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indications are that developments in tort law are a major cause for the sharp premium increases. 1/

Part B of Chapter 2 reviews the contribution of tort law to the insurance availability/affordability crisis. The Working Group found that in the past decade there has been a veritable explosion of tort liability in the United States. Four specific problem areas are identified and discussed:

- The movement toward no-fault liability, which increasingly results in companies and individuals being found liable even in the absence of any wrongdoing on their part.

- The undermining of causation through a variety of questionable practices and doctrines which shift liability to "deep pocket" defendants even though they did not cause the underlying injury or had only a limited or tangential involvement.

- The explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as pain and suffering or punitive damages. And,

- The excessive transaction costs of the tort system, in which virtually two-thirds of every dollar paid out through the system is lost to attorneys' fees and litigation expenses.

The Working Group was particularly struck by the extraordinary growth over the last decade of the number of tort lawsuits and the average award per lawsuit. A few examples amply illustrate this point:

- Between 1974 and 1985 there has been a 758% increase in the number of product liability lawsuits filed in federal district court.

- The number of medical malpractice lawsuits per 100 physicians doubled between 1979 and 1983, and tripled during that period for obstetricians/gynecologists.

- According to a jury verdict reporting service, between 1975 and 1985 the average medical malpractice jury

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1/ The Working Group also considered whether state regulation of the insurance industry may be a cause of the crisis, and found little compelling evidence that state regulation is a major cause of these problems.

verdict increased from $220,018 to $1,017,716, and the average product liability jury verdict increased from $393,580 to $1,850,452. 2/

- A survey of punitive damage awards in Cook County, Illinois indicates that the average personal injury punitive damage award (measured in constant 1984 dollars) increased from $40,000 in 1970-74 to $1,152,174 in 1980-84.

The above data demonstrates that the insurance industry was selling coverage at constant or even reduced cost over a period of years during which tort liability was undergoing a dramatic expansion. This suggests that a major factor underlying the availability/affordability crisis is the industry's attempt to bring premiums quickly back into line with rapidly growing liability risks. 3/ The high -- and in some areas unaffordable -- insurance premiums reflect the fact that tort law is now placing a massive compensation burden on the private sector.

A second important contribution of tort liability to the availability/affordability crisis is the tremendous uncertainty that has been generated by rapidly changing standards of liability and causation. The "rules of the game" have become so unpredictable that the insurance industry often cannot assess liability risks with any degree of confidence. This appears to have severely exacerbated the problem.

Chapter 3 of the report (Recent Insurance Industry Developments) summarizes a number of responses of the insurance industry, its customers and state regulators to the crisis. These developments include the use of claims-made policies, the inclusion within policy limits of all or part of defense costs, the increasing use of self-insurance and captives, and more exacting state regulation.

In Chapter 4 of the report (Tort Law Reform) the Working Group concludes that while some of the above recent developments in the insurance industry, along with a likely improvement in the industry's financial condition, should relieve some of the current availability/affordability problems, it is unlikely that these changes will provide long-term, systemic relief without

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2/ For purposes of comparison, the dollar lost approximately half of its purchasing power during this period.

3/ While some have suggested that the dramatic premium increases are an attempt by the industry to recoup its past underwriting losses, for the reasons discussed in the report such a theory makes little economic sense.

some fundamental reforms of tort law. Indeed, there are good reasons to believe that absent such reforms, particularly the insurance affordability problem will remain a long-term fixture of the American economy.

The Working Group recommends eight reforms of tort law that should significantly alleviate the crisis in insurance availability and affordability. The Working Group does not at this time recommend how these reforms should be implemented (whether at the federal or state level, or through legislative or judicial modification of the law); nor are these reforms meant to be an exhaustive list of potential reforms. The recommended reforms are:

- Return to a fault-based standard for liability.
- Base causation findings on credible scientific and medical evidence and opinions.
- Eliminate joint and several liability in cases where defendants have not acted in concert.
- Limit non-economic damages (such as pain and suffering, mental anguish, or punitive damages) to a fair and reasonable maximum dollar amount.
- Provide for periodic (instead of lump-sum) payments of damages for future medical care or lost income.
- Reduce awards in cases where a plaintiff can be compensated by certain collateral sources to prevent a windfall double recovery.
- Limit attorneys' contingency fees to reasonable amounts on a "sliding scale."
- Encourage use of alternative dispute resolution mechanisms to resolve cases out of court.

Chapter 5 of the report (Government Insurance: A Non-Solution) details the reasons why government insurance or indemnification would be highly undesirable and would do nothing to remedy the problems underlying the availability/affordability crisis. Such a federal insurance or indemnification program would not only be extremely expensive, but also could exacerbate the problems of tort law by making the "deep pocket" of the taxpayer available in many cases. In addition, such a program could undermine public health and safety, require more extensive government regulation of private sector activities, involve the government in substantial litigation, lead to increased federal involvement in state insurance regulation, and inhibit the ability of the private sector to adapt insurance services to changing economic and social conditions.

The Conclusion to the report lists five conclusions as to the appropriate response of the federal government to the current crisis in insurance availability and affordability. In sum, the Working Group concludes that while there are a number of factors underlying the insurance availability/affordability crisis, tort law is a major cause which the federal government can address in various sensible and appropriate ways. As for some of the other factors underlying the crisis, such as the insurance industry's recent large underwriting losses, there is little the federal government can or should do to remedy these problems.

In that both the tort liability and insurance developments in this report are highly dynamic, and because more detailed data and other studies undoubtedly will become available, the Working Group will continue to follow developments in this area, and, where appropriate, supplement its conclusions and recommendations.

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The Executive Letter

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ADMINISTRATION GIVES A PREVIEW OF ITS TORT REFORM VIEWS

Assistant Attorney General Richard Willard last week gave the Federal Bar Association a preview of the Reagan administration's review of tort law problems. Willard heads the interagency task force which is producing a series of reports, the first of which is due in mid-March.

He said the current liability insurance crisis is due to two factors: insurers' cash-flow underwriting in the past and the "explosion of civil liability." The latter is due to the combined effects of three changes in the law: the trend to no-fault liability; the erosion of the doctrine of causation, including the rise of joint liability; and sharp increases in the size of damage awards. He warned that "tort liability cannot be a constantly expanding concept" and indicated that the Justice Department will recommend efforts to change overall public attitudes rather than pursue specific tort reform proposals.

The task force is not likely to recommend indemnification of federal contractors, because that would merely transfer the cost rather than solve the tort law problem, Willard said. It is looking at the liability problems of federal government employees and also the impact of federal civil rights laws on local government liability. While endorsing federal product liability law in concept, the administration is not embracing any specific legislation at this point.

PRODUCT LIABILITY LEGISLATION DEBATED

Insurers, consumer groups, manufacturers and attorneys last week presented to the Senate Commerce Committee their views on new product liability legislation. The bill (S.1999), introduced by Committee Chairman Sen. John C. Danforth (R-MO), will establish a uniform federal liability standard which would incorporate a no-fault victim compensation system. Danforth admitted that his bill is "not perfect and leaves room for improvement." Consumer advocates said they would favor an incentive system which would award those manufacturers who work out a prompt settlement with victims and punish those who carry on with unreasonable litigation.

Attorneys, who have been at odds with Congress over federal product liability legislation, remained firmly opposed to any changes in the current system. Manufacturers, while acknowledging their reservations about the bill, generally favor the idea of a uniform law in the hopes it would improve the affordability and availability of liability insurance. Les Cheek of Crum & Forster offered specific suggestions for changes in the legislation, indicating that the standard of liability in the alternative claims mechanism was unworkable.

HIGH COURT LETS CITIES OFF THE ANTITRUST HOOK

The Supreme Court last week eased the threat of antitrust lawsuits against local governments that regulate economic activities. In an 8-to-1 decision, the Court said municipal rent control laws do not violate federal antitrust statutes. By extension, the ruling also validates local zoning laws, taxicab regulation, cable TV franchises and other rules that were under legal challenge. The decision clarifies a 1978 case in which the Court ruled that local governments could be held liable under antitrust law for economic regulation that exceeded authority granted to them by the state. The latest decision came in Fisher vs. City of Berkeley (Docket No. 84-1538).

HAZARDOUS WASTE OPERATORS DEBATE INSURANCE DEADLINE CHANGE

Representatives of the hazardous waste management industry last week presented opposing views on legislation (HR.3917) which would extend the period allowed for compliance with federal financial responsibility requirements. Testifying before the Senate Environmental Pollution Subcommittee, small hazardous waste management companies said the unavailability of adequate liability insurance made it impossible to meet the Nov. 1, 1985, deadline. Extending the deadline, they added, would allow them to develop alternatives to commercial insurance. Technically, those not in compliance are operating illegally.

Representatives of larger companies noted, however, that the insurance problem will not disappear in a year and that granting an extension will not help resolve the problems of those who are unable to comply with financial responsibility requirements. They said an extension of the deadline would be unfair to those companies which did meet the compliance deadline. The bill was passed by the House of Representatives last December and awaits action by the Senate.

PENNSYLVANIA GOVERNOR VETOES BILL TO RETAIN GENDER-BASED RATING

Insurers are considering their options following Pennsylvania Gov. Dick Thornburgh's veto of a bill (HB.452) which would have retained gender-based rating for auto insurance (see ExL 2/18/86). The governor said he could not support legislation "which affords less protection against unfair sexual classifications than is (legally) afforded against unfair classifications

based upon race, religion or national origin." He said what should be identified are underlying rating factors which better reflect actual variations in driving and safety records of many males and females. "While such factors might coincide with the sex of the insured, rates should be based on those underlying factors and not per se on sex."

Since the bill was passed by more than a two-thirds margin in both houses and a veto can be overturned by such a majority, insurers may lobby for that to be done. Another possibility is lobbying for Senate concurrence with the House-passed bill (SB.1037), which would, among other things, postpone implementation of unisex rating for 18 months while the State Government Commission -- a legislative body -- develops a plan for implementation. Some insurers believe the commission might find that the problems of unisex outweigh the supposed benefits, resulting in a commission recommendation for a modification of the unisex directive. The governor said he could support legislation to delay unisex implementation while a "legislative-executive inquiry" seeks alternative methods for determining auto insurance rates, but his veto message seems to flatly rule out use of sex as a rating classification.

COOK COUNTY SUIT AGAINST ASBESTOS MANUFACTURERS DISMISSED

A Cook County Circuit Court (Chicago) judge has dismissed lawsuits filed by 34 school districts in Illinois against dozens of asbestos manufacturers seeking to force the companies to pay the cost of removing the substance from school buildings. Judge Richard Curry rejected the suits (Cook County Circuit Court 85-CH-811, 812 and 3905) ruling the school districts, including the Chicago school system, failed to prove the companies knew of the dangers of the substance when they sold it to the schools. The cost of removing the asbestos, he ruled, should be paid by the school districts or the state under the Illinois Asbestos Abatement Act. Only about $3 million has been appropriated for the act, however, significantly less than the $55 million expected cost for removal of the asbestos from the schools. The suits were filed last year against 78 firms that mine, manufacture, sell and install the material. An appeal is expected.

INSURERS AND INDUSTRY CRITICS CLASH AT ICAN MEETING

Industry critics such as Ralph Nader, Robert Hunter and several trial lawyers clashed with insurance industry representatives in Los Angeles Feb. 21 and 22 at a meeting of the Insurance Consumer Action Network (ICAN). Most of the approximately 100 persons attending were plaintiff attorneys, with representatives from government and insurance companies and some consumers also present. Insurance Information Institute spokespersons represented the industry on two panels: one dealing with insurance company profits, and another dealing with auto insurance questions including territorial rating and compulsory insurance. ICAN, which bills itself as "a network of consumer insurance

advocates ... dedicated to defining and protecting insurance consumers' rights," received its start-up funds from a past president of the California Trial Lawyers Association.

TRIAL LAWYER TOURING COUNTRY TO PROMOTE BOOK

William M. Shernoff, a past president of the California Trial Lawyers Association and a force behind the Insurance Consumer Action Network (see item above), is on a 15-day tour promoting through television appearances his new book, "Payment Refused." Published by Richardson & Steirman of New York, the book reviews in detail "bad faith" claims brought by Shernoff involving all lines of insurance. The Insurance Information Institute and the American Council of Life Insurance are arranging for industry representatives to appear with Shernoff, as was the case last week in New York City where he kicked off his tour with appearances on two stations.

MICHIGAN'S AUTO LAWS GET MODIFIED

Efforts to modify the auto insurance provisions of Michigan's Essential Insurance Act (EIA) appear headed for success. Unlike last year's package, the 1986 version apparently has Gov. James Blanchard's support. The major thrust of the reform measure is to relieve the onerous rating provisions of the old law, allowing rates outside of Detroit to be set competitively while retaining some restrictions on Detroit rates.

The law also mandates a 20% discount for personal injury protection rates after Feb. 1, 1987, to reflect the state's seat belt usage law. Other sections of the proposed law deal with auto theft, including the establishment of an auto theft authority.

R.I. GOVERNOR NAMES INDUSTRY PANEL ON AVAILABILITY

Rhode Island Gov. Edward D. DePrete has established a 25-member Governor's Insurance Council, made up of insurance industry executives, to address problems of availability and affordability in the current insurance market. The governor, a former insurance agent, has targeted three main purposes for the Council: to ensure that the needs of the insurance consumer are being met; to establish communications between the insurance industry and state government; and to retain existing jobs as well as to create new employment.

VERMONT BANKING AND INSURANCE COMMISSIONER NAMED

Vermont Gov. Madeleine Kunin has named Thomas P. Menson, former executive vice president and chief operating officer of the Bank of Vermont, as the new banking and insurance commissioner. He succeeds David Bard, who resigned to become president of the New England IBM Credit Union.

Carl C.A. Lee, Editor

T.B.R. OUTLINES OF ALASKA LAW

TORTS

P.O. Box 1312
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1982-1

TORTS

TORTS

I. INTENTIONAL TORTS

A. Examples:

1. Assault and Battery

a) An act with intent to cause a harmful or offensive contact which actually places the victim in imminent apprehension of such a contact fulfills the elements of assault and battery. Malice is not an element. Merrill v. Faltin, 430 P.2d 913 (Alaska 1967).

b) Damages: A person is not entitled to actual or compensatory damages for assault and accordingly, not entitled to punitive damages if he/she suffers no mental or physical injury. Hamerly v. Denton, 359 P.2d 121 (1961).

2. False Imprisonment

a) False arrest is one way to commit false imprisonment. Since the arrest involves restraint, it inherently involves imprisonment. City of Nome v. Ailak, 570 P.2d 162 (1977).

b) Defense: Where a shopkeeper has reasonable grounds to believe that the person has concealed upon his person unpurchased merchandise, such grounds acts as a defense to false imprisonment actions, if the person is detained in a reasonable manner for not more than a reasonable time to permit investigation or questioning. Malvo v. J. C. Penney Co., 512 P.2d 575 (Alaska 1973).

c) Alaska does not permit an individual to bring an action against the state for recovery of damages for various intentional torts, assault, battery, false imprisonment, libel, slander, etc. AS 09.50.250(3). But suit permitted where plaintiff's wrongful incarceration was caused by negligent record keeping, and not false imprisonment. Zerbe v. State, 583 P.2d 845 (Alaska 1978). See, Alaska State Tort Claims Act, Sec. V.A.

Emotional Injury

3. Emotional Injury. Intentional Infliction of Emotional Distress. Despite the fact that Worker's Compensation (AS 23.30) is the exclusive remedy for the injured worker, (See Sec. V) conduct by the employer's insurance carrier subsequent to the injury in which the carrier intentionally and maliciously misled the worker about his right to compensation and discouraged him from exercising his rights, will support a claim for emotional injury. Stafford v. Westchester Fire Ins. Co. of New York, Inc., 526 P.2d 37 (Alaska 1974).

Intentional Interference w/ Contract Right

4. Intentional Interference with Contract Right. A contracting party has a claim against a third party who intentionally procures breach of contract. A prima facie case is established by proof of a breach intentionally procured. Defendant then must show that his conduct was justified. Plaintiff need not show malice or ill will. Lon v. Newby, 488 P.2d 719 (Alaska 1971).

Trespass & Conversion

5. Trespass and Conversion. Plaintiff shall be awarded damages which would place him in a substantially equivalent position to that which he would have occupied had the trespass not been committed. Thrift Shop, Inc. v. Alaska Mutual Savings Bank, 398 P.2d 657 (Alaska 1975).

II. INJURY TO REPUTATION

A. Defamation

1. Definition of Libel: Every false and unprivileged publication which exposes a person to hatred, contempt, ridicule or obloquy, or causing him to be shunned or avoided or which tends to injure him in his occupation is "libelous". Golden North Airways v. Tanana Pub. Co., 15 Alaska 303, 218 F.2d 612 (1955).

2. Privilege.

a) A publication that is defamatory in itself is itself an injury entitling the injured one to recover damages unless it is shown to be true or that it is privileged. Pearson v. Fairbanks Pub. Co., 413 P.2d 711 (1966).

b) Truth is a complete defense, Fairbanks Publishing v. Pitka, 376 P.2d 190 (Alaska 1962) 445 P.2d 685 (Alaska 1968), Urethane Specialties v. Valdez, 620 P.2d 683 (Alaska 1980).

Absolute Privilege

c) Absolute Privilege: Judicial officers, attorneys, witnesses, jurors, legislators, government executive officers and others are accorded absolute privilege of publishing false and defamatory matter within certain limitations. Fairbanks Pub. Co. v. Francisco, 390 P.2d 784 (1964). Defamatory matter published in a judicial proceeding, although made maliciously, is absolutely privileged. Smith v. Bannister, 9 Alaska 632 (1939). This extends to affidavits as well as in-court testimony. Nizinski v. Currington, 517 P.2d 754 (1974).

Conditional Privilege

d) Conditional Privilege: News media is accorded "conditional privilege" to publish reports of a government official even though report may contain false and defamatory matter. This privilege is recognized because it is considered in public interest that information be made available as to what takes place in public affairs. Fairbanks Pub. Co. v. Francisco, 390 P.2d 784 (1964).

Malice negates conditional privilege

e) Malice: A defamatory statement made with the knowledge that it is false or with a reckless disregard of whether it is false negates the conditional privilege. Pearson v. Fairbanks Pub. Co., 413 P.2d 711 (1966). Restatement (Second) of Torts § 600 (1977) Urethane Specialties v. Valdez.

III. NEGLIGENCE

A. Overview: Prima Facie case of negligence is established by the existence of an act or omission which is a breach of a duty of due care and which is the proximate cause of the plaintiff's injury.

1. Duty

a) Defendant must have owed a duty of care to the plaintiff.

Duty of Care

b) Generally, the duty of care is the duty to act with that amount of care which a reasonably prudent person would use under the same or similar circumstances. Leigh v. Lundquist, 540 P.2d 492 (Alaska 1975).

i) Inaction may also constitute a breach of duty. Sharp v. Fairbanks North Star Borough, 569 P.2d 178 (Alaska 1977).

Breach

2. Breach.

a) That duty must have been breached.

b) The breach of duty may be "misfeasance" or "nonfeasance". Transamerica Title Ins. Co. v. Ramsey, 507 P.2d 492 (Alaska 1973).

Causation

3. Causation:

Cause-in-fact

a) Cause-in-fact. The breach of duty must be the cause in fact of the injury, and

Proximate
foreseeable
probable
not extraordinary

b) Proximate cause. The injury to plaintiff must have been proximately caused by the breach. Larman v. Kodiak Electric Ass'n, 514 P.2d 1275 (Alaska 1973).

4. Damage. The plaintiff must have been injured. The injury may be to the person or to property.

5. Defenses. There are two types of defenses:

a) Defenses which may deny liability. See Comparative Negligence, Immunities, Statute of Limitations, Sec. III F.

b) "Defenses" which may reduce damage recovery. See Contribution, Indemnity, Sec. VI.

B. Duty. There are several duties in Alaska in addition to the basic duty to behave as a reasonable person would. Some of these special duties are created by statute, some by case law.

1. Duty Not to Violate Legislative or Administrative Standard or Negligence per se. The source of this special duty is judicial. The court may adopt as its standard of conduct for a reasonable

person the requirements of a legislative or administrative regulation. The purpose of the doctrine is to make the general reasonable person duty specific and precise.

a) Originally enunciated in Ferrell v. Baxter, 484 P.2d 250 (Alaska 1971) and refined in Bachner v. Rich, 554 P.2d 430 (Alaska 1976).

Special Duty based on regulation or law

Per se

b) In order for a regulation to qualify as a special duty for determining negligence per se, the purpose of the regulation violated must be:

i) To protect a class of persons which includes the one whose interest is invaded;

ii) To protect the particular interest which is invaded;

iii) To protect that interest against the particular hazard from which the harm results;

iv) To protect that interest against the kind of harm which has resulted.

c) The regulation may be employed as the applicable standard of care where the rule of conduct contained therein is expressed in specific, concrete terms.

i) The regulation may not be used as the standard of care where the regulation merely sets out a general or abstract standard of care. Northern Lights Motel, Inc. v. Sweaney, 561 P.2d 1176, rehearing 563 P.2d 256 (Alaska 1977).

ii) Nor will a safety clause in a government contract be considered the applicable standard of care toward a non-employee or non-business related person on the job site. Macey v. United States, 454 F.Supp. 684 (D.C. Alaska 1978).

Negligence per se

d) The elements listed in (b) are necessary to a finding of negligence per se; however, the fact of adopting the regulations is discretionary with the trial court. Bachner.

e) If the trial court adopts the regulation or statute for purposes of determining negligence per se, the effect is that the statute or regulation will become a substitute for the usual common law reasonable person standard as the standard of care. The jury, so instructed, must then apply the standard of care to the remaining elements necessary to a determination of negligence.

f) A prior criminal conviction may be conclusive as to negligence if it arose from the same facts as the subsequent negligence action. Scott v. Robertson, 583 P.2d 188 (Alaska 1978). (Earlier conviction for driving while impaired, conclusive evidence of facts necessarily determined in subsequent civil action arising from same incident.)

2. Duty of Owner and Occupier of Land. Alaska has abandoned the common law classifications of trespasser, licensee and invitee as a means of determining the type of duty owed by the land owner or occupier.

a) Now a reasonable person standard applies. The owner must maintain his property in a reasonably safe condition in view of all the circumstances, including:

b) A land owner is not liable if 1) the injury results from the natural conditions of the land, and 2) the injured person was under no duty to pay the owner for his use of the property.

i) The likelihood of injury to others;

ii) The seriousness of the injury;

iii) And the burden on the respective parties of avoiding the risk. Webb v. City & Borough of Sitka, 561 P.2d 731 (Alaska 1977).

Health Care Provider's Duties

3. Duty of the Health Care Provider. This duty has its source in the Medical Malpractice Act, AS 09.55.535-560.

a) The legislature has determined that the reasonableness of the conduct of a "health care provider" is measured by the degree of care ordinarily exercised in the field or specialty in which the defendant is practicing. AS 09.55.540(a)

i) The plaintiff has the burden of proving by a preponderance of the evidence the degree of care ordinarily exercised in the field or specialty, the defendant's failure to abide by this degree of care, as well as the burden of proving that plaintiff's injuries were the "proximate result" of the breach of duty. AS 09.55.540(a)

ii) Priest v. Lindig, 583 P.2d 173, (Alaska 1978), applies a community rather than national standard.

iii) There is no presumption of negligence on the part of the defendant. 09.55.540

iv) A "health care provider" includes a physician, psychologist, dentist, nurse, chiropractor and physical therapist. 09.55.560.

b) The health care provider is also under a duty to obtain the informed consent of a patient under certain circumstances.

i) The provider is liable for failure to obtain informed consent if claimant establishes by a preponderance of the evidence both failure to inform of common risks and reasonable alternatives and that but for the failure to inform, claimant would not have consented. 09.55.560.

ii) It is a defense to a claim of lack of informed consent that the risk was either commonly known or too remote, the

patient had already indicated lack of heed of any risk, consent was not possible, or disclosure would have had an adverse effect on the patient's condition. 09.55.560(b).

c) A patient and a health care provider may execute an agreement to submit to arbitration. 09.55.535.

i) Any claim filed after such an agreement is formed shall be submitted to an arbitration board, which may appoint an expert advisory panel.

ii) The report of the expert advisory panel is admissible in court as if its contents were testified to by its preparers. 09.55.536(e).

d) No advance insurance payment is admissible as an admission of liability. 09.55.546

e) Damages are awarded in accordance with principles of common law. 09.55.548

f) Good Samaritan Act AS 09.65.090 waives liability for simple negligence even when committed at a hospital by a doctor in an emergency.

Common Carrier Duty of Care

4. Duty of the Common Carrier. A higher standard of care is imposed on common carriers transporting passengers for hire. They must exercise the highest degree of care for the safety of passengers. Widmyer v. Southeast Skyways, Inc., 584 P.2d 1 (Alaska 1978).

5. The common carrier duty also applies to a prisoner. Wilson v. Kotzebue (Op. No. 2331, May 1981).

Employer's Duty to Employee

6. Employer's Duty Regarding Defects in Machinery. The employer has a special statutory duty to protect employees from defects or insufficiency in machinery on the job and is liable to the employee or representative. AS 23.25.010.

a) Contributory negligence is not a defense if the employee's contribution to the injury

was slight and the negligence of the employer gross. AS 23.25.010.

b) This statutory remedy is not available for an employee covered by worker's compensation. Haman v. Allied Concrete Products, 495 P.2d 531 (Alaska 1972). (See worker's Compensation Sec. V. E.)

Dram Shop Act in Alaska

7. Duty of Innkeeper/Bartender. There is now a Dram Shop Act in Alaska. In Alesna v. LeGrue, 614 P.2d 1387 (1980) the Supreme Court gave a private right of action against the licensee to a person injured by a drunk. Recent enactment of AS 04.21.020 provides for civil liability for a licensee who provides alcohol to a minor or a drunk.

Bailee

8. Duty of a Bailee.

a) Standard of Care: Bailee is liable for any loss or injury to bailed goods caused by failure to exercise degree of care of a reasonably careful owner.

i) This liability may be modified by contract so long as the provision is not unconscionable.

ii) Alaska refuses to exempt bailee from liability when bailment is at the bailor's risk but there is no provision concerning bailee's own negligence.

iii) A provision requiring the bailor to provide insurance does not absolve the bailee from liability for negligence.

iv) Strict liability is applied if otherwise appropriate to bailors and lessors. It is attached on the basis of the existence of a defect in the product rather than on negligent conduct. Bachner v. Pearson, 479 P.2d 319 (Alaska 1970).

b) Burden of Proof: Once loss or damage to bailed property is shown, burden shifts to bailee. Dresser Indus., Inc. v. Foss Launch & Tug Co., 560 P.2d 393 (Alaska 1977).

C. Breach. The determination of breach of the applicable duty involves factual analysis of whether the conduct that actually occurred was a deviation from the applicable standard of care.

1. Means of Establishing. Breach may be established by direct or circumstantial evidence, or by res ipsa loquitur.

2. In the doctrine of res ipsa loquitur, circumstantial evidence may establish a prima facie case of negligence where:

i) The accident is of the type which does not ordinarily occur in the absence of someone's negligence;

ii) The instrumentality is within the exclusive control of the defendant;

iii) The occurrence was not due to any voluntary action by the plaintiff. Widmyer v. Southeast Skyways, Inc., 584 P.2d 1 (Alaska 1978); Crawford v. Rogers, 406 P.2d 189 (Alaska 1965).

D. Causation. Recall that both cause-in-fact and proximate cause are necessary for the determination of negligence.

1. Cause-in-fact may be established in either of two ways:

a) "But-for" cause. Plaintiff would not have been injured but for defendant's negligence; or

b) "Substantial factor" cause. Even if defendant's conduct was not a "but for" cause (i.e., if either one of two acts would cause the injury), defendant is still liable if his conduct was a substantial factor in bringing about the injury. State v. Guinn, 555 P.2d 530 (Alaska 1976) (Failure of State to remove disabled truck was substantial factor cause in death of motorist who collided with truck.) See also, State v. Abbott, 498 P.2d 712, 726-

27 (Alaska 1972) and Sharp v. Fairbanks North Star Borough, 569 P.2d 178, 181-182 (Alaska 1977).

Proximate Cause
Foreseeable
Probable
Not Extraordinary

2. Proximate Cause. A public policy determination of liability for unexpected types or methods of injury. Vance v. United States, 355 F.Supp. 756 (D.C. Alaska 1973).

a) Recall the difference between problems of direct causation (where there are no intervening forces) and indirect causation.

"Intervening Force

b) "Intervening force" (the foreseeability of which determines defendant's liability) is one which actively operates after the defendant has acted. Sharp v. Fairbanks North Star Borough, 569 P.2d 178 (Alaska 1977).

E. Damages

1. What Damages Can Be Recovered

a) In general, all damages proximately caused by a party's tortious actions are recoverable. ERA Helicopters v. Digicon Alaska, 518 P.2d 1057 (Alaska 1974).

b) Past damages, that is those damages already suffered at the time of award, may include past economic loss, medical expenses, lost earnings and past pain and suffering. City of Whittier v. Whittier Fuel & Marine Corp., 577 P.2d 216 (Alaska 1978); Alaska Airlines v. Sweat, 568 P. 2d 916 (Alaska 1977).

c) Future damages, or those damages yet to be suffered at the time of award may include prospective medical bills, lost earnings and pain and suffering. Sweat.

Future economic loss awards not reduced to present value
- inflation offset
- investment risk shouldn't be placed on P

i) Special Alaska rule does NOT reduce future economic loss awards to present value. Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967).

ii) Reason for NOT reducing plaintiff's award to its present value by subtracting an amount equivalent to that which would

be realized by prudent, safe investments: the court believed that any earnings from a reduction to present value would be offset by inflationary pressures. Further, there is an inherent risk involved in investments and the plaintiff should not be forced to assume that risk. Beaulieu.

lost wages computation

iii) In computing future lost wages, no allowance is made for salary increases. This, however, has been slightly modified in State v. Guinn, 555 P.2d 530, 545-546 (Alaska 1976), where automatic wage increases keyed to longevity may be included in an award for lost wages. In Guinn, the step increases were contained in a collective bargaining agreement and could be accurately predicted.

iv) Regarding income taxes, the court indicated in Beaulieu that future earning capacity is not reduced by future income taxes since such taxes are speculative, but past wages lost are subject to a reduction for state and federal income taxes since they may be accurately computed.

d) Interest:

i) Prejudgment interest is the interest earned from the time the cause of action accrues until the time of judgment. State v. Phillips, 470 P.2d 266 (Alaska 1970). The rate of prejudgment interest in Alaska is 10 1/2% under AS 45.45.010 on cases filed after July 1, 1980. Cases filed before 1980 bear interest at 8%. Juneau v. Commercial Union, 598 P.2d 957 (Alaska 1979).

ii) Post-judgment interest is that interest earned from the time of settlement or judgment until the amount is paid. Guin v. Ha, 591 P.2d 1281 (Alaska 1979). Judgments after July 1, 1980 bear interest at 10 1/2% prior to July 1, 1980, at 8%.

Obligation to mitigate damages

e) Mitigation of Damages. Plaintiff has duty to mitigate damages by seeking alternate employment; however, the duty does not extend to taking employment which is temporary and of significantly less responsibility than original employment. Univ. of Alaska v. Chauvin, 521 P.2d 1234 (Alaska 1974).

Collateral Source Rule

f) Collateral source rule prevents the defendant from showing at trial that plaintiffs received payments through insurance or other sources for injury caused by defendant's negligence. Aydlett v. Haynes, 511 P.2d 1311 (Alaska 1973).

2. Who is Liable For Damages

Respondeat superior

a) Respondeat Superior. Employer liable for negligent acts or omissions of employee committed in the scope of employment. Luth v. Rogers & Babler Construction, Co., 507 P.2d 761 (Alaska 1973). Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972).

Independent Contractor

b) Independent Contractor. Generally the employer is not vicariously liable for the negligence of an independent contractor. Hobbs v. Mobil Oil Co., 445 P.2d 933 (Alaska 1968). Exceptions:

Exceptions:

i) Where employer has retained control over the actual manner of work. Hobbs. State v. Morris, 555 P.2d 1216 (Alaska 1976) (State did not have sufficient control over work of private employer contractor, and was thus not liable for contractor's failure to provide safety equipment; dissent held state inspector should have known of violations of safety regulations and would have imposed liability).

ii) Where the delegated duties involve unreasonable risk of harm to others. Alaska Airlines v. Sweat, 568 P.2d 916 (Alaska 1977). (Scheduled air carrier should not be permitted to barter away its responsibility to passengers by contracts with other carriers.) See Restatement Second Of Torts § 428.

iii) Where plaintiffs can bear burden of showing independent negligence on the part of the employer, such as failing to turn over premises to independent contractor that are free of safety hazards. Sloan v. Atlantic Richfield Co., 552 P.2d 157 (Alaska 1976).

Defences

F. Defenses to Negligence

Alaska is Comparative Neg. State.

Abolished are: contributory neg. last clear chance assumption of risk

1. Comparative negligence is adopted in Alaska. Contributory negligence, (which defeated plaintiff's claim if he were even slightly negligent himself) last clear chance, and assumption of risk are abolished in Alaska. Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

a) Pure form comparative negligence originating in admiralty and judicially adopted in California and Florida is adopted in Alaska.

b) Under a "pure form", the plaintiff's damages are simply reduced in proportion to the amount of negligence which is attributed to him. Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

c) Alaska rejected the "modified form", such as Wisconsin's 50% system, in which a negligent plaintiff may recover only so long as the amount of his fault does not exceed 50% of the total fault attributable to the parties.

d) Assumption of risk had previously been judicially abolished in Leavitt v. Gillaspie, 443 P.2d 61 (Alaska 1968).

2. Immunities. See IMMUNITIES AND SPECIAL STATUS PARTIES, Sec. V.

3. Statute of Limitations. See T.B.R. CIVIL PROCEDURE OUTLINE.

Products Liability

IV. PRODUCTS LIABILITY

A. Overview:

1. Products liability is the general category for ascertaining the liability of a commercial SUPPLIER

of a PRODUCT to a person INJURED by the product. In a fact pattern which includes a PRODUCT furnished by a commercial SUPPLIER which INJURES, always consider the following avenues of recovery:

a) - liability based on supplier's representation.

b) - liability based on supplier's negligence.

c) - liability based on supplier's implied warranty.

d) - strict liability in tort.

Strict Liability

B. Strict Liability in Tort.

1. Duty. A strict duty is owed by a commercial supplier who must provide a product free from defects.

Duty owed by commercial supplier of a product (not service)

a) The purpose of imposing strict liability on manufacturer or retailer is to insure that the costs of injury resulting from defective products are borne by suppliers rather than by consumers. Cloud v. Kit Manufacturing, 563 P.2d 248 (Alaska 1977).

b) Recall that the defendant must be the supplier of a PRODUCT, not merely a service.

i) The Supreme Court, in an important recent case, held that a company that installed and repaired truck parts is not strictly liable in tort because it did not sell a PRODUCT. It held itself out only as a repair SERVICE. (However, a business that sells used products may be strictly liable in tort.) Restatement (Second) of Torts § 402-A. Swenson Trucking v. Truckweld, 604 P.2d 1113 (Alaska 1980).

To whom owed: consumer or user

c) To whom is the duty owed? Any user or consumer.

econ. loss not recoverable

d) To what types of harm? Personal injury and sudden and calamitous property damage are recoverable; purely economic loss such as decline in value of property (purchased item a

Personal Injury + sudden property ~~loss~~ damage are recoverable

"lemon") is not recoverable. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976).

e) Personal injury and property damages are grounded in tort law which applies in products liability. Economic loss is a contract law theory and is not recoverable in products liability. Contract damages are intended to fulfill reasonable economic expectations. Tort damages are concerned with the safety of products. Northern Power & Engine Corp. v. Caterpillar, 623 P.2d 324 (Alaska 1981). Engine failure is not "sudden and calamitous."

3. Breach. The plaintiff must show that the product is defective in either manufacture or design.

a) Defect in Manufacture. Elements are:

i) Manufacturer placed product in the stream of commerce.

ii) Manufacturer knew that the product was to be used without inspection for defects.

iii) The product was "defective", i.e., that it deviated from the manufacturer's intended result.

iv) The defect caused the personal injury and property damage alleged.

Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969); Sturm, Ruger & Co., Inc., v. Day, 594 P.2d 38, (Alaska 1979); rehearing 615 P.2d 621 (Alaska 1980).

b) Defect in Design. Elements are:

i) Manufacturer placed product in the stream of commerce.

ii) Manufacturer knew that the product was to be used without inspection for defects.

iii) The product was defective in that it either:

1) Failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or

Design Defect

Manufacturer failed to prove benefits of the design outweighed the risks inherent in the design. Beck

2) Was designed in such a way that the design caused the injury, and that the manufacturer failed to prove that the benefits of the design outweighed the risks of danger inherent in the design (knowledge of manufacturer of danger measured at time of manufacture. Caterpillar Tractor Co. v. Beck, 593 P.2d 87 (Alaska 1979); Heritage v. Pioneer Brokerage Sales, Inc., 604 P.2d 1059 (Alaska 1979). The factors to be considered in weighing the risks and benefits include

Factors

a. the gravity of the danger,

b. the likelihood that such danger would occur, and

c. the mechanical feasibility at the time of sale, cost and adverse consequences of alternative designs.

iv) The defect caused the personal injury and property damage alleged.

Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979).

c) Special problem with design defect cases:

i) Intended use: lack of direction or warnings may be a defect. Failure to warn is established by:

A. Manufacturer put the product in the stream of commerce.

B. The manufacturer knew that the product was to be used without inspection for defects.

C. The defect caused the personal injury or property damage alleged.

D. The product is deemed to be defective without a warning or instructions if the jury finds that the manufacturer did not accompany the product with sufficient warning as to make the product safe (if no warning would make the product safe, the danger must be eliminated).

E. These warnings must be made in a form that will reach the ultimate consumer.

Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38 (Alaska 1979).

Supplier must anticipate types of consumer misuse

ii) Supplier is also charged with the duty of anticipating likely consumer misuse. Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975), 555 P.2d 42 (Alaska 1976).

3. Causation.

a) Actual - where plaintiff claims that the defect was failure to warn, he must also show that but for failure to warn, harm would not have occurred.

Failure of intermediary to discover defect does not excuse supplier's liability

b) Proximate - defendant supplier's liability is not extinguished by intermediary's failure to discover defect.

4. Damages.

a) See Damage Sec. III. Recall that Alaska denies recovery for purely economic loss. Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

Punitive damages possible

b) Punitive damages. In Sturm Ruger v. Day, 594 P.2d 38 (Alaska 1979), the court upheld the applicability of punitive damages to some

strict liability cases, for the purposes of punishment of the wrongdoers, deterrence of others and prevention of disadvantage to the socially responsible competitor. On remand for a new trial, the court set a ceiling on punitive damages. (The court indicated that the punitive damage award of $2.9 million was the product of passion or prejudice.)

5. Defenses.

a) Comparative negligence (See Sec. V.): The manufacturer must show that the user:

i) Was actually aware of the defect and

ii) Voluntarily and unreasonably encountered the risk known to him, or

iii) That he misued the product and that this was a proximate cause of the injury.

Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975), 555 P.2d 42 (Alaska 1976); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979).

C. Liability Based on Supplier's Negligence.

1. Duty - commercial suppliers owe a duty of care to anyone injured by the product. Larman v. Kodiak Electric Ass'n, 514 P.2d 1275 (Alaska 1973); Restatement Second Of Torts § 395. ("reasonably prudent supplier").

2. Breach - the defective product must be caused by defendant's negligence.

a) In manufacturing defect cases, the plaintiff may use direct evidence, circumstantial evidence or res ipsa loquitur.

b) In design defect cases, the plaintiff must show that the designer:

i) Knew or should have known that the product was likely to be dangerous without proper warning or instructions.

ii) Had no reason to believe that the user would recognize the danger.

iii) Actually failed to give a warning which adequately conveyed the required information to the user.

Restatement (Second) Of Torts § 388

3. Causation - the supplier's failure to exercise reasonable care must have proximately caused the injury. Larman.

4. Damages - recall that mere economic loss is not recoverable. New Moon.

5. Defenses.

a) Comparative negligence. The manufacturer must show that the plaintiff failed to exercise the care of a reasonably prudent person, which failure contributed to the accident; damages are reduced in proportion to the degree of fault attributed to the plaintiff. Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

Representation D. Liability Based on Supplier's Representation.

Express Warranties 1. Express Warranties of ~~Fitness for a Particular Purpose~~. Elements:

a) Seller expressly tells or promises the buyer that the product is safe and fit for a particular purpose.

i) Note that defendant must be a seller. One who repairs is not vulnerable to warranty claim. Swenson v. Truckweld, 604 P.2d 1113 (Alaska 1980).

b) The product is not in fact fit for such purposes.

c) The fact that the product is not fit for such purposes causes the accident.

AS 45.05.094 (Alaska's adoption of Uniform Commercial Code § 2-313); Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

2. Defenses - Recall that the statute of limitations for breach of warranty is four years and that the breach occurs when delivery is made. However, if warranty explicitly extends to future performance, cause of action accrues when breach is or should have been discovered. AS 45.05.242. See CIVIL PROCEDURE OUTLINE, Statute of Limitations.

Implied warranty/

E. Liability Based on Implied Warranty.

- Fitness for particular Purpose

1. Implied Warranty of Fitness for a Particular Purpose. Elements:

a) The manufacturer, at the time of the sale, had reason to know of a particular purpose for which the product was required.

b) The manufacturer, at the time of the sale, had reason to know that the buyer was relying on the retailer's skill or judgment in furnishing suitable goods.

c) The product was not in fact fit for the purpose for which it

d) The unfitness of the product for a particular purpose caused the accident.

AS 45.05.098 (Alaska's adoption of Uniform Commercial Code § 2-314) Prince v. LeVan, 486 P.2d 95 (Alaska 1971); Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

Implied warranty of merchantability

2. Implied Warranty of Merchantability. Elements:

a) The product (may be food or alcohol) was sold in the regular course of defendant's business, and defendant sold the particular product in question.

b) The product was not fit for the ordinary purposes for which it was used, or did not conform to the promises or affirmations of fact made on the container or label.

c) The product's failure to be fit for its intended purposes caused the injury.

AS 45.05.096 U.C.C. § 2-313; Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

3. Warranty Defenses on Personalty.

a) The plaintiff did not give the seller notice of the breach of warranty within a reasonable time after the plaintiff discovered or should have discovered the breach. AS 45.05.174(c)(1). (U.C.C. § 2-607).

b) The parties modified or limited the buyer's remedies for damages, AS 45.05.230, U.C.C. § 2-719) and such modifications or limitations are not unconscionable. AS 45.05.072 (U.C.C. § 2-302).

c) The warranties were excluded or modified, and such exclusions or modifications were not unreasonable nor unconscionable.

i) To be effective, modifications and exclusions of the warranty of merchantability must mention merchantability and if they are in writing, must be conspicuous.

ii) To be effective, modifications and exclusions of the warranty of fitness must be both in writing and conspicuous.

AS 45.05.100(b); (U.C.C. § 2-316) Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

d) Statute of Limitations. 4 years. AS 45.05.242. See IV D(2).

V. IMMUNITIES AND SPECIAL STATUS PARTIES

State Tort Claims Act

A. The State Tort Claims Act: The State as a Defendant.

1. Under the State Tort Claims Act, AS 09.50.250, the State is immune from suit in certain circumstances. Sec. 1 immunizes the State from suits based on the act or omission of an employee exercising due care in the execution of a statute or regulation and from suits based upon the exercise or performance (or failure of exercise or

performance) of a discretionary function on the part of a state agency or employee.

Section 2 immunizes the state from suit for damages caused by the imposition of quarantine.

Section 3 immunizes the state against actions arising out of assault, battery, false imprisonment or arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights. See INTENTIONAL TORTS Section I. 2(c).

2. The most important of these immunities is the DISCRETIONARY FUNCTION SOVEREIGN IMMUNITY. The state is protected from suit on its discretionary, policy making functions (such as the decision of where to build roads or overpasses) (Jennings v. State, 566 P.2d 1304 (Alaska 1977)), but remains vulnerable to suit for its operational functions (such as the actual removing of snow from the roads) (State v. Abbott, 498 P.2d 712 (Alaska 1972)).

3. In Carlson v. State, 598 P.2d 969 (Alaska 1979) the State was found liable for personal injuries inflicted by a bear, when the bear was attracted to the site of the attack by garbage that had accumulated on State-owned property.

The attack occurred after the State had ceased its litter removal for the vacation season. The lower court found that appellee's decision regarding maintenance of the highway was a discretionary functior for which the State was immune from suit under AS 09.50.250(1). The Supreme Court found that the State's decision on the broad question of whether to maintain highway turnouts in the winter was indeed a policy determination that could not give rise to tort liability. But, the decision made pursuant to that policy, on how to implement it, or when to cease maintenance are operational decisions. As to those, the State is under a duty to act with reasonable care, and is thus not immune under the State Tort Claims Act.

4. Summary: If state's action is discretionary, planning or policy-making, state is immune from suit under Sec. 1 of State Tort Claims Act, AS 09.50.250. If state's action is operational or

ministerial, state is vulnerable. Adams v. State, 555 P.2d 235 (alaska 1976); State v. I'Anson, 529 P.2d 186 (Alaska 1974).

B. Suits Against Municipality. AS 09.65.070 prohibits the following claims against the municipality:

1. Those based on failure to inspect property for violation of law or safety hazard, to discover a violation of law or health hazard if inspection is made, or to abate a violation of law or health hazard once it is discovered, or

2. Those based on a discretionary function, or

a) Urethane Specialties v. Valdez, 620 P.2d 683 (Alaska 1980). Lesser government official in issuing a public warning exercises a discretionary function, but City is not immune with regard to the warning's content. Injured party must show malice (i.e., knowledge that the statement is false or is made with reckless disregard of the truth), or

3. Those based upon a licensing or zoning proceeding or

4. Those based on the gratuitous extension of city services outside the city, or

5. Those based on agreement with the state to meet emergency public safety requirements.

In addition, a city cannot further restrict the period of time in which to bring an action through ordinance. Johnson v. Fairbanks, 583 P.2d 181 (Alaska 1978).

C. Family Immunity (Spouse, Minors, Family)

1. Interspousal tort immunity is not recognized. Cramer v. Cramer, 379 P.2d 95 (Alaska 1963).

2. Parent or guardian who signs for minor is liable for damages resulting from minor's negligent driving, unless minor can prove financial responsibility (e.g. insurance). AS 28.15.071.

3. Minor has the right to bring claim for relief against parents for negligent infliction of harm. Hebel v. Hebel, 435 P.2d 8 (Alaska 1967).

4. A child employed in violation of child labor laws may waive Worker's Compensation benefits and proceed against the employer in tort. Receipt of Worker's Compensation benefits is not determinative of whether a child has exercised a conscious intent to choose compensation benefits as opposed to bringing a claim in tort. Whitney-Fidalgo Seafoods, Inc. v. Beukers, 554 P.2d 259 (Alaska 1976).

Death & Survival

D. Death and Survival

1. Wrongful Death AS 09.55.580. Action must be commenced within two years after the death. Haakanson, Personal Representative of the Estates of Simeon and Annie Squartsoff v. Wakefield Seafoods, Inc., 600 P.2d 1087 (Alaska 1979). Even though the statute requires that the 'personal representative' bring the wrongful death action within two years, the disability of minority will toll the running of the statute of limitation. This case was brought on behalf of two surviving children more than two years after the death of their parents.

2. Survival Statute AS 09.55.570. At common law, personal tort actions were extinguished by the death of the plaintiff. However, under this statute, all causes of action, except defamation, survive both the death of the plaintiff victim and the defendant tortfeasor and may be maintained by the plaintiff's personal representative against the defendant's personal representative.

3. Death of a Minor AS 09.15.010. Besides the wrongful death act and the survival act there is a special provision that parents or guardian may sue for the injuries to or death of a child.

Worker's Compensation

E. Worker's Compensation AS 23.30.

1. The statutory remedies under AS 23.30 are the exclusive remedy of the injured employee against employer for injuries received in the course of employment.

2. The dual capacity doctrine provides that an employer apparently protected by the exclusive liability of worker's compensation insurance may become liable to the employee in tort if, in respect to that tort, he occupies a position which places upon him obligations independent and distinct from his role as an employer. In, State v. Purdy, (601 P.2d 258 (Alaska 1979), the Supreme Court rejected the dual capacity doctrine and upheld its prior decisions that the recovery under worker's compensation is exclusive, i.e., it is in place of all other liability to which the employer might be subjected because of the injury to the employee.

Dual Capacity Doctrine has been rejected in Alaska

VI. CONTRIBUTION

A. The Uniform Contribution Among Joint Tortfeasors Act AS 09.16.010 - 060. Alaska adopted the 1955 version of the Uniform Act in 1970.

1. The statute abrogates the common law rule of no contribution (that is, no sharing of damages among defendants) and provides for a right of contribution among defendants who are jointly and severally liable, even though judgment has not been recovered against all of them. AS 09.16.010(a).

2. The Uniform Act provides that a tortfeasor is compelled to make contribution only up to his pro rata share of the entire liability.

Pay pro rata share only

a) example: If there are three defendants, each is liable for 33 1/3% of the total liability even though one of the defendants was 90% at fault.

b) California has interpreted its own version of the Uniform Act to permit comparative contribution, that is, contribution among the defendants in proportion to fault. American Motorcycle v. Superior Court, 578 P.2d 899 (Calif. 1978).

3. In Artic Structures v. Wedmore, 605 P.2d 426 (Alaska 1979), an employee, injured in the course of his employment, sued various third party defendants that had made safety inspections and provided the scaffolding from which he fell. Some defendants urged the abolition of the rule of joint

and several liability in Alaska. The question was whether the liability of multiple third party defendants should be apportioned on the basis of fault or several liability. Petitioners argued for comparative fault under Kaatz. After discussing the legislative history and commissioner's comments, the court concluded that the legislature intended that:

a) liability be joint and several;

unlike Calif., Alaska's contribution is pro rata, not comparative (which would apportion based on liability)

b) contribution be pro rata and not comparative, thus breaking with California's holding in American Motorcycle;

c) Worker's Compensation be the exclusive employee remedy against the employer;

d) the employer not be required to contribute. Neither would the worker's award be offset by any comparative negligence of the employer.

The court has reaffirmed Arctic Structures in State v. Wien Air, 619 P.2d 119 (Alaska 1980).

Indemnity

B. Indemnity

1. There are situations in which one defendant such as a manufacturer or wholesaler may be held to INDEMNIFY another defendant, such as a retailer. The concept has its origin in contract. Burgess Construction Co. v. State, 614 P.2d 1380 (Alaska 1980)

a) It may arise without agreement and by operation of law to prevent a result which is regarded as unjust or unsatisfactory. PROSSER at 310 (4th ed.)

b) Application: Alaska has refused to adopt the active/passive dichotomy which compels the active tortfeasor to indemnify the passive tortfeasor as in California. State v. Kaatz, 572 P.2d 775 (Alaska 1977).

Pouch V
Juneau, Alaska 99811

Alaska State Legislature

House of Representatives

Phone:
(907) 465-3892

Labor and Commerce Committee

TO: Members, House Labor & Commerce Committee
FR: Sid Billingslea, Committee Aide
DT:4/4/86
RE: HB 532 Sectional analysis

The following is a sectional analysis of the latest draft of HB 532. I have excluded policy statements and background information.

.010 Limit and cap on noneconomic damages: Awards shall not exceed 25% of the present value of the amount awarded for economic damages, and in no cases shall the amount exceed 500,000 dollars.

.011 Defines noneconomic damages.

.020 Punitive damages: Raises the burden of proof from current "preponderance of evidence" to "clear and convincing" - the highest standard of proof in civil law. 50% of punitives go to the plaintiff, 50% to the state general fund. Precludes the state from joining a suit for damages.

.025 Damages resulting from intoxication, or in commission of a felony: If a claimant was legally under the influence of drugs or alcohol at the time of injury or death, and if he contributed more than 50% to that harm, he is barred from any recovery. The same applies if the claimant was engaged in the commission of a felony, if the felony was causally related to the injury or death. Nothing in this section is intended to bar the claimant's rights under 42USCsec.1983, the Civil Rights Statute.

.030 Itemized verdicts: Requires a jury or court to divide noneconomic and economic damages and itemize them.

.035 Periodic payments: Where the future damages in a personal injury case exceed 50 thousand dollars the court may require periodic payments to be scheduled, if it is in

the best interest of the party. The fund allocated for the total future damages award would be placed in escrow or trust.
(b) The remaining payments go to the judgment creditor's estate upon his death.
(c) Costs of structuring periodic payments are included in the award to the claimant.
(d) Allows for modification if unanticipated medical expenses arise.
(e) If the judgement debtor displays a continuing pattern of nonpayment, the court may hold him in contempt and order him to pay any damages resulting from his failure to pay, including costs and attorney fees.
(f) If a judgment debtor fails to pay in a timely manner, the judgment creditor may ask the court to order the rest of the periodic payments to be made in a lump sum. The lump sum would not be reduced to present value, and interest may be awarded.

.040 Verification of Claims: Every pleading entered by either the plaintiff or defendant shall be verified. Requires element of intent.

.045 Limits liability of directors, officers and superintendents of nonprofit corporations, public and private hospitals and school districts to gross negligence and to acts or omissions outside the scope of duty.

.050 Effect of contributory fault. The percentage of fault for which the plaintiff is to blame is reduced from the award, but does not bar recovery.

.055 Collateral benefits: After the award is rendered the defendant may introduce evidence of nonsubrogated benefits received by the plaintiff, which may be deducted from the award. The plaintiff may in response introduce evidence of the cost of the collateral benefits received by him; these may be offset from the amount credited to the defendant. Plaintiff may also admit costs of actual attorney fees which exceeded the amount awarded by the court.
The defendant may not introduce evidence of benefits which are subrogated, life insurance benefits or gratuitous benefits.

.060 Apportionment of damages: Factfinder determines the percentage of fault to each party. Factfinder may treat two parties as a single party in a master-servant, principal-agent relationship; also allows two or more persons to be treated as a single person if the cause and the separate acts of each person cannot be distinguished. Example: A&B independently start fires. The fires burn, join, and destroy plaintiff's property. Each fire itself would have destroyed the property. A&B are each 100% at fault. Only 100% may be collected as damages. The

factfinder may hold each defendant jointly liable for 100% of the damages. This is the classic joint liability situation.
(c) Court states each party's share of fault and obligation to pay the award.
(d) Each party is jointly and severally liable for damages, except if a party is under 50% at fault he may be held responsible for no more than twice that percenatage of the award, should there be insolvent defendants, or defendants who cannot pay their entire share.
Example 1: A&B are sued. A is held 10% at fault, B 90%. B has money and can pay his amount. A pays 10% and B 90%
Example 2: same, only B cannot pay all of his portion. A's 10% is doubled, and A is responsible for 20% of the total.
Example 3: If A is 51% or more at fault and B cannot pay, A pays total award.

.070 Effect of release: When a party is released from the suit for whatever reason, the dollar amount of that release is deducted from the award.

.900 Defines fault

09.10.075: Actions under $75,000 must be arbitrated before resorting to the courts.

.065 Offers of judgment: Up until 10 days before trial a party may offer to settle. If the offer is not accepted, and if the offeree does not better the offer in trial, the offeree is penalized by either adding (if the offeree is the defense) or subtracting (if the offeree is the plaintiff) 5% interest to the award per year. The amount is in addition to the statutory percentage. The interest penalty dates back to the occurrence.

.43.110 Confirmation of award

.160 Allows 60 days to file appeal from arbitration for a trial de novo.

.55.548 damages are awarded under principles of common law.
.60.010 Attorney fees: Except where statute authorizes payment of attorney fees, the Supreme Court shall determine by rule or order what fees and costs shall be awarded the prevailing party in a case. But--unless authorized by statute or agreement between parties attorney fees may not be awarded in a civil case. Abolishes Civil Rule 82, by the Supreme Court, authorizing payment of attorney fees.e

.60.035 Costs and Attorney fees for arbitration appeal: If a party appeals from arbitration and does not better his lot by 10% over (or under) the arbitration award, he is to pay the prevailing party's actual costs and fees.

A new section has been added which would enable a party to petition the court for review of the fees that party paid its attorney for reasonableness. Establishes certain criteria the court may consider in its review. Remaining sections grant and restate jurisdiction of the courts and note civil rules amended by the bill.

Richard BEAULIEU, Appellant,
v.
James V. ELLIOTT, Appellee.

James V. ELLIOTT, Appellant,
v.
Richard BEAULIEU, Appellee.

Nos. 765, 766.

Supreme Court of Alaska.

Dec. 5, 1967.

Action for damages for personal injuries sustained in automobile accident. The Superior Court, Third Judicial District, Hubert A. Gilbert, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Dimond, J., held that record which disclosed implicit finding that plaintiff's wage earning capacity had been impaired for remainder of his work life of 20 years and disclosing testimony that plaintiff's inability to work would only continue from one to five years did not set forth findings of fact to enable reviewing court to have clear understanding of basis of trial court's decision that plaintiff sustained permanent 50 percent impairment of earning capacity and case would be remanded for more detailed and explicit findings of fact.

Judgment set aside and case remanded with directions.

1. Administrative Law and Procedure ⇐=501

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

2. Attorney and Client ⇐=86

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

3. Evidence ⇐=264

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

4. Trial ⇐=388(1)

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

5. Appeal and Error ⇐=1177(8)
Trial ⇐=395(1)

Record which disclosed implicit finding that plaintiff's wage earning capacity had been impaired for remainder of his work life of 20 years and disclosing testimony that plaintiff's inability to work would only continue from one to five years did not set forth findings of fact to enable reviewing court to have clear understanding of basis of trial court's decision that plaintiff sustained permanent 50 percent impairment of earning capacity and case would be remanded for more detailed and explicit findings of fact. Rules of Civil Procedure, rule 52(a).

6. Appeal and Error ⇐=1176(1)

Whether trial court improperly used Air Force physical evaluation board's findings to award plaintiff $16,088 for impaired earning potential caused by depressive reaction could not be determined where trial court in awarding total of $160,937.25 made no mention of award for $16,088 for depressive reaction and trial court would be directed to make more detailed and explicit findings of fact on remand. Rules of Civil Procedure, rule 52(a).

7. Damages ⇐15

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

8. Damages ⇐226

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

9. Damages ⇐50

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

10. Damages ⇐100

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

11. Damages ⇐99

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

12. Damages ⇐60

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

13. Damages ⇐132(9)

Evidence that osteomyelitis had developed in bone of plaintiff's ankle injured in automobile accident and testimony that it was reasonable medical probability that osteomyelitis would remain with plaintiff for rest of his life supported award of $71,241 for pain and suffering that plaintiff would experience for expected 29 years remaining of his life.

14. Damages ⇐97

In determining amount of award for pain and suffering, juror or judge should not arbitrarily be guided by some reasonable and practical consideration and should endeavor to make reasonable or sane estimate.

15. Damages ⇐97

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

16. Damages ⇐97

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

17. Appeal and Error ⇐1013

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

18. Appeal and Error ⇐1013

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

19. Damages ⇐226

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

20. Damages ⇐185(1)

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

21. Appeal and Error ⇐1176(1)

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

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

22. Appeal and Error ⇐1177(8)

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

23. Appeal and Error ⇐984(5)

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

24. Costs ⇐173(1)

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

25. Appeal and Error ⇐984(1)
Costs ⇐12

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

26. Costs ⇐151

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

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

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

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

OPINION

DIMOND, Justice.

As a result of an automobile accident on April 13, 1963, James Elliott suffered a fracture dislocation of his right ankle. He brought this action for damages against Richard Beaulieu. Liability was conceded by Beaulieu, and the issue of damages was tried by the court without a jury. The trial court filed findings of fact and conclusions of law and entered judgment awarding Elliott $169,937.25 compensatory damages, costs of $82.10, and attorney's fees in the amount of $13,870.20. Both parties have appealed. We shall consider first Beaulieu's appeal.

Beaulieu's Appeal

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

1. *Impairment of Earning Capacity.*

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

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

In its third conclusion of law the trial court stated:

> That plaintiff will suffer a future wage loss in the amount of $30,110.40, after taking into consideration the fact that his wage earning capacity has been impaired to the extent of fifty (50%) per cent plus the further fact that his rate of pay at the time of discharge was $402.30 per month and plus the further fact that he has a remaining work life of twenty-nine (29) years.[1]

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

On this point we must remand the case to the trial court for the making of more explicit findings of fact. The court's conclusion as to loss of future wages contains the implicit finding that Elliott's wage earning capacity had been impaired for the remainder of his work life of 29 years. The court gives no indication, however, of the factual basis for such an ultimate finding, nor does it indicate how it reconciles such a finding with the testimony of two physicians who spoke on the subject of Elliott's capacity to be gainfully employed. Dr. Foster testified that in his opinion, while Elliott was unable to work at the time of the trial in 1966, this inability would at the most only continue from one to five years, and that the condition of Elliott's ankle would steadily improve so that within that period of time he would be able to engage in a sedentary type of occupation that would not involve prolonged walking, running or heavy lifting. It was Dr. Foster's opinion that Elliott's future earning capacity was impaired only to the extent that he must move to clerical work rather than truck driving which he had done prior to 1963. Dr. Weidman testified that the prognosis of the condition of Elliott's ankle was satisfactory, that he would be limited in many activities because he would have to use his ankle as a peg and would be deprived of the movements that a normal ankle offers, that it would be possible for him to be gainfully employed in a sedentary type of occupation, but that he could not give an estimate as to when that might be because he did not know how much dead bone was present in the ankle.

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

Conceivably, the court's determination of a percentage impairment was influenced by Elliott's testimony that he had received a medical discharge from the United States Air Force in January of 1956, and that he was receiving from the government a 60% disability compensation, 40% of which was attributable to his ankle, and the remaining 20% to other medical problems not related to the accident. That this may have influenced the court appears to be a possibility, because the court made Finding of Fact No. 19 which provided as follows:

> That on October 17, 1961, plaintiff was discharged from the hospital to "travel status"; that on January 11, 1956, plaintiff was given a medical discharge from the Air Force, as above mentioned; that the physical evaluation board, found plaintiff to be 60% disabled, assigning a 40% disability because of the injuries to plaintiff's right ankle, a 10% disability to a "depressive reaction" and a 10% disability due to an impairment of vision; that the latter disability is not related to the accident of April 13, 1963.[2]

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

The trial court also may have been influenced in its determination of the existence of a 50% impairment of earning capacity by what Elliott characterizes as admissions made by Beaulieu's trial counsel. In his opening statement at the trial, counsel for Beaulieu admitted that Elliott had sustained a "permanent injury", that this did not render him 100% disabled, and that the question for determination was just how much "he will lose in the future because of the injury." In his brief filed subsequent to the close of the trial Beaulieu's counsel said this:

> In summary, it is suggested by the defense that the Court make its award to the Plaintiff on the basis of the figures set forth below. These figures take into consideration: The prognosis established by the medical experts; the 60% disability rating established by the Air Force, of which 50% is attributable to Plaintiff's ankle injury; and, the Plaintiff's ability to be gainfully employed in the future as a clerk or transportation specialist in the transportation industry, or as a travel agent.
>
> * * * [I]t is * * * suggested that the following award be made:

For past lost wages	$10,000.00
For future "lost wages", or diminution of earning capacity, based on 50% disability rating for the next five years ...	11,500.00
For past pain and suffering	5,000.00
For future pain and suffering	10,000.00
For permanent disability and injury to ankle	25,000.00
Total	$61,500.00

[2, 3] It is true that admissions of fact by counsel during the course of the trial are binding on his client,[4] if they are made with the express purpose of dispensing with the formal proof of some fact at the trial, and are thus used as a substitute for legal evidence of the fact.[5] It does not appear that this was the purpose of counsel's statement in his brief filed subsequent to the trial. But even if it did constitute an admission of fact binding on Beaulieu, it is an admission only that Elli-

1. The pertinent part of Conclusion of Law No. 3 originally read:
   "That plaintiff will suffer a future wage loss in the amount of $30,110.40, after taking into consideration the fact *that his disability is 50%*. * * * [Emphasis added.]
   The italicized words were amended by the court on Elliott's motion to read: "that his wage earning capacity has been impaired to the extent of fifty (50%) per cent."

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

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

4. Ferroline Corp. v. General Aniline & Film Corp., 207 F.2d 912, 916-917 (7th Cir. 1953), cert. denied, 347 U.S. 953, 74 S.Ct. 678, 98 L.Ed. 1098 (1954), reh. denied, 347 U.S. 979, 74 S.Ct. 784, 98 L.Ed. 1118 (1954), reh. denied, 348 U.S. 851, 75 S.Ct. 19, 99 L.Ed. 671 (1954).

5. Dolce v. Stencil, 48 Wash.2d 619, 295 P.2d 312, 311 (1956); Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 705, 711 (5th Cir. 1951), cert. denied, 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 687 (1952).

ott's earning capacity had been 50% impaired for a period of five years, and 10% for the remaining work life of [illegible] 20 years as found by the trial court. Consequently, what Beaulieu's counsel said in his brief does not satisfactorily explain or establish the basis for the trial court's Conclusion of Law No. 3 which dealt with impairment of earning capacity.

[4, 5] It is most important that the trial court comply meticulously with the requirements of Civil Rule 52(a) [6] with respect to the making of findings of fact in order to give us a clear understanding of the basis of the trial court's decision, and to enable us to properly appraise the elements which entered into the court's award of damages.[7] This was not done in this case. Our review of the record leaves us with the conclusion that the trial court's findings with respect to damages for future impairment of earning capacity are not sufficiently detailed to afford us a clear understanding of the basis for the court's award.[8] We therefore will remand this case to the trial court for the purpose of making detailed and explicit findings as to Elliott's earning capacity and the degree of impairment in respect thereto.[9]

In his Finding of Fact No. 19 the trial court referred to the fact that the Air Force physical evaluation board had found Elliott to be 60% disabled, and that 10% of that disability was due to a "depressive reaction". In Finding of Fact No. 22 the court stated that a psychiatric evaluation of Elliott had been made, that the psychiatric findings were that Elliott had developed a depressive reaction attributable to permanent crippling, deformity of the lower extremity, semi-isolation, and a protracted period of surgery and recovery, and that such depressive reaction was proximately caused by the accident of April 13, 1963. Beaulieu contends that the judge used the Air Force physical evaluation board's findings to award Elliott $16,083.69 for that part of his impaired earning potential caused by a depressive reaction, and that this was error.

[6] We are unable to review this point because nowhere in the court's finding of fact or conclusions of law or judgment is there any mention of an award of $16,083.-69 for a depressive reaction as an element of Elliott's impaired earning capacity. It may be that the trial court intended that of the 50% impairment of earning capacity which is found to exist, 10% was due to a depressive reaction. However, we are unable to determine if that is the case from the record as it now exists. This point should be clarified on a remand of the case for more detailed and explicit findings of fact.

2. *Future Wage Loss—Present Value.*

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

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

6. Civ.R. 52(a) provides in part:
In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment • • •.

7. Patrick v. Sedwick, 413 P.2d 169, 174-176 (Alaska 1966); Hamilton v. Lotto, 391 P.2d 968, 969 (Alaska 1964); Spenard Plumbing & Heating Co. v. Welsh Const. Co., 370 P.2d 549, 525, 526 (Alaska 1962); Merrill v. Merrill, 365 P.2d 516, 518 (Alaska 1962); Dickerson v. Gelermann, 368 P.2d 217, 219 (Alaska 1962).

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

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

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

[8] In applying the general rule, the Supreme Court of Washington has stated a formula for reducing awards of future earnings to present value which involves the "rate of interest (which) could fairly be expected from safe investments which a person of ordinary prudence, but without particular financial experience or skill, could make in that locality." [13] This formula, although empirical at best, is probably as definite as any that has been devised. But we believe that the rule for reducing awards, including the formula applied by the Washington court, ignores facts which should not be ignored. Annual inflation at a varying rate is and has been with us for many years. There is no reason to expect that it will not be with us in the future. This rate of depreciation offsets the interest that could be earned on government bonds and many other "safe" investments. As a result the plaintiff, who through no fault of his own is given his future earnings reduced to present value must, in order to realize his full earnings and not be penalized by reduction of future earnings to present value, invest his money in enterprises, other than those which are considered "safe" investments, which promise a return in interest or dividends greater than the offsetting rate of annual inflation. But ours is a competitive economy. By their very nature some enterprises backed by investors' money are going to fail with resulting loss to individuals. Thus, instead of being assured of earnings at rates greater than the annual rate of inflation, the injured plaintiff stands a chance of entirely losing his future earnings by unlucky or unwise investments. Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without reduction to present value. The plaintiff is more likely to be restored to his original condition under the rule we adopt than under the prevailing rule which calls for a discounting of the award for future earnings.

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

10. Hill v. Varner, 4 Utah 2d 166, 290 P.2d 448, 449 (1955); Restatement, Torts § 924 comment d, at 631-35 (1939); McCormick, Damages § 86, at 304 (1935). Accord United States v. Hatahley, 257 F.2d 920, 922, 70 A.L.R.2d 668 (10th Cir. 1958); Hughett v. Caldwell County, 312 Ky. 85, 96, 230 S.W.2d 92, 21 A.L.R.2d 373 (1950).

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

12. Wentz v. T. E. Connolly, Inc., 45 Wash. 2d 127, 273 P.2d 485, 491 (1954); Borcherding v. Eklund, 156 Neb. 196, 55 N.W.2d 668, 650 (1952); Daughtry v. Cline, 224 N.C. 381, 30 S.E.2d 322, 324, 154 A.L.R. 789 (1944); Rigby v. Pifer, 290 Mo. 10, 234 S.W. 828, 832 (1921); Restatement, Torts § 924 comment d, at 631-35 (1939); McCormick, Damages § 86, at 304 (1935); Annots., 77 A.L.R. 1439, 1446 (1932) 154 A.L.R. 796, 797 (1945).

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

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

3. *Retirement Pay.*

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

[9] The general principle underlying the assessment of damages in tort cases is that an injured person is entitled to be replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort.[14] Elliott had been in the Air Force for about 18 years at the time of his discharge and he testified that he had intended to remain in the service for at least 20 years. If he had not been injured, Elliott could have continued to earn to his full capacity and, in addition, after 20 years' service, would have been entitled to retire and draw retirement pay.[15] By reason of his injuries, Elliott was entitled under law to be retired early for disability and draw retirement pay in lieu of retirement on a regular basis after completion of 20 years' service.[16] The award of damages for impaired earning capacity has the effect of putting Elliott in the same position he would have occupied had it not been for the injury, because the damages represent what Elliott could have earned had he not been injured and the disability retirement pay represents that which Elliott had earned and become entitled to under law by reason of his years of service in the Air Force. In other words, Elliott now receives an amount representing wages he could have earned were it not for the injury, plus retirement pay; had he not been injured, he would have received the full wages he could have earned during his remaining work life, in addition to receiving the retirement pay to which he would become entitled by reason of his years of service in the Air Force. Thus, Elliott, under the court's award, is getting no more than he would have gotten had he not been injured. The disability retirement pay Elliott is receiving should not be used to mitigate damages and reduce the award for loss of future earnings.

4. *Income Taxes.*

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

The courts are divided on this question. It is the more general view, supported by a majority of American decisions, that an amount representing future income taxes should not be deducted from the award.[17] As was stated by the Supreme Court of Rhode Island:

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

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

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

5. *Past Loss of Wages.*

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

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

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

14. See to 10 supra.

15. 10 U.S.C.A. §§ 8911, 8889–8891 (1959).

16. 10 U.S.C.A. §§ 1201, 1401 (1959).

17. Annot., 67 A.L.R.2d 1336, 1396 (1959).

18. Odlo v. Carol, 218 A.2d 373, 377 (R.I. 1966). See also Dixie Feed & Seed Co. v. Byrd, 52 Tenn.App. 619, 376 S.W.2d 745, 749 (1963); appeal dismissed, 379 U.S. 15, 85 S.Ct. 117, 13 L.Ed.2d 84 (1964); Cunningham v. Roderiet Vinderegen, 333 F.2d 308, 313-315 (2d Cir. 1964); Spencer v. Martin K. Eby Const. Co., 186 Kan. 345, 350 P.2d 18, 22-23 (1960); Kawamoto v. Yasutake, 40 Haw. 42, 110 P.2d 976, 981 (1956).

19. Bell v. Primeau, 101 N.H. 227, 183 A.2d 729, 730, 7 A.L.R.3d 512, 514 (1962). The collateral source rule is followed in most jurisdictions. Annot., 7 A.L.R.3d 516, 520 et seq. (1966).

20. 378 P.2d 617, 620 (Alaska 1963).

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

6. Future Pain and Suffering.

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

An infection, osteomyelitis, had developed in the bone of Elliott's injured ankle. Elliott testified that from the time of the onset of the osteomyelitis he was required to keep his ankle in an upright position for a period of from four to five days on an average of once a month to alleviate the pain he experienced, that he suffered pain of a sufficient intensity to keep him awake the better part of the night on an average of one night per week, and that there was an open, draining sinus on his ankle. Beaulieu concedes that Elliott's testimony was sufficient to justify an award for past pain and suffering.[22] However, Beaulieu contends that there is a lack of substantial medical evidence to justify an award for pain and suffering in the future.

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

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

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

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

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

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

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

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

> That plaintiff is entitled to recover from defendant the sum of $78,630.00 for past and future pain and suffering, for his general physical disability and permanent crippling and for the fact that he will no longer be able to lead that sort of life to which he had become accustomed. The past pain and suffering is set at the sum of $7,500.00. The future pain and suffering of $71,244.00 is based upon a finding of $20.00 per day for 52 days per year and an additional $3.00 per day for 313 days per year for a total sum of $1,079.00 per year multiplied by 36 years.

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

A similar contention was made by a defendant in Imperial Oil, Ltd. v. Drift, 231 F.2d 4 (6th Cir. 1956), cert. denied, 352 U.S. 911, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956), where the trial court had used a per diem formula in awarding damages for pain and suffering. It was argued there that damages for pain and suffering cannot be properly computed by using a mathematical formula. In answer to this argument, the Court of Appeals said:

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

21. Restatement, Torts § 920 comment e (1939).

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

with the evidence and to reach a result which does not appear to us to be manifestly unjust. United States v. Pusecker, 5 Cir., 231 F.2d 5; City of Knoxville, Tenn. v. Bailey, 6 Cir., 222 F.2d 570, 231.[24]

[14-17] We agree with the foregoing. As we stated in Patrick v. Sedwick,[25] there is no fixed measure of compensation in awarding damages for pain and suffering, and such an award necessarily rests in the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation. We can see nothing manifestly unfair or unjust about the method used by the trial court in assessing damages for future pain and suffering. In fact, as was suggested in the dissenting opinion in the Kansas case of Taylor v. Atchison, Topeka & Santa Fe Ry. Co.,[26] it appears to be a fair argument and a rational approach to treat damages for pain the way it is endured—day by day, month by month, year by year. Ultimately, however, the question for decision is whether the total sum is reasonable or not, regardless of how it was arrived at. We find no error in the method used by the trial court in awarding damages for future pain and suffering.

[18] Beaulieu contends that the total sum awarded is unreasonable and is grossly excessive. We shall not set aside an award on a claim of excessiveness unless it is so large as to strike us that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law.[27] Considering the evidence of permanent damage to Elliott's ankle, the bone fracture, and the pain and suffering without reduction to present worth.

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

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

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

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

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

Elliott's Appeal

As a basis for computing Elliott's impairment of future earnings for the remainder of his work life of 29 years, the court used Elliott's wage scale in the Air Force at the time of his discharge in the amount of $462.30 a month. On his appeal, Elliott claims that his future wage loss was greater than that determined by the court. The basis for his claim is that, considering evidence of his experience in truck driving and traffic management, the court ought to have determined what earnings Elliott probably would and could have received in civilian life—the wage scale there being higher for the same type of work than in the military service.

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

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

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

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

23. 231 F.2d at 11. See Annot., Per Diem or similar mathematical basis for fixing damages for pain and suffering, 69 A.L.R.2d 1347 (1959).

24. 413 F.2d 169, 176 n. 21 (Alaska 1969).

25. 190 U.S. 261, 271 F.2d 58, 61 (1922).

26. Inland Oil Ltd. v. Delk, 234 F.2d 4, 11 (9th Cir. 1956), cert. denied 352 U.S. 911, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956).

27. Accord, Peters v. Benson, 425 P.2d 189, 192 (Alaska 1967); National Bank of Alaska v. McHugh, 416 P.2d 239, 241 (Alaska 1966); Patrick v. Sedwick, 413 P.2d 169, 175 (Alaska 1966).

28. 11 Wis.2d 603, 106 N.W.2d 271, 279, 16 A.L.R.2d 227, 236 (1960).

29. See also Bigler v. Prior, 200 Mo. 10, 27, S.W. 528, 532 (1921); Comment, 60 Mich.L.Rev. 612, 629-30 (1962).

to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

ATTORNEY'S FEES IN AVERAGE CASES

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

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

The court awarded Elliott $15,670.29 attorney's fees based on the percentages listed in the "without trial" category of the above rule. Elliott claims that this was an erroneous application of the rule, and that a correct computation of attorney's fees should have been under the "contested" category[30] because even though liability was admitted, the question of damages was in issue and was contested in a four-day trial.

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

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

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

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

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

30. Attorney's fees computed under the "Contested" category of the rule would have amounted to $17,813.73.

31. McDonough v. Lee, 420 P.2d 159, 165 (Alaska 1966); Kenai Power Corp. v. Strandberg, 415 P.2d 659, 661 (Alaska 1966); Patrick v. Sedwick, 413 P.2d 139, 178-179 (Alaska 1966); Preferred Ins. Co. v. Raffetto, 391 P.2d 951, 954 (Alaska 1964); Davidson v. Kirkland, 382 P.2d 1068, 1070-1071 (Alaska 1963).

32. Elliott's total recovery, in addition to costs and attorney's fees, was $169,867.92.

33. McDonough v. Lee, 420 P.2d 159, 165 (Alaska 1966).

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

35. Euler v. Waller, 295 F.2d 765, 769, 97 A.L.R.2d 135, 137-138 (10th Cir. 1961).

Warren A. TAYLOR, Appellant,
v.
DISTRICT COURT FOR the FOURTH JUDICIAL DISTRICT, AT FAIRBANKS, Appellee.
No. 764.

Supreme Court of Alaska.
Dec. 8, 1967.

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

Reversed and remanded with directions.

1. Contempt ⇐2

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

2. Contempt ⇐20

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

3. Contempt ⇐51(1)

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

4. Contempt ⇐51(1)

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

5. Contempt ⇐20

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