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reversed its earlier position and substituted a rule of contribution in accordance with the tortfeasors' shares of fault ("comparative contribution"), partly in recognition of its greater fairness, but partly also in deference to the comparative negligence rule. Admittedly, the court could have pretended a deference to the legislative preference—and it was in any event merely reversing a prior judicially created doctrine<sup>63</sup>—but it felt and responded to the need for harmonization of the two regimes.

A much bolder assault was mounted by the New York Court of Appeals in *Dole v. Dow Chemical Co.*<sup>64</sup> Here the plaintiff's husband, employed by Urban, was overcome by poisonous fumes while fumigating a storage bin with a chemical supplied by the defendant. The plaintiff's wrongful death action against the defendant's alleged negligence in not properly labeling the fumigant so as to warn users; the defendant's cross-complained against Urban, seeking an indemnity (if held liable) for its negligence in failing to follow instructions on the label and thus contributing to its employee's death. The difficulty facing Dow in its third-party complaint was that the New York contribution statute, like the Californian, authorizes contribution only between tortfeasors held liable in a joint judgment—here joint judgment was precluded by the immunity provision of the New York Workmen's Compensation Act,<sup>65</sup> barring tort recovery against an employer "on account of such injury or death." Still, according to a widely accepted construction, this immunity does not protect against claims for indemnity (as distinct from contribution) on the sophisticated ground that indemnity is based not on the personal injury cause of action, but on the relation between indemnitor and indemnitee (here supplier and user of the harmful product). Unfortunately, Dow's indemnity claim seemed jeopardized by the requirement that the claimant's negligence must have

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Virgin Islands, in *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967), and the Seventh Circuit as the federal rule for mid-air collisions in federal airspace in *Kohr v. Allegheny Airlines*, 504 F.2d 400 (7th Cir. 1974). In addition, comparative fault recently replaced the "equal division" rule for property damage in maritime collisions, in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), thereby bringing that rule in line with the rule for personal injury under the Jones Act, 46 U.S.C. § 688 (1970), and the Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1970), and the Brussels Maritime Convention of 1910, 37 Stat. 1658, TS 756 (March 1, 1913) (concerning collisions between vessels).

63. In Wisconsin, contribution had been judicially created in 1918 (*Ellis v. Chicago & N.W. Ry.*, 167 Wis. 392, 167 N.W. 1048 (1918)), but comparative negligence was introduced by statute in 1931.

64. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), noted in 53 A.L.R.3d 175. *Dole* has been the subject of a great deal of law review comment. See, e.g., 58 CORNELL L.Q. 602 (1973); 42 N.Y.U.L. REV. 815 (1972); 24 SYR. L. REV. 462-70, 551-56 (1973).

65. N.Y. WORKMEN'S COMP. LAW § 29(4) (McKinney 1965).

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been "passive" and the indemnitor's "active." However, undaunted the court of appeals invented a form of "partial indemnity" for those, like Dow, who could not hope to satisfy that exacting requirement: the court created an indemnity with the remarkable attribute of allowing recovery which, though not a full recovery, was apportioned to the respective degrees of fault of the parties. In thus denying Urban's motion to dismiss Dow's third-party complaint, the court flouted at least three statutory rules: (1) it countenanced contribution under the false label of "indemnity" in violation of the Contribution Act's requirement of a joint judgment;<sup>66</sup> (2) such contribution was to be apportioned to the parties' shares of responsibility, in violation of the Contribution Act's requirement of equal division; and (3) it gave the go-by to the immunity provision of the New York Workmen's Compensation Act by enlarging the court-created exception for indemnity by brazenly mislabeling contribution "partial indemnity."

While this tour de force probably has no equal even in an era that has become accustomed to cynical manipulation of language in public life,<sup>67</sup> far less in the way of violence to the statutory norm is needed in the California context. For the only statutory rule requiring judicial qualification is the equal division rule of the California contribution statute<sup>68</sup> in a situation obviously un contemplated at the time of its enactment: the situation where the plaintiff also bears a share of responsibility and has become entitled to an apportioned award.<sup>69</sup> Better still,

66. N.Y. CIV. PRAC. LAW RULES § 1401 (McKinney 1963).

67. The *Dole* court was justified in drawing attention to occasional distortions of the "active-passive" criterion by some courts, but was less than frank in interpreting these distortions "as an attempt at realignment of the rule"). The courts that distorted the criterion were operating against the background of the unreformed common law rule against contribution and understood that indemnity meant a complete shifting of the loss. By contrast, the *Dole* court was faced with a contribution statute and laid an axe to the uniformly understood distinction between contribution (sharing) and indemnity (shifting). The "active-passive" criterion is discussed in Note, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490 (1969), commenting especially on *United Airlines v. Wiener*, 355 F.2d 379 (9th Cir. 1964).

Nor is *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1st Dist. 1964) a case where the court "although using the language of indemnity, . . . actually applied the principles of equitable contribution, quite like the partial indemnification or comparative negligence of *Dole*." Braun, *supra* note 55, at 202. *Herrero* shifted the whole loss caused by the malpractice from the tortfeasor to the negligent physician, while *Dole* shared it between "indemnitor" and "indemnitee." The first was therefore a case of true indemnity for a divisible part of the loss, the second a case of contribution, the sharing of an indivisible loss. Cf. *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1st Dist. 1974).

The sauciness of *Dole* is all the more difficult to reconcile with the same court's cautious refusal only 1 year later in *Cudling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) to extend apportionment to contributory negligence, a context in which the legislature had largely withheld its voice.

68. CAL. CODE CIV. PRO. §§ 875-80 (West Supp. 1975).

69. Thus Sen. Grunsky's bill, Calif. S.B. 494, 1975-76 Reg. Sess., would mandate

of course, would be a *general* abrogation of the equal division rule, but that reform would be widely regarded as falling more properly to the province of the legislature. A model bill along those lines has (once again) been recently proposed.<sup>70</sup>

A final option for accomplishing a correct distribution of shares that would altogether sidestep the problem of contribution is to abandon the "entire liability" rule, previously considered. Limiting P's claim to only D<sub>1</sub>'s apportioned share would thus solve not only the problem of D<sub>2</sub>'s insolvency but also the problem posed either by a "no contribution" rule<sup>71</sup> or, as in California, by a pro rata contribution rule. This solution would not be ideal, since it would apportion shares on the principle of fault when the plaintiff was contributorily negligent but would still apportion shares on the pro rata principle when he was not. But it has two attractions: first, the incongruity is less obvious, and second, this solution could be imposed more easily by the courts since it would involve a modification merely of the judicially created "entire liability" rule instead of the *statutory* pro rata rule of contribution.

2. *The Absent Tortfeasor.* Another problem connected with multiple parties, which the *Li* court identified as deserving the most serious future consideration, arises when all responsible parties are not brought before the court. As Justice Sullivan observed, "[i]t may be difficult for the jury to evaluate relative fault in such circumstances, and to compound this difficulty such an evaluation would not be *res judicata* in a subsequent suit against the absent wrongdoer."<sup>72</sup>

Fortunately, the virtual absence of case law from other jurisdictions (including the British Commonwealth) suggests that the problem's theoretical difficulty is not matched by its practical importance. The

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apportionment among defendants in accordance with their negligence "when a judgment is rendered against more than one defendant in any such action." "Such action" seems to refer to an action in which a plaintiff's recovery is reduced by reason of his contributory negligence.

A more general measure would require apportionment in all contribution claims, as in Utah. See note 55 *supra*.

The Vermont court in *Howard v. Spafford*, — Vt. —, 321 A.2d 75 (1974) refused to follow *Dole* and permit contributions among tortfeasors in any form despite the enactment of a comparative negligence statute.

70. Braun, *supra* note 55. For earlier recommendations see Notes, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490 (1969) and *Joint Tortfeasors: Legislative Changes in the Rules Regarding Releases and Contribution*, 9 HARV. L.J. 180 (1958). As already noted, Utah introduced unequal apportionment simultaneously for contributory negligence and contribution. Thode, *Comparative Negligence, Contribution among Tortfeasors and the Effect of a Release—a Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406 [hereinafter cited as Thode].

71. This solution is therefore preferred for Florida by Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. OF MIAMI L. REV. 737, 778-87 (1974).

72. 13 Cal. 3d at 823, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

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Appeal from the Superior Court of the State of Alaska,  
First Judicial District, Juneau,  
Victor D. Carlson, Judge.

Appearances: M. T. Thomas and W. G. Ruddy, Juneau,  
for Appellant. Allen T. Compton, Juneau, for  
Appellee.

Before: Rabinowitz, Chief Justice, Connor, Erwin and  
Bocchever, Justices. [Burke, Justice, not  
participating.]

CONNOR, Justice.

This appeal and cross-appeal result from a superior  
court ruling which denied any recovery to two wrongful death  
claimants.

We must decide whether the trial court erred in  
finding that the negligence of the State of Alaska caused  
the accident which took the decedents' lives. Additionally,  
we must decide whether the trial court erred in finding that  
the decedents' own negligence also contributed to their  
demise. Finally, if the court below did not err with regard  
to its findings of fact, we must determine whether the  
doctrine of contributory negligence should continue to  
operate as a complete bar to all recovery in cases of this  
type.

I.

The decedents, Ronald Lindley and Donald Kaatz,  
were employed by the Burgess Construction Company in early  
December 1970. At that time the company was working on a  
project in Wrangell, Alaska. The project required gravel,

which the company customarily obtained from Reid's gravel pit, located three miles south of Petersburg, Alaska, just off the Mitkof Highway.

In order to transport the gravel from the Petersburg area to Wrangell, the following procedure was usually utilized. Donald Kaatz, having taken up temporary residence in the town of Petersburg, readied the gravel at the pit for transportation to Wrangell. Periodically, the Burgess Construction Company would send a barge up the Wrangell Narrows to Petersburg. Before leaving Wrangell, the company would place a front-end loader on the barge. Ronald Lindley, an experienced operator of front-end loaders, would accompany the vessel to the Petersburg barge dock, located approximately four miles south of town.

Kaatz would meet the barge at the dock and, together with Mr. Lonnie Dreka, who supervised the operation, he would help to prepare the barge to carry the gravel back to Wrangell. When this was done, Kaatz and Dreka would drive Kaatz' pickup truck along the Mitkof Highway to the gravel pit, which was one mile north of the barge dock. Lindley would follow, driving the front-end loader.

When the men reached the gravel pit, Lindley would use the loader to fill a truck with gravel. The vehicle was then driven back to the barge dock, where the gravel was placed onto the vessel, along with the front-end loader. Dreka and Lindley then would accompany the barge back to

Wrangell and unload it. Kaatz would return to his chores in and around Petersburg.

On the evening of December 9, 1970, the barge arrived at the Petersburg dock around 7:00 p.m. Kaatz met the barge when it arrived. Lindley, Dreka and the front-end loader were on board. The weather was overcast, with intermittent rain and drizzle. The temperature throughout the day had hovered in the mid to low thirties.

On this particular evening Ronald Lindley did not wait for Dreka to finish preparing the barge for loading. Instead, he and Kaatz set out together in the front-end loader, headed north towards the gravel pit. When the balloon-tired vehicle had traveled approximately half of the one mile distance from the barge dock to the gravel pit, it began to descend a slight grade on the Mitkof Highway. At the base of the grade, the road turned to the right. The vehicle did not reach that curve because, as the loader descended the grade, it toppled off the side of the northbound lane over an embankment. Lindley and Kaatz were both killed.

The widows of these men each brought wrongful death actions against the State of Alaska. They alleged that the state was negligent in that it had failed to adequately maintain the icy road, so that it would be safe for vehicular traffic. Judge Victor D. Carlson tried the case and rendered a verdict for the defendants. In doing so, he specifically concluded that "[t]he negligence of the State of Alaska

[was] a cause of the death of Messrs. Lindley and Kaatz." However, he also found that the icy and very slippery condition of the Mitkof Highway on the evening of December 9, 1970, "was known to Mr. Kaatz before he climbed into the cab of the loader and it became known to Mr. Lindley immediately when the vehicle proceeded onto the highway." In addition, he found that it was "unreasonable for any person experienced with a front-end loader to operate such a vehicle on the highway" under those conditions. He thus concluded that the contributory negligence of the decedents was a complete defense to their claims.<sup>1/</sup>

The appellants contend that Judge Carlson clearly erred in finding that the decedents' conduct constituted contributory negligence. Alternatively, they urge us to abandon the doctrine of contributory negligence and adopt a "pure" comparative negligence formula instead.

The state, in its cross appeal, contends that the court erred in finding that it was negligent in its maintenance of the road and that such negligence caused the deaths of Lindley and Kaatz. The state also argues that Judge Carlson did not err in finding that the decedents were negligent and urges us not to abandon the doctrine of contributory negligence

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<sup>1/</sup> Judge Carlson indicated on the record that he did not favor the doctrine of contributory negligence, but was constrained by precedent to apply it.

in favor of comparative negligence. The record presented in this case requires us to address each of the contentions that has been raised.

## II.

We shall begin our analysis by determining whether the trial court erred in finding that negligence on the part of both the state and the decedents caused the accident. At the outset it is useful to restate the standard for review of judge-tryed cases in which all pertinent claims of error are predicated on an assertion of insufficient evidence. In Alaska Foods Inc., v. American Manufacturer's Mutual Insurance Co., 482 P.2d 842, 848 (Alaska 1971), we stated:

"The rule is this: Under Civil Rule 52(a) we shall not set aside the finding of fact of a trial judge unless it is clearly erroneous. A finding is clearly erroneous when, although there may be evidence to support it, we are left with the definite and firm conviction on the entire record that a mistake has been committed.

This rule applies to any finding, regardless of the nature of the evidence upon which it is based. The only difference between our review of findings based on oral testimony, and those based on documentary evidence or undisputed facts, is that in the former case we must pay some deference to the trial judge's assessment of the credibility of witnesses, whereas in the latter case we need not. It is because of the deference we pay to the trial judge's assessment of credibility of witnesses where there is oral testimony that we have characterized our scope of review in cases where there is no oral testimony as being a 'broader' type of review. Even in the latter situation, clear error must appear under the rule we apply.

The clearly erroneous standard, as we apply it, means something more than merely showing it is more probable than not that the trial judge was mistaken. We must be convinced, in a definite and firm way, that a mistake has been committed. We must be well persuaded by the party seeking to set aside the trial judge's findings before we will hold he was wrong." (footnotes omitted) 2/

With this standard in mind, we turn to the factual issues in this case.

The state, in its cross appeal, contends that its highway maintenance crew was not negligent in having failed to sand the Mitkof Highway before the accident occurred.

In State v. Abbott, 498 P.2d 712 (Alaska 1972), we held that the state has a duty to exercise reasonable care to maintain Alaska's highways in safe condition. <sup>3/</sup> That duty certainly extends to hazards created by ice and snow.

A breach of this duty of care occurs whenever lack of reasonable road maintenance exposes a person to an unreasonable risk of harm. In Abbott we stated:

"In order for a plaintiff to show that the state exposed him to an unreasonable risk of harm he would have to demonstrate that the likelihood and gravity of the harm threatened outweighed the utility of the state's conduct and the burden on the state for removing the danger. In making that determination in the case at bar, all of the following factors would be relevant: whether the state had notice of the dangerous condition, the length of time the ice and snow had been on the highway, the availability of men and equipment,

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2/ Accord, Ficke v. Alaska Airlines, 524 P.2d 271, 274 (Alaska 1974).

3/ See also State v. I'Anson, 529 P.2d 188, 193-94 (Alaska 1974).

and the amount of traffic on the highway."  
498 P.2d at 725. (footnotes omitted, emphasis  
in original)

In the present case, the evidence clearly supports  
a finding of negligence on the state's part.

Evidence at trial established that by 6:00 p.m.  
on the date of the accident, the state had both actual and  
constructive notice regarding the dangerous condition of  
the highway. For example, testimony established that by  
noon the road was dangerous, and that by 5:00 p.m. it was  
extremely dangerous, the worst that some Petersburg observers  
had ever seen. In a deposition, the school bus driver stated  
the he had alerted school authorities of the dangerous road  
conditions in mid-afternoon. Indeed, the state's road mainten-  
ance foreman in Petersburg, Mr. Cecil H. Donahue, conceded that  
he drove the road between 5:00 and 6:00 p.m., and he knew then  
that the road "probably did need sanding." Notice to Donahue  
was notice to the state in these circumstances.

The accident occurred at approximately 8:00 p.m. By  
that time the road had been in a bad condition for many hours.  
Since the highway maintenance facility was only about one mile  
from where the accident took place, time, in conjunction with  
logistics, would not have been a barrier to sanding the road.  
Nevertheless, the state did not begin sanding until after the  
accident.<sup>4/</sup>

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<sup>4/</sup> Compare Tetreault v. State, 269 N.Y.S.2d 812 (Ct. Cl. 1966),  
where the state began sanding 1/2 hour after it became aware of

Regarding the availability of men and equipment, suffice it to say that shortly after the accident, the road in fact was sanded.<sup>5/</sup>

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4. (Cont'd.)

the icy conditions. The court found that the state was not negligent, despite its failure to reach and sand that portion of the highway where the accident occurred.

5/ This does not mean that proof of subsequent repairs is to be admitted as direct evidence of negligence. Cf. *Otis Elevator Co. v. McLaney*, 406 P.2d 7, 15 (Alaska 1965); *Gunsolus v. City of Fairbanks*, 391 P.2d 13, 14 (Alaska 1964); *City of Anchorage v. Steward*, 374 P.2d 737, 739-40 (Alaska 1962). Rather, Alaska's position on this matter comports with the Federal Rule of Evidence 407, which provides:

"When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." (emphasis added)

Specifically, in *State v. Abbott*, 498 P.2d 712, 725 (Alaska 1972), we held that "availability of men and equipment" is a relevant factor in determining whether lack of road maintenance exposed plaintiff to an unreasonable risk of harm. Such evidence is crucial in determining whether a defendant could have done what plaintiff is claiming should have been done.

Therefore, the fact that the road maintenance crew in the present case did sand the Mitkof Highway shortly after the accident is admissible to prove that the road also could have been sanded before that time.

As to the amount of traffic on the highway, foreman Donahue stated that the accident occurred on the "most heavily traveled" portion of the Mitkof Highway. Other evidence established that, even on that raw, nasty night, numerous other vehicles were on the road.

Finally, we have held that an unexcused violation of administrative regulations may be negligence itself, or may be relevant evidence bearing on the issue of negligent conduct. Ferrell v. Baxter, 484 P.2d 250, 263-64 (Alaska 1971). The Department of Highways has adopted certain "standard operating procedures" with regard to highway maintenance. S.O.P. 4301-06 provides at page 13:

"Sanding crews must be dispatched at the first indication that traffic is having difficulty, with particular attention given to intersections and grades. Maintenance crews in outlying areas must keep steep grades and sharp curves well sanded, working overtime and at night if conditions warrant. Maintenance foremen must be alert to this condition and plan accordingly, and employees should be instructed to report for duty when inclement weather threatens. Sanding operations must continue as long as conditions warrant. First priority should be given to hills, intersections and curves. In the vicinity of the more populated areas, sanding crews should be dispatched in sufficient time to provide protection for the early morning and evening traffic proceeding to and from work and school."

Certainly the spirit, if not the letter of this regulation, was not complied with. The record, as a whole, shows no clear error whatever in Judge Carlson's finding that the state was negligent.

The state also argues that Judge Carlson erred in finding that the state's negligence caused the front-end loader to topple off the road. It contends that the evidence shows that the loader was simply driven off the road. Since there is no indication of slipping or sliding prior to the vehicle falling off the road, the state seemingly reasons that the icy road conditions did not cause the accident.

However, appellants never contended that the vehicle slid off the road. Their theory is that in order to obtain traction on a downhill grade with a rightward turn at the end, the driver of the vehicle was forced to allow his rig to go into the snow berm on the side of the road. The accident occurred when the berm suddenly and unpredictably broke through or ran out, causing the rig to topple off.

Appellants came forward with several witnesses who had extensive experience with operating heavy equipment. They testified that the driver probably had driven into the berm to obtain traction, and that this was the proper and only recourse available, once the vehicle started down the icy grade. To overcome this showing, the state offered highly speculative testimony to the effect that the men might have simply driven off the road during a moment of inadvertence.

In City of Fairbanks v. Schaible, 375 P.2d 201, 204 (Alaska 1962), we stated:

"A mere possibility of causation is not enough. When the matter remains one of conjecture . . . the trial court must find against the party carrying the burden of proof."

Appellants produced substantial testimony tending to show that decedents were forced to drive into the snow berm to obtain traction. That the vehicle did not leave the main road before descending the grade also substantiates this theory. We find that no error was made in the ruling that the state's negligence in failing to sand the road was a cause of the accident.

Turning to the conduct of the decedents, appellants urge that Judge Carlson erred in finding that Lindley and Kaatz were also negligent on the night of December 9, 1970. Because the facts surrounding the conduct of each man differ slightly, we will consider each case separately.

With regard to Ronald Lindley, Judge Carlson found that:

"22. The condition of the Mitkof Highway . . . became known to Mr. Lindley immediately when the vehicle proceeded onto the highway.

23. The condition of the Mitkof Highway on the evening of December 9, 1970 was so slippery that it was unreasonable for any person experienced with a front-end loader to operate such a vehicle on the highway except in case of an emergency."

Having apparently determined that Lindley's conduct was both voluntary and unreasonable,<sup>6/</sup> the judge concluded that Lindley's own negligence was a cause of his death.

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<sup>6/</sup> Cf. Hale v. O'Neill, 492 P.2d 101, 103 (Alaska 1971); Young v. State, 491 P.2d 122, 124-25 (Alaska 1971).

It is well established that knowingly crossing icy terrain in and of itself does not constitute negligent conduct.<sup>7/</sup> On the other hand, we have often intimated that knowing or having reason to know of such a dangerous condition is a minimum prerequisite to establishing negligence on the part of a plaintiff.<sup>8/</sup> In Ronald Lindley's case we must attempt to determine whether it was unreasonable to infer that he knew or should have known of the Mitkof Highway's icy condition immediately upon entering into it.<sup>9/</sup>

Our review of the record suggests that, in concluding that Lindley was aware of the road's condition immediately upon entering onto it, Judge Carlson apparently inferred knowledge based on the testimony of witnesses who stated that the road generally was very icy by late afternoon. However, the only direct testimony regarding the condition of the road immediately in front of the barge dock supports

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7/ Kremer v. Carr's Food Center, Inc., 462 P.2d 747, 752 (Alaska 1969); Cummins v. King & Sons, 453 P.2d 465, 467 (Alaska 1969); Hale v. City of Anchorage, 389 P.2d 434, 436 (Alaska 1964); Peterson v. Lang, 58 N.W.2d 609, 612 (Minn. 1953).

8/ See Roach v. Benson, 503 P.2d 1392, 1394 (Alaska 1972); Cummins v. King & Sons, 453 P.2d 465, 467 (Alaska 1969); Saslow v. Rexford, 395 P.2d 36, 41 (Alaska 1964); Hale v. City of Anchorage, 389 P.2d 434, 436 (Alaska 1962).

9/ Nothing in Judge Carlson's findings or in any of the briefs on record suggests that Lindley had any knowledge of the road's condition prior to going onto it. Nor is it likely that he would have had such prior knowledge since he did not live in Petersburg, and had arrived at the barge dock only shortly before the accident occurred.

the conclusion that Lindley would not have realized the hazardous condition until it was too late to do anything about it, i.e., after the loader started down the grade, one-half mile from the barge dock.

Mr. Dreka, who was supervising the men that night, drove his truck, without chains, to the crash scene. He did not recall having any problem driving to the scene. Additionally, a local resident testified that the road conditions varied from one spot to another, and that the area across from the barge landing wasn't always as bad as other spots on the road. Finally, there was no evidence that the loader encountered any difficulty prior to reaching the downhill grade.

There is nothing in the record to suggest that it is per se unreasonable to drive a front-end loader on either snowy or wet roads. Although such a vehicle has a propensity for instability on icy roads, every witness with experience on heavy equipment had driven similar equipment in inclement weather.

It is well established that something more than the mere occurrence of an accident generally must be shown before an inference of lack of due care will arise.<sup>10/</sup> We have

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<sup>10/</sup> See Cummins v. King & Sons, 453 P.2d 465, 467 (Alaska 1969); W. Prosser, Torts, § 39 at 211 (4th ed. 1971); 11 Blashfield, Automobile Law and Practice, § 417.2 at 116 (1968).

previously held that, if there is no evidence from which a judge could reasonably infer contributory negligence, a finding of contributory negligence constitutes clear error and must be reversed. Roach v. Benson, 503 P.2d 1392, 1394 (Alaska 1972).

In the case of Ronald Lindley, we are unable to ascertain from the findings of fact which Judge Carlson entered, what evidentiary basis he relied upon in concluding that Lindley's conduct was negligent. Specifically, we are uncertain about the evidentiary underpinnings for finding of fact #22, which states that the slippery condition of the Mitkof Highway "became known to Mr. Lindley immediately when the vehicle proceeded onto the highway." Certainly if Lindley did know of the icy conditions of the road, and yet voluntarily proceeded to drive on it in an unstable front-end loader, that conduct could be found to constitute negligence. But, if Lindley reasonably realized the condition of the road only at a time and place at which it was too late to halt the vehicle, negligence would have to be predicated on something other than the mere fact that he was driving an unstable vehicle in known icy conditions. Therefore, we remand this portion of the case for further findings of fact regarding the basis for the conclusion that Lindley was negligent.<sup>11/</sup>

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<sup>11/</sup> The state has argued that certain other facts established Lindley's negligence that night. Thus, it has been noted that Lindley departed in the loader without advising Dreka of

In the case of Donald Kaatz, the circumstances are somewhat different. The trial judge found that Donald Kaatz "had driven the portion of the Mitkof Highway which was . . . traversed by the loader within a short time before he climbed into the . . . loader" for the fatal trip. He also found that the condition of the Mitkof Highway "was known to Mr. Kaatz before he climbed into the . . . loader" that night. Finally, the court found that it was unreasonable to operate a loader under those conditions. Therefore, Judge Carlson concluded that Kaatz' conduct was negligent.

There are several facts in the Kaatz case which support the finding that Kaatz had traveled the road shortly before the accident and therefore knew the condition of the road. First, he was living in Petersburg, four miles north of the barge site, on the day in question. Second, he met the barge when it arrived at about 6:30 or 7:00 p.m. that

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11. (Cont'd.)

his departure. While the "usual practice" consisted of Dreka and Kaatz preceding Lindley and the loader with a pickup truck, there was no evidence that a variation from the normal procedure had any bearing on the accident.

The state has noted that Lindley and Kaatz were both riding in the loader's cab in violation of company policy. While this is not disputed, there is no evidence showing any causal connection between the violation and the accident. In addition, evidence suggests that the presence of two men in a cab is not uncommon.

Finally, there was evidence that another loader was already at the gravel pit and therefore it might not have been necessary to drive the death vehicle at all that night. This fact is only relevant if Lindley had been aware of the road's condition.

night, having driven to the barge site in the company's pickup truck. Finally, certain precautionary flares, which Kaatz usually lit when the company was about to load gravel, were lit when the barge arrived at the Petersburg dock that night.

It is entirely reasonable to infer from these facts that Kaatz had driven to the dock shortly before the barge arrived. It seems implausible that Kaatz would have arrived early and waited at the dock for a long time, since the weather was raw and nasty and his home was only a short distance from the dock. Although several witnesses had driven past the dock earlier in the day, there was no testimony placing Kaatz at the dock at any appreciable time before the arrival of the barge.

If Kaatz did drive the road shortly before climbing into the loader, then it is apparent that he would have or should have perceived the treacherous and unsanded condition of the road. If, despite such knowledge, he chose to ride in the cab of a vehicle which is notoriously "unstable" on ice, then his conduct can be properly said to be voluntary and unreasonable. We hold that the trial court did not commit clear error in ruling that Kaatz' conduct that evening was negligent.

III.

Since we find no clear error in the trial court's ruling that Donald Kaatz was contributorily negligent on the night of the accident, we must next decide whether such negligence should continue to operate as a complete bar to recovery in cases such as this.

Initially we must consider a procedural objection which the state raises, regarding our review of the issue. The state points out that plaintiff Kaatz first presented the issue of comparative negligence to the trial court on a motion to amend and supplement the court's findings of fact and conclusions of law. It is urged that the issue was not presented below in a timely manner, and therefore is not properly before this court on appeal.<sup>12/</sup>

We have consistently held that an issue which was not raised in the trial court will not be reached on appeal.<sup>13/</sup> Likewise, in jury cases, one cannot await the jury's verdict before objecting to various aspects of the preceding trial.<sup>14/</sup>

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<sup>12/</sup> We note that the state has devoted one paragraph to this procedural contention, and has not cited any authority in support of its claim. This normally would render the state's claim non-meritorious. *Wernberg v. Matanuska Electric Association*, 494 P.2d 790, 794 (Alaska 1972). However, because of the importance of the issue in question, we will briefly address the argument.

<sup>13/</sup> See, e.g., *University of Alaska v. Simpson Building Supply Co.*, 530 P.2d 1317, 1324 (Alaska 1975); *Powell v. Alaska Marine Equipment, Inc.* 453 P.2d 407, 410 (Alaska 1969).

<sup>14/</sup> See *Veal v. Newlin, Inc.*, 367 P.2d 155, 157 (Alaska 1961).

But, in this judge-tried case, appellant called the matter to the attention of the trial court by motion, memorandum and oral argument, and the trial court expressly rejected appellant's contention. Under these circumstances the issue is properly before us on appeal.<sup>15/</sup> We now turn to the question of whether the doctrine of contributory negligence should have continued vitality in Alaska.

Contributory negligence is the failure of a plaintiff to use due care for his own safety. When contributory negligence is a substantial factor in bringing about a plaintiff's harm, it operates in law to prevent a recovery of damages by him, even though he was injured through the negligence of the defendant. Restatement (Second) of Torts § 463 (1965). This has been the rule followed in Alaska in the past. Saslow v. Rexford, 395 P.2d 36, 41 (Alaska 1964); Ogden v. State, 395 P.2d 371, 372 (Alaska 1964); Bertram v. Harris, 423 P.2d 909, 914 (Alaska 1967).

The contributory negligence doctrine is of judicial origin. Traditionally it is ascribed to the opinion of Lord Ellenborough in Butterfield v. Forster, 103 Eng. Rep. 926 (K.B. 1809). In that case plaintiff was riding on his horse at a fast pace on the highway. He ran into an obstruction in the roadway which had been left there by defendant. While

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<sup>15/</sup> Cf., Church v. Roemer, 498 P.2d 1255, 1258 n.3 (Idaho 1972); Williams v. Idaho Potato Starch Co., 245 P.2d 1045, 1050 (Idaho 1952).

the case can be interpreted as merely a holding that the plaintiff was himself the sole cause of the accident,<sup>16/</sup> it gave rise to the broad and sweeping principle described above. This principle held full sway in the nineteenth century and still persists in the twentieth century, although it has undergone modifications and has been replaced in many jurisdictions by some system of comparative negligence.

Contributory negligence is an "all-or-nothing" doctrine. When it is operative it is a total bar to recovery by an injured plaintiff. A comparative negligence rule, on the other hand, seeks to apportion damages, i.e., distribute responsibility, in proportion to the degree of fault attributable to the parties who have negligently caused an injury.

It should be noted that comparative negligence systems have long been employed in other nations and in various jurisdictions in the United States. In one form or another it is the system employed for apportioning damages in at least 27 states.<sup>17/</sup> In

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<sup>16/</sup> See V. Schwartz, Comparative Negligence 3-4 (1974). Apparently Lord Ellenborough's rationale is somewhat terse:

"[A] party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right." 103 Eng. Rep. at 927.

<sup>17/</sup> See *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1232, n.6 (Cal. 1975). These states include Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming, and most recently, California.

federal law comparative negligence has long been employed in admiralty personal injury cases. Under federal statutes it has been applicable since 1908 to cases arising under the Federal Employers Liability Act, 45 U.S.C. § 53, and since 1920 to cases arising under the Jones Act, 46 U.S.C. § 688, and under the Death on the High Seas Act, 46 U.S.C. § 766. It has long been used in other nations of the civilized Western world.<sup>18/</sup> Moreover, in England, the source of Butterfield v. Forrester, supra, and its precedential descendants, Parliament abolished the contributory negligence defense in 1945 and replaced it with a pure comparative negligence rule for apportioning damages.<sup>19/</sup>

The benefits to be derived from a comparative negligence rule are several. It diminishes the need to employ rules which are designed to ameliorate the harshness of the contributory negligence rule. For example, the "last clear chance" doctrine becomes largely superfluous in jurisdictions which employ the comparative negligence rule. It is said that comparative negligence provides a better distribution of risk under a fault system of liability, for both plaintiffs and defendants benefit to the extent of their respective blameworthiness or lack thereof.<sup>20/</sup>

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<sup>18/</sup> See V. Schwartz, supra note 16, at 9-10. These countries include Austria, Canada, France, Germany, the Philippines, Portugal, and Spain.

<sup>19/</sup> Law Reform Act of 1945, 8 & 9 Geo. 6, c. 28.

<sup>20/</sup> See V. Schwartz, supra note 16, at 339-41.

The supporters of the contributory negligence rule have argued that fault cannot be measured on a scientific basis, that contributory negligence is a deterrent to careless conduct, that comparative negligence is difficult for courts to administer, and that settlement of negligence cases is encouraged by the contributory negligence rule.<sup>21/</sup> Contrary arguments have already been presented.

Although jurors' verdicts are not precisely scientific, an allocation of proportionate fault approaches reality more closely than the total loss or victory represented by the contributory negligence rule. As to the deterrent effect of the contributory negligence rule, Dean Prosser points out that the law must also aim to deter wrongful conduct by defendants and not only plaintiffs.<sup>22/</sup> Judicial administration of the rule has not presented insuperable difficulties in those jurisdictions which have long employed it. Experience has not borne out the argument that comparative negligence is difficult for courts and juries to apply.

Similarly, careful studies tend to show that settlement of cases can be achieved as readily under the

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<sup>21/</sup> Id. at 335-37.

<sup>22/</sup> W. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 468 (1953).

comparative negligence system as under the contributory negligence rule.<sup>23/</sup> Studies have also shown that the effect of the comparative negligence rule on insurance rates is minimal.<sup>24/</sup>

The central reason for adopting a comparative negligence system lies in the inherent injustice of the contributory negligence rule. As the California Supreme Court recently observed concerning the contributory negligence doctrine:

"It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the 'all-or-nothing' approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task. The basic objection to the doctrine--grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability--remains irresistible to reason and all intelligent notions of fairness." Li v. Yellow Cab Company, 532 P.2d 1226, 1230-31, (Cal. 1975) (footnotes omitted).

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<sup>23/</sup> Rosenberg, Comparative Negligence in Arkansas: A "Before and After" Survey, 36 N.Y.S.B.J. 457 (1964).

It has been reported that in maritime personal injury cases involving a federal question, in which a comparative negligence standard is used, only 9.6% of the cases terminated in 1974 ever reached trial. Annual Report of the Director of the Administrative Office of the United States Courts, Table C4, at 429 (1974). This supports the argument that a comparative negligence standard does not seriously discourage settlements.

<sup>24/</sup> V. Schwartz, supra note 16, at 337-38.

And as Professor Prosser has stated:

"The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff's deviation from the community standard of conduct may even be relatively slight, and the defendant's more extreme; the injured man is in all probability, for the very reason of his injury, the less able of the two to bear the financial burden of his loss; and the answer of the law to all this is that the defendant goes scot free of all liability and the plaintiff bears it all." W. Prosser, Torts 433 (4th ed. 1971).

Of great significance to us is the recent adoption of a comparative negligence rule by judicial decision in other jurisdictions. In many instances the rule has been adopted through legislative action, but increasingly it is perceived that a rule which is judicial in origin can be, and appropriately should be,<sup>25/</sup> altered by the institution which was its creator.<sup>26/</sup> Thus Florida in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), and California in Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975), through the judicial process have overturned the contributory negligence rule and have replaced it with the comparative negligence principle.

We are also particularly impressed with a recent decision of the United States Supreme Court in the field of

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<sup>25/</sup> See Leflar, Comments on Maki v. Frelk, 21 Vand. L. Rev. 918, 926-29 (1968).

<sup>26/</sup> Contra, Maki v. Frelk, 239 N.E.2d 445, 447 (Ill. 1968); Krise v. Gillund, 184 N.W.2d 405, 409 (N.D. 1971).

admiralty. In United States v. Reliable Transfer Co.,  
-U.S.-, 44 L.Ed 2d 251 (1975), the Court discarded the  
historic rule of divided damages in maritime collision cases  
and replaced it with a pure comparative negligence rule.  
Hereafter liability for property damages in admiralty collision  
cases will be allocated in proportion to the fault of each party.

The Court's reason for abandoning the divided damages  
rule is relevant to our consideration of the contributory  
negligence rule: the divided damages rule, like the contributory  
negligence rule, yields palpably crude and inequitable results  
in cases where the degree of fault is greatly disproportionate.  
Furthermore, the Court was persuaded by the rejection of the  
rule by every other maritime nation in the world. All other  
maritime nations, including England where the rule emerged,  
employ a proportionate fault measure of damages in marine  
collision cases.

It appears to us that continued adherence to the  
contributory negligence rule, absent legislative change,  
represents judicial inertia rather than a reasoned consideration  
of the intrinsic value of the rule. We are persuaded that  
the contributory negligence rule yields unfair results which  
can no longer be justified. We hold, therefore, that the  
doctrine of contributory negligence shall no longer be  
applicable in Alaska, and in its stead the principle of  
comparative negligence must be applied.

Systems of comparative negligence can take several forms. Under a "pure" form the plaintiff's damages are simply reduced in proportion to the amount of negligence which is attributed to him. There are also several "modified" forms of comparative negligence. One of these is the divided damages rule in maritime collision cases, which has now been abolished. Another is the 50% system, applicable by statute in many of the states. Under that system a negligent plaintiff may recover so long as the amount of his fault does not exceed 50% of the total fault attributable to the parties.<sup>27/</sup> We are convinced that the pure system is the one which is the simplest to administer and which is best calculated to bring about substantial justice in negligence cases. It is the system most favored by modern jurists and commentators.<sup>28/</sup> We will employ the pure system of comparative negligence hereafter in Alaska.

Our adoption of this new principle does not, of course, end our judicial tasks in this area. Subsidiary questions and problems concerning the relationship of the new rule to other doctrines of tort law must necessarily be adjudicated in the future. We must, for the most part,

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27/ There are numerous variations of the modified system. These are discussed at length in V. Schwartz, supra note 16, at 73-82.

28/ See, e.g., Hoffman v. Jones, 280 So. 2d 431, 436-37 (Fla. 1973); Li v. Yellow Cab Co., 532 P.2d 1226, 1240 (Cal. 1975); United States v. Reliable Transfer Co., 43 U.S.L.W. 4610, 4612-14 (May 19, 1975); V. Schwartz supra note 16, at 341-48.

await future cases for the further development of law in this field.

We are, however, prepared to deal with one facet of the comparative negligence rule at this time: the status of the doctrine of "last clear chance". The rationale underlying this doctrine is that even though the plaintiff has been contributorily negligent he should still be able to recover his entire damages if the defendant had the last opportunity to avoid the accident. The application of the doctrine is particularly apt in cases where the plaintiff is in a helpless predicament, owing to his own negligence, and the defendant, although perceiving plaintiff's situation and realizing the plaintiff's peril, fails negligently thereafter to avoid injuring the plaintiff.<sup>29/</sup> Unfortunately the search for limits to the doctrine and for the proper sphere of its application has led to great confusion in the law of tort, much of which can probably never be dispelled.<sup>30/</sup> But it is

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<sup>29/</sup> The doctrine had its origins in the English case of *Davies v. Mann*, 152 Eng. Rep. 588 (1842). Plaintiff there left his ass fettered upon the highway, and the defendant drove into it. It was held that plaintiff could recover, despite his negligence, if the defendant might by proper care have avoided injuring plaintiff's animal. One commentator has said,

"[T]he doctrine has been in search of a lucid rationale ever since." V. Schwartz, supra note 16, at 129.

<sup>30/</sup> See the discussion in W. Prosser, *Torts*, 427-33 (4th ed. 1971).

recognized by nearly all who have reflected upon the subject that the last clear chance doctrine is, in the final analysis, merely a means of ameliorating the harshness of the contributory negligence rule.<sup>31/</sup> Without the contributory negligence rule there would be no need for the palliative doctrine of last clear chance. To give continued life to that principle would defeat the very purpose of the comparative negligence rule--the apportionment of damages according to the degree of mutual fault. There is, therefore, no longer any reason for resort to the doctrine of last clear chance in the courts of Alaska.<sup>32/</sup>

Lastly, we must determine the extent to which the rule we have announced today shall have application to cases other than those which are filed in the future. The rule will, of course, apply in the retrial of the case in which we have reversed the judgment today. It will also apply to any case in which the trial commences after the date of this opinion. In any case pending on direct appeal in which the

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31/ See, e.g., *id.* at 433; *Cushman v. Perkins*, 245 A.2d 846, 850 (Maine 1968); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1237 (Cal. 1975).

32/ This is not to say that the notion of last clear chance is unavailable as a matter of trial court advocacy. Either party may attempt to persuade the trier of fact that one party or another should bear a greater proportion of the liability for an accident by reason of the factual pattern adduced, including a consideration of the helplessness or inattentiveness which may have led to a plaintiff's predicament, with subsequent injury at the hands of a negligent defendant.

application of the comparative negligence rule was requested or asserted in the trial court, and in which the request or assertion was preserved as a ground for appeal, there shall be a retrial under the principle of comparative negligence. Our holding today will be applicable to any trial which has commenced, but has not been submitted for decision by the trier of fact, and in which prior to submission to the trier of fact for decision there has been a request or an assertion that the rule of comparative negligence should be applied.

We observe that in the present case defense counsel offered no evidence with regard to the issue of damages. This may have occurred because of a belief by defense counsel that under the contributory negligence doctrine plaintiffs' claims should have been barred entirely. Since we have abandoned the contributory negligence doctrine today, we feel that it is appropriate to require a new trial on the issue of damages.

We remand this case to the superior court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

March 1, 1977

MEMO

TO: Terry Gardiner  
Steve Cowper

FROM: John Sund *JS*

RE: Hb 124

*file HB  
124*

HB 124 is scheduled for hearing in the Judiciary for Wednesday, March 2, 1977. On my advice that bill has been taken off the calendar for a brief period of time for further review prior to a hearing.

I have not had a chance to talk with Mr. Cowper directly regarding the intent behind the bill and what it is to accomplish. There are several facets of comparative negligence which are not dealt with in the bill and which are really the guts of deciding where comparative negligence is going to go in the State of Alaska. The present bill, as written, basically does not add anything to the Supreme Courts' decision in the Kaatz-Linsley case.

The area of multiple defendants is not addressed in the bill. The basic question is whether, in the situation of multiple defendants, where one of the defendants is insolvent that the other defendants will be jointly and separately liable for the damages.

It may be that the sponsors of the bill have resolved that issue in the bill, in fact, does represent all of the areas they wish it to address but I have not had a chance to discuss that with them. I know the Bar Association is attempting to come up with a position on the issue of the multiple defendants and to the best of my information would like to testify at the hearing. I also talked to Milard Ingrham, an attorney in Fairbanks, who is a member of the Alaska Bar Association Civil Rules Committee and also had sent a letter regarding the Uniform Comparative Fault Act to Rep. Cowper. In that conversation, he indicated he would like to testify before the Committee on the bill and that the present HB 124 as introduced did not address the major issues that he considered to be necessary.

I will attempt to contact Legislative Affairs to see who drafted the bill. Hopefully we can put the bill back on the calendar for early or the middle part of next week.

Introduced: 1/28/77  
Referred: Commerce and  
Judiciary

1 IN THE HOUSE

BY COWPER AND BROWN

2 HOUSE BILL NO. 124

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to comparative fault."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1. AS 09.16.020(1) is amended to read:

9 (1) their relative degrees of fault shall be the basis for  
10 allocation [NOT BE CONSIDERED];

11 \* Sec. 2. AS 09 is amended by adding a new chapter to read:

12 CHAPTER 17. COMPARATIVE FAULT.

13 Sec. 09.17.010. CLAIMANT'S CONTRIBUTORY FAULT. In a tort action  
14 for damages based on negligence, recklessness, or strict liability (in-  
15 cluding breach of warranty), a claimant's contributory fault does not  
16 bar recovery but has the effect of diminishing his damage proportion-  
17 ately according to his own fault or the fault attributable to him. In a  
18 derivative action or an action for wrongful death, the claimant's  
19 damages are diminished according to the fault of any person whose con-  
20 duct might otherwise have barred the liability. This section applies  
21 whether or not the contributory fault previously constituted a defense  
22 and replaces such common law principles as last clear chance and implied  
23 assumption of risk.

24 Sec. 09.17.020. SPECIAL INTERROGATORIES. In a tort action in-  
25 volving contributory fault, the court, unless otherwise requested by the  
26 parties, shall instruct the jury to give answers to special interroga-  
27 tories (to render special verdicts), or make findings itself if there is  
28 no jury, indicating

29 (1) the amount of damages each claimant would recover if con-

1 tributary fault were disregarded; and

2 (2) the percentage of the fault for each party to the action  
3 as compared with the combined fault of all parties to the action. For  
4 this purpose, the court may determine that two or more persons are  
5 appropriately treated as a single party.

6 Sec. 09.17.030. DAMAGES SET OFF. Damages awarded under this chap-  
7 ter may be set off only to the extent that an award against one party  
8 cannot be collected.

9 Sec. 09.17.040. INJURIES AFFECTED. This chapter applies to all  
10 injuries incurred after the effective date of this Act.

11 Sec. 09.17.050. SEVERABILITY. If any provision of this chapter or  
12 application of it to any person or circumstance is held invalid, the  
13 invalidity does not affect other provisions or applications of the chap-  
14 ter that can be given effect without the invalid provision or applica-  
15 tion, and to this end the provisions of this chapter are severable.

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18 → Florida - does -

Millard Ingram

19  
20 *multi*  
21 *Joint Tortfeasors*

22  
23 *Brown*

24 *Casper*

25 *Boddy*

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December 30, 1976

Representative Steve Cowper  
Pouch V  
Juneau AK 99811

Re: Uniform Comparative Fault Act

Dear Steve:

Enclosed please find a copy of Uniform Comparative Fault Act with my proposed modifications. I have already spoken to you generally about the Act.

As I mentioned, the Act first came to my attention as a member of the Alaska Bar Association Civil Rules Committee. The Act was sent to us by Chief Justice Boochever with the request that we review it with the idea, I assume, of adopting it as a Civil Rule. All members of the committee felt they were disqualified from acting with regard to the Act because all had cases pending that would be directly affected by some portion of the Act. Furthermore, all members of the committee felt that the matters contained in the Act were more appropriately the subject for legislation rather than rules. Regardless of what our committee felt, I believe it can be inferred from Chief Justice Boochever's request to the committee that if the legislature does not adopt some sort of legislation implementing comparative negligence in Alaska, the court will do so by rules.

The main argument that I have with the proposed Act is in section 3. Under section 3, the common law doctrine of joint and several liability of joint tortfeasors is abolished and all parties, including the injured party, must share proportionately in the insolvency of an uninsured or otherwise insolvent tortfeasor. This is not the law in other jurisdictions that have considered the problem. See 57 Am. Jur. 2nd, Negligence §435, especially notes 12, 13, and 14, a copy of which I am enclosing. The whole theory of comparative negligence is that a tort victim should be penalized in recovery from a tortfeasor in an amount equal to his contribution to his own injuries. It would be contrary to the humanitarian spirit of the doctrine to further penalize the tort victim for the

Representative Steve Cowper  
Re: Uniform Comparative Fault Act  
December 30, 1976  
Page 2

insolvency of one or more tort feasons. Furthermore, the proposed Act, in practice, would severely complicate litigation. I can imagine in every action filed under the proposed Act, that defendants would attempt to join every potential insolvent defendant around in an effort to decrease their own liability. I have had many cases where potential defendants are not joined because they are uninsured or otherwise insolvent and to join them under such circumstances would merely complicate the litigation. Defendants in such actions have not joined them either because, under the rule of joint and several liability, they know that they could not collect contribution from them. But if there is no joint and several liability, there would be very good reason for defendants to join insolvent defendants in an effort to reduce their own liability to the plaintiff.

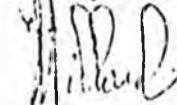
The other changes that I have made are strictly technical. I have everywhere changed "plaintiff" to "claimant" and "defendant" to "tort feason". The reason for this is that often a tort claimant may be cast in the role of a counterclaiming defendant and a tort feason may be cast in the role of a plaintiff. In section 5, I have adopted alternative 1, for the reasons stated in the second paragraph of the comments, and for the reason that some defendants, may be uninsured but have assets or be self-insured. I believe that the amendment to the Uniform Contribution Among Tort Feasons Act should be adopted.

I wish that you would attempt to get this Uniform Act, as amended by me, adopted as law. I have no particular vanity about draftsmanship and would be agreeable to any language so long as the end is accomplished.

If you have any questions, please do not hesitate to call me collect, either at the office (452-1201) or at home (456-5000). I would like to go to Juneau to testify at any important hearings regarding the Act and would appreciate it if you would advise me when any are scheduled.

Yours very truly,

RICE, HOPPNER & HEDLAND



Millard F. Ingraham

MFI/mcb  
Enclosures

A M E N D M E N T

Offered in the HOUSE

By the Commerce Committee

TO: HOUSE BILL NO. 124

Page 1, line 6:

After "fault" add "; and amending Rule 49(c) of the Alaska Supreme Court's Rules of Civil Procedure"

Page 2, line 16:

Add a new section to read:

"Sec. 3. AS 09.17.020 of sec. 2 of this Act amends Rule 49(c) of the Alaska Supreme Court's Rules of Civil Procedure by requiring the trial court to instruct the jury to give answers to special interrogatories in a tort action involving contributory fault."

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

POUCH K - STATE CAPITOL  
JUNEAU 99811

February 14, 1977

The Honorable Steve Cowper  
Chairman  
House Finance Committee  
Tenth State Legislature  
Pouch V  
Juneau, Alaska 99811

The Honorable Fred Brown  
Chairman  
Labor and Management Committee  
Tenth State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: HB 124

Dear Representatives Cowper and Brown:

The following are comments on behalf of the Attorney General's Office on the referenced bill.

The primary effect of the bill is to make a matter of statute the doctrine of "pure" comparative negligence established by the Alaska Supreme Court in Kaatz v. State, 540 P.2d 1037 (Alaska 1975). The bill would appear to achieve its purpose in this regard.

There does appear to be at least one difficulty with the bill. In order to make this apparent difficulty clear, some background discussion is necessary. The Uniform Contribution Among Joint Tortfeasors Act has been enacted into statute in Alaska at AS 09.16.010 - .060. Prior to comparative negligence becoming the law of Alaska, a claimant in a tort action could recover a judgment rendered against joint tortfeasors from any one or a combination of the joint tortfeasors who had done him injury. Additionally, the Uniform Contribution Among Joint Tortfeasors Act provided

In determining the pro rata shares of tortfeasors in the entire liability their relative degrees of fault shall not be considered. AS 09.16.020(1).

The bill in Section 1 proposes an amendment to that provision as follows:

The Honorable Steve Cowper  
The Honorable Fred Brown  
February 14, 1977  
Page 2

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In determining the pro rata shares of tortfeasors in the entire liability their relative degrees of fault shall be the basis for allocation [NOT BE CONSIDERED].

The draft of the Uniform Comparative Fault Act, largely relied on by the drafters of the bill, has an additional section not incorporated into the bill which reads as follows:

Section 3. Contribution rights among multiple defendants are determined in accordance with the percentage of fault of each defendant, as found by the trier of fact. The court shall enter judgment on the basis of those rights and findings made under Section 2. If a judgment against a party cannot be collected within [one year] after the judgment becomes final, the responsibility for the amount involved is distributed among the other parties in proportion to their relative fault.

This section has two effects: (1) it makes it clear that contribution among joint tortfeasors is to be determined on the basis of their relative degrees of fault (see AS 09.16.020(1), set forth above), and (2) it provides that if one tortfeasor cannot be made to pay his share of the judgment because he is uninsured or otherwise insolvent, then all parties, including the claimant, shall bear the burden proportionate to their relative degrees of fault. The second effect of the proposed section is to change the common law, in that, if part of a judgment is uncollectible, the amount that the claimant is to receive will be diminished proportionate to his own negligence as determined by the trier of fact.

The bill does not include this section of the draft Uniform Comparative Fault Act, apparently with the intent not to diminish the claimant's recovery proportionate to his relative degree of fault in the situation where part of the judgment is uncollectible. For example, assume that a court determines the injuries to a claimant to be \$100,000, and that the plaintiff and the two joint tortfeasors are each 33% liable. If both tortfeasors are solvent, the claimant would collect \$33,000 from each of them. However, if one of the two joint tortfeasors is insolvent, then under the section of the draft Uniform Comparative Fault Act set forth above (which the bill does not incorporate), the claimant and the solvent tortfeasor would have to share the loss proportionate to their relative degrees of fault, and

The Honorable Steve Cowper  
The Honorable Fred Brown  
February 14, 1977  
Page 3

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the claimant would collect \$50,000 of his judgment (\$33,000 from the solvent joint tortfeasor, plus an additional \$17,000 from that same joint tortfeasor, which represents one-half of the uncollectible part of the judgment). On the other hand, the apparent intent of the bill is to allow the claimant to collect the entire judgment to which he would be otherwise entitled. Under the fact situation above, it is the apparent intent of the drafters of the bill to allow the claimant to collect all \$66,000 from the single solvent joint tortfeasor.

There is some question, however, as to whether the bill in fact achieves its purpose. Accordingly, it is suggested that an additional section be added to the bill, incorporating Section 3 of the draft Uniform Comparative Fault Act, set forth above, modified as follows:

Contribution rights among multiple tortfeasors [defendants] are determined in accordance with the percentage of fault of each tortfeasor [defendant], as found by the trier of fact. The court shall enter judgment on the basis of those rights and findings made under Section 2. If a judgment against a party cannot be collected within [one year] after the judgment becomes final, the responsibility for the amount involved is distributed among the other parties in proportion to their relative fault.

The purpose of this proposed change is explained in Millard F. Ingraham's December 30, 1976, letter to Representative Cowper. I repeat the applicable portion of Mr. Ingraham's letter below:

I have everywhere changed 'plaintiff' to 'claimant' and 'defendant' to 'tortfeasor'. The reason for this is that often a tort claimant may be cast in the role of a counterclaiming defendant and a tortfeasor may be cast in the role of a plaintiff.

If, on the other hand, the bill is to be drafted so as not to require that the claimant share in any diminution of the judgment proportionate to his relative fault, then the third sentence of Section 3 of the draft Uniform Comparative Fault Act should be modified as follows:

All tortfeasors liable to claimant are jointly and severally liable for all damages to which claimant is entitled.

The Honorable Steve Cowper  
The Honorable Fred Brown  
February 14, 1977  
Page 4

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This proposed change was also suggested in Mr. Ingraham's letter to you. Set forth below are the applicable comments in that letter:

The main argument that I have with the proposed Act is in section 3. Under section 3, the common law doctrine of joint and several liability of joint tortfeasors is abolished and all parties, including the injured party, must share proportionately in the insolvency of an uninsured or otherwise insolvent tortfeasor. This is not the law in other jurisdictions that have considered the problem. See 57 Am. Jur. 2nd, Negligence §435, especially notes 12, 13, and 14, a copy of which I am enclosing. The whole theory of comparative negligence is that a tort victim should be penalized in recovery from a tortfeasor in an amount equal to his contribution to his own injuries. It would be contrary to the humanitarian spirit of the doctrine to further penalize the tort victim for the insolvency of one or more tortfeasors. Furthermore, the proposed Act, in practice, would severely complicate litigation. I can imagine in every action filed under the proposed Act, that defendants would attempt to join every potential insolvent defendant around in an effort to decrease their own liability. I have had many cases where potential defendants are not joined because they are uninsured or otherwise insolvent and to join them under such circumstances would merely complicate the litigation. Defendants in such actions have not joined them either because, under the rule of joint and several liability, they know that they could not collect contribution from them. But if there is no joint and several liability, there would be very good reason for defendants to join insolvent defendants in an effort to reduce their own liability to the plaintiff.

Again, it is possible that the bill in its present form does not create the problem discussed above; however, Section 3 of the draft Uniform Comparative Fault Act, with the changes suggested above, does make the intent behind the legislation clearer. Section 3 also, in the second sentence,

The Honorable Steve Cowper  
The Honorable Fred Brown  
February 14, 1977  
Page 5

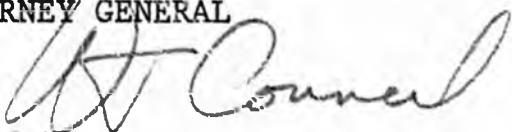
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specifies that the court shall as part of its judgment apportion damages. This sentence has the effect of dispelling any doubt as to the court's affirmative obligation to apportion at the time the initial judgment is entered.

If I can provide further assistance to the committee, please do not hesitate to contact me.

Sincerely,

AVRUM M. GROSS  
ATTORNEY GENERAL

By:   
William T. Council  
Assistant Attorney General

WTC:chp

cc: Hon. Terry Gardiner, Chairman  
House Judiciary Committee

John George  
Risk Management  
Dept. of Administration

HVB

1488

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL  
JUNEAU 99811

February 9, 1977

Hon. Terry Gardiner, Chairman  
House Judiciary Committee  
Tenth State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: HB 43; HB 148

Dear Representative Gardiner:

The following are comments on behalf of the Attorney General's Office on the referenced bill.

1. As a general rule the Attorney General's Office will be in court, even on small claims matters should this bill pass, on the request of the judge. We do not foresee a major impact on the Attorney General's Office, either financially or in terms of the time required to cover matters that may be brought in the future as small claims.

2. It appears unlikely that monetary claims against the State of a contractual nature can be brought as small claims. AS 44.77 and the Administrative Procedures Act in conjunction with Appellate Rule 45 both require that claims of this type first be processed administratively, with the right of appeal being from the administrative determination to the superior court.

3. The court rules have worked substantial changes in the statutory small claims procedure. AS 22.15.040 states that the court "shall hear" the matter as a small claim unless there is an "important or unusual" rule of law involved, whereas the rule provides that the small claims procedure shall be followed when all parties elect, or there are "important or difficult questions of law or fact." The Attorney General's Office supports the rule in its present form.

4. The bill provides for service as usual on the Attorney General's Office. The Attorney General's Office strongly supports this provision of the bill. Please note that there is a typographical error in the bill: The reference in section 3 to Civil Rule 4(c)(7) and (8) should

Hon. Terry Gardiner, Chairman  
February 9, 1977  
Page 2

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refer to Civil Rule 4(d) (7) and (8).

5. Civil Rule 12(a) presently grants to the State 40 days within which to respond to a complaint. District Court Rule 13, which sets forth small claims procedure, allows 20 days. Since at present the small claims procedure does not apply to claims against the State, there is no provision in the small claims rules allowing 40 days to the State to answer a complaint. There are very sound reasons for allowing the State 40 days to answer, and the Attorney General's Office advocates continuation of the present allowance in the rules. The Attorney General's Office proposes that the bill incorporate the following additional provision:

District Court Civil Rule 13(a) is amended to read: The state or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim within 40 days after the service upon the attorney general of the pleading in which the claim is asserted.

I am sure you are aware also of HB 148, which proposes to amend AS 22.15.040 so as to increase the jurisdictional amount for small claims from \$1,000 to \$2,000. The same comments above apply to this bill as well.

Very truly yours,

AVRUM M. GROSS  
ATTORNEY GENERAL

By: 

William T. Council  
Assistant Attorney General

WTC:chp

HB

174

Should require person go before O.A. first and if refused then may go to the G. grand jury.

Introduced: 2/4/77  
Referred: Judiciary

1 IN THE HOUSE

BY PARR AND DANKWORTH

2

HOUSE BILL NO. 174

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

TENTH LEGISLATURE - FIRST SESSION

5

A BILL

6

For an Act entitled: "An Act relating to the right of persons to bring

7

criminal accusations to the attention of the grand

8

jury; and changing Rule 6, Rules of Criminal Procedure."

9

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

10

\* Section 1. AS 12.40 is amended by adding a new section to read:

11

Sec. 12.40.045. ACCESS TO GRAND JURY. (a) If a person knows or

12

has reason to believe that a ~~crime~~<sup>felony</sup> has been committed which is triable

13

by the court, he may present a request <sup>in writing</sup> to the foreman of the grand jury

14

that a meeting of all grand jurors be called to hear his evidence. The

15

grand jury ~~shall~~<sup>may</sup> investigate the evidence presented and ~~the~~<sup>a</sup> prosecuting

16

attorney shall be in attendance to review the evidence and advise the

17

grand jury on all matters necessary to properly investigate any crime

18

disclosed.

19

(b) A person who wilfully interferes with a person's right of

20

access to the grand jury under this section is guilty of a misdemeanor

21

and, upon conviction, is punishable by a fine of not more than \$500, or

22

by imprisonment for not more than six months, or by both.

23

\* Sec. 2. Section 1 of this Act has the effect of changing Rule 6, Rules

24

of Criminal Procedure, by providing for presentation of evidence to the grand

25

jury by persons other than the prosecuting attorney or another grand juror.

26

27

line 13 ~~is~~ <sup>acknowledges</sup> public officials misfeasance

28

29

#

4/25/17

LB 174

D. Hickey  
Larry Weeks

against the bill →

read instructions of pattern grand jury  
used by Judge Stewart

intrude upon grand jury

Larry Weeks      P.A. Luncheon.

layman in grand jury pollutes grand jury  
process.

~~problem~~ <sup>problem</sup> w/ section (b) ~~of~~ <sup>of</sup> P.A. obligation  
to keep people from taking  
frivolous actions to the grand jury.

Dankworth -- support of the bill

4/25/77

HB 174

This bill encourages use of the  
grand~~jury~~<sup>jury</sup> in frivolous matters.

House Judiciary  
April 25, 1977

The meeting was called to order at 3:25 p.m. by Chairman, Gardiner. Members present were Gardiner, Dankworth, Eliason, Rudd and Brown. Miles came late. Mr. Specking is no longer a member of the Judiciary Committee.

HB 174 Right of persons to bring criminal accusations to the attention of the grand jury.

HB  
174

Dan Hickey from the Criminal Division of the A.G.'s office was here to testify. He indicated his feeling that the access to the grand jury on the part of the citizens in Alaska is adequate. He indicated that the problem with this bill is that it would encourage people to go directly to the grand jury... it is felt that this is not necessary; and such public access could cause for several ambiguous relationships. Hickey indicated a further problem with the bill in that it doesn't explain how a person would have access to the grand jury. Hickey feels that person to person contact with a grand jury could lead to all sorts of problems. If public access to the grand jury is going to be approved, Hickey feels that it should be very specific.

Larry Weeks, District Attorney, also testified in opposition to the bill. He especially objects to section (b).

Mr. Dankworth, who is a cosponsor for this bill, spoke about it. He feels that a major complaint of the public is the lack of input that they have. He feels that this bill would open a door for people who would like to appear before the grand jury. (Rather than being referred from policeman to D.A. to attorney, etc., etc.) Dankworth feels that if the D.A. doesn't want to take the case before the grand jury, the individual is out of luck.

Fred Brown mentioned some ideas that he would propose as amendments when the committee got around to marking up the bill.

This bill will be considered again at a later date.

HB 405 Providing for the qualification of district judges

HB  
405

Fred Brown spoke regarding this bill for which he is a sponsor. He explained what the bill would do.

Art Snowden from the Court System was here to testify in opposition to the bill. The court system feels that the qualifications of district court judges should be increased. Apparently this bill originated as a result of a magistrate in Brown's district who probably would be qualified to serve as a district court judge. Although this may be true of this particular magistrate, it is

House Judiciary  
April 25, 1977  
page 2

probably not true of all magistrates. In light of the fact that the court system is trying to improve the judiciary, they feel that this bill would be a step in the wrong direction in that it would be a lessening of the qualifications.

In response to a question by Rudd, Snowden indicated that the present requirements for a magistrate are that he be picked by the presiding judge; the present requirements for a district court judge are that he be a member of the bar.

Brown moved that HB 405 be moved out of committee. The vote was 3-3 so the motion failed on a tie vote. The bill will remain in committee.

The meeting was adjourned at 4:30 p.m.

HB

177

# House Judiciary

These signatures were gathered at the International Women's Year Conference held in Anchorage May 6 - 8, 1977. As such, they represent the expression of women from all parts of Alaska, from diverse social, economic and cultural backgrounds.

For further information, contact Janet Bradley at 465-3566.

JB  
5/9/77

We, the undersigned, urge your support of House Bill 177, relating to the right of a victim of a violent crime to appear and comment at the sentencing of the defendant convicted of the crime. Many women, in particular, have been denied this opportunity, resulting in their dismay and dissatisfaction with the "wrist-slap" sentences sometimes given rapists and batterers in the victim's absence.

Name	Address
Mary J. White David C. Sullivan	2985 Glacier St. Anchorage AK 99504 1335 Taylor St. #4 Anch, AK 99504
Richard J. Lindroff Mary B. Whitehead F. Steele Stewart	1277 Coscoosa # A Anch. AK 99501 2985 Glacier St. Anchorage AK 99504 Box 1072 Wrangell 99929
Linda Font	4208 E 34th Ave Anch. AK 99504
Perry Roene	28 Uek St. Ketchikan Alaska
Jan Asherman	1/4 mile Regis Rd. Toks AK 99701
Cora Peters	Box 81086 College AK 99708
Bernie David	R.R. 1 Box 4255 Juneau AK 99801



*Copies in  
all court files  
HB 177*

Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT  
415 MAIN STREET, ROOM 402  
KETCHIKAN, ALASKA 99901

Chambers of  
THOMAS E. SCHULZ, Judge

February 25, 1977

Mr. John Sund  
Administrative Assistant  
House Judiciary Committee  
Pouch V  
Juneau, Alaska 99811

Re: HB 177

Dear John:

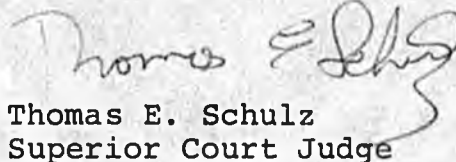
I have your letter of February 18. The matter of victims appearing at sentencing proceedings was discussed at the last Conference of Alaska Judges, and although I don't have the minutes of that conference at hand, it is my recollection that the judges did vote in favor of a resolution which suggested that the sentencing judge should, as a general rule through the Division of Corrections, make some contact with the victim of not only violent crimes, but also property offenses when it seemed appropriate, to advise the victim of the time set for sentencing and the fact that victim could appear and offer comments if he wished. That resolution was also directed to efforts to get the investigating police officers to appear at the sentencing proceedings. The sense of the discussion at the Judge's Conference was that the extent of comments by either the investigative officers or the victims would be pretty much at the discretion of the trial judge, and our thought, generally, was to get these people at the sentencing proceeding so that they have an idea what happens to the offender and why as well as to offer comments if asked by the judge.

I don't think that there would be any strong opposition to HB 177 on the part of the court system. I think many of the trial judges are sensitive to the need to have some way not only for the victim to express his or her thoughts on the offense and perhaps on an appropriate sentence, but also as a matter of communication to allow those persons to have some direct knowledge of the action taken by the court.

Mr. John Sund  
February 25, 1977  
Page 2

Concerning the provision about asking for recommendations as to the sentence, I do have some personal reservations about that. In those cases in which the victim, probably with some justification, has strong feelings about what should happen to the offender, I believe that asking for recommendations could well contribute to turning the sentencing proceedings into a shouting match without being of any real benefit to the judge. As a practical matter, I do not ask either defense counsel or the District Attorney for any specific recommendation on a sentence. I am primarily interested in information about the defendant and the offense and I have found the Numbers Game played by counsel for either side to be of no particular benefit to the court.

Very truly yours,

  
Thomas E. Schulz  
Superior Court Judge

TES:ri

House Judiciary

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F. Neale Stewart	Box 1072 Wrangell 99929
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Jan Ackerman	1/4 mile Regis Rd. Fols AK 99701
Cora Peters	Box 81086 College AK 99708
Bernie David	RR 1 Box 4255 Juneau AK 99803



Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT  
415 MAIN STREET, ROOM 402  
KETCHIKAN, ALASKA 99901

Chambers of  
THOMAS E. SCHULZ, Judge

February 25, 1977

Mr. John Sund  
Administrative Assistant  
House Judiciary Committee  
Pouch V  
Juneau, Alaska 99811

Re: HB 177

Dear John:

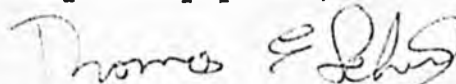
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Mr. John Sund  
February 25, 1977  
Page 2

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Very truly yours,



Thomas E. Schulz  
Superior Court Judge

TES:ri

TERRY GARDINER

STATE REPRESENTATIVE

POUCH V  
JUNEAU  
99811

BOX 1092  
KETCHIKAN  
99901

# Alaska State Legislature

*file HB 177*

February 18, 1977

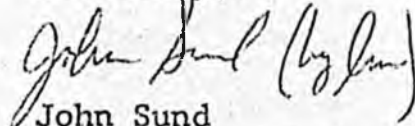
Judge Tom Schultz  
Superior Court  
Fourth Floor State Office Bldg.  
Ketchikan, Alaska 99901

Dear Judge Schultz:

Enclosed is a copy of HB 177 relating to the right of a victim of a violent crime to appear at the sentencing of the defendant convicted of the crime. I would appreciate your comment on the bill and whether you feel there is any deep opposition within the court system to granting the victim that right.

I have also heard some rumors floating around that the judges, at their latest conference, passed out a resolution relating to the rights of victims to appear at sentencing and also in an attempt to encourage the police officers to also attend the sentencing hearing period. If there is a resolution around, I would appreciate it if you could either send a copy to me or send me a note as to where I could obtain a copy.

Sincerely,



John Sund  
Administrative Assistant  
House Judiciary Committee

HB

194

HB 194

February 9, 1977

The Honorable Hugh Malone  
Speaker of the House  
Alaska State Legislature  
Juneau, Alaska 99811

Dear Mr. Speaker:

Under authority of art. III, sec. 18 of the Alaska Constitution, and in accordance with AS 24.30.060(b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill relating to the definition of "delinquent minor". The bill was requested by the Department of Health and Social Services in response to the recent Alaska Supreme Court opinion, In the Matter of L.A.M., 547 P.2d 827 (Alaska 1976). The L.A.M. decision permits a "child in need of supervision" to be classified and institutionalized as a "delinquent" if the child is found to be in contempt of court. The attached bill reverses the effect of that decision for future cases.

Under AS 47.10.010(1) and 47.10.290(2), delinquent children are those who violate laws. Under AS 47.10.010(2), (3) and (6), and 47.10.290(7) children in need of supervision are those whose behavior would not constitute a criminal offense if they were adults, e.g., runaways, truants, children beyond the control of their parents or guardians. The runaway child in the L.A.M. case violated a court order which prohibited her from leaving a foster home without contacting a responsible adult, i.e., she ran away again. The child was adjudicated a delinquent because her failure to abide by the court order would be characterized as the "crime" of contempt under AS 09.50.010(5) were she an adult.

The Department of Health and Social Services is strongly opposed to the effect of the L.A.M. decision because it believes that children in need of supervision, including those who have violated a court order to cease the behavior which has resulted in such a

classification, are in a different category from children who have violated a criminal statute and should receive different treatment. The classification and institutionalization as delinquents of children whose conduct would not be a crime were they adults is viewed by the department as a serious step backwards in providing meaningful treatment for these children.

This bill does not undertake the "legislative overhaul" in the child-in-need-of-supervision area requested by the state Supreme Court in the L.A.M. decision, 547 P.2d at 836, because such an overhaul has been made by the Children's Law Revision Task Force in the legislation which it plans to introduce during this legislative session. The present bill addresses the single issue of classifying a child as a delinquent on the ground of a finding of contempt of court, an issue not clearly covered by current statutes or the Task Force's proposed legislation.

Sincerely,

Jay S. Hammond  
Governor



POUCH V  
JUNEAU, ALASKA 99811

Alaska State Legislature  
House of Representatives

*My file HB 194*

MEMORANDUM

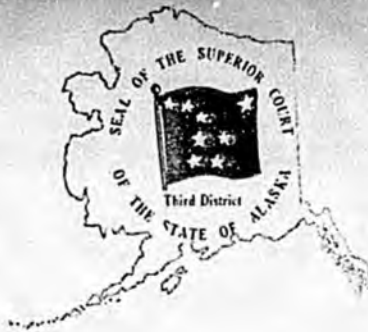
TO: Rep. Terry Gardiner  
Rep. Bill Miles  
Rep. Fred Brown  
Rep. Lisa Rudd  
Rep. Ed Dankworth  
Rep. Dick Eliason  
Rep. Keith Specking

FROM: Rep. Hugh Malone *Hm*

DATE: 15 March 1977

I would appreciate your reviewing the attached material and considering Judge Hanson's opinion before taking action on HB 194.

Thank you.



MAR 11 1977

Superior Court  
State of Alaska

Chambers of  
JAMES A. HANSON, Judge

March 8, 1977

BOX 3891  
KENAI, ALASKA  
99611

303 K STREET  
ANCHORAGE, ALASKA  
99501

Hugh Malone  
State Representative  
House of Representatives  
Pouch V  
Juneau, Alaska 99811

Dear Hugh:

Fully realizing that you do not have time now to read the enclosed material I am simply asking that you do what you can to hold HB 194 over to next year so that its ramifications can be studied. This bill is designed to overcome the Supreme Court's opinion in LAM vs State, 547 P2d 827 (Alaska 1976) a copy of which is enclosed. Also enclosed is a copy of the Superior Court decision which led to the Supreme Court opinion.

About a year ago I had a Kenai girl very similar to LAM. I'm satisfied that she'd now be either dead or better off dead if I had no legal tool with which to control her. I don't like locking up kids. Sometimes it is necessary.

On another subject the Department of Health and Social Services has been totally mute regarding the local jail situation. No reply to the city or the court system. They return neither letters or phone calls.

Very truly yours,

JAMES A. HANSON, Judge

JAH: rf  
Enclosures

In the Matter of L. A. M., Appellant,  
v.

STATE of Alaska, Appellee.  
No. 2221.

Supreme Court of Alaska.  
March 15, 1976.

The Superior Court, Third Judicial District, Anchorage, James K. Singleton, J., entered order declaring minor a delinquent child for her willful failure to comply with certain court orders made after prior adjudication that she was child in need of supervision, and she appealed. The Supreme Court, Erwin, J., held that evidence supported conclusion that minor, who was chronic runaway, would not be distinguishable in sophistication or exposure to criminal activity from average child in population at state youth center, and thus, placement of such minor in state youth center was not precluded; that superior court had authority to enforce order entered against child in need of supervision, which order provided that child was not to remain away from children's home in which she had been placed without permission of appropriate adult authorities of the home; and that failure of minor to abide by court orders regarding her supervision constituted willful criminal contempt of court's authority, and she was, therefore, properly declared delinquent and subject to those sanctions available for correction of delinquent minor's behavior.

Affirmed.

Boochever, J., concurred and filed opinion in which Rabinowitz, C. J., joined.

Rabinowitz, C. J., concurred and filed opinion.

#### 1. Contempt ⇨20

Before party may be held in criminal or civil contempt for failure to abide by court order, certain elements must be established: existence of valid order direct-

ing alleged contemnor to do or refrain from doing something and court's jurisdiction to enter that order; contemnor's notice of order within sufficient time to comply with it; and in most cases, contemnor's ability to comply with order; and contemnor's willful failure to comply with order.

#### 2. Contempt ⇨2

Distinction between criminal and civil contempt is generally phrased in terms of whether character and purpose of contempt is "remedial" or "punitive."

#### 3. Contempt ⇨3, 4

Where contempt power is invoked to punish alleged contemnor for "past, willful, flouting of the court's authority," contempt is criminal, but where contempt proceeding is instituted to "coerce future conduct," contempt is civil. AS 09.50.010(5), 09.50.050.

#### 4. Contempt ⇨3

Contempt order issued against minor for minor's willful failure to comply with certain court orders made after adjudication that minor was child in need of supervision constituted criminal contempt. AS 09.50.010(5).

#### 5. Infants ⇨16.5

Proceedings against children alleged to be in need of supervision are in substance and effect custody disputes where contestants are parent and child, and parent appeals to court to vindicate and enforce his custody rights in child against that child.

#### 6. Adoption ⇨7.2(1)

Names ⇨9

Parent and Child ⇨2(1), 4, 5(1), 8

The following are "parental rights" protected to varying degrees by constitution: physical possession of child, which, in case of custodial parent, includes day-to-day care and companionship of child; right to discipline child, which includes right to inculcate in child parent's moral and ethical standards; right to control and manage minor child's earnings; right to control and manage minor child's property; right to be supported by adult child; right

to have child bear parent's name; and right to prevent adoption of child without parents' consent.

See publication Words and Phrases for other judicial constructions and definitions.

7. Adoption  $\S$ 7.2(1)

Names  $\S$ 9

Parent and Child  $\S$ 2(17)

Of the so-called residual parental rights, those that remain after custody is placed in another include right to consent to adoption and to withhold consent to prevent adoption, right to visitation and right to have child bear parents' name.

8. Parent and Child  $\S$ 2(1)

Like all legal rights, parent's right to custody of his child is not absolute and may be lost through divorce, by conduct depriving child of necessities of life, by abandonment, by child's emancipation, or, subject to constitutional limitations, where welfare of child requires limitation or termination of parental rights. AS 09.55.205, 25.20.010, 47.10.010(a)(4, 5), 47.10.080(c), 47.10.290(3).

9. Infants  $\S$ 13

State has legitimate interest in protecting children from venereal disease, from exposure to use of dangerous and illicit drugs, from attempted rape, and from physical injury.

10. Infants  $\S$ 16.1

Purpose of statute creating classification of child in need of supervision is reintegration of child into her family and resumption of parental custody, including parental control. AS 47.10.010(a)(2), 47.10.290.

11. Infants  $\S$ 16.8

Evidence in delinquency hearings supported conclusion that minor, who was chronic runaway, would not be distinguishable in sophistication or exposure to criminal activity from average child in population at state youth center, and thus, place-

ment of such minor in state youth center was not precluded.

12. Infants  $\S$ 16.4

Whether child is characterized as delinquent child, child in need of supervision, dependent child, or merely child whose custody is disputed in domestic relations proceeding, court has authority, upon extending all procedural safeguards, to make orders affecting her custody. Const. art. 4, § 1.

13. Contempt  $\S$ 33

While court may have limitations on its power to act, there are only due process limitations on its authority to compel enforcement of its orders.

14. Infants  $\S$ 16.12

Superior court had authority to enforce order entered against child in need of supervision, which order provided that child was not to remain away from children's home in which he had been placed without permission of appropriate adult authorities of the home.

15. Infants  $\S$ 16.2

Failure of minor to abide by court orders regarding her supervision, following adjudication that such minor was child in need of supervision, constituted willful criminal contempt of court's authority, and she was, therefore, properly declared delinquent and subject to those sanctions available for correction of delinquent minor's behavior. AS 09.50.010, 47.10.010(a)(2, 3, 6), 47.10.080(j), 47.10.290.

Herbert D. Soll, Public Defender, Phillip P. Weidner, Asst. Public Defender, and R. Collin Middleton Anchorage, Alaska, for appellant.

Avrum M. Gross, Atty. Gen., Juneau and Larry R. Weeks, Asst. Atty. Gen., Anchorage, for appellee.

Before RABINOWITZ, Chief Justice, and CONNOR, ERWIN, BOOCHEVER and BURKE, Justices.

OPINION

ERWIN, Justice.

L.A.M. seeks review of the superior court's order dated July 26, 1973, declaring her a delinquent<sup>1</sup> child for violation of AS 09.50.010,<sup>2</sup> i.e., willful failure to comply with certain court orders made after a prior adjudication that she was a child in need of supervision.<sup>3</sup>

In order to understand L.A.M.'s arguments and place her situation in context, it will be necessary to set out her history at some length.

L.A.M. was born in Canada in 1958 and was adopted by the M's shortly thereafter. The M's soon were divorced and Mrs. M. moved with L.A.M. to Alaska. In 1971 Mrs. M. married Mr. C. and retired from work, intending to spend more time with L.A.M. Difficulties arose almost immediately with L.A.M. neglecting to return home after staying with friends.

L.A.M. began a consistent pattern of running away in the Spring and Summer

of 1972. During this period two petitions were filed seeking to have her declared a child in need of supervision, but in both cases the petitions were dismissed on stipulation and the matter handled informally.<sup>4</sup> On November 2, 1972, a new petition was filed. At the hearing L.A.M. admitted the allegations of the petition and was declared a child in need of supervision. She was ordered detained at the McLaughlin Youth Center pending adjudication.

On December 12, 1972, the disposition hearing was continued and L.A.M. was released to her parents. One week later the court was informed that she had run away. A pick-up order was issued and the minor was brought back to court on December 27, 1972, at which time she was detained pending disposition. The disposition hearing was finally held on January 11, 1973. Upon listening to testimony, the Master for the Family Court filed his recommendation that the minor be "released to her parents." A superior court judge adopted the finding and executed a release.

On March 19, 1973, L.A.M. was brought back to court by an intake officer who in-

1. AS 47.10.010(a)(1) provides in relevant part:

(a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the minor (1) violates a law of the state, or an ordinance or regulation of a political subdivision of the state . . .

2. AS 09.50.010 provides in relevant part: *Acts or omissions constituting contempt.* The following acts or omissions in respect to a court of justice or court proceedings are contempts of the authority of the court:

(5) disobedience of a lawful judgment, order, or process of the court . . .

3. AS 47.10.290 provides in relevant part: In this chapter, unless the context otherwise requires,

(7) "child in need of supervision" is a minor whom the court determines is within the provisions of (AS 47.10.010(a)(2), (3), (4), and (6)). [Matter in parentheses supplied.]

AS 47.10.010(a)(2), (3) and (6) respectively provide:

[B]y reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian;

[I]s habitually truant from school or home, or habitually so conducts himself as to injure or endanger the morals or health of himself or others;

[A]ssociates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others . . .

4. Children's Rule 4(d) provides:

*Informal Disposition.* If the intake officer, after investigation, believes that in the best interest of the child the matter should be handled on an informal basis, he may thereafter refrain from filing a petition and shall thereafter on behalf of the court, counsel with the child and parents, guardian or custodian, and with their consent and cooperation establish such informal supervision or disposition of the child matter as the circumstances may require.

formed the court that she had "been a run-away almost constantly since the time the court released her." The intake officer then filed a petition with the court alleging that the minor was a "child in need of supervision" by virtue of having been truant from school in violation of AS 47.10.010(a)(3) and AS 14.30.010 (truancy).<sup>5</sup> At the hearing the court was informed that Mrs. C. had obtained a child psychiatrist who had met with the child and her mother, and together they had worked out some program of counseling. The parties agreed that L.A.M. would be placed in a foster home during a period of counseling and the judge accepted a stipulation to that effect. Having previously explained to L.A.M. that if she violated a court order she could be held in contempt of court and incarcerated, the judge informed the child that she was not to leave the foster home without contacting her psychiatrist, her social worker, or her mother. She agreed. The minor was released from McLaughlin on March 31, 1973, and placed in a foster home. She ran away on April 2, without notification, and was not apprehended until May 4.

A hearing was held on May 14, 1973, at which time L.A.M. was charged with contempt of court by the intake officer. Because of the uncertainty in this area, the trial court appointed the public defender to represent her. On May 17, 1973, the hearing resumed. The state argued that a child in need of supervision could not thereby be held in contempt of court and incarcerated, but that a child guilty of "criminal contempt" could on that basis be adjudicated a "delinquent child" and thereafter institutionalized. The State, therefore, moved to dismiss the petitions, alleging contempt of court and substituting a petition of alleged delinquency. The court

denied the motion but permitted the State to file an amended petition alleging as a separate count an act of delinquency predicated upon "criminal contempt."

A petition alleging delinquency was filed on May 23, 1973, at which time a hearing was held. In responding to the petition L.A.M. denied the allegations and requested a trial. Pending trial, she was placed at the Alaska Children's Services receiving home. A written order was entered on June 8, 1973, specifically setting out the conditions under which L.A.M. would reside at the receiving home pending her adjudication hearing. Specifically, it provided that "[T]he child is not to remain away from the Anchorage Children's Christian Home overnight without the permission of the appropriate adult authorities of the home."

On July 26, 1973, an intake officer filed a petition for revocation of conditions of release pending L.A.M.'s adjudication hearing. In part, the petition stated that she had left the receiving home without permission on July 3, 1973, and remained away until July 24, 1973. A detention hearing was held on July 26th, and at the hearing L.A.M., through her counsel, admitted the allegations of the petition of alleged delinquency based on violation of a court order filed on May 23, 1973. L.A.M.'s counsel made it clear that the minor was only admitting the facts and reserving the right to litigate the legal consequences of those facts.

The court then proceeded to a consideration of the petition for revocation of conditions of release pending adjudication hearing filed on July 26, 1973. Upon admitting the allegations of this petition as well L.A.M. requested through her attorney that a disposition hearing be scheduled within thirty days.

5. AS 14.30.010 provides in relevant part: *When attendance compulsory.* (n) Every child between seven and 10 years of age shall attend school at the public school in the district in which the child resides during each school term. Every parent,

guardian or other person having the responsibility for or control of a child between seven and 10 years of age shall insure that the child is not absent from attendance.

At the disposition hearing held on August 28, 1973, and on August 31, 1973, two experts testified on behalf of the minor and two testified on behalf of the State. The expert testimony pointed up the substantial differences of opinion both as to principle and policy that exists regarding runaways and their treatment. After considering all of the evidence, the court accepted the recommendation of the Division of Corrections and ordered the minor institutionalized, but deferred execution of the order for a period of sixty days to give L. A.M. one more opportunity to establish that she could be rehabilitated within the community. During the deferred period L.A.M. was assigned to Sheila Lankford of the Division of Corrections Probation Department.

On November 2, 1973, the superior court, on the request of Ms. Lankford, vacated the deferred order of institutionalization and placed the child on regular probation, having been advised that L.A.M. was functioning effectively within the community while living at home. On November 5, 1973, the minor ran away but returned of her own accord on November 7. Two days later she ran away again and remained away until December 5, 1973, when she was apprehended by the police. On December 6, 1973, Ms. Lankford petitioned to revoke the minor's probation. At the hearing on this matter held on December 18, the superior court granted the petition to revoke probation but reinstated it on new conditions in light of a request by Ms. Lankford that the minor not be institutionalized. It was agreed that the child would reside in the Alaska Children's Services Receiving Home.

On March 18, 1974, Ms. Lankford filed a further petition seeking revocation of probation. In it she alleged that on February 20, 1974, the minor ran away from the receiving home and remained away until

March 16, 1974, when she was apprehended by the police. At the hearing on the petition, held on March 22, 1974, the court found the minor had violated the conditions of her probation and had run away from the receiving home. The court considered the minor's objections presented by her attorney and, after considering the evidence and the argument of the parties, directed that the minor be institutionalized.

L.A.M. seeks to have her adjudication of delinquency set aside on two grounds. She contends that both as a matter of statutory interpretation and constitutional law, a child in need of supervision may not be prosecuted for criminal contempt; or, in the alternative, if such a prosecution is allowable, such prosecution cannot result in incarceration. Upon discussing the nature of contempt in this case, each of these grounds will be dealt with in order.

[1] Before a party may be held in criminal or civil contempt for failure to abide by a court order, certain elements must be established: (1) the existence of a valid order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order; (2) the contemnor's notice of the order within sufficient time to comply with it; and in most cases, (3) the contemnor's ability to comply with the order; and (4) the contemnor's willful failure to comply with the order.

[2] The distinction between criminal and civil contempt is generally phrased in terms of whether the character and purpose of the contempt is "remedial" or "punitive."

[3] In *Johansen v. State*<sup>6</sup> we used a balancing test in determining that the failure to pay child support was criminal rather than civil contempt. We did so because incarceration was imposed for a fixed period under AS 09.50.020<sup>7</sup> to punish a completed act rather than to coerce future con-

6. 491 P.2d 750 (Alaska 1971).

7. See n. 2, *supra*.

duct pursuant to AS 09.50.050.<sup>8</sup> Specifically, the court held that where the contempt power was invoked to punish the alleged contemnor for "past, willful, flouting of the court's authority" pursuant to AS 09.50.010(5) (cf. AS 09.50.020), contempt was criminal, but where the contempt proceeding was instituted to "coerce future conduct" pursuant to AS 09.50.050, the contempt is civil.

[4] Applying that distinction here, the contempt order issued by the court would obviously be classified as "criminal." Were L.A.M. an adult, her failure to abide by court orders would be characterized as a "crime" under AS 09.50.010(5). Hence, L.A.M. could properly be declared a delinquent under AS 47.10.010(a)(1) after a proceeding in the Children's Court.

L.A.M. grounds her constitutional argument in *Breese v. Smith*,<sup>9</sup> where this court ruled that the right to liberty set out in Art. I, Sec. 1, of the Alaska State Constitution<sup>10</sup> guarantees every Alaskan regardless of age ". . . total personal immunity from governmental control: the right to be let alone . . .," which L.A.M. contends the supreme court qualified only to the extent that it ". . .

must yield when [it] intrudes upon the freedom of others. . . ." Therefore, she continues, a citizen's right to liberty as enunciated in *Breese, supra*, (bolstered by the more recently enacted "right to privacy")<sup>11</sup> cannot be infringed by preventing her from doing anything that does not injure a specific definable victim. Consequently, L.A.M. concludes: since her conduct, i.e. running away from home and foster home placement, did not injure anyone (except perhaps herself, which she contends has not been proved), it necessarily follows that it cannot constitutionally be interfered with by the State because there is no compelling state interest to justify such an interference.

L.A.M. assumes that the only interest to be protected by legislation in this area is that of the children. This is simply not the case. The parents' interest as well as the State's must be considered.<sup>12</sup>

[5-7] Proceedings against children alleged to be in need of supervision are in substance and effect custody disputes where the contestants are parent and child, and the parent appeals to the court to vindicate and enforce his custody rights in the child against that child.<sup>13</sup> Viewed in

8. AS 09.50.050 states in relevant part: When the contempt consists of the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he has performed it.

9. 501 P.2d 159, 168-170 (Alaska 1972).

10. Art. I of the declaration of rights of the Alaska Constitution, § 1, provides: *Inherent Rights.* This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

11. Alaska Constitution, Art. I, § 22, provides:

*Right of Privacy.* The right of the people to privacy is recognized and shall not be

infringed. The legislature shall implement this section.

12. The U. S. Supreme Court has on a number of occasions held that a parent's "right" to the custody and control of his child was constitutionally protected. See *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *May v. Anderson*, 345 U.S. 528, 78 S.Ct. 840, 97 L.Ed. 1221 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 48 S.Ct. 625, 67 L.Ed. 1042 (1923).

13. While there is much discussion of parental rights in reported cases, few cases attempt to define those rights making discussion difficult. A careful review of the literature, including case law, treatise and law review, indicates that the following have

this light, the statutes creating the status "child in need of supervision" provide a judicial remedy and discourage resort to self-help and the attendant risk of violence.<sup>14</sup>

[8] Thus, before L.A.M. can sustain her case that the child in need of supervision procedure, including the invocation of the court's contempt power to enforce orders made pursuant to it, is an unconstitutional invasion of her liberty and privacy, she must first establish that her mother has no legally enforceable right to her custody and the State thus has no right to enforce such an order. We note at the outset, however, that there is more to the parent-child relationship than simple custody. It is love and trust and a responsibility toward each other which cannot be defined legally. It is impossible to discuss covering

this relationship without considering the heartache and anguish of the parents who must ultimately live with themselves and the decision after the child reaches adulthood. Further, the consideration of such an issue must accept the limitations of the State to be a parent; good intentions are not adequate substitutes for the day-to-day relationship which we have come to accept as necessary to the growth of children into responsible adults. True, like all legal rights, a parent's right to the custody of his child is not absolute and may be lost through divorce,<sup>15</sup> by conduct depriving the child of the necessities of life,<sup>16</sup> by abandonment,<sup>17</sup> by the child's emancipation,<sup>18</sup> or, subject to constitutional limitations, where the welfare of the child requires a limitation or termination of parental rights.<sup>19</sup>

been listed as "parental rights" protected to varying degrees by the Constitution:

(1) Physical possession of the child which, in the case of a custodial parent includes the day-to-day care and companionship of the child. In the case of a non-custodial parent, possession is tantamount to the right to visitation.

(2) The right to discipline the child, which includes the right to inculcate in the child the parent's moral and ethical standards.

(3) The right to control and manage a minor child's earnings.

(4) The right to control and manage a minor child's property.

(5) The right to be supported by an adult child.

(6) The right to have the child bear the parent's name.

(7) The right to prevent an adoption of the child without the parents' consent.

Of these so called residual parental rights, those that remain after custody is placed in another include the right to consent to an adoption and to withhold consent to prevent an adoption, the right to visitation and the right to have the child bear the parents' name. See the discussion in Burt, Forcing Protection on Children and Their Parents, 69 Michigan 1259 (1971); Dobson, The Juvenile Court and Parental Rights, 4 Family Law Quarterly 393 (1970); Young, The Problem of Neglect: The Legal Aspects, 43 Journal of Family Law 29 (1964); Note, Child Neglect: Due Process for the Parent, 70 Col.L.Rev. 465 (1970).

14. By withdrawing court assistance (and police assistance) from embattled parents, the state is not inducing compromise but may encourage violence, since parents have the right under Alaska law to physically control their children. See AS 11.15.110(1) as interpreted in *State v. England*, 220 Or. 395, 349 P.2d 668 (1960), and compare the civil liability of parents for disciplining their children which is discussed in *Hedel v. Hedel*, 435 P.2d 8, 14-15 (Alaska 1967).

15. AS 09.55.205 gives a court in a divorce action the right to provide for the custody of the children.

16. See AS 47.10.010(a)(5) which, when read in conjunction with AS 47.10.080(c) and AS 47.10.200(3), permits the state to take custody of a child who "lacks proper parental care by reason of the faults, habit or neglect of his parent, guardian or custodian."

17. See AS 47.10.010(a)(4), which authorizes the state to take custody of a child who has been abandoned.

18. A child is emancipated as a matter of law when he or she reaches the age of majority which in Alaska is 19 years of age; AS 23.20.010. See *R.L.R. v. State*, 487 P.2d 27 (Alaska 1971).

19. *Turner v. Pannick*, 540 P.2d 1051, (Op. No. 1119, 1975); *In the Matter of the Adoption of K. S.*, 543 P.2d 1101, (Op.No.1219, 1975).

L.A.M. was given an opportunity to show any of the foregoing as a defense to a finding that she was a "child in need of supervision" or, subsequent thereto, to a finding that she had committed criminal contempt of court and was therefore delinquent by violating orders regarding her placement; but she failed to do so.

Runaway children of L.A.M.'s age are generally incapable of providing for or protecting themselves. As a result, police spend a substantial amount of time protecting these youths from those who would prey upon them, as well as protecting the community from those who are ultimately driven to criminal activity to provide themselves with the necessities of life.

Various other social agencies also expend considerable efforts attempting to protect and shelter runaways in an effort to provide both an alternative to criminal activities and counseling in lieu of that they received from their parents. Without question these children's matters are of broad public interest and concern. They go to all aspects of the physical and mental well being of such children.<sup>20</sup>

The family, school, social agency and police resources allocated to aid the runaway are enormous. In this case, the child had continuing aid and support of (1) her mother and step-father, (2) a private psychiatrist hired by her mother, (3) counseling with social workers in Division of Family and Children's Services, (4) probation officers in Division of Corrections, (5) school counselors, (6) psychologists and psychiatrists from Langdon Clinic, (7) Alaska Youth Advocates, (8) group home counselors, (9) her court-appointed attorney, and (10) the court. To assert that the State has no interest in this child is to

deny that the function of government is to protect its citizens. All of this presupposes the heartache and anguish of the parents, who in the first instance have been unable to deal with this problem but who must also live with the solution.

This court has previously found that there is sufficient State interest to justify restrictive measures on much less substantial grounds.<sup>21</sup> Further, this court has noted that distinct government interests with reference to children may justify legislation that could not properly be applied to adults.<sup>22</sup>

[9] The State has a legitimate interest in protecting children from venereal disease, from exposure to the use of dangerous and illicit drugs, from attempted rape, and from physical injury, all of which occurred in this case. Doubtless the State will never be entirely successful in its efforts. It does, however, have the right and obligation to try to protect its young people from such conditions.<sup>23</sup> The test set out by this court in *Ravin v. State*,<sup>24</sup> is whether the means chosen by the State are closely and substantially related to an appropriate government interest. Clearly they are here.

[10] While it may be argued that the necessary "supervision" contemplated by the statute is simply the furnishing of food, clothing, shelter and schooling in lieu of that which would otherwise have been provided by a parent, this argument begs the question, for the purpose of the supervision or treatment contemplated by the creation of the child in need of supervision and its predecessor non-criminal delinquency was reintegration of the child into her family and resumption of parental custody including parental control (cf. AS 47.10-

20. *In Re G.M.B.*, 483 P.2d 1008 (Alaska 1971); *Wagstaff v. Superior Court*, 535 P.2d 1220 (Alaska 1975).

21. *Kingery v. Chapple*, 504 P.2d 831 (Alaska 1972).

22. *Ravin v. State*, 537 P.2d 404 (Alaska 1975).

23. In the analogous equal protection argument concerning ". . . economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491.

24. 537 P.2d 404 (Alaska 1975).

280). Thus, the State's efforts regarding the child are not directed solely at providing an alternate living situation (as they are in a true case of dependency) but at putting the child back in her own home. The reestablishment of her mother's custody and supervision over her and any foster placement is merely a means to that end, not an end in itself. Thus, by rejecting these efforts L.A.M. defeats, or at least slows, this reintegration process and thereby prejudices her mother's right to her custody and control, subjecting herself to the more severe sanction contemplated by AS 09.50.020.

We note that L.A.M.'s primary argument in this case is that as a child in need of supervision whose conduct from the inception of the case to the present has not changed, she may not be placed in a closed setting, i. e. one where the doors may be locked. However, the cases upon which L.A.M. relies proceed to a different point, namely that the child should not be placed in a state training school. In Colorado, California, Illinois and New York,<sup>25</sup> children in need of supervision can at the first instance be placed in juvenile halls or youth centers, i.e. places with locked doors, but cannot be placed at the state training school, i.e. maximum security institutions. The McLaughlin Youth Center in Anchorage is more the equivalent of a juvenile hall than it is a state training school. It should be noted that Alaska has contracts with Colorado and California to place Alaska delinquents who are too sophisticated for McLaughlin in the state institutions in those states. Thus L.A.M. is not to be placed at either the California or Colorado training schools; she is threatened with placement at the McLaughlin Youth Center.

[11] Substantial evidence was introduced during the many hearings of this

25. *In re Presley*, 47 111.2d 50, 264 N.E.2d 177 (1970); *Matter of Tomasita N.*, 30 N.Y.2d 927, 335 N.Y.S.2d 683, 287 N.E.2d 377 (1972); *G. v. Redlich*, 32 N.Y.2d 588, 300 N.E.2d 424 (1973); Cal.Welf. and Inst. Code, §§ 601, 730, 777 (West 1972).

case regarding the population at the McLaughlin Youth Center. Based upon that evidence, it is clear that the kind of children who are extremely aggressive, and extremely hardened in delinquency, are not treated at McLaughlin Youth Center but are sent outside for placement at schools in Colorado and California under contract with the State of Alaska. While the population at McLaughlin is made up at the present time exclusively of "delinquents," the evidence introduced at trial convinces us that while delinquency in some form is a prerequisite to gaining admission to McLaughlin, it is not the real reason that the child is at McLaughlin. The overwhelming majority of delinquents with strong family ties are treated in the community. Those delinquents who end up at McLaughlin are by and large there for the same reason that L.A.M. may be there, namely an unwillingness to remain at home or a home substitute and heed parental or a custodian's regulations. Based upon the evidence, it appears that L.A.M. and other chronic run-aways would not be distinguishable in sophistication, exposure to criminal activity, etc., from the average child in the population at McLaughlin and that therefore the reasoning of the cases cited by L.A.M. should not apply to Alaska.

[12-14] Whether we characterize L.A.M. as a delinquent child, a child in need of supervision, a dependent child, or merely a child whose custody is disputed in a domestic relations proceeding, the court has authority, upon extending all procedural safeguards, to make orders affecting her custody. It is argued, however, that this is a situation where the court has no power to enforce its order, and thus the court must release L.A.M. This view is contrary to the inherent power of the court to enforce its orders or decrees.<sup>26</sup> While the court

26. Alaska Const. Art. IV, § 1, provides in part:

The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. See also *Ex Parte Robinson*, 80 U.S. (19

may have limitations on its power to act, there are only due process limitations on its authority to compel enforcement of its orders. Hence, we reject the argument that the superior court lacked the authority to enforce specific orders against L.A.M. in this case.

[15] The lower court determined that L.A.M. would not abide by any orders it entered regarding her supervision under AS 47.10.080(j). This behavior constitutes willful criminal contempt of the court's authority; were she an adult, her actions would be characterized as a "crime" under Alaska statutes. She was, therefore, properly declared a delinquent and subject to those sanctions available for the correction of a delinquent minor's behavior. Certainly, conciliation should precede coercion; and if coercion is necessary, mild sanctions should first be tried before more severe sanctions are imposed. However, where mild sanctions fail, the court's orders must be enforced and severe sanctions should be imposed if necessary. In the instant case, all available sanctions, save institutionalization, were tried and found unsuccessful. Thus, the lower court determined that it

Wull) 505, 510, 22 L.Ed. 205, 207 (1874); *In re Shortridge*, 99 Cal. 526, 528, 34 P. 227, 229 (1893); Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L.Rev. 1010, 1017-1022 (1924); Goldfarb, *The Contempt Power*, 37-40 (Columbia University Press 1963).

27. The trial judge was a model of patience and fairness in this extremely difficult case. Further, we are indebted to him for his scholarly memorandum opinion which aided in the preparation of this opinion.

1. The state's power to act in support of the welfare of children is exemplified by such statutory enactments as compulsory education (AS 14.30.010 et seq.); financial assistance for dependent children (AS 47.25.310 et seq.); protective laws as to the employment of children (AS 23.10.325 et seq.); minimum age of consent for marriage (AS 25.05.171); prohibition of the use of alcohol and tobacco by minors and of the sale of either substance to minors (AS 04.15.050 et seq. and AS 11.60.080); punishment for statutory rape (AS 11.15.120); con-

tributing to the delinquency of a minor (AS 11.40.130); and for lewd or lascivious acts toward children (AS 11.15.134).

had no choice but to order L.A.M. institutionalized.

In affirming this decision, we note that the trial judge was most innovative in fashioning a necessary remedy for a situation not covered by statute.<sup>27</sup> The very nature of the problem, however, calls for legislative overhaul of the statutes in this area, for the trial court's remedy is not easily modified to cover other situations where there is no statutory guidance.

BOOCHEVER, Justice, with whom RABINOWITZ, Chief Justice, joins, concurring.

I concur in the court's opinion based on the last three paragraphs thereof. I would not reach the other issues discussed in the opinion. Protection of parental rights to care, custody and supervision do not seem to me to be an appropriate rationale for placing a child in an institution. In my opinion, the court's efforts were devoted primarily to furthering the welfare of the child, a subject in which the state does have an interest.<sup>1</sup> There was ample testimony to indicate that L.A.M.'s conduct was harmful to her.<sup>2</sup>

tributing to the delinquency of a minor (AS 11.40.130); and for lewd or lascivious acts toward children (AS 11.15.134).

In *Anderson v. State*, 334 P.2d 669, 671 (Alaska 1963), this court stated that the purpose of the statute punishing acts which contribute to the delinquency of a minor is "to protect all children under the age of 18". In *Hanby v. State*, 479 P.2d 486, 498 (Alaska 1970), the court held that the state can enact statutes to protect the juveniles—to prevent as well as punish delinquency. In *Hanby*, the court found that material which was not so obscene as to be proscribed for the general population could be forbidden to minors. Children who were judged to be in a harmful environment were removed from their home in *In re P. N.*, 533 P.2d 13 (Alaska 1975). The court determines child custody in divorce proceedings according to the welfare and best interest of the child. *Horton v. Horton*, 519 P.2d 1131, 1132 (Alaska 1974); *Nichols v. Nichols*, 516 P.2d 732, 734 (Alaska 1973); *Carle v. Carle*, 503 P.2d 1050, 1052 (Alaska 1972).

2. While a runaway, L.A.M. was truant from school; was allegedly the victim of a

On the basis of the record, I do not believe that we can conclude that police spend countless hours protecting the community from anti-social conduct of runaway children. Recent studies indicate that status offenders (such as runaways) are not a source of general harm to others as contrasted with children who have committed offenses which, if perpetrated by adults, would be crimes.<sup>3</sup> I concur in the opinion since I believe that the state has an interest in the welfare of children justifying the entry of appropriate orders. In cases involving status offenders, only after all else fails, should placement in a closed setting be justified. But under the facts of this case, the trial judge had no alternative.

RABINOWITZ, Justice (concurring).

Although I am in agreement with the court's disposition of this appeal, I think it appropriate to answer appellant's contention that our prior decisions precluded the superior court from institutionalizing L.A.M. This contention is grounded upon *In re E.M.D.*, 490 P.2d 658 (Alaska 1971), where we rejected the argument that under Alaska's statutes a minor who has been adjudicated a child in need of supervision may be institutionalized by the state. Upon analysis of the relevant statutes, we concluded that ". . . the legislature has authorized institutionalization only

when the child is found to be a delinquent minor."<sup>1</sup> Thus, if the superior court in the case at bar had institutionalized L.A.M. because she had been adjudicated a child in need of supervision, such action would have been erroneous under *E.M.D.*

But here L.A.M.'s status was not merely that of a child in need of supervision; the scope of her future conduct had been limited by the superior court's order. By virtue of this order L.A.M. was, as the state argues, essentially on probation.<sup>2</sup> The majority notes that the superior court found that L.A.M. had violated the conditions of her probation by running away. The majority then observes that

Were L.A.M. an adult, her failure to abide by court orders would be characterized as a 'crime' under AS 09.50.010(5). Hence, L.A.M. could properly be declared a delinquent under AS 47.10.010(1) after a proceeding in the Children's Court.

I thus conclude that what essentially transpired below was that the trial court found a violation of the conditions of probation which it imposed pursuant to its determination that L.A.M. was a child in need of supervision, and ordered L.A.M. incarcerated.<sup>3</sup> In my view, *E.M.D.* did not prohibit the superior court from ordering the institutionalization of L.A.M. in the circumstances of this case.

rapes reported in a call to the police; contracted gonorrhoea; suffered an injured jaw and broken teeth from a fall, which injuries had not received medical attention.

3. Clarke, Stevens II, "Some Implications for North Carolina of Recent Research in Juvenile Delinquency," *Journal of Research in Crime and Delinquency*, January 1975.

1. *In re E.M.D.*, 490 P.2d 658, 659 (Alaska 1971). In *E.M.D.*, after finding the minor to be a child in need of supervision, the trial court committed *E.M.D.* to the custody of the Department of Health and Welfare and

directed the Department to place her in a correctional or detention facility.

2. AS 47.10.080(j) provides in part:

If the court finds the minor is a child in need of supervision it shall make any of the following orders of disposition for his supervision, care and rehabilitation:

(2) order the minor placed on probation under those conditions and limitations that the court may prescribe.

3. See AS 47.10.080(b)(1).

THIRD JUDICIAL DISTRICT

FAMILY COURT DIVISION

In the Matter of L. A. M., )  
 )  
 A Minor Under the Age )  
 of Eighteen Years. )  
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 )  
 )

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CP No. 2992

ORDER DENYING MOTION TO  
VACATE FINDING OF DELINQUENCY

L. M. seeks review <sup>1/</sup> of this court's order dated July 26, 1973, declaring her a delinquent <sup>2/</sup> child for violation of AS 09.50.010, <sup>3/</sup> i.e. willful failure to comply with certain court orders made after a prior adjudication that she was a child in need of supervision. <sup>4/</sup> L.M. contends that both as a matter of statutory interpretation

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1. Children's Rule 28(b) provides:

Review upon application. For good cause shown the juvenile, his parents, guardian or custodian are entitled to review at any time upon application therefor.

2. AS Sec. 47.10.010(1) provides in relevant part:

(a) Proceedings relating to a minor under eighteen years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the minor . . . (1) violates a law of the state, or an ordinance or regulation of a political subdivision of the state; . . .

3. AS Sec. 09.50.010 provides in relevant part:

Acts or omissions constituting contempt. The following acts or omissions in respect to a court of justice or court proceeding are contempts of the authority of the court:

. . . (5) Disobedience of a lawful judgment, order or process of the court; . . .

and constitutional law, a child in need of supervision may not be prosecuted for criminal contempt; or, in the alternative, if such a prosecution is allowable, such prosecution cannot result in a declaration of delinquency.

In order to understand L.M.'s arguments and place her situation in context, it will be necessary to set out a brief resume of her history.

L.M. was born in Alberta, Calgary, in Canada in 1958. The M.'s adopted her shortly after her birth. Mr. and Mrs. M. separated shortly thereafter, eventually divorcing. L.M. remained in Mrs. M.'s custody. Mrs. M. brought L.M. to Alaska and generally cared for her alone during the first twelve years of L.M.'s life. Until she was in the fifth grade, L.M. was left with babysitters

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3. (Cont'd)

AS Sec. 09.50.020 provides in relevant part:

Penalty. A person who is guilty of contempt is punishable by a fine of not more than \$300.00 or by imprisonment for not more than six months. However, when the contempt is one mentioned in (Sec. 10(5)) of this chapter, or in an action before a magistrate, the person is punishable by a fine of not more than \$100.00 unless it appears that a right or remedy of a party to an action or proceeding was defeated or prejudiced by the contempt, in which case the penalty shall be as prescribed for contempts described in Secs. 10(1) and (2) of this chapter. (Matter in parentheses supplied.)

4. AS Sec. 47.10.290 provides in relevant part:

In this chapter, unless the context otherwise requires, . . . (7) "child in need of supervision" is a minor whom the court determines is within the provisions of (AS Sec. 47.10.010(a) (2), (3), (4), and (6)). (Matter in parentheses supplied.)

AS Sec. 47.10.010 (a) (2) provides:

"by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian; . . .