

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.42 SCOM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997

SITUATION A: AN EARTHQUAKE

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

1. The lower part of Grace's body is crushed under debris. She cannot walk, needs multiple operations, and is in terrible pain for two months.
 - a. Suppose Grace completes intensive physical therapy and eventually recovers the full use of her legs, without many scars. Should there be any limit on the amount of money she can recover for her pain and suffering?
 - b. Suppose Grace's injuries result in permanent paralysis from the waist down. Should there be any limit on her recovery for pain and suffering, loss of enjoyment of life, and other noneconomic injuries?
 - c. Suppose Grace can no longer have sex with her husband or play with her small children. If you think there should be a limit on the amount she can recover, should this limit include claims by her family for loss of companionship?
2. Suppose the building collapsed in the earthquake because the architect's design did not provide enough structural support to survive a mid-sized earthquake. The architect's design flaw was the direct cause of Grace's injury.
 - a. Should Grace and the building owner be able to sue the architect for negligence even though the negligence occurred twelve years ago? Is it fair to ever end the architect's liability at some point after building completion? If so, when?
 - b. Suppose this was the architect's last project before he retired. When he retired, he bought a malpractice insurance policy to cover any claims that might be made in the years following his retirement, but he could only find a policy good for seven years, so he is currently uninsured. Should the building owner and Grace still be able to sue him?
 - c. Suppose that in addition to the inadequate structural support, a cable broke during the earthquake. This allowed a heavy light fixture to fall on top of Grace, adding to her injuries. It is later discovered that the cable was defective and would not have broken if it had been manufactured properly. Should there be a time limit on how long Grace has to sue the manufacturer? When should the time start – when the building is built, or when the cable breaks?
 - d. Should Grace be able to sue the building's owner? Why or why not?

SITUATION B: MEDICAL MALPRACTICE

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

1. Dr. Johnson is an independent contractor at the hospital where Maggie went, as are many emergency room doctors in Alaska. They are not employees of the hospital but offer their services to patients who come to the emergency room under a contract with the hospital. The hospital reviews their credentials before it allows them to practice there and reviews their practice periodically, but it does not directly supervise their work.
 - a. Assume that Maggie can file a lawsuit against Dr. Johnson. Should Maggie be prohibited from suing the hospital for what she says was Dr. Johnson's negligence because he was not a hospital employee?
 - b. Should the hospital require the emergency room doctor to carry malpractice insurance?
 - c. Should the hospital be required to carry malpractice insurance to cover the emergency room doctor?
2. Suppose Maggie is only 10 years old when this happens, and her parents do not file a lawsuit against Dr. Johnson or the hospital. By the time Maggie reaches age 18, it is clear that her family cannot support her need for specialized care for the rest of her life.
 - a. Should Maggie be allowed to bring a lawsuit on her own behalf, even though 8 years have passed since Dr. Johnson treated her?
 - b. Does it matter why her parents didn't file the lawsuit at the time?
 - c. What if Dr. Johnson retired from practicing medicine two years after this event?
3. Suppose Dr. Johnson's examination was thorough and competent, and that he followed standard medical procedure in discharging Maggie when he did. Under current law, if Maggie loses the lawsuit she may be required to pay part of Dr. Johnson's attorney fees and costs.
 - a. Should Dr. Johnson be able to sue Maggie for damages, if Maggie did not have reasonable grounds for suing him?
 - b. Should Maggie pay all of Dr. Johnson's attorney fees and costs?
 - c. What other methods could the courts use to discourage weak lawsuits without discouraging meritorious ones?

SITUATION C: AUTOMOBILE ACCIDENT

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

1. Mrs. Smith sues both Frank and Bill. Assume that Mrs. Smith will win her lawsuit against Frank, because his behavior does not meet the standard of care that society expects from people.
 - a. Suppose Bill knew about Frank's DWI record and his license suspension. Should Mrs. Smith be able to sue Bill?
 - b. What if Frank appeared obviously drunk to Bill when he asked to borrow Bill's car?
 - c. Suppose Frank is also injured in the accident. Should he be able to sue Bill for lending him the car? Should he be permitted to sue the State of Alaska for poor road maintenance?
2. In certain situations current law allows those bringing the suit (the plaintiffs) to sue for punitive damages – i.e., damages designed to punish the defendant and discourage future misconduct. In Alaska, punitive damages can be awarded only if the conduct of the defendant is outrageous, or the result of hostile feelings toward the plaintiff, or shows reckless indifference to the rights or safety of others.
 - a. Do you think it makes sense to allow Mrs. Smith to sue Frank for punitive damage, to deter or punish him?
 - b. Does it make sense to allow her to sue Bill for punitive damages, to deter or punish him, if Bill knew about Frank's record and suspension? If Bill knew Frank was drunk when he borrowed the car?
 - c. Should there be a limit on the amount of punitive damages that can be awarded?
 - d. If Mrs. Smith is awarded punitive damages by the jury, should part of the award go to the State of Alaska general fund, so Mrs. Smith doesn't receive a windfall recovery?
3. Suppose the gas tank of Mrs. Smith's car exploded on impact because it was improperly designed. The engineers who designed the car suspected the gas tank design might occasionally result in explosions, but management decided that fixing the problem would increase the cost of the car and make it harder to sell. The manufacturer made and sold quite a few of these cars.
 - a. Should Mrs. Smith be able to sue the car manufacturer for punitive damages?

Governor's Advisory Task Force on Civil Justice Reform

- b. Should there be a limit on the amount of punitive damages? If so, should it be:
- a flat dollar amount?
 - related to the plaintiff's economic losses (medical bills, lost income)?
 - related to plaintiff's noneconomic losses (pain & suffering, loss of enjoyment)?
 - related to the profit the defendant makes on the misconduct?
 - related to the defendant's income or net worth?
 - different depending on the situation?

Appendix B

Court System Data

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

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

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

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

Alaska Court System Filings 1988-1995

Number of Personal Injury and Property Damage Cases

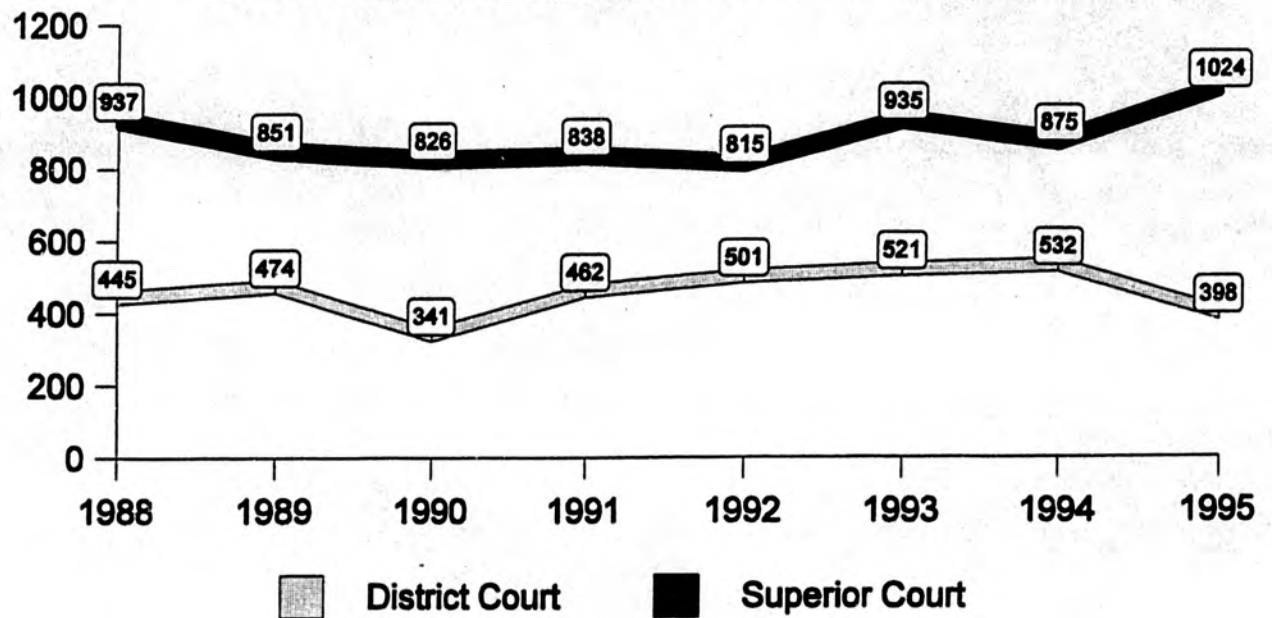


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data taken from Alaska Court System Annual Reports 1988-1995.

Alaska Court System Filings 1988-1995

Personal Injury and Property Damage Filings per 100,000 Population

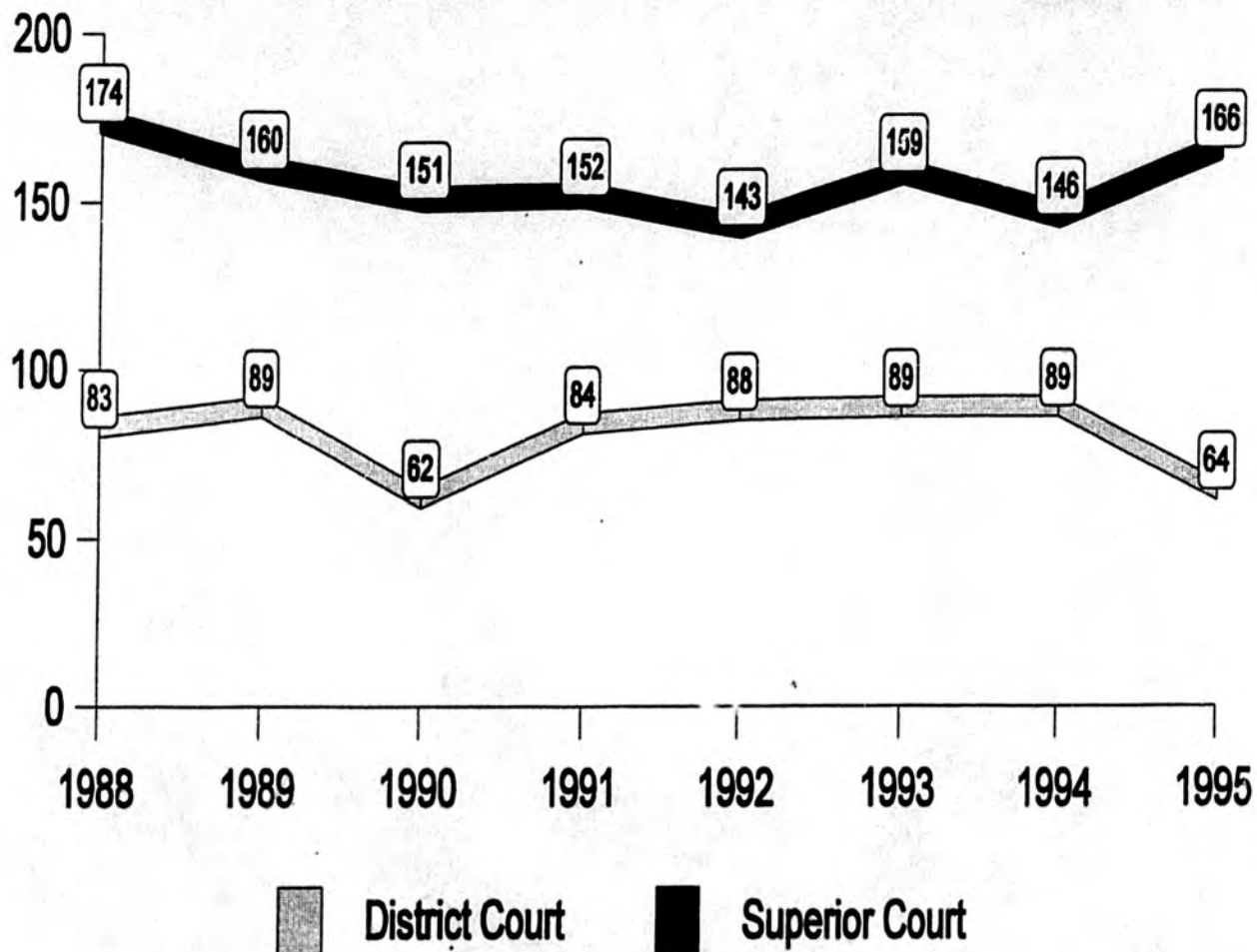


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data taken from Alaska Court System Annual Reports 1988-1995 and Alaska Department of Labor population statistics.

Alaska Court System Filings 1991-1995

Number of Personal Injury and Property Damage Cases

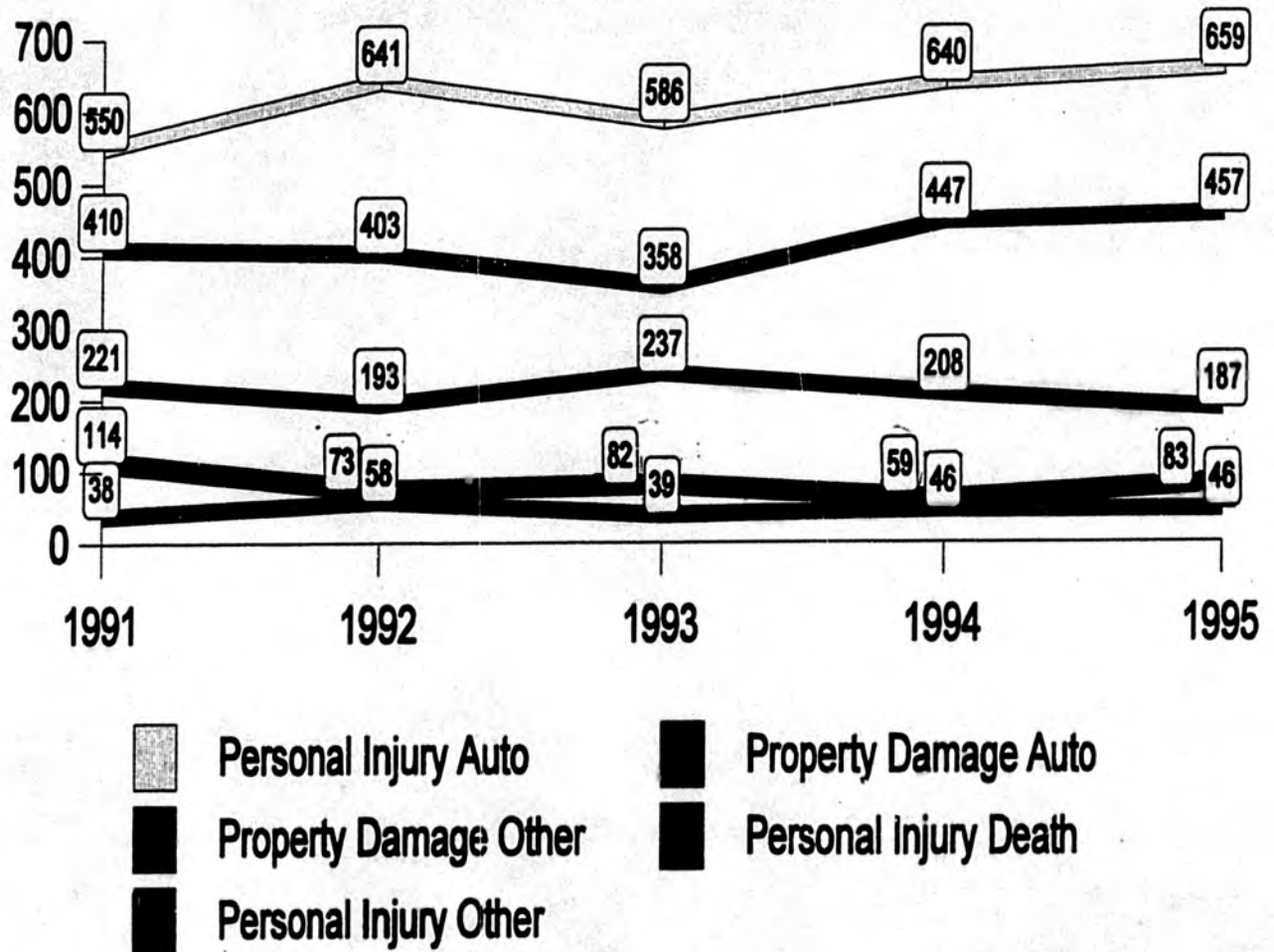


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data supplied by Alaska Court System Technical Operations August 9, 1996.

Alaska Court System Filings 1991-1995

Number of Automobile, Malpractice, and Other Personal Injury Cases

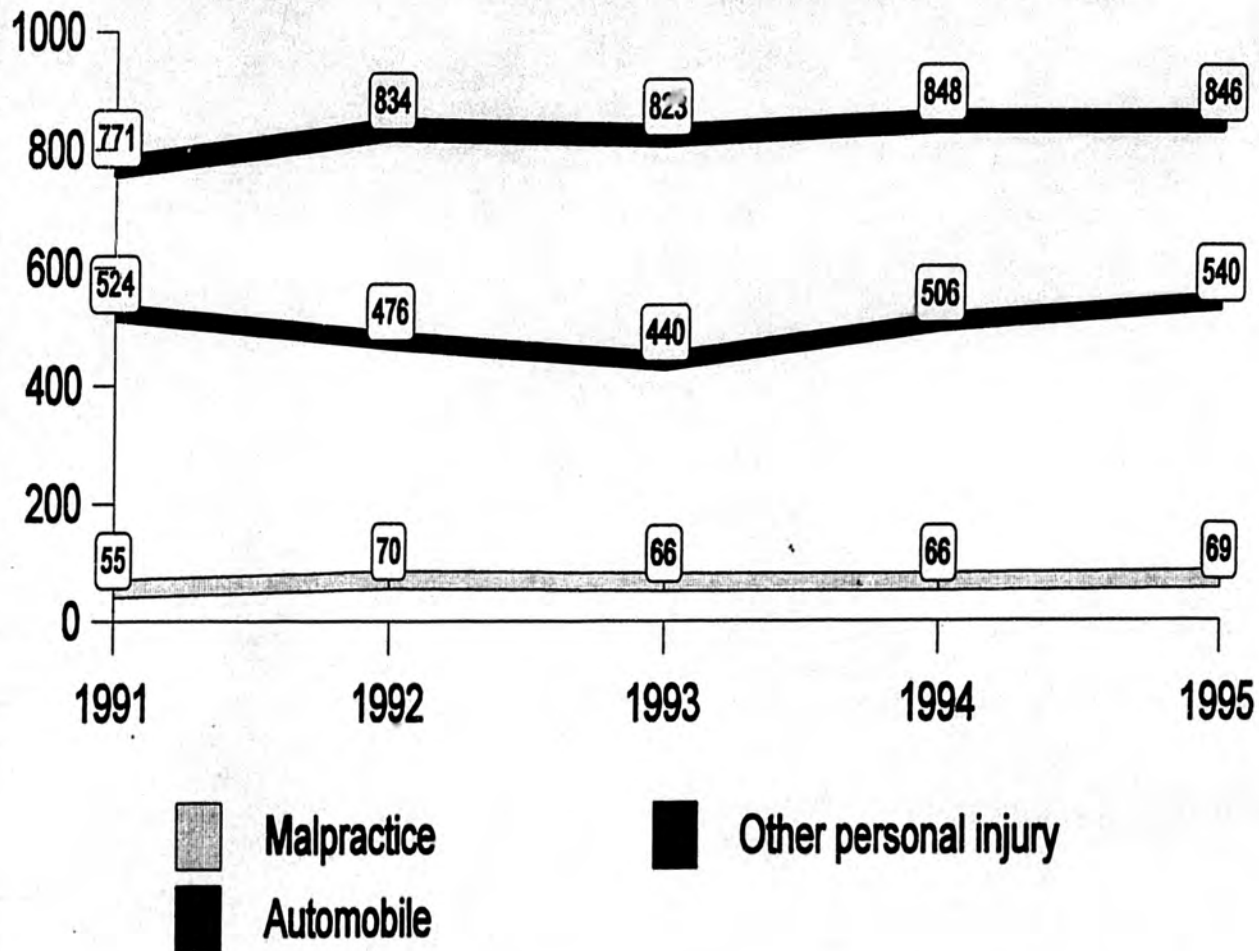


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data supplied by Alaska Court System Technical Operations August 9, 1996.

Alaska Court System Filings 1991-1995

Malpractice Filings

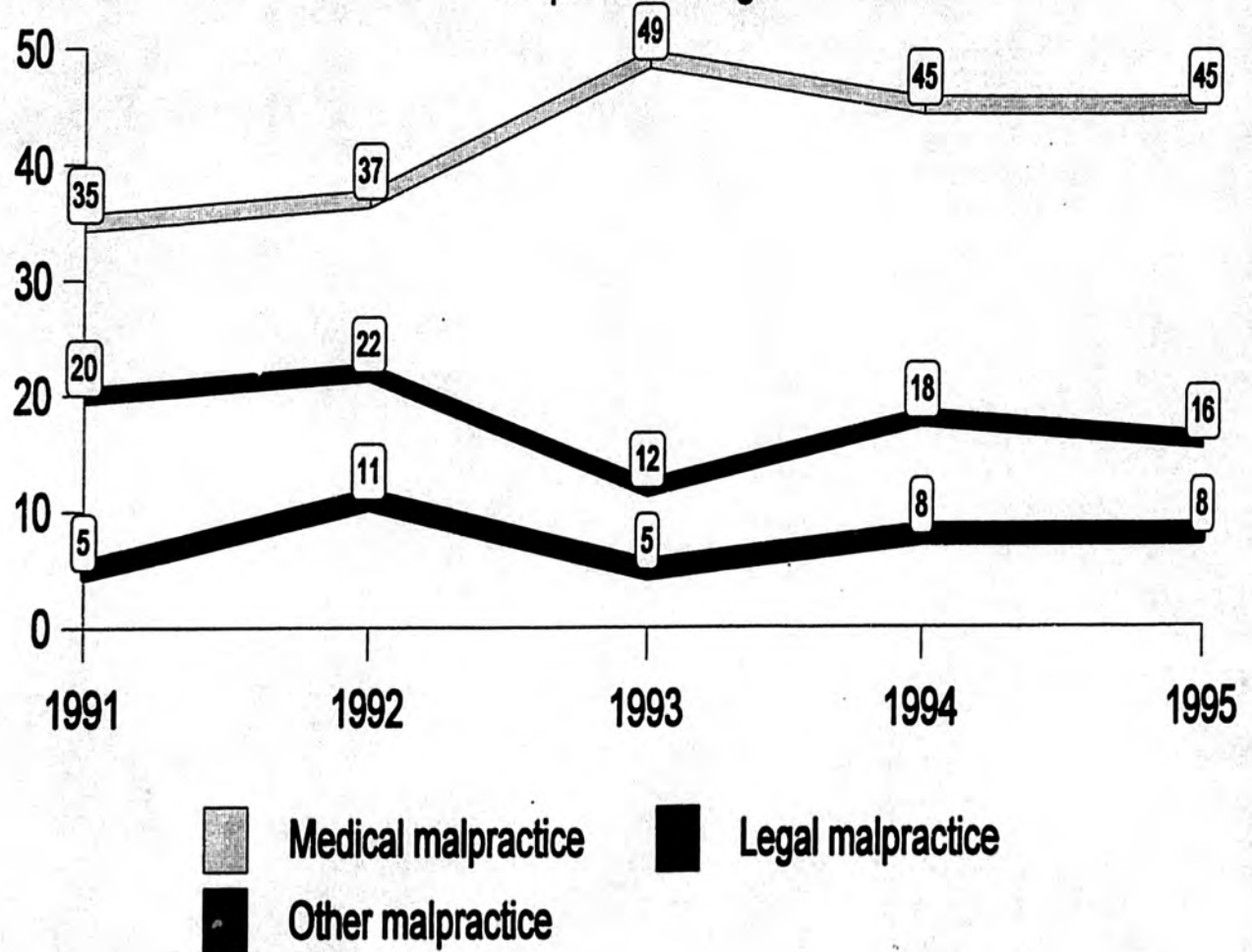


Table prepared by Alaska Governor's Advisory Task Force on Civil Justice Reform August 26, 1996. Data supplied by Alaska Court System Technical Operations August 9, 1996.

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Appendix C

Report from Alaska Judicial Council

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

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

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

Governor's Advisory Task Force on Civil Justice Reform



alaska judicial council

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MEMORANDUM

TO: Governor's Task Force on Civil Justice Reform

FROM: Susanne Di Pietro ^{SDD} and Teri Carns ^{TNC by SDD}

DATE: November 13, 1996

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

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

I. Methodology

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

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

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

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

II. Limitations of this Study

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

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

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

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

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

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

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

III. Findings

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

A. Case Types

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

B. Parties

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

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

C. Liability/Outcomes

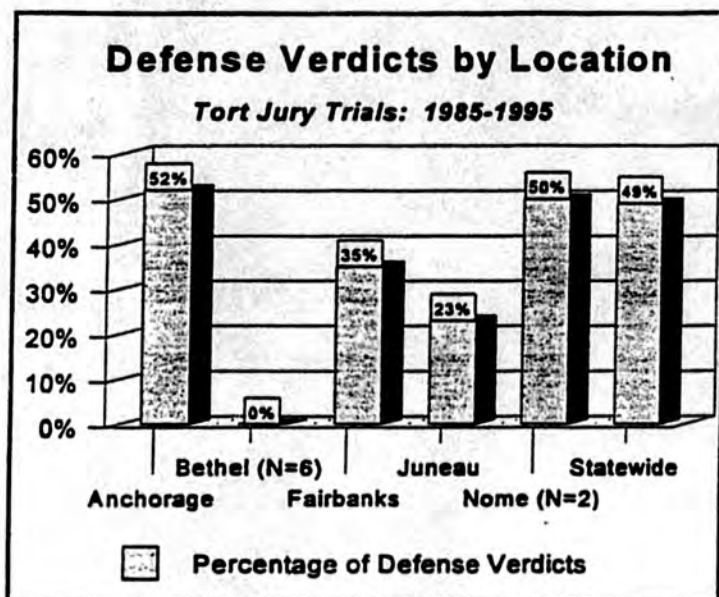


Chart 1
Alaska Judicial Council Jury Verdict Study 1996

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

Chart 1 graphically depicts the differences in defense verdicts by location. Bethel was the most plaintiff-friendly forum, with all six jury verdicts

going against defendants.⁸ Next came Juneau, where juries returned plaintiff verdicts in 77% of the cases examined. In Fairbanks, 56% of verdicts went to plaintiffs. In Anchorage juries returned verdicts for plaintiffs 45% of the time.⁹ In the two Nome cases, one was a defense verdict and one was for the plaintiff.

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

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

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

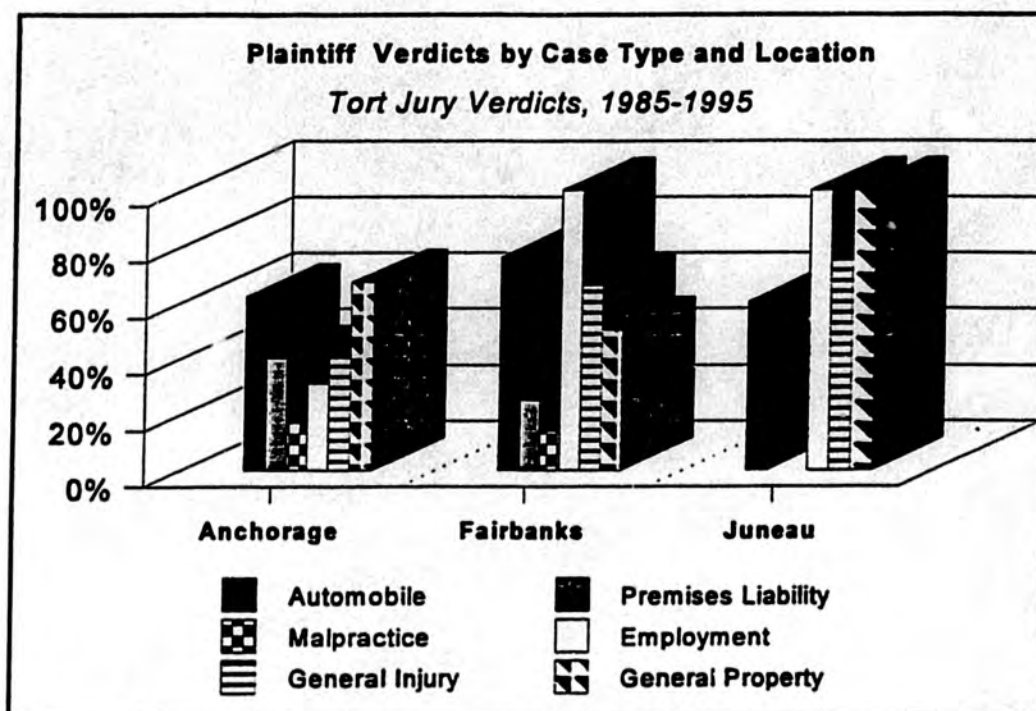


Chart 2
Alaska Judicial Council Jury Verdict Study 1996

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

D. Allocation of Fault

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

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

E. Damages

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

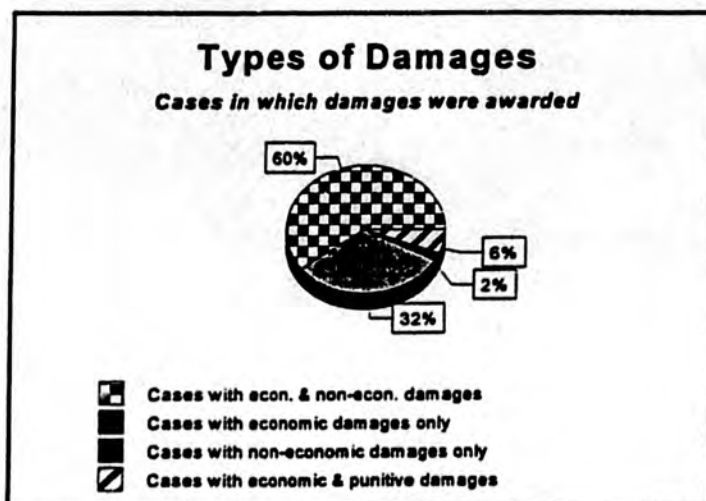


Chart 3
Alaska Judicial Council Jury Verdict Study 1996

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

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

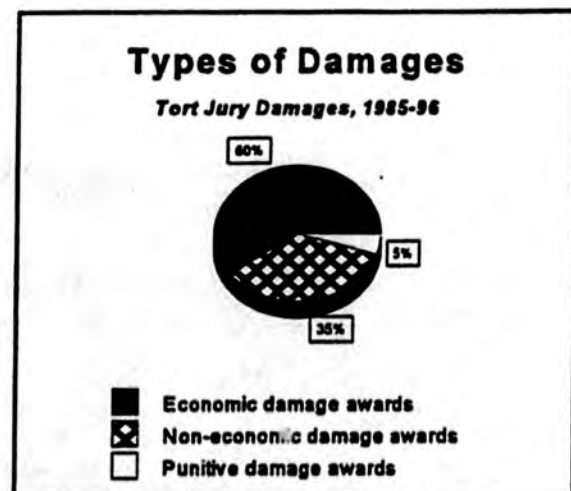


Chart 4
Alaska Judicial Council Jury Verdict Study 1996

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

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

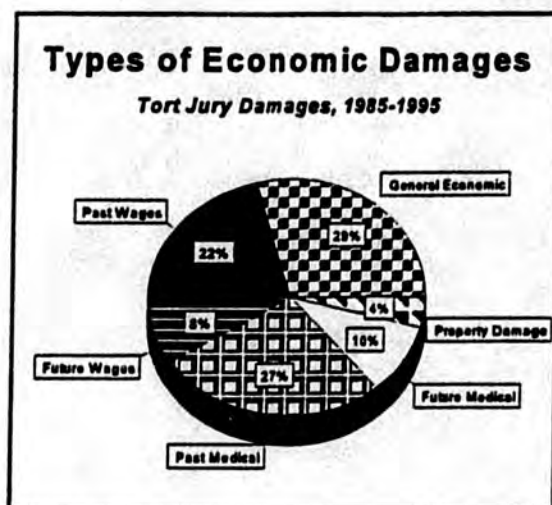


Chart 5
Alaska Judicial Council Jury Verdict Study 1996

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

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

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

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

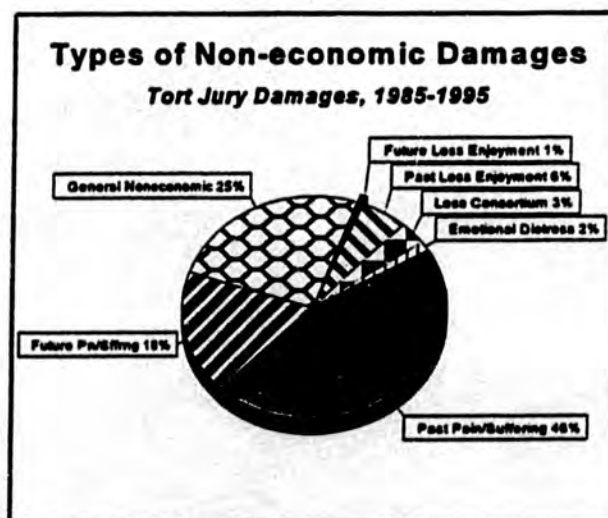


Chart 6
Alaska Judicial Council Jury Verdict Study 1996

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

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

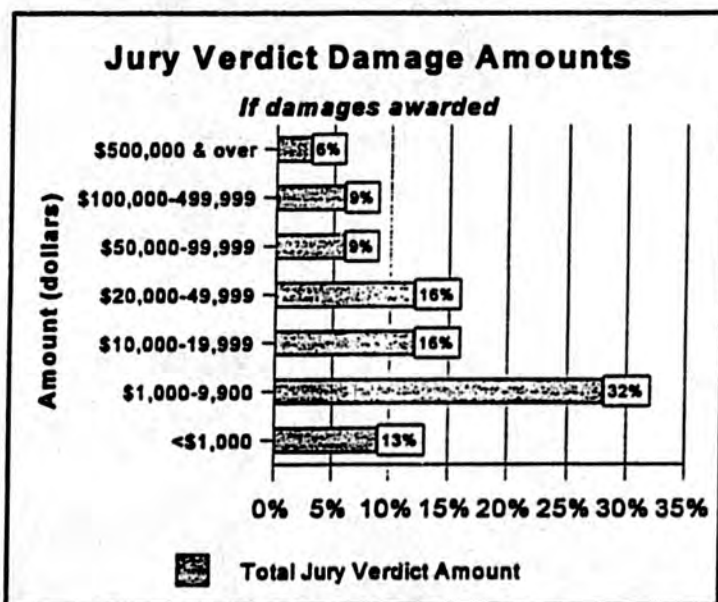


Chart 6
Alaska Judicial Council Jury Verdict Study 1996

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

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

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

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

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

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

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

Punitive Damage Awards: Anchorage, Bethel, Fairbanks, Juneau, Nome 1985-1995				
Case Type	Jury Compensatory Award (does not include fault allocation)	Jury Punitive Award	Appeal?	Appeal Outcome
Intentional Tort	\$3,025	\$250 and \$100 (one to each)	No	
Property	\$8,338	\$3,000	No	
Intentional Tort	\$4,387	\$5,000	No	
Insurance Bad Faith	\$1,001,087	\$10,000	Yes	Punitive damages reversed
Automobile	\$575	\$20,000	No	
Intentional Tort	\$87,934	\$20,000	No	
Intentional Tort	\$17,000	\$60,000	No	
Employment	\$112,273	\$132,000	Yes	Settled
General Injury	\$692,282	\$150,000	Yes	Settled
Personal Injury	\$738,765	\$150,000	Yes	Settled
Intentional Tort	Pl. won \$17,300 against def. 1. Def. 2 won \$23,500 against pl.	\$250,000	No	
Product Liability	\$3,004,500	\$500,000	No	
Employment/ defamation	\$303,604	\$500,000	No	
Insurance Bad Faith (automobile)	\$18,008	\$1,200,000	Yes	Punitive damages reversed
Intentional Tort (business dispute)	\$9,473,770	\$25,300,000	Yes	Settled

Table 1
Alaska Judicial Council Jury Verdict Study 1996

F. Costs and Fees

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

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

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

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

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

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

¹⁷ Fee awards were made to both plaintiffs and defendants.

G. Offers of Judgment

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

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

H. Appeals

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

I. Length of Cases

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

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

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

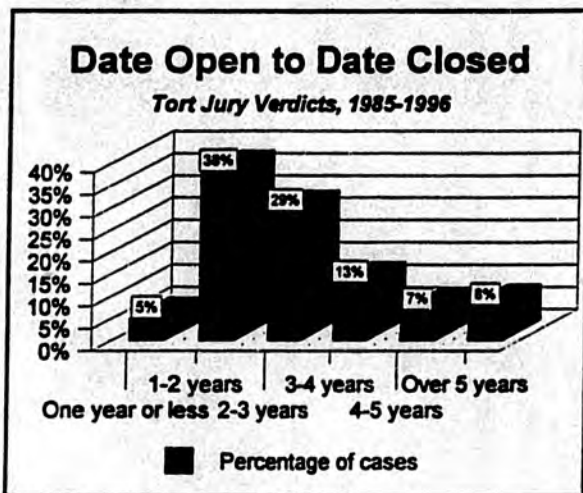


Chart 7
Alaska Judicial Council Jury Verdict Study 1996

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

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

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

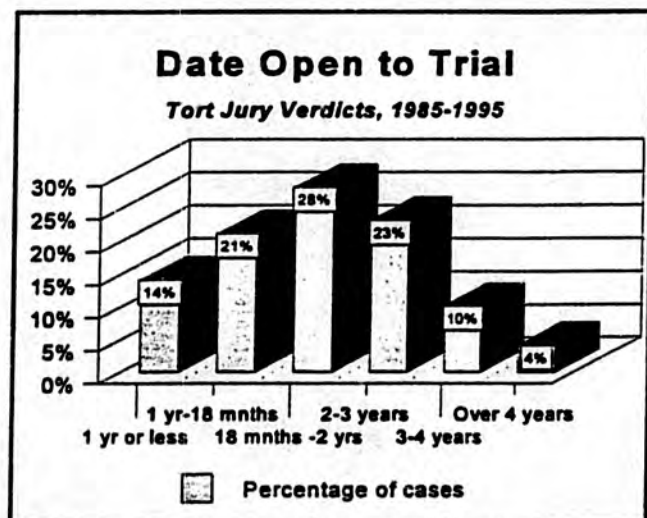


Chart 8
Alaska Judicial Council Jury Verdict Study 1996

J. Conclusion

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

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

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

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

Alaska Tort Jury Verdicts by Year¹

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

Alaska Judicial Council 1996

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

² Partial year figures.

Appendix D

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

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

Governor's Advisory Task Force on Civil Justice Reform

A CHRONOLOGY OF LEGISLATIVE TORT REFORM EFFORTS IN ALASKA¹

5TH LEGISLATIVE SESSION - 1967-68

ENACTED

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

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

6TH LEGISLATIVE SESSION - 1969-70

ENACTED

Ch. 80, SLA 1979 - Uniform Contribution Among Joint Tortfeasors Act - AS
09.16.010 - 09.16.060²

9TH LEGISLATIVE SESSION - 1975-76

ENACTED

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

Other Bills Filed:

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

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

² Repealed by 1988 Initiative.

Governor's Advisory Task Force on Civil Justice Reform

10TH LEGISLATIVE SESSION - 1977-78

ENACTED

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

Other Bills Filed:

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

11TH LEGISLATIVE SESSION 1979-80

ENACTED

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

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

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

12TH LEGISLATIVE SESSION - 1981-82

Bills Filed:

HB562 SB537	Clocks in (S) Judiciary	Repeal statute of repose on construction	(H) Jud (S) Jud
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A Chronology of Tort Reform Efforts in Alaska, 1967-1996

13TH LEGISLATIVE SESSION - 1983-84

Bills Filed:

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

14TH LEGISLATIVE SESSION - 1985-86

ENACTED

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

Other Bills Filed:

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

Governor's Advisory Task Force on Civil Justice Reform

15TH LEGISLATIVE SESSION - 1987-88

ENACTED

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

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

Bills Filed:

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

16TH LEGISLATIVE SESSION - 1989-90

Bills Filed:

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

A Chronology of Tort Reform Efforts in Alaska, 1967-1996

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

17TH LEGISLATIVE SESSION - 1991-92

Bills Filed:

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

18TH LEGISLATIVE SESSION - 1993-94

ENACTED

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

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

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

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

Governor's Advisory Task Force on Civil Justice Reform

Other Bills Filed:

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

19TH LEGISLATIVE SESSION - 1995-96

ENACTED

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

Other Bills Filed:

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

A Chronology of Tort Reform Efforts in Alaska, 1967-1996

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

Appendix E

Tort Law Vocabulary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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STATEMENT OF PRINTING COSTS

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BILL J. ALLEN
Chairman & CEO

March 18, 1997

Rep. Brian Porter
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Porter:

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

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

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

Very truly yours,

Bill J. Allen

BA:js

DAVID H. BUNDY, P.C.
CABOT CHRISTIANSON, P.C.
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March 18, 1997

Rep. Brian Porter
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Porter:

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

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

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

Three committee proposals, dealing with allocation of fault, statutes of repose, and alcohol- or drug-impaired plaintiffs, were not adopted by the Task Force.

Several proposals, relating to expert witnesses, claims against the State, collateral benefits, and hospital liability, were not approved by the committees which considered them.

The Task Force did not recommend any significant changes in the current limited cap on non-economic damages, such as for pain and suffering or loss of consortium.

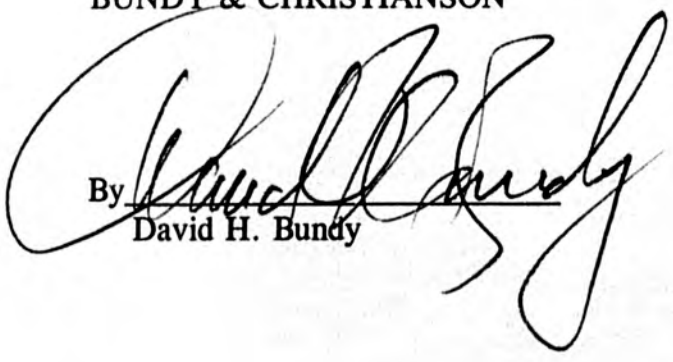
Rep. Brian Porter
March 18, 1997
Page 2

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

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

Very truly yours,

BUNDY & CHRISTIANSON

By 
David H. Bundy

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

Q: What worth 73 vote?
- who voted NO?

Q: BRIN - How stacked?
- BRIN get to vote??

Q: Call Roger Holmes

PT =

Q: Are they trying to get free
discovery of our thinking?

PT = Fact that TRIM they have
contributed generously to your
campaign they believe of
what you want that reform
to be. It could be said
that the Goss bill, under the
guise of TRIM reform, actually
increases the problems.

PT = Indeed in the course, we have
very little time to get this done,
& hope

Q: Call state farm ask re
why minor industry wasn't heard
from.

1-b/mes

JOS.

DRAFT

REPORT

DRAFT

OF THE

GOVERNOR'S
ADVISORY TASK FORCE
ON CIVIL JUSTICE REFORM



December 1996

OFFICE OF THE GOVERNOR
BOX 110XXX
JUNEAU, ALASKA
XXX

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Vice Chair Marlene Johnson, Huna Totem Heritage Foundation

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

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Senator Johnny Ellis - Damages Committee
Representative Brian Porter - Liability Committee
Brad Thompson, Director, Division of Risk Management - Liability Committee

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

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the Advisory Task Force on Civil Justice Reform
Chrystal Stillings Smith, Legal Administrator
Ann Wilde, Legal Secretary

Table of Contents

Executive Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

Governor's Advisory Task Force on Civil Justice Reform

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

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

Chapter 1

Task Force Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Governor's Advisory Task Force on Civil Justice Reform

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

Chapter 2

Previous Alaska Tort Reform Efforts

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

For injuries related to the design, planning, or construction of improvements to real estate, a statute of repose³ was enacted in 1967 as an exception to the general two-year statute of limitations. Under the 1967 statute of repose, a claim was barred unless brought within six years of the date of substantial completion of construction. An exception was made if the injury occurred in the sixth year – the claimant would have two years to file for that injury.⁴ Provisions specific to medical malpractice were added as Article 6 of AS 09.55. The new provisions listed the elements that needed to be proved to establish malpractice. A physician's standard of care was established to be that of physicians with the same expertise practicing in the same or a similar locality.

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

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

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

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

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

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

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

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

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

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

Major tort reform occurred during 1986. The bill that passed was one of five "omnibus" bills filed that session. The most significant change was a cap on noneconomic damages⁹ of \$500,000, except for damages related to disfigurement or severe physical impairment. The bill provided for jury itemization of damages between past and present, and among economic, noneconomic, and punitive types of damages.¹⁰ It also modified joint and several liability to apply some proportionality between the amount to be paid and the degree of fault, precluded damages for injuries during a claimant's commission of a felony, limited liability of nonprofit directors and officers, allowed reduction of a verdict by collateral source payments, limited awards of attorney fees to prevailing parties in certain contested cases, and provided for periodic payments of damage awards. The bill also amended provisions on offers of judgment, costs and attorney fees, and interest on judgments, including a new section on prejudgment interest. The bill codified the standard of proof for punitive damage awards of "clear and convincing evidence" that the state supreme court set in 1962 and the court's ruling on contributory fault.

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

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

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

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

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

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

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

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

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

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

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

Chapter 3

Research and Public Comment

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

- 1) evaluate any changes in the volume and type of civil liability case filings in the Alaska Court System and in amounts awarded by juries as damages;
- 2) review statutory civil liability and insurance reform measures in other states and assess the effects of those reforms;
- 3) analyze recent proposals for civil liability and insurance reform in Alaska;
- 4) review Alaska case law and statutes and assess the need to amend existing statutes and court rules;
- 5) invite written public comment and hold public hearings on civil liability, insurance reform, and related topics.

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

Those who sent information included the Institute for Civil Justice at RAND, the Brookings Institute, the National Center for State Courts, the Alaska

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

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

Dr. Hensler discussed the three goals of tort law: compensation of losses from injuries; deterrence of the behavior which leads to injuries; and fairness or corrective justice. With respect to compensation, she described a 1989 RAND study of 26,000 households showing that only 10 percent used the liability system to deal with medical losses following accidental injury. The rate of claiming was up to 50 percent in auto accidents, and down to 5 percent in products cases. She said that some studies show the claiming rate was gradually increasing. In the 1980s, the greatest increase in litigation was in "mass torts" such as asbestos and silicone breast implants. The rate of compensation is uneven; generally, the higher the loss, the lower the percentage of recovery. Transaction costs range from 33 percent for auto accidents to 60 percent for mass torts. Dr. Hensler discussed the balance between the social costs and benefits of using the court system for deterrence of unsafe behavior, finding a mix of good and bad effects. With respect to fairness, the public's attitude toward tort reform reflects an ambivalent attitude toward the civil justice system in general: while people disapprove of frivolous lawsuits and greedy lawyers, they still feel that individuals who are at fault should pay, and people do look to lawyers and the courts to right those wrongs.

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

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

Alaska judges and practitioners: At the first meeting, Judge Brian Shortell, former presiding judge of the Anchorage Superior Court, discussed allocation of fault, the statutes of limitations, medical malpractice cases, and damages. Supreme Court Justice Dana Fabe, chair of the court's civil rules committee, discussed the new Alaska Rules of Court pertaining to discovery and disclosure rules, including automatic disclosure of certain information, limitations on depositions and interrogatories, pretrial procedures, and sanctions. Teresa Williams, Assistant Attorney General, gave an overview of prior Alaska proposals to revise tort law, dating back to 1967.¹²

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

¹² This history is included in this report in Chapter 2 and Appendix D.

Court system data: The task force staff analyzed court system annual reports to determine if there have been any recent changes in filing patterns.¹³ The number of personal injury and property damage filings have stayed fairly constant since 1988. There has been a slight increase in the number of personal injury cases, while property damage, death, and malpractice claims have remained level. When the increase in personal injury claims is adjusted for the recent increase in the state's population, there is no apparent change in filing patterns at all. In 1993, Alaskans filed tort lawsuits at a rate of 159 per 100,000 population. This figure was at the low end of 28 states that the National Center for State Courts studied that year. The majority of personal injury cases filed in 1995 (58 percent) arose out of automobile accidents. Another 37 percent were general personal injury cases, and 5 percent were malpractice cases.¹⁴

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

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

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

¹³ Because of changes in the way the courts have categorized their cases, it is difficult to determine the number of tort filings before 1988. As the court computer system has come on-line, better data have become available. Since 1991, the courts have kept track of tort cases by eight different categories: automobile personal injury, automobile property damage, other personal injury, other property damage, wrongful death, medical malpractice, legal malpractice, and other malpractice.

¹⁴ Charts summarizing Alaska tort filings from 1988 to 1995 are found in Appendix B of this report.

but awarded in 6 percent. As a general rule the amount of damages was quite low. In 58 percent of superior court cases in which the juries returned awards of damages, each award was under \$50,000 (the superior court jurisdictional limit).¹⁵

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

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

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

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

¹⁵ The full text of the Judicial Council study is found in Appendix C of this report.

there should be limits on awards of punitive damages.¹⁶ After discussion, the groups shared their conclusions with each other. They learned about each other's differing perspectives and began to appreciate the difficult challenge facing those who are considering changes to Alaska civil liability law.

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

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

¹⁶ The three situations, public comment on them, and summaries of general public testimony are found in Appendix A of this report.

Chapter 4

Task

Proposals Adopted by ~~Full~~ Force

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

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

- structured caps on punitive damages,
- a stronger cap on noneconomic damages,
- a market rate of interest on judgments, and
- shorter statutes of limitation

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

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

To reduce frivolous lawsuits and defenses, the task force recommends

- increased fines for frivolous behavior by lawyers,
- restricting suits for injuries suffered during a felony, and
- clarifying liability for intentional acts

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

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

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

PURPOSE OF PROPOSED LEGISLATION

- * Sec. 1. PURPOSE. It is the purpose of this Act to
- (1) reduce the time and costs associated with civil litigation for civil litigants;
 - (2) improve access to justice for individuals and small businesses;
 - (3) provide for fair but not excessive compensation for persons injured through the fault of others;
 - (4) increase the predictability of case outcomes to reduce inappropriate litigation and settlement behavior;
 - (5) collect information on the civil justice system to inform the public policy debate on tort reform-related issues;
 - (6) collect information on the insurance industry to inform the public policy debate on tort reform-related issues.

STRUCTURED CAPS ON PUNITIVE DAMAGES

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

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

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

- (1) was outrageous;
- (2) was the result of malicious or hostile feelings towards the plaintiff; or
- (3) evidenced reckless indifference to the rights or safety of others.

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

- (1) the likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
- (2) the degree of the defendant's awareness of that likelihood;
- (3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's misconduct;
- (4) the duration of the misconduct and any intentional concealment of it;
- (5) the attitude and conduct of the defendant upon discovery of the misconduct;
- (6) the financial condition of the defendant; and
- (7) the total deterrent of other damages and punishment imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

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

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

more costly to defend, but efficient
Limitation!

No!

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

- (1) three times the amount of compensatory damages awarded to the plaintiff; or
- (2) the sum of \$500,000.

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

No!

- (1) the average net annual income earned by the defendant for the five years before the date of the trial; or
- (2) two times the amount of financial gain that the defendant received or expected to receive as a result of the defendant's misconduct.

EXHAUST!
GROSS OR NET?

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

No!
NO!

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

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

who exempted?

* Sec. 32. AS 09.17.020, as repealed and reenacted by sec. 6 of this Act, has the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to conduct a separate proceeding for the

new case?

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

Commentary

This proposal makes changes to AS 09.17.020 regarding punitive damages.

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

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

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

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

The task force considered whether part of any punitive damages award should be given to state government. The argument in favor of this proposal was

Business
not motivated
is so

But
punitive
can be
awarded for
less than
intentional
acts.

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

Att'y?
Answer is
to exempt
Att'y fees
from
recovery
except on
honor
basis?
OR 1/2 to
state!
1/2 to
injured
person.

STRONGER CAP ON NONECONOMIC DAMAGES

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

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

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

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

Commentary

This proposal makes changes to AS 09.17.010 regarding noneconomic damages.

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

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

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

While the terms "disfigurement and severe physical impairment" lack precision, the task force believed that attempting to define those terms (e.g., loss

Amend At?
multiple At?
litigate
in effect
No cap.

what 9?
PES?

of two limbs, combination of deafness and blindness, etc.) inevitably would omit injuries that warrant substantial compensation and create irrational distinctions between classes of injured victims. There is no evidence that Alaska courts have construed these terms in a manner that allows recovery of excessive damages for nonserious injuries.

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

throw
us
some.

MARKET RATE OF INTEREST ON JUDGMENTS

- * Sec. 9. AS 09.30.070(a) is amended to read:
- (a) Notwithstanding the provisions of AS 45.45.010, the [THE] rate of interest on judgments and decrees for the payment of money, including prejudgment interest, shall be determined in accordance with (c) of this section [IS 10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.
- * Sec. 10. AS 09.30.070 is amended by adding new subsections to read:
- (c) Except as otherwise provided in (a) of this section, the rate of interest on judgments and decrees for the payment of money is the rate for a five year constant maturity U.S. Treasury note published in the applicable Federal Reserve H.15 Statistical Release, plus one and one-half percent. This rate shall be the rate in effect as of the first business day of the month during which prejudgment interest begins to accrue under (b) of this section, and shall remain constant with respect to such claims until the judgment is satisfied. This rate of interest shall be determined by the Alaska Court System as of the first business day of every month.
- * Sec. 12. AS 09.50.280 is amended to read:
- Sec. 09.50.280. JUDGMENT FOR PLAINTIFF; PUNITIVE DAMAGES. If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with interest as provided under AS 09.30.070 [LEGAL INTEREST FROM THE DATE IT BECAME DUE] and without punitive damages.

Commentary

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

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

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

The task force chose the five-year U.S. Treasury Note rate plus 150 basis points (1½ percent) as the appropriate measure of interest. The five-year Treasury Note rate is a published rate that may be established by judicial notice and is a medium-term rate corresponding to the duration of many lawsuits. With the addition of 150 basis points, it fairly reflects the value of money to the plaintiff under prevailing market conditions. It equates to 7.35 percent as of December 2, 1996.

- ?
why not
5 yr note
rate?

SHORTER STATUTES OF LIMITATION

- * Sec. 2. AS 09.10.050 is repealed and reenacted to read:
Sec. 09.10.050. CERTAIN PROPERTY ACTIONS TO BE BROUGHT IN SIX YEARS. Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property.
- * Sec. 3. AS 09.10 is amended by adding a new section to read:
Sec. 09.10.065. CONTRACT ACTIONS TO BE BROUGHT IN THREE YEARS. Unless an action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, excepting those described in AS 09.10.040 or as otherwise provided by law. ?
- * Sec. 4. AS 09.10.070 is amended to read:
Sec. 09.10.070. ACTIONS FOR TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. A person may not bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) for taking, detaining, or injuring personal property, including an action for its specific recovery; (3) upon a statute for a forfeiture or penalty to the state; or (4) [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

Deleted "upon a statute for a forfeiture or penalty to the state"

Commentary

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

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

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

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

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

ALTERNATIVE DISPUTE RESOLUTION PROGRAM

- * Sec. 11. A.S. 09 is amended to add a new chapter to read:
CHAPTER 42. ALTERNATIVE DISPUTE RESOLUTION.

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

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

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

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

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

rewrite

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

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

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

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

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

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

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

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

- * Sec. 34. AS 09.42, as enacted by sec. 11 of this Act, has the effect of amending Alaska Rule of Civil Procedure 100 by making the mediation process mandatory for certain civil cases in the superior court, third judicial district, and by expanding the scope of the rule to include other forms of alternative dispute resolution in addition to mediation.

Commentary

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

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

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

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

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

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

The pilot program is being limited to the superior court and will exclude the following types of cases: divorce and dissolution; child custody and visitation; and cases where no defendant answers the complaint. This limitation will give the court system an opportunity to evaluate the impact of another task

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

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

IMPROVED SUPERIOR COURT FAST-TRACK PROCEDURES

- *Sec. 21. The lead-in to Alaska Rule of Civil Procedure 16.1(c) is amended to read:

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

- * Sec. 22. Alaska Rule of Civil Procedure 16.1(k)(4) is repealed.

- * Sec. 23. Alaska Rule of Civil Procedure 16.1(n) is repealed and reenacted to read:

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

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

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

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

(4) whether a scheduling conference is unnecessary;

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

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

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good