded that there was insufficient evidence of value of the tractor to submit the damage claims, but the jury was permitted to consider the claim for return of the tractor. The jury found for the plaintiff and required return of the tractor. The jury also awarded punitive damages. The Supreme Court affirmed, rejecting the argument that the absence of a compensatory damages award precluded an award of punitive damages. In reaching its holding, the court quoted C. McCormick, Damages § 83 (1953). The

first portion of the McCormick quotation states the rule that when the plaintiff prevails on an appropriate cause of action, punitive damages may be awarded even though there is only a nominal compensatory award or where there is no compensatory damage award at all. In Oaksmith v. Brusich, 774 P.2d 191, 201 (Alaska 1989), the Court referred to the McCormick quotation and affirmed an award of punitive damages to a plaintiff who had received an award of nominal damages.

The second requirement is that the plaintiff must prove that the wrongdoer's conduct was outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another. Bridges v. Alaska Housing Authority, 375 P.2d 696, 702 (Alaska 1962) (Citing Restatement of Torts § 908 (1939), and W. Prosser, Handbook on the Law of Torts, § 2 (2d ed. 1955)). Actual malice need not be proved. Rather, reckless indifference to the rights of others and conscious action in deliberate disregard of them may provide the necessary state of mind to justify punitive damage. Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 46 (Alaska 1979) (citing Restatement (Second) of Torts § 908 (Tent. Draft No. 19), (1973)). Reckless misconduct does not occur unless the act or omission is itself intended, notwithstanding that the actor knew of facts which would lead any reasonable person to realize the extreme risk to which it subjected the safety of others. Hayes v. Xerox Corp., 718 P.2d 929, 935 (Alaska 1986) (quoting Restatement (Second) of Torts § 500, comment b). Reckless misconduct therefore differs from negligence, which consists of mere inadvertence, incompetence or unskillfulness because reckless conduct requires a conscious choice of action. Id.

In Murray v. Feight, 741 P.2d 1148, 1158 (Alaska 1987) the court indicated that the language of this pattern instruction adequately conveyed the requirement that the jury find malicious or reckless acts. However, in other cases the court found no error in instructions in which the word "outrageous" was not used. Teamsters Local 959 v. Wells, 749 P.2d 349, 361 n.25 (Alaska 1988); Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1047 (Alaska 1984).

If the evidence does not give rise to an inference of actual malice or of conduct sufficiently outrageous to be deemed to be equivalent to actual malice, the trial court should not submit the issue of punitive damages to the jury. See State Farm Fire and Casualty Co. v. Nicholson, 777 P.2d 1152 (Alaska 1989) (error to instruct on punitive claim); Alyeska Pipeline Service Co. v. Beadles, 731 P.2d 572, 574 (Alaska 1987) (summary judgment); Ross Laboratories v. Thies, 725 P.2d 1076 (Alaska 1986) (summary

judgment dismissing punitive claim as to one defendant affirmed; submission of punitive damages claim as to co-defendant reversed); Hayes v. Xerox Corp., 718 P.2d 929, 936 (Alaska 1986) (summary judgment); Zeman v. Lufthansa German Airlines, 699 P.2d 1274 (Alaska 1985) (summary judgment); State v. Haley, 687 P.2d 305, 320 (Alaska 1984); Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co., 666 P.2d 33 (Alaska 1983) (summary judgment); Alyeska Pipeline Service Co. v. O'Kelley, 645 P.2d 767 (Alaska 1982) (refusal to instruct jury on punitives). In one case, the court affirmed the dismissal of a complaint for failure to state a claim on which relief may be granted because there were no allegations which, liberally construed, gave rise to punitive damages. Mattingly v. Sheldon Jackson College, 743 P.2d 356, 364 (Alaska 1987).

Punitive damages may exceed compensatory damages, and no definite ratio between them is presented. Factors to be considered in awarding punitive damages are the magnitude and flagrancy of the wrong committed, the importance of the policy violated and the wealth of the defendant. Pletnikoff v. Johnson, 765 P.2d 973, 979 (Alaska 1988); Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1047 (Alaska 1984) (citing Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 48 (Alaska 1979)). The Supreme Court has reviewed punitive damage awards for excessiveness and has affirmed awards made at a variety of ratios of punitive damages to actual damages. See, e.g., Teamsters Local 959 v. Wells, 749 P.2d 349, 361 n. 26 (Alaska 1988) (Ratio of less than three to one); Alaska Insurance Co. v. Movin' On Construction, Inc., 718 P.2d 472 (Alaska 1986) (ratio of three to one approved); Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1048 (Alaska 1984) (ratio of 2.38 to one affirmed); Alaska Statebank v. Fairco, 674 P.2d 288, 291, 294 (Alaska 1983) (ratio of 2.53 to one affirmed); Clary Insurance Agency v. Doyle, 620 P.2d 194, 205 (Alaska 1980) (affirming ratio of approximately two to one). Cf. Sturm, Ruger & Co. v. Day, 594 P.2d 38, 48 (Alaska 1979) (reducing punitive award of $2,895,000 to $250,000).

The Alaska Supreme Court has affirmed awards of punitive damages in a variety of factual contexts. For example, punitive damages are recoverable in products liability cases. The court affirmed a punitive damages award in a products case based on evidence that the manufacturer knew that its product was defectively designed and that injuries and deaths had resulted from the design defect, but that the manufacturer continued to market the product in reckless disregard of the public's safety. Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 46-47 (Alaska 1979). Cf. Ross Laboratories v. Thies, 725 P.2d 1076 (Alaska

1986) (insufficient evidence of prior knowledge or of similar incidents or of other outrageous conduct). Upon a proper showing, punitive damages may also be recovered in wrongful repossession cases, Murray v. Feight, 741 P.2d 1148, 1158 (Alaska 1987); Alaska Statebank v. Fairco, 674 P.2d 288 (Alaska 1983), for intentional interference with contract and intentional infliction of emotional distress, Oaksmith v. Brusich, 774 P.2d 191 (Alaska 1989), and for fraudulent misrepresentations, Great Western Savings Bank v. George W. Easley Co., J.V., 778 P.2d 569 (Alaska 1989). Punitive damages may also be awarded for bad faith failure to pay maintenance and cure to a person entitled to this remedy, Weason v. Harville, 706 P.2d 306 (Alaska 1985), and for an insurer's tortious breach of the duty of good faith and fair dealing towards its insured, State Farm Fire and Casualty Co. v. Nicholson, 777 P.2d 1152 (Alaska 1989).

Punitive damages are not recoverable for breach of contract unless the conduct constituting the breach constitutes an independent tort for which punitive damages are recoverable. Wien Air Alaska v. Bubbel, 732 P.2d 627, 631 (Alaska 1986), quoting Restatement (Second) of Contracts § 355, comment A (1981). Punitive damages may not be awarded for breach of the implied covenant of good faith and fair dealing in an employment contract. ARCO Alaska, Inc. v. Akers, 753 P.2d 1150 (Alaska 1988).

If a tort by an employee renders the employer liable for compensatory damages and the employee's actions justify a punitive damage award, the employer is liable for punitive damages whether or not the employer authorized or ratified the tortious conduct. Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (Alaska 1986). One partner may also be held vicariously liable for punitive damages based on the acts of the other partner. Murray v. Feight, 741 P.2d 1148 (Alaska 1987).

Punitive damages are not recoverable against the State of Alaska. See AS 09.05.280 and University of Alaska v. Hendrickson, 552 P.2d 148 (Alaska 1976). Punitive damages may not be awarded against municipalities absent statutory authorization. Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Richardson v. Fairbanks North Star Borough, 705 P.2d 454 (Alaska 1985). Punitive damages may not be recovered from the estate of a deceased tortfeasor. Doe v. Colligan, 753 P.2d 144 (Alaska 1988).

Effective May 1986, the legislature enacted AS 09.17.020 requiring that an award of punitive damages must be supported by

clear and convincing evidence. Because that standard of proof is likely not to be applicable to any other theory of recovery alleged, the standard of proof is included in the instruction on punitive damages instead of making it a second instruction on standard of proof.

The Alaska Supreme Court has discussed the clear and convincing standard of proof in two cases: Waks v. State, 375 P.d 136, 138 (Alaska 1962) and Saxon v. Harris, 395 P.2d 71 (Alaska 1964). In Waks, supra, the issue was the burden of proof upon claimants to recover money which has already escheated to the state and in Saxon, supra, the issue was whether clear and convincing evidence is required to establish fraud. In holding that the burden of proof was preponderance of the evidence, the Supreme Court distinguished between the two burdens and defined both.

In Providence Washington Insurance Co. v. City of Valdez, 684 P.2d 861 (Alaska 1984), the Alaska Supreme Court held that public policy did not bar construing a liability insurance policy to cover punitive damages awarded against a government entity or punitive damages awarded on the basis of vicarious liability. In LeDoux v. Continental Insurance Co., 666 F. Supp. 178 (D. Alaska 1987), the court held that under Alaska law, claims for punitive damages against individuals for their own acts were covered by an insurance policy.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

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.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.55.536. Expert advisory panel.

(a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider when the parties have not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after filing of answer to a summons and complaint a three-person expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. When the action is filed the court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions.

(b) The expert advisory panel may compel the attendance of witnesses, interview the parties, physically examine the injured person if alive, consult with the specialists or learned works they consider appropriate, and compel the production of and examine all relevant hospital, medical, or other records or materials relating to the health care in issue. The panel may meet in camera, but shall maintain a record of any testimony or oral statements of witnesses, and shall keep copies of all written statements it receives.

(c) Not more than 30 days after selection of the panel, it shall make a written report to the parties and to the court, answering the following questions and other questions submitted to the panel by the court:

(1) What was the disorder for which the plaintiff came to medical care?

(2) What would have been the probable outcome without medical care?

(3) Was the treatment selected appropriate for the case?

(4) Did an injury arise from the medical care?

(5) What is the nature and extent of the medical injury?

(6) What specifically caused the medical injury?

(7) Was the medical injury caused by unskillful care?

(8) If a medical injury had not occurred, how would the plaintiff's condition differ from the plaintiff's present condition?

(d) In any case in which the answer to one or more of the questions submitted to the panel depends upon the resolution of factual questions that are not the proper subject of expert opinion, the report must so state and may answer questions based upon hypothetical facts that are fully set out in the opinion. The report must include copies of all written statements, opinions, or records relied upon by the panel and either a transcription or other record of any oral statements or opinions; must specify any medical or scientific authority relied upon by the panel; and must include the results of any physical or mental examination performed on the plaintiff. Each member shall sign the report and the signature constitutes the member's adoption of all statements and opinions contained in it; however, a member may, instead of signing the report, submit a concurring or dissenting report that complies with the requirements of this subsection. A member may not attest to any portion of the report as to which the member is not qualified to give expert testimony.

(e) The report of the panel with any dissenting or concurring opinion is admissible in evidence to the same extent as though its contents were orally testified to by the person or persons preparing it. The court shall delete any portion that would not be admissible because of lack of foundation for opinion testimony, or otherwise. Either party may submit testimony to support or refute the report. The jury shall be instructed in general terms that the report shall be considered and evaluated in the same manner as any other expert testimony. Any member of the panel may be called by any party and may be cross-examined as to the contents of the report or of that member's dissenting or concurring opinion.

(f) Discovery may not be undertaken in a case until the report of the expert advisory panel is received. However, the court may relax this prohibition upon a showing of good cause by any party. If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant it an additional 30 days.

(g) Members of a panel are entitled to travel expenses and per diem in accordance with state law pertaining to members of boards and commissions for all time spent in preparing its report. If a panel member is called upon as a witness at trial or upon deposition, the member is entitled to payment of an expert witness fee, which may not exceed $150 per day. All expenses incurred by the panel shall be paid by the court. However, in any case in which the court determines that a party has made a patently frivolous claim or a patently frivolous denial of liability, it shall order that all costs of the expert advisory panel be borne by the party making that claim or denial.

(h) Parties to the case and their counsel may not initiate communication out of court with members of the panel on the subject matter of its inquiry and report or cause or solicit others to do so, except through ordinary discovery proceedings.

Civil Rule 72.1. Expert Advisory Panels in Health Care Provider Malpractice Actions.

(a) **Identification of Action.** Either party in a health care malpractice action subject to AS 09.55.536 may request that the court appoint an expert advisory panel to evaluate the claim. The request should identify the specialty of the health care provider named as defendant. Either party may recommend that the court appoint specific professions or specialties to the expert advisory panel.

(b) **Appointment of Panel.**

(1) After the case is at issue and a party has requested the appointment of an expert advisory panel (or the court has raised the issue), the court shall nominate a three person panel and notify the parties of the names, professions and specialties of the persons so nominated. The court may initially nominate alternate panel members if it believes nominees may be disqualified. Within 10 days after service of this notice, either party may move to disqualify a nominee, citing the reasons for the motion. The other party may submit an opposition within five days after service of the motion for disqualification. No reply may be filed.

(2) The nominated panel members must inform the court within 10 days of the notice of appointment of any financial relationship with a party or party's attorney, of any other reason which would cause the nominee to be biased in the case or present an appearance of bias, and of any other reason why the nominee cannot serve on the panel. The court shall disqualify a nominee if the nominee is biased for or against a party or if a conflict of interest raises a substantial appearance of bias.

(3) If additional nominees are required, the parties must be given the opportunity to recommend nominees' professions or specialties and move to disqualify as provided above.

(c) **Submission of Medical Records.**

(1) Within 30 days after service of the court's initial panel nominations, the plaintiff and each health care provider defendant shall serve on other parties one legible copy of all discoverable medical records in such party's possession, custody, or control. Original exhibits which are impractical or impossible to copy must be made available to all parties for review. Medical reports of consultants retained by a party for the advancement or defense of the case and medical literature must also be served on other parties if such literature or reports is to be submitted to the panel.

(2) Each party shall file with the Clerk and serve on each other party a list of all medical records, medical reports and medical literature which the party will transmit or make available to the panel.

(3) Medical records include medical records of hospitals, physicians, or other health care providers, addressing an issue of health relevant to the plaintiffs' complaint, whether generated before or subsequent to the event giving rise to the claim and whether generated by the health care provider named in the complaint or by other health care providers. Medical records also include autopsy reports and exhibits such as x-rays and slides.

(4) Upon agreement of the parties or order of the court, and after a reasonable time for inspection, each party shall submit to each member of the panel one legible copy of such party's medical records, medical reports and medical literature, and notify the panel members of the availability and location of original exhibits for which submission to the panel is impractical or impossible. If the plaintiff serves the defendant with medical reports of consultants, the defendant has 30 days to serve medical reports of its consultants on the plaintiff. Thereafter, the reports may be submitted to the panel. Any additional reports may be submitted only with leave of the court.

(5) A party may file and serve on each member of the panel a notice advising the panel of further relevant medical records of which the noticing party does not have possession, custody or control.

(6) In the event a party fails or is unable to submit relevant medical records to the panel, and the panel is unable to obtain access to such records by reason thereof, any party or the panel may apply to the court for leave to obtain such records by court order. The court may delay further proceedings until the panel is provided with the additional medical records.

(7) Within 30 days after service of the court's initial panel nominations, each party shall serve upon the panel and all other parties the information and materials required to be disclosed under Rule 26(a)(1)(A), (B), (C), and 26(a)(2).

(d) **Preliminary Findings of Fact and Conclusions of Law.** A party may move the court to resolve issues of fact or law prior to submission of the case to the panel, or to furnish instructions of fact or law to the panel. Submission of the case to the panel will be deferred pending determination of the motion by the court.

(e) **Instructions to Panel.** The court shall provide the panel with a written order which states:

(1) The questions listed in AS 09.55.536, clarified or changed as the court deems appropriate to the case.

(2) That the panel is to prepare and submit to the court a list of all persons interviewed, a list of treatises or medical literature used by the panel in its deliberations, and a list of exhibits it examined (such as X-rays, slides, and other items which are not reproducible on paper).

(3) The general nature of the allegations made against each health care provider and of the answer to those allegations. Alternately, the court may submit a copy of the complaint and the answer and advise the panel that they are to address only the medical issues.

(4) That the panel or the Alaska State Medical Association is to retain copies of medical records submitted to them until further notice from the court. The court may make special provision for the safekeeping or retention by the Clerk of Court of X-rays or other original exhibits.

(5) That the panel must maintain a recording of any testimony or oral statements of witnesses and shall keep copies of all written statements the panel may receive or take, whether from witnesses, consultants, or other sources.

(6) That the panel is to review the case of each health care provider individually and render an individual, separate opinion with regard to the allegations against each health care provider.

(7) The name and location of the court personnel who might assist the panel, and that the panel may communicate with the court concerning any questions it may have, or make any requests for assistance.

(8) Any matters of fact or law on which the court has ruled, and that the panel is to review the matter in light of the court's finding and instructions on the law.

(9) That in the event parties are named as defendants who are not health care providers, the panel's consideration is to be directed to the health care providers only.

(10) That the panel is not to communicate with the parties or their attorneys, except to arrange to obtain or review an original exhibit in the possession of one of the parties, or to arrange an examination of the plaintiff, or to arrange an interview with the plaintiff or health care provider, or to arrange the scheduling of the testimony of a panel member at a deposition or at trial.

(f) **Interviews by the Panel.**

(1) If an attorney desires to be present at an interview of his or her client by the panel, the attorney must give reasonable notice of an intent to do so to the other parties so they may also appear at the interview. If the attorney for the person being interviewed does not appear, no other attorney or party may appear. An attorney appearing before the panel may not question his or her client or any other persons appearing before the panel, nor may an attorney or party cross-examine witnesses or ask questions of the panel. A person being interviewed by the panel may not be accompanied by any representative other than the person's attorney.

(2) Any party may request the panel to interview any person or party.

(g) **Discovery.** Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until 80 days have elapsed from the date the case is at issue, whichever is first to occur, unless discovery is further stayed for good cause by order of the court.

NEW DISCOVERY AND DISCLOSURE RULES

1. **Automatic Disclosure of Certain Information.**

A. Initial Disclosures (Rule 26(a)(1))

Automatic disclosure of basic information early in the case. Information includes:

* factual basis of claims and defenses;
* names of people who have information about the case;
* statements;
* relevant documents and tangible things;
* photographs, diagrams, and videotapes;
* insurance agreements;
* computations and evidence upon which damages claims are based.

B. Expert Witness Reports (Rule 26(a)(2))

Automatic disclosure of written report from each independent expert who may be used at trial. Report must contain:

* expert's opinions and basis for opinions;
* information considered by expert in forming opinions;
* exhibits to be used by expert;
* qualifications of expert, including list of publications;
* compensation;

* other cases in which witness has testified as an expert.

Deadline for disclosure of expert reports must be specified in pretrial order required under Rule 16(b).

C. Pretrial Disclosures (Rule 26(a)(3))

Automatic disclosure of witness and exhibit lists. Deadline for disclosure must be specified in pretrial order. (Rule 16(b))

2. **Limitations on Traditional Forms of Discovery.**

A. Limits on Depositions

* Number of depositions limited. Each side may depose as a matter of right:

  * other parties;

  * expert witnesses expected to be called at trial;

  * treating physicians;

  * document custodians; and

  * any three other persons.

  Other depositions require leave of court or written stipulation. (Rule 30(a))

* Length of depositions limited. Depositions of parties, expert witnesses, and treating physicians may not exceed six hours. All other depositions limited to three hours. (Rule 30(d)(2))

* Existing restrictions on depositions of expert witnesses have been eliminated.

B. Limits on Interrogatories and Requests for Admission (Rules 33(a) and 36(b))

A party may serve no more than thirty interrogatories upon another party. (Alaska rules currently limit parties to thirty interrogatories.)

There is no limit on requests for admission.

C. Supplementation of Discovery (Rule 26(e))

Initial disclosures must be supplemented at "appropriate intervals." In fast-track cases, appropriate interval is defined as no longer than 30 days. (Rule 16.1(k)(4)) In other cases, appropriate interval will be specified in pretrial order. (Rule 16(b)(4))

Rules governing supplementation of other forms of discovery are essentially unchanged. Party must seasonably amend a response if party learns that response is in some material respect incomplete or inaccurate and additional or corrective information has not otherwise been made known during discovery process.

3. **New Pretrial Procedure.**

A. Meeting of the Parties (Rule 26(f))

Mandatory meeting of the parties to exchange/discuss disclosures and formulate discovery plan.

* meeting must occur at least two weeks before pretrial conference.

* initial disclosures are due at or within ten days after meeting.

B. Report to the Court (Rule 26(f))

Parties must file report outlining discovery plan. Report is due within ten days after meeting of the parties (i.e., at least four days prior to pretrial conference).

C. Pretrial Conference (Rule 16(a)-(c))

Pretrial conference must be held within ninety days after last answer is filed (i.e., 110 to 230 days or four to eight months after filing of complaint).

Following conference, court must enter pretrial order that establishes:

* deadlines for joinder, amendment of pleadings, and filing of motions;

* time to disclose expert witness reports;

* appropriate interval for supplementation of disclosures;

* time to exchange witness and exhibit lists;

* time to complete discovery;

* time for trial or the trial setting conference;

* other matters appropriate to the case.

4. Sanctions (Rule 37).

* Failure to disclose information: presumptive inability to use information, unless failure was harmless or justified. (Rule 37(c)(1))

* Other discovery violations: court may impose sanction under Rule 37(b)(2)(A)-(C). However, rule now lists factors court must consider before imposing sanction under this rule. Factors include:

    * the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;

    * the prejudice to the opposing party;

    * the relationship between the information the party failed to disclose and the proposed sanction;

    * whether another lesser sanction would adequately protect the opposing party and deter other discovery violations; and

    * other factors deemed appropriate by the court or required by law.

The court may not make an order which has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully. (Rule 37(b)(3))

* Court may impose sanctions for unreasonable or obstructionist conduct. (Rule 37(g))

Civil Rule 82. Attorney's Fees.

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) **Amount of Award.**

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if awarded, Prejudgment Interest		Contested With Trial	Contested Without Trial	Non-Contested
First	$ 25,000	20%	18%	10%
Next	$ 75,000	10%	8%	3%
Next	$400,000	10%	6%	2%
Over	$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) **Determination of Award.** Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) **Effect of Rule.** The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

c:\RULES\CR82(8/96)

Schedule for Award of Attorney's Fees

- When the **plaintiff** prevails in a tort case, the judge uses the following schedule to calculate the amount of fees that the plaintiff is entitled to recover:

Judgment and, if awarded, Prejudgment Interest		Contested With Trial	Contested Without Trial	Non-Contested
First	$ 25,000	20%	18%	10%
Next	$ 75,000	10%	8%	3%
Next	$400,000	10%	6%	2%
Over	$500,000	10%	2%	1%

- When the **defendant** prevails, the defendant is entitled to recover

  30% of the defendant's actual fees if the case went to trial, or

  20% of the defendant's actual fees if the case settled before trial.

Plaintiff's Recovery as Percentage of Plaintiff's Actual Fees

Plaintiff prevails in tort case:

Damages + prejudgment interest = $500,000

Plaintiff has 33 percent contingent fee agreement with attorney.

Plaintiff's actual fees = $165,000.

(500,000 x .33 = 165,000)

If plaintiff prevails **at trial**:

Fees recovered from defendant under Rule 82 = $52,500

Recovery = **32** percent of plaintiff's actual fees.

If plaintiff prevails **without trial**:

Fees recovered from defendant under Rule 82 = $34,500

Recovery = **21** percent of plaintiff's actual fees.

List of factors judge considers when deciding whether to deviate from scheduled fee:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

Alaska Judicial Council
October 1995 Study of Civil Rule 82

The Alaska Judicial Council recommends that Rule 82 be retained with limited changes:

1. Amend the plaintiff and defendant recovery schedules. The defendant percentages were set at a level intended to give the defendant an amount proportionate to what the plaintiff's attorney would recover in a one-third contingent fee tort case. However, most fee awards in state courts occur in contract, debt, or other non-tort cases.

   To equalize the recovery for plaintiffs and defendants, the Council recommends allowing all parties to recover a percentage of their actual fees or developing different schedules for tort and non-tort cases (or contingent fee and non-contingent fee cases).

2. Retain the list of factors. According to the Council, the factors have not increased litigation at the trial court level.

3. The Alaska Supreme Court has held that non-attorney *pro se* litigants can not recover attorney's fees, while attorney *pro se* litigants can. The Council does not think this distinction is justified and recommends that it be eliminated.

The Council also recommends that the Appellate Rules be amended so that fee awards in appeals are also based on a percentage of the prevailing party's actual fees.

Chapter 10
Recommendations

A. Recommendations

Our recommendations have two parts: recommendations to Alaska and recommendations to jurisdictions that do not shift fees. The Alaska recommendations focus on how the rule works and how to improve it. The national recommendations focus on factors other jurisdictions might consider when thinking about two-way fee shifting in most cases.

1. Recommendations to Alaska Policymakers

We recommend that Alaska retain Civil Rule 82, with limited changes. Perhaps the best reason for this is that more often than not, Alaska practitioners like the rule and think that it benefits them and their clients more than it harms or has no effect. Also, judges more often than not like the rule and are comfortable with its operation.

Rule 82 seemed, for the most part, to positively affect the processing and resolution of cases, even though this effect was subtle and varied depending on the factors discussed above. The negative effects of the rule, when tempered by the judicial discretion available under the 1993 amendments, were relatively minor and were offset by the rule's benefits.

The Alaska Supreme Court should consider at least a few possible changes to Rule 82 or the case law surrounding its application. A number of attorneys questioned why plaintiff and defendant recovery schedules differed. While the origins of the dual recovery system remained unclear, we did learn that the defendant percentages were set at a level intended to give the defendant an amount proportionate to what the plaintiff's attorney would recover in a one-third contingent fee tort case. The assumption behind this structure presents a problem, because it is based on contingent fee cases, although most fee awards in state court occur in contract or other non-personal injury cases.

If the Alaska Supreme Court intended to set defendant and plaintiff recoveries the same, it would be more effective to hold them both to a percentage of actuals. Another possibility is to base fee awards on the amount of recovery (and in the event of no recovery, on the amount in controversy).[597] This approach would ensure that both plaintiffs and defendants recovered fees based on the same schedule, and it would increase the predictability of the defendant's fee award. Drawbacks are that plaintiff's attorneys would have to estimate time spent and document it with affidavits or time sheets (in certain cases, like contingent fee and high-volume collections cases. they do not keep time sheets); and parties probably would disagree about the amount in controversy in the event of a defense verdict, requiring parties and judges to spend more time than they currently do settling the amount of fees. Also, because the amount of an attorney's fee award to a successful plaintiff might be less predictable, Rule 82's influence in settling cases might decrease.

Another possibility is to develop different methods of recovery for different types of cases. One schedule, based on a percentage of actuals, could apply to some cases (torts), while another schedule, based on the amount in controversy, could apply to others (debt/contract and real estate cases). Advantages to this approach are that the rule can

[597] We note that this system is used successfully elsewhere. In Germany, the parties name the damages up front and the amount of the fee award is set as a percentage of that amount. Pfennigstorf, *supra* note 7, at 63.

be better tailored to meet its goals. Drawbacks are that the process initially might be more complicated and more time-consuming.

Our interviews with attorneys and judges did not suggest that the 1993 amendments had increased litigation at the trial court level.[598] While the factors seldom were invoked, they seemed to fit when they were invoked.[599] Our data do not support a recommendation that the factors be revoked.

Next, we see no real reason why attorney's fees in appellate cases should be awarded based on a usually standard and arguably arbitrary amount. Attorney's fees for appellate cases could equally well be set at 30% of the reasonable fees spent on the appeal.

Finally, the distinction made by the Alaska Supreme Court in case law between *pro se* litigants who are attorneys and those who are not seems unjustified. The supreme court has held that non-attorney *pro se* litigants can not recover attorney's fees, while attorney *pro se* litigants can. The court supported this distinction by reasoning that non-attorneys were more likely than attorneys to spend time unnecessarily on legal issues, and also that the court would not know at what rate to compensate the *pro se* litigant. Neither of these rationales strongly supports the result. Litigants who spend excessive time do not pose a problem if a money judgment is recovered, because the attorney's fee award is based on the amount awarded, not on the time spent. If the prevailing party did not recover a money judgment, interviews with judges for the current study suggested that the defeated adversary usually alerted the trial judge of excessive legal work or hourly fees. Even without the defeated party's help, judges were comfortable reviewing billings for reasonableness. The court should reconsider whether the inequity, and economic detriment suffered by *pro se* litigants does not warrant making them eligible for attorney's fee awards.[600]

---

[598] Litigation at the appellate level may increase if cases involving the factors make their way up to the supreme court. We did not hear of many challenges to the factors.

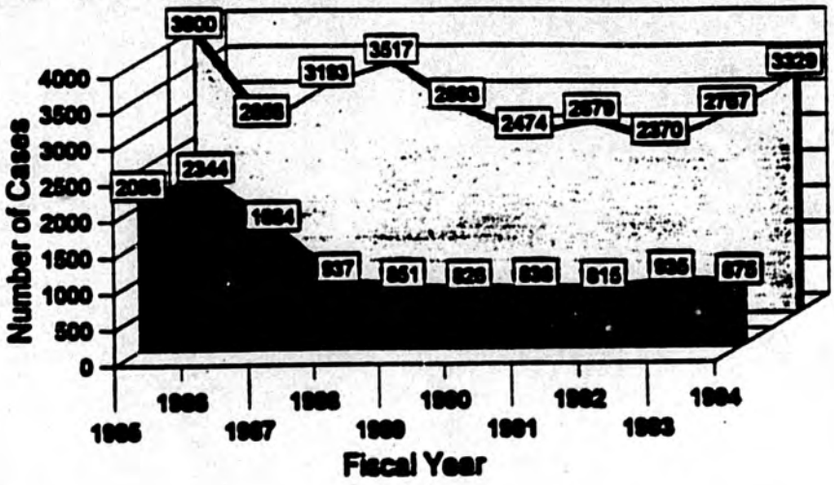
[599] Note that Oregon recently incorporated them into its fee-shifting statute.

[600] Note that litigants represented free of charge by Legal Services or another provider are entitled to attorney's fees, even though they are not paying for the legal services. *See Gregory v. Sauser*, 574 P.2d 445, 445 (Alaska 1978).

Figure 1

Tort Filings Compared to Other Civil Filings, Alaska

Adapted from National Center for State Courts & Ak. Ct. System Reports

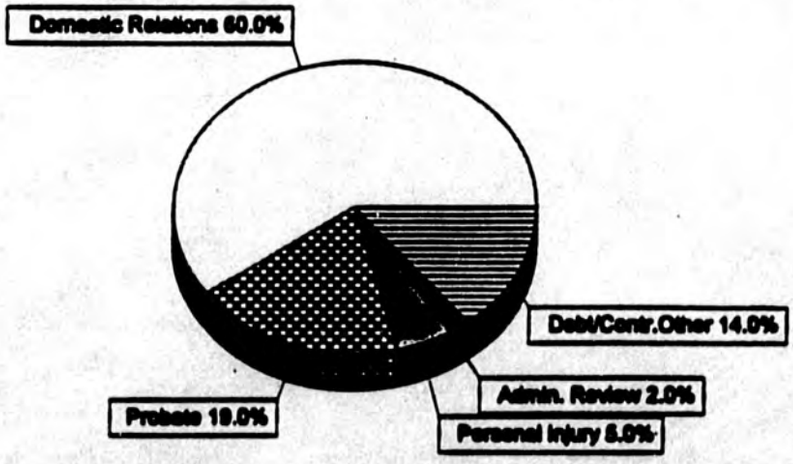


Other Civil Filings
Torts (personal injury & property damage filing

Figure 5

Superior Court Civil Cases, Alaska 1992-93

Adapted from Alaska Court System Annual Report (1993)



Domestic Relations
Personal Injury
Debt/Contr./Other
Probate
Admin Review

Civil Rule 68. Offer of Judgment.

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) . If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065 and the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer.

(2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065.

(c) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

CR68(8/96)

Effect of Offer of Judgment

1. Plaintiff prevails in tort case. No offer of judgment. Plaintiff recovers:

   damages + prejudgment interest at 10.5% + attorney's fees + costs

2. Defendant makes offer of judgment to plaintiff. Offer = $500,000. Plaintiff rejects offer. Plaintiff prevails at trial. Judgment in favor of plaintiff = $400,000. Judgment is less favorable to plaintiff than defendant's offer. Plaintiff penalized as follows:

   - Prejudgment interest rate reduced from 10.5 percent to 5.5 percent.
   - Plaintiff does not recover attorney's fees or costs incurred after date of offer.
   - Instead, plaintiff pays defendant attorney's fees and costs from date of offer through date of judgment

3. Plaintiff makes offer of judgment to defendant. Offer = $400,000. Defendant rejects offer. Plaintiff prevails at trial. Judgment against defendant = $500,000. Judgment is less favorable to defendant than plaintiff's offer. Defendant penalized as follows:

   - Prejudgment interest rate increased from 10.5 percent to 15.5 percent.

Rule 100. Mediation.

(a) **Application.** At any time after a complaint is filed, a party may file a motion with the court requesting mediation for the purpose of achieving a mutually agreeable settlement. The motion must address how the mediation should be conducted as specified in paragraph (b), including the names of any acceptable mediators. The court may order mediation in response to such a motion, or on its own motion, whenever it determines that mediation may result in an equitable settlement. In making this determination, the court may consider whether there is a history of domestic violence between the parties which could be expected to affect the fairness of the mediation process or the physical safety of the domestic violence victim. Mediation may not be ordered in a case filed under AS 25.35.010 or .020 and conduct which constitutes domestic violence under these statutes may not be the subject of mediation under this rule.

(b) **Order.** A order of mediation must state:

(1) the name of the mediator, or how the mediator will be decided upon;

(2) any changes in the procedures specified in paragraphs (c) and (e), or any additional procedures;

(3) that the costs of mediation are to be borne equally by the parties unless the court apportions the costs differently between the parties; and

(4) a date by which the initial mediation conference must commence.

(c) **Challenge of Mediator.** Each party has the right once to challenge peremptorily any mediator appointed by the court if the "Notice of Challenge of Mediator" is timely filed pursuant to Civil Rule 42(c).

(d) **Mediation Briefs.** Any party may provide a confidential brief to the mediator explaining its view of the dispute. If a party elects to provide a brief, the brief may not exceed five pages in length and must be provided to the mediator not less than three days prior to the mediation. A party's mediation brief may not be disclosed to anyone without the party's consent and is not admissible in evidence.

(e) **Conferences.** Mediation will be conducted in informal conferences at a location agreed to by the parties or, if they do not agree, at a location designated by the mediator. All parties shall attend the initial conference at which the mediator shall first meet with all parties. Thereafter the mediator may meet with the parties separately. Counsel for a party may attend all conferences attended by that party.

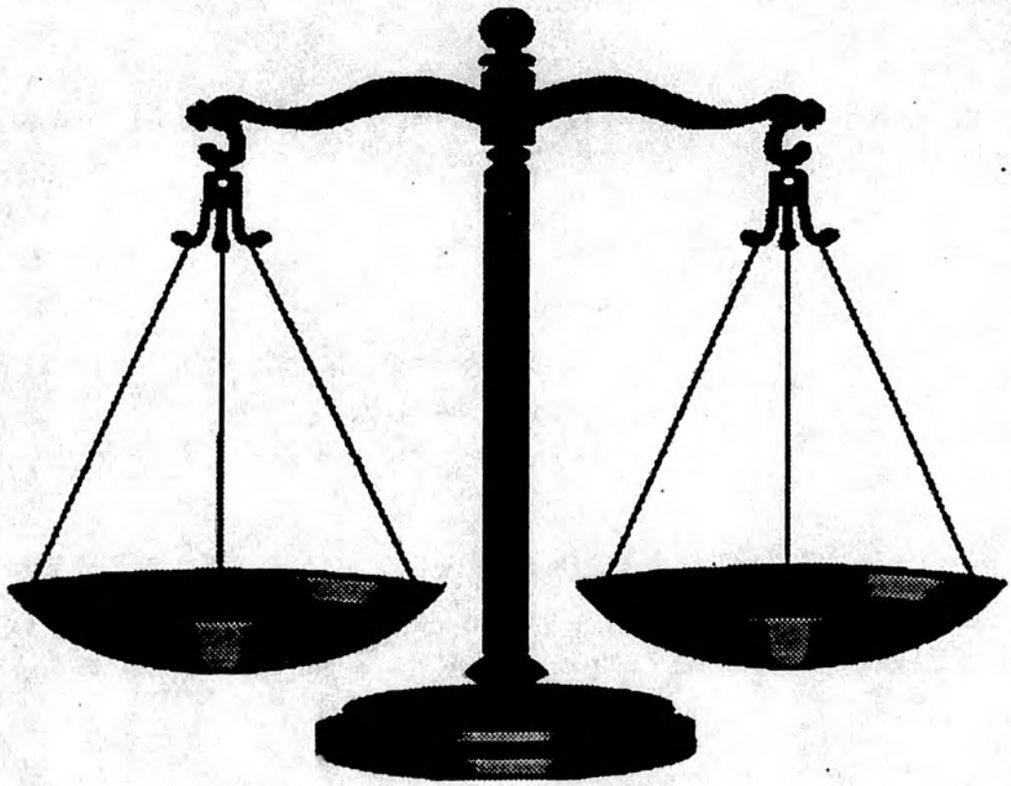
(f) **Termination.** After the initial joint conference and the first round of separate conferences if separate conferences are required by the mediator, a party may withdraw from mediation, or the mediator may terminate the process if the mediator determines that mediation efforts are likely to be unsuccessful. Upon withdrawal by a party or termination by the mediator, the mediator shall notify the court that mediation efforts have been terminated.

(g) Mediation proceedings shall be held in private and are confidential. The mediator shall not testify as to any aspect of the mediation proceedings. This rule does not relieve any person of a duty imposed by statute.

(h) If the mediation is successful, the party requesting mediation shall prepare a stipulation for dismissal which dismisses all or such portions of the action as have been concluded by mediation as agreed upon at the mediation.

1995 Directory of Mediators
Second Edition

**includes "A Consumer Guide to Selecting a Mediator"
by the Alaska Judicial Council**



Alaska Court System
State of Alaska
303 K Street
Anchorage, Alaska 99501-2099

A copy of this directory is available at the Anchorage, Juneau, Fairbanks, Ketchikan and Kenai law libraries. Copies may also be obtained from the Clerks of Court in Anchorage and Fairbanks and from the office of the Court Rules Attorney.

A new edition of this directory will be published once a year. If you would like to be included in the directory, send your name and mailing address to the Court Rules Attorney at the address shown below. Mediators who are included in the 1995 directory will automatically receive a new information form for the 1996 directory.

If you have any comments or suggestions regarding this directory, please contact the Court Rules Attorney.

Alaska Court System
303 K Street
Anchorage, Alaska 99501
(907) 264-8239

Directory of Mediators

The purpose of this directory is to help judges and parties find potential mediators. The directory contains an information form for each person or company who asked to be included. The information form was completed by the mediator and describes the mediator's education, training and mediation experience. The form also describes the types of cases the mediator handles and the mediator's fees.

The information forms are organized alphabetically by last name. The index at the front of the directory lists the mediators by type of case and by community. **Example:** To find a mediator who handles construction cases in Anchorage, find the "Construction" section of the index, then find "Anchorage" in the list of communities in that section.

Please note that parties and judges are free to choose a mediator who is not included in this directory, even if mediation is ordered under Civil Rule 100. Civil Rule 100 does not require that mediators be selected from this directory or that mediators appointed under the rule have any particular education or training.

CAUTION

In Alaska, anyone can act as a mediator. There are no State standards or licensing requirements. This directory includes an information form for each person or company who asked to be included. No minimum training or experience was required.

The Alaska Court System has not checked to see whether the mediators in this directory have the qualifications they say they have or whether they are competent mediators. It is up to parties and judges to decide what kind of training and experience they need in a mediator and to ensure that the mediator they select has the necessary skills.

A Consumer Guide to Selecting a Mediator

This guide was developed under a grant (#SJI-94-03E-H-284) from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

The Judicial Council is a state agency charged by the Alaska constitution to make recommendations that improve the administration of justice.

acknowledgments

The Judicial Council would like to express its appreciation to the many people who contributed to this project. Over forty people contributed their knowledge, time and useful suggestions on the substance and format of the brochure, and many contributed invaluable comments on drafts. Thanks to all who gave so freely of their expertise and time, and exhibited such support and enthusiasm for the project.

note to the reader

To make an informed choice of a mediator, the consumer must have information and the ability to evaluate that information. This guide begins the educational process by presenting a framework for understanding mediator competence. The information is based on research presented at the 1993 National Symposium on Court-Connected Dispute Resolution Research sponsored by the State Justice Institute and the National Center for State Courts, the ongoing work of the Test Design Project, the work of alternate dispute resolution policy makers, and the experience of mediators and mediation program directors nationwide. We anticipate that the guide will need to be updated as our knowledge grows. Please complete the evaluation form on the back cover to help us increase the usefulness of this brochure.

how to use this guide

Mark this guide up. Use the checklists as you go. Don't feel that you must use all the information or go through all the suggested steps; use only what seems most helpful. Refer to the Resources section at the back for more information.

Alaska Judicial Council
1029 W. 3rd, Suite 201
Anchorage, AK 99501
907/279-2526 Fax 907/276-5046

I. Purpose of This Brochure

This guide is for anyone looking for a mediator. It will be especially useful to lawyers or other professionals advising their clients, court systems and mediation programs that provide information to consumers, judges who refer litigants to mediation, and people who have been referred by the court to mediation and who must choose their own mediator.

This guide does not explain mediation or alternative dispute resolution (ADR) in detail, although a consumer needs at least a basic understanding of mediation to profit fully from this guide. To learn about mediation, consult books, articles and pamphlets at your local library, community mediation center, courthouse, bookstore, mediator's office, or mediation association. The Alaska Court System publishes a free pamphlet that answers some basic questions about mediation.

> **Mediation is a conflict resolution process in which one or more impartial persons intervene in a conflict with the disputants' consent and help them negotiate a mutually acceptable agreement. *The mediator does not take sides or decide how the dispute should be resolved.***

II. What Qualifications Does a Mediator Need?

Qualifications refer to the amount and type of training, education and experience possessed by a mediator. In some states, courts or legislatures impose training or experience standards on mediators who practice in state- or court-funded mediation programs. In most states, including Alaska, a person can offer private mediation services without taking a class, passing a test or having a special license or certification. In reality, however, many private mediators, and most of those who work for or are associated with mediation organizations and programs, have some training or experience.

> **Certification explicitly recognizes that a person has completed a specific level of education or training. In some cases, it recognizes that a person has achieved a particular level of skill in performing certain functions. Public, private, professional or educational bodies can certify. If a public body has certified a professional's abilities, the person may then be permitted to practice a profession or use a title.**

Most independent mediation programs impose their own training or experience standards on mediators. For example, community mediation centers often require their volunteers to complete a certain amount of mediation training before handling cases.

Some national and local mediation membership organizations set training and experience requirements and ethical standards for their practicing members (refer to the resources section at the end of this brochure for more information). One national non-profit mediator organization, the Academy of Family Mediators, is working to develop a voluntary performance-based certification program.

Many mediation-referral services impose training, experience or other requirements on mediators who wish to be included on their rosters. For example, the American Arbitration Association requires mediators listed on its mediation panel to complete an AAA training course, receive recommendations from the trainers, and successfully complete an apprenticeship. In Anchorage, the Alaska Dispute Settlement Association (ADSA) requires all mediators listed on their referral line to provide certain information to ADSA and the potential client, including an explanation of the standards of professional practice or ethical conduct that the mediator uses.

III. What Makes a Competent Mediator?

There is no universal answer to this question. No particular type or amount of education or job experience has been shown to predict success as a mediator. Successful mediators come from many different backgrounds.

Competence depends partly on the context of the dispute and the parties' expectations. It also depends on whether the mediator has the right mix of acquired skills, training, education, experience and natural abilities to help resolve the specific dispute. Important skills and abilities include neutrality, ability to communicate, ability to listen and understand, and ability to define and clarify issues.

IV. Five Steps to Choosing a Qualified Mediator

Because no easy formula can predict mediator competence, the consumer must do some groundwork before selecting a mediator. First, you must understand the mediation process. After you understand the basics, you can use the following process to choose a mediator:

These steps are described on the next pages. Remember during your search that a mediator should remain neutral and treat both parties with equal fairness and respect.

1. Decide What You Want from Mediation

Think about your goals for the session. Do you want a mediator who suggests options in order to help move the parties towards agreement? Or, do you want a mediator who resists offering opinions so the parties feel responsible for their agreement? Think about past attempts at negotiation and problems with those attempts. What are your choices if mediation does not work?

Think about your abilities. What are your strengths and weaknesses as a negotiator? What are the other party's strengths and weaknesses? What are your emotional limitations? Do you expect the mediator to help you stand your ground if the other person negotiates better than you or has more "power?" Thinking about these issues is especially important if there is a power imbalance between you and the other party. If there has been abuse and or violence between you and the other party, please read the *Domestic Abuse* section on page 9.

√Checklist: Five Steps to Choosing a Mediator
1. Decide what you want from mediation
2. Get a list of mediators
3. Look over mediators' written qualifications
4. Interview mediators
5. Evaluate information and make decision

Think about the dispute and the context in which you must resolve it. What is the time frame? Is this a commercial dispute between experienced insurance company representatives, or is it a divorce involving an emotional child custody decision? The approach or model that commercial disputants might prefer may differ greatly from the one preferred by a mother and father.

Consider your budget. How much you can spend might limit your choice of mediator or mediation program.

Many mediators and dispute resolution firms or services can help you understand what services would be best for your dispute. Some will contact the other party to the dispute to introduce the concept of mediation.

2. Compile a List of Names. You can get a list of mediators from several sources.

Word of Mouth. Ask a friend, your attorney, your therapist, or another professional. Describe your case to a mediator and ask, "Other than yourself, who are the most skilled mediators in this kind of case?" Talk to people who have been in a mediation with the mediator (you can ask the mediator for names of clients). What was their case about and what were their impressions of the mediator?

Written Lists. Check local listings in the Yellow Pages. The Alaska Court System publishes a directory of mediators in Alaska. The Alaska state law library has copies of both. Martindale-Hubbell, available in the law library, publishes a national Dispute Resolution Directory containing the names of some 60,000 service providers. Rural consumers can consult the Alaska Judicial Council's directory of organizations that resolve disputes in rural areas (many of these are tribal courts or councils). Many local mediation organizations maintain directories of member-mediators.

Referral Services. The Alaska Dispute Settlement Association maintains a statewide referral service (Anchorage number) and a written directory of members. Many national mediator membership organizations and trade organizations keep lists of practitioner members and offer referral services (some of these organizations are listed at the end of this pamphlet). Some may charge for the referral services.

Checklist: Get Names
- ✓ Ask people and professionals whom you know
- ✓ Look at directories
- ✓ Call referral services (ask whether they charge to refer you to a mediator)

3. Evaluate Written Materials. Call or write several mediators on your list and ask them to send you their promotional materials, resume, references and a sample of their written work. These materials should cover most of the following topics.

Mediation Training. How was the mediator trained? Some mediators receive formal classroom-style training. Some participate in apprenticeships or in mentoring programs. While training alone does not guarantee a competent mediator, most professional mediators have had some type of formal training. How many hours of training has this mediator had? How recent was the training?

Experience. Evaluate the mediator's type and amount of experience (number of years of mediation, number of mediations conducted, types of mediations

conducted). How many cases similar to yours has the mediator handled? A mediator's experience is particularly important if he or she has limited formal training.

Written Work. Some mediators will write up notes about agreements or even draft agreements for the parties. Other mediators do not prepare written agreements or contracts. If your mediator will prepare written work, you may want to review a sample. Samples could include letters, articles or promotional materials. Any sample of the mediator's written work should be clear, well organized, and use neutral language. Agreements or contracts should have detailed information about all items upon which the parties have agreed.

Orientation Session. Some mediators offer an introductory or orientation session after which the parties decide whether they wish to continue. Is it offered at no cost, reduced cost, or otherwise?

Checklist: Evaluate Written Materials

- ✓ Fees: Hourly? Daily? How much?
- ✓ Education: How much? What? How recent?
- ✓ Experience: What kinds of disputes? How many mediations? Areas of specialization?
- ✓ Written (if available): Understandable? Complete? Concise?
- ✓ Insurance: Yes? What kind?
- ✓ Professional memberships? certifications, adherence to ethical standards?

Cost. Understand the provider's fee structure. Does the mediator charge by the hour or the day? How much per hour/day?

Other Considerations. Find out whether the mediator carries professional liability insurance which specifically covers mediation. Is the mediator certified, and if so by whom? While certification usually shows the mediator has completed a specific amount of training or education, training and education do not guarantee competence.

Does the mediator belong to a national or local mediation organization, and is the mediator a practicing or general member? Cost may prevent some competent mediators from joining organizations, becoming certified, or carrying liability insurance.

4. Interview the Mediators. Talk to the mediators in person or by phone. During the interview, observe the mediator's interpersonal and professional skills. Qualities often found in effective mediators include neutrality, emotional stability and maturity, integrity, and sensitivity. Look also for good interviewing skills, verbal and nonverbal communication, ability to listen, ability to define and clarify issues, problem-solving ability, and organization.

During the conversation, you also may want to ask questions about matters covered in the written materials and other topics. Some topics to discuss in the interview include:

Training, Knowledge and Experience. Ask the mediator, "How has your education and experience prepared you to help us work out this specific dispute?" If the mediator had formal training, did it include role play and observations of skilled mediators? While training and education do not guarantee competence, training is most effective when it includes practice-oriented segments such as role play and observation.

Ask "Do you participate in continuing education, on-going supervision, or consultation?" Many professional mediation organizations encourage or require their members to participate in ongoing education or other professional development.

People often ask whether a mediator should be an expert in the subject of the dispute. For example, should the mediator in a commercial mediation be an expert on industry standards and practices? The answer depends on the type of dispute, the mediation program (for example, court-referred or administrative agency), and the parties' expectations and needs. Ask the mediator if he or she thinks subject-matter expertise is necessary for this dispute, and why or why not.

In some cases, the parties may prefer a mediator with no special knowledge of the subject. Benefits of this approach include avoiding a mediator's preconceived notions of what a settlement should look like and letting the parties come up with unique or creative alternatives.

In other cases, for example where the subject of the dispute is highly technical or complex, a mediator who comes to the table with some substantive knowledge could help the parties focus on the key issues in the dispute. Or, parties may want someone who understands a cultural issue or other context of the dispute.

Style. Ask "What values and goals do you emphasize in your practice?" For example, does the mediator encourage the parties to communicate directly with each other, or does he or she control the interchanges? The mediator should be able to describe his or her style of mediation and his or her role in the mediation process.

Remember that different mediators may practice their craft in different ways, although some mediators can change their style to suit the parties' specific needs.

Another stylistic difference is the use of caucus. A caucus is a meeting between one of the parties and the mediator without the other party present. Some mediators caucus frequently during the mediation, while others seldom or never use this procedure. Ask the mediator whether he or she uses caucuses, and if so, when.

If the mediator works for or is associated with a mediation program or organization, ask what values and goals the program emphasizes. For example, the style or requirements of a mediator who practices in a court program designed to reduce court caseloads may differ from the style of someone whose practice does not involve the same time pressure.

Ethics. Ask "Which ethical standards will you follow?" (You may ask for a copy of the standards). All mediators should be able to show or explain their ethical standards (sometimes called a code of conduct) to you. If the mediator is a lawyer or other professional, ask what parts of the professional code of ethics will apply to the mediator's services. Ask the mediator, "Do you have a prior relationship with any of the parties or their attorneys?" The mediator should reveal any prior relationship or personal bias which would affect his or her performance, and any financial interest that may affect the case.

Standards of conduct (Ethics). Standards of conduct do not regulate who may practice, but rather create a general framework for the practice of mediation. National mediator organizations have adopted voluntary standards of conduct. The resources section at the end of this brochure lists some of the national organizations that have adopted or are considering adopting standards of conduct for their practitioner members.

Confidentiality. The mediator should explain the degree of confidentiality of the process. The mediator may have a written confidentiality agreement for you and the other party to read and sign. If the mediation has been ordered by the court, ask the mediator whether he or she will report back to the court at the conclusion of the mediation. How much will the mediator say about what happened during mediation? How much of what you say will the mediator report to the other disputants? Does the confidentiality agreement affect what the disputants can reveal about what was said? If the parties' attorneys are not present during the mediation, will the mediator report

back to them, and if so, what will the mediator say? The mediator should be able to explain these things to you.

Logistics. Who will arrange meeting times and locations, prepare agendas, etc.? Will the mediator prepare a written agreement or memorandum if the parties reach a resolution? What role do the parties' lawyers or therapists play in the mediation? Does the mediator work in teams or alone?

Cost. Ask "How would you estimate costs for this case?; How can we keep costs down?" Are there any other charges associated with the mediation? Does the mediator perform any *pro bono* (free) services or work on a sliding fee scale? If more than one mediator attends the session, must the parties pay for both? Does the mediator charge separately for mediation preparation time and the actual mediation?

Checklist: Talk to the Mediator
- √ What ethical standards apply?
- √ Confidentiality?
- √ What approach to mediation?
- √ More about training and experience?
- √ Logistics (meetings, written agreements)?
- √ How much will this cost?
- √ Special concerns?

Special Considerations if There has Been Domestic Abuse Between You and the Other Party. If there has been domestic abuse or violence between you and the other party, you should understand how it can affect the safety and fairness of the mediation process. Talk to your lawyer, a domestic violence counselor, womens' advocate, or other professional who works with victims of domestic abuse before making the decision to mediate.

All family mediators should be knowledgeable and skilled in the screening and referral of cases involving abusive relationships. They should be able to explain the potential risks and benefits of mediation when control, abuse, and violence issues exist. Any mediator who handles such cases should have special training in domestic violence issues and should offer special techniques and procedures to minimize risk and maximize safety of all participants.

If you decide to try mediation, it is important to let the mediator know about the abuse or violence. Some ways you can tell the mediator include asking your lawyer to tell the mediator, or telling the mediator yourself. You can tell the mediator yourself in the initial telephone call, or when filling out any written questionnaires. If

there is an active restraining order, make sure the mediator knows about it before the first session.

Ask what domestic violence training the mediator has had and if the mediator has worked with similar cases. Ask whether or not the mediator believes your case is suitable for mediation and why. Ask how the mediation process can be modified to make it safer and more fair. Can the mediation be done by telephone or in separate sessions ("shuttle mediation")? Can a support person (domestic violence advocate or your attorney) be present during the mediation? If your case is not suitable for mediation, what are your alternatives? Ask for referrals to other resources, such as a local domestic violence counselor.

5. Evaluate Information and Make Decision. During the interviews, you probably observed the mediators' skills and abilities at several important tasks. These tasks, which mediators perform in almost all mediations, include:

- gathering background information,
- communicating with the parties and helping the parties communicate,
- referring the parties to other pecple or programs where appropriate,
- analyzing information,
- helping the parties agree,
- managing cases, and
- documenting information.

Ask yourself which of the mediators best demonstrated these skills. Did the mediator understand your problem? Understand your questions and answer them clearly? If the other party was present, did the mediator constructively manage any expressions of anger or tension? Did the mediator convey respect and neutrality? Did you trust the mediator? Did the mediator refer you to other helpful sources of information? Understand what was important to you? Pick up on an aspect of the conflict that you were not completely aware of yourself? Did the mediator ask questions to find out whether mediation is preferable or appropriate? Understand the scope and intensity of the case? Of course, not every orientation interview permits the mediator to demonstrate all these skills, and every mediator has relative strengths and weaknesses. But you should be satisfied that the mediator can perform these tasks for you before beginning.

Review the other questions on this checklist. Make sure that the mediator's cost and availability coincide with your resources and timeframe. The other parties to the mediation must agree to work with this person, too. You may want to suggest two or three acceptable mediators so that all parties can agree on at least one.

Checklist: Evaluate

- ✓ Check the mediator's experience skills and abilities against the tasks listed above.
- ✓ Does the mediator have the qualifications you want?
- ✓ Can you afford the services?
- ✓ Can the mediator work with your time frame?
- ✓ Will the other parties agree to the mediator?

Finally, consider evaluations of others who have used this mediator or your own previous experience with this mediator. If applicable, consider the goals and procedures of any organization with which the mediator is associated.

V. Conclusion

The increasing use of mediation has outpaced knowledge about how to measure mediator competence. You can choose a qualified mediator by thinking about what you expect, gathering information about mediators, and evaluating that information using the information in this guide.

More Information/Resources:

Many mediation organizations exist. This is not a definitive list, but merely a sample of some that offer consumer services.

LOCAL ORGANIZATIONS:

Alaska Dispute Settlement Association (ADSA): A non-profit professional association of Alaskans working for resolution of conflict in non-judicial settings by providing mediation, arbitration and facilitation services. Membership costs $25 per year and is open to everyone with an interest in alternative dispute resolution. Offers a telephone referral service: *(907) 258-0624.*

Alaska Bar Association Alternative Dispute Resolution Section: Membership in this section of the Alaska Bar Association is open to lawyers and non-lawyers with an interest in alternative dispute resolution. Among its many activities, the section presents continuing education programs on dispute resolution topics. *Call (907) 272-7469 for more information.*

NATIONAL ORGANIZATIONS:

American Arbitration Association (AAA): Maintains panels of trained mediators with wide range of subject matter expertise and supplies complete administrative services. Can arrange for any other form of alternative dispute resolution, should mediation fail or not be preferred. A not-for-profit organization in operation since 1926, AAA has a network of 34 regional offices throughout the United States. Cases processed in Alaska are administered from the AAA office in Seattle. Call *1-800-559-3222* or Email aaaaxnwx@reach.com for complete information and assistance.

American Bar Association Section on Alternative Dispute Resolution: Sells books, pamphlets and videos about alternative dispute resolution and mediation; publishes quarterly magazine, and offers general information. *Call (202) 331-2258 or write to: 1800 M St., N.W.; 2nd Floor, South Lobby; Washington, D.C. 20036.*

Academy of Family Mediators: A mediator membership organization. Practitioner membership entitles the mediator to listing in the Academy's National Referral Roster. To qualify for practitioner member status, the applicant must (1) complete 60 hours

of mediation training as described below, (2) have at least 100 hours of face-to-face mediation experience in at least 10 mediation cases; and (3) submit six sample memoranda, case reports or other documentation from the required ten mediation cases, and maintain 20 hours of continuing education every two years. The sixty hours of training must include no less than 30 hours of an integrated generic family mediation training. This integrated mediation training must include the following core areas and at least six hours of role playing: information gathering skills and knowledge, relationship skills and knowledge, communication skills and knowledge, problem-solving skills and knowledge, ethical decision-making values skills and knowledge, interaction and conflict management skills and knowledge, professional skills and knowledge, an introduction to conflict resolution theory, family systems and development, domestic violence issues and legal context (substantive knowledge base), and at least two hours of training in domestic violence issues. *Call (612) 525-8670 or write to: 1500 S. Hwy 100, Suite 355; Golden Valley, MN. 55416-1593.*

Association of Family and Conciliation Courts: an interdisciplinary association of judges,. lawyers, mediators and mental health professionals dedicated to the development and improvement of the practices and procedures of court-connected services as a complement to the judicial process. Members must subscribe to the purposes of the Association. *Call (608) 251-4001 or write to: 329 W. Wilson St; Madison, WI 53703.*

CPR Institute for Dispute Resolution: A membership-based nonprofit corporation with a variety of educational and information functions. Offers neutrals for public policy disputes. Also offers many publications, including a Model Mediation Procedure. *Call (212) 949-6490 or write to: 366 Madison, New York, N.Y. 10017.*

National Association for Community Mediation: An organization of community mediation programs and volunteer mediators which supports and promotes community-based mediation programs. The NACM will maintain a national directory and database and develop financial resources. *Requests for information handled by NIDR staff (see below).*

National Institute for Dispute Resolution (NIDR): established in 1983 by five foundations and corporations to encourage the growth and development of dispute resolution, NIDR makes grants devoted solely to conflict resolution and provides a source of innovation, information, and technical assistance for people who seek ways

to improve the ways disputes are resolved. In 1992, the National Institute for Dispute Resolution published its *Interim Guidelines for Selecting Mediators*. The Guidelines, designed to help program administrators evaluate staff mediators and target training needs, was based on work done by the Test Design Project. *Call (202) 466-4764 or write to: 1726 M St. N.W., Ste 500; Washington, D.C. 20036-4502.*

San Diego Mediation Center: a non-profit, public service organization, which provides mediation and other dispute resolution services and training. It was established in 1982 by the San Diego Law Center, a program of the University of San Diego Law School and the San Diego County Bar Association. The Center, in conjunction with representatives of the ADR community of San Diego, has developed a performance based mediator credentialing program. The instrument used to assess performance is designed as a generic evaluation of specific behaviors, measuring both the ability to facilitate a process, and specific skills and techniques. *Call (619) 295-0203 or write to: 2150 W. Washington St. #112; San Diego, CA 92110.*

The Society of Professionals in Dispute Resolution (SPIDR): a non-profit organization promoting the use of alternative dispute resolution throughout the United States and other countries. SPIDR has issued two reports on mediator qualifications. Both draw on the observations of practitioners and consumers, the policy and personal goals of the SPIDR membership, and research attempting to quantify the combination of skills, training, education, experience and other attributes in a good mediator. *Call (202) 783-7277 or write to: 815 15th St; N.W., Suite 530, Washington, D.C. 2005.*

Standards of Practice

LOCAL:
(None adopted in Alaska).

NATIONAL:
American Bar Association (ABA): Standards of Practice for Lawyer Mediators in Family Disputes (adopted 1984).
AAA, ABA & SPIDR: Standards of Practice for Mediators.
SPIDR: Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution (adopted June 1986, readopted June 1991).
Academy of Family Mediators: Standards of Practice for Divorce and Family Mediation (also subscribed to by the Association of Family and Conciliation Courts).

MORE INFORMATION:
The Ohio Commission on Dispute Resolution and Conflict Management and the Oregon Dispute Resolution Commission offer consumer's guides to selecting third parties to help resolve public conflicts. For public policy disputes, different considerations in choice of mediator may apply than the very general ones discussed here.

INFORMATION ABOUT NEGOTIATION STRATEGIES: Many books exist. Try *Getting to Yes* by Roger Fisher and William Ury and *Getting Past No* by William Ury.

RESEARCH AND ACADEMIC WRITING ON MEDIATOR QUALIFICATION AND COMPETENCE: See the list of references cited in the Test Design Project's most recent paper on performance-based assessment of mediators. The Test Design Project's work is published by NIDR (address above).

Quick Reference: Select a Mediator

Checklist 1: What Do You Want?

1. What are your goals?
2. What mediation approach do you prefer?
3. Assess your abilities: strengths, weaknesses
4. What is your timeframe?
5. What is your budget?

Checklist 2: Get Names

1. Ask people and professionals whom you know
2. Look at directories
3. Call referral services (ask whether they charge to refer you to a mediator)

Checklist 3: Evaluate Written Materials

1. Fees: Hourly? Daily? How much?
2. Education: How much? What? How recent?
3. Experience: What kinds of disputes? How many mediations? Areas of specialization?
4. Written (if available): Understandable? Complete? Concise?
5. Insurance: Yes? What kind?
6. Professional memberships? certifications, adherence to ethical standards?

Checklist 4: Interview Mediator

1. What ethical standards apply?
2. Confidentiality?
3. What approach to mediation?
4. More about training and experience?
5. Logistics (meetings, written agreements)?
6. How much will this cost?
7. Domestic abuse concerns?

Checklist 5: Evaluate

1. Evaluate the mediator's skills and abilities against the tasks listed above.
2. Did the mediator understand you, listen well, act neutral, understand the problem, convey respect, analyze well?
3. Can you afford the services?
4. Can the mediator work with your time frame?
5. Will the other parties agree to the mediator?

Consumer Guide to Selecting a Mediator
Evaluation Form

Your answers to all of the following questions will help us improve this guide. All answers will remain confidential.

1. Have you ever used mediation? ☐ Yes ☐ No

2. Are you a(n): ☐ Private consumer ☐ Attorney ☐ Judge ☐ Therapist
☐ Other_____.

3. Gender: ☐ Male ☐ Female

4. Ethnicity: ☐ Caucasian ☐ African American ☐ Alaskan Native
☐ Asian American ☐ Hispanic ☐ Other_____

5. Age: _____years.

6. The information provided in this guide was (circle one):

Very Useful				Not Useful
1	2	3	4	5

7. The information provided was (circle one):

Easy to Understand				Hard to Understand
1	2	3	4	5

8. What did you learn from this guide that will help you most?

. . . . . .
. . . . . .
. . . . . .

9. What other information should this guide include?

. . . . . .
. . . . . .
. . . . . .

10. Other comments, suggestions:

. . . . . .
. . . . . .
. . . . . .
. . . . . .
. . . . . .
. . . . . .

Thank you for your help!
Please return to: Alaska Judicial Council, 1029 W. 3rd Avenue, Suite 201, Anchorage, AK 99501
Phone: (907) 279-2526 Fax: (907) 276-5046

INDEX

Adoption

Anchorage
Adelman, Paul I.
Baker, Carol
Dearborn, Mary Ann
Harrington, Kathleen
Kelley, Laura W.
Kirk, Pamela E.
Middleton, Timothy G.
Petterson, Drew
Roley, Ryan R.
Settlement
Zalewski, Mary-Ellen

Eagle River
Jennings, Karen L.

Fairbanks
Bacon, Glenn H.
Brimner, Teresa L.
Callahan, Daniel L.
Roberts, Fleur L.
Therrien, Valerie M.

Homer
Meyer, Barbara
Zeller, Martin

Juneau
Flanders, Kirk A.
Pearson, Stephen J.

Ketchikan
Miller, Kevin G.
Stump, W. Clark

Talkeetna
McKeown, Timothy J.

Unalaska
Lutz, Gary J.

Child Support

Anchorage
Adelman, Paul I.
Anderson, Kathleen G.
Baker, Carol
Bankston, William M.
Bettine, Frank & Genivee
Carr, James R. (Randy)
Dearborn, Mary Ann
Dee, Kevin M.
Eddy, Charles H.
Groh, Eggers & Price
Harrington, Kathleen
Kelley, Laura W.
Kirk, Pamela E.
Knight, Robert H. (Bob)
Lazur, Richard & Louise
Miller, Sheila D.
Petterson, Drew
Ripley, Justin J.
Roley, Ryan R.
Settlement
Sturges, Sharon
Zalewski, Mary-Ellen

Eagle River
Jennings, Karen L.

Fairbanks
Bacon, Glenn H.
Brimner, Teresa L.
Callahan, Daniel L.
Gollogly, Vincent T.
Hamilton, David W.
Maxwell, Lou Anne
Roberts, Fleur L.
Therrien, Valerie M.

Homer
Jackinsky, Sara
Meyer, Barbara
Zeller, Martin

Juneau
Flanders, Kirk A.
Pearson, Stephen J.

Ketchikan
Miller, Kevin G.
Stump, W. Clark

Palmer
Palmer, Carol C.

Sitka
Berg, Theodore G.

Talkeetna
McKeown, Timothy J.

Unalaska
Lutz, Gary J.

Commercial

Anchorage
Adelman, Paul I.
Allingham, Lynn M.
Anderson, Kathleen G.
Bankston, William M.
Barrack, Martin J.
Bentley, Joy C.
Bettine, Frank & Genivee
Bledsoe, Mark S.
Carr, James R. (Randy)
Claman, Matthew W.
Conway, John M.
Cravez, Glenn E.
Davis, Paul L.
Dearborn, Mary Ann
Dee, Kevin M.
Dickson, Robert J.
Gagnon, Bruce E.
Gilmore, Patrick B.
Ginder, Peter C.
Groh, Eggers & Price
Hanson, David G.
Isbell, Shawn M.
Johnson, Ted
Juday, Jerome H.
Kirk, Pamela E.
Knight, Robert H. (Bob)
Knutson, Milford H.
Landau, Robert W.
Lekisch, Peter A.
Middleton, Timothy G.
Miller, Sheila D.
Page, Nelson G.
Petterson, Drew
Pfiffner, Frank A.
Ripley, Justin J.
Settlement
Seymour, S. Jay
Sturges, Sharon
Treptow, John A.
Weber, Daniel
Zalewski, Mary-Ellen

Eagle River
Jennings, Karen L.

Fairbanks
Bacon, Glenn H.
Groseclose, Robert B.
Parrish, James A.
Therrien, Valerie M.

Homer
Zeller, Martin

Juneau
Flanders, Kirk A.
Pearson, Stephen J.

Ketchikan
Miller, Kevin G.

Construction

Anchorage
Adelman, Paul I.
Allingham, Lynn M.
Bankston, William M.
Bettine, Frank & Genivee
Bledsoe, Mark S.
Brooks, Donna J.
Carr, James R. (Randy)
Claman, Matthew W.
Conway, John M.
Cravez, Glenn E.
Dickson, Robert J.
Gagnon, Bruce E.
Groh, Eggers & Price
Johnson, Ted
Juday, Jerome H.
Kirk, Pamela E.
Knight, Robert H. (Bob)
Knutson, Milford H.
Page, Nelson G.
Petterson, Drew
Pfiffner, Frank A.
Ripley, Justin J.
Settlement
Zalewski, Mary-Ellen

Eagle River
Jennings, Karen L.

Fairbanks
Bacon, Glenn H.
Groseclose, Robert B.
Milne, Clark R.
Parrish, James A.
Therrien, Valerie M.

Juneau
Flanders, Kirk A.

Ketchikan
Miller, Kevin G.