

HB

68

ALASKA STATE LEGISLATURE
House of Representatives

Committee Assignments:

Judiciary Committee, Chairman
Labor & Commerce Committee, Member
Legislative Council, Member
Special Committees:
Economic Development, Member



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REPRESENTATIVE NORMAN ROKEBERG

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

FAX COVER SHEET

DATE: 4.18.01

TO: Mike Ford

FAX: 2029 VOICE: _____

RE: CS HB 68 (JUD) 252-LS030010

MESSAGE: Mike. I need a final CS for this bill with

the following two amendments:

(1) changed "intoxicated" to "under the
influence" throughout to conform w/ HB 4.

(2) Page 1, line 10 after "from"
Insert " or near"

Thanks:
Heather
x4990

TOTAL NUMBER OF PAGES SENT, INCLUDING COVER SHEET: 1

Adopted

22-LS0300\O
Ford
4/6/01

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 68(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVE ROKEBERG

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil liability for driving the vehicle of an intoxicated person; and
2 providing for an effective date."

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

4 * Section 1. AS 09.65 is amended by adding a new section to read:

5 **Sec. 09.65.280. Damages resulting from driving the vehicle of an**
6 **intoxicated person. (a) A person is not liable for personal injury, death, or property**
7 **damage resulting from a motor vehicle accident if the person was driving a vehicle**
8 **involved in the accident and**

9 (1) before the accident, started driving the vehicle involved in the
10 accident from *own* licensed premises;

11 (2) is, at the time of the accident, a person employed to or under
12 contract to drive a taxicab or limousine, a taxicab or limousine owner, a holder of a
13 taxicab or limousine permit issued by a municipality, or an owner or employee of a
14 company that dispatches taxicabs or limousines;

1 (3) was not intoxicated at the time of the accident;

2 (4) was driving the vehicle to the motor vehicle owner's residence at
3 the request of the motor vehicle owner or a law enforcement officer; and

4 (5) was driving the vehicle because the motor vehicle owner or
5 operator was intoxicated or reasonably believed to be intoxicated.

6 (b) A person licensed under AS 04.11.080 - 04.11.250, or an agent or
7 employee of the person, is not liable for personal injury, death, or property damage
8 resulting from a motor vehicle accident described under (a) of this section.

9 (c) This section does not preclude liability for civil damages as a result of
10 gross negligence or reckless or intentional misconduct.

11 (d) A motor vehicle owner is considered to have given consent to another
12 person to drive the owner's motor vehicle if the other person is involved in an accident
13 and the provisions of (a) of this section apply to the other person.

14 (e) In this section, "licensed premises" has the meaning given in
15 AS 04.21.080.

16 * Sec. 2. The uncodified law of t' e State of Alaska is amended by adding a new section to
17 read:

18 APPLICABILITY. This Act applies to a civil action that accrues on or after the
19 effective date of this Act.

20 * Sec. 3. This Act takes effect July 1, 2001.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 6, 2001

SUBJECT: Civil liability (CSSSHB 68(JUD))

TO: Representative Norman Rokeberg
Attn: Janet

FROM: Michael F. Ford 
Legislative Counsel

The draft you requested for HB 68 is attached. In response to the question raised about the use of "gross negligence" in the draft, the term is one that is commonly used in other statutes and has a well-accepted meaning in case law. See AS 09.65.091(b), AS 09.65.092, AS 09.65.097(b) and Leavitt v. Gillespie, 443 P.2d 61, 65 (Alaska 1968). Negligence differs from gross negligence only in the degree of fault or misconduct. Generally, conduct that falls short of reckless or intentional misconduct, but is more than mere failure to act as a reasonable person, would constitute gross negligence.

I am concerned about the fact that this draft gives immunity to some individuals, but leaves others unprotected. For example, a friend or relative who takes the keys and drives an intoxicated person home has no protection under this bill. This kind of distinction between taxicab owners or operators and everyone else is vulnerable to a constitutional equal protection or due process challenge. See Turner Const. v. Scales, 752 P.2d 467 (Alaska 1988).

Please contact me if you have further questions.

MFF:lmb
01-132.lmb

Enclosure

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS

JUDICIARY COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT &
TOURISM, MEMBER

website: <http://www.akrepublicans.org/Rokeberg.htm>



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Representative Norman Rokeberg

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SPONSOR STATEMENT

CSSSHB 68 (TRA)

An Act relating to civil liability for transporting an intoxicated person or for driving an intoxicated person's motor vehicle; and providing for an effective date

CSHB 68 (TRA) is a "good samaritan" bill for taxicab operators who transport intoxicated persons or who drive an intoxicated person's motor vehicle to a location directed by that person. Absent gross negligence or reckless or intentional misconduct, a person engaging in this activity would not be civilly liable for damages.

One of the problems facing Alaskans is when they are out drinking; they want to drive home even when they shouldn't. Additionally, these intoxicated persons are worried about leaving their vehicle parked in a location other than their home. This legislation would allow the intoxicated person and his or her vehicle to get home safely without the taxicab operator fearing liability from this activity.

Your support would be appreciated.

ED 3:04/04/01

ALASKA STATE LEGISLATURE

House of Representatives

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SECTIONAL ANALYSIS CSSSHB 68 (TRA)

An Act relating to civil liability for transporting an intoxicated person or for driving an intoxicated person's motor vehicle; and providing for an effective date

- Section 1:** Adds new section to 09.65. Under certain specific circumstances, a taxicab operator is not civilly liable for personal injury or death during the transportation of an intoxicated person or an intoxicated person's vehicle except as a result of gross negligence or reckless or intentional misconduct. Additionally owner of vehicle or third-party may not bring civil action against taxicab operator unless gross negligence or reckless or intentional misconduct is involved.
- Section 2:** Applicability section.
- Section 3:** Effective date: July 1, 2001.

ED 3:04/04/01

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSSSHB 68(TRA)
 (H) Publish Date: 3/30/01

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to civil liability for transporting an BRU Civil Division
intoxicated person or for driving an intoxicated person's motor . . ." Component Special Litigation
 Sponsor Representative Rokeberg
 Requester House Transportation Committee Component No. 2213

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 68 prevents intoxicated persons being transported in a taxicab from bringing a civil action for damages against the owner or driver of the taxicab in the event of personal injury or death, if the owner or driver was acting in good faith. The bill also prevents an owner of a motor vehicle from bringing a civil action for damage to the motor vehicle when the damage occurred when the vehicle was being driven to the owner's residence at the request of the owner or a law enforcement officer by another person because the owner was intoxicated. The immunity from civil liability does not extend to cases of gross negligence or reckless or intentional misconduct.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone 465-5370
 Division Attorney General's Office Date/Time 3/27/01 10:54 AM
 Approved by: Kathryn Daughhettee for Bruce M. Botelho, Attorney General Date 3/27/01
 Agency Department of Law

For distribution information, call the Governor's Legislative Office

443 P.2d 61 LEAVITT V. GILLASPIE (S. Ct. 1968)

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

vs.

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

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

Nos. 800, 803
SUPREME COURT OF ALASKA
443 P.2d 61
June 24, 1968

COUNSEL

Millard F. Ingraham and Barry W. Jackson, Fairbanks, for appellant and appellee Herbert Leavitt.
Edward A. Merdes and Howard Staley, of Merdes, Schaible, Staley & DeLisio, Fairbanks, for appellee
and appellant Russell E. Gillaspie, Jr.

JUDGES

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

OPINION

DIMOND, Justice. OPINION

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

Leavitt's Appeal

Gross Negligence.

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

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

The court refused to give this instruction. Leavitt contends that by refusing to give this instruction the court refused to submit to the jury the issue of whether Gillaspie had been guilty

of gross negligence, or to put it in other words meaning the same thing, willful, wanton or reckless misconduct. The evidence from which it must be determined whether or not this contention is correct may be briefly summarized as follows:

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

Gillaspie testified that on the first trip back to the University he felt "high" but "not intoxicated," that the beer he consumed never impaired his ability to drive, and that he kept control of the car at all times. He described his driving as "good." He estimated his speed on the second and fatal trip back to the University at "over 50," although he admitted telling a police officer right after the accident that he was going from 65 to 70 miles an hour. Nobody said anything to Gillaspie about his driving on the fatal trip, and he did not think that his driving was impaired by his drinking. As regards the accident, Gillaspie testified that he "just lost control of the car * * * instead of * * * making the turn, the car kept on going straight." He knew of the steep shoulders of the curve and the lack of banking. He claimed to have a "pretty good capacity for drinking."

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

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

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

Sergeant Schlichtig of the Alaska State Police, the investigating officer of the accident, testified as to his observations of the car on the scene of the accident, of the condition of the road, and a reconstruction of the accident. Sergeant Schlichtig's reconstruction of how the

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

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

Where the question has arisen as to whether a directed verdict or a judgment notwithstanding the verdict should be entered with respect to an issue of negligence or contributory negligence, we have held that such issues are for the jury to determine where there is room for diversity of opinion among reasonable men as to whether a defendant is guilty of negligence or a plaintiff is guilty of contributory negligence.³ We apply that same rule where the question is whether an instruction on the issue of gross negligence should be submitted to the jury for its consideration. If reasonable minds could justifiably have different views on the question of whether plaintiff was guilty of gross negligence, then the issue of gross negligence should be submitted to the jury for determination. On the other hand, if the evidence is such that reasonable minds might reach only one conclusion, i.e., that from the facts presented there is no showing of gross negligence, then an instruction on such an issue is not justified.⁴

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

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

quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.⁷

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

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

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

Contributory Negligence.

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

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

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

Leavitt concedes that riding with a driver whom a reasonable man should know to be intoxicated may be contributory negligence. The question here is whether the evidence is such

that reasonable minds could differ on the question of whether decedent knew or should have known that Gillaspie's capacity for driving had been impaired by reason of intoxication.

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

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

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

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

We need not decide, at this time, how much or how little beer at either end of the scale will require the court to withdraw the question from the jury. We do hold, however, that upon the evidence in the case at bar a jury could say that the amount of alcohol consumed was sufficient to put a reasonable man upon inquiry concerning the fitness of his driver to convey him safely home. Upon such evidence, the jury could have found that the plaintiff failed to exercise that degree of care that a reasonable person would have exercised for his own safety.

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

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

Testimony of Pearson.

Gillaspie called as a witness, Donald Pearson, vice president and manager of Cripple Creek

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

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

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

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

Assumption of Risk.

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

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

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

But the matter did not stop here. The courts came to use the doctrine of assumption of risk, as an affirmative defense, in a way that was different in essence from the defense of contributory negligence. Where contributory negligence was a defense, the question was whether the plaintiff had acted for his own safety as a reasonably prudent man would have acted under the circumstances. But where assumption of risk was a defense, the question was whether plaintiff

had voluntarily entered into a situation involving obvious danger, with knowledge of the danger, and without regard to whether he had acted in such a situation as a reasonably prudent man would have acted. The effect of this concept was to exculpate a negligent defendant upon the notion that a plaintiff assumed the risk of that negligence even though he was not contributorily at fault, i.e., even though he had exercised the care of the reasonably prudent man under all the circumstances.¹⁴

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

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

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

Reduction of Damages to Present Worth.

The court instructed the jury that if they found for Leavitt, in computing the amount by which decedent's estate had been diminished because of his wrongful death, the jury must determine the

present case value of such amount. In other words, the jury was instructed to reduce damages to present worth. Leavitt admits that since he lost the case on the question of liability, he is in no position to claim any prejudice from the court's instruction. But he asks us, in the event a new trial is ordered, to hold that such an instruction was erroneous and not a correct statement of the law.

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

Gillaspie's Appeal

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

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

Gillaspie claims this ruling was error. His argument is that the state of decedent's sobriety was a material factor to be considered by the jury in determining whether or not decedent was contributorily negligent, that Pearson's testimony that Leavitt appeared to be sober was adverse to the interest of Gillaspie who stood to gain by showing that decedent was not sober, that Pearson may have been motivated in so testifying by his bias against Gillaspie and in favor of Leavitt, that such bias would be shown by establishing that Pearson's corporation had a financial interest in the case adverse to the interest of Gillaspie, and that such a financial interest would be demonstrated by showing that the corporation had confessed judgment in Leavitt's favor for \$100,000. Gillaspie's reasoning in support of his contention that the corporation had a financial interest in the outcome of the dispute between Leavitt and Gillaspie, is that it was in the interest of the corporation that Leavitt obtain judgment against Gillaspie because this would decrease the possibility that Leavitt would seek to collect the full \$100,000 judgment from the corporation by reason of its confession of judgment in that amount.

This is nothing more than speculation. There was no way of knowing to what extent Leavitt

would attempt to collect a judgment from the corporation if a judgment had also been rendered against Gillaspie. Evidence as to the corporation's confession of judgment was, as the trial court correctly held, irrelevant as to the issues between Leavitt and Gillaspie. There was no error in excluding such testimony.

Based upon testimony regarding decedent's educational background, grades²⁰ and character, the court allowed the introduction in evidence by Leavitt of certain charts prepared by Professor Haring, an economist at the University of Alaska, from income figures contained in the 1960 Alaska census. These charts contained statistical data showing the average annual income of males in Alaska in certain age groups, certain areas, and in certain educational levels. Gillaspie claims this was error on the ground that it was so speculative as to decedent's lifetime income expectations as to be useless to the jury.

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

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

DISSENT

NESBETT, Chief Justice (concurring and dissenting).

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

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

In *Buchner* the court adopted a subjective test. The question in each case was to be whether the plaintiff had a knowledge of the facts and an actual comprehension of the danger. Under *Buchner* it would not be enough to invoke the doctrine of assumption of risk to argue that Leavitt must have had an awareness of the fact that Gillaspie had drunk a lot of beer; that his judgment may have been impaired; that it was dangerous to ride with him and that because he did

ride with Gillaspie he comprehended the danger and elected to assume the risk.²

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

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

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

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

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

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

whether a reasonably prudent man in the exercise of due care would have incurred the risk

despite that [actual] knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.

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

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

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

would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.

This aspect of the test must mean that the jury must next decide whether the spectator, after having knowingly and without negligence placed himself in an area of danger, thereafter conducted himself in such a manner as not to increase the danger to himself. In other words, was he contributorily negligent after having taken his seat? Judging by the wording of the new test, this question would be asked in every case where the jury had found initially that the spectator was not negligent in purchasing an unprotected seat, even though no evidence may have been introduced during the trial which would tend to show that he had done anything to increase the existing danger. In my opinion, it is unrealistic to ask a jury to determine the answer to a question which has no factual basis in the evidence. For example, if the evidence showed that the spectator had merely occupied his seat until he was hit in the head by a foul ball, the judge would

be obligated, it would seem to set aside a verdict for the defendant management because of lack of any evidence that the spectator had done anything to increase the risk of injury. The question might be appropriate if there was evidence that the spectator had remained seated in a fixed posture until struck by the ball when he could have avoided being struck by ducking to one side or the other, or downward, or perhaps could have been caught the ball in his hands. Evasive or protective action of this sort is regularly employed by the average fan who must, at times, be an athlete of sorts himself in order to exercise the judgment and agility necessary to avoid injury.

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

OPINION FOOTNOTES

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

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

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

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

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

6 Nichols v. Baker, 101 Ariz. 151, 416 P.2d 584, 586 (1966).

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

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

9 AS 28.35.040.

10 Zenuk v. Johnson, 114 Conn. 383, 158 A. 910, 911-912 (1932); Sothern v. Vandyke, 114 N.J.L. 1, 174 A. 877, 879 (1934).

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

12 239 Or. 26, 396 P.2d 205, 210 (1964).

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

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

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

16 Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136, 141-154 (1965); McGrath v. American Cyanamid Co., 41 N.J., 272, 196 A.2d 238 (1963); Zumwalt v. Lindland, 239 Or. 26, 396 P.2d 205, 207 (1964); II F. Harper & F. James, The Law of Torts § 21.8 at 1191-92 (1956).

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

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

19 *Id.*, at 671-672.

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

21 *Pedersen v. State*, 420 P.2d 327, 335 (Alaska 1966); *Crawford v. Rogers*, 406 P.2d 189, 192 (Alaska 1965).

22 See *Turrietta v. Wyche*, 54 N.M. 5, 212 P.2d 1041, 1047, 15 A.L.R.2d 407 (1949).

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

DISSENT FOOTNOTES

1 386 P.2d 836, 837 (Alaska 1963).

2 The subjective test adopted by Buchner is the rule in the majority of jurisdictions. See *Guerrero v. Westgate*, 164 Cal.App.2d 612, 331 P.2d 107, 110 (1958); *Prescott v. Ralph's Grocery Co.*, 42 Cal.2d 158, 265 P.2d 904, 905-906 (1954); *Dean v. Martz*, 329 S.W.2d 371, 374 (Ken. 1959); *Evans v. Johns Hopkins Univ.*, 224 Md. 234, 167 A.2d 591, 594 (1961); *Fitzpatrick v. Marastoni*, 234 Or. 192, 379 P.2d 1022, 1023 (1963); *Shoemaker v. Floor*, 117 Utah. 434, 217 P.2d 382, 387 (1950); *Kingwell v. Hart*, 45 Wash.2d 401, 275 P.2d 431, 434-435 (1954); *Restatement of Torts* § 893 (1939); *Restatement (Second) of Torts* §§ 496 A-G (1965).

3 42 Cal.2d 158, 265 P.2d 904, 906 (1954).

4 AS 23.30.055, 23.30.080.

5 *Felgner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136, 141-154 (1965) (except in employment relationships and where there has been an express contractual assumption of risk.); *Bolduc v. Crain*, 104 N.H. 163, 181 A.2d 641, 644 (1962); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90, 95, 82 A.L.R.2d 1208 (1959).

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

7 207 Or. 337, 296 P.2d 495, 498-503 (1956).

8 Footnote 13 of the majority opinion cites the Oregon case of *Zumwalt v. Lindland*, 239 Or. 26, 396 P.2d 205, 207 (1964), as authority for the complete abolition of the doctrine of assumption of risk, but since the Oregon automobile guest statute was involved it would appear that the cause has a limited application.

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

752 P.2d 467 TURNER CONSTR. CO. V. SCALES (S. Ct. 1988) 1988 Alas. Lexis
21

Turner Construction Company, Inc., Petitioner,
vs.
**Robert Scales and Kip Clapper, Respondents; Phillip Iverson
d/b/a Iverson Construction Company, Petitioner, v.
DeWayne B. Carson and Robert J. Kottre d/b/a K
& W Doors, Respondents**

No. 3290, File Nos. S-1429, A-1600,
SUPREME COURT OF ALASKA
752 P.2d 467, 1988 Alas. LEXIS 21
April 01, 1988

Petitions for Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,
Douglas J. Serdahely, (S-1429) and Joan M. Katz (S-1600), Judges.

COUNSEL

Paula Williams and Dan Cadra, Law Offices of Roy W. Matthews III, for Petitioner Turner Construction Company.

Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, for Petitioner Phillip Iverson.

Joseph A. Kalamarides, Kalamarides & MacMillan, for Respondent Robert Scales.

Jeffrey M. Feldman and Stuart A. Ollanik, Gilmore & Feldman, and Jeffrey D. Jefferson, Nordstrom, Steele & Jefferson, for Respondent DeWayne B. Carson.

JUDGES

Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

AUTHOR: BURKE

OPINION

BURKE, Justice.

The question in these consolidated cases is whether AS 09.10.055, the six-year statute of repose on suits against design professionals, violates the Alaska Constitution. The superior court ruled the statute unconstitutional. We affirm.

I. FACTS AND PROCEEDINGS

Turner Construction v. Scales, File No. S-1429. Robert Scales suffered property damage when a fire occurred in the Winterbrook Apartments in 1984.¹ Turner Construction Company built the apartments in 1978. Scales sued Turner Construction and others for his loss, alleging in part that the fire was caused by Turner Construction's negligent construction and installation of a fireplace.

Turner Construction asserted that Scales' cause of action was barred by AS 09.10.055, the six-year statute of repose² governing actions against design professionals such as architects,

engineers and contractors, and moved for judgment on the pleadings. Scales moved to strike the defense on the ground that the statute is unconstitutional. Superior Court Judge Douglas J. Serdahely granted Scales' motion, concluding that AS 09.10.055 violates the due process³ and equal protection⁴ clauses of the Alaska Constitution.

Iverson v. Carson, File No. S-1600. DeWayne B. Carson was injured in 1985, while attempting to install an automatic garage door opener in his home. Phillip Iverson built the home in 1978; the garage door was originally installed by a subcontractor.

Seven months after his injury, Carson sued Iverson and the subcontractor. Iverson moved for summary judgment, based on the six-year statute of repose, because Carson was injured six-and-a-half years after substantial completion of the improvement. Superior Court Judge Joan M. Katz denied Iverson's motion, concluding that AS 09.10.055 violates the equal protection clause⁵ of the Alaska Constitution.

II. THE STATUTE

The statute in question was enacted in 1967. It provides in part:

(a) No action, whether in contract . . . , in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of the state for the bringing of any action.

(d) The limitation prescribed by this section **shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise** of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

AS 09.10.055 (Emphasis added).

The House Judiciary Report notes that this section "places a . . . statute of limitation on lawsuits against architects, designers and builders." 1967 House Journal 261. It is clear, however, that the House intended to enact a statute of repose. An explanatory report by the Judiciary

Committee stated in part:

"[T]he time begins running upon 'substantial completion' of the improvement; consequently this bill limits not only the bringing of the cause of action, but in effect prevents the cause of action from arising when an injury occurs after the time limitation has expired. An action based on a defect not discovered until after the time limitation has expired would likewise be precluded.

Id. at 365.⁶

III. EQUAL PROTECTION

Scales and Carson argue that AS 09.10.055 violates the equal protection clauses of the state and federal constitutions because (1) it does not protect all defendants similarly situated and (2) the two-year savings period in subsection (b) unfairly discriminates against plaintiffs injured in the seventh and eighth years after construction. The design professionals contend that the injured plaintiffs lack standing to challenge the statute on the first of these grounds, because the plaintiffs are not members of the class of unprotected defendants. The design professionals further contend that the statute is constitutional.

Standing. The injured plaintiffs' first constitutional claim is based on the rights of third parties -- potential defendants, such as owners and tenants, who are not protected by the statute.⁷ Every court which has addressed the issue has concluded that persons such as the plaintiffs are proper parties to assert this claim, because they are precluded from asserting their own rights against defendants who might otherwise be liable; the statute narrows the group against which recovery is available. *McClanahan v. American Gilsonite*, 494 F. Supp. 1334, 1342-44 (D. Colo. 1980); *Shibuya v. Architects Hawaii*, 65 Haw. 26, 647 P.2d 276, 282 (Haw. 1982). The injured plaintiffs' interest in invalidating the statute is as great as that of the materialman or the defendant in possession. *Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514, 523 (Mass. 1982). We find this reasoning persuasive, therefore, we conclude that the injured plaintiffs have standing to assert the equal protection challenge.

Equal Protection. When a plaintiff challenges a statute on state and federal equal protection grounds, the first question we must consider is whether the constitutional claimant asserts a fundamental constitutional right or the statute uses a suspect classification. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978). If the answer to either question is "yes," then the statute is unconstitutional under the federal standard absent a compelling state interest. *Id.*

This statute classifies defendants based on their occupation or the nature of the work they perform; it classifies plaintiffs based on the time of their injury. Neither is a suspect class. The right asserted is the interest in suing a particular party, which is not a fundamental constitutional right; nonetheless, the interest in redressing wrongs through the judicial process is a significant one. *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983). We, therefore, conclude that the compelling state interest standard does not apply and we may analyze the significant constitutional claims asserted under the fair and substantial relationship test of the

state constitution. **Erickson**, 574 P.2d at 12.

We next examine the statutory purpose to determine whether it is a legitimate exercise of the state's police power. **Id.** The purpose of the statute is to encourage construction and avoid stale claims by shielding certain defendants from potential future liability. See **Yarbro v. Hilton Hotels**, 655 P.2d 822, 825-27 (Colo. 1982). We believe that these are legitimate government purposes.

The final step is to examine the means to determine whether they substantially further the statutory purpose. **Erickson**, 574 P.2d at 12. In doing so, we do not hypothesize facts which would sustain otherwise questionable legislation. **Isakson v. Rickey**, 550 P.2d 379, 362 (Alaska 1976).

Scales argues that AS 09.10.055 is unconstitutional because it fails to protect owners, tenants, and materialmen, while protecting others who are similarly situated, such as architects, planners, engineers, and construction contractors. Turner Construction contends that there are substantial differences between these groups justifying the statutory distinction.

Many courts have suggested distinctions to justify the challenged classification. The exclusion of owners, tenants, and others in possession is most often rationalized by the fact that such persons have continuing control over access to and maintenance of the property. **Klein**, 437 N.E.2d at 522-25; **Freezer Storage**, 382 A.2d at 718. Some courts also point to the different treatment of owners and tenants at common law, such as the larger class of potential plaintiffs which may sue design professionals, the legal theories available to those plaintiffs, and the common law defenses available only to landlords and tenants. **Freezer Storage**, 382 A.2d at 718-20. Others cite the possibility of defective maintenance and alterations. **Yarbro**, 655 P.2d at 827-28.

Various justifications are also found to support the distinction between materialmen and design professionals.⁸ One argument is that, because materialmen provide standard goods manufactured by standard processes, they may be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. **Klein**, 437 N.E.2d at 524; **Freezer Storage**, 382 A.2d at 719. In other words, buildings are more complex than their component parts. **Freezer Storage**, 382 A.2d at 719. Furthermore, design professionals have special expertise; they should be encouraged to experiment and their creativity should not be stifled. **Klein**, 437 N.E.2d at 524; **O'Brien v. Hazelet & Erdal**, 410 Mich. 1, 299 N.W.2d 336, 342 (Mich. 1980).

We are not persuaded by any of these diverse rationales. One effect of the statute of repose is to eliminate the statutory right of contribution among tortfeasors. In **Arctic Structures v. Wedmore**, 605 P.2d 426, 435 (Alaska 1979), we ruled that the Uniform Contribution Among Tortfeasors Act, AS 09.16.010-.060, did not abolish the common law rule of joint and several liability; therefore, each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury. It follows that whenever an unprotected owner is 50% at fault and a protected contractor is 50% at fault, the

unprotected owner would be 100% liable for all damages, without a remedy for contribution. The statute of repose, therefore, does not entirely abrogate liability for defective design work, but shifts it. Thus, the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered.

In our view, there is no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction. The shift of liability to unprotected parties decreases their incentive to build in corresponding measure to the increased incentives of protected parties. If anything, the disincentive on the part of owners may be greater than their proportional measure of liability shift, because they may be liable for a product over which they have no control. Moreover, design defects may be catastrophic, and experimental designs shift correspondingly greater unknown risks to owners, giving them even more reason not to finance construction. Thus, we believe that the statutory means are not substantially or rationally related to the ends. We conclude that AS 09.10.055 violates the equal protection clause of the Alaska Constitution.

The decisions of the superior court in File Nos. S-1429 and S-1600 are AFFIRMED.

OPINION FOOTNOTES

1 Given the procedural posture of these cases, we must assume the allegations in the plaintiffs' complaints are true. *Freezer Storage v. Armstrong Curk*, 476 Pa. 270, 382 A.2d 715, 717 (Pa. 1978).

2 A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded is *damnum absque injuria*, a loss without a remedy.

In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

3 Alaska Const. art. I, § 7.

4 Alaska Const. art. I, § 1.

5 *Id.*

6 AS 09.10.055 is one of many state statutes enacted as a result of a concerted national lobbying effort by design professionals sparked by an increase in their potential liability for design and construction defects. See, e.g., Collins, *Limitation of Action Statutes for Architects and Builders -- An Examination of Constitutionality*, 29 Fed'n of Ins. Couns. Q. 41, 44-45 (1978).

7 The statute expressly excludes from its protection owners, tenants and others in possession. AS 09.10.055(d). Most courts construe the statute to exclude materialmen and manufacturers of component parts as well.

8 For purposes of argument, we assume without deciding that AS 09.10.055 does not protect materialmen or manufacturers.

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ANCHORAGE Daily News

SATURDAY

19 AUGUST 2000

Taxi plan would get drinkers' cars home

Insurance liability described as hurdle

By JULIE WESTFALL
Daily News reporter

An idea to get drunken drivers off the road in Anchorage is almost as simple as free cab rides home, but with a twist — an intoxicated person would not only get a free cab ride home from a bar, but another taxi driver would also take his car home.

"The best way to get drunks off the road is to get

them home and to get their car home," said John Pattee, owner of two downtown bars, Gaslight Lounge and The Avenue.

It has been dubbed the Off-the-Road program. Organizers say it is not an impossibility; even after being two years in the making it still needs to address liability issues that

See Back Page, CABBIES

CABBIES: Plan covers drinkers, vehicles

Continued from Page A-1

might be fixed with a law that has not been written yet.

"It's doable, but it's taking us a lot longer than we anticipated," said Rod Pfeifer, executive director of the Anchorage Downtown Partnership and the man spearheading the program along with several bar owners and cab companies.

Unfortunately for the program, car insurance in Alaska goes with the vehicle and the taxi drivers must assume that the car they are taking home is insured. Nancy R. Brockway, office manager for Anchorage Checker Cab, said her cab service has occasionally picked up intoxicated bar patrons and driven their cars home when they show proof of insurance. They also charge four times the regular rate.

"We can't advertise because of the fact that we don't have insurance," Brockway said.

She said to run the program right now, the taxi drivers themselves would have to be insured to drive any private vehicle. But insurance companies they have talked to would charge more than \$1,000 per driver a month, she said. Brockway said the problem might be fixed with a state law either exempting the program's drivers from liability if they were in an accident or re-

'It's doable, but it's taking us a lot longer than we anticipated.'

— Rod Pfeifer, executive director of the Anchorage Downtown Partnership

■ **TASK FORCE MEETING:** The DUI Prevention Task Force will have a public hearing from 4 to 7 p.m. Monday in the Assembly Chambers at Loussac Library. It is open to anyone who wants to offer suggestions on the problem of drunken drivers. You can e-mail your comments at dui@ci.anchorage.ak.us.

quiring insurance to cover the program.

No one knows how long that could take, but state Rep. Norm Rokeberg said he would support a bill next session that would eliminate insurance worries.

"This seems to have some merit, so I'd be more than happy to look into that," said Rokeberg, chairman of the Labor and Commerce Committee, which oversees insurance matters.

Pfeifer said they have gathered support from cab companies, police, bar owners and the city. The recent public spotlight on drunken driving might provide the impetus needed to overcome the logistical issues for the program. A slew of drunken driving legislation is expected to be dis-

cussed when the Legislature convenes in January, Rokeberg said.

Police Chief Duane Udland said that he likes the idea but that the insurance issue might be tough to get through the Legislature.

"I think they're going to really have to make their case, that would be my guess," Udland said.

According to Pattee, they are exploring different funding sources, including Mothers Against Drunk Driving and liquor industry cash. The program is tentatively planned to handle about 30 customers a month and cost about \$200,000 to \$250,000 a year.

"The industry is partnering with the city to come up with lots of ideas like this. This is one of the ideas," said Karen Rogina, executive vice president of the Alaska Restaurant and Beverage Association. "It's rather in a state of infancy."

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