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DATE 07/20/2011 BY 60322 UCBAW/STW

3421 HJUD SB 377 / HB 532 (FILE 2: BILLS, FISCAL NOTES & AMENDMENTS)

1 all liability for contribution to any other tortfeasor.

2 Sec. 09.17.900. DEFINITIONS. In this chapter

3 (1) "fault" includes acts or omissions that are in any  
4 measure negligent or reckless toward the person or property of the  
5 actor or others, or that subject a person to strict tort liability;  
6 the term also includes breach of warranty, unreasonable assumption of  
7 risk not constituting an enforceable express consent, misuse of a  
8 product for which the defendant otherwise would be liable, and unrea-  
9 sonable failure to avoid an injury or to mitigate damages; legal  
10 requirements of causal relation apply both to fault as the basis for  
11 liability and to contributory fault;

12 (2) "future damages" includes damages for future medical  
13 treatment, care or custody, loss of future earnings, or loss of bodily  
14 function of the claimant.

15 \* Sec. 2. AS 09.30.065 is amended to read:

16 Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10  
17 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE  
18 FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING  
19 THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party  
20 making a claim or the party defending against a claim may serve upon  
21 the adverse party an offer to allow judgment to be entered in complete  
22 satisfaction of the claim for the money or property or to the effect  
23 specified in the offer, with costs [COST] then accrued. If within 10  
24 days after the service of the offer the adverse party serves written  
25 notice that the offer is accepted, either party may then file the  
26 offer and notice of acceptance together with proof of service, and the  
27 clerk shall enter judgment. An offer not accepted within 10 days is  
28 considered withdrawn and evidence of that offer is not admissible  
29 except in a proceeding to determine the form of judgment after

1 verdict. If the judgment finally entered on the claim as to which an  
2 offer has been made under this section is not more favorable to the  
3 offeree than the offer, the interest awarded under AS 45.45.010(a) and  
4 accrued up to the date judgment is entered shall be adjusted as fol-  
5 lows:

6 (1) if the offeree is the party making the claim, the  
7 interest rate shall be reduced by five [TWO] percent a year;

8 (2) if the offeree is the party defending against the  
9 claim, the interest rate shall be increased by five [TWO] percent a  
10 year.

11 \* Sec. 3. AS 09.30.070 is amended by adding a new subsection to read:

12 (b) Except when the court finds that the parties have agreed  
13 otherwise, prejudgment interest accrues from the day the cause of  
14 action accrues.

15 \* Sec. 4. AS 09.55.548 is repealed and reenacted to read:

16 Sec. 09.55.548. AWARDS. Except as provided in AS 09.17, damages  
17 in a malpractice action shall be awarded in accordance with principles  
18 of the common law.

19 \* Sec. 5. AS 09.60.010 is amended by adding a new subsection to read:

20 (b) In making an award of attorney fees to a prevailing party,  
21 the court shall consider actual attorney fees incurred by each party  
22 in the civil action. Actual attorney fees shall be supported by  
23 affidavit from the attorney representing each party.

24 \* Sec. 6. AS 09.63 is amended by adding a new section to read:

25 Sec. 09.63.045. VERIFICATION OF CIVIL CLAIMS. (a) Except as  
26 provided in (b) of this section, every complaint, answer, cross-claim,  
27 and counterclaim shall be signed and verified by the party or the  
28 attorney of the party filing the pleading and shall bear a statement  
29 that the person signing the pleading believes the statements made in

1 the pleading are true. If the court finds that a statement made in  
2 the complaint, answer, cross-claim, or counterclaim was knowingly  
3 untrue, upon motion of a party, the person signing the pleading may be  
4 compelled to show cause why the person signing the pleading should not  
5 be held in contempt of court.

6 (b) For good cause, a complaint, answer, cross-claim or  
7 counter-claim may be filed without verification; provided, however,  
8 that verification of the pleading by the party or attorney of the  
9 party shall be made within 15 days of the filing of the pleading.

10 \* Sec. 7. AS 22.15.030(a) is amended to read:

11 (a) The district court has jurisdiction of civil cases and  
12 proceedings as follows:

13 (1) for the recovery of money or damages when the amount  
14 claimed exclusive of costs, interest and attorney fees does not exceed  
15 \$35,000 [\$25,000];

16 (2) for the recovery of specific personal property, when  
17 the value of the property claimed and the damages for the detention do  
18 not exceed \$35,000 [\$25,000];

19 (3) for the recovery of a penalty or forfeiture, whether  
20 given by statute or arising out of contract, not exceeding \$35,000  
21 [\$25,000];

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

25 (5) for establishing the fact of death of any person in the  
26 manner prescribed in AS 09.55.020 - 09.55.060;

27 (6) for the recovery of the possession of premises in the  
28 manner provided under AS 09.45.070 - 09.45.160 when the value [OF THE  
29 PROPERTY OR] of the arrears and damage to the property does not exceed

1        \$35,000 [\$25,000];

2                (7) for the foreclosure of a lien when the amount in con-  
3        troversy does not exceed \$25,000;

4                (8) for the recovery of money or damages in motor vehicle  
5        tort cases when the amount claimed exclusive of costs, interest and  
6        attorney fees does not exceed \$35,000 [\$25,000];

7                (9) over civil actions for taking utility service and for  
8        damages to or interference with a utility line filed under AS 42.20.-  
9        030;

10               (10) over cases involving injunctive relief for domestic  
11        violence under AS 25.35.010 and 25.35.020.

12        \* Sec. 8. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and  
13        09.16.060 are repealed.

14        \* Sec. 9. AS 09.17.020 and 09.17.060 enacted in sec. 1 of this Act have  
15        the effect of amending Alaska Rule of Civil Procedure 49 by requiring the  
16        jury to answer the special interrogatories listed in AS 09.17.060 regarding  
17        the amount of damages and the percentages of fault to be allocated among  
18        the parties and to itemize the verdict regarding economic and noneconomic  
19        loss as specified in AS 09.17.030.

20        \* Sec. 10. AS 09.17.060 enacted in sec. 1 of this Act has the effect of  
21        amending Alaska Rule of Civil Procedure 52 by requiring the court to make  
22        specific findings regarding the amount of damages and the percentages of  
23        fault to be allocated among the parties.

24        \* Sec. 11. AS 09.17.020 and 09.17.060 enacted in sec. 1 of this Act  
25        have the effect of amending Alaska Rule of Civil Procedure 58 by requiring  
26        the court to include a specific item in its judgment.

27        \* Sec. 12. AS 09.63.045 enacted in sec. 6 of this Act has the effect of  
28        amending Alaska Rule of Civil Procedure 11 by requiring verification of  
29        claims, answers, counterclaims, and cross-claims.

1 \* Sec. 13. AS 09.30.070 as amended by sec. 3 of this Act has the effect  
2 of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment  
3 interest accrues from the day the cause of action accrues.

4 \* Sec. 14. AS 09.60.010 as amended by sec. 5 of this Act has the effect  
5 of amending Alaska Rule of Civil Procedure 82 by requiring the court to  
6 consider the actual attorney fees incurred in the civil action.

7 \* Sec. 15. APPLICABILITY. Sections 1 - 8 of this Act apply to all  
8 causes of action accruing on or after the effective date of this Act.

9 \* Sec. 16. This Act takes effect immediately in accordance with AS 01.-  
10 10.070(c).

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Ford  
5/2/86

Original sponsors: Cotten, Binkley,  
Collins, et al

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 532 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to civil actions; amending Alaska  
7 Rules of Civil Procedure 11 49, 52, 58, 68, and 82;  
8 and providing for an effective date."

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

10 \* Section 1. AS 09 is amended by adding a new chapter to read:

11 CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

12 Sec. 09.17.010. NONECONOMIC DAMAGES. (a) In an action to  
13 recover damages for personal injury based on negligence, damages for  
14 noneconomic losses shall be limited to \$500,000 for each person  
15 injured.

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

18 Sec. 09.17.020. DAMAGES RESULTING FROM COMMISSION OF A CRIME. A  
19 person who suffers personal injury or death may not recover damages  
20 for the personal injury or death if the injuries or death occurred  
21 while the person was engaged in the commission of a felony, the person  
22 has been convicted of the felony, including conviction based on a  
23 guilty plea or plea of nolo contendere, and the felony contributed to  
24 the injury or death.

25 Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages  
26 for personal injury are awarded by the court or jury, the verdict  
27 shall be itemized between economic loss and noneconomic loss, if any,  
28 and economic loss shall be further itemized by category. Itemization  
29 of economic loss by category includes: (1) amounts intended to

1 compensate for reasonable expenses that have been incurred, or which  
2 will be incurred, for necessary medical, surgical, x-ray, dental, or  
3 other health or rehabilitative services, drugs, and therapy; (2)  
4 amounts intended to compensate for lost wages or loss of earning  
5 capacity; and (3) all other economic losses granted by the fact  
6 finder. A verdict shall further determine the amounts intended to  
7 compensate for injury or losses incurred before the verdict and  
8 amounts intended to compensate for losses that will be incurred in the  
9 future.

10 Sec. 09.17.035. PERIODIC PAYMENTS. (a) The court may enter a  
11 judgment that future damages be paid in whole or in part by periodic  
12 payments rather than by a lump-sum payment; the judgment shall in-  
13 clude, if necessary, other provisions to assure that funds are avail-  
14 able as periodic payments become due. Insurance from an authorized  
15 insurer as defined in AS 21.90.900 or from the Medical Indemnity  
16 Corporation of Alaska is sufficient assurance that funds will be  
17 available. Any part of the award that is paid on a periodic basis  
18 shall be adjusted annually according to changes in the consumer price  
19 index in the community where the claimant resides. The court shall  
20 include as a part of the costs awarded to the claimant the costs of  
21 providing periodic payment of future damages.

22 (b) A judgment ordering payment of future damages by periodic  
23 payment shall specify the recipient, the dollar amount of the pay-  
24 ments, the interval between payments, and the number of payments or  
25 the period of time over which payments shall be made. Payments may be  
26 modified only as provided in (c) of this section or in the event of  
27 the death of the judgment creditor, in which case payments may not be  
28 reduced or terminated, but shall be paid to persons to whom the judg-  
29 ment creditor owed a duty of support, as provided by law, immediately

1 before death. In the event the judgment creditor owed no duty of  
2 support to dependents at the time of the judgment creditor's death,  
3 the money remaining shall be distributed in accordance with a will of  
4 the deceased judgment creditor or under the intestate laws of the  
5 state if the deceased had no will.

6 (c) The court that rendered the original judgment may, upon  
7 petition of the judgment creditor, modify the judgment to award  
8 additional damages if the judgment creditor incurs medical expenses  
9 that were not included in the original judgment and could not have  
10 been reasonably anticipated at the time of trial.

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

17 (e) If at any time following entry of judgment, a judgment  
18 debtor fails to make a payment in a timely fashion according to the  
19 terms of the part of the judgment related to periodic payments, the  
20 judgment creditor may petition the court that rendered the original  
21 judgment for an order requiring payment by the judgment debtor of the  
22 outstanding payments in a lump sum. In calculating the amount of the  
23 lump-sum judgment under this section, the court shall total the re-  
24 maining periodic payments due and owing to the judgment creditor.  
25 This amount may not be converted to its present value. The court may  
26 also require the payment of interest on the outstanding judgment.

27 Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. Every complaint,  
28 answer, cross-claim, and counterclaim shall be signed and verified by  
29 the party or the attorney of the party filing the pleading and shall

1 bear a statement that the person signing the pleading believes the  
2 statements made in the pleading are true. If the court finds that a  
3 statement made in the complaint, answer, cross-claim, or counterclaim  
4 was knowingly untrue, upon motion of a party, the person signing the  
5 pleading shall be compelled to show cause why the person signing the  
6 pleading should not be held in contempt of court.

7 Sec. 09.17.045. LIMITED LIABILITY OF CERTAIN DIRECTORS AND  
8 OFFICERS. (a) Unless the act or omission constituted gross negli-  
9 gence, a person may not recover damages for personal injury, death, or  
10 damage to property for an act or omission to act in the course and  
11 scope of official duties, from the following:

12 (1) a member of the board of directors or an officer of a  
13 nonprofit corporation;

14 (2) a member of the board of directors or a member of a  
15 citizen's advisory board of a public or nonprofit hospital;

16 (3) a member of a school board of a school district;

17 (4) a member of the governing body, a commission, or a  
18 citizen's advisory committee of a municipality of the state.

19 (b) Notwithstanding (a) of this section, the duties and liabil-  
20 ities of a director or officer of a nonprofit corporation to the  
21 corporation or the corporation's shareholders may not be limited or  
22 modified.

23 (c) In this section "nonprofit corporation" means a corporation  
24 that qualifies for exemption from taxation under 26 U.S.C. 501(c)(3)  
25 (Internal Revenue Code).

26 Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action  
27 based on fault seeking to recover damages for injury or death to  
28 person or harm to property, contributory fault chargeable to the  
29 claimant diminishes proportionately the amount awarded as compensatory

1 damages for an injury attributable to the claimant's contributory  
2 fault, but does not bar recovery.

3 Sec. 09.17.055. COLLATERAL BENEFITS. (a) After the fact finder  
4 has rendered an award to a claimant, and after the court has awarded  
5 costs and attorney fees, a defendant may introduce evidence of amounts  
6 received or to be received by the claimant as compensation for the  
7 same injury from collateral sources that do not have a right of subro-  
8 gation by law or contract.

9 (b) If the defendant elects to introduce evidence under (a) of  
10 this section, the claimant may introduce evidence of

11 (1) the amount that the actual attorney fees incurred by  
12 the claimant in obtaining the award exceed the amount of attorney fees  
13 awarded to the claimant by the court; and

14 (2) the amount that the claimant has paid or contributed to  
15 secure the right to an insurance benefit introduced by the defendant  
16 as evidence.

17 (c) If the total amount of collateral benefits introduced as  
18 evidence under (a) of this section exceeds the total amount that the  
19 claimant introduced as evidence under (b) of this section, the court  
20 shall deduct from the total award the amount by which the value of the  
21 nonsubrogated sum awarded under (a) of this section exceeds the amount  
22 of payments under (b) of this section.

23 (d) Notwithstanding (a) of this section, the defendant may not  
24 introduce evidence of

25 (1) benefits that under federal law cannot be reduced or  
26 offset;

27 (2) a deceased's life insurance policy; or

28 (3) gratuitous benefits provided to the claimant.

29 Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions

1 involving fault of more than one party to the action, including third-  
2 party defendants and persons who have been released under AS 09.17.-  
3 070, the court, unless otherwise agreed by all parties, shall instruct  
4 the jury to answer special interrogatories or, if there is no jury,  
5 shall make findings, indicating

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

8 (2) the percentage of the total fault of all of the parties  
9 to each claim that is allocated to each claimant, defendant, third-  
10 party defendant, and person who has been released from liability under  
11 AS 09.17.070.

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

19 (c) The court shall determine the award of damages to each  
20 claimant in accordance with the findings, subject to a reduction under  
21 AS 09.17.070, and enter judgment against each party liable. The court  
22 also shall determine and state in the judgment each party's equitable  
23 share of the obligation to each claimant in accordance with the re-  
24 spective percentages of fault.

25 (d) The court shall enter judgment against each party liable on  
26 the basis of joint and several liability, except that a party who is  
27 allocated less than 50 percent of the total fault allocated to all the  
28 parties may not be jointly liable for more than twice the percentage  
29 of fault allocated to that party.

1           Sec. 09.17.070. EFFECT OF RELEASE. When a release or covenant  
2 not to sue or not to enforce judgment is given in good faith to one of  
3 two or more persons liable in tort for the same injury or the same  
4 wrongful death

5           (1) it does not discharge any of the other tortfeasors from  
6 liability for the injury or wrongful death unless its terms so pro-  
7 vide; but it reduces the claim against the others to the extent of any  
8 amount stipulated by the release or the covenant, or in the amount of  
9 the consideration paid for it, whichever is the greater; and

10           (2) it discharges the tortfeasor to whom it is given from  
11 all liability for contribution to any other tortfeasor.

12           Sec. 09.17.900. DEFINITIONS. In this chapter

13           (1) "fault" includes acts or omissions that are in any  
14 measure negligent or reckless toward the person or property of the  
15 actor or others, or that subject a person to strict tort liability;  
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1 making a claim or the party defending against a claim may serve upon  
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3 satisfaction of the claim for the money or property or to the effect  
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5 after the service of the offer the adverse party serves written notice  
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7 notice of acceptance together with proof of service, and the clerk  
8 shall enter judgment. An offer not accepted within 10 days is con-  
9 sidered withdrawn and evidence of that offer is not admissible except  
10 in a proceeding to determine the form of judgment after verdict. If  
11 the judgment finally entered on the claim as to which an offer has  
12 been made under this section is not more favorable to the offeree than  
13 the offer, the interest awarded under AS 45.45.010(a) and accrued up  
14 to the date judgment is entered shall be adjusted as follows:

15 (1) if the offeree is the party making the claim, the  
16 interest rate shall be reduced by five [TWO] percent a year;

17 (2) if the offeree is the party defending against the  
18 claim, the interest rate shall be increased by five [TWO] percent a  
19 year.

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12 not exceed \$35,000 [\$25,000];

13 (3) for the recovery of a penalty or forfeiture, whether  
14 given by statute or arising out of contract, not exceeding \$35,000  
15 [\$25,000];

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

19 (5) for establishing the fact of death of any person in the  
20 manner prescribed in AS 09.55.020 - 09.55.060;

21 (6) for the recovery of the possession of premises in the  
22 manner provided under AS 09.45.070 - 09.45.160 when the value of the  
23 property or of the arrears and damage to the property does not exceed  
24 \$35,000 [\$25,000];

25 (7) for the foreclosure of a lien when the amount in con-  
26 troversy does not exceed \$25,000;

27 (8) for the recovery of money or damages in motor vehicle  
28 tort cases when the amount claimed exclusive of costs, interest and  
29 attorney fees does not exceed \$35,000 [\$25,000];

1 (9) over civil actions for taking utility service and for  
2 damages to or interference with a utility line filed under AS 42.20.-  
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4 (10) over cases involving injunctive relief for domestic  
5 violence under AS 25.35.010 and 25.35.020.

6 \* Sec. 7. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and  
7 09.16.060 are repealed.

8 \* Sec. 8. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have  
9 the effect of amending Alaska Rule of Civil Procedure 49 by requiring the  
10 jury to answer the special interrogatories listed in AS 09.17.060 regarding  
11 the amount of damages and the percentages of fault to be allocated among  
12 the parties and to itemize the verdict regarding economic and noneconomic  
13 loss as specified in AS 09.17.030.

14 \* Sec. 9. AS 09.17.060 enacted in sec. 1 of this Act has the effect of  
15 amending Alaska Rule of Civil Procedure 52 by requiring the court to make  
16 specific findings regarding the amount of damages and the percentages of  
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18 \* Sec. 10. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act  
19 have the effect of amending Alaska Rule of Civil Procedure 58 by requiring  
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\* Sec. 14. APPLICABILITY. Sections 1 - 7 of this Act apply to all causes of action accruing on or after the effective date of this Act.

\* Sec. 15. This Act takes effect immediately in accordance with AS 01.-10.070(c).

# Memorandum

Alaska Court System

TO: [

Arthur H. Snowden, II  
Administrative Director

DATE :

April 29, 1986

FROM:

Karla L. Forsythe *KLF*  
Staff Counsel

SUBJECT:

Fiscal Impact of CSHB 532  
(L & C) if Arbitration is  
Deleted

Without costs attributable to arbitration, the fiscal note on CSHB 532 (L & C) decreases to a total of \$88,473, which funds a full-time fully-vested retired superior court judge and an in-court clerk, as well as needed supplies and one-time equipment expenses. The need for a full-time judge position is based on the Labor and Commerce substitute, which includes periodic payments, apportionment of fault to defendants previously released from liability, and also abolishes Civil Rule 82 attorney fees. To the extent the House Judiciary Committee amends these provisions, the fiscal impact could decrease even further.

KF/k1

## STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : \_\_\_\_\_

**REQUEST**

Bill/Resolution No. : CSHB 532 (L&C)  
 Title : An Act Relating to Text Reform

Sponsor : \_\_\_\_\_  
 Requestor : \_\_\_\_\_  
 Date of Request : \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected : Alaska Court System  
 BRU : Trial Courts

Components : \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		80.7	80.7	80.7	80.7	80.7
TRAVEL		6.2	6.2	6.2	6.2	6.2
CONTRACTUAL SUPPLIES		721.8	721.8	721.8	721.8	721.8
EQUIPMENT		1.0	1.0	1.0	1.0	1.0
LAND & STRUCTURES		6.7				
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		<b>816.4</b>	<b>809.7</b>	<b>809.7</b>	<b>809.7</b>	<b>809.7</b>

<b>CAPITAL</b>						
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<b>REVENUE</b>						
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND		816.4	809.7	809.7	809.7	809.7
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		<b>816.4</b>	<b>809.7</b>	<b>809.7</b>	<b>809.7</b>	<b>809.7</b>

**POSITIONS :**

FULL-TIME		2	2	2	2	2
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

Prepared by : Karla Forsythe/Robert G. Fisher / 13/ Phone : 264-8215  
 Division : Alaska Court System Date : 4/9/85

Approved by Commissioner : Arthur H. Snowden, II / 15/ Date : 4/9/85  
 Agency : Alaska Court System

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

### CSHB 532 (L & C) Fiscal Note Narrative

This legislation impacts the court system in two areas: expanded judicial workload and mandatory arbitration.

#### Expanded Judicial Workload

The presiding judge for the third judicial district anticipates that new procedures incorporated in this bill (such as hearings to determine whether defendants who have defaulted on periodic payments should be held in contempt and the amount of related damages which should be assessed) will increase the court's workload by 20% for each trial. This estimate also includes judge time expended on additional litigation which will result from attempts to transfer proportional liability to persons who have signed releases before trial, and litigation to resolve interpretation questions with the legislation. Also, more cases will go to trial because of diminished incentives to settle resulting from the prohibition on the award of Civil Rule 82 Attorneys Fees.

It is anticipated that the increased workload could be handled statewide by funding the equivalent of a pro tem judge. Pro tem funding is less costly than funding new judge positions because salary and benefits for retired pro tem judges are significantly lower. Additionally, since these judges are not permanently assigned to one court location, normal space and staffing requirements are avoided.

The provisions of this legislation which establish new procedures for the court come into play only when a case goes to trial. According to figures provided by the Anchorage trial court, approximately 5% of the cases filed go to trial, resulting in 105 personal injury trials statewide.

It is estimated that a personal injury trial averages two weeks. The total number of personal injury trials multiplied by two weeks of a judge's time total 210 judge weeks.

The estimated 20% additional judicial workload attributable to these expanded proceedings totals 42 judge weeks. Since a standard judicial work year averages 40 work weeks (excluding holidays, vacation and training), it is estimated that one judge would be required to process the additional statewide workload.

In order to avoid duplicative hearings, the court system favors binding arbitration rather than the option of de novo court trials. In the event that this legislation is not amended to provide for binding arbitration, the court system assumes for purposes of this fiscal note that the court would be required to bear the cost of arbitrators for those parties who are unable to afford this expense. It is estimated that 1216 personal injury cases statewide would be subject to the mandatory arbitration provision because they fall under \$75,000. It is assumed that a third of the parties will not be able to afford the expenses of arbitrators. Thus, the court system will be required to bear these expenses in 401 cases.

Assuming an arbitration lasting 12 hours and an estimated average hourly compensation rate for the arbitrator of \$150, the cost of an arbitration totals \$1,800. The estimated total cost of an arbitrator for all cases under \$75,000 is \$721,800. Additionally, the court system assumes that for parties in outlying rural areas who are unable to afford the costs of arbitrators, it will be less costly to fly these persons to central urban areas rather than to fly arbitrators to the outlying areas and pay for their room and board. The additional air fare and per diem costs total \$6,155. Based on these assumptions, the total costs of mandatory arbitration is \$727,955.

ALASKA COURT SYSTEM  
 CSHB 532 (L & C) - TORT REFORM  
 FISCAL IMPACT

## Personnel:

	Salary	Benefits	Total
Pro Tem, Superior Court Judge (PFT, using fully-vested retired judge) (See Schedule #2)	\$19,332	\$26,779	\$46,111
In-Court Clerk (PFT, 12B)	25,740	8,863	34,603
			-----
Total Personnel			80,714
Travel costs for indigent bush parties in manda- tory arbitration cases. (See Schedule #3)			6,155
Contractual cost of arbitrators for indigent parties in mandatory arbitration cases. (See Schedule #3)			721,800
Supplies			1,000
Equipment: (one-time items)			
New employee equipment - office furniture and reference materials			6,759
			-----
Total FY 87 Cost			\$816,428
			=====

Schedule #2

## ALASKA COURT SYSTEM

ESTIMATION OF JUDICIAL RESOURCES  
NEEDED TO PROCESS INCREASED WORKLOAD

## CSHB 532 (L &amp; C) - TORT REFORM

	Anchorage	Rest of State	Total
Number of civil damage cases (a)	1,458	638	2,096
Estimated percentage of cases going to trial	5%	5%	5%
Estimated number of trials	73	32	105
Estimated length of trial in weeks	2	2	2
Estimated judicial time in weeks	146	64	210
Estimated workload increase from legislation	20%	20%	20%
Estimated additional judicial workload in weeks	29	13	42
Estimated average number of work- weeks in judicial year (b)	40	40	40
Estimated number of judges needed to process additional workload	0.73	0.33	1.05

## Notes:

- (a) Based on FY 05 case filings. All civil damage case filings assumed to be personal injury cases.
- (b) Estimated number of work-weeks, net of holidays, vacation and training.

Schedule #3

ALASKA COURT SYSTEM  
ESTIMATED FISCAL IMPACT OF MANDATORY ARBITRATION  
CSHB 532 (L & C) - TORT REFORM

	Anchorage	Rest of State	Total
Number of civil damage cases (a)	1,458	638	2,096
Estimated percentage of cases under \$75,000	58%	58%	58%
Estimated number of cases under \$75,000	846	370	1,216
Estimated percentage of indigent parties	33%	33%	33%
Estimated number of cases involving indigent parties	279	122	401
Estimated average length of arbi- tration hearing in hours	12	12	12
Estimate average hourly rate of arbitrator	\$150	\$150	\$150
Estimated average cost of each case	\$1,800	\$1,800	\$1,800
Estimated total cost of arbitrators	\$502,200	\$219,600	\$721,800
Estimated travel cost for indigent parties living in bush areas. (See Schedule #4)	\$0	\$6,155	\$6,155
Estimated total cost of mandatory arbitration	\$502,200	\$225,755	\$727,955

## Notes:

- (a) Based on FY 85 case filings. All civil damage case filings assumed to be personal injury cases.

ALASKA COURT SYSTEM

ESTIMATED TRAVEL COSTS FOR INDIGENT BUSH PARTIES

CEHB 532 (L & C) - TORT REFORM

Bush Courts	Number of Case Filings	Percent Under \$75,000	Number of Cases Under \$75,000	Percent Indigent Defendants	Number of Indigent Cases	Air Fare to Nearest Urban Court (a)	Estimated Air Fare Cost	Estimated Per Diem Cost (b)	Estimated Total Travel Cost
Barrow	5	58%	3	33%	1	\$500	\$500	\$315	\$815
Bethel	30	58%	17	33%	6	302	1,812	1,680	3,492
Kotzebue	5	58%	3	33%	1	426	426	280	706
Nome	6	58%	3	33%	1	426	426	280	706
Valdez	6	58%	3	33%	1	156	156	280	436
								Total Cost	\$6,155

Notes:

(a) Bush courts served by urban courts:

Barrow served by Fairbanks  
 Bethel served by Anchorage  
 Kotzebue served by Anchorage  
 Nome served by Anchorage  
 Valdez served by Anchorage

(b) Estimated to require three and one half days of per diem.

APR 29 '86 11:18 ACR 2ND JUD DIST FAX:276-6342



### Trial Courts

Courts of Alaska

THIRD JUDICIAL DISTRICT  
303 K STREET  
ANCHORAGE, ALASKA 99501

GOLDEEN GOODFELLOW  
Assistant Area Court Administrator/  
Clerk of Court

(907) 264-0440

#### Memorandum

To: Karla Forsythe  
Staff Counsel

From: Goldeen Goodfellow  
AACA/Clerk of Court *GF*

Re: Personal Injury Statistics

Date: April 9, 1986

We again went through all of the Case Characterization Forms which we have in LeEllen's office at this time. They picked out the personal injury cases and put them into categories of (1) \$75,000 or less, (2) more than \$75,000 and (3) no amount stated. They looked at a total of 203 Case Characterization Forms for personal injury cases. The breakdown is as follows:

\$75,000 and under -	118 cases -	58.1%
more than \$75,000 -	61 cases -	30.1%
amounts not stated -	24 cases -	11.8%

If you want me to, I can continue to monitor the Case Characterization Sheets as they come in and add to the above figures.

cc: Douglas J. Sardahely, Presiding Judge  
Albert H. Szal, Area Court Administrator . . .

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date: \_\_\_\_\_

**REQUEST**

Bill/Resolution No. : HCS CSSB 377 (Jud.)  
 Title : "An Act relating to civil actions;  
 amending Alaska Rules of Civil  
 Procedure 49, 52, 58, 60;..."  
 Sponsor : Sen. Kelly  
 Requestor : House Judiciary Committee  
 Date of Request : May 7, 1986

**FISCAL DETAIL**

Agency Affected : Department of Law  
 BRU : Legal Services  
 \_\_\_\_\_  
 Components : Legal Services Operations  
 \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

CAPITAL						
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REVENUE						
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

**POSITIONS :**

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

The committee substitute substantially reduces the scope of the study to be conducted by the Department of Law eliminating the need for fiscal note funds.

Prepared by: Richard I. Pegues, Director Phone: 465-3672  
 Division: Administrative Services Division Date: 5/7/86  
 Approved by Commissioner: Richard I. Pegues / For  
Harold G. Brown, Attorney General Date: 5/7/86  
 Agency: Department of Law

**Distribution (by Agency preparing fiscal note):**

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: May 7, 1986

REQUEST  
Bill/Resolution No.: House CS for  
SSSB (JUD)  
Title: An act relating to civil  
actions, etc.  
Sponsor: Kelly, Abood, Bennett, et al.  
Requestor:  
Date of Request: May 7, 1986

FISCAL DETAIL  
Agency Affected:  
BRU:  
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** Attach a separate page if necessary House CS for SSSB 377 (JUD) removes or modifies the original bill language to delete any fiscal benefit to the State of Alaska's estimated ultimate loss and loss expense, i.e., "noneconomic damages" limit changed from \$250,000 to \$1,000,000, "punitive" damages not mentioned in revised bill, "periodic payment" provision changed, "joint and several" provision change, "release or covenant not to sue" provision change, "offers of judgment" provision change.

Prepared By: Donald Hitchcock, Director  
 Division: Risk Management

Phone: 465-2180  
 Date: May 7, 1986

Approved by Commissioner: Eleanor Andrews  
 Agency: Department of Administration

Date: \_\_\_\_\_

Distribution (by Agency preparing fiscal note):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)

**STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE**

Revision Date: 5/7/86

**REQUEST**

Bill/Resolution No.: HCS for CSSB 377 (Jud)  
 Title: An Act Relating to Civil  
Actions

Sponsor: Kelly, Abood, et al.  
 Requestor: House Judiciary  
 Date of Request: 5/7/86

**FISCAL DETAIL**

Agency Affected: Alaska Court System  
 BRU: Trial Court

Components: \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

<b>CAPITAL</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>
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<b>REVENUE</b>						
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

**POSITIONS :**

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

Prepared by: Karla Forsythe Phone: 264-8228  
 Division: General Counsel, Alaska Court System Date: 5/7/86

Approved by Commissioner: Arthur H. Snowden, II *AHS II* Date: 5/7/86  
 Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

## FISCAL IMPACT

### HCS for CSSB 377 (Judiciary)

#### Analysis

The House Judiciary Committee substitute does not include several provisions contained in earlier versions of tort reform legislation which would have significantly impacted the courts' workload (court monitoring of periodic payments, elimination of Civil Rule 82 attorney fees, and arbitration). Revised language relating to the effect of a release from liability should diminish the likelihood of increased litigation resulting from the so-called "empty chair defense." It is anticipated that any workload increase attributable to this version of the legislation can be absorbed with existing resources.

Pelletier

5/6/86  
7pm

(d) In all actions involving fault of more than one party to the action, a release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall, unless otherwise agreed by all parties be provided by the court to the jury for its consideration.

Patterson # 2  
5/6/86 pm

9.17.015

1. Awards for future economic loss shall be adjusted for future earning capacity and inflation, ~~and then shall be reduced to present value~~
2. Awards for future damages shall be reduced to present value, adjusted for inflation.

Wage increases



20.04 FUTURE EARNING CAPACITY

The (first, second, etc.) item of claimed loss is the reduction in the ability of the plaintiff to earn money in the future.

You may award the plaintiff a fair amount for any reduction in (his) future ability to earn money that (he) is reasonably probable to experience.

[In fixing this amount you must determine the difference between the plaintiff's ability to earn money before the (accident) [for (his) life expectancy as it then existed] and (his) ability to earn after the accident [with (his) current life expectancy.] To do this you may consider the plaintiff's health, physical and mental abilities, (his) work habits and occupation before the accident and the nature, and the extent of (his) injuries and how long and to what extent (his) injuries will affect (his) earning ability in the future.]

[In deciding the plaintiff's future earning ability both before and after the accident you may consider the wages he earned before and after the accident and any reasonably probable increases in those wages due to promotions or automatic step increases. You should not consider any likely pay increases due to increases in the cost of living, and you should not make any deduction for any likely income taxes applicable to these earnings.]

Use Note

This instruction should be used with Instruction 20.01A or 20.01B when loss of future earning capacity is claimed.

*jury instructions*  
*from Pettigrew 5/6/86*  
20.04  
*pm*

## 20.04 FUTURE EARNING CAPACITY

The (first, second, etc.) item of claimed loss is the reduction in the ability of the plaintiff to earn money in the future.

You may award the plaintiff a fair amount for any reduction in (his) future ability to earn money that (he) is reasonably probable to experience.

[In fixing this amount you must determine the difference between the plaintiff's ability to earn money before the (accident) [for (his) life expectancy as it then existed] and (his) ability to earn after the accident [with (his) current life expectancy.] To do this you may consider the plaintiff's health, physical and mental abilities, (his) work habits and occupation before the accident and the nature, and the extent of (his) injuries and how long and to what extent (his) injuries will affect (his) earning ability in the future.]

[In deciding the plaintiff's future earning ability both before and after the accident you may consider the wages he earned before and after the accident and any reasonably probable increases in those wages due to promotions or automatic step increases. You should not consider any likely pay increases due to increases in the cost of living, and you should not make any deduction for any likely income taxes applicable to these earnings.]

Use Note

This instruction should be used with Instruction 20.01A or 20.01B when loss of future earning capacity is claimed.

In many jurisdictions only the first two paragraphs or something comparable are used without the additional specificity of the two bracketed paragraphs. The two bracketed paragraphs do represent Alaska law.

If this instruction is given, Instructions 20.17 (Life Expectancy) and 20.18 (Future Damages) should also be given. The clauses relating to life expectancies should be given only if it is claimed the injury is permanent.

#### Comment

An award of damages for loss of future earnings or diminished earning capacity has been approved in Saslow v. Rexford, 395 P.2d 36, 42 (Alaska 1964) (see, trial court's instruction on diminished earning capacity at 41); Patrick v. Sedwick, 413 P.2d 169, 173, 175 (Alaska 1966); National Bank of Alaska v. McHugh, 416 P.2d 239, 244 (Alaska 1966); City of Fairbanks v. Nesbett, 432 P.2d 607, 615-17 (Alaska 1967); Beaulieu v. Elliott, 434 P.2d 665, 668 (Alaska 1967); Chugach Electric Association v. Lewis, 453 P.2d 345, 351 (Alaska 1969); Fruit v. Schreiner, 502 P.2d 133, 145 (Alaska 1972); Morrison v. State, 516 P.2d 402, 403-05 (Alaska 1973); State v. Guinn, 555 P.2d 530, 544 n.35 (Alaska 1976); Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 934 (Alaska 1977).

The court has stated that the "[i]mpairment of earning capacity means the permanent diminution of the ability to earn money. [Citing Restatement of Torts § 906, Comment c at 550 (1939)] The determination of award of impairment of future earning capacity involves two distinct considerations, namely, determination of the extent of an earning capacity and the measurement of loss therefrom." City of Fairbanks v. Nesbett, 432 P.2d 607, 617 (Alaska 1967).

Evidence that plaintiff's wages were higher for the year after the accident than for the year before and that plaintiff was working steadily at the time of trial is not necessarily conclusive in showing lack of impairment of earning capacity. The court has held that where there is evidence that plaintiff has suffered a permanent injury, the whole span of the plaintiff's life must be considered. Among factors to be considered are the plaintiff's pre- and post-injury occupational competence and whether avenues of earning occupational advancement are now closed to the plaintiff. See, Chugach Electric Association v. Lewis, 453 P.2d 345, 351 (Alaska 1969).

The court has approved an instruction regarding future earning capacity which directed:

If you find that the plaintiff is entitled to a verdict and you find from the evidence that plaintiff's power to earn money has been so impaired by the injuries in question that he will suffer a pecuniary loss in the future (that is from the date of this trial) from such impairment, then you

will award him such sum as will reasonably compensate him for any future detriment he is reasonably certain to suffer.

In fixing this amount, you may consider what the plaintiff's health, physical ability and earning power were before the accident and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent or if not permanent, the extent of their duration, the possibilities of diminution of earning capacity, all to the end of determining the effect of his injuries upon his future earning capacity and the present value of any loss so suffered. [Emphasis added].

Saslow v. Rexford, 395 P.2d 36, 41 (Alaska 1964). The court approved this instruction, interpreting it to say that the jury could award only damages which were reasonably certain to result from the injury, and that the possibility of decreased earning capacity was one factor to be considered. Id. at 42.

In a ruling related to the application of the "reasonable certainty" standard, the court has held that in most circumstances, a loss in future earning capacity cannot be inferred from the mere showing of permanent injury but that the plaintiff must present sufficient evidence so that earning capacity before and after the injury may be compared and the fact-finder may determine whether there has been an impairment in earning capacity and the extent of that impairment. The need for evidence of impairment is particularly important when the nature of the plaintiff's injury and occupation is such that the jury could not use its common knowledge and experience to determine the extent of the impairment of the plaintiff's earning capacity, City of Fairbanks v. Nesbett, 432 P.2d 607, 616-17 (Alaska 1967) (case involving ankle injury to lawyer). But see Chugach Electric Association v. Lewis, 453 P.2d 345, 351 (Alaska 1969), in which the court implies that jury could invoke its collective wisdom and experience in determining impact of eye injury to future wages and job opportunities of an electrical lineman.

The Alaska court appears to have held that alternative post-injury employment should not be considered in determining the damage award for impairment of future earning capacity in Saslow v. Rexford, 395 P.2d 36, 42 (Alaska 1964). However, the court in Beaulieu v. Elliott, 434 P.2d 665, 668 (Alaska 1967) noted that the fact that the plaintiff could be employed in an alternative occupation should be considered in determining the award for loss of future earning capacity. Similarly, in awarding damages for the loss of future earnings in Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 934 (Alaska 1977), the trial court used the difference between the amount of earnings of the plaintiff's employment before and after his injury, projected over his work-life. In sum, actual alternative employment or a reasonable probability for future employment may be considered in determining

the damage award for impairment of future earning capacity in Saslow v. Rexford, 395 P.2d 36, 42 (Alaska 1964). However, the court in Beaulieu v. Elliott, 434 P.2d 665, 668 (Alaska 1967) noted that the fact that the plaintiff could be employed in an alternative occupation should be considered in determining the award for loss of future earning capacity. Similarly, in awarding damages for the loss of future earnings in Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 934 (Alaska 1977), the trial court used the difference between the amount of earnings of the plaintiff's employment before and after his injury, projected over his work-life. In sum, actual alternative employment or a reasonable probability for future employment may be considered in determining a damage award for loss in earning capacity.

In a related matter on the subject of mitigation, the court has held that an award for future loss of earnings is not to be reduced by the amount the plaintiff receives from a disability retirement pension, at least when the damage award represents his expected future earnings exclusive of retirement pay and the disability pension is equivalent to his expected retirement income. Beaulieu v. Elliott, 434 P.2d 665, 672 (Alaska 1967).

The court initially had held that in determining an award for loss of future earnings, wage increases which commonly occur as one progresses in his chosen profession were not to be taken into account. Beaulieu v. Elliott, 434 P.2d 665, 672 (Alaska 1967). Subsequently, the court has allowed consideration of automatic step increases in salary which are based on length of service, State v. Guinn, 555 P.2d 530, 546 (Alaska 1976), and merit increases (based on increase in employee's skills and experience) which are shown with reasonable certainty as likely to occur, Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 937 (Alaska 1977). Beaulieu's reference to the non-consideration of wage increases has been limited expressly to wage increases attributable to inflation, Id. at 937.

A difficult area is the determination of a damage award for the impairment of earning capacity of a minor or housewife. Alaska case law does not offer a great deal of guidance. The court has noted that in cases involving injuries to infants or housewives, the theory of impairment of earning capacity can be inferred from the general nature of the injuries, City of Fairbanks v. Nesbett, 432 P.2d 607, 616 n.22 (Alaska 1967). In Morrison v. State, 516 P.2d 402 (Alaska 1973), the damage award for loss of future earning capacity to the minor-plaintiff was at issue. At the time of her injury, the plaintiff was 13.5 years old and had a life expectancy of 50 years. In determining the total loss of future earning capacity, the trial court considered that the plaintiff would work 5 years as a secretary at \$8000 per year then marry and therefore awarded \$40,000, Id. at 404. The Supreme Court objected to the projected marriage date as the cut-off point for determining lost earning capacity (but did not object to the use of the 5 years a secretary formula):

Appellant is, of course, entitled to recover the full amount for her diminished earning capacity. This is not to say that she is necessarily entitled to the full amount which she would earn were she to be employed for her entire life. The trial court could properly allow as an offset against the overall amount a sum which reflects the fact that appellant can still function to some degree as a housewife. But even if appellant were able to function as a normal housewife, she would still be entitled to an award for impaired earning capacity, because she has lost the capacity to work in commercial enterprises.

Id. at 405. This statement suggests that some figure representing life-time earning capacity from full-time employment is to be determined and this figure is to be reduced by an amount representing the reasonable value of services as a housewife. How these figures are to be determined is unclear although the first figure may be based on the figures for average lifetime earnings of Alaskan females. Id. at 405.

In determining damages for the loss in future earning capacity, the award is to be based on preinjury life expectancy rather than on a shortened expectancy due to the injury. This is so because "the tortfeasor should not be able to reap the benefit of the victim's shortened life occasioned by permanent injury for which the wrongdoer is responsible." Morrison v. State, 516 P.2d 402, 406 (Alaska 1973) [citing Restatement of Torts § 924, comment e at 625 (1939) and C. McCormick, Handbook on the Law of Damages § 86 at 303-04 (1935)].

## 20.18 FUTURE DAMAGES--PRESENT VALUE REDUCTION

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

[When it is appropriate I will make an adjustment in your award to reflect these matters. To do so, I need you to answer (two) (three) questions:

1. For each item of future loss, for what period of time will the loss occur? and

2. Imagine that a person of ordinary skill, experience, and prudence has money to invest on (date), and that this person wants to invest the money for the period of time over which the plaintiff's future losses will occur. What annual interest rate would this person earn on a safe investment?]

[3. Is the value of money reasonably likely to change for the period of time which the plaintiff's future losses will occur, and, if so, will the value increase or decrease and at what rate, expressed as a percentage? In other words, if you decide that a dollar would go up or down in value at a rate of 10%, or 1%, or whatever percent per year, that would be your answer to this question? If you decide that the value of money will not change over time, your answer should be "no change."]

Use Note

This first paragraph of this instruction should be used whenever future damages are claimed.

The second bracketed paragraph should be used whenever an item of future damage is to be reduced to present value. The bracketed third question should be used if it is believed inflation must be taken into account if a future damage award is reduced to present value.

Comment

The Alaska Supreme Court has held that damage awards for loss in future earning capacity should not be reduced to present value. Beaulieu v. Elliott, 434 P.2d 665, 670-71 (Alaska 1967). It is the court's reasoning that the annual inflation rate would offset any dividends from "safe" investments and therefore an award reduced to present value could not be utilized to realize the plaintiff's full future earnings without undue risk. Additionally, the court notes that wages increases which generally occur as one progresses in his occupation usually are not considered in making a damage award, Id. at 671-72. In Beaulieu, the court also held that damage awards for future pain and suffering are not to be reduced to present value, Id. at 676.

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

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

The Alaska Supreme Court has not indicated specifically whether future medical expenses should be reduced to present value, but it would appear that the same analysis relating to loss of earning capacity would apply.

It appears that most cases will not involve reductions to present value. The first paragraph instructs the jury not to implicitly take either the present value problem or inflation

into account. However, in those few situations in which a present value reduction is required, it appears to be the better approach to allow the jury to provide a factual basis for such reduction but to allow the judge to make the actual calculation. This is particularly true where some but not all future losses must be reduced. Thus, the jury is asked three questions. The first two require the jury to decide the period of future loss and the rate of interest to be used in calculating present value. It could be argued that the instruction over-simplifies the problem because the investment rate may change during the period of future losses and the timing of future loss may not be evenly distributed over the entire period. The law has for the most part avoided consideration of how specific the calculation must be by merely instructing the jury to make the calculation without disclosing their methodology.

For most cases the process established by this instruction will approach a fair result and one consistent with the Alaska Supreme Court's recognition in Beaulieu that only an approximation is possible in the best of circumstances when estimating future damage awards. In the unusual case, such as where a high percentage of future loss will be incurred shortly after the verdict is rendered this instruction may need to be modified.

The holding in Beaulieu that abandoning the present value reduction balances the effects of inflation has avoided the necessity for the court to examine if and how inflation should be used where a present value reduction is authorized. Courts have taken widely divergent approaches to inflation. Some ignore it altogether, regarding its use by the jury to be too speculative. Sleeman v. Chesapeake & O. Ry. Co., 414 F.2d 305 (6th Cir. 1970). Others allow the jury to consider inflation but limit the extent to which experts may testify as to inflationary trends. Johnson v. Serra, 521 F.2d 1289 (8th Cir. 1975). And still others allow wide-ranging expert testimony. United States v. English, 521 F.2d 63 (9th Cir. 1975). The Alaska Rules of Evidence tend to encourage the use of expert testimony generally. See Rules 702, 703.

AMENDMENT -- HCS CSSB 377(Jud)

Delete all of section 16 and replace with the following:

\* Sec. 16.

(a) The Department of Law shall collect and analyze information pertaining to the insurance crisis and its relation to the civil justice system in Alaska. The study may include an analysis of closed insurance claim files and insurance company finances.

(b) All state agencies shall cooperate fully with the Department of Law in the collection and analysis of information necessary to conduct the study under (a) of this section.

(c) The Department of Law shall report its findings under this section to the legislature no later than the 30th day of the Fifteenth State Legislature.

RT

A M E N D M E N T

Offered in the HOUSE

By Gruenberg ✓

TO: C S S S H B 532 (Jud) (Ford 5/5/86)

*Gruenberg*

Page 7, lines 21 - 22, following "entered":

Delete: "in complete satisfaction of the claim"

Insert: "[IN COMPLETE SATISFACTION OF THE CLAIM]"

Page 7, line 29 - Page 8, line 1, following "determine":

Delete: "the form of judgment after verdict"

Insert: "costs and attorney fees [THE FORM OF JUDGMENT AFTER VERDICT]"

Page 8, line 3, following "offer,":

Insert: "the offeree shall pay costs <sup>*incurred after service of the offer*</sup> and the court may <sup>*also*</sup> require payment of reasonable actual attorney fees incurred after service of the offer, and"

Page 8, after line 10, insert a new bill section to read:

"\* Sec. 3. AS 09.30.065 is amended by adding new subsections to read:

(b) The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further

proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days before the commencement of hearings to determine the amount or extent of liability.

(c) Except for civil commitment and child custody actions, this section applies to all civil actions.

Renumber remaining bill sections accordingly.

Page 10, line 27, delete "sec. 6" and insert "sec. 7"

Page 11, line 1, delete "sec. 3" and insert "sec. 4"

Page 11, line 4, delete "sec. 5" and insert "sec. 6"

Page 11, line 7, delete "1 - 8" and insert "1 - 9"



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

April 28, 1986

The Honorable Jan Faiks  
The Honorable John Sackett  
Co-Chairs, Senate Finance Committee  
AND

The Honorable M. Mike Miller  
Chairman, House Judiciary Committee  
Alaska State Legislature  
P. O. Box V  
Juneau, AK 99811

Re: Tort Reform

Dear Senators Faiks and Sackett, Representative Miller:

Today, I am recommending that we take clear and measured steps toward tort reform through a number of moderate changes to our current civil justice system. The first steps I propose include 1) revision of the common law concerning joint and several liability, 2) statutory changes to allow courts to award and monitor periodic payments of future economic damages in appropriate cases, and 3) a requirement that a percentage of all punitive damage awards be turned over to the state, to be used to promote legal services for the poor and disadvantaged of Alaska.

The real goal of tort reform is affordable insurance that will allow small businesses, non-profit groups, and individual Alaskans to operate, secure in the knowledge that they have the coverage they need at rates they can afford. It is to that end that I am recommending these changes.

In addition, and equally important, I am asking the Legislature to authorize and fund a thorough study of both the claims experience and the true financial condition of the insurance industry in Alaska. We need to uncover the real facts behind the present insurance crisis, to determine whether additional modifications to the judicial system are warranted, and to consider whether additional legislative actions might ease the present insurance crisis.

I am not, however, convinced that our civil justice system can be held solely responsible for the current insurance crisis. Nor am I convinced that tort reform will result in

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lower insurance premiums or more availability of insurance at any price. Many experts believe the current crisis is simply the result of a downturn in the economic cycle of the insurance industry, and that changes in the cost and availability of insurance may come about in the near future as a consequence of normal market forces.

Both this Administration and the Legislature have been the subject of tremendous lobbying efforts by a variety of interest groups who want to bring about significant changes in our civil justice system. The rationale behind many of the arguments advanced is sometimes confusing and occasionally misleading. I have received hundreds of communications from small businessmen, day-care operators, fishermen, professionals, and people from all walks of life, including those who represent the insurance industry, suggesting that significant tort reform will lead to lower insurance premiums and more availability of insurance coverage.

I have carefully considered the arguments and various proposals concerning tort reform. Generally, before I support any legislation, I must first be assured that the legislation is fair, equitable, and just for all Alaskans, not just certain special interest groups. I also must be assured that the rights of Alaskans who are the unfortunate victims of accidents in this state are fully protected. A balance needs to be struck between the rights of victims to compensation for their injuries and legitimate concerns for a more equitable distribution of the cost and risk of injury. The end result of any modification to our civil justice system must be fairness to all Alaskans, including the small businessman, the professional, the urban resident, the villager, the poor, and the disadvantaged.

Probably the most significant tort reform measure currently under consideration by the Legislature is an amendment to the legal doctrine of joint and several liability. This is an area of law which society has developed over the course of many years. Under this doctrine, when a fact finder determines that two or more defendants are each at fault in causing an injury to a plaintiff, that plaintiff may recover all of his damages against any one defendant and it is the defendants' responsibility to collect among themselves.

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Problems arise where one or more of the defendants is insolvent or otherwise judgment proof. In such a case, another defendant may have to pay all of the injured person's damages and the paying defendant may have no recourse to recover the amount he paid in excess of his "fair" share. The doctrine of joint and several liability developed because society, recognizing that some inequities will result in any case where one of the parties responsible for the injury cannot pay his or her share, decided that it would be more equitable for a guilty defendant to bear the added burden, rather than the injured victim.

This doctrine, however, often results in inequities of another form. Where only one of the defendants has the financial ability to pay, that defendant may end up paying 100 percent of the plaintiff's damages, even though that defendant is only 5 or 10 percent negligent in the particular case. This is the so-called "deep-pocket" problem. Municipalities, the State, and persons responsible enough to maintain insurance are often required to pay large sums of money when their actual contribution arguably should be much less.

Given these competing considerations, there is currently under consideration one proposal modifying joint and several liability which attempts to strike a fair balance between the rights of the victim, which must be protected, and the rights of the financially responsible defendant. This version provides that a party may be held liable for up to -- but not more than -- twice the party's percentage of fault in the accident. It recognizes that pure several liability, which is supported by some advocates of tort reform, may result in victims not being adequately compensated for their injuries, while pure joint and several liability, as it is currently applied, may unjustly burden those who are financially responsible.

A second concept drawing much attention is a proposal to put a cap on non-economic damages, which are generally referred to as pain and suffering. One version of a tort reform bill which I have seen purports to limit any award for non-economic damages to 25 percent of the present value of the economic damages awarded, or \$500,000.00, whichever is less. Since a significant portion of economic damages frequently involves lost wages, under this provision a successful businessman or a brain surgeon would have a right to more non-economic damages than an Alaskan who lives by a subsistence way of life, a housewife who does not work

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outside the home, a teenager who has not yet had the opportunity to demonstrate his or her income earning capabilities, or an older retired Alaskan -- even where the amount of pain and suffering sustained by each was equal. This is unacceptable: it discriminates among Alaskans on the basis of wealth, is constitutionally questionable, and fails to consider the rights of accident victims. As I stated earlier, I cannot support legislation that is not fair and equitable for all Alaskans.

Another tort reform measure currently under consideration is whether society should require parties to arbitrate cases where the amount claimed by the plaintiff is relatively small. Although I agree that there are undoubtedly better ways to resolve disputes than taking all matters to court, I believe this proposal has some serious problems, because it would infringe upon the right of people to be compensated in small cases. Under the proposed legislation, the cost of an arbitration must be borne by the parties. This is in contrast to our traditional system of justice in which the courts are funded by the State and everyone has a right of access to the courts to redress grievances. By requiring the cost of an arbitrator to be borne by the parties -- a cost which could be very significant in any given case -- persons with relatively small but nonetheless legitimate claims will be effectively prevented from recovering for their injuries. In addition, there appears to be little consideration of the difficulties and costs inherent in holding arbitration hearings in the small, more remote villages of Alaska, where the court system already exists but an arbitration mechanism does not. In my opinion, further study of alternative dispute resolution mechanisms is necessary before we enact legislation to require arbitration, and I recommend this idea be considered in the interim by the Legislature.

With respect to the idea of periodic -- rather than lump sum -- payments of awards for future economic loss (such as future wages), I would recommend that the courts be given the discretion to require that the portion of a judgment representing future economic loss be paid into a trust account or used to purchase an annuity and thereafter paid in periodic installments to the victim. The Legislature should indicate that payments for future economic losses should, in the appropriate case, be made on a periodic basis. I would not propose that periodic payments of future economic loss be required in every case, nor should periodic

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payments ever be used to reduce the liability or obligations of the defendant.

Finally, with respect to proposals dealing with the award of punitive damages (which frequently result in an undeserved windfall to the plaintiffs), I believe we should provide that 50 percent of all punitive damages awarded in any case be turned over to the State. This money should be placed in a special fund, which we could call the Legal Justice Fund, created for the purpose of providing legal services for the poor. I have asked the Department of Law to advise the Legislature on how this might be accomplished and proposed legislation is attached.

There are several other tort reform proposals presently before the Legislature, but at this time I think that we should proceed with caution. I have suggested a couple of things that can be done at this time. However before we do more, we need to develop the specific information necessary to tailor future modifications to accomplish the desired result.

There are two sides to the tort reform issue. In order to accomplish something meaningful in the years to come, I suggest that any modification to our civil justice system should be coupled with a complete study, financed by the Legislature and performed during the interim, which focuses on two major areas concerning the insurance crisis. First, a detailed and thorough examination should be undertaken of closed claims by line in Alaska for insurance companies doing business in Alaska. Second, a thorough examination should be made of insurance company financial operations, expenditures, and profitability.

From the closed claims study we would be able to identify:

- (a) the extent to which the legal system has or has not been the cause of dramatic liability insurance premium increases and coverage reduction in crisis lines in Alaska;
- (b) how victims are faring under the present system; and
- (c) what the various specific tort reform proposals will actually accomplish.

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The analysis of insurance company finances will enable us to determine:

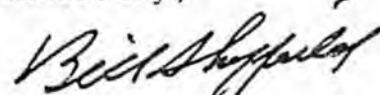
(a) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are -- or are not -- cost-justified,

(b) what alternatives exist to limiting coverage and raising rates; and

(c) the legislative and/or regulatory actions which may be necessary to resolve the State's liability insurance crisis.

I believe these proposals represent a genuine first step towards tort reform by successfully balancing the competing interests involved in this issue while guaranteeing that the rights of all Alaskans are protected. In addition, the proposed interim study would greatly assist not only the Legislature -- but Alaskans generally -- to see precisely what has caused our current insurance crisis and what can be done to correct it.

Sincerely,



Bill Sheffield  
Governor

Attachments

\* Sec. \_\_\_\_\_ AS 37.05 is amended by adding a new section to read:

Sec. 37.05.153. LEGAL JUSTICE FUND. There is established as a separate trust fund in the state treasury the Legal Justice Fund. The fund consists of amounts contributed by persons who are awarded punitive or exemplary damages in a civil action under AS 09.17.020. Money in the fund may not be diverted for a purpose other than for providing legal services for the poor in civil or criminal matters.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Each claiming party must agree that 50 percent of any punitive or exemplary damages that may be adjudged against the party defending the claim will be contributed to the legal justice fund established in AS 37.05.-153. Money in the fund shall be held in trust to finance legal services for the poor.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) Except for purposes of seeking execution on a judgment, the state may not bring or be joined in an action based on punitive damages that may be awarded under this section.