SCOMM

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MALICE = RECKLESS INDIFFERENCE.

in both. Thus it is entirely possible that an act may be a tort, but not a crime of the same name,[16] or that it may amount to the crime and not the tort.[17] Criminal cases may be useful as guides to the type of conduct which the law will condemn or excuse, and the existence of a criminal statute may indicate a legislative policy which the courts will further by creating tort liability.[18] But such conclusions do not always follow, and the criminal law must be regarded a a very unreliable analogy to the law of torts.

Punitive Damages

The idea of punishment, or of discouraging other offenses, usually does not enter into tort law, except in so far as it may lead the courts to weight the scales somewhat in favor of the plaintiff's interests in determining that a tort has been committed in the first place.[19] In one rather anomalous respect, however, the ideas underlying the criminal law have invaded the field of torts. Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts [20] have permitted the jury to award in the tort action "punitive" or "exemplary" damages, or what is sometimes called "smart money." Such damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example.[21] Occasional decisions [22] have mentioned the additional purpose of reimbursing the plaintiff for elements of damage which are not legally compensable, such as wounded feelings or the expenses of suit.

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage,[23] such as spite or

16. Compare the following cases (albeit from different states), in which the same type of act was held to be a tort but not a crime: Beach v. Hancock, 1853, 27 N.H. 223, with Chapman v. State, 1884, 78 Ala. 463 (assault); Malcom v. Spoor, 1847, 53 Mass. (12 Metc.) 279, with Milton v. State, 1898, 40 Fla. 251, 24 So. 60 (trespass ab initio); Basely v. Clarkson, 1681, 3 Lev. 37, 83 Eng.Rep. 565 with Garrett v. State, 1906, 49 Tex.Cr.R. 235, 91 S.W. 577. Note also that the elements of the prima facie case and the nature of recognized defenses may differ.

17. Compare Deaton v. State, 1908, 53 Tex.Cr.R. 393, 110 S.W. 69, with Robertson v. Edelstein, 1899, 104 Wis. 440, 80 N.W. 724 (abusive but not defamatory language). See Rubin, May a Person be Convicted of a Felony and Yet Escape Civil Liability Therefor, 1926, 10 Marq.L.Rev. 113. Note also that in certain circumstances consent may be a defense to a tort action but not to a criminal prosecution based on the same conduct. See infra, § 18.

18. See infra, § 36.

19. See infra, this section.

20. Some decisions have rejected punitive damages entirely. Moore v. Blanchard, 1949, 216 La. 253, 43 So. 2d 599; Boott Mills v. Boston & Maine Railroad Co., 1914, 218 Mass. 582, 106 N.E. 680; Wilfong v. Omaha & Council Bluffs Street Railway Co., 1935, 129 Neb. 600, 262 N.W. 537; Anderson v. Dalton, 1952, 40 Wn.2d 894, 246 P.2d 853. England has done away with them except where they could serve a "useful purpose," by penalizing oppressive, arbitrary and unconstitutional action by government servants, conduct calculated to make a profit for the actor, and the like. Rookes v. Barnard, [1964] A.C. 1129.

New Hampshire and Michigan have allowed such damages, regarding them as extra compensation for injured feelings or sense of outrage rather than as punishment. Bixby v. Dunlap, 1876, 56 N.H. 456; Wise v. Daniel, 1922, 221 Mich. 229, 190 N.W. 746; Veselenak v. Smith, 1982, 414 Mich. 567, 327 N.W.2d 261 (not allowed when compensatory damages for mental distress are awarded; since plaintiff would be doubly compensated for one injury). Connecticut decisions have limited punitive damages to the expenses of litigation, which must be proved. Tedesco v. Maryland Casualty Co., 1941, 127 Conn. 533, 18 A.2d 357.

21. Scott v. Donald, 1896, 165 U.S. 58, 17 S.Ct. 265, 41 L.Ed. 632; Gostkowski v. Roman Catholic Church, 1933, 262 N.Y. 320, 186 N.E. 798; Gill v. Selling, 1928, 125 Or. 587, 267 P. 812, affirmed 126 Or. 584, 270 P. 411; Kirschbaum v. Lowrey, 1925, 165 Minn. 233, 206 N.W. 171. See McCormick, Damages, 1935, § 278; Notes, 1957, 70 Harv.L.Rev. 517; 1962, 26 Albany L.J. 288.

22. Battle v. Kilcrease, 1936, 54 Ga.App. 808, 189 S.E. 573; Wright Titus, Inc. v. Swafford, Tex.Civ.App. 1939, 133 S.W.2d 287, error dismissed, judgment correct; Brewer v. Home-Stake Production Co., 1967, 200 Kan. 96, 434 P.2d 828; Cox v. Stolworthy, 1972, 94 Idaho 683, 496 P.2d 682.

23. Chiles v. Drake, 1859, 59 Ky. (2 Metc.) 146; Birmingham Waterworks Co. v. Brooks, 1917, 16 Ala.App. 209, 76 So. 515, certiorari denied 200 Ala. 697, 76 So. 995. Cf. Battle v. Kilcrease, 1936, 54 Ga.App. 808, 189

"malice," [24] or a fraudulent [25] or evil [26] motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.[27] There is general agreement that, because it lacks this element, mere negligence is not enough,[28] even though it is so extreme in degree as to be characterized as "gross," [29] a term of ill-defined content,[30] which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages.[31] Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.[32]

Typical of the torts for which such damages may be awarded are assault and battery,[33] libel and slander,[34] deceit,[35] seduc-

S.E. 573 (hit-and-run driver); Miller v. Blanton, 1948, 213 Ark. 246, 210 S.W.2d 293 (intoxication); Bucher v. Krause, 7th Cir. 1952, 200 F.2d 576, certiorari denied Krause v. Bucher, 1953, 345 U.S. 997, 73 S.Ct. 114, 97 L.Ed. 842, rehearing denied 346 U.S. 842, 74 S.Ct. 17, 98 L.Ed. 363 (cover-up activities of police).

"The jury must find that he acted with actual malice (in the sense of ill will) or conscious disregard of consequences to others. The jury may infer this from circumstances of aggravation surrounding the tortious conduct." Kelite Products, Inc. v. Binzel, 5th Cir. 1955, 224 F.2d 131, 143. See also Diapulse Corp. of America v. Birtcher Corp., 2d Cir. 1966, 362 F.2d 736, certiorari dismissed 385 U.S. 801, 87 S.Ct. 9, 17 L.Ed.2d 48; Mills v. Levine, 1956, 98 U.S.App.D.C. 137, 233 F.2d 16, certiorari denied 352 U.S. 858, 77 S.Ct. 86, 1 L.Ed.2d 67.

24. This includes a deliberate wrongful act known to be injurious to another. Cherry-Burrell Co. v. Thatcher, 9th Cir. 1940, 107 F.2d 65; Jones v. West Side Buick Co., 1936, 231 Mo.App. 187, 93 S.W.2d 1083; Morgan v. French, 1945, 70 Cal.App.2d 785, 161 P.2d 800; Bourne v. Pratt & Whitney Aircraft Corp., Mo. App.1948, 207 S.W.2d 533.

It does not include the "legal malice" implied in such torts as defamation. Corrigan v. Bobbs-Merrill Co., 1920, 228 N.Y. 58, 126 N.E. 260; Neeb v. Hope, 1886, 111 Pa. 145, 2 A. 568; Fields v. Bynum, 1911, 156 N.C. 413, 72 S.E. 449; Cottle v. Johnson, 1920, 179 N.C. 426, 102 S.E. 769 (alienation of affections).

As to the necessity of "actual" rather than "implied" malice, see Waters v. Novak, 1953, 94 Ohio App. 347, 115 N.E.2d 420.

25. Prince v. State Mutual Life Insurance Co., 1907, 77 S.C. 187, 57 S.E. 766; Treesh v. Stone, 1921, 51 Cal. App. 708, 197 P. 425; Augusta Bank & Trust v. Broomfield, 1982, 231 Kan. 52, 643 P.2d 100.

26. Eshelman v. Rawalt, 1921, 298 Ill. 192, 131 N.E. 675 (criminal conversation); Cobb v. Atlantic Coast Line Railroad Co., 1918, 175 N.C. 130, 95 S.E. 92 (blasting); Gamble v. Keyes, 1917, 39 S.D. 592, 166 N.W. 134; Hintz v. Roberts, 1923, 98 N.J.L. 768, 121 A. 711. Concerning motive generally, see infra, § 5.

27. Sebastian v. Wood, 1954, 246 Iowa 94, 66 N.W.2d 841 (drunken driving); Dorn v. Wilmarth, 1969, 254 Or. 236, 458 P.2d 942 (same); Brooks v. Wootton, 2d Cir. 1966, 355 F.2d 177 (same); Allman v. Bird, 1960, 186 Kan. 802, 353 P.2d 216; Toole v. Richardson-Merrell, Inc., 1967, 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (withholding vital information in sale of drug); Cox v. Stolworthy, 1972, 94 Idaho 683, 496 P.2d 682; Bull v. McCuskey, 1980, 96 Nev. 706, 615 P.2d 957 (physician counter-suit). See also Cantrell v. Amarillo Hardware Co., 1979, 226 Kan. 681, 602 P.2d 1326 ("reckless disregard of plaintiff's rights," in products liability case involving aluminum stepladder).

28. Greyhound Corp. v. Townsend, 1959, 234 Miss. 839, 108 So.2d 208, suggestion of error sustained 234 Miss. 839, 108 So.2d 853; Wright v. Everett, 1956, 197 Va. 608, 90 S.E.2d 855; Spackman v. Ralph M. Parsons Co., 1966, 147 Mont. 500, 414 P.2d 918; Sheffield Division Armco Steel Corp. v. Jones, 1964, Tex., 376 S.W.2d 825.

29. Milwaukee & St. Paul Railroad Co. v. Arms, 1875, 91 U.S. 489, 23 L.Ed. 374; Moore v. Wilson, 1929, 180 Ark. 41, 20 S.W.2d 310; Hicks v. McCandlish, 1952, 221 S.C. 410, 70 S.E.2d 629; Eatley v. Mayer, 1931, 9 N.J.Misc. 918, 154 A. 10, affirmed 1932, 10 N.J.Misc. 219, 158 A. 411.

See, however, Arnold v. Frigid Feed Express Co., 1969, 9 Ariz.App. 472, 453 P.2d 983 (driving car at top speed through dust storm; enough that the conduct involves a risk "substantially greater than that which is necessary to make his conduct negligent.")

30. See infra, § 34.

31. Cf. Texas Pacific Coal & Oil Co. v. Robertson, 1935, 125 Tex. 4, 79 S.W.2d 830; Teche Lines v. Pope, 1936, 175 Miss. 393, 166 So. 539; Sebastian v. Wood, 1954, 246 Iowa 94, 66 N.W.2d 841.

32. Thomas v. Commercial Credit Corp., Mo.App. 1960, 335 S.W.2d 703 (repossession of wrong automobile); Calhoun v. Universal Credit Co., 1944, 106 Utah 166, 146 P.2d 284 (repossession where no default); Winn & Lovett Grocery Co. v. Archer, 1936, 126 Fla. 308, 171 So. 214 (detention of suspect in store). See also De Marasse v. Wolf, Sup.Ct.1955, 140 N.Y.S.2d 235.

33. Trogden v. Terry, 1916, 172 N.C. 540, 90 S.E. 583; Bannister v. Mitchell, 1920, 127 Va. 578, 104 S.E. 800; Maxa v. Neidlein, 1932, 163 Md. 366, 163 A. 202.

34. Reynolds v. Pegler, 2d Cir. 1955, 223 F.2d 429, certiorari denied 350 U.S. 846, 76 S.Ct. 80, 100 L.Ed. 754; Rogers v. Florence Printing Co., 1958, 233 S.C. 567, 106 S.E.2d 258; Coffin v. Brown, 1901, 94 Md. 190, 50 A. 567; Loftsgaarden v. Reiling, 1964, 267 Minn. 181, 126 N.W.2d 154, certiorari denied 379 U.S. 845, 85 S.Ct. 31, 13 L.Ed.2d 50

tion,[36] alienation of affections,[37] malicious prosecution,[38] and intentional interferences with property such as trespass,[39] private nuisance,[40] and conversion.[41] But it is not so much the particular tort committed as the defendant's motives and conduct in committing it [42] which will be important as the basis of the award. Statutes in most states have provided punitive damages for particular torts, as in the case of multiple damages for trespass.[43]

Commencing in the 1970's, a new body of case law has developed, awarding punitive as well as compensatory damages against insurance companies on the basis of outrageous conduct in the handling of claims,[44] in some instances in association with a tort action, such as intentional infliction of severe mental distress,[45] and in other instances in association with an action for breach of an implied duty of good faith and fair dealing.[46]

The policy of giving punitive damages has been a subject of much controversy. They have been condemned [47] as undue compensation beyond the plaintiff's just deserts,[48] in the form of a criminal fine which should be paid to the state, if anyone, with the amount fixed only by the caprice of the jury and imposed without the usual safeguards thrown about criminal procedure, such as proof of guilt beyond a reasonable doubt, the privilege against self-incrimination, and even the rule against double jeopardy—since the defendant may still be prosecuted for the

35. Walker v. Sheldon, 1961, 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497; J. Truett Payne Co. v. Jackson, 1967, 281 Ala. 426, 203 So.2d 443; Saberton v. Greenwald, 1946, 146 Ohio St. 414, 66 N.E.2d 224; Augusta Bank & Trust v. Broomfield, 1982, 231 Kan. 52, 643 P.2d 100. See Note, 1962, 26 Alb.L.J. 288.

36. Reutkemeier v. Nolte, 1917, 179 Iowa 342, 161 N.W. 290.

37. Scott v. O'Brien, 1908, 129 Ky. 1, 110 S.W. 260.

38. Jackson v. American Telephone & Telegraph Co., 1905, 139 N.C. 347, 51 S.E. 1015; Brown v. McBride, 1898, 24 Misc. 235, 52 N.Y.S. 620; Bull v. McCuskey, 1980, 96 Nev. 706, 615 P.2d 957 (physician counter-suit). Cf. Seidel v. Greenberg, 1969, 108 N.J. Super. 248, 260 A.2d 863.

39. Oden v. Russell, 1952, 207 Okl. 570, 251 P.2d 184; Huling v. Henderson, 1894, 161 Pa. 553, 29 A. 276; Singer Manufacturing Co. v. Holdfodt, 1877, 86 Ill. 455; Cox v. Stolworthy, 1972, 94 Idaho 683, 496 P.2d 682.

40. Ruppel v. Ralston Purina Co., Mo.1968, 423 S.W.2d 752; Lutz v. Independent Construction Co., 1958, 183 Kan. 798, 332 P.2d 269; Corwine v. Maracaibo Oil Exploration Corp., 1959, 184 Kan. 151, 334 P.2d 419; Yazoo & Mississippi Valley Railroad Co. v. Sanders, 1906, 87 Miss. 607, 40 So. 163; Schumacher v. Shawhan Distillery Co., 1914, 178 Mo.App. 361, 165 S.W. 1142 (pollution of stream continued in defiance of injunction).

41. Watkins v. Layton, 1958, 182 Kan. 702, 324 P.2d 130; Lindgren Plumbing Co. v. Doral Country Club, Inc., Fla.App.1967, 196 So.2d 242; Jones v. Fisher, 1969, 42 Wis.2d 209, 166 N.W.2d 175 (forcible removal of dental plate as security for loan).

42. Thus punitive damages may be awarded against only one of two joint tortfeasors for the same tort. Kim v. Chinn, 1943, 56 Cal.App.2d 857, 133 P.2d 677; Hotel Riviera, Inc. v. Short, 1964, 80 Nev. 505, 396 P.2d 855; Mauk v. Brundage, 1903, 68 Ohio St. 89, 67 N.E. 152; Nelson v. Halvorson, 1912, 117 Minn. 255, 135 N.W. 818.

Cf. Heinze v. Murphy, 1942, 180 Md. 423, 24 A.2d 917 (no punitive damages for false arrest in good faith); American Oil Co. v. Colonial Oil Co., 4th Cir. 1942, 130 F.2d 72, certiorari denied 317 U.S. 679, 63 S.Ct. 159, 87 L.Ed. 545 (same as to trespass).

But punitive damages are not minimized by the value to the community of defendant's activity and its general contribution to the locality. Lampert v. Reynolds Metals Co., 9th Cir. 1967, 372 F.2d 245.

43. See for example Kelly v. Fine, 1958, 354 Mich. 384, 92 N.W.2d 511; Clark v. Sheriff, 1956, 247 Iowa 509, 74 N.W.2d 569; Louis Pizitz Dry Goods Co. v. Yeldell, 1927, 274 U.S. 112, 47 S.Ct. 509, 71 L.Ed. 952; and the cases collected in 1937, 111 A.L.R. 91.

44. An early and oft-cited case is Fletcher v. Western National Life Insurance Co., 1970, 10 Cal.App.3d 376, 89 Cal.Rptr. 78.

45. Fletcher v. Western National Life Insurance Co., 1970, 10 Cal.App.3d 376, 89 Cal.Rptr. 78; Eckenrode v. Life of America Insurance Co., 7th Cir. 1972, 470 F.2d 1 (Ill. law). See also Amsden v. Grinnel Mutual Reinsurance Co., Iowa 1972, 203 N.W.2d 252.

46. Gruenberg v. Aetna Insurance Co., 1973, 9 Cal. 3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032. See also United States Fidelity & Guaranty Co. v. Peterson, 1975, 91 Nev. 617, 540 P.2d 1070.

47. Willis, Measure of Damages When Property is Wrongfully Taken by a Private Individual, 1909, 22 Harv.L.Rev. 419, 420; Walther, Punitive Damages—A Critical Analysis, 1965, 49 Marq.L.Rev. 369; Duffy, Punitive Damages: A Doctrine Which Should be Abolished, [1969] Def. Research Inst. 4; Note, 1966, 41 N.Y.U.L.Rev. 1158. See also Fay v. Parker, 1872, 53 N.H. 342; Murphy v. Hobbs, 1884, 7 Colo. 541, 5 P. 119; Spokane Truck & Dray Co. v. Hoefer, 1891, 2 Wash. 45, 25 P. 1072.

48. See the dissenting opinion in Katko v. Briney, Iowa 1971, 183 N.W.2d 657, 47 A.L.R.3d 624.

crime after being mulcted in the tort action.[49] They have been defended as a salutary method of discouraging evil motives, as a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit.[50] At any rate, they are an established part of our legal system, and there is no indication of any present tendency to abandon them.

One of the various controversies which have surrounded punitive damages has been over whether they may be awarded against an employer vicariously liable for the tort of a servant,[51] where the employer has neither authorized nor ratified it.[52] Following a leading federal case,[53] a considerable number of the courts have held that they can not,[54] laying stress upon the injustice of a punishment inflicted upon one who has been entirely innocent throughout. The Restatements of Torts and Agency take this position, subject to the additional qualification that liability is recognized also if the agent was unfit and was recklessly employed or retained, and if the agent was employed in a managerial capacity and was acting in the scope of employment.[55] It has been noted also that where the employer is a corporation, the pocket which is hit is that of the blameless stockholders, whom no one wants to punish. Where the principal is a municipal corporation, and the impact of punitive damages awards would fall on taxpayers, the majority of courts have denied liability of the principal for punitive damages.[56] This position has been reinforced by the Supreme Court's holding that punitive damages are not to be awarded against a municipal corporation in actions under 42 U.S.C. § 1983.[57]

49. Morris v. MacNab, 1957, 25 N.J. 271, 135 A.2d 657; Pratt v. Duck, 1945, 28 Tenn.App. 502, 191 S.W.2d 562; Dubois v. Roby, 1911, 84 Vt. 465, 80 A. 150; Irby v. Wilde, 1908, 155 Ala. 388, 46 So. 454. Contra, Borkenstein v. Schrack, 1903, 31 Ind.App. 220, 67 N.E. 547. See Aldridge, The Indiana Doctrine of Exemplary Damages and Double Jeopardy, 1945, 20 Ind.L.J. 124; Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 1983, 69 Va.L.Rev. 269.

Some courts permit a showing in mitigation of punitive damages that the defendant has been criminally punished for the same wrong. Saunders v. Gilbert, 1911, 156 N.C. 463, 72 S.E. 610; Wirsing v. Smith, 1908, 222 Pa. 8, 70 A. 906.

50. Sedgwick, Damages, 9th Ed. 1912, § 354; 1 Street, Foundations of Legal Liability, 1906, ch. XXXII; McCormick, Damages, 1935, § 77; Morris, Punitive Damages in Tort Cases, 1931, 44 Harv.L.Rev. 1173. See also Morris, Rough Justice and Some Utopian Ideas, 1930, 24 Ill.L.Rev. 730.

51. See Morris, Punitive Damages in Personal Injury Cases, 1960, 21 Ohio St.L.J. 216, Notes, 1961, 70 Yale L.J. 1296; 1967, 19 Syr.L.Rev. 189.

52. The employer's liability for punitive damages is of course clear where the employer has authorized the employee's misconduct, or has participated in it. The employer may, however, become liable for such damages by "ratification," when, with knowledge of the tort, the employer fails to take action expressing disapproval of it, as by retaining the offending servant in the employment. Haines v. Schultz, 1888, 50 N.J.L. 481, 14 A. 488; Farvour v. Geltis, 1949, 91 Cal.App.2d 603, 205 P.2d 424; Will v. Hughes, 1951, 172 Kan. 45, 238 P.2d 478; Donivan v. Manhattan Railway Co., 1893, 1 Misc. 368, 21 N.Y.S. 457; Security Aluminum Window Manufacturing Corp. v. Lehman Associates, Inc., 1970, 108 N.J.Super. 137, 260 A.2d 248.

53. Lake Shore & Michigan Southern Railway Co. v. Prentice, 1893, 147 U.S. 101, 13 S.Ct. 261, 37 L.Ed. 97. See, however, General Motors Acceptance Corp. v. Froelich, 1959, 106 U.S.App.D.C. 357, 273 F.2d 92, where the misconduct of the employees was neither directed, authorized, nor ratified, but responsibility was attributed to the corporation on the basis of its general policies.

54. Emmke v. De Silva, 8th Cir. 1923, 293 F. 17; Gates v. St. James Operating Co., 1939, 122 N.J.L. 610, 7 A.2d 632; Curtis v. Siebrand Brothers Circus & Carnival Co., 1948, 68 Idaho, 285, 194 P.2d 281; Rickman v. Safeway Stores, Inc., 1951, 124 Mont. 451, 227 P.2d 607; Parris v. St. Johnsbury Trucking Co., 2d Cir. 1968, 395 F.2d 543.

55. Second Restatement of Agency, § 217C; Second Restatement of Torts, § 909.

56. Fisher v. City of Miami, Fla.1965, 172 So.2d 455; Desforge v. City of West St. Paul, 1950, 231 Minn. 205, 42 N.W.2d 633; Rascoe v. Town of Farmington, 1956, 62 N.M. 51, 304 P.2d 575; Clarke v. City of Greer, 1957, 231 S.C. 327, 98 S.E.2d 751. See Note, 1965, 22 Wash. & Lee L.Rev. 126.

57. City of Newport v. Fact Concerts, Inc., 1981, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616. Such damages, however, may be assessed against individual

The majority of the courts, however, have held that the vicarious liability of the master for acts within the scope of the employment extends to punitive as well as compensatory damages, even in the absence of approval or ratification,[58] and that this is true especially in the case of corporations, who can only act through their agents.[59] They have been concerned primarily with the deterrent effect of the award of exemplary damages, and have said that if such damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts, that is sufficient ground for awarding them.[60]

A related problem, on which there is a growing body of case law, is whether punitive damages awarded against one who is insured against liability are to be paid by the insurer.[61] This involves not only construction of the terms of the contract of insurance,[62] but also the question whether the purposes of punishment and deterrence underlying the damages themselves are not only not accomplished when the insured is allowed to shift the penalty to the shoulders of an innocent party, but are actually frustrated when the wrongdoer is thus afforded protection against what is essentially a criminal punishment imposed by the law. If punitive damages are supported by any sound policy, that policy would appear to demand that they shall not be covered by liability insurance.[63] Some of the small number of decided cases, however, possibly having in mind the supposed function of punitive damages in providing a substitute for attorney's fees, have held that the liability contract effectively covers such damages.[64] A different question is presented where the claim is for coverage of the insured's vicarious liability for punitive damages. The prevailing view, at least if there is no explicit policy provision to the contrary, is that the insurance will be effective to protect the insured against any liability which is purely vicarious, although not for the insured's own wrongdoing.[65]

defendants in § 1983 actions. Smith v. Wade, 1983, ___ U.S. ___, 103 S.Ct. 1625, 75 L.Ed.2d 632.

58. Miller v. Blanton, 1948, 213 Ark. 246, 210 S.W.2d 293; Eaddy v. Greensboro-Fayetteville Bus Lines, 1939, 191 S.C. 538, 5 S.E.2d 281; Atlantic Greyhound Corp. v. Austin, 1945, 72 Ga.App. 289, 33 S.E.2d 718; Western Coach Corp. v. Vaughn, 1969, 9 Ariz. App. 336, 452 P.2d 117; Clemmons v. Life Insurance Co. of Georgia, 1968, 274 N.C. 416, 163 S.E.2d 761. See Notes, 1942, 30 Geo.L.J. 294; 1961, 70 Yale L.J. 1296.

59. Occasional courts have distinguished between corporate and individual employers, holding the latter not liable for punitive damages in the absence of approval or ratification. State ex rel. United Factories v. Hostetter, 1939, 344 Mo. 386, 126 S.W.2d 1173. Most courts make no such distinction. See State ex rel. Coffelt v. Hartford Accident & Indemnity Co., 1958, 44 Tenn.App. 405, 314 S.W.2d 161, holding a sheriff liable for punitive damages for the tort of his deputy.

60. The classic diatribe to this effect is in Goddard v. Grand Trunk Railway of Canada, 1869, 57 Me. 202.

61. See R. Keeton, Insurance Law Basic Text, 1971, §§ 5.3(f), 5.4(b); Morris, Punitive Damages in Personal Injury Cases, 1960, 21 Ohio St.L.J. 216; Long, Insurance Protection Against Punitive Damages, 1965, 32 Tenn.L.Rev. 573; Brin, Punitive Damages and Liability Insurance, 1964, 31 Ins.Couns.J. 265; Marks, Automobile Insurance Coverage for Punitive Damages, [1966] Ins.L.J. 480; Notes, 1966, 20 U.Miami L.Rev. 192; 1966, 39 Temp.L.Q. 459; 1966, 25 Md.L.Rev. 326.

62. Thus in Abbott v. Western National Indemnity Co., 1958, 165 Cal.App.2d 302, 331 P.2d 997, a policy excluding liability for intentional misconduct was held not to cover punitive damages for assault and battery. See R. Keeton, Insurance Law Basic Text, 1971, §§ 5.3(f), 5.4(b).

63. It was so held in Northwestern National Casualty Co. v. McNulty, 5th Cir. 1962, 307 F.2d 432; Nicholson v. American Fire & Casualty Insurance Co., Fla. App.1965, 177 So.2d 52; Lo Rocco v. New Jersey Manufacturers Indemnity Insurance Co., 1964, 82 N.J. Super. 323, 197 A.2d 591, affirmed mem. 42 N.J. 144, 199 A.2d 655; Crull v. Gleb, Mo.App.1964, 382 S.W.2d 17; American Surety Co. of New York v. Gold, 10th Cir. 1966, 375 F.2d 523.

64. Lazenby v. Universal Underwriters Insurance Co., 1964, 214 Tenn. 639, 383 S.W.2d 1; Southern Farm Bureau Casualty Insurance Co. v. Daniel, 1969, 246 Ark. 849, 440 S.W.2d 582; Carroway v. Johnson, 1965, 245 S.C. 200, 139 S.E.2d 908; Pennsylvania Threshermen & Farmers Mutual Casualty Insurance Co. v. Thornton, 4th Cir. 1957, 244 F.2d 823; General Casualty Co. of America v. Woodby, 6th Cir. 1956, 238 F.2d 452.

65. Commercial Union Insurance Co. of New York v. Reichard, S.D.Fla.1967, 273 F.Supp. 952; Sterling Insurance Co. v. Hughes, Fla.App.1966, 187 So.2d 898; Ohio Casualty Insurance Co. v. Welfare Finance Co., 8th Cir. 1934, 75 F.2d 58, certiorari denied 295 U.S. 734, 55 S.Ct. 645, 79 L.Ed. 1682.

A problem which has arisen to haunt the courts in the 20th century concerns the "mass disaster" [66] litigation, in which the defendant, as for example by discharging hazardous waste or by putting a drug or a product on the market has caused injury to a very large number of persons. How often is such a defendant to be punished? Is there no limiting rule analogous to double jeopardy? And is there any order of priority among the claimants? Confronted with this problem, in Roginsky v. Richardson-Merrell, Inc.,[67] Judge Friendly, refused, in the absence of controlling authority in the new York cases, to find a basis for punitive damages at all in the misconduct of the defendants. Such questions as these have stimulated re-examination of the policies and procedures for awarding punitive damages,[68] and can be expected to keep the controversy over punitive damages alive in the future.

It is generally agreed that punitive damages are a windfall to the plaintiff and not a matter of right, and that it is always within the discretion of the jury or trial judge to withhold them.[69] The greater number of courts have said that they are limited to cases in which actual compensatory damages are found by the jury. Sometimes this obviously means only that without a finding of such damages there is no cause of action at all, and nothing to support the award;[70] but some of these courts have gone further and have held that punitive damages cannot be sustained where a cause of action is found but only nominal damages are awarded.[71] Since it is precisely in the cases of nominal damages that the policy of providing an incentive for plaintiffs to bring petty outrages into court comes into play, the view very much to be preferred appears to be that of the minority which have held that there is sufficient support for punitive damages.[72]

It frequently is said [73] also that punitive damages must bear some reasonable proportion, or at least some undefined kind of relation, to the actual damages found, so that a

See R. Keeton, Insurance Law Basic Text, 1971, § 5.4(b); Long, Insurance Protection Against Punitive Damages, 1965, 32 Tenn.L.Rev. 573; Notes, 1966, 39 Temp.L.Q. 459; 1965, 25 Md.L.Rev. 326; 1969, 22 Sw. L.Rev. 433.

66. See the account of one such disaster in Rheingold, The MER/29 Story—An Instance of Successful Mass Disaster Litigation, 1968, 56 Cal.L.Rev. 116. The total claims for punitive damages alone ran to a total of hundreds of millions of dollars. See generally Owen, Punitive Damages in Products Liability Litigation, 1976, 74 Mich.L.Rev. 1257.

67. 2d Cir. 1967, 378 F.2d 832.

68. See Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 1982, 49 U.Chi.L.Rev. 1; Ellis, Fairness and Efficiency in the Law of Punitive Damages, 1982, 56 So.Cal.L.Rev. 1; Owen, Civil Punishment and the Public Good, 1982, 56 So.Cal.L.Rev. 103; Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 1983, 69 Va.L.Rev. 269.

69. Hodges v. Hall, 1916, 172 N.C. 29, 89 S.E. 802; Louisville & Nashville Railroad Co. v. Logan's Administratrix, 1917, 178 Ky. 29, 198 S.W. 537; Petrey v. Liuzzi, 1945, 76 Ohio App. 19, 61 N.E.2d 158; Luke v. Mercantile Acceptance Corp., 1952, 111 Cal.App.2d 431, 244 P.2d 764. Contra, Sample v. Gulf Refining Co., 1937, 183 S.C. 399, 191 S.E. 209; Nordstrom v. Miller, 1980, 227 Kan. 59, 605 P.2d 545.

70. See for example Schippel v. Norton, 1888, 38 Kan. 567, 16 P. 804; Hoagland v. Forest Park Highlands Amusement Co., 1902, 170 Mo. 335, 70 S.W. 878.

71. Richard v. Hunter, 1949, 151 Ohio St. 185, 85 N.E.2d 109; Kroger Grocery & Baking Co. v. Reeves, 1946, 210 Ark. 178, 194 S.W.2d 876; Ennis v. Brawley, 1946, 129 W.Va. 621, 41 S.E.2d 680; Behymer v. Milgram Food Stores, 1940, 151 Kan. 921, 101 P.2d 912; Suflas v. Cleveland Wrecking Co., E.D.Pa.1963, 218 F.Supp. 289.

72. Wardman-Justice Motors v. Petrie, 1930, 59 App.D.C. 262, 39 F.2d 512; Edwards v. Nulsen, 1941, 347 Mo. 1077, 152 S.W.2d 28; Crystal Dome Oil & Gas Co. v. Savic, 1931, 51 Idaho 409, 6 P.2d 155; Barber v. Hohl, 1956, 40 N.J.Super. 526, 123 A.2d 785; Scalise v. National Utility Service, 5th Cir. 1941, 120 F.2d 938 (Florida law).

This has been carried so far as to sustain punitive damages where it is clear that there is a cause of action, but no other damages are found by the jury. Clark v. McClurg, 1932, 215 Cal. 279, 9 P.2d 505 (no finding); Fauver v. Wilkoske, 1949, 123 Mont. 228, 211 P.2d 420 (finding of no actual damages).

73. Mitchell v. Randal, 1927, 288 Pa. 518, 137 A. 171; Cotton v. Cooper, Tex.Com.App.1919, 209 S.W. 135; Luke v. Mercantile Acceptance Corp., 1952, 111 Cal.App.2d 431, 244 P.2d 764; Ogilvie v. Fotomat Corp., 8th Cir. 1981, 641 F.2d 581 (citing Mo. cases); McDonald v. Bennett, 5th Cir. 1982, 674 F.2d 1080 (Tex. law), rehearing granted 679 F.2d 415. In Wehrman v. Liberty Petroleum Co., Mo.App.1964, 382 S.W.2d 56, it was said that punitive damages must bear some relation to the injury, but need not as to damages allowed by way of compensation.

The rule resulted in setting aside such verdicts as $100 actual and $14,900 punitive damages in Bangert v.

very small award of compensation will not support a very large penalty. Apparently, however, this has meant little more than that under the particular circumstances these courts do not like the size of some verdicts; and where the enormity of the defendant's outrage calls for it, very large awards of punitive damages, ranging far out of all conceivable proportion to the amount found by way of compensation, have been sustained.[74] A few courts have repudiated outright the necessity of any ratio or relation.[75] Most courts agree that evidence of the defendant's wealth may be received as bearing on the question of the amount which will adequately punish the defendant for the conduct.[76]



WESTLAW REFERENCES

civil tort /5 action* suit* /30 criminal /5 prosecution* /30 same single one /5 act* offense*

williams /3 dickenson /s 9 /3 847

topic(torts) & evidence /p acquit! convict! /p admissib! inadmissib!

topic(37) % topic(110)

Punitive Damages

court(ct) & punitive* exemplary /s damages

topic(negligence) /p punitive* exemplary /p damages

"alienation of affection*" & punitive* exemplary /s damages

fletcher /s "western national" /s 10 /3 376

employer* master* /p vicarious** /p liab! /p servant* agent* /p punitive* exemplary /p damages

punitive* exemplary /5 damages /p insurer

punitive* exemplary /5 damages /p "mass disaster"

Hubbard, 1955, 127 Ind.App. 579, 126 N.E.2d 778, transfer denied, 1957, 237 Ind. 5, 143 N.E.2d 285, and $1,250 actual and $25,000 punitive in Hall Oil Co. v. Barquin, 1925, 33 Wyo. 92, 237 P. 255.

74. Reynolds v. Pegler, S.D.N.Y.1954, 123 F.Supp. 36, affirmed 2d Cir. 1954, 223 F.2d 429, certiorari denied 350 U.S. 846, 76 S.Ct. 80, 100 L.Ed. 754 (outrageous libel; nominal damages and $175,000 punitive); Toomey v. Farley, 1956, 2 N.Y.2d 71, 156 N.Y.S.2d 840, 138 N.E.2d 221 (libel; six cents actual and $5,000 punitive); Livesey v. Stock, 1929, 208 Cal. 315, 281 P. 70 (battery; $750 actual and $10,000 punitive); Seaman v. Dexter, 1921, 96 Conn. 334, 114 A. 75 ($318 actual and $5,000 punitive); Pelton v. General Motors Acceptance Corp., 1932, 139 Or. 198, 7 P.2d 263, rehearing denied 139 Or. 198, 9 P.2d 128 ($225 actual, $5,000 punitive).

75. Finney v. Lockhart, 1950, 35 Cal.2d 161, 217 P.2d 19 (unfair competition; $1 actual, $2,000 punitive); Edwards v. Nulsen, 1941, 347 Mo. 1077, 152 S.W.2d 28 (libel; $1 actual, $25,000 punitive); Malco, Inc. v. Midwest Aluminum Sales, Inc., 1961, 14 Wis.2d 57, 109 N.W.2d 516 (no arbitrary rule that punitive damages cannot be 15 times actual damages); Wegner v. Rodeo Cowboys Association, D.C.Colo.1968, 290 F.Supp. 369, affirmed, 10th Cir. 1969, 417 F.2d 881, certiorari denied 398 U.S. 903, 90 S.Ct. 1688, 26 L.Ed.2d 60; Foster v. Floyd, 1964, 276 Ala. 428, 163 So.2d 213.

76. Phelan v. Beswick, 1958, 213 Or. 612, 326 P.2d 1034; Wilson v. Oldroyd, 1954, 1 Utah 2d 362, 267 P.2d 759; Allen v. Rossi, 1929, 128 Me. 201, 146 A. 692; Johnson v. Horn, 1930, 86 Mont. 314, 283 P. 427; Charles v. Texas Co., 1942, 199 S.C. 156, 18 S.E.2d 719. Contra: Texas Public Utilities Corp. v. Edwards, Tex.Civ.App.1936, 99 S.W.2d 420, error dismissed; Blackman v. Honer, 1925, 119 Kan. 404, 239 P. 750; Taulborg v. Andresen, 1930, 119 Neb. 273, 228 N.W. 528. See Notes, 1965, 19 Ark.L.Rev. 189; 1966, 20 U.Miami L.Rev. 465.

§ 3. Policy and Process

Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties. But the twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants.[1] The notion of "public policy" involved in private cases is not by any means new to tort law,[2] and doubtless has been with us ever since the troops of the sovereign first intervened in a brawl to keep the peace; but it is only in recent decades that its influence on tort law has been openly considered in judicial decisions, and not merely in commentaries on the law. The influence of public policy on tort law is apparent, and most likely to be controversial, when it comes to bear upon a proposed change that is accomplished by overruling an established precedent.[3] Although less

§ 3

1. Bohlen, Fifty Years of Torts, 1937, 50 Harv.L.Rev. 725.

2. Winfield, Public Policy and the English Common Law, 1928, 42 Harv.L.Rev. 76.

3. Concerning overruling decisions, see Lawmaking by Courts, infra, this section.

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SOUNDINGS

A Guest Editorial: The Expert Witness: The Whole Truth and Nothing But. . .

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The inequities, injustice, and insanity of the medical malpractice system in the United States are well known throughout the medical profession. As the push toward healthcare reform has swept our nation, an integral component of that change was to have been a restructuring of the tort system to a more efficient, cost effective, and equitable model for physicians and patients alike. The economic and emotional burden of malpractice must be addressed in a meaningful fashion, and malpractice differentiated from maloccurrence. There has been a conspicuous absence of concrete planning in this regard in the plans proffered thus far.

A widely held concern has been with the credibility of testimony of the plaintiff's experts with regard to the scientific foundation of their opinions. Without an independent peer review system in place within the legal framework, decisions may be made on the basis of emotion or on the persuasiveness of arguments not founded in scientific methodology. In her editorial in the June 16, 1994 issue of the *New England Journal of Medicine*, Marcia Angell, MD, eloquently recapitulated yet another example of this phenomena in *Daubert vs. Merrell Dow Pharmaceuticals, Inc.* (1). Out of deep concern, the *New England Journal of Medicine*, *The Journal of the American Medical Association*, and the *Annals of Internal Medicine* filed an amicus brief in this case with the U.S. Supreme Court. This document implored that a requirement for admission of evidence to a court proceeding come only from data published in a peer-review juried journal. The U.S. Supreme Court rejected this proposal. As Dr. Angell noted in the dissenting opinion of Chief Justice William Renquist, a deep concern was expressed that judges were clearly not qualified to make decisions on admissibility of data not published after traditional specialty review.

A little used, but very powerful mechanism for an aggrieved defendant physician who has been victimized by such an existing practice by a plaintiff's expert is already in place in every state in the nation—the state's Board of Medical Practice. Medical testimony given in a deposition or at trial is a part of the practice of medicine. Boards of medical practice seriously consider malpractice history as part of the licensing process and, as such, statements made by plaintiff's experts as well as defense experts should be considered as a part of medical competence. A demonstrated lack of understanding of medical information should be a matter of grave concern for a licensing body. Outright lies are perjury and can be communicated easily from the state certifying board to the Attorney General's office for appropriate legal action. It should be noted that perjury is a criminal offense and no longer a civil matter. If the offending expert offering testimony is not licensed in the jurisdiction in which he or she testified, the testimony can easily be forwarded to the authority of the state that does have jurisdiction over the physician's license.

The right to redress grievances for all patients must be protected. The freedom to give expert medical opinion for both the plaintiff and defendant is critical to our justice system. However, accountability for one's statements is the very foundation of our societal ethic. The American College of Obstetricians and Gynecologists has published a Committee Opin-

* Dr. Komins is a long-term subscriber who was the first to volunteer to write a Soundings article. We welcome other contributors for consideration.

† Ms. Komins is a second-year student of law at Georgetown University Law Center, Washington, DC.

ion regarding this matter (2). It is incumbent upon physicians who believe that they are victims of expert witnesses who have offered information that is untrue, unsupported in scientific publication, or lacking in an understanding of basic medical principles, to call such testimony to the attention of the certifying licensing body of their state who should have both the obligation and legal mandate to redress this grievance.

If a board of medical practice determines that an expert witness has perjured oneself or given testimony that demonstrates a lack of foundation in medical principles or in juried publications, a basis for an appeal will exist and the disciplinary action against the expert witness initiated.

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1. Angell M. Do breast implants cause systemic disease? Science in the courtroom. N Engl J Med 1994;330:1748.
2. American College of Obstetricians and Gynecologists. Ethical issues related to expert testimony by Obstetricians and Gynecologists. ACOG Committee Opinion 56. Washington, DC: ACOG, 1987.

UPCOMING SOUNDINGS ARTICLES

Hazards of Accelerated Action

Who Will Deliver Your Daughters in the 21st Century

Gender Bias?

Rapid Expansion of Managed Care on Academic Medical Centers

Effects of the Threat of Medical Malpractice Litigation and Other Factors on Birth Outcomes

Frank A. Sloan, Kathryn Whetten-Goldstein, Penny B. Githens and Stephen S. Entman

The Center for Health Policy, Research, and Education, Duke University, Durham, North Carolina

Med Care 1995;33:700–714

Medical malpractice claims resulting from birth-related injuries are relatively numerous, and obstetrics often is cited as a field in which the "medical malpractice crisis" is severe. Using data from two sources in Florida, the authors examined the influence of the threat of medical malpractice litigation on birth outcomes, along with other factors that influence such outcomes.

The authors hypothesized that the threat of tort liability influences quality of care and thereby influences claim frequency and losses from claims.

The Survey of Obstetrical Care was conducted during 1992 and focused on a target birth or fetal death that occurred in 1987. The survey included questions on pregnancy history, medical history before a pregnancy, prenatal and preventive care, birth outcomes, litigation, and mother's background. A total of 66 fetal and 128 infant deaths and 34 permanent birth-related impairments were included in the study. To obtain data on more fetal and infant deaths the authors used data from Florida's fetal death and linked birth/infant death files for 1987. They selected all fetal (633) and infant deaths (1284) and infants with low Apgar scores (1366) plus an 18 percent sample of all other live births. No information was available on birth outcomes after the first year.

Only in the case of fetal deaths was there any evidence that increased claim frequency improved birth outcomes. In three regressions, low Apgar, death within 5 days, and infant death, the sine of the coefficient for the threat was negative, implying higher claim frequency leads to poorer outcomes. However, the standard errors were high relative to the corresponding parameter estimates. When the threat was measured at the individual obstetrician level, higher claim frequency only improved birth outcomes in reducing fetal death rates. With total loss per exposure year as the measure of threat, the threat coefficient for fetal deaths was again significant.

Several other factors accounted for variations in birth outcome. Women with urinary tract infections during pregnancy were more likely to have experienced infant deaths within 5 days of birth. Nulliparous women had a lower probability of giving birth to children with adverse outcomes at 5 years. Having more than one birth in a year raised the probability of a low Apgar score. Previous spontaneous abortions and stillbirths led to an increased probability of fetal death and of an adverse outcome at 5 years. Having had a very low birth weight infant before the target pregnancy increased the probability of a low Apgar score, infant death, and adverse outcome at 5 years.

Among demographic characteristics, only race had a statistically significant impact on outcome for more than one type of outcome. The exception was fetal deaths. Adequate prenatal care was associated with higher Apgar scores, fewer deaths within 5 days, and fewer adverse outcomes at 5 years. Several problems during labor and delivery accounted for differences in birth outcome. Placental abruption and previa resulted in a lower fetal death rate but higher rates of low Apgar scores, deaths at 5 days, and infant death. Breech presentation increased the probability of a low Apgar score and death at 5 days. Multiple births led to adverse outcomes in all categories except fetal deaths. Preterm delivery increased the probability of bad outcomes in all five regressions. Having Medicaid coverage increased rates of death at 5 days, infant death, and adverse outcome at 5 years. Uninsured persons had higher rates of low Apgar scores and infant death.

The threat of medical malpractice litigation had no effect on the probability of a fetal death. Claim frequency had a negative impact on infant death. Both results imply that an increased threat leads to poorer birth outcomes.

The fetal death rate was decreased by target birth being the first and increased by maternal history of previous birth resulting in death; being single; and being a preterm delivery. The probability of a low Apgar score was increased by maternal history of a previous birth resulting in death; being single; being Hispanic or nonwhite; being a preterm delivery, and being a multiple birth. The probability of an infant death was increased by the same factors as low Apgar score except that the level 3 obstetrical units had a higher rate of infant death, and having been unmarried had no effect.

(Tort reform has been high on the political agenda of organized medicine for some time, because the threat of malpractice litigation is alleged to be one cause of the escalation of healthcare costs. Those who favor the current fault-based system for resolving medical malpractice disputes claim that such a system ultimately improves health care by ensuring that physicians provide state-of-the-art care for their patients. The present study from the Center for Health Policy, Research, and Education at Duke University demonstrates that the threat of malpractice litigation did not improve birth outcomes.

The study was conducted in Florida because of the frequency of malpractice claims in that state, and because closed malpractice claims are on file for public use. A wide variety of characteristics regarding physicians, patients, medical and obstetric care, and perinatal outcomes were analyzed. For validation, the obstetric outcomes also were evaluated in two separate data bases. The authors found that adverse perinatal outcomes were related to a number of demographic and obstetric factors such as short birth intervals, lack of prenatal care, race, breech presentation, multiple births, and urinary tract infection. These anticipated correlations further validate the quality of the data and its analysis.

Savage found that obstetricians in the U.S. and the U.K. regard the fear of litigation as the single most important reason for the rise in the cesarean delivery rate, which occurred between 1960 and 1980 (In T Chard, MPM Richards, eds. *Obstetrics in the 1990s: Current Controversies*. New York: Cambridge University Press, pp. 183–184). In a study of 31 hospitals in New York State, Localio et al. found a positive association between malpractice claims risk and the rate of cesarean delivery (J Am Med Assoc 1993;269: 366). A more recent study in the state of Washington did not support an association between actual malpractice experience or exposure of individual physicians and an increase in the use of prenatal resources or cesarean deliveries for the care of low risk obstetric patients (L-M Baldwin et al., J Am Med Assoc 1995;274:1606). However, this study did not address the question of whether obstetric practice was affected by how physicians perceived the risk of malpractice litigation.

Taken together, these studies suggest that the perceived threat, if not the actual experience of malpractice litigation, increases the use of expensive obstetric technology without a commiserate decrease in untoward perinatal outcomes. Such studies should be in the hands of healthcare policy experts and legislators when they debate issues relating to tort reform.—WAB)

Read 810 F. 2d 162
re Limitation re
Officers

Cont'd HAZEN v. Mun. of Arch
Punitive
718 F2d 456

Look up
Lambert
v. Merrill Dow
120 L.Ed 2d 469

The trial court was specifically troubled by the fact that one of two individuals who are arrested at the same time for the same crime might receive a dividend while the other might not. This could occur, for example, if one cannot make bail and therefore spends ten days in jail. Later, both are convicted and sentenced to serve ten days in jail. The one who could not make bail gets credit for the time already served and therefore does not spend any time in jail as an incarcerated felon. The other is incarcerated and forfeits his or her dividend.

The state responds that both felons in the trial court's example would be ineligible for dividends. According to the state, even if an individual is sentenced only to "time served," the incarceration is deemed to have commenced on the date of sentencing and therefore will be deemed to have been served "as a result of the conviction." The state concedes that some criminals who cause harm to victims may continue to receive a dividend while others who cause harm do not. The state argues, however, that the distinctions drawn by AS 43.23.005(d) are sufficiently related to the statute's purpose to meet the requirements of the equal protection clause of the Alaska Constitution. We agree.

III. CONCLUSION

An individual's interest in a permanent fund dividend, like other economic interests, is entitled to minimum scrutiny. Therefore, the state must show only that its purposes are legitimate and that the challenged statute bears a fair and substantial relationship to these purposes. Since AS 43.23.005(d) bears a fair and substantial relationship to the legitimate goal of compensating crime victims, the statute does not violate the equal protection clause of the Alaska Constitution. Since the federal equal protection clause is less protective of individual rights than Alaska's equal protection clause, the statute also does not violate the equal protection clause of the United States Constitution. The judgment of the superior court is REVERSED.

who serve time in prison contribute to the incarceration costs incurred by the state.



CITIZENS COALITION FOR TORT REFORM, INC., Appellant,

v.

Stephen A. McALPINE, Lt. Governor of the State of Alaska; Alaska Academy of Trial Lawyers, Appellees.

No. S-3714.

Supreme Court of Alaska.

April 26, 1991.

Tort reform group sued state to require certification of initiative measure setting limitations on attorneys' contingent fee recoveries. The Superior Court, Third Judicial District, Karen Hunt, J., dismissed case and appeal was taken. The Supreme Court, Burke, J., held that: (1) proposed initiative was attempt to prescribe a rule of court; (2) State Constitution precluded use of initiative to prescribe such a rule; and (3) trial court did not abuse discretion by awarding partial attorneys' fees to state and to trial lawyers' association which had intervened in case.

Affirmed.

1. Statutes ⇐303

Initiative proposal limiting maximum recovery on attorney contingent fee agreements is an attempt to prescribe a rule of court.

2. Statutes ⇐303

State constitutional provision authorizing judiciary to prescribe rules precluded initiative proposal setting forth limitations upon attorney contingent fee recoveries. Const. Art. 11, § 7.

3. Costs ⇐194.42

Trial court did not abuse discretion in awarding partial attorneys' fees to state and to trial lawyers' association, to cover costs of defending suit challenging refusal of lieutenant governor to certify initiative measure calling for limitations on contingent fee agreements; group proposing initiative had not provided enough information about itself to determine whether it would have had sufficient economic incentive to file the suit so as to be exempt, as public interest litigant, from paying fees, even if action had involved only narrow issues lacking general importance.

Michael L. Lessmeier, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for appellant.

Virginia B. Ragle, Asst. Atty. Gen., Douglas B. Baily, Atty. Gen., Juneau, for appellee McAlpine.

Avrum M. Gross, Gross & Burke, Juneau, for appellee Alaska Academy of Trial Lawyers.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

In this case the lieutenant governor denied certification of an initiative that would have set maximum allowable levels of attorney's fees in personal injury cases. The lieutenant governor found that the initiative was an attempt to prescribe a rule of court, a subject that the Alaska Constitution expressly restricts from the people's power to legislate by initiative. On a motion for summary judgment, the superior court upheld the lieutenant governor's decision. We affirm.

I

In August 1987, Citizens Coalition for Tort Reform, Inc. ("Coalition") filed with Lieutenant Governor McAlpine an application for certification of an initiative entitled: "An Act relating to civil liability; and relating to contingency agreements in connection with personal injury actions." [1] Sections 1 and 2 of the initiative proposed to alter the statutory law governing apportionment of damages and contribution among tortfeasors. Section 3 of the initiative proposed to add the following new statute to AS 09.17:

> (a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for personal injury in excess of the following limits:
>
> (1) Thirty-three and one-third percent of the first one hundred thousand dollars ($100,000) recovered;
>
> (2) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered;
>
> (3) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000).
>
> Such limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.
>
> (b) For purposes of this section:
>
> (1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office overhead costs or charges shall not be deductible disbursements or costs for such purposes.

After reviewing the initiative and a legal opinion on the initiative prepared by the attorney general, the lieutenant governor denied certification on October 11, 1987.

1. "An initiative is proposed by filing an application with the lieutenant governor." AS 15.45.020. The lieutenant governor shall review the application and shall either certify it or notify the initiative committee of the grounds for denial." AS 15.45.070.

FRE 702

The basis of denial was that the proposed regulation of attorney's fees in section 3 of the initiative constituted an attempt to prescribe a rule of court, a subject that both Article XI, section 7 of the Alaska Constitution and AS 15.45.010 restrict from the people's power to legislate by initiative.[2]

In November 1987, the Coalition filed a complaint in superior court seeking a temporary restraining order that would direct the lieutenant governor to certify the initiative and to prepare the initiative petitions. The Alaska Academy of Trial Lawyers ("AATL") intervened in the action, and they and the attorney general, appearing on behalf of the lieutenant governor, filed answers to the Coalition's complaint. After oral argument, the trial court denied the Coalition's motion for a temporary restraining order. We denied the Coalition's petition for review in December 1987.

The Coalition removed section 3 from the initiative and resubmitted it to the lieutenant governor, who certified it in that form. The voters adopted that truncated version of the initiative at the 1988 general election. Soon after the election, in February 1989, the Coalition resumed litigation over the lieutenant governor's refusal to certify the initiative in its original form by filing for summary judgment in the superior court. The Coalition sought a ruling that section 3 of the original initiative did not propose to enact a constitutionally or statutorily restricted court rule. The state and AATL filed cross motions for summary judgment. In August 1989, the superior court, Judge Karen L. Hunt, held that section 3 of the Coalition's original initiative was "an attempt to prescribe a rule of Court, as that phrase is used in Article 11, Section 7, of the Constitution." Accordingly, the court denied the Coalition's motion and granted both cross motions. The superior court also awarded partial attorney's fees to the state and to AATL. The Coalition appealed.

II

The primary dispute in this case presents two related questions of law. First, we must decide whether a limit on attorney contingent fees is necessarily classifiable as a rule of court. Second, if a contingent-fee limit is a rule of court, we must decide whether article XI, section 7 of the constitution removes such a rule from the scope of the people's power to legislate by initiative. We address each issue in turn.[3]

A

[1] As a threshold matter, the lieutenant governor and the superior court both decided that section 3 of the Coalition's proposed initiative constituted an attempt to prescribe a rule of court. On appeal, the state and AATL argue that the decisions below on this point were correct. In essence, those decisions and appellees' arguments all rely upon the conclusion that it is within this court's rule-making authority to prescribe a limit on contingent fees.

It is true that this court possesses extensive rule-making authority. The sources of that authority are two separate provisions

2. "The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation." Alaska Const. art. XI, § 7. Alaska Statute 15.45.010 provides that the people may exercise, through the initiative, the law-making powers of the legislature, subject to the same restrictions that appear in article XI, § 7.

3. The superior court granted summary judgment after deciding as a matter of law that section 3 of the proposed initiative included a constitutionally restricted subject. We review this appeal from the grant of summary judgment *de novo*. *Grand v. Municipality of Anchorage*, 753 P.2d 141, 143 n. 3 (Alaska 1988).

When reviewing questions of law *de novo*, the court's duty is to adopt the rule of law that is most persuasive in light of precedent, reason and policy. *Williford v. L.J. Carr Investments, Inc.*, 783 P.2d 235, 236 (Alaska 1989).

When construing constitutional provisions we are especially sensitive to policy concerns, because—as we explained in *Thomas v. Bailey*, 595 P.2d 1, 4 (Alaska 1979)—"a constitution is a document 'unchangeable by ordinary means,' *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed 60, 73 (1803), which 'must be considered as a living document adaptable to changing conditions and circumstances unanticipated at the time it was written.' *Warwick v. State ex rel. Chance*, 548 P.2d 384, 391 (Alaska 1976)."

Benner v. Wichman

Benner was a T.P. D who could have, but did not, joined a 1st Tier party K to K.

At trial, Benner wanted to instruct the jury to determine the fault of K to K, which was a nonparty.

T held a "parties" in §09.17.080 meant "party to the K" and not "persons involved in the accident" (Ala case) - or "all persons whose negl contributed to all injuries (Fed) et in casebre)

Result was no apportionment of fault to the nonparty K to K.

Q: Pg 956-7: Agree that "holding" legal opportunity is avail as a means of proving in affirm D's case that the K is more likely the cause or a cause to form on definitive "parties" or is it all holding each open legal opportunity of fault by nonparties?

A: Probably not, since fault allocn only among parties to K.

∴ why did T leave door open to legal opportunity to

~~John Comeau~~ 7.26

FNTA
Archi corr

18 pgs?

666-2330

7.6.94 fax

Dir = Paul Grossi
State Workers
Comp Bd.

465-2790

Nov, 1992 Pursel exposure Lungs, total Limitation Hearing loss Time loss Perm Partial impairment (60% x $135,000)

NO P&S suffered
NO loss of consortium

Avg awards =
1995 Annual Report =

Risk Mgmt Assoc
- Start w/ Brad Thompson
Kirsh Consensus
Archi 262-5190

Allocation of Liability
Comparative negligence

Feldman suggested only to go
Allocate to Nonparties, but
no allocation to Plaintiff

Depending on Jurisdiction, Plaintiff's Counsel may or may not want to name Employer as a party.

Cooper v. Aaronson

Client recovered by
court of pleas amount after
deducting state fees & cost of
fees & BP.
- 100K W.C. & no
- 500K CKN v. BP

100K is reduced by
atty's 1/3 contingent fee.
Contingent low. For years.

That part of allocation re
fees

to do allocation to non-lawyers
but no allocation to client.

(mine) = Gentle entity -
= Good Samaritan
= someone who can't
get sue on.
but allowed to shut those
who are here.

~~Carl Voigt Landers~~

Comp. system.

Make address to

Gail Voegtlander 700
769-5

At = when were talking about allocation of fault to nonparties, were talking about comparative negl.

Cooper v. Argonaut Ins, 556 P.2d 525 (Ak 1976)

Reimbursement to elec under 23.30.015(g) interpreted to mean that the elec's contingent fee contract fee would be reduced but the recovery of elec.

R: To prevent elec fm being unjustly enriched at expense of ee.

Lake v. Cowtin Marine:

Where ee recd W.C. benefits fm elec, and sued Cherry Picker in 3rd party K, and where there was an express indemnity between the Cherry Picker and the elec, the ct held that the Cherry Picker could only show that elec was totally at fault under AS09.17.080(a)(4), but could not show that it was partially at fault.

The ct denied Cherry Pickers argmt that under 9.17.080 it could allocate partial fault to elec.

The Ct reasoned ~~that the~~ exclusive provisions of the W.C. Act precluded

Apportionment of Losses

Pt = §16 = Lien Amt, not

Pt = what we're losing is reducing amt of the lien

~~existing~~ loss

Recap: $1,000,000, 5 pays 50K - 1/3 x.
CER

case.[20] Persuaded by arguments such as these, many courts have emphasized that the instruction should be reserved for exceptional situations where called for by the unique facts of a particular case,[21] and some have more generally disapproved the unavoidable accident instruction for use in negligence cases altogether.[22] Probably a majority of jurisdictions still permit the instruction in appropriate cases, however, and the instruction is still stoutly defended as helpful in focusing the issues in proper cases.[23] Neither the unavoidable accident doctrine nor instructions thereon should be expected to wither away completely any time soon because of the notion's underlying logical simplicity and because such instructions, properly applied, may usefully serve to translate the arcane words and concepts of the law into a common sense perspective of everyday life and experience that jurors can readily understand.[24]

WESTLAW REFERENCES

272k140 /p "unavoidable accident"

heart coronary epilep! faint! /10 seizure* attack* & "unavoidable accident"

brown /5 kendall /15 60 /5 292

jury /s instruct! /s "unavoidable accident" /s permit! permissible allow!

20. See, e.g., Butigan v. Yellow Cab Co., 1958, 49 Cal.2d 652, 320 P.2d 500, 65 A.L.R.2d 1; Graham v. Rolandson, 1967, 150 Mont. 270, 435 P.2d 263, 273.

21. See, e.g., Del Vecchio v. Lund, S.D.1980, 293 N.W.2d 474; Damron v. Hagy, 1979, 220 Va. 455, 258 S.E.2d 517, 518 (occasion for use of instruction "'rare'"; "'only where there is a reasonable theory of the evidence under which the parties involved may be held to have exercised due care'"); Guanzon v. Kalamau, 1965, 48 Hawaii 330, 402 P.2d 289.

22. Graham v. Rolandson, 1967, 150 Mont. 270, 435 P.2d 263; Miller v. Alvey, 1965, 246 Ind. 560, 207 N.E.2d 633; Koll v. Manatt's Transportation Co., Iowa 1977, 253 N.W.2d 265; Lewis v. Buckskin Joe's Inc., 1964, 156 Colo. 46, 396 P.2d 933; Fenton v. Aleshire, 1964, 238 Or. 24, 393 P.2d 217; Schaub v. Linehan, 1968, 92 Idaho 332, 442 P.2d 742; Camaras v. Moran, 1966, 100 R.I. 717, 219 A.2d 487; George v. Guerette, Me.1973, 306 A.2d 138; Alexander v. Delgado, 1973, 84 N.M. 717, 507 P.2d 778 (summarizing arguments); Vespe v. DiMarco, 1964, 43 N.J. 430, 204 A.2d 874. See also Deskin v. Brewer, Mo.App.1979, 590 S.W.2d 392, 402 (at least in auto collision cases, per M.A.I. 1.01 (2d ed.1969)); Maxwell v. Olsen, Alaska 1970, 468 P.2d 48 (semble); City of Phoenix v. Camfield, 1965, 97 Ariz. 316, 400 P.2d 115 (semble); Cox v. Vernieuw, Wyo. 1980, 604 P.2d 1353 (Act of God defense not appropriate in negligence cases).

§ 30. Elements of Cause of Action

Negligence, as we shall see,[1] is simply one kind of conduct. But a cause of action founded upon negligence, from which liability will follow, requires more than conduct. The traditional formula for the elements necessary to such a cause of action may be stated briefly as follows:[2]

1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.[3]

2. A failure on the person's part to conform to the standard required: a breach of the duty. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.

23. See, e.g., Anderton v. Montgomery, Utah 1980, 607 P.2d 828, 835 (in light of instructions on res ipsa loquitur, it was "not only permissible but indeed proper that the need to find negligence, by one means or another, be reemphasized"); Butigan v. Yellow Cab Co., 1958, 49 Cal.2d 652, 320 P.2d 500, 508 (dissenting opinion) (instruction "can lead only to *better understanding*").

24. Indeed, even if purged, such instructions have an uncanny habit of sneaking back. See, e.g., Ernst v. Sparacino, 1978, 177 Ind.App. 610, 380 N.E.2d 1271.

§ 30

1. See infra, § 31.

2. See, e.g., Knight v. United States, E.D.Mich. 1980, 498 F.Supp. 315; Anderson v. Green Bay & Western Railroad, 1980, 99 Wisc.2d 514, 299 N.W.2d 615; Arneson v. City of Fargo, N.D.1981, 303 N.W.2d 515; ABC Builders, Inc. v. Phillips, Wyo.1981, 632 P.2d 925; Lawyers Surety Corp. v. Snell, Tex.Civ.App.1981, 617 S.W.2d 750; Quillen v. Quillen, Ala.1980, 388 So.2d 985; Beauchene v. Synanon Foundation, Inc., 1979, 88 Cal. App.3d 342, 151 Cal.Rptr. 796; Strother v. Hutchinson, 1981, 67 Ohio St.2d 282, 423 N.E.2d 467 (including element of plaintiff's freedom from contributory negligence). See generally Second Restatement of Torts, § 281.

3. See infra, ch. 9.

3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.[4]

4. Actual loss or damage resulting to the interests of another.[5] Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred.[6] The threat of future harm, not yet realized, is not enough.[7] Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.[8]

It follows that the statute of limitations is generally held not to begin to run against a negligence action until some damage has occurred.[9] Real difficulties have resulted where, as is frequently the case in actions for medical malpractice[10] and in products liability actions involving toxic drugs or chemicals,[11] the statute has run before the plaintiff discovers that he has suffered injury, and sometimes even before the plaintiff himself has suffered the injury. The older approach to such cases was a literal application of the statute to bar the action, regarding it as intended to protect the defendant, not only against fictitious claims, but also against the difficulty of obtaining evidence after the lapse of time even when the defendant is confronted with a genuine one—the hardship upon the plaintiff being considered as merely part of the price to be paid for such protection.[12]

4. See, e.g., Beauchene v. Synanon Foundation, Inc., 1979, 88 Cal.App.3d 342, 151 Cal.Rptr. 796 (stated as separate elements); Reiman Associates, Inc. v. R/A Advertising, Inc., 1981, 102 Wisc.2d 305, 306 N.W.2d 292 (legal cause comprised of two components, cause in fact and proximate cause). See infra, ch. 7.

5. See, e.g., Richards v. City of Lawton, Okl.1981, 629 P.2d 1260; Cannon v. Sears Roebuck & Co., 1978, 374 Mass. 739, 374 N.E.2d 582.

6. See Hall v. Cornett, 1952, 193 Or. 634, 240 P.2d 231; Kirby v. Carlisle, 1955, 178 Pa.Super. 389, 116 A.2d 220; Alhino v. Starr, 1980, 112 Cal.App.3d 158, 169 Cal.Rptr. 136; Second Restatement of Torts, § 907, Comment *a*.

7. Johnson v. Rouchleau-Ray Iron Land Co., 1918, 140 Minn. 289, 168 N.W. 1. See Alhino v. Starr, 1980, 112 Cal.App.3d 158, 169 Cal.Rptr. 136. It should be noted, however, that the danger of future harm may in itself cause present damage, as in nuisance cases, where it interferes with the enjoyment of land. See infra, ch. 15.

8. Such a statement must, however, be qualified to the extent that, as in the case of other torts, where irreparable injury is threatened, a court of equity may act by injunction to prevent the harm before it occurs. Even here the damage, even though only potential, is the basis for granting relief.

9. See, e.g., White v. Schnoebelen, 1941, 91 N.H. 273, 18 A.2d 185; Cannon v. Sears, Roebuck & Co., 1978, 374 Mass. 739, 374 N.E.2d 582; Locke v. Johns-Manville Corp., Va.1981, 275 S.E.2d 900 (asbestosis: statute runs from date of injury, which is date when cancer or lung impairment begins, rather than date of discovery or exposure). But cf. Steinhardt v. Johns-Manville Corp., 1981, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297, dismissed 456 U.S. 967, 102 S.Ct. 2226, 72 L.Ed.2d 840 (asbestosis: statute runs from date of last exposure; discovery rule must come from legislature); H. Hirschfield Sons Co. v. Colt Industries Operating Corp., 1981, 107 Mich.App. 720, 309 N.W.2d 714 (statute runs from date of wrong, not damage: date of defective installation of truck scales). Compare Martin v. Edwards Laboratories, Sup.1982, 112 Misc.2d 93, 446 N.Y.S.2d 182 (cerebral hemorrhage from teflon particles in bloodstream from broken valve of artificial heart valve; injury occurred upon breakage of valve); Klein v. Dow Corning Corp., 2d Cir.1981, 661 F.2d 998 (injury occurred and statute began to run when silicone breast prosthesis burst, not when implanted).

As was observed long ago, "[i]t would be a laborious and unprofitable task to examine all the cases which have been decided on the statute of limitations." Fries v. Boisselet, Pa.1822, 9 Serg. & R. 128, 130 (Tilghman, C.J.).

10. See, e.g., Lilich, The Malpractice Statute of Limitations in New York and Other Jurisdictions, 1962, 47 Corn.L.Q. 339.

11. See Anthony v. Koppers Co., 1980, 284 Pa. Super. 81, 425 A.2d 428 (Spaeth, J.) (cancer from coke oven emissions; scholarly and exhaustive analysis), reversed, 1981, 496 Pa. 119, 436 A.2d 181. Comment, 1978, 7 Ford.Urb.L.J. 55 (asbestosis); Note, 1983, 96 Harv.L.Rev. 1683.

12. Hawks v. De Hart, 1966, 206 Va. 810, 146 S.E. 2d 187; Vaughn v. Langmack, 1964, 236 Or. 542, 390 P.2d 142; Pasquale v. Chandler, 1966, 350 Mass. 450, 215 N.E.2d 319.

The apparent injustice and illogic of this approach [13] has led to the adoption by many courts of various devices to circumvent the rule. Thus, the negligent treatment, or at least the defendant's duty, is held to continue until the relation of physician and patient has ended; [14] or the court finds fraudulent concealment of the damage or its cause, which tolls the running of the statute; [15] or, in some jurisdictions, the defendant's silence, where a confidential relationship gives rise to a duty to speak; [16] or the failure to discover and remove the sponge or other foreign object left in the plaintiff's body is held to be "continuing" negligence.[17]

Beginning in the medical malpractice area, a wave of decisions and legislative enactments has met the issue head-on by tolling the statute until the plaintiff has in fact discovered that he has suffered injury, or by the exercise of reasonable diligence should have discovered it.[18] This "discovery rule" appears infectious, and it has been spread-

13. "Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff." Frank, J., dissenting in Dincher v. Marlin Firearms Co., 2d Cir.1952, 198 F.2d 821, 823, quoted approvingly in Patterson v. Her Majesty Industries, Inc., E.D.Pa.1978, 450 F.Supp. 425, 428.

14. Samuelson v. Freeman, 1969, 75 Wn.2d 894, 454 P.2d 406; Borgia v. City of New York, 1962, 12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777 (medical malpractice); Ballenger v. Crowell, 1978, 38 N.C.App. 50, 247 S.E.2d 287 (same); Wilkin v. Dana R. Pickup & Co., Sup.1973, 74 Misc.2d 1025, 347 N.Y.S.2d 122 (accountant); Greene v. Greene, 1982, 56 N.Y.2d 86, 451 N.Y.S.2d 46, 436 N.E.2d 496. See Flora's Card Shop, Inc. v. Paul Krantz & Co., Sup.1981, 111 Misc.2d 907, 445 N.Y.S.2d 392 (insurance broker: exception not applied). See generally Zepkin, Virginia's Continuing Negligent Treatment Rule: *Farley v. Goods* and *Fenton v. Danaceau*, 1981, 15 U.Rich.L.Rev. 231.

15. Brown v. Bleiberg, 1982, 32 Cal.3d 426, 186 Cal.Rptr. 228, 651 P.2d 815; Krueger v. St. Joseph's Hospital, N.D.1981, 305 N.W.2d 18; Van Bronckhorst v. Taube, 1976, 168 Ind.App. 132, 341 N.E.2d 791 (equitable fraudulent concealment doctrine, not similar statute, applied to medical malpractice claim); Alford v. Summerlin, Fla.App.1978, 362 So.2d 103 (doctor allegedly lied to father concerning cause of daughter's death).

16. Morrison v. Acton, 1948, 68 Ariz. 27, 198 P.2d 590 ("constructive fraud"); Hardin v. Farris, 1974, 87 N.M. 143, 530 P.2d 407; Garcia v. Presbyterian Hospital Center, 1979, 92 N.M. 652, 593 P.2d 487 (dissent argued that fraudulent concealment exception should not apply since no confidential relationship existed between hospital and patient); McClung v. Johnson, Tex.Civ.App.1981, 620 S.W.2d 644 (legal malpractice). But cf. Nardone v. Reynolds, Fla.1976, 333 So.2d 25, 39, conformed to, 11th Cir., 538 F.2d 1131, rehearing denied, 11th Cir., 546 F.2d 906 (duty is only "to disclose known facts and not conjecture and speculation as to possibilities"). This is said to be the minority rule, see Louisell & Williams, Medical Malpractice, 1981, ¶ 13.11, such that most courts require something more than mere silence in the way of some affirmative act or representation designed to prevent discovery of the cause of action. Urchel v. Holy Cross Hospital, 1980, 82 Ill.App. 3d 1050, 38 Ill.Dec. 314, 403 N.E.2d 545.

17. Frazor v. Osborne, 1966, 57 Tenn.App. 10, 414 S.W.2d 118, appeal after remand, 425 S.W.2d 768; Flanagan v. Mount Eden General Hospital, 1969, 301 N.Y.S.2d 23, 24 N.Y.2d 427, 248 N.E.2d 871 (clamps); Shillady v. Elliot Community Hospital, 1974, 114 N.H. 321, 320 A.2d 637; Hill v. Clarke, 1978, ___ W.Va. ___, 241 S.E.2d 572 (needle left in dishwasher's foot); Stoner v. Carr, 1976, 97 Idaho 641, 550 P.2d 259 (needle left in plaintiff's abdomen); Fox v. Passaic General Hospital, N.J.Super.1975, 135 N.J.Super. 108, 342 A.2d 859, affirmed, 1976, 71 N.J. 122, 363 A.2d 341 (drain from abdomen); Darragh v. County of Nassau, Sup.1977, 91 Misc.2d 53, 397 N.Y.S.2d 553, affirmed, 1978, 63 A.D.2d 1010, 405 N.Y.S.2d 1020 (failure to remove one IUD before inserting another one). But see Owen v. Wilson, 1976, 260 Ark. 21, 537 S.W.2d 543; Rockwell v. Ortho Pharmaceutical Co., N.D.N.Y.1981, 510 F.Supp. 266 (foreign object medical malpractice rule not extended to manufacturer of IUD in products liability action). See also Banks v. Dalbey, 1980, 245 Ga. 162, 264 S.E.2d 4 (failure to remove glass in hand; foreign object rule not applied since doctor's failure was misdiagnosis); Soto v. Greenpoint Hospital, Sup.1980, 76 A.D.2d 928, 429 N.Y.S.2d 723 (small toy in 5-year-old's esophagus; claim "founded exclusively upon diagnostic judgment or discretion"). See generally Annot., 1976, 70 A.L.R. 3d 7.

18. Franklin v. Albert, 1980, 381 Mass. 611, 411 N.E.2d 458; Moran v. Napolitano, 1976, 71 N.J. 133, 363 A.2d 346 (medical malpractice generally, including misdiagnosis); Foil v. Ballinger, Utah 1979, 601 P.2d 144; Newberry v. Tarvin, Tex.Civ.App.1980, 594 S.W.2d 204; Annot., 1961, 80 A.L.R.2d 368 (doctors and other medical practitioners). But see Alberts v. Giebink, S.D.1970, 299 N.W.2d 454; Rod v. Farrell, 1980, 96 Wis.2d 349, 291 N.W.2d 568; Robinson v. Weaver, Tex.1977, 550 S.W.2d 18 (inapplicable to misdiagnosis cases); Miller v. Duhart, Mo.App.1982, 637 S.W.2d 183. See generally Sonenshein, A Discovery Rule in Medical Malpractice: Massachusetts Joins the Fold, 1981, 3 W.New Engl.L.Rev. 433.

ing from doctors to dentists,[19] accountants,[20] architects,[21] lawyers,[22] manufacturers of defective products,[23] and a miscellany of negligence and other tort actions.[24] Yet statutes of limitations are legislative creatures, and even courts that favor the discovery rule as a general proposition are bound to follow specific legislation that mandates a different approach.[25]

The widening acceptance of the discovery rule has not been without cost, however, since the rule leaves the defendant vulnerable to suit indefinitely, sometimes decades after the event. Sparked by widening principles of liability including the discovery rule,[26] the great majority of states have enacted legislation placing an outer time limit on negligence and related claims in certain contexts where the hardship to (and perhaps the political clout of) the defendant has appeared the greatest.[27] Such statutes, called statutes of "repose," generally supplement or override the discovery accrual rule. Repose statutes were first widely applied to architects and contractors, in actions for defects in design and construction,[28] and were adapted to the medical service and chattel sale contexts in the 1970's in response to

19. See Kaufman v. Taub, 1980, 87 Ill.App.3d 134, 43 Ill.Dec. 852, 410 N.E.2d 114; Annot., 1981, 3 A.L.R.4th 418.

20. Moonie v. Lynch, 1967, 256 Cal.App.2d 361, 64 Cal.Rptr. 55; Sato v. Van Denburgh, 1979, 123 Ariz. 225, 599 P.2d 181; Annot., 1969, 26 A.L.R.3d 1438.

21. Chrischilles v. Griswold, 1967, 260 Iowa 453, 150 N.W.2d 94.

22. Anderson v. Neal, Me.1981, 428 A.2d 1189 (title search); Peters v. Simmons, 1976, 87 Wn.2d 400, 552 P.2d 1053 (drafting of business purchase agreement); Jarmillo v. Hood, 1979, 93 N.M. 433, 601 P.2d 66 (drafting and execution of will); Neel v. Magana, Olney, Levy, Cathcard & Gelfand, 1971, 6 Cal.3d 176, 98 Cal. Rptr. 837, 491 P.2d 421 (failure to serve summons within statute of limitations); Annot., 1968, 18 A.L.R.3d 978.

23. Raymond v. Eli Lilly & Co., 1977, 117 N.H. 164, 371 A.2d 170 (oral contraceptive) (Kenison,C.J.) (characteristically penetrating analysis); Nolan v. Johns-Manville Asbestos, 1981, 85 Ill.2d 161, 52 Ill.Dec. 1, 421 N.E.2d 864; Coyne v. Porter-Hayden Co., 1981, 286 Pa. Super. 1, 428 A.2d 208 (discovery rule applies to "creeping disease" such as asbestosis); Pauley v. Combustion Engineering, Inc., S.D.W.Va.1981, 528 F.Supp. 759; Louisville Trust Co. v. Johns-Manville Product Corp., Ky.1979, 580 S.W.2d 497 (asbestos); Ohler v. Tacoma General Hospital, 1979, 92 Wn.2d 507, 598 P.2d 1358 (incubator causing blindness). Cf. Dawson v. Eli Lilly & Co., D.D.C.1982, 543 F.Supp. 1330 (DES; discovery that injury resulted from defendant's wrongdoing); Clutter v. Johns-Manville Sales Corp., 6th Cir.1981 (Ohio law), 646 F.2d 1151 (asbestos: "manifestation" rule applied to asbestosis). *Contra*, Garrett v. Raytheon Co., Ala.1979, 368 So.2d 516 (radiation from radar system); Thornton v. Roosevelt Hospital, 1979, 47 N.Y. 2d 780, 417 N.Y.S.2d 920, 391 N.E.2d 1002 (cancer from drug). See Birnbaum, "First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases, 1977, 13 Forum 279; Annots., 1979, 91 A.L.R.3d 991 (products liability generally); 1980, 1 A.L.R.4th 117 (latent industrial disease).

24. Sears, Roebuck & Co. v. Ulman, 1980, 287 Md. 397, 412 A.2d 1240 (libel to credit reputation); Friedman v. Jablonski, 1976, 371 Mass. 482, 358 N.E.2d 994 (deceit); Seelenfreund v. Terminix of Northern California, Inc., 1978, 84 Cal.App.3d 133, 148 Cal.Rptr. 307 (negligent breach of oral contract; improper termite inspection); Cain v. State Farm Mutual Automobile Insurance Co., 1976, 62 Cal.App.3d 310, 132 Cal.Rptr. 860 (invasion of privacy); Allred v. Bekins Wide World Service, Inc., 1975, 45 Cal.App.3d 984, 120 Cal.Rptr. 312 (skin rash from tiny bugs; negligence in packing and shipping household goods); Brown v. Sandwood Development Corp., 1982, 277 S.C. 581, 291 S.E.2d 375 (design and construction of concrete spillway by builder); Note, 1980, 68 Cal.L.Rev. 106 (arguing for discovery rule for all actions).

25. See, e.g., Cannon v. Sears, Roebuck & Co., 1978, 374 Mass. 739, 374 N.E.2d 582, 585.

26. Judicial adoption of the discovery rule in medical malpractice litigation appears to have been a principal cause of the enactment of statutes of repose in this context, at least in some states. See Anderson v. Wagner, 1979, 79 Ill.2d 295, 37 Ill.Dec. 558, 402 N.E.2d 560, 565, appeal dismissed 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11; Jones v. Morristown-Hamblen Hospital Association, Tenn.App.1979, 595 S.W.2d 816, 818 (noting repose legislation in 1975 following discovery opinion in 1974); S.C. Code § 15-3-545 (Supp.), enacted 1977, following Gattis v. Chavez, D.S.C.1976, 413 F.Supp. 33. Architect-contractor repose statutes may be traced to the breakdown of the privity defense, see Annot., 1979, 93 A.L.R.3d 1242, 1246, and products liability repose statutes are part of the broader reform movement in this area of the law following a decade or two of rapid expansion of liability. Compare Epstein, Products Liability: The Search for the Middle Ground, 1978, 56 N.C.L.Rev. 643; Phillips, An Analysis of Proposed Reform of Products Liability Statutes of Limitations, 1978, 56 N.C.L.Rev. 663.

27. The architect-contractor, medical malpractice, products liability, and general statutes are collected and analyzed in McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 1981, 30 Am.U.L.Rev. 579.

28. See generally Note, 1981, 57 N.D.L.Rev. 43; Annot., 1979, 93 A.L.R.3d 1242.

perceived "crises" in the areas of medical malpractice [29] and products liability.[30]

A statute of repose generally begins to run at an earlier date and runs for a longer period of time [31] than the otherwise applicable statute of limitations unaffected by the discovery accrual rule. Repose statutes may begin to run from the time of the defendant's act or neglect, as in the medical malpractice context, or upon the occurrence of a specific and identifiable event shortly thereafter—as from the substantial completion of the structure, in actions against architects and contractors, or from the manufacture or sale of the product, in products liability cases.[32] Statutes of repose by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists, and their constitutionality has been challenged on a variety of state and federal grounds.[33] Although some of the statutes have been declared unconstitutional,[34] the courts in most jurisdictions have upheld their statutes [35] and the legislatures in those that have not have sometimes reenacted new repose legislation that has withstood constitutional attack.[36] It appears quite likely that statutes of repose, at least in selected areas of tort law, are here to stay.

29. See Anderson v. Wagner, 1979, 79 Ill.2d 295, 37 Ill.Dec. 558, 402 N.E.2d 560.

30. See note 26, supra.

31. General negligence statutes of limitations for personal injury range in duration from 1–6 years, typically 2, 3 or 4 years, depending on the state. See, e.g., CCH Prod.Liab.Rep. ¶ 3420. Repose statutes typically range in length, for medical malpractice: 2–6 years; architect-contractor cases: 4–10 years; products liability: 6–12 years. See generally McGovern, supra note 27, at 625–41.

32. See generally McGovern, supra note 27, at 625–41.

33. Most frequently on equal protection, special laws, due process, and access to courts grounds. See McGovern, supra note 27, at 604; Witherspoon, Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice, 1979, 10 Tex.Tech.L.Rev. 419; Note, 1981, 57 N.D.L.Rev. 43 (architect-contractors).

34. Most of these holdings have concerned the builder statutes, which have been ruled unconstitutional in some eleven states. See McGovern, supra note 27, at 587; Note 1981, 57 N.D.L.Rev. 43, 57–58; Annot., 1979, 93 A.L.R.3d 1242. E.g., Phillips v. ABC Builders, Inc., Wyo.1980, 611 P.2d 821, appeal after remand 632 P.2d 925; Overland Construction Co. v. Sirmons, Fla.1979, 369 So.2d 572; Broome v. Truluck, 1978, 270 S.C. 227, 241 S.E.2d 739; Pacific Indemnity Co. v. Thompson-Yaeger, Inc., Minn.1977, 260 N.W.2d 548; Shibuya v. Architects Hawaii, Limited, 1982, ___ Hawaii ___, 647 P.2d 276. The other states are Ala., Ill., Ky., N.H., Okla. and Wis.

Only one medical malpractice statute has been struck down, Carson v. Maurer, 1980, 120 N.H. 925, 424 A.2d 825, and four products liability statutes, although the first such product statute was passed only in 1977. Bolick v. American Barmag Corp., 1981, 54 N.C.App. 589, 284 S.E.2d 188, decision modified 306 N.C. 364, 293 S.E.2d 415; Battilla v. Allis Chalmers Manufacturing Co., Fla.1980, 392 So.2d 874 (as applied; see note 35 infra); Lankford v. Sullivan, Long & Hagerty, Ala. 1982, 416 So.2d 996; Heath v. Sears, Roebuck & Co., 1983, 123 N.H. ___, ___ A.2d ___ (Douglas, J.).

35. Architect-contractor statutes have been upheld in 20 states: Ark., Cal., Colo., Ga., La., Mass., Mich., Miss., Mont., Neb., N.J., N.M., Pa., Or., S.D., Tenn., Tex., Utah, Va. and Wash. See Anderson v. Wagner & Anderson, Inc., Miss.1981, 402 So.2d 320, 322; O'Brien v. Hazelet & Erdal, 1980, 410 Mich. 1, 299 N.W.2d 336; Freezer Storage, Inc. v. Armstrong Cork Co., 1978, 476 Pa. 270, 382 A.2d 715; Salinero v. Pon, Cal.App.1981, 177 Cal.Rptr. 204; Yarbro v. Hilton Hotels Corp., Colo.1982, 655 P.2d 822; Klein v. Catalano, 1982, 386 Mass. 701, 437 N.E.2d 514.

Medical malpractice statutes have been upheld in at least 16 states: Ala., Ariz., Ark., Colo., Del., Ga., Ill., Ind., Kan., La., Minn., Mo., Neb., N.C., Tenn., Utah, and Wash. E.g., Anderson v. Wagner, 1979, 79 Ill.2d 295, 37 Ill.Dec. 558, 402 N.E.2d 560 (scholarly and exhaustive analysis), appeal dismissed 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11; Stephens v. Snyder Clinic Association, Kan.1981, 230 Kan. 115, 631 P.2d 222; Carmichael v. Silbert, 1981, ___Ind.App.___, 422 N.E.2d 1330; Ross v. Kansas City General Hospital & Medical Center, Mo.1980, 608 S.E.2d 397.

Products liability statutes have been upheld in several decisions. See, e.g., Dague v. Piper Aircraft Corp., 1981, ___ Ind. ___, 418 N.E.2d 207; Purk v. Federal Press Co., Fla.1980, 387 So.2d 354 (where injury occurred before statute enacted and claim not abolished; but see note 34, supra); Thornton v. Mono Manufacturing Co., 1981, 99 Ill.App.3d 722, 54 Ill.Dec. 657, 425 N.E.2d 522; Buckner v. GAF Corp., E.D.Tenn.1979, 495 F.Supp. 351, affirmed without opinion, 6th Cir. 1981, 659 F.2d 1080; Scalf v. Berkel, Inc., 1983, ___ Ind.App. ___, 448 N.E.2d 1201. Compare Tyson v. Johns-Manville Sales Corp., Ala.1981, 399 So.2d 263 (discovery rule statute for asbestos injury claims upheld).

36. Five states have reenacted architect-contractor repose statutes, and none of these second-generation statutes had been stricken as of early 1981. See McGovern, supra note 27, at 587.

Jim's

Working Copy No. 2: February 5, 1997
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Sectional Summary

of

SSHB 58 (JUD)

An Act Relating to Civil Actions

Section 1. **Legislative intent.** This section generally sets forth the legislative intent of this Act.

Section 2. **Certain property actions to be brought in six years.** This section ~~originated with the~~ Governor's Task Force on Civil Justice Reform ("Governor's Task Force"). ~~It repeals and reenacts AS 09.10.050 to~~ impose a six year statute of limitations for waste or trespass to real property.

Section 3. **Contract actions to be brought in three years.** This section ~~originated with~~ the Governor's Task Force. This section ~~amends AS 09.10 by adding a~~ new section which imposes a three year statute of ~~limitations~~ on contract actions.

Section 4. **Statute of repose of eight years.** This section ~~amends AS 09.10 by adding a~~ new section which generally imposes an eight year statute of repose. The great majority of states have enacted statutes of repose, which generally override the discovery accrual rule by placing an outer time limit on negligence and related actions. They were first applied to architects and contractors in actions for defects in design and construction. The courts in most states have upheld their statutes of repose against constitutional challenges. The architect-contractor statutes have been upheld in 20 states, including California, Oregon and Washington. Prosser and Keeton on Torts, 5th Edition, at 168. The Alaska Supreme Court looks to those three states for case law precedents.

In this section, the statute of repose begins to run on the earlier of the date of substantial completion of a construction project, or the last act alleged to have caused the personal injury, death or property damage.

This section does not apply if the cause of action resulted from intentional or reckless disregard of plans and specifications or building codes in the design-construction area. It also does not apply if the claim resulted from hazardous waste exposure; intentional act or gross negligence; fraud or fraudulent misrepresentation; breach of express warranty or guarantee; or a defective product. This section also does not apply in cases of intentional

concealment of facts, as well as in cases where a shorter statute of limitations applies. In medical malpractice cases the statute of repose is tolled until the actual discovery of a foreign object in the body of the injured person.

Section 5. **Limitation of actions against health care providers.** This section amends AS 09.10 by adding a new section which generally requires that actions for medical malpractice involving children under the age of six to be brought before the child's eighth birthday, including actions brought against obstetricians and gynecologists. This statute is tolled in cases where fraud or collusion, or intentional concealment of facts can be shown. It is also tolled until the actual discovery of a foreign object in the body of the injured person.

Section 6. **Actions for torts, for certain statutory liabilities, and against peace officers and coroners to be brought in two years.** This section ~~amends AS 09.10.070(a) by including in the two year statute of limitations~~ actions for recovery of, or damages to, personal property. Such actions previously were ~~limited to a~~ six year statute of limitations under AS 09.10.050. The report of the Governor's Task Force sought to accomplish the same reduction in the amount of time within which to bring actions, ~~but~~ Although probably not intended to do so, the amending language in the Governor's Task Force report appears to impliedly repeal subsection (b) of AS 09.10.070, with the result that causes of actions against peace officers and coroners would be extinguished if the amendment were enacted.

Section 7. **Limitation of actions involving injury to person or property.** This ~~new section provides~~ a two year statute of limitations, ~~after the accrual of the cause of action,~~ in cases involving personal injury, death, property damage, and other non-contract causes of action.

Subsection (b) of the statute is a consistency change with respect to the one year statute of limitations set forth in AS 09.10.080, relating to actions against peace officers for the escape of prisoners, and AS 09.10.090, relating to actions for statutory penalties.

Section 8. **Noneconomic damages.** This section replaces an earlier version ~~of this statute~~ pertaining to noneconomic damages. This section generally places more stringent limits on the amounts which may be awarded for noneconomic damages, ~~and~~ specifically adds loss of consortium to the list of items for which noneconomic damages may be sought.

This section lowers the recovery cap from $500,000 to $300,000 for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage, unless the personal injuries are so severe that the claimant is a hemiplegic, paraplegic, quadraplegic, or has other specified disabilities, in which case the cap remains at $500,000.

Section 9. **Punitive damages.** This section replaces an earlier version ~~of this statute~~ which defines the circumstances in which punitive damages may be awarded. This section incorporates the language used by the Alaska Supreme Court to require malice or conscious acts showing a deliberate disregard of another person from whom the punitive damages are sought.

Section 10. **Punitive damages.** This section relates to new subsections which are added to the preceding section in order to clarify and cap the amount of punitive damages which may be awarded.

Subsection (b) generally limits punitive damages to the ~~higher~~ of three times compensatory damages, or $300,000, ~~whichever is greater.~~

Subsection (c) carves out an exception to the subsection (b) limitation in cases where the wrongful conduct arose in connection with commercial activities motivated by financial gain, and the likelihood of injury was previously known by the persons who made the subsequent policy decisions to nonetheless go forward with selling a product, or otherwise engaging in the commercial activities which resulted in serious personal injuries, or death. Under these circumstances, the ~~measure of~~ punitive damages would be four times compensatory damages, or $600,000, whichever is greater. This exception was carved out to address the ~~concerns~~ of the Governor's Task Force ~~on this issue.~~

Subsection (d) requires that one half of any punitive damage award be paid into the general fund of the State of Alaska.

The measure of punitive damages recommended by the Governor's Task Force is grossly excessive, and would result in huge windfalls for personal injury attorneys and their clients. As an example, if a company wrongfully terminated the employment of two or more people, or if it wrongfully failed to hire or promote two or more people, it could be subjected to claims for punitive damages amounting to one year's net income. For Union Oil Company of California alone, that would be approximately $ 260M. The almost certain effect of the Governor's Task Force language would be to send a distinctly anti-business message to the large corporations necessary to develop Alaska's resources at precisely the time the State of Alaska needs massive investment for the creation of jobs and royalty income. Such inconsistent public policy would be a tragic mistake for the citizens of Alaska.

Section 11. **Award of damages; periodic payments.** This section ~~amends AS 09.17.040(a) to~~ clarify that an award for personal injuries is intended to include damages for death.

This section also includes in a new subsction (2), ~~to require~~ that the amount of any judgment awarded shall be reduced by the amount of federal and state income taxes which would have been paid on the judgment under tax rates in effect on the date of the injury or death. Should the current federal income tax laws change in the future, with the result that the current tax treatment of personal injury awards (now not includable in gross income)

changes, the reduction of judgment effect of this subsection automatically terminates without having to amend the statute.

Section 12. **Award of damages; periodic payments.** This section ~~adds a new provision which~~ clarifies that cases involving judgments in excess of $100,000 may be paid in periodic payments rather than a lump sum payment if either party to the action requests it.

Insurance industry statistics show that about 25% to 35% of all accident victims completely dissipate their judgments or settlements within two months of recovery, and that 90% of them spend it all within five years. The Rutter Group, Ltd. from Flahavan, Rea, Kelly & Tenner, "California Practice Guide: Personal Injury" (TRG 1992) Ch. 4. In cases where the accident victims are disabled by their injuries, they become wards of the federal and state governments. In the face of these stunning statistics, this result is not good public policy given the high probability of federal welfare reform which will shift financial responsibility for these individuals to the State of Alaska. Periodic payments will protect the interests of both injured persons and the state.

This subsection also provides that if part of the judgment is owed to an attorney under a contingent fee argreement, those fees shall be reduced to present value and paid to the attorney in a lump sum, leaving the rest of the judgment to be paid to the client in periodic payments.

Section 13. **Award of damages; periodic payments.** This section ~~amends AS 09.17.040(c)~~ to require that if a structured settlement type of periodic payment is selected by the injured party, the court must require security be posted in the form of U.S. government obligations to ensure that the funds are available when they become due. Excepted from the posting of security requirement are the State of Alaska, self-insured municipalities, and insurance companies authorized to do business in the state if their financial strength is in the highest two categories as measured by any two nationally recognized independent rating services. The rating requirement is an important one. In 1991 Executive Life Insurance company failed in connection with the "junk bond" market crash. Apparently the State of Alaska put $138.1 million into Executive Life at or about the time it went into a California conservatorship. In the year prior to its failure, Executivce Life was rated "B+" by A.M. Best, its third highest rate out of 9 possible ratings.

This section also clarifies that annuities are also a recognized method of making periodic payments, and that it is the injured party who decides whether to take a structured settlement trust or annuity type of periodic payment. However, an annuity type of periodic payment can only be issued by authorized insurers of the same quality as those which offer structured settlement type of periodic payments.

Section 14. **Award of damages; periodic payments.** This section ~~amends AS 09.17.040(f) by~~ clarifying that damage awards for personal injury or death are controlled by this statute.

This section also requires that either type of periodic payments provide for increases in future payments to compensate for inflation. It uses the Consumer Price Index for Anchorage as the standard for measuring increases in the rate of inflation.

Section 15. **Collateral benefits.** This section repeals and reenacts the collateral source statute, AS 09.17.070, which prevents double recovery by plaintiffs. In general, the award realized by an injured person is reduced by the amount of money the injured person has already received, or will likely receive in the future, ~~such as settlements received from other defendants in the suit and insurance proceeds~~ collateral sources.

Under the provisions of the repealed collateral benefits statute, no evidence could be offered at the trial that the plaintiff was receiving, or would in the future receive, funds from various collateral sources. It was only after the verdict was in that the defense could offer evidence to show how much the plaintiff had received, or would receive in the future, from collateral sources.

This section now allows the defendant at trial to introduce evidence that the plaintiff has received, or will likely receive in the future, the types of collateral benefits appearing in subsection (b) of this section. However, the defendant is still precluded from offering evidence of worker's compensation benefits received, life insurance death benefits received, and various federally funded collateral sources which by law must seek subrogation from the plaintiff's recovery under subsection (a). ~~Not only~~ is defendant precluded from offering evidence of these items under (a), the defendant is precluded from deducting the five items in subsection (a) from the final judgment. ~~This will result in some double recovery~~.

The new subsection (c) prevents persons who pay the collateral benefits enumerated in subsection (b) from seeking reimbursement from the injured party, either directly or through subrogation rights.

The repealed statute specifically excepted the collateral benefit statute from medical malpractice actions under AS 09.55. The new statute does not make that exclusion.

Section 16. **Apportionment of damages.** This section ~~amends the existing statute by~~ deleting all references to AS 09.16.040 [the Contribution Among Joint Tortfeasors statute which was repealed by the 1987 Initiative Proposal] and by making necessary consistency changes. The current law is found in AS 09.17.080(d), which requires the court to enter judgment against each party in accordance with that party's percentage of fault.

By substituting the word "person" for the phrase "party to the action", this section extends apportionment of fault to nonparties to the action, thereby overruling Benner v. Wichman, 874 P.2d 949, 957 (Alaska

1994), which held that equitable apportionment is available as a means of bringing other tortfeasors into the action, despite the 1987 initiative which repealed contribution rights among joint tortfeasors. Prior to Benner, the United States District Court for the District of Alaska correctly recognized that allowing equitable apportionment as a means of joining additional defendants "presumes that the Alaska Supreme Court would in substance veto the 1987 initiative.....even though the voters had eliminated a tortfeasor's ability to hold another tortfeasor responsible through the repeal of the statutory provision for contribution." Carriere v. Cominco Alaska, Inc., 823 F. Supp. 680, 687 (D. Alaska 1993).

Thus, this section vindicates the voters and the federal court's analysis by requiring state courts in the future to determine each person's share of the fault, whether or not that person is a party to the suit.

Section 17. **Apportionment of damages.** This section amends AS 09.17.080(b) by allowing the trier of fact to assign a percentage of fault to two or more persons if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.

Section 18. **Apportionment of damages.** This section amends AS 09.17.080(c) by making a consistency change to conform with the repeal of the contribution among joint tortfeasors statute.

Section 19. **Definition; intentional torts.** This section is taken verbatim from the Report of the Governor's Task Force. This section amends AS 09.17.900 to clarify its application to intentional acts.

Section 20. **Expert witness qualification.** This section adds a new section AS 09.20.185 to require that certain minimal standards be met by persons who testify in professional malpractice cases, including medical malpractice cases

Section 21. **Offers of judgment.** This section builds upon the approach taken from the Governor's Task Force report to encourage early settlements. This section improves the Governor's Task Force recommendation substantially by placing significantly more pressure on the parties to settle a case within 30 days after the Rule 26(a)(1) discovery disclosures have been made. The Governor's Task Force report relies on modestly increased interest rate sanctions to encourage settlements. However, in view of recent developments in the case law disallowing prejudgment interest to be assessed for future damages [McConkey v. Hart, Alaska Supreme Court Opinion No. 4441, November 29, 1996] , and even broader similar provisions described in Section 21 hereof, merely increasing interest rates will have less effect on encouraging early settlements.

The approach taken in this section is to assess reasonable actual attorney fees against the offeree incurred after the date the offer is tendered, if the judgment finally entered is not at least 5% more favorable than the offer,

whether the offer is tendered by the party making the claim, or the party defending against the claim. The phrase "reasonable actual attorney fees" is intended to mean the actual attorney's time expended, as evidenced by time sheets and billing statements. That phrase is not intended to mean Rule 82 fees. If the asserted attorney fees are unreasonably high, that issue can be resolved by the court.

The encouragement to settle early is furnished by the sliding scale percentages of actual attorney fees expended, based on the time the offer is made in relation to the date the Rule 26(a)(1) disclosures is made. The maximum amount of settlement pressure will occur within 30 days after the Rule 26(a)(1) disclosures are made, since 100% of the actual attorney fees should provide a heavy inducement to settle, particularly against frivolous suits.

Section 22. **Interest on judgments; prejudgment interest.** This section amends the existing statute by providing for a variable interest rate on judgments and prejudgment interest by making it three hundred basis points above the discount rate at the 12th Federal Reserve District as of January 2 of each year. Using the discount rate of the 12th Federal Reserve District is consistent with the way interest rates are determined under AS 45.45.010(b).

The Governor's Task Force report recomends a variable interest rate on judgments and prejudgment interest, and this section should satisfy those concerns.

Section 23. **Prejudgment interest.** This new section is intended to preclude prejudgment interest from being awarded for future economic and future noneconomic damages. This section also precludes prejudgment interest on punitive damage awards, and in this respect goes further than McConkey v. Hart, mentioned above.

Section 24. **Alternatve Dispute Resolution.** This section requires the Alaska Judicial Council to see what alternative dispute resolution programs have been used in other states and the federal courts in order to efficiently and economically structure such a program in the Alaska Court System. The report shall be ready in time for the second term of this 20th legislature.

While both the Governor's Task Force and the sponsor of this bill have proposed pilot programs, it seems to be the wiser course to see what the experience has been in other jurisdictions before putting into place either pilot program

Section 25. **Motion to set trial and certificate.** This section is taken verbatim from the report of the Governor's Task Force. It is intended to improve Superior Court fast-track procedures.

Section 26. **Voluntary arbitation.** This section modifies subsection (k) of the statute to make a consistency change regarding the repeal of AS 09.55.548. That statute was repealed for the reason that it is no longer necessary in view of AS 09.17.070, which is operative to adjust damages in all tort cases, including medical malpractice cases.

Section 27. **Medical advisory panels.** This section is taken verbatim from the report of the Governor's Task Force. This provision amends AS 09.55.536(a) by making expert advisory panels available to state health care providers.

Section 28. **Expert advisory panel; panel questions.** This section is taken verbatim from the Report of the Governor's Task Force. The proposed changes are intended to clarify that omissions as well as commissions are within the purview of the questions to be answered by the medical advisory panel. The medical questions were modified by language proposed by Rodman Wilson, MD., who incidentally wrote the original questions almost 20 years ago.

Section 29. **Expert advisory panel; discovery.** This section is taken verbatim from the Report of the Governor's Task Force. The change appears to allow discovery to proceed within 60 days after the selection of a panel, irrespective of whether the panel has rendered its report. The reason given in the Governor's Task Force report is to expedite reporting of answers to improve the usefulness of the medical advisory panel system.

Section 30 **Expert advisory panel;** public sector provider. This section is taken verbatim from the Governor's Task Force. It should be read in tandem with As 09..55.536(a), in that this provision makes clear access to the expert medical advisory panel. The clarification is sought because some trial judges do not refer such cases, usually stemming from healthcare extended to prisoners in correctional facilities, to expert advisory panel.

Section 31. **Collateral benefits.** This section was repealed because it was no longer necessary for the reason stated in the provision.

Section 32. **Definitions; health care provider.** This section amends the existing definition of health care providers to include various entities recently formed, and which will be formed, to provide health care services in the wake of the health care reforms which are taking place.

Section 33. **Definitions; professional negligence and professional services.**

This section adds new subsections to define professional negligence and professional services in the health care area.

Section 34. **Attorney contingent fee agreements.** This section adds a new section AS 09.60.080 which clarifies that the 50% of punitive damage awards which are payable to the State of Alaska under AS 09.17.020(d) shall pass free and clear of any contingent fees which would otherwise would have been deducted under the terms of a contingent fee agreement between the attorney and the client.

Section 35. **Civil liability of hospitals for nonemployees.** This section adds a new section desdignated AS 09.65.096. This statute grants immunity from liability for the acts or omissions of certain health care providers who are independent contractors to hospitals which comply with the disclosure requirements of this section. Current law allows a claimant to sue only the hospital rather than the independent contractor who may have less ability to satisfy a judgment. This section will provide immunity to the hospital if it posts a notice of limited liability in all admission areas, and publishes a notice annually in a local newspaper. This section is intended to overrule the case of Jackson v. Powers, 743 P.2d 1376 (Alaska 1987).

Subsection (c) imposes, however, an additional condition of immunity to the hospital by requiring independent contractor health care providers to carry liability insurance coverage in the amount of at least $500,000 per incident.

Section 36. **Damages resulting from commission of a felony, or while under the influence of alcohol or d rugs.** The Governor's Task Force recommends that a person who sustains personal injuries or death during the commission, or attempted commission of a felony, should be barred from recovering damages for those injuries. However, the Governor's Task Force allows the injured perpetrator to recover tort damages if the person were acquitted of the criminal charge, even if it could be shown by clear and convincing evidence that he was engaged in conduct that would constitute the commission of the felony. This section forecloses the exception created by the Governor's Task Force report.

This section goes further than the Governor's Task Force report, and extends the bar to recovery to those instances where the injured perpetrator is convicted of operating a motor vehicle, aircraft or watercraft while under the influence of intoxicating liquor or a controlled substance in violation of AS 28.35.030. This section also extends the bar to recovery to cases where the injured perpetrator was not convicted, but was none the less engaged in conduct that would constitute a violation of AS 28.35.030 if shown by clear and convincing evidence.

Section 37. Health care providers. This section carries through the consistency change required by enactment of the new definition of health care

providers found in the amended version of AS 09.55.560(1). See Section 24 hereof.

Section 38. **Medical review organizations.** This section amends the existing definition of "review organization" to include governing bodies or committees of various entities recently formed, or which will be formed, to provide health care services in the wake of health care service reforms which are taking place.

Section 39. **Insurance report.** This section is intended to require insurance company reporting of information necessary to evaluate the impact of tort reform on the availability and cost of insurance in the state. The statute empowers the division of insurance to require reporting by insurers doing business in this state to file information relating to premiums, claims, losses, expenses, and solvency of the company as a whole. This section obtains most of the information sought by the Report of the Governor's Task Force, while minimizing the regulatory burdern on the insurance industry. Incredibly, the insurance industry was not invited to participate in the work of the Governor's Task Force, so caution is advisable when considering the credibility, conclusions and recommendations set forth in the report.

Concerns expressed by the Governor's Task Force about the 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 insurance protection, is well founded. At this time there are no domestic insurers who will write policies for the highest risk areas, including the marine highway system.

The June 1, 2000 commencement date for the reports to the governor and legislature is suggested by the division of insurance as a realistic starting date considering existing regulatory reporting deadlines.

Section 40. **Appointment of independent counsel; conflicts of interest.**

Section 41. **Appointment of independent counsel; conflicts of interest.**

Section 42. **Collection of settlement information.** This section is taken verbatim from the Governor's Task Force report. It amends AS 09.68 by adding a new section which requires civil litigants who settle cases to file information about the settlements, including amounts paid to settle. The vast majority of civil cases, estimated to be 95%, are settled without going to trial. Currently, none of this data is collected, so there can be no analysis which would be useful in assessing tort reform propress.

Section 43, 44 and 45. **Motion to set trial and certificate.** These sections are taken verbatim from the report of the Governor's Task Force. They are intended to improve upon Superior Court fast track procedures by providing for a meeting of the parties and a pretrial conference.

Section 46. **Settlement information.** This section is taken verbatim from the report of the Governor's Task Force. It amends Civil Rule 41(a) by adding a new paragraph to require collection of settlement information as required by the new As 09.68.130. See Section 39 hereof.

Section 47. **Medical advisory panel; discovery.** This section is taken verbatim from the report of the Governor's Task Force. It amends Civil Rule 72.1(g) by allowing discovery to proceed after 60 days after the selection of the panel in order to expedite obtaining panel reports.

Section 48 and 49. **Attorney sanctions for Rule 11 violations.** These sections modify Civil Rule 95 by imposing serious sanctions against attorneys and their clients for violations of Civil Rule 11. Section 47 permits fines up to #10,000, up from $1,000. Section 48 allows the court to enter judgment on intentionally misrepresented issues.

Section 50. **Settlement information.** This section is taken verbatim from the report of the Governor's Task Force. This section changes Appellate Rule 511 to require the gathering of settlement information at the appellate level. See Section 45 and Section39 hereof.

Section 51. **Apportionment of damages.** This section changes Civil Rule 49 to conform to the changes made to AS 09.17.080(a)(2).

Section 52. **Offer of judgment.** This section changes Civil Rule 68 to conform to the changes made to AS 09.30.065.

Section 53. **Prejudgment interest.** This section changes Civil Rule 78 to conform to the changes made to AS 09.30.070(c).

Section 54. **Expert witness qualification.** This section changes Evidence Rule 702 to conform to the changes made to AS 09.20.185.

Section 55. **Severability.** Self explanatory.

Section 56. **Applicability.** Self explanatory.

Section 57. **Effective** date. July 1, 1997.

[redacted]

Supreme Court Slip Opinion No. 4441
November 29, 1996 [15 pages]

1. Prejudgment interest in medical malpractice cases begins to accrue only when the defendant receives written notice of a claim. However, this requirement may be satisfied with proof the defendant received actual notice. Evans (901,1138); Morkunas (754,1117).

2. Prejudgment interest cannot be awarded on future damages, i.e., those incurring after trial. Prejudgment interest may be awarded on past damages, i.e., those incurred prior to trial. Sebring (649,932); *distinguishing* Hertz (704,767).

FACTS: In October, 1990, Hart visited McConkey, an opthamologist, for an eye exam. The physician diagnosed a condition which could be corrected with laser surgery. McConkey performed the surgery in November, 1990. Hart's eye was damaged. In March, 1992, Hart and her husband met with McConkey and threatened suit unless compensation was tendered. In September, 1992, an attorney for Hart wrote a demand letter to McConkey. When payment was not forthcoming, suit was filed. McConkey admitted negligence and made a settlement offer of $100,000, including costs, interest and attorney fees. Hart did not accept the offer. A jury awarded Hart $69,600, all but $7000 being future economic and non-economic losses.

PROCEEDINGS BELOW: Judge Savell, Fourth Judicial District, entered judgment on the verdict and awarded Hart prejudgment interest of $21,000 accruing from March, 1992, the date Hart and her husband threatened suit. With fees of $11,500 and costs of $7000, the total judgment entered for Hart was $109,100. Because the judgment was greater than McConkey's offer, the judge denied McConkey's motion for application of Civil Rule 68.

Both parties appealed. The Supreme Court AFFIRMED in part and REVERSED in part, as outlined below. Justice Matthews wrote the 5-0 opinion.

ATTORNEYS: Appellant/Cross-Appellee: Craig Stowers of Clapp, Peterson (ANC). Appellee/Cross-Appellant: Lloyd Hoppner of Hoppner & Paskvan (FBX).

HOLDINGS: 1. Date Interest Accrues. AFFIRMED. Under AS 09.30.070(b), prejudgment interest accrues from the day process is served or the day the defendant receives written notification of an injury and claim. McConkey argued the first date he received written notice of Hart's claim was September, 1992, not March, 1992, when only a meeting between the parties occurred. The Court affirmed the trial judge by applying the "actual notice" exception to the written notice requirement. Bold ¶1, above.

2. Interest on Future Losses. REVERSED. The award of prejudgment interest on Hart's recovery for future losses, the major portion of the verdict, constituted an "impermissible double recovery." Bold ¶2, above.

3. Offer of Judgment. REVERSED. The error in calculating prejudgment interest, with the corresponding reduction in attorney fees, decreased the judgment to less than Dr. McConkey's $100,000 offer under Rule 68. The case was remanded for recalculation and application of Rule 68.

4. Constitutionality of Statute. AFFIRMED. Hart unsuccessfully argued that AS 09.30.070(b), which permits interest in personal injury, property damage and wrongful death cases only to the date of notice of claim, not the date of injury, creates an "impermissible classification with no rational basis," since other types of tort cases, such as legal malpractice and defamation, allow interest to the date of injury. After exploring the legislative history, the Court found "legitimate justifications" for the statute, passed in 1986, primarily the escalating cost of medical malpractice insurance.

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THE SUPREME COURT OF THE STATE OF ALASKA

SAM A. McCONKEY, M.D., Appellant and Cross-Appellee, v. BARBARA L. HART, Appellee and Cross-Appellant.	Supreme Court Nos. S-7104/7154 Superior Court No. 4FA-93-857 CI OPINION [No. 4441 - November 29, 1996]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Richard D. Savell, Judge.

Appearances: Craig F. Stowers, Clapp, Peterson & Stowers, Anchorage, for Appellant and Cross-Appellee. Lloyd I. Hoppner, Hoppner & Paskvan, P.C., Fairbanks, for Appellee and Cross-Appellant.

Before: Compton, Chief Justice, Rabinowitz, Matthews, Eastaugh, and Fabe, Justices.

MATTHEWS, Justice.

I. INTRODUCTION

This appeal presents a question of interpretation of the prejudgment interest statute, AS 09.30.070, and a question of the appropriateness of awarding prejudgment interest on an award of

future damages. The cross-appeal challenges the constitutionality of AS 09.30.070 on equal protection and due process grounds.

II. FACTS AND PROCEEDINGS

The facts are undisputed. Barbara Hart visited Dr. Sam McConkey, an opthamologist, on October 10, 1990, for an eye exam. Dr. McConkey's diagnosis was that Hart had a condition known as macular degeneration in her left eye; he performed laser surgery on the eye on November 14, 1990. Hart's eye was damaged. Dr. McConkey has since admitted negligence both in diagnosing her condition and in performing the surgery.

Hart telephoned McConkey at some point in March 1992, telling him that she considered him responsible for damage to her eye and that if he did not compensate her she would bring suit. McConkey asked her to come to his office. On March 24, 1992, Hart and her husband visited McConkey to discuss the matter. McConkey wrote a note in his file:

> 3/24/92 Pt. & husband in to see re: phone call
> if not compensated will sue re: laser Rx OS.
>
> Pt. says Dr DeR. told her no leaks existed
> She says he had to do more laser to stop hemorrhage
> Pt. holds me respons for ultimate outcome & says she will seek attorney.

On September 11, 1992, Hart's attorney wrote McConkey:

> I represent Barbara Hart . . . in connection with injuries she sustained as a result of a laser procedure that was initiated by you on her in November of 1990. As a result of our investigation in this matter, it appears that the complications she has sustained, and the permanent damage to her

vision, is as a result of negligence on your part in that laser procedure.

After asking for information relating to McConkey's medical malpractice carrier, the letter concluded: "It is necessary that some agreement for handling this claim be reached as soon as possible if the filing of a lawsuit is to be avoided."

Hart filed a medical malpractice suit against McConkey. On January 10, 1995, McConkey made a settlement offer of $100,000, including costs, interest, and attorney's fees. Hart did not accept the offer, and the case went to trial on damages.

After the trial, the jury returned a verdict of $69,592 against McConkey. This figure broke down as follows:

Past economic loss	$ 5,592
Past non-economic loss	$ 2,000
Future economic loss	$15,000
Future non-economic loss	$47,000
Total:	$69,592

At the stipulation of the parties, the future economic and non-economic losses were not discounted to present value.[1]

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[1] The parties stipulated that they would follow the rule of Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967). Beaulieu held that the trial court in a tort case did not err by failing to reduce future wage losses to present value. Id. at 670-72. It held that the uncertainties inherent in investment of a present lump sum did not allow one to guarantee that the returns on the investment of that money would exceed the rate of inflation. Id. at 671. This, coupled with a concern that future wage increases would not be factored into a present value for future economic losses, led the court to reject the majority view that future damage awards should be discounted. Id.

While AS 09.17.040(b) now requires a fact finder to reduce future economic damages to present value, subsection .040(c)

(continued...)

On April 14, 1995, the trial court entered judgment awarding Hart $69,592 plus prejudgment interest on the entire award accruing from March 24, 1992, the date Hart met with McConkey in his offices. This prejudgment interest amounted to $21,041.02. The court also awarded attorney's fees of $11,563 and costs of $6,988.51, for a total judgment of $109,184.53.

Because the final judgment was greater than Dr. McConkey's offer of $100,000, the court denied McConkey's motion for application of Civil Rule 68. These appeals were then taken.

III. STANDARD OF REVIEW

Questions of the application and constitutionality of the prejudgment interest statute and questions of the application of Civil Rule 68 are questions of law subject to this court's independent judgment. Tookalook Sales and Serv. v. McGahan, 846 P.2d 127, 129 (Alaska 1993); Langdon v. Champion, 745 P.2d 1371, 1372 n.2 (Alaska 1987).

IV. DISCUSSION

A. Prejudgment Interest

1. From what date should interest have accrued?

Alaska Statute 09.30.070(b) governs the accrual of prejudgment interest in this case:

> Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day process is

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[1](...continued)
provides that the requirement "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)."

> served on the defendant or the day the defendant received written notification that an injury has occurred and that a claim may be brought against the defendant for that injury, whichever is earlier. The written notification must be of a nature that would lead a prudent person to believe that a claim will be made against the person receiving the notification, for personal injury, death, or damage to property.

The superior court calculated interest from March 24, 1992, the date Hart met with McConkey in his offices to follow up her telephone call. Following this meeting, but on the same day, McConkey made a note in his chart indicating that Hart considered him responsible for her eye problems, that she would sue if she were not compensated, and that she would seek an attorney.

McConkey argues on appeal that prejudgment interest should not accrue until he received the September 11 letter from Hart's attorney threatening the lawsuit. Hart maintains that the superior court's calculation was correct, and that McConkey's written note to himself in Hart's file indicating that Hart "holds [him] responsible" and "will seek [an] attorney" constitutes receipt of written notice to McConkey under AS 09.30.070(b).

We have held that a statutory requirement of written notice may be satisfied by proof of actual notice. See In re Estate of Evans, 901 P.2d 1138, 1142 & n.3 (Alaska 1995); Morkunas v. Anchorage Tel. Util., 754 P.2d 1117, 1120 (Alaska 1988); In the Matter of L.A.M., 727 P.2d 1057, 1061 (Alaska 1986). We adhere to these decisions in this case. The statute provides for prejudgment interest accrual upon notice to the defendant of the claim; the requirement that the notice be written assures proof that notice

was received and of the date when notice was received. In this case, the written note in the file provides reliable proof of notice and when it was given. McConkey does not deny that the content, as distinct from the form, of the notice he received on March 24, 1992, satisfied the statute.

The superior court did not err in holding that interest accrued from the date of actual notice, March 24, 1992.

2. Was prejudgment interest on the future losses proper?

The purpose of awarding prejudgment interest to a plaintiff is to make a plaintiff whole by compensating her for the use of money rightfully hers between the time of the injury and the trial. See, e.g., State v. Phillips, 470 P.2d 266, 274 (Alaska 1970) ("All damages then, whether liquidated or unliquidated, pecuniary or nonpecuniary, should carry interest from the time the cause of action accrues, unless for some reason peculiar to an individual case such an award of interest would do an injustice."); Bevins v. Peoples Bank & Trust Co., 671 P.2d 875, 881 (Alaska 1983). Alaska Statute 09.30.070(b) modifies this rule by providing that the starting date for prejudgment interest on certain tort judgments shall be the date on which the defendant receives written notice that a claim may be brought, or the date on which process is served, whichever is earlier.

McConkey argues that the award of prejudgment interest on a nondiscounted award of future damages constitutes an impermissible double recovery. See Sebring v. Colver, 649 P.2d 932, 936 (Alaska 1982); Farnsworth v. Steiner, 638 P.2d 181, 184

(Alaska 1981); Haskins v. Shelden, 558 P.2d 487, 494-95 (Alaska 1976). Hart responds that there was no double recovery and that the award of prejudgment interest was therefore appropriate.

Both sides frame the issue as if it turns on their decision to follow the Beaulieu rule and not discount future damages. The discounting issue is, however, only secondary. The key to the case lies in the legislative requirement that tort awards be split into past and future components from the time of trial.

As part of the 1986 Tort Reform Act the legislature enacted AS 09.17.040. See ch. 139, § 1, SLA 1986. Subsection (a) requires that jury verdicts in personal injury cases be itemized into past economic loss, past noneconomic loss, future economic loss, future noneconomic loss, and punitive damages. Subsections (b) and (c) require that future losses be discounted unless the parties agree otherwise.

In Navistar International Transportation Corp. v. Pleasant, 887 P.2d 951 (Alaska 1994), we discussed the significance of the point back to which an award is discounted. We held that, where an award of future damages is discounted to the time of trial and not to the time of the injury, then prejudgment interest is inappropriate:

> [T]he assumption in the Phillips hypothetical [illustrating the use of prejudgment interest to allow similar compensation for otherwise identical victims who go to trial at different times] does not take into account cases in which a future stream of income is discounted not to the time of injury (or the time of accrual of prejudgment interest) but to the

> time of trial. If future damages were discounted back to the time of injury, it would be appropriate to allow prejudgment interest on future damages so discounted. It is, however, a double recovery to permit prejudgment interest on future sums which are discounted only to the time of trial, for such sums are greater than they would be if they were discounted to the time of injury -- a difference attributable to the interaction of the discount rate and the intervening period.

Id. at 959-60 (citing Phillips, 470 P.2d at 274).

In Navistar we also alluded to an "ideal system" in which

> a trial could be conducted immediately following the injury at which time all of the plaintiff's claims could be valued and a judgment entered. The judgment, of course, would bear interest until it was paid. Since the ideal of instant adjudication cannot be met, and money is worth less the later it is received, it is ordinarily unjust not to award prejudgment interest between the time of the accident and the adjudication.

Id. at 959. The assumption on which this discussion is based is that damages will be calculated as of the time of the plaintiff's injury. "Indeed, as a plaintiff has 'a right to be made whole immediately upon being injured,' nearly all damages at that point are future damages." Id.[2]

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[2] A footnote in Navistar also stated:

> At one time it was thought appropriate to distinguish between compensating a plaintiff "for the loss of time from his work which has actually occurred up to the time of trial" and compensating him "for the time he will lose in [the] future." This suggested that estimated future earning capacity should be discounted to the date of trial, and a separate calculation should be performed for the estimated loss of earnings between injury and trial. It is both easier and more precise to

(continued...)

The legislature has essentially precluded the uniform application of the assumption on which the foregoing discussion is based by requiring awards to be itemized into past and present categories, clearly using the time of trial as a reference point. AS 09.17.040(a). An award of future damages by definition contains no element of economic or noneconomic loss suffered before the trial. There is therefore no reason to discount such a future award to any time before trial. If it were discounted to a time before trial, then prejudgment interest would be appropriate to make up for the exaggerated discount, as Navistar held. But because the award is for future damages prospective from the time of trial, the award should only be discounted to the time of trial.[3]

"The real question in awarding interest to a judgment creditor is whether the debtor has had use of money for a period of time when the creditor was actually entitled to it." Farnsworth, 638 P.2d at 184. As noted, one can imagine a system

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discount the entire lost stream of earnings back to the date of injury -- the moment from which earning capacity was impaired. The plaintiff may then be awarded interest on that discounted sum for the period between injury and judgment, in order to ensure that the award when invested will still be able to replicate the lost stream.

887 P.2d at 959 n.12 (quoting Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 538 n.22 (1983)) (internal citations omitted).

[3] AS 09.17.040(a) thus returns us to the system "at one time . . . thought appropriate" as described in Navistar, 887 P.2d at 959 n.12. See supra note 2.

under which the tort victim would be "entitled to" a single sum which would make her whole immediately upon her injury. This amount could later be determined at trial, with prejudgment interest awarded to account for the loss of use of the money between injury and trial. Alaska Statute 09.17.040(a) compels a bifurcation of the award, however, into damages incurred before the trial and damages to be incurred after the trial. In a very real sense, then, before the trial the tort victim is only "entitled" to the damages found to have been incurred before the trial. Thus, prejudgment interest should be awarded only as to the past damages. It should not be awarded as to any future damages, discounted or nondiscounted, except as to future damages which were discounted to a date earlier than the date of trial.

This holding is consistent with Sebring v. Colver, 649 P.2d 932 (Alaska 1982). There, we inferred that one part of a damage award had been for repair expenses already incurred, and another had been for expenses yet to be incurred:

> We now turn to whether prejudgment interest should be granted on that portion of the jury verdict awarded to compensate the Colvers for future repairs. . . . [W]e conclude that the probable basis for the jury award was the estimated cost of repairs at the time of trial. Since the financial impact of the passage of time was thus incorporated into the jury's damage award, any award of prejudgment interest on this amount would therefore constitute a double recovery.

Id. at 936. Since the jury made its award for future damages from the perspective of the trial date and not of the date of the injury, prejudgment interest was held inappropriate. Cf. Haskins,

558 P.2d at 495 (holding prejudgment interest inappropriate on punitive damage award where jury likely assessed punitive damages defendant should pay at time of trial, not at time of injury).

Hart may have received a windfall under the agreement not to discount the future damages. By investing her award, her likely ultimate compensation may be significantly greater than her actual losses. But it makes no difference to the prejudgment interest analysis whether the future award was discounted or not. Under AS 09.17.040(a), the losses at issue were future losses and Hart had no claim on the money before the trial. Future damage awards should receive prejudgment interest only where they are discounted to a time before trial, in order to give the award the effect of being discounted to the time of trial. Here, the parties chose not to discount future damages; this does not change the fact that they were awarded as future damages.

We reverse and remand on this issue.[4]

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[4] We recognize that this holding may be facially inconsistent with some language of Hertz v. Berzanske, 704 P.2d 767 (Alaska 1985). There, after reversing a superior court's refusal to set aside a judgment, we wrote:

> Finally, Hertz maintained on appeal that the superior court erred by awarding prejudgment interest on Pierce's damage award for lost future earning capacity. We wish to state at this time that the superior court's award was proper under State v. Phillips, 470 P.2d 266 (Alaska 1970).

Id. at 773 n.9. However, that opinion was decided before the enactment of AS 09.17.040(a) in 1986. Under Phillips, we considered damages "future" from the date of injury and did not separate damages as past and future from the time of trial. Thus the reasoning of Hertz was correct as the law then stood, even though a different result obtains today under the current statute.

3. Did the court err in denying McConkey's Rule 68 motion?

Alaska Civil Rule 68 provides in relation to unaccepted settlement offers:

> (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 of 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 [5%] 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 of attorney's fees incurred after the making of the offer.

The trial court denied McConkey's motion in light of an estimated judgment in excess of $100,000, the amount of the offer. The final judgment was for $109,184.53. In light of the trial court's error in calculating prejudgment interest, however, the final judgment should have been for an amount less than $100,000, and Rule 68 should have been applied.[5]

B. Constitutionality of AS 09.30.070(b)

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[5] That is, although the jury award remains unchanged at $69,592, the prejudgment interest should have only run upon the past portion of that award, and the attorney's fees awarded upon that sum under Rule 82 would have been lower.

We are unable to calculate the final judgment due because under Rule 68 McConkey is entitled to attorney's fees and costs accruing after the offer. The trial court will need to determine this.

Hart's cross-appeal challenges the constitutionality of AS 09.30.070(b).[6] She makes due process and equal protection arguments, essentially asserting that the statute creates an impermissible classification with no rational basis.

We assume, for purposes of this argument only, that Hart's interpretation of AS 09.30.070(b) is correct. Hart adopts, and McConkey accepts, a reading of the statute that limits the accrual of prejudgment interest to the earlier of notice or service only in cases involving personal injury, death, and damage to property, while preserving the right to prejudgment interest from the time of injury in other tort cases, such as legal malpractice or defamation.[7] But see Shaw v. State, Dep't of Admin., 861 P.2d 566, 569 (Alaska 1993) (applying statute in legal malpractice case to calculate prejudgment interest from date of service of process).

As Hart points out in her briefs, this court uses the following test for an equal protection challenge to a statute's classification:[8]

> Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial

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[6] See Part IV.A.1 above for the text of the statute.

[7] To accomplish this reading, the phrase "for personal injury, death, or damage to property" in the second sentence of subsection .070(b) would have to be applied to the first sentence as well.

[8] Hart does not argue that any test other than a rational basis test should apply.

> relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) (citing State v. Wylie, 516 P.2d 142, 145 (Alaska 1973)).

Alaska Statute 09.30.070(b) was enacted as part of the 1986 Tort Reform Act. Ch. 139, § 3, SLA 1986. The Senate offered a statement of findings and purpose for the Act. We thus need not hypothesize legitimate justifications for the statute, since they are provided for us:

> * Section 1. FINDINGS AND PURPOSE. (a) Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this Act is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.
>
> . . . .
>
> (c) The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.
>
> . . . .
>
> (e) It is the intent of the legislature to reduce costs associated with the tort system, while ensuring that adequate and

> appropriate compensation for persons injured through the fault of others is available.

Senate Findings and Purpose, C.C.S. S.B. 377, 14th Leg., 2nd Sess. (1986) (available in Conference Committee files).

The Senate findings directly address the rising costs of medical malpractice insurance and the disincentives those costs create for health care providers. In this medical malpractice case, then, the argument that there is no rational basis for the statute is unconvincing. Reducing health care costs and encouraging the provision of health care services are legitimate goals which can reasonably be thought to be furthered by lowering the amount of medical malpractice judgments. There is thus no merit to Hart's constitutional argument, even assuming her interpretation of the statute is correct.

V. CONCLUSION

The superior court did not err in calculating prejudgment interest from the date of the meeting in McConkey's office, when McConkey had actual notice. However, the superior court erred in awarding prejudgment interest on future damages. Consequently, it also erred in denying McConkey's motion for application of Civil Rule 68. The superior court's judgment is REVERSED and REMANDED for recalculation of the award.

The cross-appeal on equal protection grounds has no merit, since the statute has a clearly stated and rational legislative purpose in so far as it applies to medical malpractice claims.

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ARCTIC STRUCTURES, INC., Glenn Sinclair and Brown & Root, Inc., Petitioners/Cross-respondents,

v.

Jack WEDMORE, Carol Wedmore, Home Insurance Company and Alaska Totem Electrical Enterprises, Inc., Respondents/Cross-petitioners.

Nos. 3633, 3654.

Supreme Court of Alaska.

Dec. 21, 1979.

Action was brought to recover for injuries sustained by electrical subcontractor's employee in fall from scaffolding. The Superior Court, Third Judicial District, C. J. Occhipinti, J., struck defendant's affirmative defense that basically urged abolition of rule of joint and several liability in Alaska, and denied another defendant's motion for leave to assert a similar defense, and defendants petitioned for review. The Supreme Court, Rabinowitz, J., held that: (1) common-law rule of joint and several liability would not be judicially modified; (2) general contractor and project manager had not been deprived of any "available" defenses by Superior Court's refusal to allow them to present employer's negligence as a partial defense to liability; (3) alleged differential treatment of tort-feasors who become involved in employee-employer tort claims as compared to all other tort-feasors did not deprive general contractor and project manager of equal protection; and (4) statute which provides that an employer or its workers' compensation carrier is entitled to reimbursement from third-party tort-feasors for workers' compensation paid employee would not be construed to deny reimbursement when employer is shown to be concurrently negligent but, rather, such question is for the legislature.

Affirmed.

Boochever, C. J., filed a dissenting opinion.

1. Contribution ⇐7

The principles of equity which apply through the Uniform Contribution Among Tortfeasors Act were intended to govern contribution when one defendant is found to be insolvent, and were not intended to affect requirement that relative degrees of fault are not to be considered as factor in apportionment. AS 09.16.020(3).

2. Constitutional Law ⇐70.1(11)
Negligence ⇐15

In light of Alaska's existing pro rata legislative scheme for apportionment of damages among joint tort-feasors and public policies implemented by legislation, common-law rule of joint and several liability would not be judicially modified, and thus liability of multiple defendants in action by subcontractor's employee who sustained on-the-job injuries to which both employer and defendants negligently contributed could not be apportioned on basis of fault or several liability. AS 09.16.010–09.16.060, 09.16.010(a, b), 09.16.020(1, 3).

3. Constitutional Law ⇐251.5

What procedural due process may require under any particular set of circumstances depends on nature of governmental function involved and private interest affected by governmental action. Const. art. 1, §§ 1, 7; U.S.C.A.Const. Amends. 5, 14.

4. Constitutional Law ⇐106, 305(3)

While it is manifest that no one has a vested right in any particular mode of procedure such that legislative change is prohibited, due process does require that a substantial and efficient remedy remain available or that one be provided when a preexisting defense is statutorily limited. Const. art. 1, §§ 1, 7; U.S.C.A.Const. Amends. 5, 14.

5. Constitutional Law ⇐305(3)

Since the judicial adoption of comparative negligence did not disturb the continuing validity of joint and several liability, project manager, general contractor, and its supervisory employee were not deprived of any "available" defenses by superior court's refusal to allow them to present employer's

negligence as partial defense to liability in action seeking to recover for injuries sustained by subcontractor's employee in fall from scaffolding, and thus they were not deprived of due process on theory that court's action deprived them of access to the court to raise defense of subcontractor's negligence. AS 09.16.010–09.16.060, 23.30.-170; Const. art. 1, §§ 1, 7, U.S.C.A.Const. Amends. 5, 14.

6. Constitutional Law ⇐301(4)

Test for upholding exclusive liability provision of the Workmen's Compensation Act against challenge on substantive and due process grounds is whether legislative enactment has reasonable relationship to legitimate governmental purpose. U.S.C.A. Const. Amends. 5, 14; AS 23.30.015(g).

7. Constitutional Law ⇐301(4)
Workers' Compensation ⇐19

Lack of availability of pro rata contribution from negligent employer under Uniform Contribution Among Tortfeasors Act, because of limited, exclusive liability of employer under Workmen's Compensation Act, did not deny general contractor, its supervisory employee and project manager substantive due process in action for injuries sustained by subcontractor's employee in on-the-job accident where applicable "reasonable relationship" test was satisfied by purposes of workers' compensation scheme, including exclusive liability provision. Const. art. 1, §§ 1, 7; U.S.C.A.Const. Amends. 5, 14; AS 09.16.010–09.16.060, 23.-30.005–23.30.270.

8. Constitutional Law ⇐245(4)
Workers' Compensation ⇐19

There is fair and substantial relationship between legislative objective of providing guaranteed, expeditious compensation to injured employee and limitation on employer's total liability regardless of its percentage of fault, even though that limitation has effect of denying third-party tortfeasors right to prorata contribution from negligent employer, and thus fact that only tort-feasors who become involved in employee-employer tort claims are prohibited from securing pro rata contribution from concurrently negligent employer does not violate equal protection. AS 09.16.010–09.-16.060, 23.30.005–23.30.270; Const. art. 1, §§ 1, 7; U.S.C.A.Const. Amend. 14.

9. Workers' Compensation ⇐2251

In light of specific reimbursement provision in the Workmen's Compensation Act, which provides that if employee recovers damages from third party, employee shall promptly pay to employer total amounts paid by employer, and which subrogates workers' compensation carrier to all rights of employer when appropriate, the Act would not be construed to deny reimbursement when employer is shown to be concurrently negligent but, rather, appropriate forum for resolution of such issue is the legislature. AS 23.30.015(g, i).

Richard J. Smith, Bradbury & Bliss, Anchorage, for Arctic Structures and Glenn Sinclair.

John L. Orlandini, Murphy L. Clark, Anchorage, for Brown & Root, Inc.

Douglas J. Serdahely, Libbey & Serdahely, Anchorage, for Jack and Carol Wedmore.

Sanford M. Gibbs, Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for Alaska Totem Elec. Enterprises and Home Ins. Co.

OPINION

Before BOOCHEVER, C. J., RABINOWITZ, CONNOR, and BURKE, JJ., and ROWLAND, Superior Court Judge.

RABINOWITZ, Justice.

Jack Wedmore sustained personal injuries while working on the North Slope of Alaska on November 7, 1974. On that date, Wedmore was an employee of Alaska Totem Electrical Enterprises, Inc., the electrical sub-contractor employed on a construction project by the general contractor, Arctic Structures, Inc. Arctic Structures was employed in turn by B. P. Alaska, Inc., the project owner. Brown & Root, Inc. also was under contract with B. P. Alaska to provide project management services in the

development of the North Slope, and Glenn Sinclair was a supervising employee of Arctic Structures.

Jack and Carol Wedmore, plaintiffs below, alleged that Jack Wedmore was injured by falling fifteen to twenty feet from a scaffolding or platform supported by the forks of a lift-truck at a Prudhoe Bay warehouse then under construction. The Wedmores further alleged that Brown & Root and B. P. Alaska were occupying the warehouse in a joint and common economic venture at the time; that the various defendants provided the scaffolding and safety inspections; that defendant Arctic Structures negligently failed to furnish a safe scaffolding platform; and that Brown & Root expressly warranted the safety of the scaffolding which was in fact dangerously defective such that injury resulted. Carol Wedmore alleged loss of consortium, both past and future.

Petitioners Arctic Structures and Glenn Sinclair, brought a petition for review asking this court to review two interlocutory orders issued by the superior court. The first order granted the motion of Jack and Carol Wedmore to strike an affirmative defense in the answer of Brown & Root which basically urged the abolition of the rule of joint and several liability in Alaska.[1] In the second, the superior court denied Arctic Structure's motion for leave to amend its answer to assert affirmative defenses similar to those asserted by Brown & Root.[2]

The first issue addressed in this opinion is whether the liability of multiple third-party defendants in an action by a plaintiff-employee who sustained on the job injuries to which both the plaintiff's employer and third-party defendants negligently contributed should be apportioned on the basis of fault or several liability. Petitioners appropriately concede that the present law with regard to joint and several liability in Alaska comports with the questioned orders of the superior court which struck Brown & Root's defense based on several liability and which denied Arctic Structures' motion to amend its answer to include the same de-

1. The affirmative defense which was struck from Brown & Root's answer to the amended complaint was the following:

> Defendant Brown & Root, Inc. denies that it was negligent, but if it is found that it was negligent, then defendant Brown & Root, Inc. asserts that the negligence of other parties to this litigation proximately caused plaintiffs' damages and defendant Brown & Root, Inc.'s liability to plaintiffs, if any, should not exceed the percentage of negligence attributable to defendant Brown & Root, Inc. Thus, if the fact finder determines that, for example, Brown & Root, Inc.'s negligence amounted to 10% of the total negligence which proximately caused plaintiffs' damages, then defendant Brown & Root, Inc. is liable to plaintiffs for only 10% of their damages.

2. The affirmative defenses which petitioner Arctic Structures sought to add included its theory of several liability (Affirmative Defense IV) and the doctrine of *Witt v. Jackson*, 57 Cal.2d 57, 17 Cal.Rptr. 369, 366 P.2d 641 (1961) (Affirmative Defense III), a California case which held that a negligent employer may not be indemnified by, and the plaintiff-employee may not recover from, third-party defendants that sum which the employer paid the employee under the Workmen's Compensation statute. The proposed third affirmative defense read:

> Plaintiff JACK WEDMORE's employer was negligent thereby causing plaintiff's injuries and reducing the recovery of ALASKA TOTEM ELECTRICAL ENTERPRISES, INC., and/or HOME INSURANCE COMPANY, if any, and reducing plaintiffs' JACK WEDMORE's and CAROL WEDMORE's recoveries, if any.

The fourth affirmative defense stated:

> Defendants ARCTIC STRUCTURES, INC., and GLENN SINCLAIR deny that they were negligent, but if it is found that they were negligent, then defendants, ARCTIC STRUCTURES, INC., and GLENN SINCLAIR assert that the negligence of other parties to this litigation proximately caused plaintiffs' damages and defendants ARCTIC STRUCTURES, INC. and GLENN SINCLAIR's liability to plaintiffs, if any, should not exceed the percentage of negligence attributable to defendants, ARCTIC STRUCTURES, INC., and GLENN SINCLAIR. Thus, if the fact finder determines that, for example, ARCTIC STRUCTURES, INC., and GLENN SINCLAIR's negligence amount to 10% of the total negligence which proximately caused plaintiffs' damages, then defendants, ARCTIC STRUCTURES, INC., and GLENN SINCLAIR, are liable to plaintiffs for only 10% of their damages.

fense.[3] Nevertheless, petitioners argue that the common law imposes no constraints on judicial adoption of the rule of several liability, particularly since the practical and moral bases for joint and several liability of concurrent tortfeasors have been eroded by this court's adoption of comparative negligence as the appropriate rule for apportioning damages in tort actions.

In *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975), this court adopted the rule of comparative negligence. In so doing, we rejected arguments that fault cannot be measured on a scientific basis, that contributory negligence is a deterrent to careless conduct, that comparative negligence doctrine is difficult for courts to administer, and that settlement of negligence cases is encouraged by virtue of the existence of the contributory negligence rule.[4] In abandoning the rule of contributory negligence in favor of comparative negligence, this court was primarily concerned with the inequity of requiring an injured plaintiff to bear damages far in excess of his or her own measure of fault simply because the plaintiff was less than completely free of negligence.[5]

Petitioners Arctic Structures and Glenn Sinclair argue that the comparative negligence rule adopted in *Kaatz* should be extended to the apportionment of damages between multiple defendants and they urge this court to limit the liability of each defendant in the case at bar proportionately to its degree of fault. In response to the original common law doctrine of joint and several liability and a marked judicial reluctance to permit contribution between tortfeasors even where independent but concurrent negligence contributed to a single injurious result,[6] numerous contributory negligence jurisdictions have passed statutes which, to a greater or lesser extent, allow contribution among tortfeasors.[7] Alaska is one of those states which has adopted a "Uniform Contribution Among Tortfeasors Act," AS 09.16.010–.060 which provides for pro rata contribution among tortfeasors found jointly or severally liable for the

3. *Lucas v. City of Juneau*, 127 F.Supp. 730, 15 Alaska 413 (D.Alaska 1955), decided that multiple tortfeasors are jointly and severally liable for the full amount of damages where consecutive or concurrent acts of negligence combine to produce a single injury.

4. With respect to these arguments, we stated in *Kaatz v. State*, 540 P.2d 1037, 1048 (Alaska 1975) (footnotes omitted):

> Although jurors' verdicts are not precisely scientific, an allocation of proportionate fault approaches reality more closely than the total loss or victory represented by the contributory negligence rule. As to the deterrent effect of the contributory negligence rule, Dean Prosser points out that the law must also aim to deter wrongful conduct by defendants and not only plaintiffs. Judicial administration of the rule has not presented insuperable difficulties in those jurisdictions which have long employed it. Experience has not borne out the argument that comparative negligence is difficult for courts and juries to apply.
>
> Similarly, careful studies tend to show that settlement of cases can be achieved as readily under the comparative negligence system as under the contributory negligence rule. Studies have also shown that the effect of the comparative negligence rule on insurance rates is minimal.

5. In this regard, we quoted from *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 862–863, 532 P.2d 1226, 1230–31 (1975) (footnotes omitted), where the California Supreme Court wrote:

> It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the 'all-or-nothing' approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task. The basic objection to the doctrine—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.

Quoted in Kaatz v. State, 540 P.2d 1037, 1048 (Alaska 1975). *See also* W. Prosser, Law of Torts § 67, at 433 (4th ed. 1971).

6. W. Prosser, Law of Torts § 850, at 306 (4th ed. 1971). As of 1971, Prosser wrote that only nine American jurisdictions had allowed contribution among tortfeasors without legislation to that effect.

7. *See* Prosser, *id.* at 307.

same injury to person or property. In light of the foregoing, the question thus presented to this court with respect to changing the existing common law rule of joint and several liability is whether a rule of several liability would contravene the intentions of the Alaska legislature in enacting the Contribution Among Tortfeasors Act.

[1] The Alaska Uniform Contribution Among Tortfeasors Act was adopted at a time when contributory negligence and no right of contribution was the law in Alaska.[8] Section 09.16.010(a) of the Alaska act provides:

> *Right to contribution.* (a) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

The statutory right of contribution is expressly limited to the pro rata share of the common liability and "[n]o tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability." [9] In determining the tortfeasors' pro rata shares, "their relative degrees of fault shall not be considered;" [10] however, "principles of equity applicable to contribution generally shall apply." [11] The comments of the Commissioners on Uniform State Laws in regard to the Uniform Contribution Among Tortfeasors Act upon which the Alaska act is based indicate that a deliberate decision was made not to consider comparative negligence or degrees of fault in contribution cases. The comment to Uniform Contribution Among Tortfeasors Act § 2 (section 09.16.020(1) of the corresponding Alaska act) states that "the exclusion of intentional, willful and wanton actors from the right to contribution eliminates the better arguments for a relative degree of fault rule." [12] Though the Judiciary Committee of the Alaska House of Representatives apparently disagreed with the Uniform Commissioners on this issue at one point,[13] the Alaska statute, as enacted, follows the exact language of the Uniform Act with respect to pro rata contribution. The principles of equity which apply through section 2(c) of the Uniform Act (section 09.16.020(3) of the corresponding Alaska statute) were intend-

8. The House Judiciary Committee Report on the bill which became the Contribution Among Tortfeasors Act indicates that the Act was based on the 1955 version of the Uniform Contribution Among Tortfeasors Act:

> This bill proposes the adoption of the Uniform Contribution Among Tortfeasors Act, prepared by the National Conference of Commissioners on Uniform State Laws in 1955. The national conference's prefatory note to this Act states in part:
>
> 'This uniform act establishes the right of a person liable for damages for an unintentional wrong to compel others, who are liable with him for the same damages, to share in discharging the common liability.
>
> 'Under the existing law an injured person may select whom he wishes to sue from among those jointly liable to him for an injury. He need not sue all. He may settle out of court or he may sue all and collect the full amount of the judgment from one. Under the prevailing law rule there is no recourse by one who voluntarily pays or who is forced to pay the common liability, against the others who are equally liable to the injured party but who have escaped payment.
>
> 'This act would distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under the common law.'

1970 House Journal 437.

9. AS 09.16.010(b).

10. AS 09.16.020(1).

11. AS 09.16.020(3).

12. Uniform Contribution Among Tortfeasors Act (U.L.A.) § 2, at 87 and Commissioners' Comment (1975). *See also* Comment to § 1(c) at 65.

13. The House Judiciary Committee Report states that:

> The Judiciary Committee amendment would require each tortfeasor's share of the liability to be based on his relative degree of fault. After a review of the official comments accompanying the uniform Act and of the relevant pages of the transcript of the meeting of the national conference's committee which wrote this Act, the Judiciary Committee is unconvinced of the need to prohibit the degrees of fault from being considered (as is done in the original version).

1970 House Journal at 438.

ed to govern contribution when one defendant is found to be insolvent, and were not intended to affect the requirement that relative degrees of fault are not to be considered as a factor in the apportionment.[14]

Despite the express language of the Alaska act requiring pro rata distribution of liability for damages among concurrent tortfeasors, petitioners contend that the underlying purpose of the act was the fair and equitable treatment of multiple defendants rather than pro rata sharing, and that the pro rata method was chosen because it was the only method of apportionment thought workable or judicially acceptable before comparative negligence had become accepted as a basis for apportioning damages. Petitioners therefore urge this court to adopt judicially the rule of several liability in recognition of the changed approach to liability for negligence brought about by *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975), and to effect the legislative intent to achieve an equitable result even though the literal statutory language lends itself to the opposite outcome.[15]

Petitioners further assert that apportioning liability based on fault can be reconciled with the provision of the Alaska Uniform Contribution Among Tortfeasors Act governing releases from liability. AS 09.16.040 provides:

> *Release or covenant not to sue.* When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death,
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Petitioners focus on the "good faith" requirement in the release provision and argue:

> Adequate recognition of *all* the purposes of the statute, in the greatly changed circumstances of comparative negligence commends that the court construe the good faith provision of AS 09.16.040 to require that the amount of reduction of the claim in AS 09.16.040(1) against the remaining defendants means a reduction by the amount of liability which would have been visited upon that settling party as a result of apportioning liability based on fault had the settling party remained available to answer any eventual judgment.[16]

Though the common law rule of joint and several liability does impose the risk of uncollectibility upon the solvent defendants, we are not convinced that as a general rule the alternative, which would cast the total risk of uncollectibility upon the injured plaintiff, is an improvement. In assessing the advisability of such a change, we think it significant that the National Conference of Commissioners on Uniform State Laws has declined to abolish joint and several liability in the Uniform Comparative Fault Act which was approved by the National

14. Uniform Contribution Among Tortfeasors Act (U.L.A.) § 2, at 87–88 and Commissioners' Comment (1975).

15. *See Cooper v. Argonaut Ins. Co.*, 556 P.2d 525, 526 (Alaska 1976) ("While grammatically the disputed phrase lends itself more to the second construction . . . we feel that the first alternative more accurately conforms to the legislative intent."). *See also Li v. Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975); 2A C. Sands, Sutherland Statutory Construction § 45.05, at 16 (4th ed. 1973).

16. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 408–11, 95 S.Ct. 1708, 1714–1716, 44 L.Ed.2d 251, 260–62 (1975) (replacing the rule of divided damages in admiralty actions with a rule requiring, whenever possible, the allocation of damages in proportion to the relative fault of the parties involved. The Supreme Court found no reason that the adoption of the new rule should impede out of court settlements).

Conference in 1977. Rather, that act adopts a compromise position requiring contribution among multiple defendants based on relative degrees of fault and allowing reallocation of the damages where the obligation of a defendant proves uncollectible. The commissioners' comment regarding this matter of apportionment states:

> The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligent or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.
>
> The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.
>
> Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.
>
> Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule at joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.[17]

The case law with regard to joint and several liability in jurisdictions which have adopted a comparative negligence system should not be rejected merely because of the change of comparative negligence.[18] Although a few comparative negligence jurisdictions have legislatively abolished joint and several liability,[19] it is notable that we can find no state in which a statutory scheme of joint and several liability has been judicially modified or abolished.[20] Even more significant, two states other than Alaska have judicially (as opposed to legislatively) adopted comparative negligence, have expressly addressed the issue of retention of joint and several liability and have upheld the continued validity of the doctrine subsequently.

In Florida, *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973), replaced the old common law rule of contributory negligence with the principles of comparative negligence. At the time *Hoffman* was decided, Florida had

17. Uniform Comparative Fault Act (U.L.A.) § 2, Comment at 30 (Supp.1979).

It is apparent that the Commissioners of Uniform State Laws considered and rejected petitioners' argument that the adoption of comparative negligence doctrine requires the abolishment of joint and several liability. Though the Alaska legislature has not adopted the Uniform Comparative Fault Act and it therefore is not dispositive of the legislative intent in the present case, the existence of the compromise solution does undercut petitioners' policy arguments on this point.

18. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) (joint and several liability of a shipowner for 90% of damages to a stevedore firm's employee injured while unloading the boat, even though the stevedore firm was 70% comparatively negligent. The decision was based on interpretation of the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b)).

19. These states include Kansas (Kan.Rev.Stat. Ann. § 60-258a(d)); Nevada (Nev.Rev.Stat. § 41.141, subd. 3); New Hampshire (N.H.Rev. Stat.Ann. § 507:7-a); Vermont (Vt.Stat.Ann., Tit. 12, § 1036).

20. *See* V. Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 Pac.L.J. 747, 764 (1976). *See also* M. Raskoff, *Comparative Negligence in California: Multiple Party Litigation*, 7 Pac.L.J. 771, 772 (1976).

The Supreme Court of Wisconsin did alter a common law rule of equal contribution among tortfeasors after the judicial adoption of a comparative negligence doctrine to allow contribution based on percentage of causal negligence attributable to each tortfeasor. *Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962). No statutory pro rata contribution among tortfeasor's act was in effect in Wisconsin at the time of the *Bielski* decision, however.

not adopted the Uniform Contribution Among Torfeasors Act, and it retained the original common law rule of no contribution among multiple defendants found to be jointly and severally liable for commission of a tort.[21] Subsequently, the Florida legislature enacted the Uniform Contribution Among Tortfeasors Act in 1975, including its provision for pro rata apportionment of damages among concurrent tortfeasors.[22] The Florida Supreme Court has since then had occasion to rule on a trial court's apportionment of damages among multiple defendants based on the jury's assessment of the percentage of fault attributable to each. In *Lincenberg v. Issen*, 318 So.2d 386, 393 (Fla.1975), the court held:

> The trial court by allocating damages on the basis of percentage of fault acted inconsistently with the new law since said act specifically provides for contribution on a pro rata basis with the relative degrees of fault *not* to be considered.

The court further stated:

> The plaintiff is entitled to a measurement of his full damages and the liability for these damages should be apportioned in accordance with the percentage of negligence as it relates to the total of all the defendants. The negligence attributed to the defendants will then be apportioned on a pro rata basis without considering relative degrees of fault although the multi-party defendants will remain jointly and severally liable for the entire amount.[23]

Thus, the Florida court was able to reconcile the doctrine of comparative negligence with retention of the rule of joint and several liability and the enactment by the Florida legislature of the Uniform Contribution Among Tortfeasors Act.

[2] The Supreme Court of California also has directly addressed this issue.[24] *Li v. Yellow Cab Company*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975), abrogated the doctrine of contributory negligence in California and replaced it with a comparative negligence rule of liability. In deciding the comparative negligence issue, the court expressly declined to address the issue of liability of multiple parties since it was not before the court in the *Li* case. *Id.* 119 Cal.Rptr. at 871, 532 P.2d at 1239. Subsequently, the appellate courts in California

21. In these circumstances the Florida Supreme Court explained the purposes of the adoption of the comparative negligence rule as follows:

> (1) To allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury; and
>
> (2) To apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.

Hoffman v. Jones, 280 So.2d 431, 439 (Fla. 1973).

22. Fla.Stat. § 768.31 (1975).

23. *Lincenberg v. Issen*, 318 So.2d 386, 393-94 (Fla.1975). The court explained its interpretation of the Uniform Contribution Among Tortfeasors Act provisions relating to determination of pro rata liability for damages as follows:

> The Act retains the full, joint, and several liability of joint tortfeasors to the plaintiff, and provides for contribution between them on a pro rata basis. In determining pro rata shares of the tortfeasors in the entire liability, this law provides:
>
> '(a) There relative degrees of fault shall not be considered;
>
> '(b) If equity requires the collective liability of some as a group shall constitute a single share; and
>
> '(c) *Principles of equity applicable to contribution generally shall apply.*'

Id. at 392-93 (emphasis supplied).

24. Pro rata sharing of damages by concurrent tortfeasors through contribution was established by a contribution statute adopted in California in 1957 entitled "Releases From and Contribution Among Joint Tortfeasors." Cal. Code of Civ.Proc. 875 *et seq.* *See Safeway Stores, Inc. v. Nest-Kart*, 63 Cal.App.3d 934, 134 Cal.Rptr. 150, 153 (1976), *vacated*, 21 Cal.3d 322, 146 Cal.Rptr. 550, 579 P.2d 441 (1978).

split on the resolution of the question of several liability where multiple parties were involved.[25] The California Supreme Court recently resolved the conflict in appellate court decisions in *American Motorcycle Association v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899 (1978). There the court expressly upheld the continuing validity of joint and several liability after the adoption of comparative negligence. The court stated:

> [W]e conclude that our adoption of comparative negligence to ameliorate the inequitable consequences of the contributory negligence rule do[es] not warrant the abolition or contraction of the established 'joint and several liability' doctrine; each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury.

Contrary to petitioner's contention, we conclude that joint and several liability does not logically conflict with a comparative negligence regime. Indeed, as we point out, the great majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability rule; we are aware of no judicial decision which intimates that the adoption of comparative negligence compels the abandonment of this long-standing common law rule. The joint and several liability doctrine continues, after *Li*, to play an important and legitimate role in protecting the ability of a negligently injured person to obtain adequate compensation for his injuries from those tortfeasors who have negligently inflicted the harm.[26]

25. *See American Motorcycle Ass'n v. Superior Court*, 65 Cal.App.3d 694, 135 Cal.Rptr. 497 (1977), *vacated*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899 (1978); *Safeway Stores, Inc. v. Nest-Kart*, 63 Cal.App.3d 934, 134 Cal.Rptr. 150 (1976), *vacated*, 21 Cal.3d 322, 146 Cal. Rptr. 550, 579 P.2d 441 (1978); *Stambaugh v. Superior Court*, 62 Cal.App.3d 231, 132 Cal. Rptr. 843 (1976).

26. *American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 184, 578 P.2d 899, 901 (1978). The court explained in detail its reasoning for reaching these conclusions:

> First, the simple feasibility of apportioning fault on a comparative negligence basis does not render an indivisible injury 'divisible' for purposes of the joint and several liability rule. As we have already explained, a concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of that injury. In many instances, the negligence of each of several concurrent tortfeasors may be sufficient, in itself, to cause the entire injury; in other instances, it is simply impossible to determine whether or not a particular concurrent tortfeasor's negligence, acting alone, would have caused the same injury. Under such circumstances, a defendant has no equitable claim vis a vis an injured plaintiff to be relieved of liability for damage which he has proximately caused simply because some other tortfeasor's negligence may also have caused the same harm. In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.
>
> Second, abandonment of the joint and several liability rule is not warranted by AMA's claim that, after *Li*, a plaintiff is no longer 'innocent.' Initially, of course, it is by no means invariably true that after *Li* injured plaintiffs will be guilty of negligence. In many instances a plaintiff will be completely free of all responsibility for the accident, and yet, under the proposed abolition of joint and several liability, such a completely faultless plaintiff, rather than a wrongdoing defendant, would be forced to bear a portion of the loss if any one of the concurrent tortfeasors should prove financially unable to satisfy his proportioned share of the damages.
>
> Moreover, even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant. In this setting, a plaintiff's negligence relates only to a failure to use due care for his own protection, while a defendant's negligence relates to a lack of due care for the safety of others. Although we recognized in *Li* that a plaintiff's self-directed negligence would justify reducing his recovery in proportion to his degree of fault for the accident, the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious.
>
> Finally, from a realistic standpoint, we think that AMA's suggested abandonment of

The court therefore concluded that, after *Li*, "a concurrent tortfeasor whose negligence is a proximate cause of indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.'" *American Motorcycle Association v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 189–190, 578 P.2d 899, 906–07 (1978), quoting *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 875, 532 P.2d 1226, 1243 (1975). In our opinion, the reasoning of *American Motorcycle Association* is persuasive for retention of the joint and several liability rule.[27] In light of Alaska's existing pro rata legislative scheme for apportionment of damages among joint tortfeasors and the public policies implemented by the legislation,[28] we hold that the common law rule of joint and several liability should not be judicially modified.[29]

This brings us to the second issue presented in this petition, namely, whether third-party defendants in a tort action may reduce their total liability to the plaintiff-employee in proportion to the percentage of negligence attributable to the plaintiff's employer. Petitioner Brown & Root argues that the fact that Jack Wedmore's employer, Totem Electrical Enterprises, Inc., already had paid the statutorily defined amount of worker's compensation to him does not relieve the employer of responsibility for its proportion of negligence in causing the injury. Thus, even though the employer cannot be required to contribute further to the damages the employee is entitled to receive,[30] Brown & Root argues that third-party defendants are entitled to a reduction of liability in proportion to the

> the joint and several liability rule would work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries. One of the principal by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability. In such a case the rule recognizes that fairness dictates that the 'wronged party should not be deprived of his right to redress,' but that '[t]he wrongdoers should be left to work out between themselves any apportionment.' The *Li* decision does not detract in the slightest from this pragmatic policy determination.
>
> *Id.*, 146 Cal.Rptr. at 188–189, 578 P.2d at 905–06 (citations omitted) (footnote omitted).

27. However, we have considered and reject judicial creation of a partial indemnity rule of law, adopted by the California Supreme Court in *American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 195, 578 P.2d 899, 912 (1978).

28. *See* note 26 *supra*.

29. *See State v. Guinn*, 555 P.2d 530, 547 n.42 (Alaska 1976) (recognizing that judicial adoption of the doctrine of comparative negligence in *Kaatz v. State*, 540 P.2d 1037, 1042 (Alaska 1975), will require legislative amendment of Alaska's Uniform Contribution Among Tortfeasors Act).

30. The Alaska Workmen's Compensation Act, AS 23.30.005–.270, provides that the employer's liability for workmen's compensation awards is exclusive.

In this regard, AS 23.30.055 states:

> *Exclusiveness of liability.* The liability of an employer prescribed in § 45 of this chapter is exclusive and in place of all other liability of the employer and any fellow employee to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or his legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

AS 23.30.170 sets forth the rates of compensation by which an employer's liability to an employee injured on the job is determined for purposes of the workmen's compensation statute.

percentage of fault attributable to the plaintiff's employer. While one foundation for this claim is the several liability argument we have rejected above, Brown & Root also raises constitutional issues of due process and equal protection.

Essentially, Brown & Root claims that the combination of the doctrine of joint and several liability as it applies to third-party defendants, and the lack of availability of pro rata contribution from a negligent employer under the Alaska Uniform Contribution Among Tortfeasors Act, AS 09.16.010–.060, because of the limited, exclusive liability of an employer under the Alaska Workmen's Compensation Act,[31] deprives it of access to the courts to raise the defense of the employer's negligence under the due process and equal protection clauses of the state and federal constitutions.[32]

[3–7] What procedural due process may require under any particular set of circumstances depends on the nature of the governmental function involved and the private interest affected by the governmental action.[33] While it is manifest that no one has a vested right in any particular mode of procedure such that legislative change is prohibited, due process does require that a substantial and efficient remedy remains available or that one be provided when a preexisting defense is statutorily limited.[34] In the present case, however, it is doubtful whether the defense of a co-defendant's negligence ever has been available separately from its relationship to the lack of negligence on the part of the defendant asserting the claim.[35] Under the common law of Alaska prior to enactment of the Uniform Contribution Among Tortfeasors Act, a concurrently negligent defendant was entitled to no contribution from other negligent parties.[36] The Contribution Among Tortfeasors Act introduced the concept of pro rata contribution among tort-

31. *Id.*

32. Alaska Constitution art. I, §§ 1 and 7; U.S. Constitution, Amends. V, XIV.

33. *See, e. g., Fireman's Fund Ins. Co. v. Arizona Ins. Guaranty Ass'n*, 22 Ariz.App. 453, 528 P.2d 839 (1974), *vacated* 112 Ariz. 7, 536 P.2d 695 (1975); *Aguchak v. Montgomery Ward Co., Inc.*, 520 P.2d 1352, 1357 (Alaska 1974) ("Whenever a party demonstrates a prima facie denial of due process of law, the reviewing court must balance the interest of the state in the act or procedure challenged against the right denied the individual."). *See also Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Bush v. Reid*, 516 P.2d 1215 (Alaska 1973).

34. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 102, 77 L.Ed. 231, 239 (1932); *Jones v. Hildebrant*, 191 Colo. 1, 550 P.2d 339 (1976); *State v. Griffith*, 97 Idaho 52, 539 P.2d 604 (1975).

35. *See Lindsey v. Normet*, 405 U.S. 56, 68–69, 92 S.Ct. 862, 871–872, 31 L.Ed.2d 36, 48 (1972) ("The substantive law of landlord-tenant relations differs widely in the various States. . . . There is no showing that Oregon excludes any defenses it recognizes as "available" on the three questions (physical possession, forcible withholding, legal right to possession) at issue in [a suit under the Oregon Forcible Entry and Wrongful Detainer Statute]").

36. *See* note 8 *supra*. It should be noted here that contribution and indemnity constitute two distinct concepts of allocation of damages among tortfeasors.

> In traditional terms, the apportionment of loss between multiple tortfeasors has been thought to present a question of contribution; indemnity, by contrast, has traditionally been viewed as concerned solely with whether a loss should be entirely shifted from one tortfeasor to another, rather than whether the loss should be shared between the two.

American Motorcycle Ass'n v. Superior Court, 20 Cal.3d 578, 146 Cal.Rptr. 182, 190, 578 P.2d 899, 907 (1978) (citations omitted). Thus, Brown & Root's citations to *Sunspan Eng'r & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla.1975), and *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974), for the proposition that the adoption of an exclusive liability statute which abolishes the common law right of a third party to sue for indemnity is unconstitutional as denying access to the courts is not applicable to the present case. This court has not yet passed on the question of whether a third party may recover indemnification from an employer in the absence of a contractual relationship, given the exclusive remedy provision of the Workmen's Compensation Act. *Golden Valley Elec. Ass'n, Inc. v. City Elec. Serv., Inc.*, 518 P.2d 65, 69 n.16 (Alaska 1974).

feasors but it did not abrogate the doctrine of joint and several liability which ultimately makes each concurrently negligent defendant liable for the whole of the plaintiff's loss where the co-defendants turn out to be insolvent. Since we have held that judicial adoption of comparative negligence does not disturb the continuing validity of joint and several liability, we conclude that petitioners have not been deprived of any "available" defenses by the refusal of the superior court to allow them to present the employer's negligence as a partial defense to liability.[37]

[8] Brown & Root's equal protection claim is based on the differential treatment of tortfeasors who become involved in employee-employer tort claims as compared to all other tortfeasors. Only the former are prohibited from securing pro rata contribution from their concurrently negligent co-defendants, when the co-defendant in question happens to be the employer of the injured plaintiff. Review of equal protection challenges is governed by the standards set out in *State v. Erickson*, 574 P.2d 1 (Alaska 1978).[38] The purpose of the Workmen's Compensation Act, including the exclusive liability provision attacked by Brown & Root in this action, is the provision of financial and medical benefits for victims of work-connected injuries in the most efficient, most dignified, and most certain form.[39] In accomplishing the goal of securing adequate compensation for injured employees without the expense and delay inherent in a determination of fault as between the employee and employer, the legislature apparently also found it necessary to limit the total amount of the employer's liability to the statutory award.[40] We have concluded that there is a fair and substantial relationship between the legislative objective of providing guaranteed, expeditious compensation to the injured employee and the limitation on the employer's total liability regardless of its percentage of fault,

37. Brown & Root also asserts a denial of substantive due process in its brief to this court. The test for upholding the exclusive liability provision of the Workmen's Compensation Act against a challenge on substantive due process grounds is whether the legislative enactment has a reasonable relationship to a legitimate governmental purpose. *Concerned Citizens of So. Kenai Pen. v. Kenai Pen. Borough*, 527 P.2d 447, 452 (Alaska 1974); *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92, 101 (Alaska 1974). The "reasonable relationship" test is satisfied in the present case by the purposes of the worker's compensation scheme, including the "exclusive liability" provision:

> The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obligated to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

1 A. Larson, Workmen's Compensation Law § 2.20, at 5 (1972), *quoted in Wright v. Action Vending Co.*, 544 P.2d 82, 86–87 (Alaska 1975).

38. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978), requires an evaluation of the purposes of the challenged statutory scheme, the means used to accomplish those legislative objectives, and a balancing of relative necessity for utilizing the particular means selected against the nature of the interest which is interfered with.

> Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of this test will be essentially the same as requiring a 'compelling state interest'; but, by avoiding outright categorization of fundamental and non-fundamental rights, a more flexible, less result-oriented analysis may be made.

Id. at 12.

39. *Wright v. Action Vending Co.*, 544 P.2d 82, 86–87 (Alaska 1975). *See* note 37 *supra.*

40. *See Haman v. Allied Concrete Products, Inc.*, 495 P.2d 531, 535 (Alaska 1972) ("The exception to the Alaska Compensation Act's exclusive remedy provision [for injuries resulting from defective or insufficient machinery] urged by the Hamans would seriously undermine, if not engulf, the comprehensiveness of that system of compensation."). *See also* 1 A. Larson, Workmen's Compensation Law § 2.40, at 10 (1978 and Supp.1979) ("In compensation, unlike tort, the only injuries compensated for are those which produce disability and thereby presumably affect earning power.").

even though that limitation has the effect of denying the third-party tortfeasors the right to pro rata contribution from the employer.[41]

[9] The final question to be addressed in this case is whether, as a matter of law, Jack Wedmore's employer or its worker's compensation insurance carrier is entitled to reimbursement from the third-party defendants for compensation paid to the plaintiff-employee under the Alaska Workmen's Compensation Act. Section 23.30.015 of that act creates an insurance carrier's lien on damages recovered by an injured plaintiff-employee against third party tortfeasors. Specifically AS 23.30.015(g) provides:

> If the employee or his representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A), (B), and (C) of this section, insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter.

AS 23.30.015(i) subrogates the insurance carrier to all the rights of the employer when appropriate:

> If the employer is insured and the carrier has assumed the payment of compensation, the carrier shall be subrogated to all the rights of the employer.

The Alaska Workmen's Compensation Act was originally enacted in 1959,[42] long before judicial adoption of the doctrine of comparative negligence in *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975). The act did not expressly address the situation where the employer seeking reimbursement is contributorily negligent in causing the employee's injuries. Whether, in light of the policies behind adoption of comparative negligence in this state, the statute should be construed to deny reimbursement where the employer is shown to be concurrently negligent is thus a question of first impression before this court. Petitioners argue that we should adopt the rationale of *Witt v. Jackson*, 57 Cal.2d 57, 17 Cal.Rptr. 369, 366 P.2d 641 (1961), a decision of the California Supreme Court which held that neither a negligent employer nor the plaintiff-employee may recover from third-party tortfeasors the amount which the employer paid to the employee under the applicable workmen's compensation scheme.[43] Since *Witt* was decided prior to the adoption of comparative negligence in California, petitioners further urge that the rule of that case be adopted in a modified form such that the employer's reimbursement is re-

41. *See Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), *quoting State v. Wylie*, 516 P.2d 142, 145 (Alaska 1973) (footnote omitted), where we stated:

> Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

We have previously upheld Alaska's worker's compensation scheme, including the "exclusive liability" provision, against an equal protection challenge under the Alaska Constitution as having a "rational basis—even under the 'less speculative, less deferential, more intensified means-to-ends' application of that test." *Wright v. Action Vending Co.*, 544 P.2d 82, 87 (Alaska 1975) (footnote omitted). The compensation scheme likewise passes muster under the equal protection clause of the fourteenth amendment to the United States Constitution.

42. Ch. 193, SLA 1959.

43. It should be noted that the rule in *Witt v. Jackson*, 57 Cal.2d 57, 17 Cal.Rptr. 369, 366 P.2d 641 (1961), differs from the absolute reduction of third-party tortfeasors' liability based on the percentage fault of the employer, which the rejection of joint and several liability doctrine urged above would have accomplished. Under the rule in *Witt*, the employee always would retain full recovery of damages since the reduction in reimbursement required by *Witt* would not exceed the amount of compensation paid to the employee by the negligent employer. Thus, *Witt* simply reallocates a portion of the damages between the employer and the third-party tortfeasors. It would not require the injured employee to bear any part of the employer's proportion of negligence liability.

duced only by the proportionate share of negligence attributable to it.

In California, the effect of the adoption of comparative negligence doctrine on the holding in the *Witt* case was recently decided by the California Supreme Court in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board*, 22 Cal.3d 829, 150 Cal.Rptr. 888, 587 P.2d 684 (1978). In that case the court held:

> Applying the principle that the employer and third party should, to the extent consistent with the employer's statutory immunity from tort liability, share the burden of the employee's recovery as joint tortfeasors, we conclude that the concurrently negligent employer should receive either credit or reimbursement for the amount by which his compensation liability exceeds his proportional share of the injured employee's recovery.[44]

Courts in other jurisdictions have gone both ways on this issue. Pennsylvania allows a third-party tortfeasor to secure contribution from a negligent employer limited to the amount of compensation payments the employer has made to the employee. *Brown v. Dickey*, 397 Pa. 454, 155 A.2d 836, 840 (1959). *See also Chamberlain v. Carborundum Co.*, 485 F.2d 31, 33 (3rd Cir. 1973); *Maio v. Fahs*, 339 Pa. 180, 14 A.2d 105, 110 (1940). North Carolina, instead of requiring limited contribution of a negligent employer, reduces the judgment against the third party by the amount of compensation paid if the third party can show the concurrent negligence of the employer. *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886, 892 (1953); *Brown v. Southern Railway Co.*, 204 N.C. 668, 169 S.E. 419 (1933).[45]

On the other hand, some jurisdictions have held that the employer's statutory right to reimbursement is not affected by its concurrent negligence in causing the injury. In New Mexico, *Royal Indemnity Co. v. Southern California Petroleum Corp.*, 67 N.M. 137, 353 P.2d 358, 363 (1960), held that the worker's compensation reimbursement provision allows a negligent employer to recover from third-party tortfeasors compensation paid to the employee under the act. Similarly, in *Schweizer v. Elox Division of Colt Industries*, 70 N.J. 280, 359 A.2d 857, 861 (1976), the court held:

> When the issue of an employer's concurrent negligence arises in the context of his credit claim based on a third party settlement, the board must determine the appropriate contribution of the employer since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he should be granted a credit for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of the statutory credit adequately accommodate the principle that a negligent employer should not profit from his own wrong.

Id. (footnotes omitted).

44. *Associated Constr. & Engineering Co. v. Workers' Compensation Appeals Bd.*, 22 Cal.3d 829, 150 Cal.Rptr. 888, 896, 587 P.2d 684, 692 (1978). The California Supreme Court further elaborated its holding as follows:

> When the issue of an employer's concurrent negligence arises in a judicial forum, application of comparative negligence principles is relatively straightforward. The third party tortfeasor should be allowed to plead the employer's negligence as a partial defense, in the manner of *Witt*. Once this issue is injected into the trial, the trier of fact should determine the employer's degree of fault according to the principles of [*American Motorcycle Ass'n. v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899 (1978)]. The court should then deduct the employer's percentage share of the employee's total recovery from the third party's liability—up to the amount of the workers' compensation benefits assessed against the employer. Correspondingly, the employer should be denied any claim of reimbursement—or any lien under section 3856, subdivision (b)—to the extent that his contribution would then fall short of his percentage share of responsibility for the employee's total recovery.

45. *See also McDrummond v. Montgomery Elevator Co.*, 97 Idaho 679, 551 P.2d 966 (1976) (A third-party tortfeasor may invoke the concurrent negligence of the employer to defeat the employer's right to reimbursement under the workmen's compensation statute).

The employer renders itself absolutely liable for the scheduled and fixed compensation liability to the injured employee regardless of absence of negligence on its part or the contributory negligence of the employee. The employee, for his part, is guaranteed recovery for his common-law damages against contributing third-party tortfeasors or for his compensation award, whichever is greater, but he may not duplicate these recoveries. But the act is neutral insofar as the third-party tortfeasor is concerned, leaving him with his common-law liability to the injured employee, or, if the latter has been recompensed therefore to any extent by compensation payments, to the statutorily subrogated employer who has made those payments.[46]

Based on the foregoing, we think it apparent that cogent arguments can be made on either side of the reimbursement issue. Indeed, Professor Larson notes that "[P]erhaps the most evenly-balanced controversy in all of compensation law is the question whether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer's negligence has caused or contributed to the injury."[47] Nevertheless, we have concluded that in light of the specific reimbursement provision in AS 23.30.015(g) the appropriate forum for resolution of the issue is with the legislature. Although we think there is considerable merit in adoption of the *Associated Construction & Engineering Co.* solution to the problem, we are reluctant to modify the existing legislative scheme set out in AS 23.30.015(g).

The orders of the superior court are Affirmed.

MATTHEWS, J., not participating.

BOOCHEVER, Chief Justice, dissenting.

I understand the majority opinion to hold that liability among joint tort-feasors is to be joint and several, rather than several, and that it is to be prorated according to the number of defendants. For the reasons set forth in the opinion, I can agree to joint and several liability, but I cannot agree to pro rata contribution among defendants regardless of their degree of fault. I believe that our decision in *State v. Guinn*, 555 P.2d 530 (Alaska 1976), controls in allocating liability among defendants in accordance with their degree of fault, rather than in equal shares. In *Guinn*, we stated:

> It is therefore necessary to remand this case to the superior court for a determination of the degrees of fault attributable to Guinn, the State and McGee. . .
>
> In summary, consideration of the State's arguments has led us to the following conclusions. Contributory negligence of the decedent was established as a matter of law. The effect of that negligence should be governed by the doctrine of comparative negligence. It is necessary that this case be remanded to the superior court for the purpose of attributing degrees of fault to the three parties in this litigation.

Id. at 542.

If a plaintiff is unable to collect the percentage share of the judgment from one of

46. The court in *Schweizer v. Elox Division of Colt Industries*, 70 N.J. 280, 359 A.2d 857, 861 (1976), further explained:

> We are not at all impressed by the argument that the Legislature should not be deemed to have intended a 'reward' to a 'wrongdoer'. The latter characterization is out of place in the industrial scene where human negligence by corporate agents and employees is commonplace and certainly carries no moral connotations. The legislative rationale for the existing scheme of the compensation act as a whole, read together with the employer subrogation and reimbursement provisions, is plain and quite defensible.
>
> *See also Cacchillo v. H. Leach Machinery Co.*, 111 R.I. 593, 305 A.2d 541, 543–44 (1973) (Even though the employer's negligence contributed to injuries received by the employee, where the employer had compensated the employee pursuant to the statutory worker's compensation scheme, third-party defendants who were also liable to the employee were not entitled to recover contribution from the employer under the state Contribution Among Tortfeasors Act.)

47. 2A A. Larson, Workmen's Compensation Law § 76.10, at 14–287 (1976) (footnote omitted).

the defendants, it is only logical that the increased liability of the other defendants should be shared in accordance with their proportionate degrees of fault. *See American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899 (1978). I agree that this method of apportionment is not in accord with the pro rata method of contribution prescribed in Alaska's statute for apportionment of damages among joint tort-feasors. AS 09.16.020(1). It does conform, however, to the legislative intent of justly apportioning damages among joint tort-feasors and the statutory requirement that "principles of equity applicable to contribution generally shall apply." AS 09.16.020(3).

In 1970, when the Alaska Uniform Contribution Among Tort-Feasors Act was passed, comparative negligence was not authorized. I believe that the Act should be construed in conformity with its general purpose to permit contribution in accordance with degree of fault, instead of an arbitrary pro rata basis, as the reason for dividing liability equally no longer exists. Without comparative negligence, sharing equally, furnished a rough approximation of a just result. For example, it was certainly preferable when two joint tort-feasors were liable, for them to share equally in paying the damages, than for one to go free simply because the plaintiff elected to recover from the other. Yet such a sharing is far from equitable when one defendant is 90 percent at fault and the other 10 percent. In fact, once comparative negligence is available and assuming that both defendants are responsible, requiring the defendant who is 10 percent responsible to bear 50 percent of the loss, the same amount as the one who was 90 percent at fault, is so arbitrary that it presents a serious question whether constitutional due process rights are violated.[1]

The California Supreme Court has reached the same result suggested here although applying a rationale based on equitable partial indemnity. *See American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 195–199, 578 P.2d 899, 912–16 (1978).

I also respectfully disagree with the portion of the opinion which holds that third party defendants in tort actions may not reduce their total liability to the plaintiff in proportion to the percentage of negligence attributable to a plaintiff's employer. I believe that the amount of a third party defendant's liability should be reduced by the employer's percent of negligence up to a maximum of the employer's payments of compensation to the employee. Assuming that the third party defendant is 50 percent at fault and the employer is 50 percent at fault, with total damages of $10,000.00 and $5,000.00 paid by the employer under the compensation act, the third party's liability to the plaintiff would be $5,000.00 rather than $10,000.00. The employer, however, would not be entitled to recover any of the $5,000.00 in compensation benefits paid. The employee would still recover $10,000.00 ($5,000.00 in damages from the third party and $5,000.00 in compensation benefits from the employer).

The opposite result which would follow under the majority's holding is glaringly inequitable. The third party defendant would be required to pay $10,000.00, although only 50 percent at fault. The employer, who was also 50 percent at fault, would recover his full $5,000.00 previously paid under the compensation act so as to be free of any liability. Not only is the result

1. In determining a violation of substantive due process, we have applied the test of whether the action is arbitrary or whether the provision has no reasonable relationship to a legitimate state purpose. *Mobil Oil Corp. v. Local Boundary Comm.*, 518 P.2d 92 (Alaska 1974); *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447 (Alaska 1974). It would seem that the only legitimate state purpose for requiring equal contribution is its simplicity. Since we have now authorized comparative negligence, however, that purpose would no longer seem to justify the inequitable result of having defendants pay more than their degree of fault warrants. However, there may be a substantial question as to whether one liable in tort has any constitutionally protected right to contribution from another tort-feasor.

inequitable between the employer and third party, but in the example, the negligent employer is far better off than if no one had been at fault in causing the employee's injury. If no one were at fault, the employer would incur a $5,000.00 nonrecoverable liability. If the employer and a third party are negligent, however, the employer can recover the $5,000.00 from the amount paid by the third party to the employee.

I do not believe that such an absurd result was intended by our legislature. In my opinion, to permit the employer to recover compensation payments violates constitutional rights to equal protection under Alaska's Constitution. I respectfully differ from the majority's analysis of this equal protection issue. The opinion states:

> Brown & Root, Inc.'s equal protection claim is based on the differential treatment of tortfeasors who become involved in employee-employer tort claims as compared to all other tortfeasors. Only the former are prohibited from securing pro rata contribution from their concurrently negligent co-defendants, when the co-defendant in question happens to be the employer of the injured plaintiff. Review of equal protection challenges is governed by the standards set out in *State v. Erickson*, 574 P.2d 1 (Alaska 1978). The purpose of the Workmen's Compensation Act, including the exclusive liability provision attacked by Brown & Root[, Inc.] in this action, is the provision of financial and medical benefits for victims of work-connected injuries in the most efficient, most dignified, and most certain form. In accomplishing the goal of securing adequate compensation for injured employees without the expense and delay inherent in a determination of fault as between the employee and employer, the legislature apparently also found it necessary to limit the total amount of the employer's liability to the statutory award. We have concluded that there is a fair and substantial relationship between the legislative objective of providing guaranteed, expeditious compensation to the injured employee and the limitation on the employer's total liability regardless of its percentage of fault, even though that limitation has the effect of denying the third-party tortfeasors the right to pro rata contribution from the employer. [footnotes omitted]

I agree that there is a fair and substantial relationship between the legislative objective of providing guaranteed expeditious compensation to the injured employee and limiting the employer's total liability regardless of fault.

As part of this system, it also seems logical not to require contribution from a negligent employer, otherwise the limitation of liability provided by the Workmen's Compensation statute could be removed indirectly. The majority's opinion, however, goes far beyond this when it not only bars contribution but actually requires a negligent employer to be reimbursed for any amounts he has paid an injured employee. Such a result does not bear any relation to the necessity for limiting an employer's liability. In fact, as discussed above, it gives the negligent employer a windfall at the expense of a third party. The right of the employee to recover Workmen's Compensation benefits is independent of the third party action brought in the state courts. The determination of the employer's degree of fault is not involved in the compensation proceedings, so even the minimal increase in efficacy of the compensation procedure attained as a result of not requiring evaluation of the employer's fault bears no relationship to having the employer assume at least a portion of his just share of liability in the third party proceeding. I can see no conceivable relationship between permitting the negligent employer to recover all compensation paid and the over-all purposes of the compensation act. Therefore, the differential treatment of tort-feasors involved in employer-employee tort claims from other tort-feasors cannot be justified to the extent that such tort-feasors are required to indemnify the negligent employer for compensation payments that do not exceed the employer's share of damages based on his or her degree of fault.

I believe that the statute providing for allocation of recovery from third parties may be construed so as to avoid such an unnecessary and unconstitutional result. After authorizing suits by an injured employee, AS 23.30.015 specifies in subsection (g):

> (g) If the employee or his representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (E)(1)(A), (B), and (C) of this section, insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter.

It is only "[i]f the employee . . . recovers damages from the third person," that the payment must be made to the employer "insofar as the recovery is sufficient after deducting all litigation costs and expenses."

Under the solution here suggested, the employee would not recover damages to the extent of his compensation benefits. The employee thus receives the full amount to which he is entitled (damages plus compensation). The recovery, however, does not include any amount for reimbursement of compensation so that the "recovery is [not] sufficient" for the purpose of reimbursing the employer. Admittedly, this is a strained construction of the statute, but we have not hesitated to apply such a liberal construction in the past when necessary to prevent obvious injustice and to accord with what we believe to be the legislature's intent. *See Cooper v. Argonaut Insurance Cos.*, 556 P.2d 525 (Alaska 1976).

This solution is similar to that suggested by the California Supreme Court in *Witt v. Jackson*, 57 Cal.2d 57, 17 Cal.Rptr. 369, 366 P.2d 641 (1961). It does no violence to the exclusive remedy provisions of the Alaska Workmen's Compensation Act, for the employer would not be required to contribute any more than the amount of compensation benefits for which he or she was already liable under the Act. The quid pro quo by which the employer's liability would be limited to benefits specified in the compensation act in exchange for making prompt payment to the employee, regardless of fault, would be unaltered. The negligent employer, however, would be unable to recover those payments unless they exceeded the proportion of damages represented by the employer's degree of fault.[2]

The solution which I have suggested does not encompass all of the situations which may arise. Until the legislature addresses the problems presented by the third party provisions of our present Workmen's Compensation statute and other problems arising out of the adoption of comparative negligence, a comprehensive solution is not possible. A reasonable solution to many of the variables suggested by this case are set forth in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board*, 22 Cal.3d 829, 150 Cal.Rptr. 888, 896, 587 P.2d 684, 692 (1978).[3]

2. Similar results have been achieved in other jurisdictions. Pennsylvania allows a third party tortfeasor to secure contribution from a negligent employer limited to the amount of compensation payments the employer has made to the employee. *Maio v. Fahs*, 339 Pa. 180, 214 A.2d 105, 110 (1940); *Brown v. Dickey*, 397 Pa. 454, 155 A.2d 836, 840 (1959). North Carolina, instead of requiring limited contribution of a negligent employer, reduces the judgment against the third party by the amount of compensation paid if the third party can show the concurrent negligence of the employer. *Brown v. Southern Ry. Co.*, 204 N.C. 668, 169 S.E. 419, 420 (1933); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886, 892 (1953).

3. The California court stated:

> Applying the principle that the employer and third party should, to the extent consistent with the employer's statutory immunity from tort liability, share the burden of the employee's recovery as joint tortfeasors, we conclude that the concurrently negligent employer should receive either credit or reimbursement for the amount by which his compensation liability exceeds his proportional share of the injured employee's recovery. (See *Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal.App.3d 500, 508-509, 145 Cal.Rptr. 608.)
>
> When the issue of an employer's concurrent negligence arises in a judicial forum, applica-

Thus, I would hold that contribution among joint tort-feasors be in accordance with their degrees of fault, although remaining joint and several. I would further reduce the amount of damages assessed against third parties by the amount of compensation benefits paid by an employer up to an amount equal to the employer's share of damages based on comparative fault.



tion of comparative negligence principles is relatively straightforward. The third party tortfeasor should be allowed to plead the employer's negligence as a partial defense, in the manner of *Witt*. Once this issue is injected into the trial, the trier of fact should determine the employer's degree of fault according to the principles of *American Motorcycle*. The court should then deduct the employer's percentage share of the employee's total recovery from the third party's liability—up to the amount of the workers' compensation benefits assessed against the employer. Correspondingly, the employer should be denied any claim of reimbursement—or any lien under section 3856, subdivision (b)—to the extent that his contribution would then fall short of his percentage share of responsibility for the employee's total recovery.

When the issue of an employer's concurrent negligence arises in the context of his credit claim based on a third party settlement, the board must determine the appropriate contribution of the employer since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he should be granted a credit for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of the statutory credit adequately accommodate the principle that a negligent employer should not profit from his own wrong. *Id.* [footnotes omitted]

JMB

MEMORANDUM

STATE OF ALASKA
Department of Administration
Division of Retirement & Benefits

To: Paula Scavera, Leg. Research
Dave Tonkovich, Leg. Finance

Date: February 6, 1997

From: Anselm Staack A. Staack
Chief Fiscal Officer

Phone: 465-4460

Subject: Executive Life Recovery \ Investment Loss Trust Fund (ILTF)

The ILTF was capitalized with $138.1 million in June\July 1991. Below is an update:

April 1994, ELIC Conservatorship	$ 37,630,579.76	
March 1995, ELIC Conservatorship	7,464,246.41	
October 1995, ELIC Conservatorship	68,387,660.80	
February 1996, ELIC Conservatorship	5,970,518.17	
May 1996, ELIC Conservatorship	200,268.94	
Amounts Received, ELIC Conservatorship	119,653,274.08	
Transfer to General Fund, 9/94	(37,600,000.00)	
Transfer to General Fund, 2/96	(75,882,486.97)	
Transfer to Childrens Trust Fund, 7/96	(6,000,000.00)	
Balance of Recoveries not transferred due to General Fund, excluding interest earnings	170,787.11	
Interest Earnings on Amounts Due to General NOT Transferred or Appropriated to 9/30/96	2,737,247.81	
Amt. in ILTF Due State as of 9/30/96	$ 2,908,034.92	This Amount Available, No SBS Plan Restriction; original apprcpriation appears to return this to Statutory Budget Reserve
Amount To Remain in ILTF from Original Capital Held in Escrow For Commitments Under Legal Settlements and Recovery Purposes; plus applicable interest	$ 4,451,051.40	Balance After Any Payments Will eventually become available after legal release; NOT expected until after year 2003
Total ILTF Balance @ 9/30/96	$ 7,359,086.32	
ADDITIONAL Approx. Amounts Expected To Be Received From ELIC in Conservation Between Now and 2003, Amt. Estimated 5/96	$ 4,600,000.00	Appears would become immediately available to State once rec'd.

Note: Updated information as of 1/97 indicates that the $4.6 million amount could come in as high as $8.9 million by 2003.

The above schedule is current to 9/30/96. The Department of Revenue has not updated its interest calculation for the 4th quarter yet. We also received $30 million in third party recoveries to compensate the State for the loss of use of its funds; this amount was transferred to the General Fund in May 1996.

We still have active litigation in progress to obtain further amounts on behalf of the Plan and the State.

MATANUSKA ELECTRIC ASSOCIATION, INC., Appellant,

v.

Mark D. WEISSLER, Appellee.

No. S–738.

Supreme Court of Alaska.

Aug. 1, 1986.

Property owner brought action against electrical association under tree trespass statute. The Superior Court, Beverly W. Cutler, J., awarded treble damages, allowed property owner to recover on his ex-wife's claims, and calculated prejudgment interest on total award. Electrical association appealed. The Supreme Court, Burke, J., held that: (1) electrical association trespassed without lawful authority since trespass was not casual or made with probable cause, so that it was liable for treble damages; (2) trial judge's determination that property owner's former wife assigned her interest to property owner and that parties intended merely to dismiss former wife as coplaintiff, was not clearly erroneous, nor was admission of wife's second affidavit, in which she stated that she orally assigned her interest in cause of action prior to her dismissal as party plaintiffs, in error; and (3) electrical association, against which damages were awarded under tree trespass statute, was entitled to hearing prior to award to property owner of attorney fees and costs.

Affirmed in part; reversed and remanded in part.

1. Trespass ⇐61

Statute allowing award of treble damages for injuries to trees and vegetation on property of another is not limited to trees and vegetation near public rights-of-way. AS 09.45.730.

2. Damages ⇐91(1)

Common-law standards require sho ing of malice before court may award pu tive damages.

3. Trespass ⇐44

Electrical association, against whi property owner sought damages for cu ting of trees on his property, had to sho that it fell within exceptions to treble dan ages provision under tree trespass statut AS 09.45.730.

4. Trespass ⇐46(2)

Evidence supported trial court's finc ings that while written easement did no have "four feet" filled in, property owne clearly had agreement with electrical asso ciation that easement granted in order t allow extension of electrical service t property owner's house was supposed to b four feet, so that electrical association ex ceeded scope of property owner's consen when it cleared beyond four-foot easement and thus trespass was without lawful authority, for purpose of award of treble damages under tree trespass statute. AS 09.45.730.

5. Trespass ⇐61

For purpose of statute allowing treble damages for injury to trees or vegetation on property of another, except where trespass was casual or voluntary, negligence signified by "casual" does not include mistaken belief in authority to cut down trees, so that trespass committed under negligently mistaken belief in right to cut would not be "casual," since trespasser intends to cut. AS 09.45.730.

6. Trespass ⇐61

Once trespasser forms intent to enter land, trespass becomes "willful" and plaintiff may recover treble damages under Alaska's tree trespass statute. AS 09.45.730.

7. Trespass ⇐61

Electrical association's negligent decision to exceed scope of property owner's permission to cut trees in order to extend service to property owner's house did not qualify as "casual" negligence so as to

tive, conclusive and in harmony with the facts and law of the case." *Pennington v. Employers Liaoility Assurance Corp.*, 520 P.2d 96, 97 (Alaska 1974) (Supreme Court reversed dismissal with prejudice of garnishment proceeding because "the judgment of dismissal is ambiguous." *Id.*). MEA relies on a policy favoring finality of judgments in arguing that the dismissal with prejudice should preclude admission of further evidence of assignment. *See, e.g., Pearson v. Bachner*, 503 P.2d 1401, 1402 (Alaska 1972) (rejecting untimely Rule 60(b)(6) motion for prejudgment interest filed two and a half years after judgment). Weissler maintained throughout the suit that he was claiming damage for the property as a whole and that Wadke had assigned her interests to him. His attorney signed an affidavit stating that he told MEA's counsel during settlement negotiations that MEA's offers were unsatisfactory because Weissler sought recovery on the total damage to the property.

[13] On the record taken as a whole we agree with Weissler and Judge Cutler. Judge Cutler had the opportunity to observe the entire trial and judge the witnesses' demeanor and credibility. She determined that Wadke assigned her interests to Weissler and that the parties intended merely to dismiss Wadke as a coplaintiff. We do not believe that Judge Cutler's determination was clearly erroneous.[16] Nor was her admission of the second affidavit in error.[17]

C. *Prejudgment Interest on the Treble Damages Award*

[14] MEA argues that the trial court erred by awarding Weissler prejudgment interest on the punitive portion of the treble damages award. We agree. In *Andersen*, we held that prejudgment interest may be awarded on the compensatory portion but not on the punitive portion of the award. 625 P.2d at 289–90. We remand the case for computation of prejudgment interest solely on the compensatory award.

D. *Award of Costs and Attorney's Fees*

[15] Civil Rule 79(a) [18] requires the party entitled to costs to serve on the other parties a bill and "a notice of the date and time of the cost bill hearing at which the clerk will tax costs." Rule 79(c)(1) [19] pro-

16. MEA also asserts that it detrimentally relied on the dismissal with prejudice. It asserts that it would have taken greater efforts to find and depose Wadke if it had known the court would allow Weissler full recovery. Since Weissler alleged throughout the trial that he was pursuing a full recovery, and MEA continued to oppose the inclusion of such claims, MEA's contention is specious.

17. Judge Cutler's order stated:

> The court allows Mary T. Wadke's affidavit to be entered as evidence under Alaska Rules of Evidence 804(b)(5) and 803(23). It appears that the affiant is unable to be located for live testimony, and that a substantial guarantee of trustworthiness lies in the fact that the witness has no motive to testify favorably to plaintiff, and in fact appears to dislike plaintiff. The statement also corroborates other testimony.

On the record before us, we find no error in Judge Cutler's ruling.

18. Civil Rule 79(a) provides:

> Within 10 days after the date shown in the clerk's certificate of distribution on the judgment, a party entitled to costs shall serve on each of the other parties to the action or proceeding a cost bill, together with a notice of the date and time of the cost bill hearing at which the clerk will tax costs. The date and time of the hearing shall be scheduled with the clerk's office and shall be not less than 3 nor more than 7 days from the date of the notice. The cost bill shall distinctly set forth each item claimed in order that the nature of the charge can be readily understood. It shall be verified by the oath of the party, or his agent or attorney or of the clerk of such attorney, stating that the items are correct, that the services have been actually and necessarily performed, and that the disbursements have been necessarily incurred in the action or proceeding. Failure of a party to serve a cost bill and notice as required by this subdivision shall be construed as a waiver of his right to recover costs.

19. Civil Rule 79(c)(1) provides:

> At the time specified in the notice, any party may present his objections to the cost bill, either orally or in writing. He shall specify each item to which objection is made and the ground of the objection. The parties may file affidavits or other documentary evidence to support their respective positions.

case. This is not an instance where, because of their beauty, location, quality, size or other particular features, the trees were of peculiar value to the landowner. They are not akin to ornamental trees.[14] The severed trees were without special value beyond the fact that they were located on the Edwardses' property. Additionally, this is not a situation where there is a reasonable likelihood that the trees will be restored.[15] Consequently, we hold that the diminution in value of the property or the economic value of the timber cut was the appropriate measure of damages.

V. TREBLE DAMAGES UNDER AS 09.45.730

[16] AS 09.45.730 provides that a "person who cuts down ... timber ... without lawful authority, is liable to the owner ... for treble the amount of damages...." Wrangell contends that "treble damages are appropriate where the damages awarded are based on the lumber or timber value of the trees but are clearly inappropriate where damages are assessed on some other basis." We reject this contention.

[17, 18] We adopt the reasoning of the court in *Schankin v. Buskirk*, 354 Mich. 490, 93 N.W.2d 293, 295–96 (1958), which rejected a similar argument:

> "As to the damages involved, it is settled that the damages that are to be trebled under the statute represent not merely the value of the timber cut but damages to the freehold as well. Generally speaking, damages in trespass to land are measured by the difference between the value of the land before the harm and the value after the harm, but there is no fixed, inflexible rule for determining, with mathematical certainty, what sum shall compensate for the invasion of the interests of the owner. Whatever approach is most appropriate to compensate him for his loss in the particular case should be adopted. Thus, the damages awarded in [our previous decision] reflected, in part, the value of the timber taken and, in part, the cost of restoring the land to a condition of usefulness—by filling up stump holes and cleaning up the toppings and other debris left behind by the trespassers." (citations omitted).

VI. PREJUDGMENT INTEREST ON A VERDICT BASED ON AS 09.45.730

Wrangell contends that it was error to award any prejudgment interest for the damages awarded under AS 09.45.730. Alternatively, it contends that the interest should be awarded only on the compensatory portion of the award, not the punitive portion. We agree with this latter contention.

[19–22] Wrangell's initial contention is based on *Ventoza v. Anderson*, 14 Wash. App. 882, 545 P.2d 1219, 1230 (Wash.App. 1976). In *Ventoza*, the court held that under a statute very similar to AS 09.45.730, prejudgment interest could not be awarded on either the compensatory or punitive portion of the treble damage award. We believe that holding sweeps too broadly. Punitive damages are not compensation for actual physical harm, and prejudgment interest is generally not awarded on punitive damages. *Blake v. Grant*, 65 Wash.2d 410, 397 P.2d 843, 845 (Wash.1964). On the other hand, actual damages are compensatory and the interest on this award is of the same character. To refuse interest on the compensatory portion would be unfair to the injured party. *Beech Aircraft Corp. v. Harvey*, 558 P.2d 879, 888 (Alaska 1976). Consequently, we hold that prejudgment

McCrossan, Inc., 306 Minn. 103, 235 N.W.2d 609, 610–11 (1975); *see also* D. Dobbs, Remedies § 5.1 at 316 (1973).

14. Edwards did testify that he liked having patches of "nice straight trees" that were not thickly overgrown, but we do not think that this brings this case within the principle of *G & A*.

15. "[I]f the plaintiff is unlikely to repair for any reason and is likely instead to sell, then diminution in value rather than repair costs would be a more appropriate measure." D. Dobbs, Remedies § 5.1 at 317 (1973).

interest may be awarded on the compensatory portion of the award but not the punitive portion.[16]

VII. THE SCHNEIDER PARCEL

The Edwardses' claim sought damages not only for the injury caused to their parcel by the cutting, but also for injury caused to the Schneider parcel. Wrangell argues that because the Edwardses had no interest, or possession of, the trees on the Schneider side of the section line, the Edwardses could not bring an action for trespass since possession is the basis of such an action. The Edwardses contend that they received a valid assignment of the cause of action from the owners of the Schneider parcel.

Mrs. Schneider testified that after the trees were cut, the Schneiders orally gave Mr. Edwards the rights to the trees. She also agreed that she intended to let Mr. Edwards "have any rights that [she] might have with respect to damages to that property adjoining his." The oral assignment was later confirmed by a letter from the Schneiders stating "we give you [Mr. Edwards] legal consent to take our portion [of the trees]." Thereafter, the owners of the Schneider parcel conveyed by quitclaim "any interest of any kind which they may have in the damages which have been claimed in a Complaint filed by James H. Edwards and Maxine B. Edwards."

[23, 24] It is settled that an assignment may be made of a cause or right of action for trespass on, or injury to, land.[17] Specifically, a cause of action for the unlawful cutting and removal of timber may be assigned.[18] Moreover, a claim for damages to real property may be assigned without assigning or transferring the title or possession of the property.[19] We see no reason to deviate from these rules. It has been stated that a cause of action can be assigned if it survives.[20] AS 09.55.570 provides in part:

> "All causes of action by one person against another, whether arising on contract or otherwise, except those involving defamation of character, survive to the personal representatives of the former and against the personal representatives of the latter."

Therefore, we hold that the cause of action for unlawful cutting of timber may be assigned even though the owners of the Schneider parcel did not transfer any interest or possession in the land to the Edwardses.

The general rule regarding the creation of an assignment has been stated as follows:

> "The creation and existence of an assignment is to be determined according to the intention of the parties, and that intention is a question of fact to be derived not only from the instruments executed by them, but from the surrounding circumstances as well."

Rivan Die Mold Corp. v. Stewart-Warner Corp., 26 Ill.App.3d 637, 325 N.E.2d 357, 361 (Ill.App.1975).[21] Moreover,

> "an assignment may be oral or written and no special form is necessary provided that the transfer is clearly intended as a

16. *Casto v. Arkansas-Louisiana Gas Co.*, 562 F.2d 622, 625–26 (10th Cir. 1977), supports our conclusion. In *Casto*, the trial court awarded interest on a personal injury award and a punitive damage award connected with the injury. The Tenth Circuit affirmed the award of interest on the personal injury part but reversed the award of interest on the punitive damage part.

17. *United Verde Copper Co. v. Jordan*, 14 F.2d 299, 301 (9th Cir.), *cert. denied*, 273 U.S. 734, 47 S.Ct. 243, 71 L.Ed. 865 (1926); *Stapp v. Madera Canal & Irrigation Co.*, 34 Cal.App. 41, 166 P. 823, 825 (1917); *Peterson v. Lake Superior Dist. Power Co.*, 255 Wis. 584, 39 N.W.2d 706, 708 (1949).

18. *White v. Gordon*, 213 Ga. 730, 101 S.E.2d 759, 762 (1958); *J. H. Leavenworth & Son v. Hunter*, 150 Miss. 245, 116 So. 593, 595–96 (1928).

19. Stapp, 166 P. at 825.

20. *See generally Olmstead v. Allstate Ins. Co.*, 320 F.Supp. 1076, 1078 (D.Colo.1971).

21. *See generally Lil' Red Barn, Inc. v. Red Barn System, Inc.*, 322 F.Supp. 98, 106–07 (N.D.Ind. 1970).

TCW Paul Grossi, 2.7.97
Director, State
Workers' Comp Bd

Average cost per claim
(excluding insurance Co
processing costs)

PAID =

1992 =	$4,230.85
93 =	$4,122.06
94 =	$3939.95
95 =	$3911.42

JDS

JAN-30-97 THU 13:46 LEGISLATIVE LIBRARY 9074654844 P.01

465-3834

4/29/96	4124	(H)	DP: PORTER, VEZEY, BUNDE
4/29/96	4124	(H)	DNP: FINKELSTEIN, B.DAVIS, GREEN, TOOHEY
4/29/96	4124	(H)	4 FNS (COURT, LAW, ADM, CORR)
4/29/96	4124	(H)	SENATE FISCAL NOTE (GOV) 3/12/96
4/29/96	4124	(H)	SENATE ZERO FN (DPS) 3/28/96
4/29/96	4125	(H)	REFERRED TO FIN
5/04/96	4380	(H)	CROSS SPONSOR(S): KOHRING

SB 53
HCS CSSB 53(L&C) AM H
"An Act relating to insurance; amending Alaska Rule of Civil Procedure 45; and providing for an effective date."

SPONSOR(S): LABOR & COMMERCE

CURRENT STATUS: CHAPTER 62 SLA 95 STATUS DATE: 6/05/95

JRN-DATE	JRN-PG		ACTION
1/25/95	83	(S)	READ THE FIRST TIME - REFERRAL(S)
1/25/95	84	(S)	L&C, JUD
3/07/95	515	(S)	L&C RPT CS 1DP 4NR NEW TITLE
3/07/95	516	(S)	ZERO FISCAL NOTE (DCED)
4/06/95	891	(S)	JUD RPT CS 2DP 3NR NEW TITLE
4/06/95	892	(S)	PREVIOUS ZERO FN (DCED)
4/18/95	1058	(S)	RULES TO CALENDAR 4/18/95
4/18/95	1065	(S)	READ THE SECOND TIME
4/18/95	1065	(S)	JUD CS ADOPTED UNAN CONSENT
4/18/95	1066	(S)	ADVANCED TO THIRD READING UNAN CONSENT
4/18/95	1066	(S)	READ THE THIRD TIME CSSB 53(JUD)
4/18/95	1067	(S)	PASSED Y16 N3 E1
4/18/95	1067	(S)	EFFECTIVE DATE(S) SAME AS PASSAGE
4/18/95	1068	(S)	COURT RULE(S) FAILED Y12 N7 E1
4/18/95	1068	(S)	TAYLOR NOTICE OF RECONSIDERATION
4/19/95	1088	(S)	HELD ON RECONSIDERATION TO 4/20
4/20/95	1122	(S)	RECON TAKEN UP - IN THIRD READING
4/20/95	1123	(S)	PASSED ON RECONSIDERATION Y17 N3
4/20/95	1123	(S)	EFFECTIVE DATE(S) SAME AS PASSAGE
4/20/95	1123	(S)	COURT RULE(S) SAME AS PASSAGE
4/20/95	1126	(S)	TRANSMITTED TO (H)
4/21/95	1417	(H)	READ THE FIRST TIME - REFERRAL(S)
4/21/95	1417	(H)	LABOR & COMMERCE, JUDICIARY
5/06/95	1916	(H)	L&C RPT HCS(L&C) NT 2DP 3NR 1AM
5/06/95	1916	(H)	TITLE CHANGE AUTHORIZED BY HCR 20
5/06/95	1917	(H)	DP: KUBINA, KOTT
5/06/95	1917	(H)	NR: SANDERS, ELTON, PORTER
5/06/95	1917	(H)	AM: ROKEBERG
5/06/95	1918	(H)	SENATE ZERO FN (DCED) 3/7/95
5/06/95	1941	(H)	JUD REFERRAL WAIVED
5/07/95	1952	(H)	RULES TO CALENDAR 5/07/95
5/07/95	1952	(H)	READ THE SECOND TIME
5/07/95	1954	(H)	HELD IN SECOND READING TO 5/08/95 CAL
5/08/95	1978	(H)	L&C HCS ADOPTED UNAN CONSENT
5/08/95	1980	(H)	AM NO 1 NOT OFFERED
5/08/95	1980	(H)	ADVANCED TO THIRD READING UNAN CONSENT
5/08/95	1980	(H)	READ THE THIRD TIME HCS CSSB 53(L&C) AMH
5/08/95	1980	(H)	TITLE AM ADOPTED Y34 N3 A3
5/08/95	1981	(H)	RETURN TO SECOND FOR AM 2 UNAN CONSENT
5/08/95	1981	(H)	AM NO 2 ADOPTED UNAN CONSENT
5/08/95	1982	(H)	AUTOMATICALLY IN THIRD READING
5/08/95	1982	(H)	PASSED Y36 A4
5/08/95	1982	(H)	EFFECTIVE DATE(S) SAME AS PASSAGE
5/08/95	1982	(H)	COURT RULE(S) SAME AS PASSAGE
5/08/95	1982	(H)	DAVIES NOTICE OF RECONSIDERATION
5/09/95	2049	(H)	RECON TAKEN UP - IN THIRD READING
5/09/95	2049	(H)	SB 53 MOVED TO BOTTOM OF CAL
5/09/95	2063	(H)	SB 53 MOVED TO BOTTOM OF SUPP. CAL
5/09/95	2068	(H)	AM NOS 3, 4 AND 5 NOT OFFERED
5/09/95	2068	(H)	RETURN TO SECOND FOR AM 6 UNAN CONSENT

5/09/95	2068	(H)	AM NO 6 ADOPTED UNAN CONSENT
5/09/95	2068	(H)	AUTOMATICALLY IN THIRD READING
5/09/95	2069	(H)	PASSED ON RECONSIDERATION Y30 N3 E1 A6
5/09/95	2070	(H)	EFFECTIVE DATE(S) SAME AS PASSAGE
5/09/95	2070	(H)	COURT RULE(S) SAME AS PASSAGE
5/09/95	2076	(H)	TRANSMITTED TO (S) AS AMENDED
5/10/95	1732	(S)	HCR 20 SUSPENDS RULES RE TITLE CHANGE
5/11/95	1733	(S)	FAILED CONCUR (S) AM YA N15 S1
5/11/95	1737	(S)	RESCINDED ACTION FLG TO CONCUR Y18 N2 E1
5/11/95	1739	(S)	CONCUR AM OF (H) Y15 N6 E1
5/11/95	1739	(S)	COURT RULE(S) & EFD(S) SAME AS PASSAGE
5/16/95	1927	(S)	ENROLLMENT CORRECTIONS
6/26/95	1939	(S)	10:30 AM 5/19/95 TRANSMITTED TO GOVERNOR
6/26/95	1955	(S)	SIGNED INTO LAW 6/5 CHAPTER 62 SLA 95
6/26/95	1955	(S)	EFFECTIVE DATE OF LAW SEE CHAPTER

SB 54
CSSB 54(RLS) AM
"An Act relating to exclusive service areas for utilities certificated to provide electric utility service and to the definition of 'general public' for utilities furnishing electric service; and relating to employees and terms of members of the Alaska Public Utilities Commission."

SPONSOR(S): LABOR & COMMERCE BY REQUEST

CURRENT STATUS: (H) CRA THEN L&C, STA STATUS DATE: 2/02/96

JRN-DATE	JRN-PG		ACTION
1/26/95	95	(S)	READ THE FIRST TIME - REFERRAL(S)
1/26/95	95	(S)	STA, L&C, FIN
3/10/95	576	(S)	STA RPT CS 2DP 2NR SAME TITLE
3/10/95	576	(S)	FISCAL NOTE W/FY97 IMPACT (DCED)
3/22/95	743	(S)	L&C RPT CS 2DP 3NR NEW TITLE
3/22/95	744	(S)	PREVIOUS FN FY97 IMPACT (DCED)
4/18/95	1056	(S)	FIN RPT CS 2DP 1DNP 3NR NEW TITLE
4/18/95	1057	(S)	PREVIOUS FN W/FY97 IMPACT (DCED)
1/30/96	2251	(S)	RLS RPT CS 4DP AND CAL 1NR NEW TITLE
1/30/96	2251	(S)	ZERO FISCAL NOTE TO CS (DCED)
1/30/96	2251	(S)	RULES TO CALENDAR 1/30/96
1/30/96	2252	(S)	READ THE SECOND TIME
1/30/96	2252	(S)	RLS CS ADOPTED Y15 N3 E1 A1
1/30/96	2253	(S)	ADVANCED TO THIRD READING UNAN CONSENT
1/30/96	2253	(S)	READ THE THIRD TIME CSSB 54(RLS)
1/30/96	2253	(S)	PASSED Y14 N4 E1 A1
1/30/96	2253	(S)	TAYLOR NOTICE OF RECONSIDERATION
1/31/96	2265	(S)	RECON TAKEN UP - IN THIRD READING
1/31/96	2265	(S)	RETURN TO SECOND FOR AM 1 UNAN CONSENT
1/31/96	2265	(S)	AM NO 1 ADOPTED Y13 N7
1/31/96	2266	(S)	AUTOMATICALLY IN THIRD READING
1/31/96	2266	(S)	PASSED ON RECONSIDERATION Y14 N6
1/31/96	2268	(S)	TRANSMITTED TO (H)
2/02/96	2595	(H)	READ THE FIRST TIME - REFERRAL(S)
2/02/96	2595	(H)	C&RA, L&C, STATE AFFAIRS

SB 55

"An Act repealing the sunset of the enhanced 911 emergency reporting systems."

SPONSOR(S): SENATOR(S) TORGERSON; REPRESENTATIVE(S) Navarre, Phillips Bunde

CURRENT STATUS: CHAPTER 8 SLA 95 STATUS DATE: 4/20/95

CONTINENTAL INSURANCE COMPANY and Arthur Stanford, Appellants,

v.

BAYLESS AND ROBERTS, INC., Appellee.

BAYLESS AND ROBERTS, INC., Cross-Appellant,

v.

CONTINENTAL INSURANCE COMPANY and Arthur Stanford, Cross-Appellees.

Nos. 2922, 2923.

Supreme Court of Alaska.

March 7, 1980.

Insured, which had settled wrongful death action against it, brought action to recover against insurer and its adjuster on theory that insurer breached its fiduciary duty to insured by refusing to defend it except under a reservation of rights and that adjuster breached his fiduciary duty in failing to adequately investigate wrongful death claim and in failing to inform insured, insurer or attorney of facts of the case. Insurer counterclaimed on theory that insured breached its obligation to cooperate in defense of wrongful death claim. The Superior Court, Fourth Judicial District, Seaborn J. Buckalew, J., entered judgment in favor of insured, and insurer and adjuster appealed and insured cross-appealed. The Supreme Court, Burke, J., held that: (1) issue whether adjuster had not exercised ordinary case in respect to insured was for jury; (2) where insurer challenged insured's right to enforce policy on ground that insured had breached condition thereof, insurer had to either affirm policy and defend insured unconditionally or repudiate policy and withdraw from the defense; (3) insurer waived alleged breach of cooperation clause; (4) insurer's liability to insured was not limited to policy limits; (5) insurer's liability to insured for negligence of attorney, who had been retained by insurer to defend insured, was not limited to policy limits; and (6) though the settlement was entered as a consent judgment, provisions within Contribution Among Joint Tortfeasors Act did not require that amount awarded under such judgment be reduced by amounts of settlements negotiated by other defendants in wrongful death action.

Affirmed.

Boochever, C. J., dissented in part and filed opinion.

1. Insurance ⇐564

Insurance adjuster can be held liable to insured for negligence arising out of a breach of general tort duty of ordinary care.

2. Insurance ⇐564

In action wherein insured, which had settled wrongful death action against it, sought to recover against insurer's adjuster on theory that he breached his fiduciary duty in failing to adequately investigate wrongful death claim and in failing to inform insured, insurer or attorney of the facts of the case, issue whether adjuster had not exercise ' ordinary care in respect to insured was for jury.

3. Trial ⇐142

Where the evidence, viewed in light most favorable to party not moving for directed verdict, is such that reasonable people could differ in their judgment, the question is one for the jury to decide.

4. Insurance ⇐397.1

Where insurer of insured, against which wrongful death action had been brought, challenged insured's right to enforce policy on ground that insured had breached a condition thereof, insurer had to either affirm policy and defend insured unconditionally or repudiate policy and withdraw from the defense; insurer could not defend insured while reserving the right to repudiate policy unless insured consented to a reservation of that right.

5. Trial ⇐142

Directed verdict on an issue is appropriate when the evidence is such that rea-

Co., 498 P.2d 702 (Alaska 1972). In *Austin*, we recognized that an insurance agent could be held liable for his negligent failure to insure the plaintiff's house against earthquake damage: "The law is well established that in the event of negligence by a disclosed agent acting within the scope of his authority the agent may be held personally liable to a third party." *Id.* at 704 (footnote omitted). We conclude that there was evidence from which the jury could reasonably find that Stanford had not exercised ordinary care in respect to B & R.[10] Where the evidence, viewed in the light most favorable to the non-moving party, is such that reasonable people could differ in their judgment, the question is one for the jury to decide. *See Holiday Inns of America, Inc. v. Peck*, 520 P.2d 87, 92 (Alaska 1974). We therefore affirm the decision of the superior court denying Stanford's motion for a directed verdict.

III. B & R's Refusal to Accept a Conditional Defense

[4] Continental contends that the trial court should have granted its motion for summary judgment on the ground that, as a matter of law, B & R breached the policy by refusing to accept Continental's offer to defend under a reservation of rights. Continental contends that it should be able to conduct the insured's defense without giving up its right to refuse to pay an adverse judgment if it can later establish that the insured breached a condition of the policy. B & R's position is that Continental cannot have it both ways. B & R contends that Continental must either (1) affirm the policy, defend the suit, and pay any resulting adverse judgment, thus waiving both the alleged breach by the insured and any possible coverage defenses, or (2) repudiate the policy and withdraw from the defense, taking its chances that its claim of a breach by the insured would stand up in a subsequent suit on the policy.

Continental acknowledges that the general rule is that, if an insured refuses to accede to the insurer's reservation of rights, the carrier must either accept liability under the policy and defend unconditionally or surrender control of the defense and be held liable if it guessed wrong on the coverage issue. *See Boise Motor Car Co. v. St. Paul Mercury Indemnity Co.*, 62 Idaho 438, 112 P.2d 1011, 1016 (1941). Continental, however, urges us to reject that rule and adopt the approach of the Oregon Supreme Court in *Ferguson v. Birmingham Fire Insurance Co.*, 254 Or. 496, 460 P.2d 342 (1969). Under *Ferguson*, where the insurer defends and there is a conflict of interest between the insurance company and the insured in the original litigation, a judgment in that action does not operate as an estoppel to prevent the insurance company from contesting coverage in a later action. The *Ferguson* court therefore found that it was unreasonable for the insured to insist that the insurance company either withdraw from the case or defend and waive its right to later litigate the question of coverage. *Id.* at 349.

Both *Boise* and *Ferguson*, however, are distinguishable from the case at bar. In *Boise* and *Ferguson* the insurance company refused to defend because it believed that the claim was not covered by the policy. In the case at bar, Continental is not contesting coverage in that sense. Continental's contention is that the policy is unenforceable because of the insured's breach of the cooperation clause.[11] While Continental was willing to proceed with B & R's defense, it insisted on reserving its right to later challenge B & R's right to claim the protection of the policy, by asserting the insured's alleged breach as a defense in a later action to enforce the policy.

Applying traditional principles of contract law, we perceive a substantial distinction between the two situations. In the

10. The duty to settle and the duty to protect the interest of the insured are generally considered to be duties which sound in tort rather than contract. *See* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv.L. Rev. 1136, 1138 & n. 5, 1168 (1954).

11. The cooperation clause is set forth in note 18 *infra*.

first, where the insurer asserts a *coverage defense*, the insurer admits the validity of the policy but contends that a particular claim does not come within the coverage provided by the policy. In the second situation, where the insurer asserts a *policy defense*,[12] the insurer admits that the claim comes within the coverage provided by the policy but contends that the policy itself is unenforceable because of the insured's breach of a condition of the policy. In short, the insurer repudiates the contract and refuses to perform because of a prior breach by the other party. *Boise* and *Ferguson* represent two possible approaches to the *coverage defense* situation. The case at bar, however, involves an asserted *policy defense*, and we do not believe that the two situations necessarily involve the same considerations. In reaching our decision, therefore, we consider only the policy defense situation. We leave open the question whether the insurer has the same obligations and liabilities in the coverage defense situation.[13]

The purpose of the *Boise* rule—that an insured need not accept the insurance company's offer of a conditional defense under a reservation of rights—is to avoid conflicts of interest between the company and its insured. Two types of conflicts are foreseeable in the reservation of rights situation. The first conflict which may arise, if the insurer knows it can later assert non-coverage, is that it may offer only a token defense of its insured. If the insurer does not think that the loss on which it is defending will be covered under the policy, it may not be motivated to achieve the lowest possible settlement or in other ways treat the interests of its insured as its own. The second conflict arises when success on a particular theory of recovery in the case against the insured would result in the denial of coverage under the policy. In that case, the insurance company would have an interest in seeing the plaintiff obtain a verdict based on the theory under which no coverage would result. For example, if a plaintiff alleged both negligence and an intentional tort as alternative theories of recovery, an insurer operating under a reservation of rights might covertly frame its defense to achieve a verdict based upon commission of the intentional tort, so that it could later assert that the defendant was not covered, since the policy provided no coverage for intentional torts. In the absence of a reservation of rights agreement, however, the insurer would be liable for indemnification regardless of whether the verdict established negligence or an intentional tort.

12. For a discussion of the distinction between "coverage defenses" and "policy defenses," see Browne, *The Demise of the Declaratory Judgment Action as a Device for Testing the Insurer's Duty to Defend: A Postscript*, 24 Clev.St.L. Rev. 18, 29–30 (1975).

13. The recent case of *Afcan v. Mutual Fire, Marine & Inland Ins. Co.*, 595 P.2d 638 (Alaska 1979), involved an asserted coverage defense. In *Afcan* we discussed in some detail the obligation of the insurer under the duty to defend clause in situations where it wishes to contest coverage. In *Afcan* we recognized that the duty to defend and the duty to indemnify are independent obligations. *Id.* at 645. We concluded that, regardless whether the claim does *in fact* come within the coverage provided by the policy, the insurer must defend if the complaint *alleges* a claim within policy coverage. *Id.* Thus the insurer may be required to defend, although the claim is in fact not covered. It is in that situation that the insurer frequently wishes to reserve explicitly its right to contest coverage so that the insured cannot later contend that the insurer's participation in the defense estopped it to deny coverage under the policy.

Afcan, however, dealt only with the consequences of the *failure* to defend. 595 P.2d at 646–47. We have not been confronted with the question, and we do not decide, whether the insurer's defense of a claim under a duty to defend clause does estop it to contest coverage later. We note that whether estoppel is applied may depend on whether the interests of the insurer and the insured were adverse in the original action. *See generally* Comment, *Estoppel, Third Party Practice, and Insurer's Defenses*, 19 U.Chi.L.Rev. 546 (1952); Note, *The Effect of Collateral Estoppel on the Assertion of Coverage Defenses*, 69 Col.L.Rev. 1459, 1465–69 (1969). *See also* Browne, *The Demise of the Declaratory Judgment Action as a Device for Testing the Insurer's Duty to Defend*, 23 Clev.St.L.Rev. 423 (1974); Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 Harv.L.Rev. 1436, 1443 n. 38 (1955) (in a few jurisdictions defense based on noncoverage not subject to estoppel principles).

tional tort, and thus would be more likely to defend vigorously on both grounds. *See, e. g., Socony-Vacuum Oil Co. v. Continental Casualty Co.*, 144 Ohio St. 382, 59 N.E.2d 199, 204–05 (1945) (conflict created by alternative theories of recovery, *Boise* rule applied).

The court in *Ferguson* admitted that the overwhelming weight of authority holds that the two types of conflict described above justify not requiring an insured to accept a defense under a reservation of rights. 460 P.2d at 349. The *Ferguson* court, however, saw a way around each of the two types of conflict. In the first, more generalized conflict of interest situation, the court reasoned that the insurance company's knowledge of supposed jury sympathy toward an insured in a coverage dispute would prevent the insurer from providing a less than adequate defense on the merits:

> It is feared that if the insurer knows that it can later assert non-coverage, it may offer only a token defense in the action brought against the insured, or be less prone to effect a settlement advantageous to the insured.
>
> We think that this danger is minimal. The insurer knows that when it is the defendant in a lawsuit brought by one of the policy holders the jury's sympathy for the insured frequently produces a plaintiff verdict even when the insurer's case is strong. Knowing this, the insurer is not likely to relax its effort in defending the action against the insured. If the insurer feels certain that it can successfully defend an action brought against it by the insured, it is not likely to accept the insured's tender of the defense in the first place.

Id. (footnote omitted).

As to the second form of conflict, where a judgment on one theory of the case could affect the coverage issue, the *Ferguson* court reasoned that, when such a conflict exists, the estoppel by judgment rule should not be applied to the trial on coverage. The court held that the judgment in the original action should operate as an estoppel in the subsequent coverage determination only when the interests of the insurer and insured in defending the original action were identical. Thus, under the *Ferguson* decision, if a plaintiff's alternative theories of recovery based on negligence and intentional tort posed a potential conflict of interest on the coverage issue, a finding by the jury that an intentional tort had been committed would not be binding in the later action to determine coverage:

> Where there is a conflict of interest between the insurer and insured and the judgment in the action against the insured can be relied upon as an estoppel by judgment in a subsequent action on the issue of coverage, the control of the action by the insurer could adversely affect the insured if the judgment was based upon conduct of the insured not falling within the coverage of the policy. Likewise, the insurer could be adversely affected by a judgment based upon conduct for which there is coverage. But we see no reason for applying the rule of estoppel by judgment in such cases. The judgment should operate as an estoppel only where the interests of the insurer and insured in defending the original action are identical—not where there is a conflict of interests. If the judgment in the original action is not binding upon the insurer or insured in a subsequent action on the issue of coverage, there would be no conflict of interests between the insurer and the insured in the sense that the insurer could gain any advantage in the original action which would accrue to it in a subsequent action in which coverage is in issue.

Id. at 348–49 (footnotes omitted).

While the *Ferguson* approach might be acceptable in the *coverage* defense situation for which it was developed,[14] we do not believe it is an adequate solution to the *policy* defense situation. The fact that, under the *Ferguson* approach, the insurer would not be estopped to assert the insured's breach as a defense in a subsequent

14. We do not decide that question. *See* text accompanying note 13 *supra*.

action on the policy does not sufficiently eliminate the conflict of interest in the original litigation. Even if the insurer vigorously and properly defended the claim against its insured, it could still take actions which could prejudice the insured's position in a later suit on the policy. If nothing else, the insurer might gain access to information, not otherwise properly available to it, which it could use to its advantage later to establish the insured's breach. Furthermore, if the insurer felt that its chance of prevailing in the later suit was fairly certain, it would not have the same interest in achieving a reasonable settlement that it would otherwise have.[15]

Because the application of the *Ferguson* approach to the policy defense situation would unacceptably compromise the interests of the insured, we reject it. The *Boise* approach requires the insurer to make a clear choice between defending and withdrawing, and, in the policy defense situation, we believe that approach is necessary to protect the interests of the insured. Thus, we decline to adopt in full the position of either party. It may be that, where the insurance company wishes to contest coverage, the insured is obligated to accept a defense under a reservation of rights.[16] We hold, however, that where, as here, the insurance company challenges the insured's right to enforce the policy on the ground the insured has breached a condition thereof, the insured has a right to demand an unconditional defense. Thus, the insurance company must either affirm the policy and defend unconditionally or repudiate the policy and withdraw from the defense.[17] The insurer may not reserve its right to repudiate the policy, unless the insured consents to a reservation of that right.

In the case at bar, therefore, B & R was fully within its rights and did not breach of policy when it insisted that Continental either defend unconditionally or withdraw from the defense. The superior court properly denied Continental's motion for summary judgment.

IV. Breach of the Cooperation Clause

At trial Continental contended that its refusal to defend B & R without a reservation of rights was justified since Roberts, as an officer of B & R, had breached the contractual duty of the insured to cooperate in the defense by giving willfully false testimony at his deposition.[18] After all the evidence was presented, however, the trial court directed a verdict in favor of B & R on this issue, finding that there was no evidence that Roberts had intentionally given false testimony.[19]

15. In fact, in the case at bar, it is conceivable that this very conflict played a role in Continental's refusal to accept Warbelow's settlement offer of $160,000, and offer arguably within policy limits. *See* notes 5 & 6 *supra*.

16. We do not decide whether an explicit reservation of rights is *necessary* in order to preserve the insurer's right to contest coverage. The necessity of the reservation depends on whether the insurer is considered to be estopped to deny coverage by its participation in the defense. *See* note 13 *supra*.

17. The possibility of a conflict might be avoided in such cases if the insurance company were to offer its insured the right to retain independent counsel to conduct his defense, and agree to pay all the necessary costs of that defense. In that event, it would seem that the company should be entitled to reserve the right to later litigate an alleged policy defense.

18. The terms of the insurance policy included the following condition:

Insured's Duties in the Event of Occurrence, Claim or Suit

. . . . .

(c) The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

19. Roberts testified at trial that he had been "confused" and "rattled" at the time of the deposition. Other witnesses testified that he was merely an inarticulate person who had been confused and perhaps frightened. The

FACTS & Trends

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Reflections on Tort Reform

This has been an active—indeed, turbulent—year for tort reform at both the state and federal level. This spring, Congress debated and passed the product liability component of the more extensive tort reform package contained in the Contract with America. President Clinton vetoed the bill, and congressional supporters could not muster the votes for an override. States launched their own tort reform initiatives: In California, an attempt to implement tort reform through the referendum process was ultimately unsuccessful. Other states have tort reform initiatives still simmering.

ICJ research and ICJ staff figured prominently in many aspects of this debate. We fielded numerous requests for our empirical findings on jury verdicts, product liability, and auto no-fault; we provided materials to members of Congress on both sides of the aisle and testified on various aspects of our work to several state legislatures; and we gave interviews and provided background information to the media. In the debate leading up to the March ballot initiatives in California, our research was part of the formal ballot's explanation of the estimated effects of Proposition 200, the auto no-fault initiative, and was widely cited in media coverage of the debate.

I thought this would be an appropriate time to gain some perspective—on the recent debate in particular and on the nature of tort reform in general. So I've asked the ICJ staff who have been most involved to comment on the debate as policy analysts. Steve Garber reflects on the discussion surrounding product liability. Steve Carroll draws some general lessons from the nature of the no-fault debate in California. And Cindy Lebow, formerly Senior Counsel for Policy in the Civil Division of the U.S. Department of Justice, describes the role that empirical information plays, and could play, in informing the debate.

Deborah R. Hensler



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The Debate over Federal Product Liability Legislation: Views from Outside the Trenches

by Steve Garber

After 15 or so years of active debate in the U.S. Senate, broad-based federal product liability legislation came closer to reality this year than ever before. What will happen in the next 15 years is anybody's guess. I wouldn't be surprised if no federal product liability legislation is signed into law. I also wouldn't be surprised to witness far-reaching federal reform.



Steve Garber leads our research on the economic effects of product liability.

I spend a lot of time trying to understand how product liability affects the U.S. economy and how changes in the product liability system might help or hurt. With all the recent discussion of such issues in Washington, I have been reflecting on how what I think I know comports with the national policy debate.

Let me start by making explicit some personal views:

- In my professional role as an economist, I care about product liability policy because of its effects on the national economy, or "economic efficiency," which refers to aggregate well-being and subsumes tangible and intangible costs of product injuries.
- Having spent several years examining the economic effects of product liability—especially those involving the medical products industries—I believe that, in principle, the product liability system could be changed in ways that would deliver major economic benefits.
- When I consider the alternatives to federal legislation for attempting to improve the system—far-flung courts and state legislatures—my interest in the possibility of federal legislation is heightened.
- The politics of federal product liability legislation greatly constrain what can be accomplished through federal legislation.

At most, analysts can develop and present information about how the present system operates and how reforms might change things, and can attempt to nudge the policy debate to incorporate analytic insights more often. I offer the following comments in that spirit.

I'll begin with an assertion:

The quality of the debate—and its outcomes—would benefit from the recognition that political realities drive the agenda to simple, but misleading, characterizations of problems and solutions.

Although many participants in the debate care intensely about product liability, most citizens don't know or care much about it. So, dramatic, simplistic claims are used to attract popular attention and support. Two caricatures are especially prominent: irresponsible juries awarding excessive amounts in damages, and irresponsible manufacturers callously endangering public safety. Neither irresponsible juries nor irresponsible manufacturers are nearly as prevalent as some would have us believe, and, surely, neither caricature offers a promising, substantive foundation for effective, far-reaching reforms.

Let me take issue with three oversimplifications that have been prominent in the debate:

Oversimplification 1: Reforms that benefit business necessarily hurt consumers.

The history of federal reform efforts is characterized by business interests proposing reforms and reform opponents portraying the issue as a choice between business interests and consumer interests. This portrayal ignores the facts that consumers benefit from product availability and innovation, and that higher costs generally translate into higher prices. Economic efficiency is not a fancy term for "what's good for business."

Oversimplification 2: Reforms that improve economic effects necessarily reduce fairness of compensation.

Besides protecting product users from injury at costs that are worth the benefits, the product liability system is relied upon to compensate people fairly for product injuries. Yet principles of compensation are rarely discussed in

the debate, perhaps because we know we'll never approach consensus on what is "fair."

I, for one, am skeptical of a proposition that—while rarely made explicit—plays an important role in shaping the debate: that economically beneficial reforms would necessarily reduce fairness of compensation. First, more compensation is not necessarily fairer compensation. Second, as discussed presently, some economically beneficial reforms would involve increases in compensation. The policy process might benefit greatly by thoughtful discussion of the thorny issue of fairness of compensation.

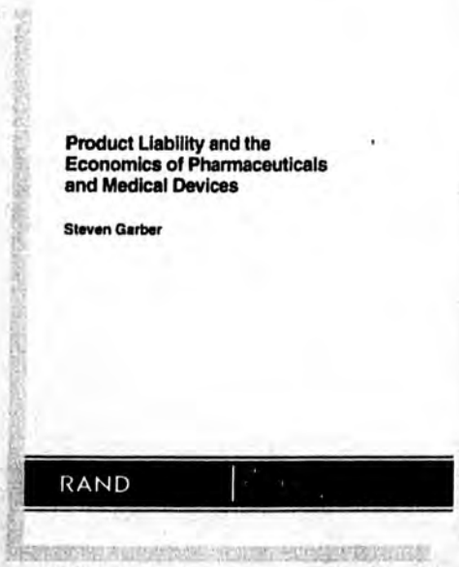
Oversimplification 3: We must choose between increasing liability and decreasing liability.

The product liability debate is largely framed in terms of whether the system involves too little or too much liability. Proponents of reducing liability point to alleged instances of liability-induced withdrawals of valuable products, reduced innovation, and high prices as evidence for the "too much liability" view. Opponents of reforms aimed at reducing liability point to products alleged to have caused numerous, serious injuries.

Both sides are right—and wrong. Companies are not sufficiently shielded from liability to avoid deterring all the behavior we don't want to deter. At the same time, the threat of product liability is not sufficient to deter all companies from behavior that is best deterred. The trick is to find—and implement—ways to strengthen deterrence of bad behavior while weakening deterrence of good behavior.

Before commenting further on the politics of the debate, I want to highlight two crucial economic realities:

Liability has important effects on the provision of safety information. Consumers want to avoid injuries and will tend to shy away from products they believe to be dangerous. If consumers were reasonably well-informed about product risks, market forces could go a long way toward balancing safety with other economically important outcomes such as product usefulness, cost, and innovation. Thus, the product liability system would accomplish a great deal if it could induce product manufacturers to produce and communicate to consumers accurate, usable information about product risks.



Taking a comprehensive look at the economic effects of product liability in the pharmaceutical and medical device industries in this analysis, Steve Garber drew on empirical information from a wide variety of sources.

Steve examined the effects of liability on product availability, safety, effectiveness, and innovation, and found that

- the liability system enhances the economic contributions of these industries in some ways—for example, encouraging them to invest in safer designs for medical devices
- undermines them in some—for example, causing companies to withdraw products that the medical community generally believed were beneficial
- has mixed effects in others—for example, in pricing and innovation.

The effects are industry-specific, and the perceptions of firm decisionmakers about the probability and consequences of liability suits must be addressed to understand both the effects of the current system and the effects of reforms.

Steve identified liability policy reforms that should improve economic performance: Make regulatory compliance central for drugs and extensively regulated devices, specify explicit standards for behavior warranting punitive damages, and improve procedures for weighing scientific evidence about the cause of injury.

"Well-designed reforms . . . are likely to cut both ways, advantaging plaintiffs in some instances and defendants in others."

However, many studies, including my 1993 ICJ study of pharmaceuticals and medical devices—***Product Liability and the Economics of Pharmaceuticals and Medical Devices***, R-4285-ICJ, 1993—have highlighted how liability encourages manufacturers to provide warnings so lengthy and detailed that they are often ignored or misunderstood—an instance in which the system may actually be pushing manufacturers in directions that *reduce* safety. But the product liability debate appears to have ignored this important issue.

Reforms targeted at particular industries could help a lot. The economic effects of product liability and the scope for and routes to improvement are likely to differ greatly across industries. These differences stem from differences across industries in liability doctrine, administrative regulation, risk information available to consumers, market factors, technologies for and costs of improving product safety, etc.

In fact, federal legislative action to date has been aimed at ameliorating the effects of product liability in two cases: childhood vaccines and small aircraft. Both actions were taken in response to product-availability crises. Many predict that the next crisis of this type will involve medical device companies that can't buy some of the biomaterials they need to manufacture their products. It will be interesting, and quite possibly distressing, to watch this drama unfold.

Let me close with some comments targeted at the politics of the debate:

Some burdens of proof can't be met, no matter what the facts are. The status quo is politically privileged in most policy contexts. In the context of federal product liability legislation, the usual reasons are strongly reinforced by the fact that product liability has traditionally been the province of the states. Many have argued that federal action would be warranted only in the presence of compelling evidence of major, detrimental effects on interstate commerce.

However, it might be impossible to meet this burden no matter how detrimental the economic effects really are, because many of the most important potential effects of product liability cannot be seen or measured. Such effects include discouragement of

Product Liability, Cont. on page 15

Inside the Law

ICJ Director Deborah Hensler has been asked to serve on the advisory board for *Inside the Law*, a new public television series created to inform viewers about the legal system and the legal aspects of current new issues. Hosted by Jack Ford, Chief Legal Correspondent for NBC News, the series originates from WNET Channel 13 in New York and will appear weekly on television stations across the country.

Inside the Law is underwritten by Reliance National, in cooperation with the American Bar Association. As a member of the board, Deborah will help shape the program's agenda and advise program staff about relevant research.

Perspectives on the Auto No-Fault Debate

by Steve Carroll

In contrast to many other areas of proposed tort reform, the automobile personal-injury area enjoys the relative luxuries of ample empirical analysis and documented outcomes of previous reform experiments. But neither of these advantages seemed to enhance the clarity of the debate in California over Proposition 200, a proposed no-fault automobile insurance plan that attracted national attention. Considering why this particular debate was so muddled provides a useful perspective on the tort reform debate writ large.

What Was Proposition 200?

The traditional rules of the tort system govern recovery for auto accident injuries in California. An injured party may seek compensation for all types of losses, both economic and non-economic, from the driver who caused the accident. However, the accident victim is entitled to compensation only to the degree that the other driver is responsible for the accident. A driver's bodily-injury (BI) insurance pays the compensation owed to someone the driver injured, up to the policy's limits. Uninsured-motorist insurance pays the policyholder any compensation he or she cannot obtain from an uninsured motorist, up to policy limits.

Proposition 200 would have replaced this system with a "pure no-fault" auto insurance system. It would have eliminated tort liability for auto accident personal injuries and established first-party, no-fault insurance, which would have covered all of an accident victim's economic losses up to policy limits—either $50,000 or $1 million. An accident victim's compensation would be limited to this coverage, even if that amount was not sufficient to cover all economic losses.

The proposal would have reduced insurers' costs, because insurers would not compensate accident victims for non-economic losses and would not incur the claims-processing and legal costs associated with resolving claims under the tort system. The proposal would have increased insurers' costs by providing full compensation for economic loss to all insured accident victims, including those primarily or entirely responsible for the accident.

Would the savings outweigh the increased costs?

At the request of the California Department of Insurance, my colleague Allan Abrahamse and I analyzed the effects of the proposed plan on automobile insurance costs in California. In brief, we found that the proposed plan would reduce the costs of compensating auto accident victims for personal injuries by 21 to 54 percent relative to California's current auto insurance system. If the premium an insurer charges for a policy varies in proportion to the compensation costs it can expect to incur on behalf of the policyholder, the proposed plan would have reduced the average California driver's auto insurance premiums by 11 to 29 percent.

What Issues Did the Debate Focus On?

We expected to see these and other empirical studies of no-fault systems cited, albeit selectively, by proponents and opponents of Proposition 200. That's the nature of the public debate. But how did "neutral" parties—for example, California newspapers—present the issues?

I reviewed articles published in major newspapers across the state in the three weeks preceding the election. Although the coverage varied widely, three common themes emerged.

Not All No-Fault Systems Are Equal

First, journalists routinely generalized from a group of states called "no-fault" states to draw conclusions about the potential success or failure of the California no-fault proposal. This generalization badly muddies the policy waters. In fact, the no-fault plans now in place differ greatly both in terms of the incentives they provide



Steve Carroll has been analyzing auto accident compensation systems for more than a decade.

Choosing an Alternative to Tort

Escalating auto insurance premiums have been a major public policy issue at the state level for the past three decades. No-fault auto insurance, spawned in the 1970s, was one response, offering cost savings to motorists and speedier compensation to auto accident victims. But because it required claimants to give up rights to seek compensation through the courts unless their losses exceeded a specified threshold, many states found it an unappealing alternative.

"Choice" auto insurance was proposed to address this concern. Under a choice auto insurance system, drivers may choose either a traditional auto insurance plan (tort) or a no-fault plan. Those who choose tort retain traditional tort rights and liabilities. Those who choose no-fault neither recover, nor are liable to others for, non-economic losses (typically, pain and suffering) for less-serious injuries incurred in auto accidents.

Giving motorists a choice of coverage has strong appeal. But how does the choice alternative affect the premiums motorists pay? In a series of analyses, Stephen Carroll and Allan Abrahamse estimated how a choice auto insurance plan would affect insurance premiums in each state.

This spring, these studies were cited in a report by the Joint Economic Committee of the U.S. Congress; this fall, choice insurance systems surfaced in the presidential debate.

A number of states are also considering adopting choice systems, and Steve has been working directly with legislative staff to help them understand how choice works and how adopting a choice plan in their state might affect auto insurance costs.

to exaggerate personal-injury claims and in the trade-offs between the costs of compensating accident victims for economic losses without regard for fault and the savings obtained by not compensating some accident victims for non-economic losses.

Many of the no-fault systems now in place have a *dollar threshold*, which limits access to compensation for non-economic loss to victims whose medical costs exceed a specified dollar amount. Accordingly, these plans encourage less seriously injured victims to build the costs of their claims to get over the threshold. To the extent that accident victims engage in such "building," the no-fault plan has actually increased compensation costs.

But other no-fault plans have a *verbal threshold*, which limits access to compensation for non-economic loss to victims who have suffered one of the specific types of injuries explicitly listed in the law establishing the plan. Because an accident victim's medical bills have no bearing on whether the verbal threshold has been exceeded, these plans provide no incentives to exaggerate claims for below-threshold injuries or to submit claims for non-existent injuries.

The threshold also affects the cost trade-offs inherent in a no-fault approach to auto insurance. All no-fault plans increase insurers' costs by providing compensation for economic loss up to policy limits to all insured accident victims, including those primarily or entirely responsible for the accident. And all no-fault plans reduce insurers' costs by not compensating below-threshold accident victims for non-economic losses and by avoiding the associated claims-processing and legal costs. Plans with easily surmountable thresholds obviously offer smaller savings than do plans with thresholds that bar large fractions of accident victims.

The California proposal would have established yet a third type of no-fault insurance: a "pure" system. It would have implemented an *infinite threshold* in the sense that accident victims would never be compensated for non-economic loss, regardless of how seriously they were injured.

Each of these no-fault systems has its own set of costs and benefits; making the trade-offs between them is what the political process is all about. But we cannot draw conclusions about the costs or benefits of any *one* of the systems by generalizing from the experience of "no-fault" states.

The Baseline Matters

The second theme that emerges in the media coverage is the importance of the baseline used for judging a proposal. Should a proposal be assessed absolutely or in comparison with the current system? For example, many journalistic assessments of Proposition 200 pointed out that if the cost of a victim's injury exceeded the benefit provided for in the proposal, the victim, having no one to sue, would

"... we cannot draw conclusions about the costs or benefits of any *one* of the [proposed] systems by generalizing from the experience of 'no-fault' states."

come up short. This is a true statement and constitutes a valid criticism of the proposal. However, it ignores the fact that any insured motorist injured that severely would almost certainly have ended up with *less compensation* under the current system than under the proposed one.

California's current fiscal-responsibility law requires $15,000-per-person BI coverage—the most common level of BI coverage purchased. Although many drivers purchase higher limits, few purchase more than $50,000 per person, and policies that would pay more than $100,000 to an accident victim are rare. Many drivers have underinsured-motorist coverage that will make up—up to policy limits, which are themselves often not high—for what the victim cannot collect, but it's quite likely that insured accident victims with more than $15,000 in losses would obtain greater compensation under the $50,000 version of Proposition 200—and virtually certain that they would be better off under the $1 million version of the proposal.

Slogans Rarely Clarify the Debate

Finally, the clarity of the Proposition 200 debate was certainly not enhanced by having the no-fault initiatives presented as part of a package that included proposals to limit contingency fees and shareholder litigation. The press relentlessly presented this package as the "anti-lawyer initiatives." As a consequence, attention was diverted from the real issues surrounding no-fault. Indeed, the vote came to be a referendum on lawyers: Did the people of California want to punish these "greedy" professionals by pushing them out of the system?

Eliminating lawyers from any part of the civil justice system is not, per se, a desirable goal. The real issue is what the consequences would be for society if lawyer activity in a particular part of the system were curtailed in some particular way. This is a complicated question, with many dimensions and important consequences, and cannot be appropriately pursued with slogans.

Lessons Learned

Thus, despite the relative wealth of empirical analysis and real-world experience in the auto no-fault arena, the debate on Proposition 200 was no model of clarity. I think we can learn something from the California experience that will enhance the quality of the ongoing national tort-reform debate:

Selected ICJ Publications on Alternative Automobile Personal-Injury Compensation Systems

Abrahamse, A. F., and S. J. Carroll, *The Effects of a Choice Auto Insurance Plan on Insurance Costs*, MR-540-ICJ, 1995.

Carroll, S. J., and A. Abrahamse, *The Effects of a Proposed No-Fault Plan on the Costs of Auto Insurance in California: An Updated Analysis*, IP-146-1, January 1996.

Carroll, S. J., and A. F. Abrahamse, *The Effects of Proposition 213 on the Costs of Auto Insurance in California*, IP-157, September 1996.

Carroll, S. J., and J. S. Kakalik, *No-Fault Approaches to Compensating Auto Accident Victims*, RP-229, 1993. (Reprinted from *Journal of Risk and Insurance*, Vol. 60, No. 2, 1993, pp. 265–287.)

Carroll, S. J., A. Abrahamse, and M. E. Vaiana, *The Costs of Excess Medical Claims for Automobile Personal Injuries*, DB-139-ICJ, 1995.

Carroll, S. J., J. S. Kakalik, N. M. Pace, and J. L. Adams, *No-Fault Approaches to Compensating People Injured in Automobile Accidents*, R-4019-ICJ, 1991.

Carroll, S. J., J. S. Kakalik, with D. Adamson, *No-Fault Automobile Insurance: A Policy Perspective*, R-4019/1-ICJ, 1991.

O'Connell, J., S. J. Carroll, M. Horowitz, A. F. Abrahamse, and P. Jamieson, *The Comparative Costs of Allowing Consumer Choice for Insurance in All Fifty States*, RP-518, 1996. (Reprinted from *Maryland Law Review*, Vol. 55, No. 1, 1996, pp. 160–222.)

O'Connell, J., S. J. Carroll, M. Horowitz, and A. Abrahamse, *Consumer Choice in the Auto Insurance Market*, RP-254, 1994. (Reprinted from *Maryland Law Review*, Vol. 52, No. 4, 1993, pp. 1016–1062.)

O'Connell, J., S. J. Carroll, M. Horowitz, A. Abrahamse, and D. Kaiser, *The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance*, RP-442, 1995. (Reprinted from *Maryland Law Review*, Vol. 54, No. 2, 1995, pp. 281–351.)

Assessing the Effects of Tort Reform

Nearly a decade ago, we offered a framework for assessing the effects of tort reforms:

Assessing the Effects of Tort Reforms, S. J. Carroll and N. M. Pace, R-3554-ICJ, 1987.

To provide a structure for thinking systematically about how research can contribute to the policy debate, the ICJ identified four basic policy questions that must be answered if we want to assess the effects of tort reforms: (1) how soon we can expect to see effects of reforms; (2) how reforms have affected the outcomes of disputes; (3) who won, who lost, and how much; and (4) how reforms have affected economic behavior.

This study also noted that the types of data needed to assess the effects of reform are generally not available, and suggested that three types of new data-collection systems be considered:

- Systematic efforts to obtain data from insurers and self-insured defendants on the aggregate outcomes of liability claims
- Special surveys of claimants, the bar, and insurers to obtain the detailed individual-claim information needed to identify the winners and losers in the reformed system
- Systems for collecting information both on the other factors that affect the behavior of participants in the tort system and on economic outcomes and injuries.

- Inappropriate generalization—across case types, across systems with different design features, or across industries with different sets of economic incentives—characterizes other areas of tort reform. One may not be able to generalize from the character of punitive damage awards in product liability cases to the effects of punitive damages in other types of cases or to generalize from the effects of product liability awards in the pharmaceutical and medical devices industries to their effects in the automobile industry.
- Policymakers always face the choice of baseline when assessing proposed reforms. No proposal fixes everything. When we are weighing the costs and benefits of alternatives to current policies, might we want to balance absolute assessments with a realistic look at the problems a given proposal *does* fix?
- Everyone, including many legal practitioners, has his or her favorite lawyer joke. But we will all be better served by spending less time lawyer-bashing and more time attending to the formidable tasks at hand: accurately diagnosing the problems in the civil justice system, identifying potential remedies, and empirically assessing the effects of those remedies on all Americans. ❖

"Inappropriate generalization—across case types, across systems with different design features, or across industries with different sets of economic incentives—characterizes other areas of tort reform."

Broadening the Tort Liability Debate: Toward a New Research Agenda

For nearly a decade, public officials, legal practitioners, and representatives of private and public interests have debated the social and economic consequences of the U.S. civil justice system. Although the debate has touched on a number of features, its major focus has been the liability system. The debate over tort liability has sometimes become mired in controversy over statistics on case filings, jury verdicts, and so forth. At other times it has appeared to ignore relevant empirical research on Americans' legal attitudes and behaviors.

In late 1993, the National Science Foundation's Law and Social Science Program asked the Institute for Civil Justice to organize and host a workshop to consider how social science research might contribute to a more informed public policy debate about the civil justice system generally and tort liability particularly.

NSF's interest in the workshop was stimulated, in part, by queries from federal officials about available scientific evidence on how the legal system affects the economy. The objective for the workshop was to develop an agenda for future research on the links between the legal system and the economy and society.

The workshop, held at RAND in Santa Monica, brought together diverse scholars who don't often share research ideas. The scholars reflected not only different disciplinary perspectives but, some would argue, different political perspectives as well. For example, experts from the law and economics community are often associated with more-conservative perspectives on civil justice reform, while many social science scholars are associated with liberal perspectives on the civil justice debate.

We also invited scholars whose work we thought would help illuminate the relationships between law and society, whether or not that work focused directly on traditional liability concerns—for example, a noted legal anthropologist and an economist whose research models settlement behavior.

Our goal was to broaden the exchange of research information across disciplinary boundaries and to stimulate interdisciplinary collaboration. And at the close of the day-and-a-half workshop, all the participants agreed that the cross-disciplinary context had been especially fruitful for identifying new approaches to civil justice policy research, as well as for highlighting previously unexplored links between more-traditional topics.

This year, when many of the issues we discussed at the workshop surfaced in the national tort-reform debate, we thought it would be instructive to summarize the key points from the workshop for our readers. As the summary highlights, the need for broad, sustained, empirical research to underpin considerations of civil justice reform is critical, and enduring.

The ICJ's current research agenda reflects several of the key recommendations that emerged from the workshop. Our new program on health law probes the legal system's role in the evolution of health care; our work on product liability, which examines interactions among liability, regulation, and market forces in the automobile industry, pays particular attention to the media's role in affecting company sales and regulatory actions; and we recently completed a profile of the market for private dispute resolution in Los Angeles.

Highlights of the NSF-ICJ Workshop

Testing the Assumptions Underlying the Debate

To lay the groundwork for the discussion, workshop participants began by noting some of the empirical assumptions underlying the tort liability debate that require verification and by identifying the kind of research that would illuminate those assumptions.

Claiming

Assumption: The tort system is out of control: There are too many tort claims and the number is increasing. There was general agreement that some form of this assumption is central to the tort liability debate. The discussion explored several areas in which research is needed. First, this assumption pointed to a recurring dilemma about the baseline for measuring the rate of tort claims. Should it be the general population? The injury rate? Or the underlying legal culture? Second, what factors drive claiming and changes in claiming rates?

We identified several promising directions for exploring claiming, including

- the role of tort doctrine
- the nature or the cost of injury
- participants' expectations about outcomes and processes
- the mass media's role in reporting the risks and coverage of litigation
- the role of technology: new sources of injury and increased capability to detect injury
- incentives: economic need, greed, desire for an apology or a hearing
- the supply of lawyers
- changes in the demographic composition of the bar.

Jury Behavior and Verdicts

Assumption: A basic problem with the tort liability system is the erratic behavior of juries. Participants debated the merits of the perception of juries as being capricious and unable to cope with the complexities of modern litigation. Some argued that juries have been unfairly singled out when the system is blamed for unpopular or negatively valued outcomes; others judged the criticism of juries to be warranted. One participant argued that getting rid of juries altogether would improve the system by reducing the uncertainty of its outcomes. Others responded that skewed media coverage, not juries per se, was responsible for the uncertainty.

This discussion led to debate over the utility of longitudinal analyses of jury verdicts, given the difficulties of disentangling the effects of changes in lawyer and party litigation strategies from the effects of changes in juror attitudes. Some participants asserted that the focus on jury behavior tends to obscure the importance of the legal contexts in which juries operate.

The discussion identified several promising areas for research:

- Improving and augmenting current sources of data on jury behavior
- Determining the effects of selection bias (changes over time and differences by jurisdiction and case type) on jury outcomes
- Analyzing jury understanding of expert testimony, including the effects of jury instructions, rules of evidence, and the potential use of neutral experts
- Assessing the comparative accuracy of fact-finding by juries, judges, and other possible fact finders
- Quantifying comparative variance in liability and damage awards.

Tort Liability System's Effects on the Economy

Assumption: The liability system does not send clear signals to corporate decision-makers. Participants generally agreed that legal research has, to date, not obtained a clear picture of how companies respond to the threat of tort liability. They went on to debate a number of issues related to deterrence, including the nature of the loss that companies fear—dollar expense, damage to reputation, decreased market share—and the range of corporate reactions to liability exposure.

Participants expressed interest in how companies estimate the magnitude of losses from liability and what role insurance companies play in companies' perception and management of risk.

Assumption: U.S. liability laws, especially those affecting product safety, place American firms at a competitive disadvantage. Several workshop members argued that the importance of the "competitiveness" issue has been exaggerated. It remained unclear whether this should be regarded as a "real" issue, and, if it is, how it can be framed and explored through research. Nonetheless, some expressed interest in studying the issue of a "level playing field" in international competition and in making a comparative analysis of liability laws' effect on job creation.

Other Issues

The discussion ranged over a number of other issues, including the following:

Role of judges. Workshop members raised the question of how judges decide whether cases are important or frivolous, and expressed interest in exploring judges' decisions regarding the validity of scientific evidence.

Judicial "system." Does it really make sense to study legal behavior as a system? Or is legal behavior really an aggregation of smaller systems or, perhaps, cultures?

Lawyers' negotiating and settlement strategies. Do lawyers use discovery as a tactical weapon to drive up opposition

costs or to promote or discourage settlement? How do lawyers identify and use experts, and what effect do experts have on settlement? Assuming that cases are, in fact, becoming more complex, what effect does this complexity have on settlement behavior?

Private dispute-resolution processes. There is considerable debate about the merits of privatization. Yet we don't have a clear picture of the workings of private processes. Participants generated an abundant list of potential research issues in this area: What is the magnitude of the use of private dispute resolution? What kinds of cases is it "draining" from the public system? What can be learned about the private system's outcomes and procedures? What effects does the private system have on access, courts' normative roles (i.e., precedents), public perceptions of the justice system, and public expenditures for the courts?

Deterrence and Compensation

Participants considered a number of issues regarding the liability system's deterrence function, as well as its function as a compensation system:

- What is the informational role of the tort system for product users and manufacturers? Does the threat of tort action impair the flow of information? Are there changes that would enhance information flow?
- How do organizational culture and professional codes affect corporate employees' and officers' responses to liability?
- What are the relative costs and benefits of tort as a deterrence mechanism, and how do they compare with those of regulation and criminal law?
- How do the deterrence and compensation goals of the tort system interrelate? In particular, how would health care reform affect the need for tort-based compensation?
- What standards should be used for evaluating tort as a compensation system: transaction costs, the adequacy and equity of compensation, or other values?

We also discussed issues surrounding the tort system in its social and cultural contexts. The principal questions were

- Are changes in claiming propensity a reflection of social and/or cultural change?
- Is there an increasing divergence between formal legal rules and ordinary social norms?
- How does the public view and value the tort system, especially the role of the jury and potential trade-offs between (1) process efficiency and procedural fairness, and (2) deterrence/compensation and retribution?

Promising Theoretical and Methodological Approaches

During the workshop's final day, we discussed promising approaches to addressing the questions facing civil-justice researchers. Many participants, feeling that scholarship on tort liability and civil law generally has relied too heavily on economic theory, urged their colleagues to expand their conceptual horizons to incorporate different disciplinary approaches. Highlights of the discussion included innovative suggestions for studying corporate behavior, jury behavior, and the effect of the mass media.

We concluded that nearly every aspect of the tort liability system is poorly understood and expressed support for some basic—albeit perhaps less-innovative—work describing aspects of the system, surveying the location and contents of data sources, and tracking record-keeping operations. This conclusion was particularly true of private dispute resolution: In the absence of some initiative by researchers, records may disappear or never exist at all. ❖

Workshop Participants

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Professor Neil Vidmar
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Duke University

Professor Michelle White
Department of Economics
University of Michigan

Dr. Susan White
Program Officer
Law and Social Science Program
National Science Foundation

Affiliations shown are those that the participants had at the time of the workshop.

Building an Empirical Basis for the Tort Reform Debate

by Cindy Lebow



Cynthia Lebow, this year's ICJ Visiting Fellow, served as the Senior Counsel for Policy in the Civil Division at the U.S. Department of Justice (DOJ). At DOJ, she was principally responsible for the development of policy and legislative initiatives relating to civil justice and legal reform, including product liability reform, the Civil Justice Reform Act, bankruptcy reform, and the legal implications of national health care reform. We asked Cindy to comment on the use of empirical information in tort reform. We're pleased that Cindy has joined us as the ICJ's Associate Director for New Initiatives.

The tort reform debate at the federal level has been, and continues to be, seriously hampered by the lack of knowledge about the effects of tort reforms enacted in various states over the past 20 years. The best data we have focus on medical-malpractice reforms legislated in the late 1970s and early 1980s.

But even that information is sparse. The handful of studies are uneven in quality, differ widely in approach, often have conflicting results, and tend to focus on insurance premiums rather than on other possible outcomes—for example, the profile of cases being brought, and whether awards are up or down.

In the past five years, a number of states have passed other tort reforms—some, such as damage caps, of broad interest; others, such as venue changes, specific to a particular jurisdiction. But we have no idea what effect these reforms have had.

During this year's product liability debate, many argued that federal legislation in this area was inappropriate, because the states are the laboratories of reform. Unfortunately, we don't even have an inventory of the experiments the "laboratories" are conducting, much less "lab reports" describing the results.

Trying to help make policy in this kind of information vacuum is both frustrating and inefficient. For example, at DOJ, I regularly received calls from state legislators who were considering a particular reform or package of reforms and wanted to know how similar initiatives had worked out in other states. I had no good information to give them. During the federal product liability debate, poor understanding of what was happening at the state level hampered our ability to estimate the effects of federal legislation. Federal product liability law would, of course, take precedence over state law. But in some cases, it was not clear which state laws were being overruled or whether the result would help or hurt defendant or plaintiff interests.

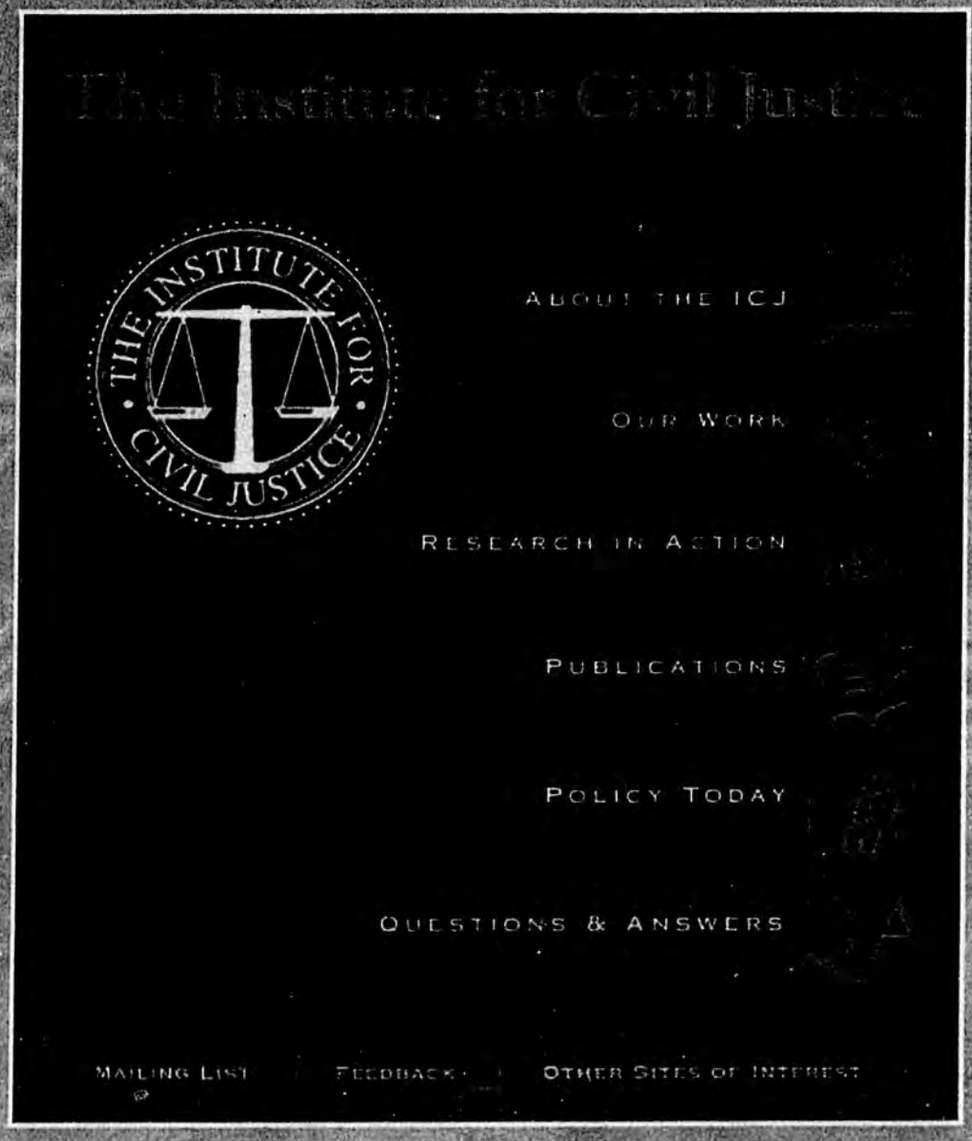
Developing a comprehensive catalog of reforms would be very difficult. The laws we are interested in are not introduced into a state's statutes and labeled "tort reform." The legislation could be hidden in a state's tax code or the labor code. Dozens of laws in a state's legal structure might be involved. There are services that track current legislative activity, but once the legislative moment has passed, the laws seem to disappear into the Bermuda triangle. Of course, lobbyists track certain kinds of reforms and are ready to supply all kinds of data, but such reports can't be relied on for either objectivity or comprehensiveness.

I think a good deal could be learned from a RAND-style evaluation of reforms in selected states. Such an evaluation would have to take account of the legal systems into which the reforms are being introduced, but it might be possible to simulate the effect of introducing into State *Y* a reform that had been implemented and assessed in State *X*.

On a more basic level, some useful generalizations could be drawn by comparing the volume of litigation and award levels in states where punitive damages are not given to individuals, to the volume and level in other states. Even such simple comparisons could provide an empirical basis for discussions about whether federal tort reform is desirable.

The *sine qua non* in any discussion of empirical data in tort reform is quality. Both at DOJ and earlier as the General Counsel on the Senate Judiciary Committee, I've been in positions in which research played an important role in key decisions. But only a few studies—those bearing the hallmark of certain rare institutions—were considered credible, reliable, and unbiased.

RAND's Institute for Civil Justice is one of those institutions, and ICJ empirical research has been, and will continue to be, a touchstone in the evolving civil justice reform discussions. Indeed, after spending three months working with the political scientists, economists, lawyers, organizational experts, and statisticians who constitute the core of the talented ICJ research team, I have an even deeper appreciation for the breadth of the ICJ's current and future contributions to the civil justice debate. ❖



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On Our Agenda

It's been a busy and productive summer, and we've launched a number of new research efforts.

Evaluation of Workers' Compensation. We've been selected by the California Commission on Health and Safety and Workers' Compensation to evaluate the disability component of the Workers' Compensation program. California's payments for permanent-partial disability rank 48th in the country, but the costs of the system are the second highest.

We will

- profile the California permanent-partial disability system: the formal rules and procedures that govern it, the practices and behaviors that determine how the system really works, the problems the system appears to have, and the parameters of feasible change
- review reforms undertaken in other states and determine their potential application to the California system
- identify a set of feasible reforms that address the problems we have identified and that hold promise for improving the functioning of the system and reducing costs
- determine the consequences of introducing proposed reforms in California and translate that understanding into a cost-benefit framework.

Mark Peterson and Elizabeth Rolph are the co–project leaders.

Because of California's size, the study is likely to play a major role in the workers' compensation debate, not only in California but nationwide. And in conjunction with our assessment of California's "24-hour coverage" pilot programs (see below), this new undertaking will help us build a comprehensive picture of how one of the nation's largest workers' compensation systems is attempting to adapt to a dynamic environment.



The Advisory Committee for our evaluation of permanent-partial disability represents all the participants in the California workers' compensation community, as well as groups potentially affected by changes in the system. At its initial meeting, Committee members shared their perspectives on the most important issues in this area of workers' compensation and suggested potential solutions to problems they perceived. Here, Elizabeth Rolph, co-leader of the evaluation, helps orchestrate the lively discussion.

The Integration of Managed Care in Liability Environments. California has fielded an experiment that integrates the health care component of workers' compensation with traditional managed group health plans. In a collaborative effort with RAND's Health Sciences program and with researchers from the University of California—Los Angeles and the University of California—Berkeley, we are evaluating California's "24-hour coverage" pilot programs, assessing their effects on costs, health and legal outcomes, and worker and employer satisfaction. Donna Farley leads the ICJ's team.

The Use of Alternative Dispute Resolution in Managed Care. We've recently received two grants to examine the role of alternative dispute resolution in managed care. With support from The Robert Wood Johnson Foundation, we are evaluating pre-dispute alternative dispute resolution agreements in health care contracts: their use; their immediate effects on transaction costs, time to disposition, participant satisfaction, and access; and systemic outcomes, such as the equity of the process. With a grant from the Kaiser Family Foundation, we have begun the first phase of an investigation of user satisfaction with alternative dispute resolution services that users have received in the course of health care disputes governed by pre-dispute agreements. Elizabeth Rolph leads both projects.

These studies are part of our evolving program of research on the legal system's role in the evolution of health care. You'll be hearing more about this program in the coming months.

Evaluation of the Civil Justice Reform Act. Over the past four years, an ICJ research team led by Jim Kakalik has been conducting the congressionally



Jim Kakalik, project leader of the CJRA evaluation, reviews a subtle point in the quantitative analysis with lawyer Nick Pace, who set up many of the project's surveys and provided legal expertise, and Dan McCaffrey, the project's statistician.

mandated evaluation of the Civil Justice Reform Act. The study has just been completed, and the findings were delivered to the Judicial Conference at the end of September. Details of the analysis will be available from RAND in December 1996, when the Judicial Conference is scheduled to submit its report to Congress.

For us, the next step is to engage with the bench, the bar, and other experts in what will surely be an extended and spirited discussion. An important forum for this exchange will be next spring's special conference, co-sponsored by the American Bar Association and the University of Alabama School of Law, which will be devoted entirely to considering what our findings imply for both the process and the substance of procedural change. As members of the planning committee for the conference, we welcome the opportunity to help create the context for this historic debate. ❖

Product Liability, Cont. from page 4

innovation (a favorite of reform advocates) and deterrence of dangerous corporate behavior (a favorite of those defending the status quo). The policy process will not benefit from discounting or denying effects we can't see or measure.

Coupling increases in liability with decreases in liability deserves serious attention. With most onlookers believing that product liability is a zero-sum game between businesses and consumers or that improving economic effects must reduce fairness, reform packages that seem to benefit business—packages routinely advanced in the name of economic competitiveness—are very vulnerable politically. Broad-based federal legislation could be more politically viable if it included elements that clearly increase liability in some ways and clearly decrease it in others.

Well-chosen combinations of elements, i.e., some that strengthen deterrence of bad behavior and others that weaken deterrence of good behavior, might attract broad support and be beneficial economically. Consider two examples from my study of medical products:

- Improving legal procedures for dealing with scientific evidence of injury causation could increase the fear of companies that they will be held liable for injuries caused by their products while decreasing their fear that they will be held liable for injuries not caused by their products.
- Articulating the standards for availability of punitive damages—currently based on such vague terms as "outrageous" and "reckless"—in ways that provide clear guidance for both companies and juries could also strengthen good deterrence while weakening bad deterrence.

In the reform debate, many have emphasized how manufacturers are sometimes disadvantaged by difficulties in dealing with scientific evidence and by vague standards for awarding punitive damages. Much less appreciated, I believe, is that plaintiffs are sometimes disadvantaged by the same difficulties. Well-designed reforms aimed at these issues are likely to cut both ways, advantaging plaintiffs in some instances and defendants in others.

The fact that someone else's suggestion is imperfect is not sufficient reason to reject it. All achievable product liability systems will leave plenty to be desired, because different people want the product liability system to accomplish very different things, any one of which would be impossible to achieve with precision.

The current system is badly flawed. Its transaction costs are high. It seems haphazard as a deterrence mechanism and as a compensation mechanism. I doubt that anyone would design anything like it if economic performance were the goal. I doubt that anyone would design anything like it if fair compensation were the goal. Indeed, I doubt that anyone would design anything like it if some *explicit compromise* were the goal.

In political forums, we have great difficulty admitting the obvious—much less calmly discussing complicated high-stakes issues. When considering potential reforms, our goal should be improvement, not perfection. Many arguments for and against particular reforms do little more than point out imperfections in someone else's proposal. We could all benefit from admitting that achieving anything close to perfection is impossible. Merely hurling criticisms back and forth ill serves the goal of improving the system for the national benefit. ❖

In the Spotlight

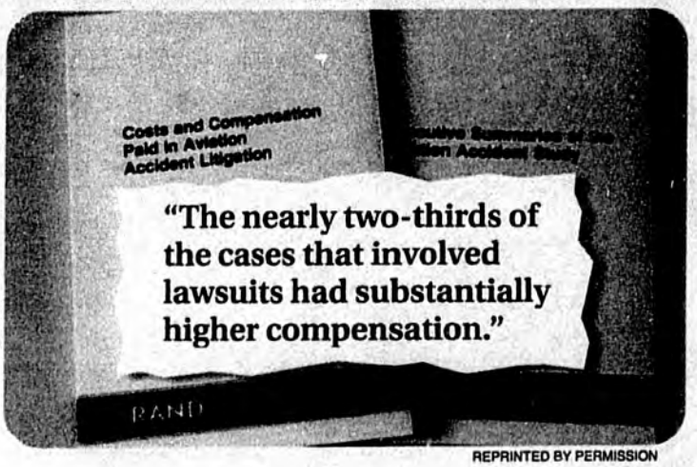
As seen on CNBC, May 1, 1996



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In anticipation of President Clinton's veto of the product liability bill, CNBC's Jerry Cobb interviewed Erik Moller, author of our most recent jury verdict study, and ICJ Director Deborah Hensler about trends in jury verdicts, especially punitive damages.

As seen on CBS News' *60 Minutes*, May 26, 1996



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The May 26 airing of CBS News' *60 Minutes*, which explored the legal consequences of the ValuJet crash, cited our analyses of aviation accident litigation in the United States. These studies characterized the decedents and the litigation, and provided data on compensation paid, litigation costs incurred, and economic losses suffered. Other key findings: airlines and other defendants compensated victims' survivors for less than half of their average economic loss, and plaintiffs who hired lawyers received higher compensation.

RAND ⁘ *Institute for Civil Justice*

The mission of the Institute for Civil Justice is to help make the civil justice system more efficient and more equitable by supplying policymakers and the public with the results of objective, empirically based, analytic research. The ICJ facilitates changes in the civil justice system by analyzing trends and outcomes, identifying and evaluating policy options, and bringing together representatives of different interests to debate alternative solutions to policy problems.

A profile of the ICJ, abstracts of its publications, and ordering information can be found on RAND's home page on the World Wide Web at **http://www.rand.org/centers/icj/**.

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February 3, 1997

via FAX (907)465-3834

Jim Sourant
c/o Representative Brian S. Porter
Alaska State Legislature
District 20
State Capitol Building
Juneau, AK 99801-1182

Re: SS for H.B. 58
File No. 1795.6377

Dear Jim:

Enclosed is a memo which I have prepared for David Jones concerning Sections 31 and 32. If you would like to have this memo to the attention of yourself or Representative Porter, please let me know and I will resend the first page.

I also enclose for your quick reference a copy of the California statute from which AS 21.89.100 was taken. As you can see subsection (b) of that statute contains language which is similar to that in the current subsection (c) of the Alaska statute. From all of the legislative history which I have it appears that this section has been in the Alaska statute since inception.

Please let me know if there is anything at all that I can do to assist.

Very truly yours,

Michael A. Barcott

MAB:mb

Enclosures

you are obligated to pay [illegible]
lawsuit. This is counsel neither selected nor controlled by the insurance carrier and is frequently counsel who is under the direct control of the company being sued. Additionally, it may be that under current Alaska law you are obligated to pay this lawyer's bills not only for the claims which are potentially covered, and for which you collected a premium, but you must pay the bills for that attorney for defending Claims 2-5. This issue has never been directly addressed by the Alaska Supreme Court but current practice in Alaska is that independent counsel defends both the potentially covered and clearly uncovered claims.

What inevitably happens in these cases, and the abuse to which I refer, is that the independent counsel has no real financial constraints on his/her defense and that lawyer defends vigorously, and extraordinarily expensively, both the potentially covered claims as well as the claims for which there is no coverage. This has a direct financial impact on the insurer which is forced to pay exorbitant legal fees which to some extent may be justified on the claims for which coverage may exist but which finds no justification for the claims for which there clearly is no coverage. Had the uncovered claims been sued upon alone without the potentially covered claim, there would be no insurance carrier provided "independent counsel" and the defendant would have no expectation or right to have the claims defended at the cost of an insurance company. Similarly, the insurer has never received a premium or analyzed the risk of this type of expense. It is the mere fortuity that they are joined with potentially covered claims which causes the specter of the payment for their defense. In addition to the extraordinary cost to the insurer there is a potential significant detriment to the plaintiff in these types of cases. The plaintiff who may have unwittingly invoked a potentially insured claim faces an unfettered defense counsel who often engage in scorched-earth defenses as they have no fiscal constraints upon them. Sections 31 and 32 of this Bill deal with two separate aspects of this problem.

Section 31 merely provides that an insurer in this circumstance need only pay for the costs of defense for the claims which may have been covered under its insurance policy. This is the result which has been judicially established in California by Horace Mann Insurance Company v. Barbara B, 846 P.2d 792 (1993). Section 31 requires the insurer to do that which it contractually agreed to do and that is provide a defense to the insured for claims which may be covered under the policy. In the scenario mentioned above this would involve the costs of defense for Claim 1. Claims 2-5 for which the insured never purchased insurance and which the insurer never had the opportunity to evaluate would have to be defended by the insured on its own without assistance from the insurance company. Had Claims 2-5 been brought separately, this would be the result which everyone would expect and agree was appropriate as there was never any insurance for these claims. It does not make sense that the simple joinder of a potentially insured claim in the litany of uninsured claims should give the insured the right to have the defense costs paid for the uninsured claims especially when the lawyer selected is operating with no real financial constraints.

I would hope that there would be no opposition to this section from plaintiff's bar. Two things can happen under the present state of the law. One of those may be beneficial to plaintiff's counsel but the other, more frequent scenario in fact

Calendar of Events

Alaska...

•February 6, North Pacific Rim Fisheries Conference, What It Can Do For Alaska is the topic of the monthly luncheon forum for February. Former Governor of Alaska, Steve Cowper will be presenting the program for this year's Pacific Rim Fisheries Conference to be held in Japan in April. RSVP to luncheon by calling 278-7233.
•February 10-14, Alaska Survey and Mapping Conference. For more information on this conference, please call Bridget McCleod at Aeromap at 272-4495 or e-mail at bmcleod@alaska.net.
•February 11 - 12, Construction, Oil and Mining Exposition (PAC COM Expo) scheduled for February 11-12 at the Sullivan Arena in Anchorage. If you are interested in attending, exhibit space or the business roundtables, please contact Sourdough Productions at 277-7469 or Fax 272-7372
•February 17,18,19 Rural Small Business Conference, Anchorage.
•February 18, Survival Strategies for Business in the Russian Far East. Half day course will be taught by Russ Howell, Program Director of the American Russian Center. Course is $75 for members and $90 for non-members. Register by calling WTCAK at 27-TRADE.
•February 20, Security on the Internet. DYNAMIC short course taught by Charles Preston of Information Integrity. This is for ANYONE and EVERYONE who uses the internet or e-mail for business. Course will be held in Fairbanks at the Fairbanks Princess and is being co-sponsored by the Alaska State Chamber of Commerce and the Fairbanks Chamber. For registration or more information, you may call 278-7233.
•February 21, World Bank Executive Briefing, Anchorage.
•February 27, Mastering Russian Far East Customs, Anchorage.
•May 4-10, ISCORD '97, Fifth International Symposium on Cold Region Development, Anchorage. The Fifth International Symposium on Cold Region Development is sponsored by the American Society of Civil Engineers in association with the International Association for Cold Region Development Studies. Topics for this conference will feature **General Development Policies and Projects, Building/Housing and Construction, Regional Development/Infrastructure and Transportation, Rural Recreational and Energy Resource Development and Environment.**
•May 9 -10, Northern Forum Regional Coordinator's Meeting, Anchorage.
•May 10-13, 12th Pacific Rim Coal Conference, Anchorage. Featuring Alaska and Far East Russia.
•May 22, Annual Export Alaska Banquet

Outside of Alaska

•January 30, Tax Reform in Russia, Duke University, North Carolina. For more information, call Jonathan Abels, (919) 613-7390 or fax (919) 684-2861.
•March 12-13, TIOGE '97, Turkmenistan International Oil and Gas '97 Projects Conference. Copies of brochure available by calling 278-7232.
•March 17-19, Asia/Pacific Business Outlook Conference, Los Angeles. For more information call 271-6237.
•April 7-10, Mioge '97, Moscow International Oil and Gas Exhibition, Moscow. (If you're interested, we have an update of the NEWEST aspects of this international exhibition including Mioge'97 Awards, a media village and a real time web page of the event.)
•November 2-4, '97, Indian Sub Continent Oil and Gas Market Exhibition.

is very detrimental to plaintiff's counsel. If a plaintiff is intentionally adding a claim for which coverage may exist in the hope that the specter of unfettered defense costs will cause the insurance carrier to cough up an immediate large settlement, then this section would work to that lawyer's detriment. That, however, is not usually the case. Rather, the implication of the potentially covered claim means that the plaintiff's lawyer faces a scorched earth defense and the costs of pursuing a legitimate claim goes up exponentially. It is my strong suspicion that if trial lawyer's groups truly understand this section they would not oppose it as this provision will have the effect of leveling the playing between plaintiffs and defendants when there are potentially insured and uninsured claims. Under the present state of the law the plaintiff's counsel who implicates a covered claim often faces a phalanx of lawyers without fiscal constraints. For this reason I do not believe that the trial lawyers would oppose this section if they understand it. The only likely opposition would come from any group who represents insureds. While I could understand their financial desire to have uncovered claims defended at the expense of the insurance company, there is no equitable reason why that should be the case. These companies did not pay for insurance for the defense of uncovered claims and have no right to expect that insurance companies would provide that defense merely because they were joined with claims potentially covered by insurance.

Section 32 deals with this problem in a different fashion and should come with the blessing of the trial lawyer's groups. Section 32 allows the insurer to go to plaintiff's counsel in the situation I have hypothesized and settle the potentially covered claim. To date, insurers have been constrained to do this for fear of claims of "bad faith" by their insured. Once the potentially covered claim is settled with the plaintiff it leaves the uncovered claims (Claims 2-5) standing just as if they had been sued upon alone. The insurer would have no obligation to provide a defense for these claims but it has collected no premium, assessed no risk, and should have no obligation to provide such a defense. This section is beneficial to plaintiff's counsel because it is only implicated if both the plaintiff and the insurer agree to settle the potentially covered claim. If a plaintiff sues on a potentially covered claim (Claim 1) and for uncovered claims this gives him the ability to obtain a settlement for the covered claim and litigate the uncovered claims as if they had been separately maintained. If the plaintiff's counsel does not choose to settle the potentially covered claim he/she does not have to and this section is not implicated. Again, the only opposition to this section would come from insureds who really have no right to complain as they have not purchased insurance for the uncovered claims and should have no right to expect a defense to those claims, especially when that defense is provided by "independent counsel" with no financial constraints.

what if pl. atty wants to go for bad faith?

TRADE WINDS

A Weekly Update of News from the World Trade Center Alaska January 27, 1997

News:

•WTCAK's membership survey's went out this week. Please take the time to review and complete these as thoroughly as possible. We use this each and every year to modify our programs to better meet your business needs. THANKS to those that responded immediately! Our first respondent was the Sakhalcentre in Yuzhno-Sakhalin (maybe because of their advantage of time zones?).

•The December/January issue of AIA's (AK Int'l Airport System) newsletter announces that an advance team of China Southern Airlines visited Anchorage. Their purpose was to review facilities and meet with potential ground handlers for Anchorage to serve as an alternate airport for service between Guangzhou/Los Angeles. AEDC and Airport officials are seeing this as positive toward their efforts for Anchorage to serve as a technical and/or traffic stop for the carrier when it begins service to the midwest or east coast of the U.S.

•World Trade Center Alaska Member, Bill Robinson will be presenting a course entitled Russian Business Strategies -- Risks and Opportunities on March 11th from 3-5:00pm. in Anchorage. Don't miss this one! Mr. Robinson will be available for one-on-one meetings prior to the seminar to discuss specific projects or business interests. If you're interested in a one-on-one appointment, please call Robin at 278-7233.... more later.

•A recent article in Export Today announces that Sea-Land has completed test runs in which refrigerated cargo is carried in ocean containers via rail into the CIS, and hopes to make the service available commercially in the near future. The test runs are part of the Trans-Siberian Express Service-- a joint venture between the Charlotte, NC-based company and the Russian Ministry of Rail on the design, engineering and implementation of refrigerated cargo container trains in the region. Along the same lines...

•Pacific Gateway a publication of the Port of Tacoma highlights FESCO's Russian Pacific Line of new reefer containers. These containers offer precise temperature control for shipping from the Port of Tacoma to the RFE ports of PK, Magadan, Vlad and Korsokov.

•WTCAK member Jim Preston plans to return to Anchorage in early February and will be glad to meet with friends, associates and WTC members to discuss the current commercial environment of Vladivostok. If you want to be on the "list" to meet with Jim -- give us a call at 278-7233.

•WTCAK is starting up it's bi-weekly membership breakfast where we invite 10 or so WTC members to network informally on Friday mornings. If you are from outside of Anchorage and would like to participate... let us know and given enough notice we will plan one of these around your schedule.

Resources and Information

•WOW! One of the best resources we've seen yet! **Dictionary of International Trade** published by the World Trade Press and the World Trade Centers Association. This resource guide sells for $16.50 and includes a thorough listing of international terminology, a list of useful trade publications, maps, time zones, currency listings and books published by country listings. You can order the book through World Trade Press at (415) 454-9934 or 1 800 833-8586 or e-mail: worldpress@aol.com. Or you may obtain an order list direct from World Trade Center Alaska. DISCOUNTS for World Trade Center members are considerable! Other books include a Passport series which are pocket guides to business, culture and etiquette by country -- members might be interested in those on Vietnam, Taiwan, Hong Kong, India, Indonesia, Malaysia, Russia or China. (E.G. Retail cost of Passport Books are $6.95 and for WTC Members are $5.20).

•The Small Business Internship Program of the US Department of Commerce is seeking applications for **interns from Russia.** If you are a business interested in hosting a pre-qualified business/technical intern for your firm, please contact WTCAK at 278-7233 or the US Department of Commerce at 271-6237 or SABIT office directly at (202) 482-0073. Applications are being accepted through March 31, 1997.

•**Russian Commerce News** a publication of the Russian [illegible] overview of Russia's Booming Telecommunications Industry including a list of Legislative Bills of the Russian Federal Communications. Copies are available for members by calling 278-7233.

•Business America recently published an article on Business Outlook Abroad with a special 3 page feature on Norway. According to the article, leading sectors for U.S. Business is **Offshore Oil/Gas Exploration/Exploration Equipment (including pipeline services and equipment).** Other sectors mentioned are Telecommunications Equipment, Defense Industry Equipment, Pollution Control Equipment and Industrial Process Controls. For a copy, please call Jillaine at 278-7233.

•**Japan Direct Marketing?** If you're looking for a good lists of prospects for a Japanese direct marketing campaign, you may want to obtain a copy of this article. Only two pages, this article gives great tips and resources for direct marketing. Call us at 278-7233 for your copy.

•**"The Changing of Customs"** is an excellent article in the December issue of Russian Life. The article documents the current state of Russian Customs including recent training and new high tech equipment being used by the agency. The article also mentions a new "hotline" for "anyone who considers himself unfairly treated by customs". Unfortunately, the article does not include a number for that "hotline".

These sections can stand independently as they deal with this problem in separate ways and are not necessarily tied together.

FAX TRANSMITTAL

ALASKA

WORLD TRADE CENTER

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Anchorage, Alaska 99501 U.S.A.
(907) 278-7233 • Fax: (907) 278-2982
E-mail: 102761.2127@compuserve.com

A division of the University of Alaska Anchorage

DATE: Monday, January 27, 1997

TO:

NAME Rep. Brian Porter, Alaska State Legislature

FAX NUMBER: 907 1, 907-465-3834, 756

SENT BY: Lane' Richards, World Trade Center Alaska

Number of pages including cover: 3

Please call (907) 278-7233, if not received

Citation | Rank(R) | Database | Mode
CA CIVIL s 2860 | R 1 OF 4 | CA-ST-ANN | Page
West's Ann.Cal.Civ.Code s 2860

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 3. OBLIGATIONS
PART 4. OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS
TITLE 13.5. OBLIGATION TO DEFEND ACTION
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Current through the 1993-94 legislative sessions.

s 2860. Conflict of interest; duty to provide independent counsel; waiver; qualifications of independent counsel; fees; disclosure of information

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

(b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

(c) When the insured has selected independent counsel to represent him or her the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in

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OFFICIAL BUSINESS

Alaska State Legislature

Twentieth Legislature - First Session

SENATE CALENDAR

Seventeenth Legislative Day

Wednesday - January 29, 1997 - 11:00 a.m.

Chaplain: Pastor Chris Grube, Church of the Nazarene

SECOND READING OF SENATE RESOLUTIONS

SJR 7
Supporting continued funding of the Alaska National Guard Youth Corps Challenge Program.
STA RPT 5DP p. 0124
ZERO FISCAL NOTE (DMVA) p. 0124

CITATIONS

Honoring - Florence Schutte
Representative(s) Grussendorf
Senator(s) Taylor, Kelly, Hoffman, Pearce, Duncan, Lincoln, Mackie, Sharp

In Memoriam - Mary Magdalena Backford
Representative(s) Ivan
Senator(s) Hoffman, Taylor, Kelly, Adams, Pearce, Duncan, Lincoln, Mackie, Wilken, Sharp

PUBLICATION NOTICE - CITATIONS

Honoring - Chad McMullen and Craig McMullen, Eagle Scouts
Representative(s) Elton, Hudson
Senator(s) Duncan, Miller

camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

(e) The insured may waive its right to select independent counsel by signing the following statement: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

(f) Where the insured selects independent counsel pursuant to the provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.

CREDIT(S)

1993 Main Volume

(Added by Stats.1987, c. 1498, s 4. Amended by Stats.1988, c. 1114, s 1.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

1993 Main Volume

The 1988 amendment, in subd. (a), inserted "independent" before "counsel" in two places; in subd. (c) substituted "civil" for "tort" in the first sentence; and made nonsubstantive changes.

Former s 2860, enacted by Stats.1872, relating to the liability of the writer of a letter of credit, was repealed by Stats.1963, c. 819, s 2, eff. Jan. 1, 1965. See, now, Com.C. ss 3408, 5115.

FORMS

1993 Main Volume

See West's California Code Forms, Civil.

LAW REVIEW COMMENTARIES

1995 Pocket Part

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TWENTIETH ALASKA LEGISLATURE

First Session

HOUSE CALENDAR

Seventeenth Legislative Day

Official Business

Wednesday - January 29, 1997 - 10:00 a.m.

Invocation: Beverly Haywood
Juneau Unitarian Universalist Fellowship

SECOND READING OF HOUSE RESOLUTIONS

HCR 1

Relating to a new Alaska liquefied natural gas project.

WTR RPT CS(WTR) 7DP	P. 0134
2 ZERO FISCAL NOTES (DNR, REV)	P. 0135
RESOURCES REPORT PENDING	
PENDING WAIVER FROM OIL & GAS	

LEGISLATIVE CITATIONS

Honoring - Florence Schutte
By Representatives Grussendorf, Berkowitz, Brice, Davies, Elton, James, Joule, Kott, Kubina, Masek, Nicholia, Ogan, Porter, Rokeberg, Therriault, Vezey, Williams

Honoring - Senior Captain Walter Jackinsky, The Alaska Marine Highway System
By Senators Leman, Torgerson; Representatives Phillips, Kubina, Davis, Austerman, Berkowitz, Brice, Croft, Davies, Elton, Hanley, Hudson, James, Joule, Kemplen, Kohring, Kott, Masek, Mulder, Nicholia, Ogan, Porter, Rokeberg, Therriault, Vezey, Williams

Honoring - Linda Parker, Soldotna Chamber of Commerce, 1996 Person of the Year
By Senator Torgerson; Representatives Davis, Phillips, Berkowitz, Croft, Davies, Elton, Hanley, Hudson, James, Joule, Kemplen, Kohring, Kott, Kubina, Masek, Mulder, Nicholia, Ogan, Porter, Rokeberg, Therriault, Vezey, Williams

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FAX COVER SHEET

CONFIDENTIALITY NOTICE: The documents accompanying this facsimile message contain confidential communications which may be subject to protection under the attorney-client privilege or the attorney work-product doctrine. These documents are intended solely for the use of the proper addressee and should not be read or retained by anyone other than the intended recipient. If you have received this facsimile in error, please notify us immediately by collect telephone call at (206) 292-8008.

DATE: February 3,1997	**TIME: 12:06pm**
SENT TO: ALASKA STATE LEGISLATURE	**FAX NO: (907)465-3834**
ATTN: Jim Sourant	**PAGES: 7 + COVER**
FROM: Michael A. Barcott	**RE: HB 58 FILE NO: 1795.6377**

CONTENTS OF FAX: **February 3, 1997 letter with attachments**

MESSAGE:

Wed, Jan 29, 1997 **Jan 27-Feb 2 1997**

Monday 27

10:00 AM Kent Dawson 463-2533 re: Tort
11:00 AM Session
1:00 PM Judiciary Committee

Tuesday 28

8:30 AM Mock Press Conference
10:00 AM Press Conference
11:30 AM Tony's Press Conference
2:45 PM Paul Flynn w/ Close Up re: Tobaccy Tax
3:00 PM HESS Committee
5:00 PM Juneau Empire, Pennisula Clarion Rcptn 5 to 7

Wednesday 29

9:45 AM Majority Caucus
10:00 AM Session
1:00 PM Judiciary Committee
5:00 PM Leg Council in Butrovich Rm
6:00 PM Tentative Rules Hearings

Thursday 30

3:00 PM HESS Committee

Friday 31

10:00 AM Session
1:00 PM Judiciary Committee
3:45 PM Judy late lunch Dr. Longworth

Saturday 1

Sunday 2

1996 Cumulative Supplement No. 1

THE LAW OF TORTS

Second Edition

FOWLER V. HARPER
FLEMING JAMES, JR.
OSCAR S. GRAY

Volume 1

negligence not involving motor vehicles (or in other states), the benefits are not deducted from these claims, but the no-fault insurer is subrogated to them to the extent of the no-fault benefits payable. Minn. Stat. Ann. §§65B.51, subd. 1 and 65B.53, subds. 2, 3 (1986); Fox v. City of Holdingford, 375 N.W.2d 44 (Minn. App. 1985). Cf. also *Nelson* case, discussed in comment to §25.23 note 20, *infra* this Supplement.

§25.22 n.7, p.651.

The collateral source rule has been modified or virtually abandoned in over a dozen states since 1986. See Alaska Stat. §9.17.070 (1994) (except in medical malpractice actions evidence of collateral benefits, excluding, inter alia, gratuitous benefits provided to claimant, may be introduced by defendant, in which case the court shall reduce the award by the excess of such benefits over the sum of premiums paid by the claimant for any such insurance benefit and net attorney fees incurred by claimant in securing the award); Cal. Govt. Code §985 (West Supp. 1995) (providing for posttrial reduction of judgments against public entities in the amount of certain collateral source payments made in respect of services provided before trial, if the collateral source payments exceed certain threshold amounts (adjustable annually beginning at $5000); the reductions may not, however, exceed one-half of plaintiff's net recovery); Conn. Gen. St. Ann. §§52-225a-c (1991 and West Supp. 1995) (collateral source payments must be deducted by court from personal injury and wrongful death awards, except for payments as to which right of subrogation exists; unless otherwise provided by law no insurer providing health or sickness benefits, including those under automobile accident insurance, may have subrogation), applied in Fleming v. Garnett, 231 Conn. 77, 646 A.2d 1308 (1994); Fla. Stat. §768.76, 1986 Fla. Sess. Law Serv. 766 (West) (court similarly must deduct collateral source payments paid or available to claimant except those for which right of subrogation exists, offset by amounts paid by

claimant or his family to secure such benefits; also excepted from deduction are Medicaid benefits and those under certain state-administered medical service programs, but other Social Security and most other government disability and medical benefits are treated as collateral sources to be included in the reduction of the award; claimant's contingent legal fee obligations are net of collateral source reductions as increased by insurance premiums paid); Ga. Off. Code Ann. §51-12-1 (Michie Supp. 1995) (discretionary consideration by trier of fact of available collateral source benefits, except life insurance, in actions "in which special damages are sought . . . or evidence of same is . . . introduced"); Ill. Code Civ. Proc. §2-1205.1, Ill. Comp. Stat. Ann. ch. 735 §5/2-1205.1 (1992) (in cases "on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, to which Section 2-1205 [malpractice claims; cf. comment to §25.22 note 10, *infra* this Supplement] does not apply," collateral benefits over $25 thousand payable by "any other insurance company or fund" for medical and related benefits are to be deducted, but premiums paid in the two years before the accident or death or payable in the future are to be added to the award, and the total judgment may not be so reduced by more than 50 percent); Ind. Code ch. 34-4-36 (evidence of certain collateral source payments, as well as cost to plaintiff or his family of such benefits, to be admitted and considered by trier of fact to determine "the actual amount of . . . pecuniary loss" and "to provide that a prevailing party not recover more than once from all applicable sources for each item of loss sustained"; excepted, however, are any death benefits; "insurance benefits for which the plaintiff or members of the plaintiff's family have paid for [sic] directly"; and payments made by the United States, the state of Indiana, or by any agency of either); Kan. Stat. Ann. §§60-3801 et seq. (1994) (evidence of certain collateral source benefits admissible in claims of over $150 thousand that accrue on or after July 1, 1988; plaintiff's recovery must be reduced by amount of such collateral benefits, net cost of such benefits, less any amounts by which plaintiff's recovery shall have been reduced by operation of state's comparative negligence or several liability laws, by the

insolvency or bankruptcy of any person, or by statutory limits on the recovery of damages); Ky. Rev. Stat. §411.188(3) (1991) (making admissible evidence of collateral source payments, any premiums paid, and known subrogation rights); Mich. Comp. L. Ann. §600.6303 (1987) (amounts paid or payable by collateral source, except by those entitled to lien against plaintiff's recovery, less premiums paid for any such insurance, should be deducted from judgment in personal injury action, but not more than "the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source" is to be deducted; collateral source having only contractual right to subrogation loses unless it is exercised within 20 days of notice of the verdict); Minn. Stat. Ann. §548.36 (1988 and West Supp. 1995) (court shall reduce award by amount of collateral source payments, offset by amount paid by plaintiff or his immediate family to secure the benefits, for the two-year period before the accrual of the action); Mont. Code Ann. §§27-1-307, -308 (1993) (recovery "must be reduced" by payments from collateral sources that do not have subrogation rights, if total award against all defendants is more than $50 thousand and plaintiff will be fully compensated for his damage, exclusive of court costs and attorney fees, with adjustment in case of insurance payments for amounts plaintiff has paid and will in future be obliged to pay to keep policy in force); N.J. Stat. Ann. §2A:15-97 (West Supp. 1995) (amount of collateral source benefits, other than workers' compensation or proceeds from life insurance policies, to be deducted from awards for personal injury or death, except for motor vehicle accidents, "less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable"); cf. similarly N.J. Stat. Ann. §59:9-2(e) (1992) (similar provision in state Tort Claims Act concerning claims against public entities or public employees), discussed in Sikes v. Township of Rockaway, 269 N.J. Super. 463, 635 A.2d 1004 (App. Div. 1994). N.Y. Civ. Prac. L.R. §4545(c) (1992) (court to reduce award by amount of most collateral source payments received or reasonably certain to be received, except for payments by

sources entitled by law to liens on plaintiff's recovery, offset by premiums paid by plaintiff during two-year period before accrual of action and plaintiff's projected future costs to maintain the benefits); compare Staffer v. Bouchard Transp. Co., 878 F.2d 638, 645 (2d Cir. 1989); N.D. Cent. Code §§32-03.2-05, 32-03.2-06 (Michie Supp. 1993) (post-award reduction of "economic damages" to extent covered by collateral sources, defined so as not to include "life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages"); Ohio Rev. Code Ann. §2305.27 (1991) (1975 legislation applicable to "medical" claims, but not covering payments under policies or contracts paid for by plaintiffs or their employers), upheld in Morris v. Savoy, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991); id., §2317.45 (1991) (inapplicable to tort claims against the state or a political subdivision or "medical" claims); Or. Rev. Stat. Ann. §18.580 (1988) ("court may deduct collateral benefits" except, e.g., "[i]nsurance benefits for which the person injured or deceased or members of that person's family paid premiums; and . . . [r]etirement, disability and pension plan benefits, and federal social security benefits"). A deceased's life insurance proceeds are generally excluded from the definition of collateral source payments for purpose of reduction of awards under these provisions.

By contrast, the Missouri legislature in 1987 reaffirmed the collateral source rule. Mo. Ann. Stat. §490.715 (West Supp. 1995) (providing, obscurely, for evidence of defendant's own payments to plaintiff, which are generally considered not from a "collateral" source under the rule).

§25.22 n.8, p.653. Add the following:

See also Molzof v. United States, 6 F.3d 461 (7th Cir. 1993) (Wis. law; malpractice liability for brain damage to patient in Veterans Affairs hospital; future VA hospitalization benefits deemed "collateral" to FTCA award, and therefore not to be set off against it, despite patient's double recovery from the United

States, by analogy to "traditional employee health benefits" for which employee has contributed part of his salary; "In the case of veterans, the consideration is his service and, in all likelihood, a lower salary in order to defray the costs of his and other servicemen's care."). Berg v. United States, 806 F.2d 978 (10th Cir. 1986) (Colo. law; Medicare payments made from special fund, to which plaintiff had contributed, not deducted from FTCA award); Guyote v. Mississippi Valley Gas Co., 715 F. Supp. 778 (S.D. Miss. 1989) (claim by victim of natural gas explosion not reduced by benefits she had received under health and medical program for dependents of United States military personnel (CHAMPUS)).

§25.22 n.9, p.654. Add the following:

"The statute [the Medical Care Recovery Act] has . . . been interpreted by the government as allowing recovery of payment for medical care. See 32 C.F.R. §199.12 (setting forth the specific procedure whereby the United States may recover money paid through CHAMPUS for the expenses of medical care)." Guyote v. Mississippi Valley Gas Co., 715 F. Supp. 778, 780 n.2 (S.D. Miss. 1989).

§25.22 n.10, p.655.

Delaware also requires the trier of fact in medical malpractice cases to "consider evidence of . . . any public collateral source of compensation benefits," such as Social Security. Del. Code Ann. tit. 18, §6862 (1989); cf. Nanticoke Memorial Hosp., Inc. v. Uhde, 498 A.2d 1071 (Del. 1985).

For another restriction on the application of the collateral source rule to medical malpractice claims, under which the reduction of benefits is subject to various limitations, e.g., that the total judgment shall not be reduced more than 50 percent, and that there be an offset for plaintiff's insurance premiums,

see Ill. Code Civ. Proc. §2-1205, Ill. Comp. Stat. Ann. ch. 735 §5/2-1205 (1992). Cf. Md. Code Ann., Crts. & Jud. Proc. §§3-2A-05(h), 3-2A-06(f) (Michie Supp. 1994) (permissive reduction of medical injury awards in amount of payments available from certain collateral sources, but not others; exclusions from reduction include damages covered by workers' compensation, social security, employee benefit plans established under collective bargaining agreements and federal government life insurance); N.Y. Civ. Prac. L.R. §4545 (1992) (reduction of award in dental or medical malpractice actions by amounts already paid or reasonably certain to be paid in future from collateral sources, with certain exclusions, i.e., life insurance, less amounts paid by plaintiff in two years preceding accrual of action and likely to be paid in future for such benefits; reduction also of awards against public employers by amount of benefits already paid by collateral sources provided by the employer, exclusive of workers' compensation). A similar Kansas statute has been held unconstitutional and has been subsequently repealed and replaced. Farley v. Engelken, 241 Kan. 663, 740 P.2d 1058 (1987); cf. Kan. Stat. Ann. §§60-3801 et seq., discussed in comment to §25.22 note 7, *supra* this Supplement.

Such statutes have been reported to reduce medical malpractice awards, where they apply, by "between eleven and eighteen percent." Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49(2) Law & Contemp. Probs. 57, 77 (Spring 1986).

See also comment to §25.22 note 7, *supra* this Supplement.

§25.22 n.11, p.655. Add the following:

Compare Galanter and Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U.L. Rev. 1393, 1404-1407 (1993).

§25.22 n.14, p.

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§25.22 n.22, p.

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306 Md. 669, 5
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undue temptation to the needy accident victim who, having "no real freedom of choice," is thereby deprived, by the election, of the superior tort remedy.[4] From either point of view, therefore, or both, election is regarded as potentially exploitative of the accident victim. It is accordingly in general disfavor as a solution to the questions raised by multiplicity of remedies.

§25.22 Letting the claimant cumulate remedies: The "collateral source" rule. This has been a frequent common law solution in nonstatutory situations, and the lines of reasoning used in reaching it have often been invoked as guides for legislation. Thus the plaintiff who has been paid his salary[1] or a pension[2] during disability, or had his medical expenses or other

[4]J. Fleming, Collateral Benefits, XI Intl. Encyclopedia of Comparative Law §11-4 (1971).

§25.22 [1]Restatement (Second) of Torts §920A(2) and Comment *c*(2) (1979); Bell v. Primeau, 104 N.H. 227, 183 A.2d 729 (1962); cf. Fisher v. Thompson, 50 N.C. App. 724, 275 S.E.2d 507 (1981); Pryor v. Webber, 23 Ohio St. 2d 104, 263 N.E.2d 235 (1970); cf. Soucy v. Martin, 121 R.I. 651, 402 A.2d 1167 (1979); Ryan v. Hardin, 495 S.W.2d 345 (Tex. Civ. App. 1973); Ellard v. Harvey, 231 S.E.2d 339 (W. Va. 1976); Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927); C. McCormick, Handbook on the Law of Damages 310 (1935); Note, Developments in the Law — Damages, 61 Harv. L. Rev. 113, 163 (1947); Comment, 38 Mich. L. Rev. 1073 (1940). This represents the weight of authority, but not the universal rule. See, e.g., Note, 14 Ala. L. Rev. 148 (1961); Moon v. St. Louis Transit Co., 247 Mo. 227, 152 S.W. 303 (1912); Ephland v. Missouri Pac. Ry. Co., 57 Mo. App. 147 (1894); Nelson v. State, 105 Misc. 2d 107, 431 N.Y.S.2d 955 (Ct. Cl. 1980); Drinkwater v. Dinsmore, 80 N.Y. 390 (1880); Kite v. Jones, 389 Pa. 339, 132 A.2d 683 (1957). The position in Alabama, Missouri, and Pennsylvania appears to be that the collateral source rule applies only to those benefits which are "gratuitous." The New York position appears to be that the rule applies only to such benefits as are not "gratuitous." Compare Rankin v. Blue Grass Boys Ranch, Inc., 469 S.W.2d 767 (Ky. 1971) (rule applies to gratuitous payments by employer but not to payments made because of claimant's legal entitlement) *with* Davidson v. Vogler, 507 S.W.2d 160 (Ky. 1974) (rule applies to contractual sick leave and vacation payments). Compare R. Posner, Economic Analysis of Law §6.13 (3d ed. 1986) ("... [M]ost gratuitous benefits turn out to be ones for which the beneficiary has paid indirectly. . . . [T]he money wage would be higher if the 'gratuitous' benefits were lower."). Cases are collected in annot., 7 A.L.R.3d 516 (1966).

In England occupational sick pay is treated not as a collateral source, but as diminishing plaintiff's loss. Salmond and Heuston on the Law of Torts 536 (18th ed., Heuston and Chambers, 1981), citing Metropolitan Police Receiver v. Croydon Corp., [1957] 2 Q.B. 154, [1957] 2 W.L.R. 33, [1957] 1 All E.R. 78 (C.A. 1956).

[2]Parry v. Cleaver, [1970] A.C. 1, [1969] 2 W.L.R. 821, [1969] 1 All E.R. 555

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losses[3] paid for by another,[4] or out of the proceeds of an accident[5] or other insurance[6] policy, may still recover full damages

(H.L.); Judd v. Board of Governors of the Hammersmith, West London & St. Mark's Hospitals, [1960] 1 W.L.R. 328, [1960] 1 All E.R. 607 (Q.B.D.); Eichel v. New York Cent. R. Co., 375 U.S. 253, 84 S. Ct. 316, 11 L. Ed. 2d 307 (1963); cf. Bourque v. Diamond M. Drilling Co., 623 F.2d 351 (5th Cir. 1980) (workers' compensation); Caughman v. Washington Term. Co., 345 F.2d 434 (D.C. Cir. 1965) (benefits under Railroad Retirement Act); United States v. Price, 288 F.2d 448 (4th Cir. 1961) (benefits under Civil Service Retirement Act); United States v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960) (federal social security benefits); Capital Products, Inc. v. Romer, 252 F.2d 843 (D.C. Cir. 1958) (medical retirement benefits from Fire Department); Funston v. United States, 513 F. Supp. 1000, 1008 (M.D. Pa. 1981); Gribble v. Cox, 349 So. 2d 1141 (Ala. 1977); cf. Reeves v. Gulf States Util. Co., 327 So. 2d 671, 676 (La. App. 1976); cf. Healy v. Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777 (1961) (defendant not entitled to show that injury accelerated plaintiff's pension as firefighter and increased its amount); Houghton v. Leinwohl, 135 Vt. 380, 376 A.2d 733 (1977); cf. Boeke v. International Paint Co. (Cal.), 27 Wash. App. 611, 620 P.2d 103 (1980) (workers' compensation income). Older authorities include Wachtel v. Leonard, 45 Ga. App. 14, 163 S.E. 512 (1932); Mullins v. Bolinger, 115 Ind. App. 167, 55 N.E.2d 381, 56 N.E.2d 496 (1944); Rusk v. Jeffries, 110 N.J.L. 307, 164 A. 313 (1933); Geary v. Metropolitan St. Ry., 73 A. D. 441, 77 N.Y.S. 54 (1902); cf. Chicago G.W.R. Co. v. Peeler, 140 F.2d 865 (8th Cir. 1944); Hetrick v. Reading Co., 39 F. Supp. 22 (D.N.J. 1941); Comment, 38 Mich. L. Rev. 1073 (1940).

Cases are collected in annot., 75 A.L.R.2d 885 (1961).

[3]Cf. Smith v. Springsteen, 385 So. 2d 56 (Ala. Civ. App. 1980) (property damage paid by indemnity insurer); Scott v. Southern Ry., 231 S.C. 28, 97 S.E.2d 73 (1957) (plaintiff entitled to damages for loss of use of auto even though he was loaned car gratuitously by third person).

[4]Varlack v. SWC Caribbean, Inc. 550 F.2d 171 (3d Cir. 1977); Denver & R.G.R. Co. v. Lorentzen, 79 F. 291 (8th Cir. 1897); Roth v. Chatlos, 97 Conn. 282, 116 A. 332 (1922); Clark v. Berry Seed Co., 225 Iowa 262, 280 N.W. 505 (1938); Robert E. Owen & Associates, Inc. v. Gyongyosi, 433 So. 2d 1023 (Fla. App. 1983). See also Medicare and Medicaid cases, note 6 *infra*. There is no uniformity among the decisions dealing with medical, hospital, or nursing services that are furnished free, note 32 *infra;* Note, 31 Yale L.J. 776 (1922), and perhaps there is very good reason for some of these differences in treatment. Cf. notes 31, 32, 35 *infra*.

[5]Bradburn v. Great W.R. Co., L.R. 10 Ex. 1 (1874); Roth v. Chatlos, 97 Conn. 282, 116 A. 332 (1922); Harding v. Townshend, 43 Vt. 536 (1871). On this proposition it has been said "[T]here appears to be no dissent." 18 A.L.R. 678, 683 (1922). But cf. Nelson v. Pauli, 176 Wis. 1, 186 N.W. 217 (1922), and annot., 13 A.L.R.2d 355 (1950) (suggesting, without approval, a possible distinction between accident insurance and "hospitalization or medical insurance").

[6]Helfend v. Southern California Rapid Transit Dist., 2 Cal. 3d 1, 84 Cal.

for these items from a defendant who is liable for the injury. To this extent, plaintiff may get double payment on account of the same items. The defendant wrongdoer should not, it is said, get the benefit of payments that come to the plaintiff from a "collateral source" (i.e., one "collateral" to the defendant).[7] The dam-

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Rptr. 173, 465 P.2d 61 (1970) (medical insurance); Iseminger v. Holden, 544 S.W.2d 550 (Mo. 1976) (Blue Cross and Blue Shield); cf. Ratlief v. Yokum, 280 S.E.2d 584, 589-590 (W. Va. 1981) (medical insurance); Rixmann v. Somerset Pub. Schools, Inc., 83 Wis. 2d 571, 266 N.W.2d 326 (1978) (health insurance). Cf. Powell v. Brady, 30 Colo. App. 406, 496 P.2d 328 (1972) (Medicare for which beneficiary had paid); Reid v. District of Columbia, 391 A.2d 776 (D.C. 1978) (Medicaid); James v. Baptist Hosp. of Miami, Inc., 349 So. 2d 672 (Fla. App. 1977) (Medicare); Bennett v. Haley, 132 Ga. App. 512, 208 S.E.2d 320 (1974) (Medicaid); Tebo v. Havlik, 418 Mich. 350, 342 N.W.2d 181 (1984) (proceeds of motor vehicle no-fault insurance deemed collateral source in dramshop action); Ciminski v. SCI Corp., 90 Wash. 2d 802, 585 P.2d 1182 (1978) (Medicare for which beneficiary had not paid); annot., 77 A.L.R.3d 366 (1977). See also Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958) (cost of special nurses paid for by Employees' Hospital Association); Conley v. Foster, 335 S.W.2d 904, 907 (Ky. 1960) (medical expenses paid for by Welfare Fund of United Mine Workers); Taylor v. Jennison, 335 S.W.2d 902 (Ky. 1960) (Blue Cross); Kirkham v. Carter, 335 S.W.2d 83 (Ky. 1960) (same); Healy v. Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777 (1961) (defendant may not cross-examine plaintiff about membership in, or benefits paid by, health insurance plan); cases collected in annot., 7 A.L.R.3d 415 (1977). Cf. note 10 *infra*.

[7]For the origin of the term, see Harding v. Townshend, 43 Vt. 536, 538 (1871); Note, 38 Mich. L. Rev. 1073 (1940).

Cases involving money from "collateral sources" (the subject of notes 1-6 *supra*) are collected in annots. therein cited and also in annots., 18 A.L.R. 678 (1922), 95 A.L.R. 575 (1935), 13 A.L.R.2d 355 (1950); cf. 19 A.L.R.2d 557 (1951), 68 A.L.R.2d 876 (1959), 84 A.L.R.2d 264 (1962); 4 A.L.R.3d 535 (1965).

The collateral source rule has come in for its share of critical comment, and the opinions of commentators are divided. Representatives of the vested interests on both sides take wholly predictable views. Compare, e.g., Peckinpaugh, An Analysis of the Collateral Source Rule, 32 Ins. Couns. J. 32 (1965); Pretzel, Do We Need the Collateral Source Rule?, [1967] Ins. L.J. 69, on the one hand, *with* Averbach, The Collateral Source Rule, 21 Ohio St. L.J. 231 (1960); Review of Leading Current Cases, 31 A.T.L.A.J. 377-397 (1965), on the other.

There is no more unanimity of opinion among commentators less obviously aligned. See, e.g., P. Atiyah, Accidents, Compensation and the Law 455-466 (3d ed. 1980); Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Calif. L. Rev. 1478 (1966); Maxwell, Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669 (1962), reprinted

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ages to be exacted, even of a wrongdoer, are to be sure "compensatory." But in these cases the courts measure "compensation" by the total amount of the harm done, even though some of it has been repaired by the collateral source, not by what it would take to make the plaintiff whole. It is "compensation" in a purely Pickwickian sense that only half conceals an emphasis on what defendant should pay rather than on what plaintiff should get.[8] Let us analyze this reasoning in the situations where

in P.L.I., Damages 61 (1965); Schwartz, The Collateral Source Rule, 41 B.U.L. Rev. 348 (1961); New York L. Rev. Comm., Report and Recommendations, 221-225 (1957); Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964), reprinted in P.L.I., Damages 88 (1965).

The arguments adduced on either side by these authors are those marshalled generally in this section.

So far as American case law goes, the great weight of American judicial authority applies the rule in most contexts. On the other hand there is considerable evidence that American juries do not like the rule. See Kalven, The Jury, The Law, and the Personal Injury Damage Award, 19 Ohio St. L.J. 158, 169 (1958); Fleming, *supra* at 1545. Cf. Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055, 1072 (1964). And there has been an almost universal repudiation of the rule in the rest of the Western world. See Fleming, *supra* at 1514-1526, 1535-1544; Hellner, Tort Liability and Liability Insurance, 6 Scandinavian Studies in Law 129 (1962). Moreover the one notable modern attempt to get a legislature to adopt the rule ended in failure. See Coyne v. Campbell, 11 N.Y.2d 372, 230 N.Y.S.2d 1, 183 N.E.2d 891 (1962). All this suggests that the near unanimity of the American judicial rule may have a fairly narrow local and professional base. See also Browning v. War Office, [1963] 2 W.L.R. 52, [1962] 3 All E.R. 1089 (C.A.); but compare Salmond and Heuston on the Law of Torts 535-537 (18th ed., Heuston and Chambers, 1981); s.4(1), (U.K.) Fatal Accidents Act 1976.

[8]This is neatly shown by the fact that if defendant is the one who has already repaired some of the damage, compensation is measured, as it should be, by what is still required to make plaintiff whole. Note, 63 Harv. L. Rev. 330, 333 (1949), which correctly analyzes this aspect of the problem, at 331. For attempts to rationalize the collateral source rule in terms of "compensation," see NLRB v. Marshall Field & Co., 129 F.2d 169 (7th Cir. 1942); Roth v. Chatlos, 97 Conn. 282, 116 A. 332 (1922); Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927) ("The extent of the liability of the wrongdoer is dependent on the extent of the injuries inflicted by his wrongful act, not by the question whether the employee receives wages during his disability."); C. McCormick, Handbook on the Law of Damages 310 (1935). See also Notes, 42 Geo. L.J. 556 (1954), 43 id. 515 (1955), 68 Harv. L. Rev. (1954), [1953] Wash. U.L. Rev. 453.

it has been used, from the point of view of all the parties con-

The question whether payments made by or on behalf of the tortfeasor may nevertheless be collateral has been raised in several contexts:

1. Where a tort claimant has received money to pay medical expenses under a medical payments provision in defendant's insurance policy some courts have held that these sums are to be subtracted from claimant's tort recovery. Adams v. Turner, 238 F. Supp. 643 (D.D.C. 1965); Dodds v. Bucknum, 214 Cal. App. 2d 206, 29 Cal. Rptr. 393 (1963); Yarrington v. Thornburg, 198 A.2d 181 (Del. Super. 1964), *aff'd*, 205 A.2d 1 (Del. 1964); Gunter v. Lord, 242 La. 943, 140 So. 2d 11 (1962) (settling conflict among courts of appeal); Moore v. Lezette, 24 A.D.2d 891, 264 N.Y.S.2d 765 (1964); Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Chambers v. Pinson, 6 Ohio App. 2d 66, 216 N.E.2d 394 (1966). See Klafter, Double Recovery of Medical Payments, 23 Albany L. Rev. 126 (1959).

Earlier cases had refused to allow the subtraction. Truitt v. Gaines, 199 F. Supp. 143 (D. Del. 1961) (Del. law; an Erie-educated guess that proved wrong. See *Yarrington, supra*); Severson v. Milwaukee Auto. Ins. Co., 265 Wis. 488, 61 N.W.2d 872, 42 A.L.R.2d 976 (1953); Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961). This view has picked up adherents. Beschnett v. Farmers Equity Ins. Co., 275 Minn. 328, 146 N.W.2d 861 (1966); Edmondson v. Keller, 401 S.W.2d 718 (Tex. Civ. App. 1966); Moorman v. Nationwide Mut. Ins. Co., 207 Va. 244, 148 S.E.2d 874 (1966).

The strongest argument for this point of view is that the insurer has received separate payment for this type of coverage and that the insurer will get the windfall if it is allowed to discharge its double obligation by a single payment. But clearly in the long run the insured motoring public would have to pay for these double recoveries.

For the shifting attitudes of the insurance companies themselves toward the problem and changes in the wording of the medical payments clause see Katz, Automobile Medical Payments Coverage — A Changing Concept?, 28 Ins. Couns. J. 276 (1961). Such wording may in the future exclude double recoveries.

Cf. Clark v. Burlington Northern, Inc., 726 F.2d 448 (8th Cir. 1984) (where railroad's disability plan was deemed to have been intended to protect employer against liability, rather than to provide duplicative benefits).

2. Where the Government's liability is pursued under the Federal Tort Claims Act, questions have arisen about the effect of (a) various payments received by the claimant from the government or from funds financed in whole or in part by the government, and (b) other benefits, e.g., medical and hospital furnished to the claimant by the Government. The cases are not entirely clear. Compare, e.g., United States v. Brooks, 176 F.2d 482 (4th Cir. 1949) *with* United States v. Gray, 199 F.2d 239 (10th Cir. 1952) (hospitalization, etc., furnished by Veterans Administration). And see Smith v. United States, 587 F.2d 1013 (3d Cir. 1978) (benefits under Social Security legislation not deducted); United States v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960) (same);

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cerned, and examine its validity and its applicability to the problem presented by the present topic.

From the defendant's point of view it is an evil to have to pay any damages, including those involved in plaintiff's double recovery. But there may be reasons for making him pay nonetheless. It should be noted, however, that if it is *payment by the defendant* that is desired, this may conceivably be had without plaintiff's double recovery by simply making defendant pay someone else. One way of doing this is to subrogate a third person to the claimant's right to so much of the damages as would represent double recovery. Some such solution could always be provided by the legislation that creates a social insurance scheme,[9] so that the problem of plaintiff's double recovery

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United States v. Price, 288 F.2d 448 (4th Cir. 1961) (benefits under Civil Service Retirement Act not deducted); Siverson v. United States, 710 F.2d 557 (9th Cir. 1983) (Medicare benefits not deducted). Compare Overton v. United States, 619 F.2d 1299 (8th Cir. 1980) (under Mo. law medicare payments were to be deducted where federal funds were involved and plaintiff recovered under a transitional program providing benefits without plaintiff's contributions or contractual entitlement).

The *Harue Hayashi* opinion formulates the rule "that injury-related benefits paid from unfunded general revenues are to be deducted and similar benefits paid from a special funded source are not." 282 F.2d at 604. The court explained, "The objection to double compensation is that the same source is made to pay twice. But if different sources are tapped, neither pays twice and this is true whether or not the benefits are contractual or vested." Ibid. See the excellent analysis of these cases in Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669, 689-692 (1962), reprinted in P.L.I., Damages 61, 81-87 (1965). Cf. also Johnson v. United States, 510 F. Supp. 1039, 1046 (D. Mont. 1981) (Veterans Administration benefits not "collateral" because they are paid "from unfunded general revenue," but Social Security benefits are "collateral").

3. Where the claimant has received payment from a fund recruited *in part* from contributions made by the defendant, e.g., under federal social security, under the Railroad Retirement Act, etc. The tendency here is to deny the subtraction. See, e.g., Eichel v. New York Cent. R.R., 375 U.S. 253, 84 S. Ct. 316, 11 L. Ed. 2d 307 (1963) (Railroad Retirement benefits); Caughman v. Washington Term. Co., 345 F.2d 434 (D.C. Cir. 1965) (same); Titchnell v. United States, 681 F.2d 165 (3d Cir. 1982) (Medicare); United States v. Price, *supra* (Civil Service Retirement benefits); United States v. Harue Hayashi, *supra* (social security benefits); Maxwell, *supra*.

[9]Practically all workers' compensation laws have provided for subrogation or its equivalent. See Notes, 40 Colum. L. Rev. 1452 (1940), 2 Stan. L. Rev.

could logically be discussed without getting at all into the question of whether defendant ought to be made to pay in full. But while the common law too had developed devices like subrogation, their availability was so restricted and beset by technicalities that most of the common law thinking in this field was based on the assumption that if you did not let plaintiff have a doubling up included in what he got, you would have to subtract that amount from what defendant had to pay.[10] It will help us to

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810 (1950); §10.2 notes 67-71 *supra.* Cf. Bell v. United States, 754 F.2d 490 (3d Cir. 1985) (under Federal Employees' Compensation Act, 5 U.S.C. §§8101, 8132 (1982), Government entitled to reimbursement from employee's tort recovery of non-economic as well as economic damages); Brown v. Leighton, 385 Mass. 357, 434 N.E.2d 176 (1982). The United States is subrogated to the torts claims for hospital and medical expenses of persons to whom it furnishes such care, except for care furnished veterans by the Veterans Administration for service-connected disability. Medical Care Recovery Act, 42 U.S.C. §2651 (1976); United States v. York, 398 F.2d 582 (6th Cir. 1968). The United States may sue directly to enforce these claims, and has similarly been treated as the beneficiary in respect of these economic losses under the victim's automobile accident no-fault insurance contract. United States v. Leonard, 448 F. Supp. 99 (W.D.N.Y. 1978); cf. Government Employees Ins. Co. v. Rozmyslowicz, 449 F. Supp. 68 (E.D.N.Y. 1978); United States v. Criterion Ins. Co., 198 Colo. 128, 596 P.2d 1203 (1979); but compare Heusle v. National Mut. Ins. Co., 628 F.2d 833 (3d Cir. 1980) (Pa. law) (no recovery against no-fault insurer by either accident victim or federal government for cost of government medical care).

[10]Thus in Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927), the court saw no reason why ". . . one whose acts have caused the injury to another should reap the entire benefit that comes from the payment of wages made by an employer, either as a gratuity to a faithful employee or because such payments are required by contract. Such payments do not change the nature of the injury which the employee sustains through the wrongful acts of the tortfeasor. If either is to profit . . . it should be the person who has been injured — not the one whose wrongful acts caused the injury." Similar statements occur time and again in this connection. The same view is expressed, e.g., in Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958). Cf. also Olivas v. United States, 506 F.2d 1158, 1163-1164 (9th Cir. 1974); Roth v. Chatlos, 97 Conn. 282, 116 A. 332 (1922); many of the excerpts quoted from the *Roth* case are in the A.L.R. annotations cited note 7 *supra.*

The California court has recognized the likelihood of subrogation by the insurer, and consequent elimination by that route of the risk of double recovery, as a reason for upholding the collateral source rule as between defendant and plaintiff (supposedly in the interest of encouraging insurance). Helfend v. Southern California Rapid Transit Dist., 2 Cal. 3d 1, 84 Cal. Rptr. 173, 465

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understand and evaluate this thinking, therefore, if we examine here what social gain or loss may come from making the tort defendant pay in full, then refer back to the present discussion when we come to evaluate subrogation.

It may be said that defendant *deserves* being made to pay in full because of the moral quality of his act. Now there can be no question here of who should fairly bear a loss, as between an innocent and a guilty party, for by hypothesis the innocent person's loss has been made whole and we are discussing a further payment beyond that. There may be mixed with this feeling of desert a desire to deter dangerous conduct, but that merits separate treatment. What is left under this head, then, springs from a feeling of indignation or resentment and a desire to punish as such. Surely there is no place for such a notion in any philosophy of social insurance. It has no acknowledged place even in normal tort liability based on fault, for the theory of damages here is purely compensatory.[11] And there is nothing in the context of modern accident law that would warrant bringing such a notion into the basic civil law of liability at this late date. The whole trend has been towards diluting the concept of fault

P.2d 61 (1970). The New Hampshire court has similarly discussed the likelihood of subrogation, and consequent reduction of risk of double recovery, as relevant to the application of the collateral source rule in personal injury cases. Moulton v. Groveton Papers Co., 114 N.H. 505, 323 A.2d 906 (1974) (refusing to extend rule to state payments to town toward replacement of damaged bridges).

California has since by statute apparently abolished the collateral source rule in negligence actions against health care providers. Cal. Civ. Code §3333.1 (West Supp. 1985); cf. Robinson v. Pediatric Affiliates Medical Group, Inc., 98 Cal. App. 3d 907 159 Cal. Rptr. 791 (1979). But cf. Brown v. Stewart, 129 Cal. App. 3d 331, 336, 181 Cal. Rptr. 112, 116 (1982) (evidence of insurance payments admissible, but jury not precluded from making duplicative award); Barme v. Wood, 37 Cal. 3d 174, 207 Cal. Rptr. 816, 689 P.2d 446 (1984) (collateral source precluded from subrogation claim against either plaintiff or defendant).

Cf. note 52 *infra*.

[11]See §25.1 *supra;* Ministry of National Insurance, Final Report of the Committee on Alternative Remedies, CMD No. 6860, ¶44 (1946); authorities cited §25.19 note 4 *supra*. The law of torts does, of course, recognize and allow punitive damages in some cases, but they are awarded in addition to compensatory damages and are not involved here. See Restatement (Second) of Torts §908 (1979); §25.5A *supra*.

so as to ease recovery by accident victims.[12] Courts and juries have been increasingly willing to find legal fault with less and less moral blameworthiness on the part of the actor. Moreover the "wrongdoing" actor himself is less and less often the real defendant in these days of ever widening vicarious liability and ever growing insurance.[13] If therefore a feeling of revenge and resentment has any place in the law at all, it should certainly be banished as far as possible from the law of civil recovery, practically as well as theoretically. In spite of this, we suggest, it has played a large — though usually unrecognized — part in justifying plaintiff's double recovery.[14]

[12]Cf. Anderson, Reputation, Compensation, and Proof, 25 Wm. & Mary L. Rev. 747 (1984). As indicating the existence of this trend, see Chapters XIII, XV, XVII, XVIII, XIX, XXVI, XXVIII. Early comments on it include Ehrenzweig, Negligence Without Fault (1951); Nixon, Changing Rules of Liability in Automobile Accident Litigation, 3 Law & Contemp. Prob. 476 (1936); Searl, Automobile Liability Law Development and Trend, 39 Best's Ins. News 583 (Fire & Cas. ed. 1938); James, Accident Liability: Some Wartime Developments, 55 Yale L.J. 365 (1946); compare Schwartz, The Vitality of Negligence and the Ethics of Strict Liability, 15 Ga. L. Rev. 963 (1981) (arguing that the "explosion of tort liability" during the preceding quarter century has been largely "an explosion of negligence liability"). In certain nonaccident contexts, of course, e.g., wrongful discharge cases (cf. §4.9 *supra* at note 25), fault is normally central to the theory of liability, and a punitive aspect in the application of the collateral source rule to compensatory damages is less anomalous than in the case of accidents. Cf., e.g., Sporn v. Celebrity, Inc., 129 N.J. Super 449, 324 A.2d 71 (Law Div. 1974) (wrongful discharge case, treated as contract action, but similar to tort because of "fault elements"; no offset for unemployment compensation benefits).

[13]See P. Atiyah, Accidents, Compensation and the Law 456 (3d ed. 1980); McNiece and Thornton, Automobile Accident Presention and Compensation, 27 N.Y.U.L. Rev. 585 (1952); James and Thornton, Impact of Insurance on the Law of Torts, 15 Law & Contemp. Prob. 431 (1950). See also James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549 (1948); An Evaluation of the Fault Concept, 32 Tenn. L. Rev. 394 (1965); Book Review, [1966] Utah L. Rev. 297.

[14]See notes 3, 10 *supra;* cf. Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 83 (3d Cir. 1983) (citing text; sexual harassment, not accident case; unemployment compensation not to be deducted from back-pay award); cf. Hubbard Broadcasting, Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980) (contract case); Mobley v. Garcia, 54 N.M. 175, 217 P.2d 256 (1950) ("The right of redress for wrong is fundamental. Charity cannot be made a substitute for such right, nor can benevolence be made a set-off against the acts of a tort-feasor."); Harding v. Townshend, 43 Vt. 536 (1871) ("... the burden of making compen-

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A more serious question is posed by the possible admonitory effect of unabated liability. Accident prevention is surely a legitimate objective both of social insurance and of tort liability. It is very doubtful, however, whether *undiminished* civil liability will make any significant contribution to the cause of accident prevention.

In the first place it is problematic just how much any civil liability effectively deters accidents.[15] So far as individual participants in an accident are concerned, they often have the greatest incentives to be careful quite aside from any thought of civil liability.[16] Moreover, studies of accident-producing behavior have emphasized the relatively insignificant part that the individual's deterrable conscious free choice plays in causing or preventing accidents.[17] And what evidence there is at hand indicates that the protection of liability insurance that is being increasingly held (by individuals as well as by others) has not been responsible for any increase in the accident rate.[18] On the other hand there is substantial reason for thinking that liability exerts its most effective pressure toward accident prevention when it is directed to larger units (industrial, transportation, insurance companies, etc.[19]) — on whose part, paradoxically

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sation to the injured party ought to be ultimately borne by the party thus in fault"). As to the application of the rule to contract cases cf. generally Fleming, The Collateral Source Rule and Contract Damages, 71 Calif. L. Rev. 56 (1983).

[15]See, e.g., P. Atiyah, Accidents, Compensation and the Law 558-564, 603-609 (3d ed. 1980); cf. also Epstein, The Social Consequences of Common Law Rules, 95 Harv. L. Rev. 1717, 1740-1744 (1982).

[16]See §13.5 *supra;* James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549, 558 (1948).

[17]See §11.4 *supra.*

[18]See §13.5 *supra;* McNiece and Thornton, Automobile Accident Prevention and Compensation, 27 N.Y.U.L. Rev. 585, 595 (1952); James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549, 561, 562 (1948).

[19]§12.4 *supra;* James and Dickinson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769, 779 et seq. (1950). There are limits to the effectiveness of liability as a deterrent, as compared with other techniques of social regulation, on even such units. See. P. Atiyah, note 15 *supra* at 563-564 (arguing that the effect of liability can even be counterproductive, if its availability as a device for deterrence distracts attention from opportunities for safety regulation); Pierce, Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 Vand. L. Rev. 1281 (1980).

enough, fault in the sense of moral shortcoming is often most attenuated.[20] But even with the larger units, civil liability probably plays a less important role in promoting safety than the host of other pressures, such as safety regulations, penal and licensing sanctions, and the economic waste that flows from accidents.

Let it be granted, however, that civil liability is an effective incentive to care, at least in some circumstances. The concession still does not necessarily reach the present problem. The choice here is not between liability and nonliability for the defendant, but simply whether his damages shall be diminished by what plaintiff gets from another source. And if that other source is a scheme of social insurance, the amount it provides is likely to be only a fraction of the damages recoverable at common law — perhaps a third, a quarter, or less.[21] Altogether it seems unlikely indeed that anticipation of such an abatement from the flexible and indeterminate damages in a tort action will materially dilute whatever admonitory value there is in civil liability.[22]

[20]The paradox is only seeming. It results from confusing a feeling of moral resentment at a blameworthy act with the objective of preventing accidents. The paradox serves to point up the fact that though the desire to punish and the desire to promote safety are probably *both* operative under the fault principle (one surreptitiously and the other avowedly) yet they are really quite different and often inconsistent things.

[21]See Ministry of National Insurance, Final Report of the Committee on Alternative Remedies, CMD No. 6860, ¶27 (1946), for estimates for Great Britain. It has been often said in Connecticut that as a rule-of-thumb recovery should run to "three times the specials." This would make the figures here about what the text indicates. Such a rule of thumb may well underestimate actual jury awards, which seem to be influenced by factors in addition to "specials," such as differences in the severity of the injury and in disability. Jury awards in Illinois have been found to rise faster than medical specials, in a logarithmic relationship. M. Peterson, Compensation of Injuries: Civil Jury Verdicts in Cook County *vi-vii*, 23-28 (1984)

No doubt the sources of reparation open to a tort victim have increased in number since the first edition of this text, and produce larger amounts. See, e.g., §13.1 note 8 *supra;* A. Conard, J. Morgan, R. Pratt, C. Voltz, and R. Bombaugh, Automobile Accident Costs and Payments 147 (1964); Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Calif. L. Rev. 1478-1482 (1966) (noting also "the swelling volume of fringe benefits in collective and private labor contracts," id. at 1479). On the other hand the size of verdicts and settlements in tort cases has also grown apace.

[22]This was the conclusion of a majority of the Committee on Alternative Remedies. Ministry of National Insurance, Final Report of the Committee on Alternative Remedies, CMD No. 6860, ¶46 (1946).

It is submitted, therefore, that unless receipt of double benefits can be justified on claimant's side, it cannot be justified simply on the basis that social good comes from making defendant pay more.

What then are the considerations with regard to claimant's position? Let us assume that he has a good cause of action against a tortfeasor and that part of his damages would ordinarily represent loss of earnings, or earning capacity, and medical and other expenses of care and cure, and that he has received money from some collateral source to cover (or partly cover) the same items. What good or evil will result from letting him have both?

It is sometimes said that neither sum alone represents full compensation and that this lack will be repaired by allowing the duplication.[23] What comes from the collateral source generally does not in fact represent full compensation for claimant's injuries. This is true of most forms of social insurance. But tort damages are supposed to represent full compensation for pecuniary loss as well as many intangible losses caused by the

[23]This argument was presented to the Committee on Alternative Remedies. Ministry of National Insurance, Final Report of the Committee on Alternative Remedies, CMD No. 6860, ¶32 (1946). Cf. also Edgerton, J., in Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir. 1954); G. Palmer, The Law of Restitution §23.16 (1978) (using this argument as reason for denying subrogation).

As factors offsetting the tendency of the collateral source rule to overcompensate plaintiffs, Judge Friendly listed two. The first is the tendency of future inflation to erode the value of a present award. "The second offsetting factor is that the supposedly overcompensated plaintiff does not retain his entire recovery or anything like it." This is because American judicial systems do not award attorneys' fees to the successful party, so that between 25 percent and 50 percent of any judgment collected must go to plaintiff's lawyer McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38 (2d Cir. 1960).

Justice Tobriner argued that the collateral source rule provides lawyers and juries "with an important measure for assessing the plaintiff's general damages," as well as serving "partially . . . to compensate for the attorney's share"; also, that in its absence plaintiffs would be penalized for insuring, in that they would be worse off than if they had not insured, as they receive nothing for their insurance investment. Helfend v. Southern California Rapid Transit Dist., 2 Cal. 3d 1, 84 Cal. Rptr. 173, 465 P.2d 61 (1970). General damages also, of course, help compensate for attorneys' fees. And the insured whose recovery is not duplicated will have still received protection against not being compensated by a tortfeasor, either in the case at issue, or frequently in case of illness or disease that would not be subject to any tort claim.

See also Review of Leading Cases, 31 A.T.L.A.J. 377, 393-395 (1965).

injury, except where the item of loss is thought too remote or too speculative. Of course in one sense no amount of money can compensate for the human suffering involved in serious injury. Moreover the law is often laggard in recognizing items of damage that could fairly and reasonably be measured in money with a little ingenuity.[24] But any decision that the law in these respects falls short of expressing fully a desirable social policy should be implemented by a uniform and well thought out change in the law and not left to the chance of a double recovery in an occasional case.[25]

If, then, the duplication in plaintiff's recovery does represent more than fair compensation, it is a question of justifying a windfall to him. In inquiring whether this may be done, it is well to keep in mind these basic distinctions that have often been lost sight of by the courts. Plaintiff's loss may have been partly met (1) out of resources that would otherwise have been available to him for other purposes; (2) by a gift occasioned by the accident; (3) by resources he had a right to (by contract, statute, etc.) but only in the event of the loss caused by the accident.

Cases of the first type are easiest to justify, but furnish no legitimate analogy for the other two. Thus if someone has put money in the savings bank, then uses it to defray the expenses of an accident, it is perfectly clear that the accident victim is not made whole until that money has been put back in the bank for the victim's children, or old age, or even to squander, as had

[24]This may happen, for instance, when the requirement of certainty of proof (see §25.3 *supra;* C. McCormick, Handbook on the Law of Damages c.4 (1935)) is overstrictly applied; or where the law refuses to put a value on an item (such as the *chance* of physical recovery). See Kuhn v. Banker, 133 Ohio St. 304, 13 N.E.2d 242 (1938). Cf. also §18.4 *supra;* Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 Calif. L. Rev. 772, 814 (1985).

[25]This line of reasoning may possibly be inconsistent with positions taken elsewhere by one of the authors. See, e.g., James, Contribution Among Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156 (1941); James, Proof of the Breach in Negligence Cases, 37 Va. L. Rev. 179, 187 n.27 (1951). The reader will, of course, make what he wants to of any inconsistency. There is no intention here to recant any former positions, but as justification for the difference in attitude it may be urged that the making of some substantial compensation in all accident cases is far more important than an assurance of the full outer reaches of compensation. Compare, And Then — Sudden Ruin, Reader's Digest 79 (Sept. 1952).

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been planned. Pensions or annuities that are payable to plaintiff without regard to the disability caused by the accident are of this type.[26] So are wages or salary taken out of vacation pay or sick leave that could otherwise be cumulated.[27] So, to a large extent, is life insurance because of its heavy investment features.[28] Compensation in these cases is not double in any true sense. It might be condemned under a system that would give to each only according to his need, but even the Marxists have put aside this part of their philosophy for their nirvana.[29] There is another situation also where compensation is not really double. Plaintiff may have insured against an item of possible loss that may not be included in common law damages, and if the insurance is valid plaintiff should have its benefit and full damages too.[30]

The case of the gift — though different — also seems clear. Generally anyone may give where he will on conditions of his own choosing so long as the gift and the conditions do not violate public policy. And if a generous person pays the medical expenses or wages of someone who is injured, with the actual intention that the gift shall be in addition to all other recovery, there seems to be no good reason for denying effect to such intention or for diverting it to another beneficiary, whether that other is a wrongdoer or not. Most of the cases do not subtract a gift from tort damages.[31] A few have done so, stressing the

[26]McCarthy v. Palmer, 113 F.2d 721 (2d Cir. 1940).

[27]Hoobler v. Voelpel, 246 Ill. App. 69 (1927); D'Amico v. Resnik, 22 Misc. 2d 545, 197 N.Y.S.2d 826 (Sup. Ct. 1960); Martin v. Sheffield, 112 Utah 478, 189 P.2d 127 (1948).

[28]See W. Vance, Handbook on the Law of Insurance 32. 65, 105, 160 (3d ed. 1951). The American cases seem to be uniform in holding that the proceeds of a life insurance policy are not to be subtracted from damages for wrongful death. See annots., 95 A.L.R. 575, 579 (1935), 18 id. 678, 686 (1922). See similarly, for England, s.4(1), Fatal Accidents Act 1976. Compare §25.14 note 9 *supra.*

Term life insurance, of course, has little if any investment feature.

[29]See Hazard, Personal Injury and Soviet Socialism, 65 Harv. L. Rev. 545, 555 (1952).

[30]As in Standard Marine Ins. Co. v. Scottish Metropolitan Assoc. Co., 283 U.S. 284, 51 S. Ct. 371, 75 L. Ed. 1037 (1931).

[31]E.g., Hueper v. Goodrich, 314 N.W.2d 828 (Minn. 1982) (medical services provided free of charge by charitable institution). Older cases include Denver & R.G.R. Co. v. Lorentzen, 79 F. 291 (8th Cir. 1897); Roth v. Chatlos, 97 Conn. 282, 116 A. 332 (1922), noted in 31 Yale L.J. 776 (1922); Clark v.

compensatory aspect of such damages,[32] but this result may

Berry Seed Co., 225 Iowa 262, 280 N.W. 505 (1938); Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927). Conflict appears where the services themselves are donated, e.g., by a member of the family. See note 32 *infra.*

In Missouri and Pennsylvania, wages or salary received during incapacity will be subtracted from damages, *unless it is made to appear that they were intended as a gift* (in which case plaintiff may have both his gift and his damages). Moon v. St. Louis Tr. Co., 247 Mo. 227, 152 S.W. 303 (1912); Quigley v. Pennsylvania R. Co., 210 Pa. 162, 59 A. 958 (1904); 18 A.L.R. 678, 681 (1922). This makes sense.

[32]An example is Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939), in which the injured husband was not allowed to recover the value of services rendered gratuitously by his wife, a registered nurse. Aside from any flaw in logical reasoning, such a result would operate most harshly against families least able to afford outside help. See Note, [1953] Wash. U.L. Rev. 453, 462. It has been widely disapproved and is against the weight of authority. Annot., 90 A.L.R.2d 1323 (1963); Notes, 77 Harv. L. Rev. 741, 747 (1964), reprinted in P.L.I., Damages 88, 97 (1965); 24 Minn. L. Rev. 280 (1940). And most cases where services were performed within the family circle continue to allow recovery for their reasonable worth. Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973) (N.J. law); Chanez v. United States, 192 F. Supp. 263, 272-273 (D. Mont. 1961); Rodriguez v. McDonnell Douglas Corp, 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (1978); Johnson v. Rhuda, 156 Me. 370, 164 A.2d 675 (1960); South v. National R.R. Passenger Corp., 290 N.W.2d 819, 841 (N.D. 1980). Cf. similarly Hay v. Hughes, [1975] Q.B. 790, [1975] 2 W.L.R. 34, [1975] 1 All E.R. 257 (C.A.).

Where medical or hospital services are furnished gratuitously because plaintiff is a member of the armed forces, or of the medical profession, etc., the case for recovery is weaker, yet most courts allow it. See, e.g., Rayfield v. Lawrence, 253 F.2d 209, 68 A.L.R.2d 868 (4th Cir. 1958) (injured sailor may recover value of medical services furnished him free at naval hospital); Burke v. Byrd, 188 F. Supp. 384 (N.D. Fla. 1960) (similar); Werner v. Lane, 393 A.2d 1324, 1336 (Me. 1978) (free state psychiatric care; rule applicable "[i]n accordance with the overwhelming judicial opinion . . ."); Bell v. Primeau, 104 N.H. 227, 183 A.2d 729, 7 A.L.R.3d 512 (1962) (also military). On the other hand New York does not allow a doctor to recover the reasonable value of medical services furnished him free by his colleagues as a matter of professional courtesy. Coyne v. Campbell, 11 N.Y.2d 372, 230 N.Y.S.2d 1, 183 N.E.2d 891 (1962), noted 27 Albany L. Rev. 149 (1963), 29 Bklyn. L. Rev. 154 (1962), 48 Cornell L.Q. 353 (1963), 12 De Paul L. Rev. 313 (1963), 24 Ohio St. L.J. 417 (1963), 14 Syracuse L. Rev. 121 (1962); 24 U. Pitt. L. Rev. 650 (1963), 16 Vand. L. Rev. 220 (1962). See similarly Peterson v. Lou Bachrodt Chevrolet Co., 76 Ill. 2d 353, 29 Ill. Dec. 444, 392 N.E.2d 1 (1979) (recovery denied victim for value of services provided free by Shriner's Hospital). Compare Hueper v. Goodrich, note 31 *supra.*

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allow it. See, e.g., Rayfield v.
Cir. 1958) (injured sailor may
free at naval hospital); Burke
ar); Werner v. Lane, 393 A.2d
; rule applicable "[i]n accord-
"); Bell v. Primeau, 104 N.H.
military). On the other hand
reasonable value of medical
matter of professional cour-
N.Y.S.2d 1, 183 N.E.2d 891
Bklyn, L. Rev. 154 (1962), 48
(1963), 24 Ohio St. L.J. 417
Pitt. L. Rev. 650 (1963), 16
n v. Lou Bachrodt Chevrolet
d 1 (1979) (recovery denied
hriner's Hospital). Compare

ignore the donor's legitimate desire to add his gift to mere compensation. The subtraction seems proper only where the gift intent was merely to tide the claimant over the crisis without any thought either of adding to his wealth or of a moral responsibility to repay if damages are recovered. Often of course the intent was never even thought out by the donor, certainly not expressed. In these cases of private generosity the best solution seems to be a rule of thumb that would give greatest scope to the donor's generosity and to the adjustment of moral obligations within the more or less intimate relationships that usually bring such generosity into play. The gift should be disregarded in assessing damages.

The private gift cases find little analogy in social insurance. Pensions and other benefits — both public and private — were once widely regarded as matters of gratuity or bounty, but the philosophy of modern legislation involves a vehement repudiation of any such notion.[33] Governments do, however, often provide hospital or other services free to designated classes of people. In any of these cases if the legislative intent is to confer a bounty, that intent should be given effect.[34] Unless such an

The Illinois and New York result seems sounder. These cases are not like those cited in the first paragraph of this note where a member of the family has been furnished valuable services gratuitously and is morally entitled to their worth. In the case of military personnel the services are contributed by society — i.e., by the community of taxpayers of which defendant is as much a member as plaintiff. A possible answer to this reasoning might be that the member of the armed forces has already earned the right to medical care by the military service performed, as part of the compensation therefor, or, alternatively, that the legislature intended the care as a gift for past services that was to inure to the military person's benefit alone. Either contention, it is submitted, must rest ultimately on a finding of the requisite legislative purpose.

For services furnished by the United States under the authority or requirement of law, Congressional intent is now clear: There is to be subrogation by the Government rather than double recovery by the claimant. See note 9 *supra.*

[33]See, e.g., H. Millis and R. Montgomery, Labor's Risks and Social Insurance 395 (1938), for the modern attitude that pensions are earned.

[34]Some such notion seems in part responsible for the decision n Cunnien v. Superior Iron Works Co., 175 Wis. 172, 184 N.W. 767 (1921) (benefits payable to sailor injured during period of his service were provided by Congress "by way of appreciation and gratitude of the great sacrifices made," and not to relieve "those who were engaged in wrongdoing towards anyone en-

intent is made fairly clear, however, it seems reasonable to suppose that statutory benefits and free services furnished by government to needy classes of people are meant simply to make sure certain of their needs will be fulfilled and not to confer an additional bounty on the recipient. Thus a sailor who has been hospitalized free at a government marine hospital has not been allowed to recover the value of those services from a tort defendant.[35]

The third type of case presents the hardest problem. Here the claimant has contracted for benefits that will cover certain losses in the event of a contingency (e.g., fire, collision, disability from accident), but that will not be paid unless the contingency happens, and the defendant has brought about the contingency. To this problem the common law has yielded two solutions which are directly opposed to each other so far as the *claimant* is concerned. In property, fire, and marine insurance cases the claim-

gaged in the military or naval service of the United States"). Cf. Perry v. New England Tr. Co., 71 R.I. 352, 45 A.2d 481 (1946).

[35]Nelson v. Western S. Nav. Co., 52 Wash. 177, 100 P. 325 (1909). To similar effect are City of Englewood v. Bryant, 100 Colo. 552, 68 P.2d 913 (1937); Di Leo v. Dolinsky, 129 Conn. 203, 27 A.2d 126 (1942); Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984). Cf. Scolavino v. State, 187 Misc. 253, 62 N.Y.S. 2d 17 (1946). See annot., 19 A.L.R.2d 557 (1951); note 32 *supra.* But cf. Mobley v. Garcia, 54 N.M. 175, 217 P.2d 256 (1950); Klein v. Thompson, 19 Ohio St. 569 (1869) (both assault and battery cases). Compare Sainsbury v. Pennsylvania Greyhound Lines, 183 F.2d 548 (4th Cir. 1950), and sweeping dictum in Standard Oil Co. v. United States 153 F.2d 958, 963 (9th Cir. 1946), which appear to be opposed to the view in the text.

In the first Restatement it was said that "there can be no recovery for the value of services rendered gratuitously by a state-supported or other charity. . . ." 4 Restatement of Torts §924, Comment *f* (1939). This statement was dropped from the second Restatement. Restatement (Second) of Torts §924, Comment *f* (1979). Cf. Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 179-180 (3d Cir. 1977) (V.I. law) (". . . we are satisfied that the weight of authority now lies behind the position in the Tentative Draft of the Second Restatement, rather than that contained in the First Restatement . . .").

The reasoning in the text was rejected in Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir. 1954); Plank v. Summers, 203 Md. 552, 102 A.2d 262 (1954). These decisions have, in turn, received adverse criticism from law reviews. Notes, 42 Geo. L.J. 556 (1954), 43 id. 515 (1955), 68 Harv. L. Rev. 366 (1954).

For Medicare and Medicaid cases see note 6 *supra.*

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ant-insured is held to strict indemnity and may recover from all sources together no more than the amount of his loss.[36] But the claimant who has accident insurance may keep the proceeds of his policy and recover in full against the tort defendant as well.[37] And wages payable by contract during periods of disability are generally treated like the proceeds of accident insurance.[38]

Because the rule in accident insurance cases is so often urged as a model for social insurance legislation,[39] it invites careful analysis. It is often justified on the ground that the insurance money is the product of the claimant's own thrift and foresight.[40] But precisely the same thing is true of property insur-

[36]S. Huebner, Property Insurance 41, 156, 205 (1938); E. Patterson, Essentials of Insurance Law §§32, 33 (1935); W. Vance, Handbook on the Law of Insurance §14 (3d ed. 1951).

[37]See authorities cited note 5 *supra.* Such policies, however, sometimes provide contractually for subrogation. Cf. §6.10 note 5 *supra;* note 43 *infra.*

[38]C. McCormick, Handbook on the Law of Damages 310 (1935). Cf. notes 1, 31 *supra.*

[39]This analogy was strongly pressed before the Committee on Alternative Remedies. Ministry of National Insurance, Final Report of the Committee on Alternative Remedies, CMD No. 6860, ¶32 (1946). A majority of the Committee rejected the analogy. The legislation that finally emerged was a compromise. See §25.20 note 4 *supra.*

The analogy has often been urged successfully on courts in cases where plaintiff who had received benefits under statute was seeking full recovery in tort. Chicago G.W.R. Co. v. Peeler, 140 F.2d 865 (8th Cir. 1944) (disability benefits under Railroad Retirement Act not subtracted from recovery under Federal Employers Liability Act); Wachtel v. Leonard, 45 Ga. App. 14, 163 S.E. 512 (1913) (disability allowance provided by ordinance); Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 92 S.E. 112 (1917) (workers' compensation payments). Cf. City of Philadelphia v. Philadelphia R.T. Co., 337 Pa. 1, 10 A.2d 434 (1940).

[40]See Ministry of National Insurance, Final Report of the Committee on Alternative Remedies, CMD No. 6860, ¶32 (1946); authorities cited and referred to in note 41 *infra.* Cf. also Parry v. Cleaver, [1970] A.C. 1, 14, [1969] 2 W.L.R. 821, 825, [1969] 1 All E.R. 555, 558 (H.L.) (per Lord Reid); R. Posner, Economic Analysis of Law §6.13 (3d ed. 1986) ("[T]he double recovery is not a windfall to me. I purchased the insurance policy at a price presumably equal to the discounted cost of my injury plus the cost of writing the policy. The company could if it wished have excepted from the coverage of the policy accidents in which the injurer was liable to me for the cost of the injury, or it could have required me to assign to it any legal rights that I might have arising from an accident (subrogation). In either case my premium would have been less.").

ance in respect to each of the notions that may underlie the thrift and foresight argument. Let us examine them. (1) Accident insurance is sometimes likened to an investment and so to life insurance with its heavy investment features.[41] But the accident insurance premium buys only "straight protection" just as the fire or collision insurance premium does. If the event insured against does not happen during the term of the policy the premium has still been fully spent for the protection. Nothing comes back. There is no saving or investment feature at all. (2) The rule of double recovery may be thought a desirable inducement to insure. But the certainty and speed of insurance payments, and the fact that they will be made in many situations where there is no tort at common law,[42] operate as strongly here as in property insurance. Moreover it may be noted that this consideration is irrelevant in any scheme of insurance where participation is compulsory. (3) It may be thought that anyone should be free to bargain and pay for double recovery if he wishes; and that he has done so in the case of accident insurance and has not in the case of property insurance. It is true that this may reflect the intentions of the parties today and that modern policies are so written.[43] But it is not as simple as that. The concept of strict indemnity in property insurance is not rooted in the intentions of the parties but in the policy to prohibit wagering that has found expression in the doctrine of insurable interest, and this limits the sphere within which parties are free to contract.[44] The doctrine has two facets. First, only those may

[41]In Cornish v. North Jersey St. Ry., 73 N.J.L. 273, 62 A. 1004 (1906), the court said, ". . . the tortfeasor was no more entitled to be credited with the sums repaid to the plaintiff under such contracts, than it would be to his withdrawal of his accumulations in a savings bank." Cf. Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927) ("in the nature of an investment"). The analogy of life insurance is more commonly invoked. See, e.g., cases cited note 52 *infra*.

[42]See James and Law, Compensation for Auto Accident Victims: A Story of Too Little and Too Late, 26 Conn. B.J. 70, 77 (1952).

[43]Standard fire and property insurance policies have subrogation clauses in them. Liability policies also frequently do, and increasingly such clauses appear in medical, surgical, and hospitalization policies. R. Keeton, Basic Text on Insurance Law 147-153 (1971).

[44]R. Keeton, Basic Text on Insurance Law 88-98, 101 et seq. (1971). See also Thompson, Insurable Interest, in Readings on Insurance No. 10 (Howe ed. 1928); S. Huebner, Property Insurance 20, 41 (1938); E. Patterson, Essen-

insure who have a recognized interest in the thing insured, and this applies to all the kinds of insurance dealt with here[45] but is irrelevant to the present issue for, by hypothesis, the claimant has insured against personal loss from accident or other casualty. Second, the amount of legitimate insurance is limited to the value of the insured's interest.[46] This limitation is generally applied to all forms of property insurance, but not to life or accident insurance. One reason for the distinction in the case of life insurance — its savings and investment features[47] — is absent from the case of accident insurance. But the difficulty in putting a money value on the thing insured is common to both life and accident insurance and may well justify letting the parties put their own value on it by an agreement that the law will enforce between those parties.[48] Something of the same thing is frequently permitted for "valued policies" in property and marine insurance.[49] But this consideration furnishes no reason for refusing to apply the principle of indemnity to the present problem.[50] Whatever difficulty there is in putting a money value on a personal injury must be met in any event in computing the

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tials of Insurance Law §22 (1935); W. Vance, Handbook on the Law of Insurance §§14, 28 (3d ed. 1951). While the terms indemnity and compensation may not always be synonymous, it is clear they are used in the same sense here. Cf. also Restatement (Second) of Torts §901(a) and Comment *a*, §903 (1979).

[45]Although the tests for insurable interest are by no means uniform in the different kinds of insurance. See, e.g., W. Vance, Handbook on the Law of Insurance §§29, 31 (3d ed. 1951).

[46]Thompson, Insurable Interest, in Readings on Insurance No. 10 (Howe ed. 1928); S. Huebner, Property Insurance 156 (1938); E. Patterson, Essentials of Insurance Law §32 (1935); W. Vance, Handbook on the Law of Insurance §§14, 28 (3d ed. 1951). Where the insured's interest in the property is something less than full ownership, the principle of indemnity is not always strictly applied.

[47]See note 28 *supra.* Compare R. Keeton, Basic Text on Insurance Law 152 (1971).

[48]Olmstead v. Keyes, 85 N.Y. 593 (1881); W. Vance, Handbook on the Law of Insurance 159 (3d ed. 1951).

[49]R. Keeton, note 47 *supra* at 140. See also S. Huebner, Property Insurance 156, 157, 417, 429 (1938); E. Patterson, Essentials of Insurance Law §32 (1935); W. Vance, Handbook on the Law of Insurance §§14, 157 (3d ed. 1951). Cf. also the treatment accorded to interests that are less than full ownership, note 46 *supra.*

[50]Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430, 58 S. Ct. 959, 82 L. Ed. 1443 (1938).

tort damages, and the amount payable under the insurance is either fixed or determinable by familiar techniques. All that remains is a matter of arithmetic.

It is submitted that so far as *claimant* is concerned, the double recovery rule in accident insurance cases simply lets him wager.[51] He gambles a very small portion of his premium on the chance of a windfall in excess of indemnity.

But of course the claimant is not alone concerned and perhaps this has been the rub. The reluctance to apply notions of strict indemnity to accident insurance has meant an unwillingness — on reasoning that seems overtechnical — to let the accident insurer be subrogated to the rights of the insured.[52] The

[51]See Harding v. Townshend, 43 Vt. 536, 538 (1871) ("It is in the nature of a wager between the plaintiff and . . . the insurer.").

A principal objection to permitting the wager is that to do so makes liability insurance more expensive than it would have to be were it limited to providing indemnity. This is objectionable to the extent that it applies to those who do not desire to pay for the fair cost of the added feature (the possibility of over-compensation). If liability insurance were made available at lower premiums for those who prefer to waive duplication of recoveries from collateral sources, and at correspondingly higher premiums for those who wish to gamble and are willing to pay for it, the objection would be minimized.

Conversely, it is conceivable that social insurance might be less expensive if it were made secondary to tort recovery. This is, however, not a question of the application of the collateral source rule, but one (probably) of subrogation. This raises difficulties of its own and is dealt with in the next section. (Subrogation would be the normal way of accomplishing the result because principles of first-party insurance coverage require a prompt payment to the insured, usually well before recovery from a third party is to be expected.)

[52]The question of nonstatutory subrogation is discussed at length by Dobie, J., in Crab Orchard Imp. Co. v. Chesapeake & O.R. Co., 115 F.2d 277 (4th Cir. 1940). He concludes that the principle of indemnity, on which subrogation rests in fire insurance, cases, etc., is inapplicable to accident insurance or workers' compensation payments because of "the difficulty of appraising human suffering," and because ". . . the loss insured against is not the same loss for which plaintiff [the insured] had a right of action against the wrongdoer. . . ." The last reason was quoted from the opinion in Suttles v. Railway Mail Assn., 156 A.D. 435, 141 N.Y.S. 1024 (1913). The latter opinion also stresses the discrepancy between the insurance proceeds, which are fixed by the contract without regard to pecuniary loss, and tort damages that depend on many factors irrelevant to rights under the policy. It also concludes that accident insurance is not indemnity, though more like it than life insurance is. Aetna Life Ins. Co. v. J. B. Parkes Co., 30 Tex. Civ. App. 521, 72 S.W. 621 (1902), likewise stresses the lack "of that identity of damage or loss that would

common law therefore saw no feasible way to withhold double benefit from plaintiff in these cases without giving defendant a windfall.[53] Distaste for this consequence probably had more to do with permitting the double recovery here than any belief in the merits of claimant's position.[54] Yet as we have seen, it would be hard to justify giving a claimant more than compensation simply because it makes defendant pay more. So the double recovery result in the accident insurance cases is hard indeed to justify on principle though perhaps it has done little harm in practice for, as practical claims adjustors know, the beneficiary of an accident policy is usually willing to settle a tort claim for less than he otherwise would.[55]

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entitle the insurer to subrogation." The decision in this case on appeal added to this reasoning the thought that accident insurance is more like life than property insurance. 96 Tex. 287, 72 S.W. 168 (1903). Mercer Co. v. Perlman, 62 Ohio App. 133, 23 N.E.2d 502 (1939), states that the right to proceeds of accident insurance "does not depend on any elements of negligence or damages, and hence contains no element of indemnity."

While subrogation may often be undesirable on the merits, it is submitted that these reasons are not convincing. Cf. Hardman, Common-Law Right of Subrogation Under Workmen's Compensation Acts, 26 W. Va. L. Rev. 183 (1920). See also text, *supra,* at notes 44 to 50.

For a more modern discussion, avoiding determination of the validity of a subrogation clause if it is included in a group health policy, but denying subrogation in the absence of such a clause, see Frost v. Porter Leasing Corp., 386 Mass. 425, 436 N.E.2d 387 (1982).

[53]In Harding v. Townshend, 43 Vt. 536, 539 (1871), the court reasoned on the assumption that the insurer will be subrogated, but this is uniformly disallowed.

[54]See note 14 *supra.*

[55]Cited with approval in Review of Leading Cases, 31 A.T.L.A.J. 377, 381 (1965). There is a touch of irony in this, since members of the American Trial Lawyers' Association are doing all they can to educate plaintiffs' lawyers about the collateral source rule and this will no doubt tend to modify the tort claimant's willingness to "settle for less" in cases where a lawyer is brought into the picture. Averbach, The Collateral Source Rule, 21 Ohio St. L.J. 231 (1960) (The article points out the wide lack of lawyers' comprehension of "the importance and impact of this rule," and the author's efforts "to alert audiences" of lawyers "about the collateral source rule."); Lambert, Collateral Source Rule, 28 NACCA L.J. 425-433 (1961-1962); Review of Leading Cases, *supra.*

See James, Social Insurance and Tort Liability: The Problem of Alternative Remedies, 27 N.Y.U.L. Rev. 537, 556 n.72 (1952); James and Law, Compensa-

The implications of the foregoing discussion for the problem of social insurance seem fairly clear. To the extent that legislation is concerned with compensation or indemnity, accident insurance furnishes a weak analogy, and there seems to be no basis for double recovery to the claimant whether the legislation is one providing for a contribution on claimant's part or not. Presumably such schemes are not intended to provide windfalls.[56] Certainly there is little if any trace of such intent in the philosophy of the American legislation, and it is submitted that the courts should be exceedingly reluctant to find it. The only theory that would justify such a result is one that would seek to redistribute the wealth beyond the point that indemnity or compensation calls for, and we probably do not want to do that in our country, though such a notion may well lie behind the current British solution that lets a claimant get social insurance benefits in full and makes him credit only half of them against a possible tort recovery.[57] Moreover even if the wealth is to be redistributed, this would be a haphazard and capricious way to do it.

Private schemes for taking care of some of the losses from accident — such as Blue Cross insurance — should also be treated as providing indemnity or compensation rather than a windfall in these cases. The analogy to accident insurance is perhaps even closer here, but the quality of the analogy remains just as poor, and there seems to be at least some tendency to get away from it.[58]

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tion in Auto Accident Victims: A Story of Too Little and Too Late, 26 Conn. B.J. 70, 74 (1952).

[56]See authorities cited §25.19 *supra.*

Of course a provision for subrogation completely negatives any such intent. Cf., e.g., McGlohon v. Ogden, 251 Ga. 625, 308 N.E.2d 541 (1983). But even in the absence of such a provision, the presumption should be against it. Cf. cases cited note 35 *supra.* Moreover, there may be specific indications (other than a subrogation provision) of an intent to give the statutory benefits the character of indemnity rather than largess, such as the clauses providing for nonduplication of benefits in no-fault compensation plans. See §25.19 note 8 *supra.*

[57]Friedmann, Social Insurance and the Principles of Tort Liability, 63 Harv. L. Rev. 241, 256 (1949).

[58]Annot., 13 A.L.R.2d 355 (1950). Cf. notes 5-6 *supra.* But compare Gersick v. Shilling, 97 Cal. App. 2d 641, 218 P.2d 593 (1950); Michigan Hosp. Serv.