

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.43 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997

faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

Commentary

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

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

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

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

STREAMLINED DISTRICT COURT PROCEDURES AND HIGHER JURISDICTIONAL LIMITS

*Sec. 20. AS 22.15.030(a) is amended to read:

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

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

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

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

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

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

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

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

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

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

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

* Sec. 28. District Court Civil Rule 1(a)(1) is amended to read:

(1) The procedure in civil actions and proceedings before district judges and magistrates shall be governed by the rules governing the procedure in the superior court to the extent that such rules are applicable. **However, unless otherwise agreed by all parties or permitted by order of the court in exceptional cases and for good cause shown, discovery shall be limited to the disclosures required under Civil Rule 26(a) and to the taking by**

each party of the deposition of the opposing party (or parties) and of one additional person.

* Sec. 29. District Court Civil Rule 4 is amended by adding a new subsection to read:

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

Commentary

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

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

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

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

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

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

ENCOURAGING OFFERS OF JUDGMENT

- * Sec. 8. AS 09.30.065 is amended to read:
Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 and accrued up to the date judgment is entered shall be adjusted as follows:

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

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

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

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

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

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

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

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

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

* Sec. 25. Alaska Rule of Civil Procedure 68 is repealed and reenacted to read:

Rule 68. Offer of Judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- * **Sec. 33.** AS 09.30.065, as amended by sec. 8 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by altering the manner in which interest under AS 09.30.070 is adjusted when a judgment is not more favorable to the offeree than the offer.

Commentary

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

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

enhancements or penalties are the same whether the offer is made early or late in the case.

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

OK

MEDICAL ADVISORY PANEL IMPROVEMENTS

- * **Sec. 14.** AS 09.55.536(c) is amended to read:
- (c) Not more than 30 days after selection of the panel, it shall make a written report to the parties and to the court, answering the following questions and other questions submitted to the panel by the court in sufficient detail to explain the case and the reasons for the panel's answers:
- (1) Why did the claimant come to medical care [WHAT WAS THE DISORDER FOR WHICH THE PLAINTIFF CAME TO MEDICAL CARE]? OK
- (2) Was a correct diagnosis made? If not, what was incorrect about the diagnosis [WHAT WOULD HAVE BEEN THE PROBABLY OUTCOME WITHOUT MEDICAL CARE]? OK
- (3) Was the treatment or lack of treatment [CHOSEN] appropriate [FOR THE CASE]? If not, what was inappropriate about the treatment or lack of treatment?
- (4) Was the claimant harmed (injured) during the course of evaluation or treatment or by failure to diagnose or treat [DID AN INJURY ARISE FROM THE MEDICAL CARE]? OK
- (5) If the answer to Question 4 is "yes", what [WHAT] is the nature and extent of the medical injury?
- (6) What specifically caused the medical injury?
- (7) Was the medical injury caused by unskillful care? Explain.
- (8) If a medical injury had not occurred, what would have been the likely outcome of the case [HOW WOULD THE PLAINTIFF'S CONDITION DIFFER FROM THE PLAINTIFF'S PRESENT CONDITION]? OK
- * **Sec. 15.** AS 09.55.536(f) is amended to read:
- (f) Discovery may not be undertaken in a case until the report of the expert advisory panel is received or 60 days after selection of the panel, whichever first occurs. However, the court may relax this prohibition upon a showing of good cause by any party. If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant it an additional 30 days.
- * **Sec. 26.** Alaska Rule of Civil Procedure 72.1(g) is amended to read:
- (g) **Discovery.** Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until 60 days after selection of the panel [80 DAYS HAVE ELAPSED FROM THE DATE THE CASE IS AT ISSUE], whichever is first to occur, unless discovery is further stayed for good cause by order of the court.

- * Sec. 35. AS 09.55.536(f), as amended by sec. 15 of this Act, has the effect of amending Alaska Rule of Civil Procedure 72.1(g) by changing the duration of the stay on further discovery when an expert advisory panel is appointed to evaluate a health care malpractice claim.

Commentary

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

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

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

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

ACCESS TO THE MEDICAL ADVISORY PANEL FOR STATE HEALTH CARE PROVIDERS

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

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

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

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

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Commentary

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

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

why?

INCREASED FINES FOR FRIVOLOUS BEHAVIOR BY LAWYERS

- * Sec. 27. Alaska Rule of Civil Procedure 95(b) is amended to read:
- (b) In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed \$10,000.00 [\$1,000.00] against any attorney who practices before it for willful failure to comply with these rules or any rules promulgated by the supreme court.

Commentary

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

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

The task force considered and rejected the provisions of the final version of HB 158¹⁷, passed by the legislature last year, which were purportedly aimed at further deterring frivolous litigation. None of those provisions would likely have had any significant additional deterrent effect. Each provision had fundamental flaws and, if enacted and used by litigants, would seriously complicate and expand litigation, imposing additional burdens and expenses on the parties.

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

In short, the frivolous litigation sanction and deterrent provisions in the final version of HB 158 would have the principal effect of creating more trouble

¹⁷ The version vetoed by the Governor was SCS CSHB158(RLS) amS (ct rls fld 5).

and expense for civil litigants. That result would not further the cause of civil justice reform.

The consensus of the task force is that little litigation is wholly frivolous, lacking a reasonable basis in law and fact. However, some litigation conduct – e.g., motions made or positions taken – lacks substantial merit or is otherwise improper. Judges polled thought that sanctions currently available to punish such conduct are adequate. Under the current rules a court may require a party (or his or her attorney) to pay costs and attorney fees to another party faced with frivolous or otherwise improper litigation conduct; the court also may punish litigants and attorneys with contempt sanctions for such conduct.

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

RESTRICTING SUITS FOR INJURIES SUFFERED DURING A FELONY

- * Sec. 17. AS 09.65.210 is repealed and reenacted to read:
- Sec. 09.65.210. DAMAGES RESULTING FROM THE COMMISSION OF A FELONY. (a) A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person
- (1) was engaged in the commission of a felony, and the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the felony substantially contributed to the personal injury or death;
 - (2) was engaged in the commission of an unclassified felony or a class A or class B felony for which the person was not convicted if
 - (A) the felony substantially contributed to the injury or death;
 - (B) the person was not acquitted of the felony; and
 - (C) the felony is proven by the defendant in the civil trial by clear and convincing evidence; or
 - (3) was fleeing from the commission of an unclassified felony or a class A or class B felony, or was being apprehended for an unclassified felony or class A or class B felony, if
 - (A) the felony or flight or the person's conduct during the apprehension, as the case may be, substantially contributed to the injury or death;
 - (B) the person was not acquitted of the felony; and
 - (C) the felony is proven by the defendant in the civil trial by clear and convincing evidence.
- (b) This section does not affect a right of action under 42 U.S.C. § 1983.

Commentary

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

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

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

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

CLARIFYING LIABILITY FOR INTENTIONAL ACTS

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

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

Commentary

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

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

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

SETTLEMENT INFORMATION

- * **Sec. 19.** AS 09.68 is amended by adding a new section to read:
- Sec. 09.68.130. **COLLECTION OF SETTLEMENT INFORMATION.** (a) Except as provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate information relating to the compromise or other settlement of all civil litigation. The information, including the case name and file number, a general description of the claims being settled, the dollar amount of the settlement, to whom it is to be paid, and any nonmonetary terms, shall be collected on a form developed by the council for that purpose.
- (b) The information received by the council under (a) of this section is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow the identification of particular cases or parties.
- (c) The requirements of (a) of this section do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.
- * **Sec. 30.** Alaska Rule of Appellate Procedure 511 is amended by adding a new subsection to read:
- (e) **Settlement Information.** When a dismissal under (a) or (b) of this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A dismissal by agreement under (a) of this rule must be accompanied by a certification signed by the attorneys of record for all parties that the information required under AS 09.68.130 has been submitted to the Judicial Council. A dismissal by the appellant or petitioner under (b) of this rule must be accompanied by such a certification signed by the appellant's or petitioner's attorney of record. The requirements of this subsection do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.
- * **Sec. 24.** Alaska Rule of Civil Procedure 41(a) is amended by adding a new paragraph to read:
- (3) *Scheduling Order.* When a voluntary dismissal under this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A notice of dismissal under (1)[a] of this subsection must be accompanied by a certification signed by or on behalf of the plaintiff that the

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

Commentary

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

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

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

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

Although the task force recognizes that state legislation cannot require parties litigating in federal court in Alaska to make comparable disclosures of

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settlement information, the task force suggests that the Judicial Council explore whether the Federal District Court might consider adopting changes to its local rules of practice to allow collection of the same information in federal cases.

COLLECTION OF MORE DETAILED INSURANCE INFORMATION

- * Sec. 31. INSURANCE REPORT. (a) The division of insurance shall compile information necessary to evaluate
- (1) the impact of the measures enacted in this bill on the availability and cost of insurance in the state; and
 - (2) the financial health and profitability of the insurers' business in the state.
- (b) Beginning June 1, 1999, the information compiled under (a) of this section shall be reported to the legislature annually.
- (c) The division of insurance shall adopt regulations requiring insurers doing business in the state to provide information necessary for the division to carry out its responsibilities under (a) of this section. That information shall be for Alaska and shall include premiums, claims paid, expenses of claims, and an allocation of investment profits or losses by line of business written in Alaska. The information shall be compiled in a way that protects the identity of individual insureds.
- (d) The division of insurance may consult with the Alaska Judicial Council when determining what information to require under (c) of this section and when carrying out the compilation required under (a) of this section.

Commentary

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

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

Therefore, the task force recommends that the Division of Insurance adopt regulations requiring most insurers to report information regarding premiums and claims, by line of business written in Alaska. Recognizing that looking only at premiums collected and claims paid does not provide a complete picture of an insurer's profitability in doing business in Alaska, the task force also proposes that the division obtain information regarding that portion of the insurers' investment

experience attributable to their Alaska business. The legislature can use this information to evaluate the impact of tort reform-related measures on the availability and cost of insurance in Alaska, as well as the financial well-being of insurers doing business in the state. The Division of Insurance is expected to compile the information and make it publicly available, but is not required to perform the analysis.

The task force recognizes that there is a delicate balance between careful regulation of existing insurers and the risk that existing insurers will withdraw from the market, leaving Alaska consumers and businesses without the protection of insurance. The Division of Insurance should develop its regulations to avoid significant disruption to the existing market. In developing the regulations, the division may consult the Alaska Judicial Council on civil justice research issues.

MISCELLANEOUS PROVISIONS, INCLUDING EFFECTIVE DATES [TO BE REPLACED BY RON LORENSEN]

* **Sec. 36. SEVERABILITY.** Under AS 01.10.030, if any provision of this Act, or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

* **Sec. 37. APPLICABILITY.** (a) Secs. 8 — 16, 20 — 23, and 25 — 29 of this Act apply to all civil actions filed on or after the effective date of this Act.

(b) Secs. 8 — 16, 20 — 23, and 25 — 29 of this Act apply to all causes of action accruing on or after the effective date of this Act.

* **Sec. 38.** Secs. 24 and 30 of this Act take effect on January 1, 1998.

* **Sec. 39.** Except as provided in sec. 38 of this Act, this Act takes effect immediately under AS 01.10.070(c).

Commentary

The task force proposals become applicable on different dates. Some proposals apply to cases that are filed on or after the effective date of the proposed legislation. These are proposals that do not affect the parties' substantive rights, but are designed to streamline court processes, improve access, and cut costs. These include the proposals for superior court fast track pretrial procedures (secs. 21, 22, and 23), encouraging offers of judgment (secs. 8 and 25), streamlined district court procedures and higher jurisdictional limits (secs. 20, 28, and 29), medical advisory panel improvements (secs. 14, 15, and 26), access to medical advisory panels for state health care providers (secs. 13 and 16), and increased fines for frivolous behavior by lawyers (sec. 27).

Some proposals apply to causes of action that accrue on or after the effective date of the proposed legislation. These are proposals that affect substantive rights to bring a cause of action, to seek a certain amount of damages, or to be subject to a certain defense. These include the proposals for restricting suits for injuries suffered during felonies (sec. 17), structured caps on punitive damages (sec. 6), liability for intentional acts (sec. 7), shorter statutes of limitations (secs. 2, 3, and 4), and a stronger cap on noneconomic damages (sec. 5).

The proposal on alternative dispute resolution (sec. 11) contemplates that cases filed on or after January 1, 1998, will be subject to assignment to ADR procedures. This delay gives the court system time to develop screening criteria for cases and a pool of qualified mediators. The Alaska Judicial Council has until March 31, 1998, to make its first report on the program.

*Jeff F.
Please
review*

The change in the rate of interest on judgments (secs. 9, 10, and 12) applies to cases in which the defendant receives service of process or other written notice of the claim on or after the effective date of the proposed legislation. This date is intended to be consistent with the date on which prejudgment interest begins to run under AS 09.30.070. The rate of postjudgment interest is the same as the rate of prejudgment interest for each case.

Under the proposal for collection of settlement data, the requirement that the Judicial Council develop a form to receive this information (sec. 19) will apply on or after the effective date of the proposed legislation. However, it will take the Judicial Council some period of time to develop the form and establish the internal procedures it needs to collect this information. Accordingly, the effective date of the related court rule changes (secs. 24 and 30) is delayed until January 1, 1998, so that the council can establish its procedures in an orderly fashion. The requirement will apply to all cases dismissed on or after that date, regardless of when they were filed or when the cause of action accrued.

Under the proposal for collection of insurance data (sec. 31), the Division of Insurance is required to adopt regulations requiring insurers to provide information to the division and to present that information in an annual report to the legislature. The division's duty to start the regulatory process begins on or after the effective date of the proposed legislation, while the first report is scheduled for June 1, 1999.

WRONGFUL DISCHARGE - [note, where does this go??]

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

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

Accordingly, the task force recommends that the issue of a cap on front pay in wrongful discharge employment cases be addressed in the broader context of employment law, along with the collateral and intangible claims that plaintiffs often raise in such cases. Avenues of future inquiry might include statutory language similar to 42 U.S.C. § 1981(a), a statutory definition of employment at will, review of issues related to the covenant of good faith and fair dealing, and consideration of the collateral claims of protected classes.

Chapter 5

Proposals Rejected by Task Force

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

These proposals recommended

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

STATUTES OF REPOSE

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

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

A chart summarizing the current statutes of repose for design and construction in other states was distributed to the task force, showing that the statutory period in most states is 10 years or less. Nonetheless, several members had serious reservations about reducing the statute of repose for design and construction actions from 15 to 10 years, in part because the 15-year statute of repose was enacted as a compromise reduction in 1994. While recognizing that any statute of repose is arbitrary by nature, several members expressed concern with the proposed reduction, especially given the hardship this could cause to children injured at a young age who would lose their right to recovery while still quite young. It was also noted that the Alaska Supreme Court has called into question the validity of any statute of repose. See *Hanebuth v. Bell Helicopter Int'l*, 694 P.2d 143, 147 (Alaska 1984), in which the court stated: "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has a reasonable opportunity to do so."

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

the issue, the motion to adopt the amended changes to the statute of repose failed.

ALLOCATION OF FAULT

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

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

However, others on the task force felt that an additional wrongdoer should be added to the lawsuit by the defendant, not the innocent victim. Allocation of fault to nonparties is a foreign concept to American courts, which depend on the adversarial process to arrive at the truth. If a defendant is allowed to argue that someone not present in court is responsible for the harm to the plaintiff, the plaintiff is forced to present his own case and to defend the "empty chair." Some members were also concerned that the proposal would increase the number of

additional defendants, thus increasing the cost and complexity of litigation for all concerned.

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

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

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

ALCOHOL- AND DRUG-IMPAIRED PLAINTIFFS

The liability committee considered the problem of lawsuits filed by people who are partly responsible for their own injuries because their judgment or coordination was impaired by alcohol or drugs. It discussed whether a new section should be added to AS 09.65 to create a defense to such lawsuits, but ran out of time to finalize a proposal. The full task force asked staff to develop such a proposal, but ultimately rejected it.

The proposal was based on a Michigan statute creating an absolute defense to a lawsuit where the plaintiff was impaired by alcohol or drugs. If the defendant could show that the accident was more than half the fault of the

Proposals Rejected by Task Force

intoxicated plaintiff, the plaintiff would recover nothing. The proposal incorporated the presumption of .10 for alcohol intoxication. The defense applied only to operation of motor vehicles, snowmachines, boats, and aircraft. Members rejected an amendment to broaden the defense to cover all injuries. The proposal did not allow this defense to be used by license holders selling alcoholic beverages.

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

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Governor's Advisory Task Force on Civil Justice Reform

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Chapter 6

Proposals Rejected in Committee

This chapter contains proposals that were discussed by the committees but failed to advance for consideration by the full task force. The commentary describes the issues the committees considered and the reasons why they decided not to recommend changes in the current law.

These issues were

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

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

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SETTING STANDARDS FOR QUALIFICATIONS OF EXPERT WITNESSES

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

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

IMPOSING A SLIDING SCALE FOR CONTINGENCY FEES

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

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

CONVERTING CLAIMS STATE EMPLOYEES TO CLAIMS AGAINST THE STATE

The procedures committee considered a proposal to provide that claims against state employees be converted to claims against the state, similar to the procedure used under the Federal Tort Claims Act. The effect of this provision would be to make claims against the state the sole avenue for pursuing claims

based on the actions or inactions of individual state employees, provided the employee acted within the scope of employment.

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

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

CHANGES RELATING TO COLLATERAL BENEFITS

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

The damages committee considered whether the jury should be informed that someone else already has paid the plaintiff's medical bills and lost wages. The committee saw no evidence that the existing law leads to injustice through double recoveries or windfalls to plaintiffs, nor any inherent benefit in having juries perform a calculation that judges now do as a matter of law. The committee also saw no reason to interfere with the subrogation rights of insurers and state programs. The committee noted that although restricting recovery of collateral benefits might reduce the costs of liability insurance, it would be at the cost of increasing the price of health insurance and other forms of coverage. The committee unanimously concluded that the current law should be left as it is; as a result, the task force did not take up the issue.

PERIODIC PAYMENTS

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

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

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

HOSPITAL LIABILITY FOR CONTRACTORS

Under current law, hospitals are liable for the negligent acts of emergency room physicians working on contract. Many emergency room physicians are independent contractors, not employees of the hospital, and it has been suggested that the hospital should not have to bear the responsibility of directly supervising them. The liability committee considered the nature of the work and the employment relationship, the reasonable expectations of patients, the costs of malpractice insurance, and public comment on the issue.

The committee initially recommended that hospitals be relieved of liability for the negligence of contract emergency room physicians, but be required to require the physicians to carry malpractice insurance as a condition of their contracts. The liability committee recommended that the physicians be required to purchase malpractice insurance with limits of \$1 million per claim, \$3 million

annual total claims. The hospitals would also have been required to exercise reasonable care in determining whether the physicians were qualified to practice in the hospitals and to review the physicians' standards of practice on a regular basis. The committee considered whether the hospitals should be required to post or publish notices explaining the limits of their liability. It concluded that such a requirement would be meaningless, given that patients use emergency rooms when they need immediate attention and their options for going elsewhere are usually limited.

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

Governor's Advisory Task Force on Civil Justice Reform

Chapter 7

Recommendations for the Future

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

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

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

Data collection and evaluation: As part of its efforts to improve access to justice, the task force recommended an extensive program of alternative dispute resolution to resolve cases early in the litigation. Although alternative

dispute resolution programs are well established in other jurisdictions, the Alaska program will need to be evaluated on a yearly basis to ensure it is serving the purposes for which it was designed, to make modifications, and to see whether it should be made available statewide. Because settlement information is confidential, little is currently known about how most cases are concluded and why. The task force recommends that settlement data be collected and evaluated on an ongoing basis, to allow a complete understanding of current and future tort reforms. Similarly, the task force was frustrated by the lack of insurance information available and recommends that the Division of Insurance collect the information necessary to evaluate the impact of tort reform measures on the availability and cost of insurance in Alaska. The legislature can then take this information into account as the total picture of civil liability law and insurance becomes available.

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

Appendix A

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

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

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

The summaries are intended to give a flavor of what the task force heard from the public in the community forums; they are not comprehensive. The discussion scenarios used in the forums are also included.

MARCIA IS GOING TO WORK ON THIS SECTION TO TIGHTEN IT UP
SOMEWHAT

Appendix B

Court System Data

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

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

Only very basic filing information is available from court system records. Tort cases represent about @ percent of the civil case load, and less than @ percent of the total court case load, civil and criminal. The rate of total tort filings has remained relatively constant from 1988 to 1995. In 1993, Alaska had 159 tort filings per 100,000 population, which placed it near the lower end of 28 states that the National Center for State Courts studied that year. In 1995, personal injury and property damage cases accounted for 5.5 percent of the civil cases in Alaska superior courts and 4.8 percent of all superior court cases, civil and criminal. In district courts, the category "civil/property damage" accounted for 4.9 percent of the civil cases (including small claims) and 1.0 percent of all district court cases (including small claims and traffic tickets).

Appendix C

Report from Alaska Judicial Council

To address the Governor's request that it evaluate changes in the amounts awarded by juries as damages, the task force sought assistance from the Alaska Judicial Council. The council prepared an analysis of case file data for jury trials of tort claims in Alaska from 1985 to 1995. In addition, because the task force was particularly interested in large jury verdicts, council staff informally polled a number of experienced litigation attorneys on large, tort jury verdicts they could remember in the past ten years.

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

The report of the Judicial Council follows.

Appendix D

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

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

Governor's Advisory Task Force
on Civil Justice Reform

Overview of Alaska Tort Law

Honorable Dana A. Fabe
Alaska Supreme Court

Honorable Brian C. Shortell
Alaska Superior Court

September 3, 1996

*AKSC Background
info.*

Alaska Court System
303 K Street
Anchorage, Alaska 99501

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THE EVOLUTION OF ALASKA LAW UNDER TORT REFORM

BEFORE TORT REFORM	TORT REFORM STATUTES. EFFECTIVE 6-11-86	TORT REFORM BALLOT INITIATIVE OF NOVEMBER 1988. EFFECTIVE 3-5-89.
<u>LIABILITY STANDARDS</u>		
1) Common law negligence.	1) Common law negligence.	1) Common law negligence.
2) Common law strict product liability.	2) Common law strict product liability.	2) Common law strict product liability.
3) Medical malpractice governed by separate statutes. AS 09.55.530 <u>et seq.</u> and Civil Rule 72.1.	3) Medical malpractice governed by statute and separate rule. AS 09.55.530 <u>et seq.</u> and Civil Rule 72.1.	3) Medical malpractice governed by statute and separate rule. AS 09.55.530 <u>et seq.</u> and Civil Rule 72.1.
4) Wrongful death action governed by statute. AS 09.55.580 <u>et seq.</u>	4) Wrongful death statute. AS 09.55.580 <u>et seq.</u>	4) Wrongful death statute. AS 09.55.580 <u>et seq.</u>
5) "Pure" comparative negligence, adopted by common law. Plaintiff's percentage of negligence determined by the jury and is an offset to damages. <u>Kaatz v. State</u> , 540 P.2d 1037 (Alaska 1975).	5) Pure comparative negligence. AS 09.17.060.	5) Pure comparative negligence. AS 09.17.060.
6) Percentage of fault of each defendant is irrelevant. AS 09.16.020.	6) Percentage of fault of all "parties," including those previously released, is to be determined by the jury. AS 09.17.080.	6) Jury determines each party's percentage of fault. AS 09.17.080.
7) Joint and several liability.	7) Joint and several liability continues except that a party is jointly liable for only twice its percentage of assessed fault. For example, a party that is found to be 10 percent at fault would pay no more than 20 percent of the total damages. The term "fault" includes strict liability. AS 09.17.090.	7) Joint liability abolished. A party is only severally, or individually liable for its own percentage of fault. AS 09.17.080.

BEFORE TORT REFORM

**TORT REFORM
STATUTES EFFECTIVE
6-11-86**

**TORT REFORM BALLOT
INITIATIVE OF
NOVEMBER 1988.
EFFECTIVE 3-5-89.**

DAMAGES

- | | | |
|--|--|---------------------|
| 1) Common law personal injury damages including loss of past earnings, loss of future earning capacity, medical expenses, pain and suffering, and other common law forms of damages. | 1) Categories of damages are set by statute:
-non-economic limited to \$500,000, except in serious injury
-pain
-suffering
-inconvenience
-physical impairment ✓
-disfigurement ✓
-loss of enjoyment of life
-past and future economic loss
AS 09.17.010-040. | 1) Remain the same. |
| 2) Future damages are not offset or reduced to present value under the rule of <u>Beaulieu v. Elliott</u> , 434 P.2d 665 (Alaska 1967). | 2) Future economic damages are to be reduced to present value unless counsel stipulates to the <u>Beaulieu</u> rule. AS 09.17.040(c). | 2) Remain the same. |
| 3) Punitive damages under common law. <u>Sturm, Ruger & Co. v. Day</u> , 594 P.2d 38 (Alaska 1979). | 3) Punitive damages must be shown by clear and convincing evidence. AS 09.17.020. | 3) Remain the same. |
| 4) Prejudgment interest from date of accident. | 4) Prejudgment interest begins from time of written notice of claim, or filing of suit, not time of accident. AS 09.30.070. | 4) Remain the same. |
| 5. Rule 82 attorney fees. | 5) Remain the same. | 5) Remain the same. |
| | 6) Collateral benefit evidence is allowed to reduce the judgment where certain types of insurance or other payments have been made. AS 09.17.070. | 6) Remain the same. |
| | 7) Judgment may be entered as to future amounts for periodic payments, rather than a lump sum, at the request of plaintiff. AS 09.17.040. | 7) Remain the same. |

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BEFORE TORT REFORM

**TORT REFORM
STATUTES EFFECTIVE
6-11-86**

**TORT REFORM BALLOT
INITIATIVE OF
NOVEMBER 1988.
EFFECTIVE 3-5-89.**

**RIGHTS AND LIABILITIES
BETWEEN CO-
DEFENDANTS AND
JOINT TORT FEASORS**

1) Pro rata contribution pursuant to contribution statute, between joint tort feors. AS 09.16.010 et seq.

2) No equitable or implied indemnity in the absence of a contract. Vertecs Corp. v. Riechhold Chem. Inc., 661 P.2d 619 (Alaska 1982).

Equitable indemnity may be allowed without a written contract, only where there is a preexisting contractual or other duty between the parties, such as manufacturer - retailer, etc. See Providence Washington Ins. Co. v. DeHavilland Aircraft Co., 699 P.2d 355 (Alaska 1985).

1) Contribution statute, AS 09.010, continues in force. (Note that the contribution statute was not amended. It still provided for pro rata contribution even though the liability of each party was to be found in a specific percentage.)

2) No equitable indemnity, without contract, between joint tort feors.

1) Contribution statute is abolished.

2) The future of any equitable rights and liabilities between co-defendants or parties whose actions contribute to an injury remains to be determined.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.080. Apportionment of damages.

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault.

Court Rules Related to Apportionment of Damages

Civil Rule 14. Third-Party Practice.

* * * *

(c) **Equitable Apportionment.** For purposes of apportioning damages under AS 09.17.080, a defendant, as a third-party plaintiff, may follow the procedure of paragraph (a) to add as a third-party defendant any person whose fault may have been a cause of the damages claimed by the plaintiff. Judgment may be entered against a third-party defendant in favor of the plaintiff in accordance with the third-party defendant's respective percentage of fault, regardless of whether the plaintiff has asserted a direct claim against the third-party defendant.

Civil Rule 82. Attorney's Fees.

* * * *

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

Civil Rule 79. Costs—Taxation and Review.

* * * *

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, costs must be apportioned and awarded according to the provisions of Civil Rule 82(e).

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.060. Effect of contributory fault.

In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.040. Award of damages.

(a) In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

- (1) past economic loss;
- (2) past noneconomic loss;
- (3) future economic loss;
- (4) future noneconomic loss; and
- (5) punitive damages.

(b) The fact finder shall reduce future economic damages to present value. In computing the portion of a lump-sum award that is attributable to future economic loss, the fact finder shall determine the present amount that, if invested at long-term future interest rates in the best and safest investments, will produce over the life expectancy of the injured party the amount necessary to compensate the injured party for

Adjusted
for
taxes?

(1) the amount of wages the injured party could have been expected to earn during future years, taking into account future anticipated inflation and reasonably anticipated increases in the injured party's earnings; and

(2) the amount of money necessary during future years to provide for all additional economic losses related to the injury, taking into account future anticipated inflation.

(c) Subsection (b) of this section does not apply to future economic damages if the parties agree that the award of future damages may be computed under the rule adopted in the case of *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967).

(d) In an action to recover damages, the court shall, at the request of an injured party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment.

(e) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be

posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

(f) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will.

(g) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments required under (d) of this section, the court shall, in addition to the required periodic payments, order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees.

20.05 INFLATION AND PRESENT VALUE/FUTURE ECONOMIC LOSSES

Plaintiff claims that (he/she) will have economic losses in the future, consisting of [future medical expenses] [and] [loss of future earning capacity]. I will now instruct you on two principles you must apply to calculate an award for a future economic loss.

The first principle is that an award for future economic loss must account for the effect that any future inflation would have on the amount of the future economic loss. [Any award for future medical expenses must be based on the cost of the medical expenses when they are incurred in the future.] [Any award for future loss of earning capacity must account for reasonably probable increases in wages due to inflation.]

The second principle is that any award that you make for future economic loss must be equal to the amount of money that the plaintiff would need to invest today so that the total of the amount invested today plus future investment earnings equals the amount of the future economic loss when it will occur in the future. To make this calculation, you must make three assumptions: (1) that the money you award to the plaintiff for a future economic loss would be available to (him/her) today; (2) that the plaintiff would invest the money immediately; and (3) that the plaintiff would invest the money in investments that would pay the long-term future interest rates that would be obtained in the best and safest investments.

Use Note

This instruction must be given whenever the plaintiff claims a future economic loss in a personal injury case, and where the parties have not agreed pursuant to AS 09.17.040(c) to compute damages under the Beaulieu rule. If the parties have agreed to use the Beaulieu rule, this instruction should not be given.

The appropriate bracketed language in the second paragraph should be used depending upon whether the plaintiff claims future medical expenses, loss of future earning capacity or both.

Comment

In personal injury cases, AS 09.17.040(b) requires the fact finder to reduce future economic damages to present value, and to consider the effect of future anticipated inflation. This instruction is intended to convey these concepts to the jury.

Richard BEAULIEU, Appellant,
v.

James V. ELLIOTT, Appellee.

James V. ELLIOTT, Appellant,
v.

Richard BEAULIEU, Appellee.
Nos. 765, 766.

Supreme Court of Alaska.
Dec. 5, 1967.

Action for damages for personal injuries sustained in automobile accident. The Superior Court, Third Judicial District, Hubert A. Gilbert, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Dimond, J., held that record which disclosed implicit finding that plaintiff's wage earning capacity had been impaired for remainder of his work life of 29 years and disclosing testimony that plaintiff's inability to work would only continue from one to five years did not set forth findings of fact to enable reviewing court to have clear understanding of basis of trial court's decision that plaintiff sustained permanent 50 percent impairment of earning capacity and case would be remanded for more detailed and explicit findings of fact.

Judgment set aside and case remanded with directions.

1. Administrative Law and Procedure §501

Findings or judgment of quasi-judicial administrative agency in proceedings before it are not admissible in subsequent action against person not a party to such proceedings.

2. Attorney and Client §86

Admissions of fact by counsel during course of trial are binding on his client if made with express purpose of dispensing with formal proof of some fact at trial and are thus used as substitute for legal evidence of the fact.

434 P.2d—42½

3. Evidence §264

Even if statement in defendant's brief filed subsequent to close of trial suggesting award to be made plaintiff for damages from personal injuries and containing computation based on 50 percent disability rating for next five years did constitute admission of fact binding on defendant, it admitted only that plaintiff's earning capacity had been 50 percent impaired for period of five years and not for plaintiff's remaining work life.

4. Trial §388(1)

Trial court must comply meticulously with requirements of rule with respect to making of findings of fact in order to give reviewing court clear understanding of basis of trial court's decision and to enable reviewing court properly to appraise elements which entered into award of damages. Rules of Civil Procedure, rule 52(a).

5. Appeal and Error §1177(8)

Trial §395(1)

Record which disclosed implicit finding that plaintiff's wage earning capacity had been impaired for remainder of his work life of 29 years and disclosing testimony that plaintiff's inability to work would only continue from one to five years did not set forth findings of fact to enable reviewing court to have clear understanding of basis of trial court's decision that plaintiff sustained permanent 50 percent impairment of earning capacity and case would be remanded for more detailed and explicit findings of fact. Rules of Civil Procedure, rule 52(a).

6. Appeal and Error §1178(1)

Whether trial court improperly used Air Force physical evaluation board's findings to award plaintiff \$16,088 for impaired earning potential caused by depressive reaction could not be determined where trial court in awarding total of \$169,937.25 made no mention of award for \$16,088 for depressive reaction and trial court would be directed to make more detailed and explicit findings of fact on remand. Rules of Civil Procedure, rule 52(a).

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7. Damages $\Rightarrow$ 15

General principle underlying assessment of damages in tort cases is that injured person is entitled to be replaced as nearly as possible in position he would have occupied had it not been for defendant's tort.

8. Damages $\Rightarrow$ 226

Damages awarded for future loss of earnings should not be reduced to present value.

9. Damages $\Rightarrow$ 60

Disability retirement pay which plaintiff became entitled to upon retirement from Air Force by reason of injuries sustained in automobile accident would not be used to mitigate damages and reduce award for loss of future earnings.

10. Damages $\Rightarrow$ 100

Damage award for impairment of earning capacity should not be reduced by amount representing estimated income taxes that injured party would have to pay on future income.

11. Damages $\Rightarrow$ 99

Amount of income taxes which injured party would have had to pay had he earned amount awarded prior to trial should be deducted from the award for past loss of wages.

12. Damages $\Rightarrow$ 60

Damages in form of past loss of wages sustained by serviceman as result of automobile accident could not be diminished or mitigated on account of payments received by serviceman from Air Force by virtue of contractual arrangement between serviceman and government for payment during periods of physical incapacity from performing his duty.

13. Damages $\Rightarrow$ 132(9)

Evidence that osteomyelitis had developed in bone of plaintiff's ankle injured in automobile accident and testimony that it was reasonable medical probability that osteomyelitis would remain with plaintiff for rest of his life supported award of \$71,244 for pain and suffering that plaintiff

would experience for expected 29 years remaining of his life.

14. Damages $\Rightarrow$ 97

In determining amount of award for pain and suffering, juror or judge should necessarily be guided by some reasonable and practical consideration and should endeavor to make reasonable or sane estimate.

15. Damages $\Rightarrow$ 97

There is no fixed measure of compensation in awarding damages for pain and suffering.

16. Damages $\Rightarrow$ 97

Assessing damages for future pain and suffering by using per diem formula was not manifestly unfair or unjust.

17. Appeal and Error $\Rightarrow$ 1013

Ultimate question for decision on review of award for damages for pain and suffering is whether sum awarded is reasonable and not how it was arrived at.

18. Appeal and Error $\Rightarrow$ 1013

Award of damages will not be set aside on claim of excessiveness unless it is so large as to appear manifestly unjust or result of passion or prejudice or disregard of evidence or rules of law.

19. Damages $\Rightarrow$ 226

Amount awarded for future pain and suffering will not be reduced to present worth.

20. Damages $\Rightarrow$ 185(1)

Record disclosing no testimony by plaintiff's physician that he told plaintiff to bear as much weight as possible on injured ankle and disclosing that physician prescribed that plaintiff use crutches to tolerance by testing how much weight he would be able to put on his foot would not substantiate defendant's claim that plaintiff's pain and suffering were attributable to plaintiff's failure to follow orders of his doctor in not bearing as much weight as possible on his ankle.

21. Appeal and Error $\Rightarrow$ 1176(1)

Record which failed to disclose why trial court used plaintiff's military pay rather than civilian pay scales in computing

plaintiff's impairment of future earning capacity as result of injury to ankle, where plaintiff indicated that he might have retired from military service if he had not received medical discharge because of injury, was insufficient to enable reviewing court to determine whether award for impairment of future earning capacity was inadequate and trial court would be directed to make further findings on remand.

22. Appeal and Error ⇐1177(8)

Findings disclosed by record were not sufficient for purpose of determining whether evidence established that impairment of plaintiff's earning capacity was total or near total rather than 50 percent as determined by trial court.

23. Appeal and Error ⇐984(5)

Where liability is admitted but amount of damages is contested, question of which category of rule pertaining to computation of attorney fees is applicable is matter within discretion of trial court. Rules of Civil Procedure, rule 82(a)(1).

24. Costs ⇐173(1)

Where liability for injury to plaintiff's ankle was admitted but question of damages was contested in four-day trial resulting in award of \$169,937.25 compensatory damages, trial court's assessing attorney's fees at rate prescribed by rule for cases concluded without trial was not abuse of discretion. Rules of Civil Procedure, rule 82(a)(1).

25. Appeal and Error ⇐984(1)

Costs ⇐12

Taxing of costs rests largely in sound discretion of trial court and reviewing court will not interfere with exercise of that discretion except in cases of abuse.

26. Costs ⇐154

Refusal to include in costs assessed against defendant certain expenses incident to taking of depositions which allegedly were necessary to establish liability, where plaintiff did not point out what depositions were involved, how they related to liability, when they were taken, or when concession

of liability was made by defendants, was not abuse of discretion.

James J. Delaney, Jr., and James K. Singleton, of Delaney, Wiles, Moore & Hayes, Anchorage, for appellant in No. 765 and appellee in 766.

Robert M. Libbey, of Kay, Miller, Jacobs & Libbey, Anchorage, for appellee in No. 765 and appellant in 766.

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

OPINION

DIMOND, Justice.

As a result of an automobile accident on April 13, 1963, James Elliott suffered a fracture dislocation of his right ankle. He brought this action for damages against Richard Beaulieu. Liability was conceded by Beaulieu, and the issue of damages was tried by the court without a jury. The trial court filed findings of fact and conclusions of law and entered judgment awarding Elliott \$169,937.25 compensatory damages, costs of \$82.40, and attorney's fees in the amount of \$13,870.29. Both parties have appealed. We shall consider first Beaulieu's appeal.

Beaulieu's Appeal

In his brief on appeal, Beaulieu states 21 specifications of error. These resolve themselves into six principal issues to be reviewed and determined by this court.

1. *Impairment of Earning Capacity.*

There is no question but that Elliott suffered a permanent injury. The fracture dislocation of his right ankle, after several unsuccessful operations, resulted in a lack of a true ankle joint per se. As Dr. Scholtens said: "There is simply a ragged margin of rather schlerotic bone." He also stated, "It's not a joint any more but it's just a couple of pieces of bone grating against each other." Dr. Wichman testified that the joint was such that Elliott's ankle could be used only as a "peg". In

addition, osteomyelitis developed in the ankle bone and both Shelton and Foster testified that the reasonable medical probabilities were that such disease would continue for the remainder of Elliott's life.

In its third conclusion of law the trial court stated:

That plaintiff will suffer a future wage loss in the amount of \$80,440.40, after taking into consideration the fact that his wage earning capacity has been impaired to the extent of fifty (50%) per cent plus the further fact that his rate of pay at the time of discharge was \$462.30 per month and plus the further fact that he has a remaining work life of twenty-nine (29) years.¹

Beaulieu contends that there is no evidence to support the court's determination that Elliott suffered an impairment of earning capacity which would result in a loss of future wages.

On this point we must remand the case to the trial court for the making of more explicit findings of fact. The court's conclusion as to loss of future wages contains the implicit finding that Elliott's wage earning capacity had been impaired for the remainder of his work life of 29 years. The court gives no indication, however, of the factual basis for such an ultimate finding, nor does it indicate how it reconciles such a finding with the testimony of two physicians who spoke on the subject of Elliott's capacity to be gainfully employed. Dr. Foster testified that in his opinion, while Elliott was unable to work at the time of the trial in 1966, this inability would at the most only continue from one to five years, and that the condition of Elliott's ankle would steadily improve so that within that period of time he would be able to engage in a sedentary type of occupation that would not involve prolonged walking, running or

heavy lifting. It was Dr. Foster's opinion that Elliott's future earning capacity was impaired only to the extent that he must now do clerical work rather than truck driving which he had done prior to 1963. Dr. Wichman testified that the prognosis of the condition of Elliott's ankle was satisfactory, that he would be limited in many activities because he would have to use his ankle as a peg and would be deprived of the movements that a normal ankle offers, that it would be possible for him to be gainfully employed in a sedentary type of occupation, but that he could not give an estimate as to when that might be because he did not know how much dead bone was present in the ankle.

As to the extent of impaired earning capacity, the court reached the conclusion that there was a 50% impairment. But the court does not say how it arrived at that figure. And we are unable to tell from our review of the record.

Conceivably, the court's determination of a percentage impairment was influenced by Elliott's testimony that he had received a medical discharge from the United States Air Force in January of 1966, and that he was receiving from the government a 60% disability compensation, 40% of which was attributable to his ankle, and the remaining 20% to other medical problems not related to the accident. That this may have influenced the court appears to be a possibility, because the court made Finding of Fact No. 19 which provided as follows:

That on October 17, 1964, plaintiff was discharged from the hospital to "travel status"; that on January 14, 1966, plaintiff was given a medical discharge from the Air Force, as above mentioned; that the physical evaluation board, found plaintiff to be 60% disabled, assigning a 40% disability because of the injuries

1. The pertinent part of Conclusion of Law No. 3 originally read:

That plaintiff will suffer a future wage loss in the amount of \$80,440.40, after taking into consideration the fact that his disability is 50%. * * * [Emphasis added.]

The italicized words were amended by the court on Elliott's motion to read: "that his wage earning capacity has been impaired to the extent of fifty (50%) per cent."

to plaintiff's right ankle, a 10% disability to a "depressive reaction" and a 10% disability due to an impairment of vision; that the latter disability is not related to the accident of April 13, 1963.²

[1] If the court based its conclusion as to degree of impairment of earning capacity upon certain findings of an Air Force physical evaluation board, this would have been error. The findings or judgment of a quasi-judicial administrative agency in proceedings before it are not admissible in a subsequent action against a person not a party to such proceedings.³

The trial court also may have been influenced in its determination of the existence of a 50% impairment of earning capacity by what Elliott characterizes as admissions made by Beaulieu's trial counsel. In his opening statement at the trial, counsel for Beaulieu admitted that Elliott had sus-

tained a "permanent injury", that this did not render him 100% disabled, and that the question for determination was just how much "he will lose in the future because of the injury." In his brief filed subsequent to the close of the trial Beaulieu's counsel said this:

In summary, it is suggested by the defense that the Court make its award to the Plaintiff on the basis of the figures set forth below. These figures take into consideration: The prognosis established by the medical experts; the 60% disability rating established by the Air Force, of which 50% is attributable to Plaintiff's ankle injury; and, the Plaintiff's ability to be gainfully employed in the future as a clerk or transportation specialist in the transportation industry, or as a travel agent.

* * * [I]t is * * * suggested that the following award be made:

For past lost wages	\$10,000.00
For future "lost wages", or diminution of earning capacity, based on 50% dis- ability rating for the next five years ...	11,500.00
For past pain and suffering	5,000.00
For future pain and suffering	10,000.00
For permanent disability and injury to ankle	<u>23,000.00</u>
Total	\$61,500.00

[2,3] It is true that admissions of fact by counsel during the course of the trial are binding on his client,⁴ if they are made with the express purpose of dispensing with the formal proof of some fact at the trial, and are thus used as a substi-

tute for legal evidence of the fact.⁵ It does not appear that this was the purpose of counsel's statement in his brief filed subsequent to the trial. But even if it did constitute an admission of fact binding on Beaulieu, it is an admission only that Elli-

2. Apart from Elliott's testimony just mentioned, we do not know where the trial court obtained information regarding the findings of the Air Force physical evaluation board. Such findings were not introduced into evidence at the trial.

3. *Cady v. Fraser*, 122 Colo. 252, 222 P.2d 422, 425 (1950).

4. *Ferroline Corp. v. General Aniline & Film Corp.*, 207 F.2d 912, 916-917 (7th

Cir. 1953), cert. denied, 347 U.S. 953, 74 S.Ct. 678, 98 L.Ed. 1098 (1954), reh. denied, 347 U.S. 970, 74 S.Ct. 784, 98 L.Ed. 1118 (1954), reh. denied, 348 U.S. 851, 75 S.Ct. 19, 99 L.Ed. 671 (1954).

5. *Dodge v. Stencil*, 48 Wash.2d 619, 296 P.2d 312, 314 (1956); *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705, 714 (5th Cir. 1951), cert. denied, 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 687 (1952).

ott's earning capacity had been 50% impaired for a period of five years, and not for the remaining work life of Elliott of 29 years as found by the trial court. Consequently, what Beaulieu's counsel said in his brief does not satisfactorily explain or establish the basis for the trial court's Conclusion of Law No. 3 which dealt with impairment of earning capacity.

[4, 5] It is most important that the trial court comply meticulously with the requirements of Civil Rule 52(a) * with respect to the making of findings of fact in order to give us a clear understanding of the basis of the trial court's decision, and to enable us to properly appraise the elements which entered into the court's award of damages.⁷ This was not done in this case. Our review of the record leaves us with the conclusion that the trial court's findings with respect to damages for future impairment of earning capacity are not sufficiently detailed to afford us a clear understanding of the basis for the court's award.⁸ We therefore will remand this case to the trial court for the purpose of making detailed and explicit findings as to Elliott's earning capacity and the degree of impairment in respect thereto.⁹

In his Finding of Fact No. 19 the trial court referred to the fact that the Air Force physical evaluation board had found Elliott to be 60% disabled, and that 10% of that disability was due to a "depressive reaction". In Finding of Fact No. 22 the court stated that a psychiatric evaluation of Elliott had been made, that the psychiatric findings were that Elliott had developed a depressive reaction attributable to permanent crippling, deformity of the lower ex-

tremity, semi-isolation, and a protracted period of surgery and recovery, and that such depressive reaction was proximately caused by the accident of April 13, 1963. Beaulieu contends that the judge used the Air Force physical evaluation board's findings to award Elliott \$16,088.00 for that part of his impaired earning potential caused by a depressive reaction, and that this was error.

[6] We are unable to review this point because nowhere in the court's finding of fact or conclusions of law or judgment is there any mention of an award of \$16,088.00 for a depressive reaction as an element of Elliott's impaired earning capacity. It may be that the trial court intended that of the 50% impairment of earning capacity which is found to exist, 10% was due to a depressive reaction. However, we are unable to determine if that is the case from the record as it now exists. This point should be clarified on a remand of the case for more detailed and explicit findings of fact.

2. Future Wage Loss—Present Value.

The trial court did not reduce the amount it found as damages for future impairment of earning capacity to present value. Instead, the court stated that "The interest rate reduction and decline in purchasing power of the dollar is off-set by pay increases plaintiff could have expected in the future from his military service." Beaulieu contends that the failure to reduce the damages to present value was prejudicial error.

[7] The general principle underlying the assessment of damages in tort cases is that an injured person is entitled to be

6. Civ.R. 52(a) provides in part:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment

7. Patrick v. Sedwick, 413 P.2d 169, 174-176 (Alaska 1966); Hamilton v. Lotto, 391 P.2d 948, 949 (Alaska 1964); Spe-

nard Plumbing & Heating Co. v. Wright Const. Co., 370 P.2d 519, 525-526 (Alaska 1962); Merrill v. Merrill, 368 P.2d 546, 548 (Alaska 1962); Dickerson v. Geiermann, 368 P.2d 217, 219 (Alaska 1962).

8. Patrick v. Sedwick, note 7 supra, 413 P.2d at 175.

9. Patrick v. Sedwick, note 7, supra, 413 P.2d at 176.

replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort.¹⁰ In the case of impairment of future earning capacity, it is reasoned that a failure to reduce damages to present value would be to place the injured person in a better position than he would have occupied except for the defendant's tort, because the injured person would get all of his future wages long in advance and would be able to invest the lump sum and realize earnings on such investment during the intervening period.¹¹ For this reason—that money has the power to earn money—it has become the generally accepted rule that damages awarded for future loss of earnings should be reduced to present worth.¹²

[8] In applying the general rule, the Supreme Court of Washington has stated a formula for reducing awards of future earnings to present value which involves the "rate of interest (which) could fairly be expected from safe investments which a person of ordinary prudence, but without particular financial experience or skill, could make in that locality."¹³ This formula, although empirical at best, is probably as definite as any that has been devised. But we believe that the rule for reducing awards, including the formula applied by the Washington court, ignores facts which should not be ignored. Annual inflation at a varying rate is and has been with us for many years. There is no reason to expect that it will not be with us in the future. This rate of depreciation offsets the interest that could be earned on government bonds and many other "safe" invest-

ments. As a result the plaintiff, who through no fault of his own is given his future earnings reduced to present value must, in order to realize his full earnings and not be penalized by reduction of future earnings to present value, invest his money in enterprises, other than those which are considered "safe" investments, which promise a return in interest or dividends greater than the offsetting rate of annual inflation. But ours is a competitive economy. By their very nature some enterprises backed by investors' money are going to fail with resulting loss to individuals. Thus, instead of being assured of earnings at rates greater than the annual rate of inflation, the injured plaintiff stands a chance of entirely losing his future earnings by unlucky or unwise investments. Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without reduction to present value. The plaintiff is more likely to be restored to his original condition under the rule we adopt than under the prevailing rule which calls for a discounting of the award for future earnings.

Our conclusion is fortified by another factor which also may not be ignored. This is the factor, relied upon by the trial judge, which involves wage increases that the injured plaintiff might have expected to receive in the future had he not been injured.

10. Hill v. Varner, 4 Utah 2d 166, 290 P. 2d 448, 449 (1955); Restatement, Torts § 924 comment d, at 634-35 (1939); McCormick, Damages § 86, at 304 (1935). Accord United States v. Hatahley, 257 F.2d 920, 923, 79 A.L.R.2d 668 (10th Cir. 1958); Hughett v. Caldwell County, 313 Ky. 85, 96, 230 S.W.2d 92, 21 A.L.R.2d 373 (1950).

11. McCormick, Damages § 86, at 304 (1935).

12. Wentz v. T. E. Connolly, Inc., 45 Wash. 2d 127, 273 P.2d 485, 491 (1954); Bor-
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cherding v. Eklund, 156 Neb. 196, 55 N. W.2d 643, 650 (1952); Daughtry v. Cline, 224 N.C. 381, 30 S.E.2d 322, 324, 154 A.L.R. 789 (1944); Rigley v. Prior, 290 Mo. 10, 233 S.W. 828, 832 (1921); Restatement, Torts § 924 comment d, at 634-35 (1939); McCormick, Damages § 86, at 304 (1935); Annot., 77 A.L.R. 1439, 1446 (1932) 154 A.L.R. 796, 797 (1945).

13. Wentz v. T. E. Connolly, Inc., *supra* note 12, 273 P.2d at 492.

It is a matter of common experience that as one progresses in his chosen occupation or profession he is likely to increase his earnings as the years pass by. In nearly any occupation a wage earner can reasonably expect to receive wage increases from time to time. This factor is generally not taken into account when loss of future wages is determined, because there is no definite way of determining at the time of trial what wage increases the plaintiff may expect to receive in the years to come. However, this factor may be taken into account to some extent when considered to be an offsetting factor to the result reached when future earnings are not reduced to present value. Thus, if there is any fear that failure to reduce the present value will give the plaintiff more than he is entitled to because of the possibility of his making successful investments of the sum awarded at returns greater than the annual rate of inflation, such fear is obviated by the fact that the award may well be deficient in that it does not take into account probable wage increases that the plaintiff would ordinarily be expected to receive in the future.

3. Retirement Pay.

Elliott testified that he would receive disability retirement pay from the Air Force in the amount of \$191.00 a month for the remainder of his life. Beaulieu contends that the trial judge committed prejudicial error in refusing to deduct the net present value of future retirement pay from the award for future loss of earnings. Beaulieu's argument is that to allow Elliott damages for future wage loss, in addition to his retirement pay, is to unjustly enrich Elliott by allowing him double compensation for his injuries.

[9] The general principle underlying the assessment of damages in tort cases is that an injured person is entitled to be replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort.¹⁴ Elliott had been in

the Air Force for about 18 years at the time of his discharge and he testified that he had intended to remain in the service for at least 20 years. If he had not been injured, Elliott could have continued to earn to his full capacity and, in addition, after 20 years' service, would have been entitled to retire and draw retirement pay.¹⁵ By reason of his injuries, Elliott was entitled under law to be retired early for disability and draw retirement pay in lieu of retirement on a regular basis after completion of 20 years' service.¹⁶ The award of damages for impaired earning capacity has the effect of putting Elliott in the same position he would have occupied had it not been for the injury, because the damages represent what Elliott could have earned had he not been injured and the disability retirement pay represents that which Elliott had earned and become entitled to under law by reason of his years of service in the Air Force. In other words, Elliott now receives an amount representing wages he could have earned were it not for the injury, plus retirement pay; had he not been injured, he would have received the full wages he could have earned during his remaining work life, in addition to receiving the retirement pay to which he would become entitled by reason of his years of service in the Air Force. Thus, Elliott, under the court's award, is getting no more than he would have gotten had he not been injured. The disability retirement pay Elliott is receiving should not be used to mitigate damages and reduce the award for loss of future earnings.

4. Income Taxes.

Beaulieu argues that the trial judge erred in failing to deduct from the damages awarded for impairment of future earning capacity an amount representing income taxes that Elliott would have had to pay on future income.

The courts are divided on this question. It is the more general view, supported by a

14. Note 10 *supra*.

15. 10 U.S.C.A. §§ 8914, 8889, 8991 (1959).

16. 10 U.S.C.A. §§ 1201, 1401 (1959).

majority of American decisions, that an amount representing future income taxes should not be deducted from the award.¹⁷ As was stated by the Supreme Court of Rhode Island:

This view has been adopted by the various courts on diverse grounds but primarily on the ground that the quantum of such taxation is of necessity in the realm of conjecture.¹⁸

[10] We adopt the majority rule. Income tax rates, provisions relating to deductions and exemptions, and other aspects of income tax laws and regulations are so subject to change in the future that we believe that a court cannot predict with sufficient certainty just what amounts of money a plaintiff would be obliged to pay in federal and state income taxes on income that he would have earned in the future had it not been for a defendant's tortious conduct. We hold that a damage award for impairment of earning capacity should not be reduced by an estimated amount representing income taxes that the injured party may be required to pay on future income. In awarding damages to Elliott for impaired earning capacity, the court did not err in failing to take income tax consequences into consideration.

[11] The rule we adopt has no application, however, as to the court's award of past wages in the amount of over \$10,000.00. The reason for the rule—inability to predict with sufficient certainty what taxes would have to be paid—does not exist here, because taxes on income earned prior to trial can be easily calculated based on income tax laws and regulations as they existed at the time the wages would have been earned. The court erred in failing to deduct from

the award for past loss of wages the income taxes Elliott would have had to pay had he earned the amount awarded prior to the trial.

5. Past Loss of Wages.

Elliott testified that he had not lost any military pay or allowances between the date of the accident in April 1963 and the date of his military discharge in January 1966. During that period of time Elliott was either hospitalized or on leave, except for the period January to August, 1964, when he was on duty status. The trial court awarded \$10,752.85 for a partial past wage loss covering the period from the date of the accident to the day of Elliott's discharge from the Air Force, but excepting the period between January and August, 1964, when Elliott was on duty status.

Beaulieu contends that this award for past wages was error. His argument in essence is that the general principle underlying the assessment of damages in tort cases is that the injured person is entitled to be replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort, and that since Elliott suffered no loss of wages during the period involved he should be awarded none.

[12] In arguing that the award should be sustained, Elliott urges the adoption of the collateral source rule, which provides that damages may not be diminished or mitigated on account of payments received by plaintiff from a source other than the defendant.¹⁹ We applied this rule as to workmen's compensation benefits in *Ridgeway v. North Star Terminal & Stevedoring Co.*²⁰ We apply the rule in this instance. By entering the military service, Elliott in effect agreed to perform certain duties and func-

17. Annot., 63 A.L.R.2d 1893, 1896 (1959).

18. *Odde v. Cardl*, 218 A.2d 373, 377 (R.I. 1966). See also *Dixie Feed & Seed Co. v. Byrd*, 52 Tenn.App. 619, 376 S.W.2d 745, 749 (1963); appeal dismissed, 379 U.S. 15, 85 S.Ct. 147, 13 L.Ed.2d 84 (1964); *Cunningham v. Rederiet Vindeggen*, 333 F.2d 308, 313-315 (2d Cir. 1964); *Spencer v. Martin K. Eby Const.*

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Co., 186 Kan. 345, 350 P.2d 18, 22-25 (1960); *Kawamoto v. Yasutake*, 49 Haw. 42, 410 P.2d 976, 981 (1966).

19. *Bell v. Primeau*, 104 N.H. 227, 183 A.2d 729, 730, 7 A.L.R.3d 512, 514 (1962). The collateral source rule is followed in most jurisdictions. Annot., 7 A.L.R.3d 516, 520 (1966).

20. 378 P.2d 647, 650 (Alaska 1963).

tions in exchange for certain benefits to be given him by the government. One of those benefits was that he was to receive military pay and allowances during periods of physical incapacity from performing his duties. This was in the nature of a contractual arrangement between Elliott and the government when he became a member of the armed forces, and which he may have paid for by accepting wages lower than those he might have obtained from the performance of like duties in civilian life. The income that Elliott received from the government is not the result of earnings, but of such previous contractual arrangement.²¹ Such a contractual arrangement was made for Elliott's own benefit, and not for the benefit of a tortfeasor, such as Beaulieu. The latter has no right to claim the benefit of such an arrangement by having the damages awarded against him reduced by the amount that Elliott was paid by the government during the period of his disability. The trial court did not err in awarding damages for loss of wages during the period of Elliott's disability while he was still in the military service.

6. *Future Pain and Suffering.*

The court awarded Elliott \$71,244.00 for pain and suffering that he would experience for the remainder of his life. Beaulieu contends that the evidence does not justify such an award.

An infection, osteomyelitis, had developed in the bone of Elliott's injured ankle. Elliott testified that from the time of the onset of the osteomyelitis he was required to keep his ankle in an upright position for a period of from four to five days on an average of once a month to alleviate the pain he experienced, that he suffered pain of a sufficient intensity to keep him awake the better part of the night on an average of one night per week, and that there was an open, draining sinus on his ankle. Beaulieu concedes that Elliott's testimony was sufficient to justify an award for past pain

and suffering.²² However, Beaulieu contends that there is a lack of substantial medical evidence to justify an award for pain and suffering in the future.

Dr. Wichman testified that the osteomyelitis would cause the sinus tract in Elliott's ankle to become obliterated or plugged by bone particles in the drainage fluid—osteomyelitis being the type of infection caused by the healing process in draining away or discarding dead bone—and that this caused a pressure build-up and a swelling with resulting pain.

Dr. Foster testified that the probable source of Elliott's pain was the presence of injured tissues which, throughout the injury, operation and infection, became so altered that with use they became sore. It is true, as Beaulieu points out, that Dr. Foster said that within approximately five years from the time of trial, Elliott would be able to return to work and would no longer be limited by the infection. But the doctor also testified that at the end of the five-year period Elliott would still have some pain, and that it was a reasonable medical probability that the osteomyelitis would remain with Elliott the rest of his life.

Dr. Scholtens gave his opinion as to the reasonable medical probability of the infection in Elliott's ankle continuing for the remainder of his life. He said:

Yes, I have an opinion, and my opinion is that the infection present, by all odds, will continue, there's an excellent possibility for the rest of his life, no matter what medical attempts are made to clear the infection in the ankle. Present—the experience with osteomyelitis indicates that it's very, very difficult to treat, that cures are relatively infrequent. Recurrences of those that appear to be cured are frequent. For those reasons, I would feel that he, at present, has a chronic infection. He has the fuel for the infection, dead bone, and I think that this

21. Restatement, Torts § 920 comment e (1930).

22. The trial judge awarded Elliott \$7,500 for past pain and suffering.

will continue in the future for as far as I can see.

And as to the reasonable medical probability of the general condition of the ankle improving or remaining the same, Dr. Scholtens said:

I'd say that the chances are that his ankle will stay very much the same as it is, with no appreciable change. This is by far the greatest probability. * * * There's—there's a slight chance that it could get worse. There's a slight chance that it could get better, but—and I'm not talking in terms that if he never sees a doctor again. I mean if he's treated, I think the chances of this appreciably improving are slim or really of getting a great deal worse, that's what I'm saying.

[13] The trial court found that it was a reasonable medical probability that Elliott's condition, including the infection in the ankle and the pain, would continue for the remainder of his life. The medical evidence supports such a finding; we cannot say that it is clearly erroneous. Such a finding, in turn, justifies the court's conclusion that Elliott should be awarded damages for pain and suffering for the remainder of his life. An award of such damages was not error.

The trial court used a per diem formula in assessing damages for future pain and suffering. In its Conclusion of Law No. 5 the court said:

That plaintiff is entitled to recover from defendant the sum of \$78,636.00 for past and future pain and suffering, for his general physical disability and permanent crippling and for the fact that he will no longer be able to lead that sort of life to which he had become accustomed. The past pain and suffering is set at the sum of \$7,500.00. The future pain and suffering of \$71,244.00 is based upon a finding of \$20.00 per day for 52 days per year and an additional \$3.00 per day for 313 days per year for a total sum of \$1,979.00 per year multiplied by 36 years.

Beaulieu contends that such a method of ascertaining damages constituted prejudicial error.

A similar contention was made by a defendant in *Imperial Oil, Ltd. v. Drlik*, 234 F.2d 4 (6th Cir. 1956), cert. denied, 352 U.S. 941, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956), where the trial court had used a per diem formula in awarding damages for pain and suffering. It was argued there that damages for pain and suffering cannot be properly computed by using a mathematical formula. In answer to this argument, the Court of Appeals said:

It remains to be considered whether the method used by the District Judge in determining the total amount was error as a matter of law. It may be that it was a novel one but it does not follow that it invalidates the award. In determining the amount of an award for pain and suffering a juror or judge should necessarily be guided by some reasonable and practical considerations. It should not be a blind guess or the pulling of a figure out of the air. At the same time there is no exact or precise measuring stick. Exact compensation is impossible in the abstract but the juror or judge should endeavor to make a reasonable or sane estimate. The practical considerations influencing a particular juror or judge or the reasoning used by him may very well differ with the method used by another juror or judge, yet each of such different methods or modes of reasoning may be a reasonable method of reaching the desired result. We are more concerned with the result, reached by a reasonable process of reasoning and consistent with the evidence, than we are with which one of several suitable formulas was actually used by the juror or judge. It is not necessary for us to adopt the method used by the District Judge as a rule of law for the proper disposition of such an issue, and we do not do so. In our opinion, it was not an arbitrary or unreasonable approach to the problem presented and its application was so adjusted in the present case as to be consistent

with the evidence and to reach a result which does not appear to us to be manifestly unjust. *United States v. Puscedu*, 5 Cir., 224 F.2d 5; *City of Knoxville, Tenn. v. Bailey*, 6 Cir., 222 F.2d 520, 531.²³

[14-17] We agree with the foregoing. As we stated in *Patrick v. Sedwick*,²⁴ there is no fixed measure of compensation in awarding damages for pain and suffering, and such an award necessarily rests in the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation. We can see nothing manifestly unfair or unjust about the method used by the trial court in assessing damages for future pain and suffering. In fact, as was suggested in the dissenting opinion in the Kansas case of *Caylor v. Atchison, Topeka & Santa Fe Ry. Co.*,²⁵ it appears to be a fair argument and a rational approach to treat damages for pain the way it is endured—day by day, month by month, year by year. Ultimately, however, the question for decision is whether the total sum is reasonable or not, regardless of how it was arrived at. We find no error in the method used by the trial court in awarding damages for future pain and suffering.

[18] Beaulieu contends that the total sum awarded is unreasonable and is grossly excessive. We shall not set aside an award on a claim of excessiveness unless it is so large as to strike us that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law.²⁶ Considering the evidence of permanent damage to Elliott's ankle, the osteomyelitis, and the pain and suffer-

ing that he is likely to endure for the remainder of his life, it is our opinion that the award for future pain and suffering was not manifestly unjust.²⁷ And Beaulieu did not contend in his brief or in oral argument that the trial court acted through passion or prejudice.

Beaulieu contends that the court erred in not reducing the future pain and suffering award to present value. He relies principally on the case of *Affett v. Milwaukee & Suburban Transp. Corp.*,²⁸ where the court, after disapproving of the use of a mathematical formula for computing damages for pain and suffering, said: Logically, if this method were followed, the gross amount arrived at should be discounted to its present worth."²⁹

[19] If an award for future pain and suffering must be reduced to present value when a mathematical formula is used, it must be for the same reason that an award for future earnings is discounted under the prevailing rule—i. e., because the plaintiff receives his damages for the future long in advance and is able to invest the sum awarded and realize earnings during the intervening period. But we have held that as to impairment of future earning capacity, the award should not be reduced to present value. The same reasoning applies here as to an award for future pain and suffering. Because of the annual rate of inflation offsetting dividends or interest that may be expected on "safe" investments, and of the risk of loss involved in making other investments, a plaintiff is more likely to be restored to his original condition had defendant not committed his tort by allowing the plaintiff his award for future pain and

23. 234 F.2d at 11. See Annot., *Per Diem or similar mathematical basis for fixing damages for pain and suffering*, 60 A. R.L.2d 1347 (1958).

24. 413 P.2d 169, 176 n. 21 (Alaska 1966).

25. 100 Kan. 261, 374 P.2d 53, 64 (1962).

26. *Imperial Oil, Ltd. v. Drlik*, 234 F.2d 4, 11 (6th Cir. 1956), cert. denied, 352 U.S. 941, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956).

27. Accord, *Peters v. Benson*, 425 P.2d 149, 152 (Alaska 1967); *National Bank of Alaska v. McHugh*, 416 P.2d 239, 244 (Alaska 1966); *Patrick v. Sedwick*, 413 P.2d 169, 175 (Alaska 1966).

28. 11 Wis.2d 604, 106 N.W.2d 274, 279, 86 A.L.R.2d 227, 236 (1960).

29. See also *Rigley v. Prior*, 290 Mo. 10, 233 S.W. 823, 832 (1921); Comment, 60 Mich.L.Rev. 612, 629-30 (1962).

suffering without reduction to present worth.

Finally, Beaulieu contends that the greater part of Elliott's pain and suffering was attributable to his failure to follow his doctor's orders in not bearing as much weight as possible on his ankle, and therefore that such pain and suffering cannot be the basis for the recovery of damages.

Dr. Wichman did state that if he were asked by Elliott for treatment, he would suggest as much ambulation as possible, and that it was his opinion that complete ambulation would be his suggestion or prescription. However, there is no evidence that Dr. Wichman ever told Elliott to bear as much weight as possible on his ankle. All that Wichman said was that this is what he would prescribe if he were to treat Elliott for his injury.

[20] There is also no testimony by Dr. Foster that he told Elliott to bear as much weight as possible on his ankle. The doctor stated that he prescribed crutches and advised Elliott to use them to tolerance by testing how much weight he would be able to put on his foot, absorbing the rest with the crutches. When Dr. Foster was asked what his suggested course of procedure would be, based on his examination of Elliott's ankle, he stated:

My suggested course of procedure is for Sergeant Elliott to continue bearing what—weight he can on his foot, to treat it when it becomes inflamed and sore and red by warm soaks and elevation, to continue on the use of the crutches up to the limits of comfort, to maintain his brace on his ankle as he is.

There is nothing in the evidence to show that Elliott had not done what Dr. Foster suggested that he do. The record does not substantiate Beaulieu's claim that Elliott's pain and suffering was attributable to his failure to follow the orders of his doctor.

Elliott's Appeal

As a basis for computing Elliott's impairment of future earnings for the remainder of his work life of 29 years, the court used

Elliott's wage scale in the Air Force at the time of his discharge in the amount of \$462.30 a month. On his appeal, Elliott claims that his future wage loss was greater than that determined by the court. The basis for his claim is that, considering evidence of his experience in truck driving and traffic management, the court ought to have determined what earnings Elliott probably would and could have received in civilian life—the wage scale there being higher for the same type of work than in the military service.

[21] We have held that this case must be remanded to the trial court for the purpose of making detailed and explicit findings as to Elliott's earning capacity and the degree of impairment in respect thereto. Such findings may contain the answer to the question as to why the court used Elliott's military pay, rather than civilian pay scales for equivalent work, as a basis for computing future wage loss for the entire period of 29 years, when Elliott had indicated that he may have retired from the Air Force at the end of 20 years of service which would have been approximately two years after his discharge if he had not received a medical discharge. In the absence of adequate findings and a clear understanding of the basis for the court's award, we are unable to pass upon Elliott's contention that the award for impairment of future earning capacity was inadequate.

[22] Similarly, we are unable to pass upon Elliott's contention that the evidence established that the impairment of his earning capacity was total, or near total, rather than 50% as determined by the court. Adequate findings as to Elliott's degree of impairment of earning capacity may afford a clear understanding of the basis for the court's determination. The findings are not sufficient for that purpose now.

Elliott's next point has to do with attorney's fees allowed by the court. Civil Rule 82(a) (1) provides as follows:

Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered

to in fixing such fees for the party recovering any money judgment therein,

as part of the costs of the action allowed by law:

ATTORNEY'S FEES IN AVERAGE CASES

	Contested	Without Trial	Non-Contested
First \$2,000	25%	20%	15%
Next \$3,000	20%	15%	12.5%
Next \$5,000	15%	12.5%	10%
Over \$10,000	10%	7.5%	5%

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

The court awarded Elliott \$13,870.29 attorney's fees based on the percentages listed in the "without trial" category of the above rule. Elliott claims that this was an erroneous application of the rule, and that a correct computation of attorney's fees should have been under the "contested" category³⁰ because even though liability was admitted, the question of damages was in issue and was contested in a four-day trial.

[23] In a case like this where liability is admitted but the amount of damages is contested, the question of which category of Civil Rule 82(a) (1) is applicable in computing attorney's fees is a matter within the discretion of the trial court. We limit our review in matters of this type to the question of whether the court exceeded the bounds of such discretion—whether such discretionary authority has been abused.³¹

30. Attorney's fees computed under the "Contested" category of the rule would have amounted to \$17,843.73.

31. *McDonough v. Lee*, 420 P.2d 459, 465 (Alaska 1966); *Kenai Power Corp. v. Strandberg*, 415 P.2d 659, 661 (Alaska 1966); *Patrick v. Sedwick*, 413 P.2d 169, 178-179 (Alaska 1966); *Preferred Gen. Agency v. Raffetto*, 391 P.2d 951, 954 (Alaska 1964); *Davidson v. Kirkland*, 362 P.2d 1063, 1070-1071 (Alaska 1961).

[24] The court's reasons for assessing attorney's fees as it did was that liability was admitted, that the total recovery of damages was large, and that the attorney's fees allowed were adequate. Considering the character of this litigation and the amount of recovery,³² we cannot say that the court's reasoning was not sound and that the manner of applying the rule amounted to an abuse of discretion.³³

Costs were assessed against Beaulieu in the amount of \$82.40. Elliott claims that it was error to not include in the costs certain expenses incident to the taking of depositions necessary to establish liability.³⁴

[25, 26] The taxing of costs rests largely in the sound discretion of the trial court, and we shall not interfere with the exercise of that discretion except in cases of abuse.³⁵ Elliott claims that the depositions taken were necessary to establish liability. But he does not point out what depositions were involved, how they related to liability, when they were taken, or when the concession of liability was made by Beaulieu.

32. Elliott's total recovery, in addition to costs and attorney's fees, was \$169,937.25.

33. *McDonough v. Lee*, 420 P.2d 459, 465 (Alaska 1966).

34. Civ.R. 79(b) provides that "A party entitled to costs may be allowed * * * the necessary expenses of taking depositions for use at trial * * *."

35. *Euler v. Waller*, 295 F.2d 765, 766, 97 A.L.R.2d 135, 137-138 (10th Cir. 1961).

In these circumstances we cannot find any abuse of discretion in the court's refusal to allow as costs the expenses incident to the taking of such depositions.

The judgment is set aside. The case is remanded to the superior court for the purpose of making appropriate findings as to the damage issues referred to in this opinion and for the further purpose of entering an appropriate judgment thereon.



Warren A. TAYLOR, Appellant,

v.

DISTRICT COURT FOR the FOURTH JUDICIAL DISTRICT, AT FAIRBANKS, Appellee.

No. 764.

Supreme Court of Alaska.

Dec. 8, 1967.

The Superior Court, Fourth Judicial District, Everett W. Hepp, J., affirmed judgment of the district court which held attorney in contempt for failure to appear for trial at time set. Upon the attorney's appeal, the Supreme Court, Dimond, J., held that action of the attorney in agreeing to a trial setting in the superior court two days before date previously set for trial of another case in the district court, with result that the attorney was unable to appear for the district court trial when the superior court trial extended longer than two days, did not give rise to an inference, which would support judgment of contempt, of a willful disregard or disobedience by the attorney of the district court order in setting the district court case for trial.

Reversed and remanded with directions.

1. Contempt $\S$ 2

In order for there to be contempt, it must appear that there has been a willful disregard or disobedience of the authority or orders of the court. Rules of Civil Procedure, rule 90.

2. Contempt $\S$ 20

Attorney's failure to appear in court at time specified by order of the court may amount to an indirect, but not a direct, contempt of court. Rules of Civil Procedure, rule 90.

3. Contempt $\S$ 54(1)

Purpose of civil rule relating to contempt in requiring a motion in indirect contempt proceedings to be supported by affidavits is to afford one charged with contempt the procedural due process requirement of notice of the charge against him. Rules of Civil Procedure, rule 90(b).

4. Contempt $\S$ 54(1)

In proceeding by district court judge to hold attorney in contempt of court for failure to appear for trial at time required, it was unnecessary under rule for judge to have filed in his own court his affidavit stating that the attorney had failed to appear at the time required, in view of fact that the attorney was duly apprised of the charge against him by the district court's order directing the attorney to show cause why he should not be punished for the alleged contempt. Rules of Civil Procedure, rule 90(b).

5. Contempt $\S$ 20

Action of attorney in agreeing to a trial setting in the superior court two days before date previously set for trial of another case in the district court, with result that the attorney was unable to appear for the district court trial when the superior court trial extended longer than two days, did not give rise to an inference, which would support a judgment of contempt, of a willful disregard or disobedience by the attorney of the district court order in setting the district court case for trial. Rules of Civil Procedure, rule 90.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

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

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

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

20.06 NON-ECONOMIC LOSSES

The (first, second, etc.) item of loss claimed by plaintiff is for non-economic losses. You may award the plaintiff a fair amount to compensate plaintiff for [pain and suffering] [loss of enjoyment of life] [disfigurement] [physical impairment] [and] [inconvenience] resulting from the injury. Such an award should fairly compensate the plaintiff for the non-economic losses (he/she) has experienced from the date of the injury until the date of trial [and for non-economic losses that he/she is reasonably probable to experience in the future.] [In deciding how long the plaintiff may experience such losses in the future, you may need to consider his/her current life expectancy].

The law does not establish a definite standard for deciding the amount of compensation for non-economic losses, and the law does not require that any witness testify as to the dollar value of non-economic losses. You must exercise your reasonable judgment to decide a fair amount in light of the evidence and your experience.

Use Note

This instruction should be used with Instruction 20.01A or 20.01B. Instruction 20.07A (Limitation on Non-Economic Damages) must also be given unless the plaintiff claims disfigurement or severe physical impairment. In that case, Instruction 20.07B, C or D must be given.

The list of items included in the concept of non-economic damages may be tailored for the particular case. The consolidation of these items in a single non-economic loss instruction is not intended to suggest that evidence or argument may not focus on particular items rather than on a general category of "non-economic loss."

The bracketed language concerning future non-economic losses should be given in cases where future losses are alleged. In such a case, Instruction 20.10 (Future Damages) should also be given.

The bracketed sentence on life expectancy should be given only when it is claimed that the injury is permanent. In that event, Instruction 20.13 should be given.

Comment

This instruction replaces former Instructions 20.05 (Physical Impairment) and 20.06 (Pain and Suffering). The list of items included in the concept of non-economic loss is derived from AS 09.17.010(a), which states that "damages for non-economic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other non-pecuniary damage." It is not clear what additional concepts are included in the category of "other non-pecuniary damage." In a case where the evidence supports an additional descriptive term, and where the law permits such a recovery, other terms could be added.

The category of non-economic loss most frequently discussed in the Alaska cases is pain and suffering. The plaintiff is not required to prove pain and suffering damages with great precision. Morrison v. State, 516 P.2d 402, 406 (Alaska 1973). There is no fixed measure for the amount of an award, and its calculation rests with the good sense and deliberate judgment of the fact finder. Patrick v. Sedwick, 413 P.2d 169 (Alaska 1966); see also Beaulieu v. Elliott, 434 P.2d 665, 676 (Alaska 1967). A per diem formula may be used. Id.

Where the evidence of pain and suffering is uncontradicted, it is error for the court not to make an award. Walker v. Alaska Road Commission, 388 P.2d 406 (Alaska 1964); Morrison v. State, 516 P.2d 402, 406 (Alaska 1973); Martinez v. Bullock, 535 P.2d 1200 (Alaska 1975). Cf. Bullard v. BP Alaska, 650 P.2d 402, ___ (Alaska 1982) (affirming zero verdict when issue was

contraverted); Hayes v. Xerox Corp., 718 P.2d 929 (Alaska 1986) (rejecting argument for new trial based in part on alleged absence of award for pain and suffering).

Among the other Alaska cases discussing pain and suffering awards are: Patrick v. Sedwick, 413 P.2d 169, 175 (Alaska 1966); National Bank of Alaska v. McHugh, 416 P.2d 239, 244 (Alaska 1966); Peters v. Benson, 425 P.2d 149, 152 (Alaska 1967); City of Fairbanks v. Nesbitt, 432 P.2d 607 (Alaska 1967); Maddocks v. Bennett, 456 P.2d 453 (Alaska 1969); City of Kotzebue v. Ipalook, 482 P.2d 75 (Alaska 1969); Transamerica Title Insurance Co. v. Ramsey, 507 P.2d 492, 496-97 (Alaska 1973); City of Fairbanks v. Smith, 525 P.2d 1095 (Alaska 1974); Northern Lights Motel, Inc. v. Sweaney, 561 P.2d 1176 (Alaska 1977); American National Watermattress Corp. v. Manville, 642 P.2d 1330 (Alaska 1982); and Hutchins v. Schwartz, 724 P.2d 1194 (Alaska 1986).

Alaska cases also discuss awards for the other categories of non-economic loss mentioned in this instruction. The terms or concepts are sometimes discussed in conjunction with the discussion about an award for pain and suffering (particularly in cases involving lump sum verdicts). Examples include: Walker v. Alaska Road Commission, 388 P.2d 406 (Alaska 1964) (pain, suffering and inconvenience); Peters v. Benson, 425 P.2d 149 (Alaska 1967) (pain and suffering and physical impairment); Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967) (pain and suffering, physical disability, and inability to lead life to which accustomed); Morrison v. State, 516 P.2d 402 (Alaska 1973) (diminished enjoyment of life, including pain and suffering); Martinez v. Bullock, 535 P.2d 1200 (Alaska 1975) (pain and suffering caused by disfigurement); Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1986) (loss of enjoyment of life) and American National Watermattress Corp. v. Manville, 642 P.2d 1330, 1341 (Alaska 1982) (loss of enjoyment of life). Cf. Buoy v. ERA Helicopters, Inc., 771 P.2d 439 (Alaska 1989); Hutchins v. Schwartz, 724 P.2d 1194 (Alaska 1986); Hayes v. Xerox Corp., 718 P.2d 929 (Alaska 1986) (affirming judgments denying claims for loss of enjoyment of life).

A separate award may be appropriate for loss of non-market services, such as performance of household chores. Such an award does not necessarily duplicate an award for loss of enjoyment of life. Dura Corp. v. Harned, 703 P.2d 396, 412 (Alaska 1986).

20.07A LIMITATION ON NON-ECONOMIC DAMAGES WHERE NEITHER SEVERE PHYSICAL IMPAIRMENT NOR DISFIGUREMENT ARE CLAIMED

In this case plaintiff is claiming non-economic loss. You are instructed that an award for non-economic loss may not exceed \$500,000. [**] This limitation on the total award for non-economic loss does not apply to any other award you may make to the plaintiff for any of the other items of loss claimed by the plaintiff.

Use Note

This instruction deals with the \$500,000 limit on awards for non-economic loss. See AS 09.17.010. Before using this instruction, the trial court must first resolve a question not yet addressed by the Alaska Supreme Court: should the cap be imposed by the judge after the verdict, if necessary, or should the jury be instructed on the cap? See Comment 5 below. If the trial judge concludes that the cap will be imposed by the judge as necessary after the verdict, Instructions 20.07A, B, C and D must not be given.

If the trial judge concludes that the jury should be instructed on the "cap," Instruction 20.07A should be given only if: (1) the plaintiff does not allege disfigurement or severe physical impairment and (2) comparative negligence of the plaintiff is not at issue. In any case in which plaintiff alleges either severe physical impairment or disfigurement, Instruction 20.07A must not be given. Instead, Instruction 20.07B, C or D must be given.

[**] In any case in which comparative negligence of the plaintiff is at issue, there are significant issues regarding the calculation of the damage award and the effect of the "cap," and it may be necessary to modify this instruction. See Comment 6 below.

This instruction should ordinarily be given immediately after the instruction on non-economic losses [20.06].

Comment

This instruction is intended to inform the jury concerning the limitations on recovery for non-economic losses required by AS 09.17.010.

A number of unanswered questions exist concerning AS 09.17.010. A description of some of the issues raised by this statute follows:

1. AS 09.17.010(a) refers to actions "for personal injury based on negligence." As a result, it is not clear whether the cap applies in personal injury cases based on warranty or strict liability in tort.

2. AS 09.17.010(c) states that the cap does not apply to damages for disfigurement or severe physical impairment. While the adjective "severe" was used with reference to physical impairment, it was not used with reference to disfigurement. As drafted, Instructions 20.07B and 20.07D allow the jury to conclude that in any case in which the plaintiff has been disfigured, regardless of severity, the cap does not apply.

3. The Alaska Supreme Court has not decided whether the existence of "disfigurement" or a "severe" physical impairment is solely a question for the jury or involves a threshold determination by the judge. Assuming that these are questions for the jury, nothing in AS 09.17.010 appears to alter the usual standards for motions for directed verdict. As a result, it appears that the judge could enter a directed verdict on whether the plaintiff was disfigured or severely physically impaired, leaving it to the jury to decide any disputed issues as to liability, causation or damages.

4. Instructions 20.07A-20.07D are drafted on the assumption that if the fact finder finds that there is disfigurement or severe physical impairment, there is no cap on any of the non-economic damages described in AS 09.17.010(a). In other words, these instructions were drafted on the assumption that upon a finding of disfigurement or severe physical impairment, the "cap" disappears entirely. An alternative interpretation suggested by the language of AS 09.17.010(c) is that in cases of disfigurement or severe physical impairment, damage awards for only those two elements would be exempt from the \$500,000 cap, and all other elements of non-economic loss listed in AS 09.17.010(a) would remain subject to the \$500,000 cap. Under this alternative interpretation, even with a finding of disfigurement or severe physical impairment, the cap remains effective for all elements of non-economic loss other than compensation for the specific elements of severe physical impairment or disfigurement. Under this alternative interpretation, it may be difficult to isolate elements of disfigurement and severe physical impairment that are distinct from other categories of non-economic loss such as pain and suffering, "ordinary" physical impairment, loss of non-market services, etc.

5. Another open question is the division of responsibility between the judge and jury in applying the "cap." Two possible approaches are apparent to the Committee. Under the first approach, the jury is instructed: (1) to decide whether the cap applies, i.e., whether plaintiff is disfigured or severely physically impaired; and (2) if the cap applies, to limit the non-economic loss award to \$500,000. Under the second approach, application of the cap is the post-verdict responsibility of the judge. Under this approach, the jury would receive special interrogatories asking for "yes" or "no" answers concerning whether the defendant's conduct caused disfigurement and/or severe physical impairment of the plaintiff. After the verdict, the judge would use the answers to the special interrogatories to decide whether the cap applies. If the cap applies and if the jury's award for non-economic loss exceeds \$500,000, the judge would reduce the non-economic loss award to \$500,000.

The Committee expresses no view on which approach is correct. If the first approach is followed, Instruction 20.07A, B, C or D must be given. If the second approach is taken, none of these instructions should be given. Instead, the special verdict form must include special interrogatories concerning whether plaintiff suffered disfigurement or severe physical impairment.

6. Under AS 09.17.010, the "amount awarded [for non-economic loss]" cannot exceed \$500,000. Another issue raised by this statute is whether the "amount awarded" refers to the non-economic loss calculation before or after reduction for comparative negligence. The effect on the judgment can be significant. For example, assume that the plaintiff has non-economic losses of \$600,000, economic losses of \$400,000, and that plaintiff's comparative negligence is 20%. Under the "before" approach, the fact finder will limit the non-economic loss award to \$500,000 before reduction for comparative negligence. The judgment will then be calculated as follows:

Non-Economic Loss (per "cap")	\$500,000
<u>Economic Loss</u>	<u>+400,000</u>
Total Damages	900,000
<u>-20% Comparative Negligence</u>	<u>-180,000</u>
Total Judgment	\$720,000

Under the "after" approach, the "cap" is triggered only if the non-economic loss exceeds \$500,000 after it has been adjusted for comparative negligence. Under this approach, in the same example the judgment would be computed as follows:

Non-Economic Loss	\$600,000
<u>-20% Comparative Negligence</u>	<u>-120,000</u>
Non-Economic Loss Award	480,000
 Economic Loss	 \$400,000
<u>-20% Comparative Negligence</u>	<u>- 80,000</u>
Economic Loss Award	<u>320,000</u>
 Total Judgment	 \$800,000

(Under this approach the "cap" was not a factor because after the adjustment for comparative negligence, the non-economic loss award was below the \$500,000 cap.)

The significance of this issue with respect to the instructions and verdict forms depends upon whether the cap is to be applied by the judge on a post-verdict basis or whether the jury is to apply the cap based on the court's instructions. If the judge is to apply the cap on a post-verdict basis, the jury is simply asked to (1) calculate total damages, (2) calculate the percentage of comparative negligence, and (3) answer special interrogatories on whether the defendant's conduct caused disfigurement or severe physical impairment of the plaintiff. The judge will use this information to calculate the judgment, and the jury will not be instructed on how or when to apply the cap or the comparative negligence percentage. However, if the jury applies the cap during its deliberations, it must be instructed on how to do so. Creative counsel may see other possibilities, but here are two possible approaches:

Option One: If the cap is applied by the jury before reduction of the award for comparative negligence, the court will give Instruction 20.07A, B, C or D as appropriate to the facts of the case. The jury will then enter an amount on the verdict form for non-economic loss. If the jury has concluded that the cap applies, this amount cannot exceed \$500,000. The jury will also make an entry on the verdict form for the percentage of plaintiff's negligence, if any. As in current practice, neither the instructions nor the verdict form will ask the jury to apply the comparative negligence percentage to reduce any awards; this reduction will be made by the judge in computing the judgment.

Option Two: If the cap is applied by the jury after it reduces the award for comparative negligence, Instructions 20.07A, B, C or D must be given. However, these instructions and the special verdict form must be modified to tell the jury to take three steps in computing an award for non-economic loss: (1) compute the amount

of the award, (2) reduce this amount by a percentage reflecting the plaintiff's own negligence, if any, and (3) if the award after reduction for plaintiff's negligence exceeds \$500,000, reduce it to \$500,000.

20.10 FUTURE DAMAGES--NO REDUCTION TO PRESENT VALUE

As I have instructed you, you may decide it is reasonably probable that the plaintiff will have some future [non-economic] losses resulting from the (accident). In fixing an amount for future [non-economic] losses, you must disregard the fact that any amount you award the plaintiff may be paid before the actual loss occurs. You must also disregard the fact that the value of money may change over time.

Use Note

Instruction 20.10 is intended for use in cases in which future losses are claimed, but some or all of the damage awards are not to be reduced to present value.

Under AS 09.17.040, the ordinary rule is that future economic losses must be reduced to present value. In such a case, Instruction 20.04 (Inflation and Present Value) must be given. Future non-economic losses are not reduced to present value. Therefore, if future non-economic losses are also being claimed, Instruction 20.10 must also be given and the bracketed language must be used.

Cases may arise in which none of the future damages are to be reduced to present value. For example, plaintiff may not claim any future economic losses, but only future non-economic losses. Alternatively, the parties may have agreed pursuant to AS 09.17.040(c) to use the Beaulieu rule in awarding future economic loss. In such a case, Instruction 20.04 will not be given. Instruction 20.10 will be given and the bracketed language must be omitted.

Comment

In 1967, the Alaska Supreme Court held that damage awards for loss in future earning capacity should not be reduced to present value. Beaulieu v. Elliott, 434 P.2d 665, 670-71 (Alaska 1967). The court reasoned that the annual inflation rate would offset any earnings from investments. The court also held that damage awards for future pain and suffering are not to be reduced to present value. Id. at 676.

AS 09.17.040(b), enacted in 1986, provides that future economic damages shall be reduced to present value, unless the parties stipulate to use the Beaulieu rule. This statute does not affect future non-economic loss.

A damage award for loss of retirement benefits may result in a double recovery if not reduced to present value. This is so because a figure for total retirement benefits is based on the result of the investment and return upon employer contributions over many years. The plaintiff would have the opportunity to invest an award, the size of which is based on projected investment. See Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 933 (Alaska 1977).

The court has suggested that in a case in which the award of damages for loss in earning capacity is to be based on the difference in earning potential between pre- and post-injury employment of the plaintiff, the award might be reduced to present value if it can be shown that the actual gap in earnings between the jobs will remain constant in the future, as then inflation would have no effect. Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 934 (Alaska 1977). If both sets of wages were to increase by the same percentage, the actual gap in wages would increase and a reduction to present value would be improper. Id. at 934.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.020. Punitive damages.

Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence.

20.20 PUNITIVE DAMAGES

The plaintiff has requested that you award (him/her/it) a separate amount of money in order to punish the defendant and to deter the defendant and others from repeating similar acts. You may award the plaintiff such an amount of money only if you decide that the defendant's conduct which forms the basis of your verdict was outrageous. The defendant's conduct was outrageous if it was the result of maliciousness or hostile feelings toward the plaintiff, or was undertaken with reckless indifference to the interests, rights or safety of others.

Plaintiff must prove the outrageousness of defendant's conduct by clear and convincing evidence. I will now define what it means to prove something by clear and convincing evidence. An alleged fact is established by clear and convincing evidence if the evidence induces belief in your minds that the alleged fact is highly probable. It is not necessary that the alleged fact be certainly true or true beyond a reasonable doubt or conclusively true. However, it is not enough to show that the alleged fact is more likely true than not true.

The law provides no fixed measure as to the amount of such damages, but leaves it to you to decide an amount that will fairly accomplish the purposes of punishment and deterrence. In assessing such damages you may consider the magnitude and flagrancy of the defendant's offense, the importance of the

policy violated, the wealth of the defendant, and the amount of compensatory damages.

Use Note

This instruction is for use when punitive damages are claimed.

For defamation cases see Instruction 16.06.

Comment

Punitive damages are a remedy, not a cause of action. Doe v. Colligan, 753 P.2d 144, 145 n.2 (Alaska 1988). They are considered a harsh remedy not favored in law. Ross Laboratories v. Thies, 725 P.2d 1076, 1081 (Alaska 1986); Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986). Punitive damages are to be allowed only with caution and within narrow limits. Id.

The purpose of punitive damages is two-fold: to punish the wrongdoer and to deter the wrongdoer and others from repeating the offensive act. Doe v. Colligan, 753 P.2d 144, 145 (Alaska 1988); Providence Washington Ins. Co. v. City of Valdez, 684 P.2d 861 (Alaska 1984).

The Alaska Supreme Court has recognized two requirements for the recovery of punitive or exemplary damages. First, since punitive damages are a remedy and not an independent cause of action, it is essential that the plaintiff prevail on one or more causes of action. In other jurisdictions this requirement has occasionally been expressed by the statement that the plaintiff must recover compensatory damages as a prerequisite to recovery of punitive damages. In Alaska, punitive damages may be recovered even though the plaintiff has only received an award of nominal damages. The Alaska Supreme Court first addressed this issue in Haskins v. Sheldon, 558 P.2d 487, 492-93 (Alaska 1976). In Haskins the plaintiff sought damages for wrongful repossession of a tractor. He also sought return of the tractor. The trial court concluded that there was insufficient evidence of value of the tractor to submit the damage claims, but the jury was permitted to consider the claim for return of the tractor. The jury found for the plaintiff and required return of the tractor. The jury also awarded punitive damages. The Supreme Court affirmed, rejecting the argument that the absence of a compensatory damages award precluded an award of punitive damages. In reaching its holding, the court quoted C. McCormick, Damages § 83 (1953). The

first portion of the McCormick quotation states the rule that when the plaintiff prevails on an appropriate cause of action, punitive damages may be awarded even though there is only a nominal compensatory award or where there is no compensatory damage award at all. In Oaksmith v. Brusich, 774 P.2d 191, 201 (Alaska 1989), the Court referred to the McCormick quotation and affirmed an award of punitive damages to a plaintiff who had received an award of nominal damages.

The second requirement is that the plaintiff must prove that the wrongdoer's conduct was outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another. Bridges v. Alaska Housing Authority, 375 P.2d 696, 702 (Alaska 1962) (Citing Restatement of Torts § 908 (1939), and W. Prosser, Handbook on the Law of Torts, § 2 (2d ed. 1955)). Actual malice need not be proved. Rather, reckless indifference to the rights of others and conscious action in deliberate disregard of them may provide the necessary state of mind to justify punitive damage. Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 46 (Alaska 1979) (citing Restatement (Second) of Torts § 908 (Tent. Draft No. 19), (1973)). Reckless misconduct does not occur unless the act or omission is itself intended, notwithstanding that the actor knew of facts which would lead any reasonable person to realize the extreme risk to which it subjected the safety of others. Hayes v. Xerox Corp., 718 P.2d 929, 935 (Alaska 1986) (quoting Restatement (Second) of Torts § 500, comment b). Reckless misconduct therefore differs from negligence, which consists of mere inadvertence, incompetence or unskillfulness because reckless conduct requires a conscious choice of action. Id.

In Murray v. Feight, 741 P.2d 1148, 1158 (Alaska 1987) the court indicated that the language of this pattern instruction adequately conveyed the requirement that the jury find malicious or reckless acts. However, in other cases the court found no error in instructions in which the word "outrageous" was not used. Teamsters Local 959 v. Wells, 749 P.2d 349, 361 n.25 (Alaska 1988); Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1047 (Alaska 1984).

If the evidence does not give rise to an inference of actual malice or of conduct sufficiently outrageous to be deemed to be equivalent to actual malice, the trial court should not submit the issue of punitive damages to the jury. See State Farm Fire and Casualty Co. v. Nicholson, 777 P.2d 1152 (Alaska 1989) (error to instruct on punitive claim); Alyeska Pipeline Service Co. v. Beadles, 731 P.2d 572, 574 (Alaska 1987) (summary judgment); Ross Laboratories v. Thies, 725 P.2d 1076 (Alaska 1986) (summary

judgment dismissing punitive claim as to one defendant affirmed; submission of punitive damages claim as to co-defendant reversed); Hayes v. Xerox Corp., 718 P.2d 929, 936 (Alaska 1986) (summary judgment); Zeman v. Lufthansa German Airlines, 699 P.2d 1274 (Alaska 1985) (summary judgment); State v. Haley, 687 P.2d 305, 320 (Alaska 1984); Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co., 666 P.2d 33 (Alaska 1983) (summary judgment); Alyeska Pipeline Service Co. v. O'Kelley, 645 P.2d 767 (Alaska 1982) (refusal to instruct jury on punitives). In one case, the court affirmed the dismissal of a complaint for failure to state a claim on which relief may be granted because there were no allegations which, liberally construed, gave rise to punitive damages. Mattingly v. Sheldon Jackson College, 743 P.2d 356, 364 (Alaska 1987).

Punitive damages may exceed compensatory damages, and no definite ratio between them is presented. Factors to be considered in awarding punitive damages are the magnitude and flagrancy of the wrong committed, the importance of the policy violated and the wealth of the defendant. Pletnikoff v. Johnson, 765 P.2d 973, 979 (Alaska 1988); Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1047 (Alaska 1984) (citing Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 48 (Alaska 1979)). The Supreme Court has reviewed punitive damage awards for excessiveness and has affirmed awards made at a variety of ratios of punitive damages to actual damages. See, e.g., Teamsters Local 959 v. Wells, 749 P.2d 349, 361 n. 26 (Alaska 1988) (Ratio of less than three to one); Alaska Insurance Co. v. Movin' On Construction, Inc., 718 P.2d 472 (Alaska 1986) (ratio of three to one approved); Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1048 (Alaska 1984) (ratio of 2.38 to one affirmed); Alaska Statebank v. Fairco, 674 P.2d 288, 291, 294 (Alaska 1983) (ratio of 2.53 to one affirmed); Clary Insurance Agency v. Doyle, 620 P.2d 194, 205 (Alaska 1980) (affirming ratio of approximately two to one). Cf. Sturm, Ruger & Co. v. Day, 594 P.2d 38, 48 (Alaska 1979) (reducing punitive award of \$2,895,000 to \$250,000).

The Alaska Supreme Court has affirmed awards of punitive damages in a variety of factual contexts. For example, punitive damages are recoverable in products liability cases. The court affirmed a punitive damages award in a products case based on evidence that the manufacturer knew that its product was defectively designed and that injuries and deaths had resulted from the design defect, but that the manufacturer continued to market the product in reckless disregard of the public's safety. Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 46-47 (Alaska 1979). Cf. Ross Laboratories v. Thies, 725 P.2d 1076 (Alaska