

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.34 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997 596

Hon. Brian Porter
State House of Representatives
January 15, 1997
Page 4

go to federal court to have their insurance coverage obligations decided. (The federal court approach to summary judgment tends to weed out meritless claims, while the state approach is to allow far more cases to go to jury trials.)

I have just explained the foreseeable impact of section 19 on insurance litigation. But the greatest impact may foreseeably occur in divorce litigation. In a divorce, the parties tend to be so emotionally distraught that they will readily add this claim against both their spouse and the spouse's lawyer, injecting the right to a jury trial in divorce proceedings, a place so far unfettered with this added expense and complexity.

The ability to sue opposing counsel is a nearly unprecedented step, with inherent opportunities to tactically derail fair and reasonable legal proceedings. A lawyer cannot properly function on behalf of his or her client when the lawyer knows a claim is to be brought against the lawyer. It injects an element of distraction and conflict between the interests of attorney and client.

I encourage you to seek an advisory opinion from the Alaska Bar Association about this issue. I believe Bar Counsel will foresee that when threatened with a lawsuit, the threatened lawyer may tend to compromise the legitimate interests of his client in order to defuse the delayed claim against the lawyer. This puts the attorney in a dilemma. To stay in is problematic, but to withdraw will foreseeably result in the same accusations against replacement counsel, unreasonably running up the client's litigation expenses.

The lawyer will be especially intimidated by such a claim because the lawyer will have no insurance protection from such claims. The insurer will foreseeably deny coverage on two grounds. First, it will be said that intentional and non-accidental conduct is not covered. There is generally such limiting language in all liability insurance policies. Second, it will be said by the lawyer's malpractice insurer that this is not a malpractice claim, because malpractice involves a suit by one's client, not by the client's opponent. I have seen this happen in actual cases, which I would be glad to share with you.

Section 19 would therefore create a new cause of action, closely resembling the old claim of malicious prosecution, but without the court-imposed limitations that once held back the floodgates of so dangerous a claim. Having created that cause of action, and actually increased the amount and the scope of unreasonable litigation instead of limiting it, we would find that there would not be insurance to protect the people sued under this new theory.

Hon. Brian Porter
State House of Representatives
January 15, 1997
Page 5

Accordingly, the application of section 19 will tend to undermine the real goals of tort reform.

The proviso in section 19 that the prevailing party on such a claim can collect actual damages is small help. The defendant in such a suit must still pay for litigation expenses in the meantime. Those expenses can be formidable, especially because plaintiff can by sharp tactics force the defendant to change counsel.

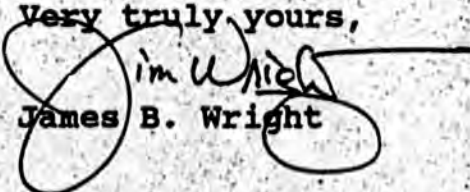
Most cases settle, and this class of claim lends itself to misuse in order to force an unreasonable settlement by a sort of blackmail. The threat goes something like this: "I'll sue you for taking an improper position, and your attorney, too. This will pressure him to withdraw as your lawyer. Then you'll have to pay for new counsel to learn this case. Then maybe I'll put that lawyer on notice that he'll be sued too, because he is continuing to assert the same position (and the lawyer after that, etc.). This will destroy you with expense to defend each time you change counsel. You'd better settle on my terms."

I have seen this tactic used for years in the insurance coverage field, under the old "subjective bad faith" theory of liability. The lawyer was made a witness to prove his client's "bad faith", or the lawyer was actually made a defendant. In effect, it forced an unreasonable settlement because the cost and complexity was simply too great to go on. Again, I am willing to provide examples from past lawsuits in order to demonstrate how this is used in practice, if you wish.

For the foregoing reasons I encourage you to rethink the wisdom of Section 19. The goal is laudable, but I do not think this section will in fact serve that goal in practice. Rather, I believe it will tend to work against the larger purposes of tort reform, and be used by the enemies of tort reform to denounce future efforts at limiting the excesses of our tort system.

Thank you for your consideration of the foregoing. If you wish to discuss this matter further, I would like to do so. This area is a complex one, and I imagine it would be helpful to hear more from those who deal in the trenches of the tort system on an ongoing basis. If so, please feel free to contact me.

Very truly yours,


James B. Wright

Phone: 276-3222 (office)
276-0546 (home)

HILLMAN v. NATIONWIDE MUT. FIRE INS. CO. Alaska 1321
Cite as 885 P.2d 1321 (Alaska 1993)

**John A. HILLMAN and Janet Hillman,
individually and Janet Hillman as Personal Representative of the Estate of
Julie G. Hillman, a deceased minor, Appellants,**

v.

**NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY,
Appellee.**

No. S-4555.

Supreme Court of Alaska.

July 9, 1993.

Insureds brought action against uninsured motorist insurer for bad faith in handling uninsured motorist claim filed after the death of their daughter. The Superior Court, Third Judicial District, Peter A. Michalski, J., granted insurers motion to dismiss and designated insurer as prevailing party for purposes of awarding attorney's fees. Insureds appealed. The Supreme Court, Matthews, J., held that: (1) insurer's denial of coverage was not unreasonable; (2) insurer's arbitration demand was reasonable and not in bad faith; and (3) trial court erred in designating the insurer rather than the insured as prevailing party.

Affirmed in part, reversed in part, and remanded.

Compton, J., filed an opinion dissenting in part, in which Burke, J., joined.

1. Insurance ¶602.5

The tort of bad faith in first-party insurance cases may or may not require conduct which is fraudulent or deceptive, but it necessarily requires that insurance company's refusal to honor a claim be made without a reasonable basis.

2. Judgment ¶185(2, 6)

If, when viewing evidence most favorably to opponent of motion for summary judgment, trial court finds that reasonable jury could only conclude that challenged conduct must be characterized in one way,

then summary judgment in accordance with that conclusion should be entered, although questions of reasonableness must often be resolved at trial.

3. Insurance ¶602.12(2)

Where insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury.

4. Insurance ¶602.5

Insurer did not act in bad faith in denying coverage under policy exclusion for injury suffered while occupying motor vehicle not insured for uninsured motorist coverage, where insureds did not present any evidence suggesting unreasonableness, trial court found that only reasonable interpretation of exclusion was that advanced by insurer, and two of the five members of the court had previously believed that the exclusion was valid, even though insurer did not follow its standard procedures in denying coverage, did not forward its attorney's letter to insureds as promised, and conditioned \$50,000 offer on settling all of insureds' claims rather than just their uninsured motorist claim.

5. Insurance ¶567.1

Insurer's demand for arbitration was reasonable and not in bad faith, where insurer could reasonably have concluded that uninsured motorist was only partially responsible for accident from initial police report, insurance policy only covered insureds to the extent that the uninsured motorist was liable, and in fact arbitrators determined that decedent was 66% at fault for the accident, and insureds were 85% at fault for their emotional distress.

6. Costs ¶194.12

An award of attorney's fees will be reversed if the trial court's determination is an abuse of discretion or manifestly unreasonable.

7. Costs ¶194.14

Designation of prevailing party for purposes of awarding attorney's fees to prevailing party is committed to the broad

discretion of the trial court. Rules Civ. Proc., Rule 82(a).

8. Costs $\$$ 194.14

It is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party for purposes of attorney fee award. Rules Civ.Proc., Rule 82(a)(2).

9. Insurance $\$$ 675

Insureds prevailed against vigorous opposition on their claim of policy coverage and received \$50,000 on that claim, and thus were prevailing parties entitled to award of attorney's fees, even though they did not receive compensatory and punitive damages on their claim of bad faith. Rules Civ.Proc., Rule 82(a).

Michael J. Schneider, Mestas & Schneider, P.C., Anchorage, for appellants.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for appellee.

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

OPINION

MATTHEWS, Justice.

John and Janet Hillman sued their insurer, Nationwide Mutual Fire Insurance Company (Nationwide), for bad faith in the handling of their uninsured motorist claim filed after the death of their daughter. The superior court granted Nationwide's motion to dismiss the claim, concluding that the insurer's decisions to deny coverage and to demand arbitration were reasonable. The Hillmans appeal this decision along with the trial court's designation of Nationwide as the prevailing party for attorney's fee purposes. We affirm on the merits but reverse the award of attorney's fees.

1. The pertinent exclusion stated that (t)his Uninsured Motorists insurance does not apply as follows:

....
4. It does not apply to bodily injury suffered while occupying a motor vehicle owned by

I. FACTS AND PROCEEDINGS

On August 14, 1983, while driving an ATV owned by her father, eleven-year old Julie Hillman collided with an uninsured pickup truck driven by William Amis. Julie died six days later as a result of her injuries.

Nationwide had issued an automobile insurance policy to Julie's father, John Hillman, which provided uninsured motorist coverage up to \$25,000 per person or \$50,000 per occurrence. However, when on August 10, 1984, Janet Hillman, Julie's mother, contacted Nationwide to inquire about coverage and claim procedures, Maury Hafford, Nationwide's local adjustor, indicated that Nationwide had no liability. This denial was based on one of the "coverage exclusions" in the uninsured motorist section.¹ On February 7, 1985, after further inquiries by Mrs. Hillman, Hafford referred the claim to Nationwide's legal counsel in order to "clarify this issue of coverage for your understanding and satisfaction," as he wrote Mrs. Hillman. When, in late March 1985, Nationwide's attorney informed Hafford that "the question of coverage appears to be a roughly 50/50 proposition," Hafford wrote Hillman "seeking ... further details with regard to Julie's accident." However, he did not relay the attorney's opinion to Mrs. Hillman.

On April 1, 1985, the Hillmans filed a complaint against Nationwide for bad faith. The following month Nationwide offered the Hillmans \$50,000 as a "compromise payment." The Hillmans rejected the offer, claiming that they were entitled to \$150,000 under the insurance policy, plus medical benefits, incidental, consequential, and punitive damages.

The following April Judge Katz granted Nationwide's motion for summary judgment and dismissed the Hillmans' claims. The Hillmans appealed the decision.

you or a relative living in your household, but not insured for Uninsured Motorist coverage under this policy. It does not apply to bodily injury from being hit by any such vehicle. (Emphasis deleted.)

On July 1, 1988, this court held that the Hillmans were covered by the Nationwide policy. *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248, 1250 (Alaska 1988) (*Hillman I*). We agreed with Nationwide's interpretation of the contractual language. However, a majority of the court refused to give effect to the uninsured owned motor vehicle exclusion contained in the policy for statutory and public policy reasons. *Id.* at 1251-52.

Once coverage was established, Nationwide chose to pursue the arbitration procedure mandated by the policy for determining liability.² Arbitration was held on January 30, 1989. The arbitrators concluded that Amis was 33% at fault with regard to the claims related to Julie's estate. As for John and Janet's claims for negligent infliction of emotional distress, the panel agreed that Amis' negligence accounted for 15% of the harm. The arbitrators awarded \$92,500 to the Hillmans. Two weeks later Nationwide paid the Hillmans \$50,000, the maximum amount of the uninsured motorist coverage provided by the policy.³

Following arbitration, the Hillmans' bad faith litigation began anew. On June 21, 1990, Judge Michalski granted Nationwide's motion for partial summary judgment, dismissing the bad faith claims associated with Nationwide's denial of coverage and decision to arbitrate.

After several pre-trial motions, Judge Michalski reconsidered an earlier ruling and granted Nationwide's motion for summary judgment on the remaining bad faith claims.⁴ Dismissal of the claims was based

on Judge Michalski's belief that the Hillmans failed to demonstrate that they could show damages. After issuing the Final Judgment, the superior court identified Nationwide as the prevailing party and awarded costs and partial attorney's fees in the amount of \$154,899.57.

This appeal followed.

II. DISCUSSION

A. Dismissal of the Hillmans' Bad Faith Claims

1. Denial of Coverage

In *State Farm Fire & Casualty Co. v. Nicholson*, 777 P.2d 1152 (Alaska 1989), we held that insurance companies could be liable for the tort of bad faith in so-called "first-party" cases—cases in which insureds seek compensation from their own insurers for losses which they have suffered. *Id.* at 1156.

We had no occasion to comprehensively define the elements of the tort of bad faith in a first-party insurance context in *Nicholson*; we have not done so in subsequent cases, see e.g., *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992); nor do we do so now. In recognizing the tort of bad faith in first-party cases, we aligned Alaska with those jurisdictions that have followed *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (Cal.1973), apparently the first case to apply bad faith as a tort in first-party cases.⁵ *Gruenberg* articulated the tort in a manner that seemed to require unreasonable conduct and bad

no error in the trial court's reasoning or conclusion.

2. In *Hillman I*, we rejected the Hillmans' argument that Nationwide had waived its right to arbitration. *Hillman I*, 758 P.2d at 1253. The trial court held that although "Nationwide acted in bad faith in failing to disclose the availability of the arbitration procedure in four separate pieces of correspondence to Mrs. Hillman," arbitration should proceed because the Hillmans were represented by counsel who "simply made a calculated decision to attempt to obtain relief through the court system, knowing that the policy actually required dispute resolution through arbitration." *Id.* The court added that since "none of the litigants herein has clean hands," "[t]he balance tips in favor of submitting appropriate issues to the contractually mandated arbitration process." *Id.* We found

3. On June 12, 1989, Judge Gonzalez granted Nationwide's motion for partial summary judgment and barred the Hillmans from recovering arbitration damages for emotional distress. The arbitration award was consequently reduced to \$55,000.

4. What these claims consisted of is not brought into focus in the briefs before us.

5. The jurisdictions that have followed *Gruenberg* are listed in William M. Shernoff, et al., *Insurance Bad Faith Litigation*, § 5.01 at 5.3 n. 4 (1984 and Supp.1992).

faith: "Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." *Gruenberg*, 510 P.2d at 1038.

A similar double requirement was imposed in *Noble v. National American Life Insurance Co.*, 128 Ariz. 188, 624 P.2d 866 (1981), another case on which we relied in *Nicholson*. The Arizona Supreme Court adopted the standard expressed by the Wisconsin Supreme Court in *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (Wis.1978):

The *Anderson* Court states:

To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one....

The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances. 271 N.W.2d at 376-77.

Under the *Anderson* standard an insurance company may still challenge claims which are fairly debatable. The tort of bad faith arises when the insurance company intentionally denies, fails to process, or pay a claim without a reasonable basis for such action.

Noble, 624 P.2d at 868.

A leading text has this to say about the standard in first-party bad faith cases:

6. The Wisconsin Supreme Court may have modified the *Anderson* standard. In *Fehring v. Republic Insurance Co.*, 118 Wis.2d 299, 347 N.W.2d 595 (1984), the court held that proof that a reasonable insurer would not have acted as the defendant did under the circumstances establishes bad faith.

7. In *Loyal Order of Moose v. International Fidelity Insurance Co.*, 797 P.2d 622 (Alaska 1990), a case involving the somewhat analogous relationship between a surety and its obligee, we stated: "A surety may satisfy its duty of good faith to its

In third party situations, an insurer can be liable for an excess judgment when it has failed to settle a third party action against its insured. However, courts have not agreed on the standard for imposing such liability. Some courts impose liability for a negligent failure to settle the third party action; others apply a "bad faith" test that, in practical terms, amounts to a negligence test; and a third group of courts applies a fairly strict requirement of subjective bad faith. A similar divergence of views concerning the level of wrongdoing necessary to impose tort liability on insurers for denial of benefits appears to exist among courts that have adopted the tort of first party bad faith.

Although bad faith is not fully defined in some jurisdictions, courts have consistently held that a refusal to pay benefits based on a reasonable interpretation of the insurance contract is not bad faith.

Shernoff, Insurance Bad Faith Litigation, § 5.02[1] at 5-6 (1992) (footnotes omitted).

[1] The above authorities make it clear that while the tort of bad faith in first-party insurance cases may or may not require conduct which is fraudulent or deceptive,⁶ it necessarily requires that the insurance company's refusal to honor a claim be made without a reasonable basis.⁷ Neither party takes issue with this proposition. Instead, the Hillmans argue that summary judgment should not have been granted because (a) reasonableness is always a question of fact for the jury and, alternatively, (b) under the facts and circumstances of this case there was a fact ques-

obligee by acting reasonably in response to a claim by its obligee, and by acting promptly to remedy or perform the principal's duties where default is clear." *Id.* at 628. In a footnote, we quoted an Arizona decision, *Dodge v. Fidelity and Deposit Co. of Maryland*, 161 Ariz. 344, 778 P.2d 1240 (1989), which uses language mirroring the rule of law employed in today's opinion: "So long as a surety acts reasonably in response to a claim made by its obligee, the surety does not risk bad faith tort liability." *Loyal Order of Moose*, 797 P.2d at 627 n. 8.

tion as to whether Nationwide had a reasonable basis for denying the claim.

[2] The Hillmans' argument that reasonableness always presents a question of fact is without merit. Although questions of reasonableness often must be resolved at trial, we have not held that they are never an appropriate subject for summary judgment procedures. If, when viewing the evidence most favorably to the opponent of a motion for summary judgment, the trial court finds that a reasonable jury could only conclude that the challenged conduct must be characterized in one way, then summary judgment in accordance with that conclusion should be entered. *Schneider v. Pay 'N Save Corp.*, 723 P.2d 619, 623 (Alaska 1986).

The Hillmans also argue that the superior court tacitly accepted the standard of bad faith articulated in *National Savings Life Insurance Co. v. Dutton*, 419 So.2d 1357 (Ala.1982). In *Dutton*, the Alabama Supreme Court held that, except in extraordinary circumstances, "if the evidence produced by either side creates a fact issue with regard to the validity of the claim ... the [bad faith] tort claim must fail and should not be submitted to the jury." *Id.* at 1362. In short, under the *Dutton* test, the plaintiff must prove that plaintiff is "entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law." *Id.*

[3] We need not address whether the superior court adopted the *Dutton* standard. *Dutton* does not state the Alaska rule of law. Our position is merely that where the insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury.

[4] The Hillmans' alternative argument—that they presented sufficient evidence to raise a fact question as to whether Nationwide's denial of coverage had a reasonable basis—requires more discussion.

8. The Hillmans maintain that Nationwide's District Claims Manager and its Regional Claim Attorney concede that Nationwide failed to fol-

The Hillmans argue that they presented evidence showing that Nationwide denied coverage before making *any* investigation of the facts or the law and that Nationwide made subsequent, formal denials of coverage without having conducted significant investigation. They also argue that Nationwide's agents violated its guidelines and policies, which are intended to guarantee fair, honest and reasonable claims handling. Among others, this included violating the company policy requiring local adjusters to consult with higher echelons in the company before denying a death claim; failing to resolve all reasonable doubts about coverage in favor of the policy holder; withholding from the file any explanation for why the policy holder was required to sign a nonwaiver agreement; obtaining a legal opinion just to "paper the file" and for the main purpose of denying the claim; failing to provide a policy holder with a previously promised letter from Nationwide's attorney regarding coverage; lying to the policy holder about whether that letter was available; and "stonewalling" the claim for four years because of vindictiveness towards the Hillmans' attorneys.⁸ Finally, the Hillmans argue that even after Nationwide had given its personnel the authority to concede coverage and settle the underlying case for the \$50,000 policy limits, its Regional Claims Attorney unilaterally decided not to do so.

In our view none of these facts suffice to raise a factual question as to whether Nationwide's denial of coverage lacked a reasonable basis. The denial was based on an explicit exclusion in the policy. The question in this case is whether Nationwide was unreasonable in treating the exclusion as valid. As to this question, the Hillmans have directed us to no evidence suggesting unreasonableness. We have found that "the only reasonable interpretation" of this exclusion was that advanced by Nationwide. *Hillman I*, 758 P.2d at 1250. We also concluded in *Hillman I* that the exclusion was invalid on statutory and public policy grounds. Two of the five members

low its own policies and procedures in all these respects.

of this court disagreed that the exclusion was invalid. *Id.* at 1255 (dissenting opinion of Justice Burke, joined by Justice Moore). See also *State Farm Mut. Auto. Ins. Co. v. Bass*, 231 Ga. 269, 201 S.E.2d 444, 445 (1973) (where appellate court was divided on interpretation of uninsured motorist statute, "insurer was legally justified in litigating the issue and cannot, as a matter of law, be liable for ... bad faith"). Further, as we acknowledged in *Hillman I*, a respectable minority of jurisdictions have reached the same conclusion as the dissent. *Hillman I*, 758 P.2d at 1251. The facts that Nationwide did not follow its standard procedures in denying coverage, that it did not forward its attorney's letter to the Hillmans, and that its \$50,000 offer was conditioned on settling all of Hillmans' claims rather than their uninsured motorist claims, do not suffice to create a fact question as to whether Nationwide's decision to deny coverage lacked a reasonable basis, as they have little or no relevance on that point. We conclude, therefore, that there are no genuine issues of material fact as to whether Nationwide's denial of coverage was reasonable.⁹

2. Demand for Arbitration

[5] In the same order dismissing the bad faith claim related to coverage denial, Judge Michalski also dismissed the bad faith claim based on Nationwide's demand for arbitration. Judge Michalski found that the arbitration demand was not in bad faith because Nationwide "merely exercised its right." The court reiterated the decision in its March 7, 1991 order dismissing the Hillmans' remaining bad faith claims.

The Hillmans contend that Nationwide had no reasonable basis to demand arbitra-

tion. Instead, they argue, Nationwide's agents insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims and because of vindictiveness and aggravation with their attorneys.

However, the insurance policy covered the Hillmans "only to the extent the uninsured motorist was liable." Based on evidence from the initial police report, Nationwide could reasonably conclude that Amis was only partially responsible for the accident.¹⁰ The subsequent findings of the arbitrators, that Julie was 66% at fault for the accident and her parents 85% at fault for their emotional distress, lend additional support to Nationwide's claim that its demand for arbitration was reasonable. See *Sullivan v. Allstate Ins. Co.*, 111 Idaho 304, 723 P.2d 848, 850 (1986) (a subsequent arbitrator's decision that a claimant was partially negligent was clear evidence that an insurer's denial of liability was not in bad faith). Consequently, Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith.

B. Award of Attorney's Fees

[6, 7] An award of attorney's fees will be reversed if the trial court's determination is an abuse of discretion or "manifestly unreasonable." *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1138 (Alaska 1989). Designation of the prevailing party "is committed to the broad discretion of the trial court." *Apex Control Systems, Inc. v. Alaska Mechanical, Inc.*, 776 P.2d 310, 314 (Alaska 1989).

The determination will be affirmed on appeal "unless it is shown that the court abused its discretion by issuing a decision which is arbitrary, capricious, mani-

9. This conclusion is consistent with *State Farm Mutual Automobile Insurance Co. v. Bass*, 231 Ga. 269, 201 S.E.2d 444 (1973) and *Aetna Casualty & Surety Co. v. Superior Court*, 161 Ariz. 437, 778 P.2d 1333 (App.1989). In both cases, courts found that an insurer was not liable for bad faith when it denied coverage to an insured on the basis of an uninsured motorist exception which was later held invalid. See also *Hanson v. Prudential Insurance Co. of America*, 772 F.2d 580 (9th Cir.1985) (applying California law).

10. The report stated that Julie had "failed to yield when entering Long Lake Road from a side road." The Hillmans note that the information available to Nationwide when it insisted on arbitration was insufficient to prove that Amis was not at all at fault. This is true but irrelevant. Nationwide was entitled to arbitration if it could reasonably maintain that Amis was not completely at fault.

HILLMAN v. NATIONWIDE MUT. FIRE INS. CO. Alaska 1327

Cite as 855 P.2d 1321 (Alaska 1993)

festly unreasonable, or improperly motivated."

Howard S. Lease Constr. Co. & Assoc. v. Holly, 725 P.2d 712, 720 (Alaska 1986) (quoting *City of Yakutat v. Ryman*, 654 P.2d 785, 793 (Alaska 1982)).

After the Final Judgment was issued, Judge Michalski awarded Nationwide approximately \$155,000 in costs and partial attorney's fees.¹¹ The Hillmans argue that the trial court abused its discretion when it determined that Nationwide was the prevailing party. The Hillmans claim that since they prevailed on two of the three issues in the case, coverage and liability, but not on bad faith, they were the "prevailing party."

Civil Rule 82(a) directs that attorney's fees be awarded to the prevailing party.¹² "[T]he prevailing party is the one 'who has successfully prosecuted or defended against the action, the one who is successful on the 'main issue' of the action and 'in whose favor the decision or verdict is rendered and the judgment entered.'"¹³ *Day v. Moore*, 771 P.2d 436, 437 (Alaska 1989) (quoting *Adoption of V.M.C.*, 528 P.2d 788, 795 n. 14 (Alaska 1974)).

[8, 9] This court has recognized that "it is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party." *Owen Jones & Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312, 313-14 (Alaska 1972). We have been cited to two cases¹⁴ where the party who obtained an affirmative recovery was held not to be the prevailing party by the trial court and this decision was affirmed on appeal. The cases are *Owen Jones* and *Hutchins v. Schwartz*, 724 P.2d 1194 (Alaska 1986). In *Hutchins*, the plaintiff sought

\$275,000 in compensatory damages. After a trial the jury returned a verdict in favor of the plaintiff, awarding some \$1,900, which in turn had to be reduced by 40% because of the plaintiff's comparative negligence. *Id.* at 1204. Thus the plaintiff's affirmative award was only approximately \$1,100. This recovery is so small in comparison with what was sought that it may properly be considered *de minimis*. The verdict essentially was a defense verdict.¹⁴

Owen Jones may not be so easily distinguished. There, Jones-Western, a contractor, sued its subcontractor, C.R. Lewis Co., to recover approximately \$120,000 in progress payments that Jones-Western had paid C.R. Lewis in connection with construction of a building that was destroyed by an earthquake before it was completed. The subcontractor counterclaimed for services rendered and materials furnished before the collapse. The trial court held that Jones-Western was not entitled to recover progress payments and that the subcontractor had a claim in *quantum meruit* for the reasonable value of the services and materials supplied prior to the earthquake. The trial court fixed this sum at approximately \$142,000. Thus, the subcontractor would have been entitled to an affirmative recovery of some \$22,000 except for the fact that it salvaged some materials from the building after the earthquake on which the court placed a value of \$30,000. Because of this, Jones-Western was left with a small affirmative recovery. We described this recovery in *Owen Jones* as merely "incidental": "This recovery based on the accounting can be classified as an incidental recovery which will not be a sufficient recovery to bar a party who has defended a large claim from being consid-

11. The total consisted of \$44,448.57 in costs and \$110,451.00 in fees. The attorney's fees award was 40% of the total amount of attorney's fees Nationwide incurred after July 1988.

12. Alaska R.Civ.P. 82(a)(2) states:

In actions where the money judgment is not an accurate criterion for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

13. *Buoy v. ERA Helicopters, Inc.*, 771 P.2d 439 (Alaska 1989), is not a case in which the plain-

tiff received an affirmative recovery. The \$141,676 jury verdict the plaintiff received in that case was reduced to nothing because of prior settlements which the plaintiff had made. *Id.* at 441.

14. In addition, in *Hutchins* the defendant had made an offer of judgment under Civil Rule 68 for \$35,000 and therefore under that rule he was in any case entitled to attorney's fees incurred after the date of the offer. *Id.* at 1203.

ered a prevailing party." *Owen Jones*, 497 P.2d at 314, n. 5. We also noted that the "main issue" in the case below was whether the subcontractor had an obligation to refund the progress payments. The subcontractor prevailed on this issue. *Id.* at 314. Accordingly, we affirmed the trial court's holding that the subcontractor was the prevailing party. *Id.*

In reaching our conclusion in *Owen Jones*, we distinguished *Buza v. Columbia Lumber Co.*, 395 P.2d 511 (Alaska 1964). *Buza* was a suit brought for conversion of a quantity of logs. The plaintiff sought the return of the logs, worth some \$8,000, plus compensatory and punitive damages of \$31,000. After a trial the plaintiff was awarded the logs, but no damages. We held, nonetheless, that the plaintiff was the prevailing party, defining that term to mean the party "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention." *Buza*, 395 P.2d at 514.

In *Owen Jones* we distinguished *Buza* as follows:

The main issue in that case was the ownership of a quantity of logs, and the plaintiff proved his right to the logs although he was not able to obtain compensating or punitive damages.

The instant case differs because the recovery of appellants was based only on an accounting for materials salvaged by the appellee. It was clear that the main issue had been resolved against appellants when the court found that appellee had no obligation to refund its progress payments under the contract....

Owen Jones, 497 P.2d at 314 (footnote omitted).

In our view the present case more closely resembles *Buza* than *Owen Jones*. Here,

15. The fact that Nationwide made an offer of settlement of \$50,000 is irrelevant to the question of who the prevailing party is since this offer was not made under Civil Rule 68. *Myers v. Snow White Cleaners & Linen Supply, Inc.*, 770 P.2d 750, 753 (Alaska 1989) ("no offers not in compliance with Civil Rule 68 should be considered in determining questions of costs and attorney's fees").

as in *Buza*, plaintiff prevailed on the basic liability question and received an affirmative recovery based on its successful litigation of that question, which was substantial in amount. *Owen Jones* is distinguishable because the plaintiff's affirmative recovery there was based on a minor accounting issue, not on the liability theory which plaintiff tried unsuccessfully before the court.

In the present case, the Hillmans are no doubt disappointed that they did not receive compensatory and punitive damages against the insurance company on their claim of bad faith. Nonetheless, they prevailed against vigorous opposition on their claim of policy coverage and received \$50,000 on that claim. This recovery cannot be classified as an incidental one unrelated to the main focus of the litigation in this case. We conclude therefore that the trial court erred in refusing to designate the Hillmans as the prevailing party.¹⁵ Accordingly the award of attorney's fees must be reversed and this case remanded so that an award of reasonable attorney's fees may be made in favor of the Hillmans.

III. CONCLUSION

We affirm the decision of the superior court granting Nationwide's motion for summary judgment on the Hillmans' bad faith claims. Nationwide's decisions to deny coverage and then to demand arbitration were reasonable. In light of our decision, there is no reason to consider the damages issue.¹⁶

The superior court's designation of Nationwide as the prevailing party was an abuse of discretion. Since the Hillmans prevailed on two of the three issues central to the case and won a substantial affirmative recovery based on these issues, they were the prevailing party. The trial court

16. In addition, we decline to address the Hillmans' claim that several of the superior court's evidentiary rulings were an abuse of discretion. Even if the superior court's rulings concerning the admissibility of evidence during trial were erroneous, such error was harmless where the case was never submitted to the jury.

HILLMAN v. NATIONWIDE MUT. FIRE INS. CO. Alaska 1329

Cite as 855 P.2d 1321 (Alaska 1993)

should make a new award reflecting this determination.

The superior court's decision granting summary judgment on the bad faith claims is **AFFIRMED**. The award of attorney's fees is **REVERSED** and **REMANDED**.

COMPTON, Justice, with whom, BURKE, Justice, joins, dissenting in part.

While declining to comprehensively define the elements of the tort of bad faith, the court has actually eliminated the implied covenant of good faith and fair dealing in insurance contracts. The court concludes that summary judgment is appropriate if the insurer has a reasonable (colorable) contractual basis for denying liability. In other words, the insurer may enforce a contractual basis for denying liability regardless of any subjective bad faith. Because the court's analysis is contrary to law and not supported by policy, and because a reasonable jury could find that Nationwide acted with subjective bad faith, I dissent.

The court concludes that the tort of bad faith in the context of first party insurance claims necessarily includes a requirement that the insurer's refusal to honor the claim be made without a reasonable basis. It should be noted that the Hillmans do not accept this proposition, because contrary to the court's conclusion, the Hillmans do not accept that a reasonable basis can exist if actions are motivated by improper purposes. The Hillmans argue that because evidence was presented that shows Nationwide's denial was motivated by self serving, dishonest and improper purposes, summary judgment was inappropriate. "Where the record supports plaintiff's contention that acts or omissions by the carrier were for a bad-faith purpose or motive, the matter should be submitted to a jury for its determination." Thus the issue is properly before us.

Until today the covenant of good faith and fair dealing, which we have implied in every contract including insurance contracts, has imposed duties above and beyond express contractual duties. *Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979).

The additional duties imposed by the covenant of good faith and fair dealing were not eliminated when this court accepted the argument that in insurance contracts, a breach of the covenant sounds in tort. "That responsibility is not the requirement mandated by the terms of the policy itself—to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." *Gruenberg v. Aetna Insurance Company*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 485, 510 P.2d 1032, 1037 (1973).

The covenant of good faith and fair dealing requires that the party act with both subjective good faith and objective fairness. *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1225 (Alaska 1992). It is objectively reasonable to rely on contractual rights. Contractual rights, therefore, provide a reasonable basis for a position. But this does not end our inquiry. The covenant of good faith and fair dealing requires that contractual rights be pursued with subjective good faith. In *Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983), even though the employment at will contract allowed the firing of Mitford for no reason at all, "the circumstances surrounding Mitford's termination give rise to an inference that he was fired ... for the purpose of preventing him from sharing in future profits," thereby violating the duty of good faith and fair dealing. In *Loyal Order of Moose v. International Fidelity Insurance Co.*, 797 P.2d 622, 629 (Alaska 1990), we noted that while the surety had a contractual right to demand arbitration, "the demand for arbitration may not itself be made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim."

We have declined to hold that a breach of the covenant of good faith and fair dealing sounds in tort in the context of employment contracts. However, because of the special nature of insurance contracts, a breach of the covenant of good faith and fair dealing in first party insurance claims does sound in tort. *State Farm Fire & Cas. Co. v.*

Nicholson, 777 P.2d 1152, 1156-57 (Alaska 1989).

The adhesionary aspects of the insurance contract, including the lack of bargaining strength of the insured, the contract's standardized terms, the motivation of the insured for entering into the transaction and the nature of the service for which the contract is executed, distinguish this contract from most other non-insurance commercial contracts. These features characteristic of the insurance contract make it particularly susceptible to public policy considerations.

Id., quoting Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F.L.Rev. 187, 200-01 (1982). The reason for holding that such claims sound in tort is because "an action in tort provides a remedy for harm done to insureds though no breach of an express contractual covenant has occurred and where contract damages fail to adequately compensate insureds." *Id.*, quoting *White v. Unigard Mutual Insurance Co.*, 112 Idaho 94, 730 P.2d 1014, 1017-18 (1986).

Nicholson is consistent with our policy that because of the special nature of insurance contracts, they are particularly susceptible to public policy considerations. *Hillman v. Nationwide Mutual Fire Ins. Co.*, 758 P.2d 1248, 1250 (Alaska 1988) (invalidating uninsured motor vehicle exclusion on the basis of public policy); *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993) (granting an insured the unilateral right to select independent counsel in cases where an insurer has reserved its rights, despite the insurer's express contractual right to select counsel); *Estes v. Alaska Ins. Guar. Ass'n*, 774 P.2d 1315 (Alaska 1989) (concluding

that a time limitation on commencement of suit will only be enforced on a showing of prejudice); *Alaska Energy Authority v. Fairmont Insurance Co.*, 845 P.2d 420 (Alaska 1993) (concluding that the failure to file suit within the time limitation of the contract does not bar a claim without a showing of prejudice).

In spite of these cases, this court now concludes that as long as there exists a reasonable contractual basis for a denial of liability, a bad faith claim sounding in tort will fail regardless of any evidence of subjective bad faith. The court interprets our adoption of *Gruenberg* as "seem[ing]" to require proof of both objectively unfair conduct and subjective bad faith. *Gruenberg* was the first case to hold that a breach of the covenant of good faith and fair dealing sounds in tort, giving the plaintiff broader remedies than those in contract. While in *Gruenberg* there may have been evidence of both unfair conduct and bad faith, the court clearly articulated "the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." 510 P.2d at 1037 (emphasis added).

Instead of providing more protection for an insured by adopting the proposition that a bad faith claim may sound in tort, in fact we are providing less protection. In the context of first party insurance claims, the court has actually limited the covenant of good faith and fair dealing by imposing a twofold requirement which it has not required in any other contract. The covenant of good faith and fair dealing is meaningless if existence of a reasonable contractual basis for denial of liability is alone sufficient to defeat a bad faith claim.¹

1. This court stated in *State Farm Mutual Auto Insurance Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992), that an insured may bring a bad faith claim "in tort as well as in contract." The duty of good faith and fair dealing implied in every contract requires the insurer to act with subjective good faith and objective fairness, unlike the tort of bad faith which, as now defined, permits the insurer to act with subjective bad faith. If *Weiford* is still a correct statement of the law, then the proper disposition of this case would be to remand it to the superior court for

further proceedings. The Hillmans should be permitted to proceed on a claim based on a breach of the implied covenant of good faith and fair dealing arising out of the contractual relationship, distinct from a claim based on the tort of bad faith. They have set forth specific facts which, viewed in a light most favorable to them, raise genuine issues of material fact. Contractual damages based on a breach of the implied covenant of good faith and fair dealing may be narrower in scope than tort damages, yet some relief may be available to the Hill-

This is contrary to our previous holdings. For example, in *State Farm Mutual Auto Insurance Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992), we reaffirmed that "bad faith claims brought by insured persons against their insurance companies may be brought in tort as well as in contract." We vacated the award of punitive damages because "the \$20,000 offer clearly was reasonable. While the suspect note to the file might be reflective of bad motive, since the offer in question was reasonable, the note cannot independently form the basis for a punitive damages award." *Id.* at 1268. However, we noted that "the crux of Weiford's bad faith case was the testimony of her expert, George Broatch. Broatch testified that no single act of State Farm amounted to bad faith, but that cumulatively State Farm's actions did: 'It—to me it was a matter of the company philosophy. I don't really have any quarrel with the day to day handling of the file particularly.'" *Id.* at 1267. We concluded "that there was sufficient evidence to support a jury finding that State Farm acted in bad faith." *Id.* at 1269. The court is correct in rejecting the Hillmans' assertion that reasonableness is always a question of fact for the jury. But the proper question is whether a reasonable jury could conclude that Nationwide acted unreasonably, i.e. either objectively unfairly or with subjective bad faith.

In reviewing a grant of summary judgment we view the facts in the light most favorable to the non-prevailing party. *Loyal Order of Moose*, 797 P.2d at 628. The Hillmans presented evidence that Nationwide denied coverage before making an investigation of the facts or law. Nationwide violated its internal guidelines and policies which guarantee fair, honest and reasonable claims handling. Specifically, Nationwide: (1) failed to follow internal procedures when local adjusters failed to consult with higher echelons in the company before denying the death claim; (2)

failed to resolve all reasonable doubts about coverage in favor of the policy holder; (3) failed to explain why a nonwaiver agreement was required; (4) obtained a legal opinion in order to justify denying the claim; (5) failed to provide the Hillmans with previously promised information from its attorney; (6) lied about whether a letter from its attorney was available; (7) stonewalled for four years because of alleged vindictiveness toward the Hillmans' attorneys; and, (8) even after authority to concede coverage and settle the case was granted, the Regional Claims Attorney unilaterally decided not to settle.

Taking these assertions as true,² a reasonable jury could conclude that by failing to investigate, lying to the policy holder and stonewalling for four years, Nationwide acted with subjective bad faith. The grant of summary judgment was improper. Yet this court concludes that as long as Nationwide had a reasonable contractual basis for denying liability, evidence of bad faith and unfair dealings "have little or no relevance."

The court applies this same standard to the question of arbitration. Again, on summary judgment we view the facts in a light most favorable to the non-prevailing party. *Loyal Order of Moose*, 797 P.2d at 628. The Hillmans claim Nationwide insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims, and because of vindictiveness and aggravation with Hillmans' attorneys. Again, a reasonable jury could conclude that Nationwide acted with subjective bad faith. Yet because Nationwide's insurance policy contained an arbitration provision, "Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith." This conclusion ignores *Loyal Order of Moose*, 797 P.2d at 629, which specifically states that even though a surety may have a right to arbitration, "the demand for arbitration may not itself be

mans. However, the correctness of the statement in *Weiford* is now doubtful, despite this court's assertion that it is declining to "comprehensively" define the elements of the tort of bad faith.

2. While the Hillmans have not at this point presented convincing evidence of their assertions, they have set forth specific facts which, viewed in the light most favorable to the Hillmans, raise a genuine issue of fact.

made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim." The court's conclusion again effectively eliminates the covenant of good faith and fair dealing.

The Hillmans presented evidence from which a reasonable jury could conclude Nationwide acted with subjective bad faith. There are genuine issues of material fact which preclude summary judgment.



Debbie M. NIX, Appellant,

v.

Daniel L. NIX, Appellee.

No. S-4916.

Supreme Court of Alaska.

July 23, 1993.

Mother appealed from order of the Superior Court, Third Judicial District, Anchorage, Elaine M. Andrews, J., granting father's motion to vacate child support arrearage. The Supreme Court, Matthews, J., held that letter from mother partially waiving father's child support obligation was ineffective.

Reversed and remanded.

1. Parent and Child ¶3.1(8)

Child support waiver is not valid and enforceable until court has reviewed and approved waiver's substantive adequacy. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

2. Divorce ¶311.5

Where child support award has been established through initial dissolution proceeding, any subsequent proposed waiver must be presented to court for review un-

1. The letter is dated February 1, 1989. Both parties agree, however, that the date "1989" was incorrect and that the letter was actually written

der modification procedures provided for in applicable rule. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

3. Divorce ¶311.5

Child support waiver presented after initial dissolution proceeding will be given only prospective effect from date of judicial approval. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

4. Divorce ¶311.5

Letter from mother partially waiving father's child support obligation was ineffective, where mother revoked waiver as to any future child support before waiver was approved by superior court. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

Maryann E. Foley, Anchorage, for appellant.

Allen M. Bailey, Law Offices of Allen M. Bailey, Anchorage, for appellee.

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

OPINION

MATTHEWS, Justice.

Debbie and Daniel Nix were married in 1984 and have one child, born in 1986. Debbie and Daniel petitioned for dissolution of their marriage and the superior court entered a decree of dissolution in February 1990. The decree required Daniel to pay Debbie monthly child support in the amount of \$936.

A letter written sometime after the hearing on their petition for dissolution,¹ signed only by Debbie, states her agreement to reduce the child support payments to \$300 per month until such time that Debbie asks Daniel to increase the amount back to \$936 per month. Daniel acknowledges that Debbie eventually exercised this right. He then increased the child support payment to the full \$936 per month. After a period of time, the Child Support Enforcement

and signed after the dissolution hearing, but before entry of the decree, in 1990.

Date: Jan 18, 1997

To: Brian

Fm: Jim



99-374

Subj: Additional legislative findings and purposes for HB58

1. Encourage the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost and complexity of litigation, without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others.
2. Provide for reasonable, but not excessive, punitive damage awards against tortfeasors sufficient to deter conduct and practices which harm innocent Alaskans, while not hampering a positive business environment by allowing excessive windfall recoveries.
3. Encourage individual savings and economic growth by fostering a reduction in liability insurance rates to individuals and businesses alike.
4. Encourage the traditionally recognized Alaska values of individual self reliance and independence by underscoring the need for personal responsibility in making choices, and the personal accountability arising from those choices.

*ak. Dispute Settlement Assoc.**The Arbitration & Mediation Group**Cathy Anderson*

MEDIATORS, ARBITRATORS, FACILITATORS & TRAINERS

POST OFFICE BOX 240783
ANCHORAGE, ALASKA 99524-0783
TELEPHONE: (907) 345-3801
FAX: (907) 345-0006
E-MAIL: tamg@alaska.net

January 13, 1997

Brian:

Please excuse the informality of my transmitting letter. Subsequent to my volunteering to provide you with research and input on ADR and tort claims, I have reviewed, cover to cover, Rogers' and McEwen's *Mediation Law Policy & Practice*, (the most popular treatise on the subject), Court Connected Mediation Activities, published by the Society of Professionals in Dispute Resolution, and have gathered input and comment from several local and national colleagues, including persons whom I consider to have balanced opinions on the subject. Have invested considerable time and thought; the following are my recommendations.

I have included language drawn from the statutes of:

Arkansas	Kansas	Nebraska
Colorado	Maine	New Hampshire
Florida	Michigan	North Dakota
Illinois	Minnesota	Oregon
Indiana	Mississippi	Texas
		Utah

First, I firmly believe, after gathering all this data, that any project designed to determine whether mandated ADR will succeed in Alaska's court system will do so only to the extent that it is monitored by a balanced, independent body. As a result, I recommend the enactment of a balanced commission to oversee the pilot project's implement, and, perhaps to continue at the pleasure of the legislature for other ADR-related tasks.

The power of the balanced-membership commission will limit its oversight to pilot project results, establishing training standards for ADR providers, and make "further recommendations." In order to survive, the commission must include attorneys, nonattorneys, ADR providers, and business folk. Volunteer organizations must be taken into consideration as must be court administration.

I've tailored the language to place as much of the power as possible with the parties - the businesses and the individuals engaged in the dispute - and their legal advocates. If much is cut from the language, the balance will be lost

Post-It Fax Note	7671	Date	1/15	# of pages	11
To	Foran, Jan	From	Cathy Anderson		
Co./Dept.		Co.			
Phone #	465 3804	Phone #			

Brian Porter
January 13, 1997
Page two

between the need to insure that such a project could succeed and that the power is placed with and kept in the hands of the parties. Many have suggested in the past that we leave as much to the free market as possible. This does just that.

E.g., take a look at how cases are screened and referred. If too much power is given to court administration to screen and refer, another back-log will be created. If too much discretion is given the court to choose the process, attorney litigants may more successfully argue their clients' constitutional rights have been denied. If the case is referred too late in the discovery process - most ADR processes will fail as research tells they work best early in the dispute.

To balance out the costs and "burdensomeness" of any pilot project, which could add costs and risk of failure, I've reduced the pilot project by screening out cases I believe from experience would meet the most opposition, e.g., domestic cases, cases where no answer is filed, and those in which a defendant asserts a statute of limitations defense. I believe that for the purposes of the pilot project only, they, in particular, should be adjudicated by the court. In addition, I've lowered the number of cases to be submitted to an ADR process, shortened the length of the project, but applied the pilot project to both the superior and district courts.

In order to protect the processes of mediation, arbitration and early neutral evaluation, as they are practiced in the market place and for which formal education exists, definitions are provided.

The court would retain ultimate jurisdiction over attorneys' fees so as to avoid conflicts with Rule 82, common law, and arguments raised by parties. The Alaska Judicial Council would, through the court system's budget, develop guidelines for pilot project analysis and statistics compilation.

Confidentiality, privilege and immunity are provided ADR service providers as it consistent with many other states' statutes and would be absolutely necessary, at a minimum, to increase litigation due to the introduction of new processes.

Interestingly, the Alaska Dispute Settlement Association is in the process of developing minimum qualifications for mediators and arbitrators. Discussions

Brian Porter
January 13, 1997
Page three

thus far have focused on a minimum number of hours training in mediation or arbitration, adherence to a recognized, applicable code of ethics for same, and other elements. I cannot say what they will do with the data, but highly suspect it will be made available upon request. For address the issue of protection of the public, I have included a liability insurance section.

Thanks for this opportunity, Brian. If I may be of further service, please do not hesitate to contact me.

Best regards,

Purpose. The Legislature finds that the resolution of disputes through litigation can be costly and time-consuming and that alternative processes of dispute resolution have great potential to efficiently and fairly reduce the burden upon Alaska's court system. The Legislature intends to encourage, promote, and develop alternative processes in Alaska to resolve disputes brought in court for personal injury, death, and property damage by providing parties with less adversarial and equitable forums within which to resolve these disputes. These forums include, but are not limited to mediation, arbitration, and early neutral evaluation or fact finding. The legislature encourages all attorneys licensed in this state, when practicing in this state, to advise their clients about the dispute resolution process options available to them and to assist them in the selection of the technique or procedure appropriate for the client's dispute, case, or controversy.

(A) There is hereby created the Alaska Alternative Dispute Resolution Advisory Commission which shall consist of nine (9) members.

(1) Three (3) members shall be appointed by the Chief Justice of the Alaska Supreme Court, one (1) of which shall have been recommended to the court by the Alaska Bar Association. Two shall be attorneys and one (1) shall be a representative of court administration.

(2) Two (2) members shall be appointed by the Speaker of the House of Representatives, of which one shall be a nonattorney lay person.

(3) Two (2) members shall be appointed by the President of the Senate, of which one shall be a nonattorney lay person.

(4) Two (2) members shall be appointed by the Governor, one of which shall be a representative of voluntary or nonprofit alternative dispute resolution organizations in the State of Alaska. One of the members shall be a nonattorney lay person.

(B) All members of the commission shall be residents of the State of Alaska and shall demonstrate prior involvement in alternative dispute resolution.

(C) Commission members shall be appointed no later than _____ and shall serve for renewable three (3) year terms. If any member dies, resigns, or is otherwise unable to serve prior to the expiration of the term, the appointing

entity shall appoint a successor to serve the unexpired portion of the term. Upon expiration of a term of service, the appointing entity shall be responsible for filling the position for the next term.

(D) The members of the commission shall elect a chairman.

(E) The commission members shall be compensated in accordance with AS _____.

(F) The commission shall hold regular meetings no less than quarterly, on dates fixed by the commission, and shall hold special meetings as the commission finds necessary.

(G) Five members of the commission shall constitute a quorum.

Powers and duties of the commission.

The commission shall have the authority and responsibility to:

(A) Systematically promote the appropriate use of alternative dispute resolution;

(B) Establish standards for experience and alternative dispute resolution training requirements of persons who serve as mediators, arbitrators, or other alternative dispute resolution neutrals in and for the District and Superior Courts of the Third Judicial District for purposes of the pilot project. Nothing in this subsection or in the standards promulgated by the commission shall in any way limit the pursuits of alternative dispute resolution providers consistent with their training and code of ethics, nor shall this section or the standards established hereby apply to alternative dispute resolution services provided through a governmental agency. The requirements of this section, as well as the standards developed herein, may be satisfied by a nonprofit corporation on behalf of its service providers by providing a statement of training and retention requirements for its provider panels. Regardless, no individual may act as a mediator, arbitrator, or early neutral evaluator or fact finder under the pilot program discussed in this chapter without providing the individuals to the conflict with a written statement of qualifications which describe the person's experience and training in the applicable field; and

(C) Make recommendations to the legislature, the court system, the bar associations in the state of Alaska, and Alaska's public pertaining to the use of alternative dispute resolution processes. The commission shall issue annual reports to the legislature and the court system concerning its progress and activities.

Pilot Program for Alternative Dispute Resolution.

(A) There shall be a pilot program of no less than two years duration in which the court submits civil tort and property damage cases filed in the district and superior courts of the Third Judicial District to alternative dispute resolution processes.

(B) For purposes of the pilot project only, the following cases are exempted from submission to an alternative dispute resolution process:

(1) divorce, dissolution, child custody or visitation dissolutions or complaints, including motions to modify previous decrees;

(2) probate cases;

(3) cases where no answer is filed; and

(4) cases in which an answer raises dismissal based on filing outside the statute of limitations affirmative defense.

(C) All parties to selected, nonexempt cases, as defined by subsection (B) above, shall be ordered by the court, within 10 days of filing of the answer, to an alternative dispute resolution process of the parties' choice. The cases shall be selected on a random basis, after screening, the number of which shall be equal to forty percent (40%) of all exempt cases filed in a calendar year. The parties shall choose the process to which the case shall be submitted no later than 10 days of the court's order to a process and shall advise the court of its choice and scheduling.

(D) The parties shall choose an alternative dispute resolution service provider applicable to the process chosen by them no later than 30 days after the filing of the complaint. The parties may consult resources such as the Alaska Supreme Court Mediator's Directory, nonprofit alternative dispute resolution

corporation referral lists, or the free market. Alternative dispute resolution service organizations, as well as private providers, are encouraged to accept cases involving indigent parties.

(E) Parties who choose mediation shall attend at least one full session, which shall not include a scheduling, planning, premediation or orientation session. The parties are encouraged to negotiate in good faith and shall engage in the early and inexpensive exchange of discovery, case evaluation, and other data in furtherance of the process.

(F) Parties who choose or have been ordered to an alternative dispute resolution process shall engage in the process in good faith.

(G) Every partial or full settlement reached through mediation shall be submitted to the court for approval within ten (10) days of the submission and, if approved, shall be reflected in the judgment of the court.

(H) Cases not resolved in an alternative dispute resolution process within 140 days of ordering to an alternative process shall immediately, without exception, be scheduled by the court for a trial setting conference.

Pilot Program Evaluation and the Alaska Judicial Council.

The Alaska Judicial Council shall develop guidelines to evaluate the efficacy of the pilot program established pursuant to AS _____ at least annually. The evaluation shall, at a minimum, address factors such as the monetary value of cases resolved in the pilot program, the satisfaction of the parties to the case, the satisfaction of legal advocates to the parties, the nature and length of the alternative process used, and the costs of the alternative process used.

The Council shall annually evaluate data and concurrently report the results of its evaluation to the Commission, to the court, and to the legislature no later than March 15 of the year following the year of evaluation.

Confidentiality and Privilege.

The following shall apply to the pilot program as defined at AS _____:

(A) All information, whether verbal, written, or computer-controlled, transmitted between any party and a neutral person conducting the proceeding, or the staff of an alternative dispute resolution organization assisting the neutral person, and amendments thereto, shall be confidential communications. All memoranda and other work product, including files, reports, interviews, case summaries, and notes, prepared by an alternative dispute resolution provider or his or her staff shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any process in which the materials are generated. No person who serves as a mediator, arbitrator, early neutral evaluator or fact finder under this section may be subpoenaed or otherwise compelled to disclose matters discussed in the alternative dispute resolution process and no such person shall be subject to a process requiring the disclosure of any matter discussed during the pendency of the proceeding, absent a detailed written stipulation or consent to waiver entered into by the parties.

(B) Any party, including the neutral person or staff of an alternative dispute resolution organization, has a privilege in any action to refuse to disclose, or to prevent a witness from disclosing, any communication made during the pendency of the proceeding. The privilege may be claimed by the party or anyone the party authorizes to claim the privilege.

(C) The confidentiality and privilege requirements of this section shall not apply to:

(1) Information that is reasonably necessary to establish a defense for the neutral person or staff of an alternative dispute resolution organization administering the proceeding in the case of an action against the neutral person or staff of an alternative dispute resolution organization that is filed by a party to the alternative dispute resolution process;

(2) Information that the neutral person is required to report under AS _____ (child abuse);

(3) Information that is reasonably necessary to stop the commission of an ongoing crime or fraud or to prevent the commission of a

crime or fraud in the future for which there was an expressed intent to commit such crime or fraud made or revealed during the process; or

(4) A report to the court only that the process used succeeded or failed to resolve all the issues in the dispute. Partial reports of success are specifically prohibited.

Immunity.

Persons who accept a case to mediate, arbitrate, or act as a early neutral evaluator or fact finder in issues in a dispute are immune from civil liability for or resulting from any act or omission done or made while engaged in efforts to assist, facilitate or arbitrate a settlement, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

Professional liability insurance:

Persons who offer mediation, arbitration or early neutral evaluation or fact finding services and who accept a case under this chapter shall carry professional liability insurance specific to the provision of mediation, arbitration, or early neutral evaluation or fact finding services in an amount not less than \$100,000.00.

Alternative Dispute Resolution provider fees.

(A) The parties shall equally share in the payment of an alternative dispute resolution service provider's fees or in a fashion stipulated between them prior to commencement of the process.

(B) Alternative dispute resolution service providers who provide services to the indigent may consider a fee sliding scale, reduced rate, or flat fee bases. Nothing herein limits a service provider from requiring that both parties symbolically vest in the alternative dispute resolution process through bartering or by other nonmonetary means.

Definitions.

As used in this chapter:

Alternative dispute resolution organization means a not-for-profit corporation which trains, certifies, and makes available to the public individuals who provide fact-finding, mediation, or binding arbitration services.

Alternative dispute resolution process means arbitration, mediation, or early neutral evaluation or fact finding.

Alternative dispute resolution provider means a person, other than a currently-seated judge, who holds himself out to the public as a qualified neutral and impartial person trained to function in the conflict-solving process addressed, using the techniques and procedures of mediation, arbitration or early neutral evaluation or fact finding.

Agreement to mediate means a written agreement which identifies a controversy between the parties to the agreement, states that the parties will seek to resolve the controversy through mediation, sets forth applicable principles of confidentiality and privilege, provides for voluntary withdrawal from the mediation upon written notice from either party or the mediator delivered by certified mail or personally to the other individuals who signed the agreement, is signed by the parties and the mediator, and is dated.

Arbitration means a forum to which parties voluntarily submit their dispute and in which a neutral third party considers all relevant evidence presented by the parties, rendering a binding decision, under either a collective bargaining agreement or pursuant to AS 9._____ (Alaska Uniform Arbitration Act).

Arbitrator means a person who is qualified by training and adherence to a recognized professional code of ethics to serve as a neutral third party in an arbitral proceeding.

Commission means the Alaska Alternative Dispute Resolution Commission.

Court means the district or superior court of the Third Judicial District of the state of Alaska.

Early neutral evaluator or fact finder means a private, neutral individual who offers alternative dispute resolution services in a forum designed to provide evaluative assistance to parties to a dispute prior to or shortly after the initiation of a lawsuit.

Early neutral evaluation or fact finding means a forum for case evaluation by a private, impartial third party who in investigating the issues to a dispute, may issue evaluative, advisory opinions regarding the liability or damages, or both, of the parties. Early neutral evaluation or fact finding occurs early in the dispute, either prior to the filing of a civil cause of action pertaining to the dispute, or shortly after.

Mediation means a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.

Mediator means a person who is qualified by training and adherence to a recognized code of professional ethics who facilitates communication between parties in the mediation process, defines the issues in the dispute, and assists in exploring alternative solutions. The mediator remains neutral throughout and may not impose his own judgment on the issues for that of the parties.

SCOMM

101A:34

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 as 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.

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

Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts²⁰ 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 decisions²² 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

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, *affirm*, 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 fraudulent²⁵ or evil²⁶ 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

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

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-

(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

clude
to con-
dam-
dam-
under
duct

dam-
d bat-
educ-

Cox v.
Bull v.
ysician
rdware
s disre-
ase in-

Miss.
ed 234
56, 197
arsons
d Divi-
S.W.2d

Arms,
1929,
1952,
931, 9
Misc.

s Co.,
at top
uct in-
ich is

rtson,
Pope,
Wood,

App.
tomo-
Utah
(ault);
5 Fla.
See
S.2d

S.E.
S.E.
202.

429,
L.Ed.
S.C.
190,
Minn.
5, 85

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 it⁴² 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 ac-

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. Holdford, 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.

tion, 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 condemned⁴⁷ 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

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. Grinnell 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 in to 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 on-

ly 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 5 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. Cofelt 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 said⁷³ 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

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,

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"

§ 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

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

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.

Volume 51, Number 5
OBSTETRICAL AND GYNECOLOGICAL SURVEY
Copyright © 1996 by Williams & Wilkins

SOUNDINGS

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

Jeffrey I. Komins* and Deborah J. Komins†

Department of Obstetrics and Gynecology, Memorial Hospital of Burlington County, Mount Holly, New Jersey

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 Rehnquist, 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.

266

Obstetrical and Gynecological Survey

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 med-

ical principles or in juried publications, a basis for an appeal will exist and the disciplinary action against the expert witness initiated.

REFERENCES

1. Angeli 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 sign 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)

Lead 810 P. 28162
re structure re
CFLS

Hazen V. Muni of
look up Arch

punitive of
#18 pte 456

look up

Dubert
V. Merrill Dow
125 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

who serve time in prison contribute to the in-

judgment of the superior court is REVERSED.



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 $\S$ 303

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

2. Statutes $\S$ 303

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

carceration costs incurred by the state.

3. Costs $\approx$ 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.

1. "An initiative is proposed by filing an application with the lieutenant governor." AS 15.45.020. The lieutenant governor shall review the

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." 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.

application and shall either certify it or notify the initiative committee of the grounds for denial." AS 15.45.070.

FR 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)."

Berner v. Wichman

Berner was a T.P. Def who could have, but did not, joined a 1st Tier gen'l Kior. At trial, Berner wanted to instruct the jury to determine the fault, allocated to that Kior, which was a nonparty.

CT held "parties" in 1509.17.0802 meant "party to the Xⁿ" and not "persons involved in the accident" (the core). or "all persons whose negl contributed to pl's injuries (red) CT in Carver"

Result was no apportioning of fault to the nonparty Kior.

nice

Q: pg 956-7: agree that CT holding legal opportunity is avail as a means of bringing in other parties into the Xⁿ is mere dicta, since the case appears to turn on definition of parties or is. At CT holding took open legal opportunity of fault by nonparty? A: probably not, since fault allocn only among parties to Xⁿ. Why did CT leave door open on legal opportunity?

into Xⁿ the Xⁿ bring other parties into Xⁿ = HCO

~~John C. Arnold 756~~

FN 44 Core
Arctic

6664

~~53~~

[Handwritten signature]

8928

7.6.97

Q. 1. State workers comp bd.

~~State works~~

Comp bd -

465-279

Adm, since 1988

purely economic leverage to hold under a double limit for time loss!

Levy

the loss

100

Handwritten signature: *James M. Smith*

1000

1300

No P & suffering
No loss of censor attention

NO LOSS of Tensile strength.

Avg awards =
J = 1995 Annual Regt =

RISK Mgmt AGS
- Start w/ Brad Thompson

~~Start w/ Brad Thompson~~

~~Kirsten Countess~~

Arch

269-5790

1. piece of resolved

Allice of Lawth

~~Check~~ ✓ disproportion

Feld was my best bet to go.

Alloc to nonpart, but
no alloc to erer

Cooper v. Regonist.

There's been reduced by
amt of pl's argument at elec
of state elec & hist w/
elec of BP.

- 100K W.C. to reg
- 100K C/XN V. BP

100K is reduced by
atlys $\frac{1}{3}$ contingent fee.
Trusty low. For years.

That part of allocn v.
ee

If do allocn to non party,
but no allocn to elec, ✓

miny = gentle entity -
Good Samaritan

= someone who can't
get sue on.

but allocate put there
who are here.

~~Govt v. Board~~

Comp. system.

~~Note added to~~

Gail Voghtlander 100
269-5100

It = when we're talking about
allocation of fault to companies,
we're talking about comparative
negl.

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

Reimbursement to elee under
23.30.015(g) interpreted to mean
that the elee's contingent fee
contract fees would be deducted
from the recovery of elee.

R: To prevent elee from being
unjustly enriched at expense of eee.

Lane v. Conklin Mchng.

where elee paid w.c. benefits
for elee, and sued Cherry picker
in 3rd party X, and where there
~~was an express warranty between~~
the Cherry picker and the elee,
the Ct held that the
~~exclusive~~ Cherry picker could
only show that elee was ~~at~~
totally at fault under AS09.17.080(a)(4),
but could not show that it
was partially at fault.

The Ct denied Cherry picker's
argument that under 9.17.080 it
could allocate partial fault to
elee.

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

Appropriateness of leverage

$PT = 8/6 = \underline{\underline{lien Amt}}$, not

$PT =$ what we're looking is
reducing amt of the
lien ✓

~~existing loan~~
See 9.2 $\$1,000,000$, ϵ pays 50k - 1/3%
cbr

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"

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).

brown /5 kendall /15 60 /5 292
jury /s instruct! /s "unavoidable accident" /s
permt! permissible allow!

§ 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

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 30, 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).

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 malpractice¹⁰ 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

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 approach¹³ 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 non-existent 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, conforming 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 454; *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, 554 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 prin-

ciples 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; Annot., 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); *Fried-*

man 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 malpractice²⁹ and products liability.³⁰

A statute of repose generally begins to run at an earlier date and runs for a longer period of time³¹ 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

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. Simons*, 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.

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 statutes³⁵ 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.

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.

u
[Jim's]

Working Copy No. 2: February 5, 1997
[Saved as "hb58sectional"]

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 ^{this section} is ~~originated with the Governor's Task Force on Civil Justice Reform~~ ^{taken} ("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 ^{is taken} ~~originated with the Governor's Task Force.~~ [✓] This section ~~amended AS 09.10~~ ^{by adding a} new section which imposes a three year statute of limitations on contract actions. ^{freq}

Section 4. **Statute of repose of eight years.** This section ~~amends AS 09.10 by~~ ^{adds a} adding a new section which generally imposes an eight year statute of repose. ^{add} 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.

space
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)~~ *ins 09.10.070 A two year SL on* 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, *and much of the language in this came by the*
[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.]

controlled by the
Section 7. **Limitation of actions involving injury to person or property.** This ~~new section provides~~ *New section ins 09.10.080* 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.

new
Section 8. **Noneconomic damages.** This ~~section~~ *new* 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 ^{new} 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 ^{greater} 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~~ ^{caps on} punitive damages would be four times compensatory damages, or \$600,000, ~~whichever is greater.~~ ^{greater} This exception was carved out to address the ~~concern~~ ^{proposal} of the Governor's Task Force ~~on this issue. The C.R.C. has failed to impose higher~~

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 ^{in 1995}. 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 ^{to} that an award for personal injuries is intended to include damages for death.

This section also includes in a new subsection (2) ^{which} 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)

- space

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~~ *by periodic payments*.

[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 agreement, 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(a)~~ 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, Executive 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 and other 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~~ ^{has been reached} 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. ^{at trial} 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). ^{at trial} 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.

placed plain English:

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 recommends 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. Alternative 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 arbitration. 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 designated 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 drugs. 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 burden 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 progress.

*Break
out
induly* 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 Section 39 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). *Ac R*

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

Section 53. **Prejudgment interest.** This section changes Civil Rule 78 to conform to the changes made to AS 09.30.070(c). *AK 27*

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

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

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

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

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 ophthalmologist, 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.

Alaska Opinion Service

Published by INFORMALASKA, INC.

907-563-4375

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0607, fax (907) 264-0878.

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
)

O P I N I O N

[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 ophthalmologist, 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	<u>\$47,000</u>
Total:	\$69,592

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

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

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. Sheldon, 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

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

²(...continued)

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

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)

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

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.

BISS & HOLMES
FACSIMILE TRANSMITTAL SLIP

DATE: January 28, 1997
TO: Honorable Brian Porter's Office
ATTN: James D. Sourant, Esquire
FAX NO: 465-3834
FROM: BISS & HOLMES FAX #: (907) 243-6695
SENDER: Roger F. Holmes, Esq.
RE: Tort Reform FILE NO. 3625

MESSAGE:

Please see the attached from Mr. Roger Holmes. Thank you.

TOTAL PAGES TRANSMITTED (Including this page) 17

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL: (907) 248-8013

The pages comprising this facsimile transmission contain confidential information from the office of Biss & Holmes. This information is intended solely for the use by the individual entity named as the recipient hereof. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this transmission is prohibited. If you have received this transmission in error, please notify us by telephone (collect if long distance) so we may arrange to retrieve this transmission at no cost to you.

**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., Respon-
dents/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