ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4758 HJUD SB 200 - SB 211 330

SB

200

STATE OF ALASKA
THE LEGISLATURE

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POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Judiciary:

1988 - May 4

HOUSE COMMITTEE REPORT

(7)

Date referred: 4/22/88 FURTHER REFERRALS: Finance

DATE: May 4, 1988

The Judiciary Committee has considered CSSB 200(Res)

"An Act amending the mining loan fund law."

RECOMMENDS:

[ ] replace with ______ [ ] the same title
[ ] attached amendment(s) [ ] a new title

[✓] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ______ Committee

ADOPTS: [ ] ______ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[✓] zero fiscal note
[ ] zero with analysis

[ ] same as previous fiscal note published ______
[✓] same as previous zero fiscal note published 4/22/88

SIGNING DO PASS:

[signatures]

Edwin L. Taylor

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

Offered: 4/22/88
Referred: Judiciary and
Finance

5-0900L

Original sponsors: Coghill, Fahrenkamp,
Bennett and Faiks

1 IN THE SENATE BY THE RESOURCES COMMITTEE

2 HOUSE CS FOR CS FOR SENATE BILL NO. 200 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act amending the mining loan fund law."

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

8 * Section 1. AS 27.09.040(a) is amended to read:

9 (a) A loan granted under this chapter

10 (1) may not exceed $5,000,000;

11 (2) may not exceed a term of 15 years except for an exten-

12 sion or modification under AS 27.09.048;

13 (3) may not bear interest exceeding 10 percent; and

14 (4) may not exceed 75 percent of the appraised value of the

15 collateral used to secure the loan.

16 * Sec. 2. AS 27.09 is amended by adding a new section to read:

17 Sec. 27.09.048. EXTENSION OR MODIFICATION OF LOAN. The depart-

18 ment may grant an extension on a loan or modify the conditions of a

19 loan when the borrower is able to show to the satisfaction of the

20 commissioner that the borrower's opportunity to mine has been adverse-

21 ly affected by circumstances beyond the control of the borrower, such

22 as a poor mining season or legal injunctions against the federal or

23 state government. An extension or modification of the terms of the

24 loan under this section, including a postponement of payments of

25 interest and repayments of principal due under the loan, may not

26 include a reduction in the amount of the interest owed or a cancel-

27 lation of the amount of the interest due under the loan, although the

28 payment of interest and principal under the loan may be extended or

29 postponed beyond the original term of the loan. During the period of

Department of Commerce & Economic Development / POSITION PAPER

HCS CSSB 200 (RESOURCES): "An Act amending the mining loan fund law."

This legislation authorizes the Department of Commerce and Economic Development to grant an extension or modification of a mining loan provided it can be shown that the borrower's opportunity to mine was adversely affected by circumstances beyond the borrower's control. The bill provides that these extensions may exceed a term of 15 years; however, interest continues to accrue during the extension.

This essentially allows the department the ability to extend a loan beyond the current statutory limit of 15 years.

The Department of Commerce and Economic Development supports this bill because of the added flexibility it provides in dealing with delinquent borrowers.

J. Anthony Smith, Commissioner
Department of Commerce and
Economic Development

Date 5/2/88

GW/dg11565D
042888a

March 31, 1988

STATISTICS ON D[illegible]ED LOAN PROGRAMS
(Thousands of Dollars)

	Veterans	Small Business	Commercial Fish	Tourism	Bulk Fuel	Child Care	Hist Dist	Mining	Alternative Energy	Resid. Energy	Fish Enhance	Power Dev.	Water Resource	Total
COMMITMENTS														
Total No. Loans Committed FY 72-88	7,718	1,338	3,356 [3]	59	268	63	12	73	2,944	2,232	146	5	5	18,219
Total Dollar Amount Committed FY 72-88	371,795.2	202,529.3	195,225.6 [3]	29,874.7	9,751.8	2,200.6	1,345.4	28,597.4	19,299.6	8,346.5	54,734.5	193,847.0	2,500.0	1,120,047.6
Total No. Loans Committed FY 88	-0-	-0-	126 [3]	-0-	20	-0-	-0-	-0-	-0-	-0-	8	-0-	-0-	154
Total Dollar Amount Committed FY 88	-0-	-0-	7,369.9 [3]	-0-	754.8	-0-	-0-	-0-	-0-	-0-	2,690.0	-0-	-0-	10,814.7
APPROPRIATIONS														
FY 85	-0-	-0-	3,500.0	-0-	-0-	-0-	-0-	-0-	1,000.0	-0-	5,000.0	210,000.0	-0-	219,500.0
FY 86	-0-	-0-	3,710.0	-0-	-0-	-0-	-0-	-0-	845.0	-0-	812.0	-0-	-0-	5,367.0
FY 87	-0-	-0-	-0-	-0-	64.0	-0-	400.0	-0-	-0-	-0-	-0-	-0-	-0-	464.0
FY 88	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	2,200.0	-0-	-0-	2,200.0
LOANS OUTSTANDING														
Owned by Fund														
Number of Loans Outstanding	24	18	1,464	2	51	36	6	44	1,387	1,062	126	1	1	4,222
Principal Amount Outstanding	1,342.4	2,678.0	60,696.0	1,019.9	783.6	1,316.2	969.4	12,119.5	9,438.4	2,385.9	48,221.2	186,104.1	835.9	327,908.5
Average Loan Amount Outstanding	55.9	148.7	41.5	510.0	15.4	36.7	161.6	275.4	[illegible].8	2.3	382.7	186,104.1	835.9	77.5
Serviced for AIDEA														
Number of Loans Outstanding	1,475	179	253	7	N/A	1	3	N/A	N/A	N/A	11	N/A	N/A	1,929
Principal Amount Outstanding	62,466.7	14,622.6	8,009.2	[illegible]1.3		4.9	80.7				5,909.6			91,935.0
Average Loan Amount Outstanding	42.4	81.7	31.7	120.2		4.9	26.9				537.2			47.7
Summary														
Total No. of Loans Outstanding	1,499	197	1,717	9	51	37	9	44	1,387	1,062	137	1	1	6,151
Total Principal Amount Outstanding	63,80[illegible].1	17,298.6	68,705.2	1,861.2	783.6	1,321.1	1,050.1	12,119.5	9,438.4	2,385.9	54,130.8	186,104.1	835.9	419,843.5
DELINQUENCY RATES AND DEFAULT STATISTICS														
Statistics Based on Balances Outstanding														
% Delinquent[1]	6.5%	18.2%	4.7%	5.3%	10.4%	-0-	-0-	42.9%	3.2%	6.7%	0.07%	-0-	-0-	3.9%
% in Default[2]	2.8%	23.5%	4.0%	5.2%	14.1%	18.4%	-0-	44.4%	6.8%	4.9%	2.9%	-0-	-0-	4.6%
Statistics Based on Number of Loans														
% Delinquent[1]	5.7%	17.3%	4.0%	11.1%	9.8%	-0-	-0-	40.9%	3.0%	5.5%	3.7%	-0-	-0-	5.2%
% in Default[2]	2.2%	18.3%	3.0%	22.2%	15.6%	13.5%	-0-	34.0%	6.5%	3.6%	1.5%	-0-	-0-	4.6%

1 Delinquent is defined as 60 days or more past due, not in litigation.
2 Default is defined as in litigation.
3 Prequalifications NOT included

Prepared by: Division of Investments, Accounting Branch

4/12/88

STATISTICS ON DCED LOAN PROGRAMS
(Thousands of Dollars)

March 31, 1988

	Veterans	Small Business	Commercial Fish	Tourism	Bulk Fuel	Child Care	Hist Dist	Mining	Alternative Energy	Resid. Energy	Fish Enhance	Power Dev.	Water Resource	Total
COMMITMENTS														
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Total Dollar Amount Committed FY 88	-0-	-0-	7,369.9 [3]	-0-	754.8	-0-	-0-	-0-	-0-	-0-	2,690.0	-0-	-0-	10,814.7
APPROPRIATIONS														
FY 85	-0-	-0-	3,500.0	-0-	-0-	-0-	-0-	-0-	1,000.0	-0-	5,000.0	210,000.0	-0-	219,500.0
FY 86	-0-	-0-	3,710.0	-0-	-0-	-0-	-0-	-0-	845.0	-0-	812.0	-0-	-0-	5,367.0
FY 87	-0-		-0-	-0-	64.0	-0-	400.0	-0-	-0-	-0-	-0-	-0-	-0-	464.0
FY 88	-0-		-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	2,200.0	-0-	-0-	2,200.0
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Number of Loans Outstanding	1,475	179	253	7	N/A	1	3	N/A	N/A	N/A	11	N/A	N/A	1,929
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Total Principal Amount Outstanding	63,809.1	17,298.6	68,705.2	1,861.2	783.6	1,321.1	1,050.1	12,119.5	9,438.4	2,385.9	54,130.8	186,104.1	835.9	419,843.5
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FY 88	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	2,200.0	-0-	-0-	2,200.0
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Prepared by: Division of Investments, Accounting Branch

4/12/88

SB

211

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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JUNEAU, ALASKA 99811
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May, 1988

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Mary Van Nimwegen

House Judiciary:

1988 ~ May 8

Alaska State Legislature

SENATE

Office of the President

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3755

May 6, 1988

MEMORANDUM

TO: Representative John Sund, Chairman
House Judiciary Committee

FROM: Senator Jan Faiks
President of the Senate

SUBJECT: SB 211 "An Act relating to civil liability; and providing for an effective date."

Senate Bill 211, which proposes changes to the civil liability system, has been referred to the House Judiciary Committee for consideration. For your review, I have attached a sectional analysis of CSSB 211 (Fin) am, the version of this bill which passed the Senate on March 30. I have also attached a sectional analysis of HCS CSSB 211 (L&C) prepared by the House Labor and Commerce Committee.

I would appreciate the committee's scheduling of this bill at its earliest convenience.

Thank you.

SECTIONAL ANALYSIS

CSSB 211 (Fin) am "An Act relating to civil liability; and providing for an effective date."

As passed by the Senate, CSSB 211 (Fin) am makes the following changes to the law:

Section 1. NONECONOMIC DAMAGES. Amends AS 09.17.010(b) by reducing the maximum amount of noneconomic damages which may be awarded for personal injury based on negligence.

The present statute has a limit of $500,000 for such damages; CSSB 211 (Fin) proposes a maximum of $100,000 for noneconomic damages, which are defined as subjective, nonpecuniary damages including pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, and all other nonpecuniary damages.

Section 2. PUNITIVE DAMAGES. Amends AS 09.17.020 by requiring clear and convincing evidence of specific conduct by the defendant before the court may award punitive damages.

The present statute has the same burden of proof (clear and convincing evidence), but does not specify the type of conduct which will trigger the award. CSSB 211 (Fin) provides that fraud, malice, gross negligence, or reckless disregard by the defendant may result in the award of punitive damages.

Section 3. DAMAGES RESULTING FROM COMMISSION OF A CRIME. Amends AS 09.17.030 by expanding the class of persons who may not recover damages for personal injury or death if the damages were incurred while the person was engaged in the commission of a crime.

The present statute provides that a person may not recover damages for injury or death if the damages were incurred while the person was engaged in the commission of a felony which substantially contributed to the injury or death.

CSSB 211 (Fin) replaces "felony" with "crime". This has the additional effect of precluding persons convicted of a

misdemeanor from recovering damages for personal injury or death if that crime substantially contributed to the injury or death.

Section 4. LIABILITY OF CRIMINAL DEFENDANTS. Further amends AS 09.17.030, to provide that a person convicted of a crime that substantially contributed to the person's injury or death can recover damages from the wrongdoer if the wrongdoer has also been convicted of a crime in which he/she was engaged at the time of the injury or death.

Section 5. AWARD OF DAMAGES. Amends AS 09.17.040(d) by allowing any party, not just the injured party, to request the court to enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump sum payment.

The present statute allows only the injured party to make such a request.

Section 6. INCREASES IN PERIODIC PAYMENTS. Amends AS 09.17.040(f) to make it clear that if the payment of future damages is made periodically rather than in a lump sum, the court may order increases in future payments for anticipated inflation.

Section 7. LIMITED LIABILITY OF CERTAIN DIRECTORS AND OFFICERS. Amends AS 09.17.050 to include members of the board of directors or an officer of an electric or telephone cooperative organized under AS 10.25.

Section 8. COLLATERAL BENEFITS. Repeals and reenacts AS 09.17.070, replacing it with language similar to that found in present statute AS 09.55.548(b) relating to collateral sources in malpractice actions.

This section of CSSB 211 (Fin) provides that a person may only recover damages that exceed amounts that he/she has already received from a collateral source, whether it be a private, group, or governmental source, either contributory or noncontributory. The only exceptions are where the collateral source by law or contract must seek subrogation, or from death benefits paid under life insurance.

This section further provides that the trier of fact shall be informed of the tax implications of an award of damages. The court may also take into account the value of the person's right to coverage which may have been exhausted or depleted by payment of these collateral benefits, and add a reasonable estimate of their probable value to the award.

Section 9. APPORTIONMENT OF DAMAGES. Amends AS 09.17.080(d) by modifying the theory of joint and several liability.

Under the present statute, a party can be held liable for all of the damages, even if that party has been allocated a certain percentage of the fault. The exception under the present statute is that where a party has been allocated less than 50% of the total fault allocated to all of the parties, that party may not be jointly liable for more than twice the percentage of fault allocated to that party.

CSSB 211 (Fin) establishes full joint and several liability in cases involving hazardous waste, environmental pollution, or violation of state or federal antitrust laws.

In all other cases, CSSB 211 (Fin) has the effect of eliminating joint liability, and making each defendant liable only for the share of the damages for which he/she is personally responsible.

Section 10. DEFINITIONS. Amends AS 09.17.900 by adding new definitions for "economic losses" and "noneconomic losses".

Section 11. COSTS ALLOWED PREVAILING PARTY. Amends AS 09.60.010 by eliminating the language "unless the civil action is contested without trial, or fully contested as determined by the court."

This has the effect of allowing the supreme court to determine the costs which may be allowed a prevailing party in a civil action. However, unless attorneys fees are authorized by statute or by an agreement between the parties, they may not be awarded in actions for personal injury, death, or property damage relating to fault.

Section 12. DIRECTOR'S ANNUAL REPORT. AS 21.06.110 currently requires the director of the Division of Insurance to submit an annual report to the legislature. CSSB 211 (Fin) requires this report to include an analysis of medical malpractice insurance rate changes occurring as a result of court decisions in the state.

Section 13. REPEALERS. 1) AS 09.17.010(c) would be repealed, to make the limit on noneconomic damages in section 1 applicable to all injuries. Currently, the limit on noneconomic damages does not apply to damages for disfigurement and severe physical impairment.

2) CSSB 211 (Fin) also repeals AS 09.17.040(c), which allows parties to agree to compute the award of future damages under

the rule adopted in Beaulieu v. Elliott, 434 P. 2d 665 (Alaska 1967). That case held that income taxes should be deducted from the allowance for past lost wages, but not from the allowance for inflation or for future lost wages. It further made no allowance for inflation or for future normal wage increases and approved the use of a per diem formula in computing damages for pain and suffering.

Section 14. REPORT. CSSB 211 (Fin) requires the Department of Law, with the assistance of the Department of Commerce and Economic Development, to report annually to the legislature on closed insurance claims and insurance company finances.

Section 15. APPLICABILITY OF ACT. This Act applies to all causes of action which accrue after the effective date.

Section 16. SEVERABILITY. If any provision of this Act is held invalid, the remainder of the Act is not affected.

Section 17. EFFECTIVE DATE. This Act takes effect immediately.

HOUSE LABOR AND COMMERCE COMMITTEE
ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
(907) 465-3892
Chairman-Representative Dave Donley

May 3, 1988

MEMORANDUM

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Explanation of proposed CS for SB 2.1

Before you today is a proposed House Labor and Commerce CS for SB 211, drafted in response to public testimony received during the last week of public hearings before our Committee and testimony received during the interim public hearing and statewide teleconference we hosted on November 13, 1988.

The changes in the proposed CS from the version of SB 211 that passed the Senate are:

1. Deletes Section 1. (lowered the cap on noneconomic damages from $500,000 under current law to $100,000).

2. Deletes Section 2. (limits the standards for award of punitive damages to only cases involving fraud, malice, gross negligence, or reckless disregard).

3. Leaves Section 3 unchanged - becomes Section 1 of the proposed CS. (plaintiff cannot receive damages if they were involved in a crime (FELONY) at the time they were injured and the crime (FELONY) substantially contributed to the injury or death).

4. Leaves Section 4 unchanged - becomes Section 2 of the proposed CS. (allows plaintiff to recover damages if person liable for their injuries was engaged in the commission of a crime or has been convicted of the crime).

5. Deletes Section 5. (allows either party to request periodic payments rather than only the plaintiff, as under current law).

6. Deletes Section 6. (amends section of law governing payment of damages by requiring judgement to include any increases in future payments for anticipated inflation).

7. Leaves Section 7 unchanged - becomes Section 3 of the proposed CS. (extends immunity from liability to members of the board of directors or an officer of an electric or telephone cooperative except for gross negligence).

8. Deletes Section 8. (repeals and reenacts collateral benefits language in existing statute).

9. Rewrites Section 9 (becomes Section 4 of the proposed CS) to establish three tiers of liability:

   (1) Strict joint and several liability if action involves an intentional tort, toxic or hazardous waste, environmental pollution or damage, violation of state or federal antitrust statutes, a party who acted in consort or conspired with another party, or where the plaintiff is fault free.

   (2) Modified joint and several liability if damages result from a breach of contract, manufacture and sale of a defective product, operation of an aircraft or motor vehicle, a land sale practice, a transaction involving a security, medical malpractice, medical expenses, an injury for which the party is strictly liable, vicarious liability imposed on the party, a construction project, an injury to an employee and the party is not the employer, and administrative hearings, and design professionals [illegible] mitigation of [illegible] environmental pollution cleanup

   (3) Strict several liability, if the party is not jointly and severally liable under (1) and (2).

10. Deletes Section 10. (definition of economic and noneconomic losses).

11. Deletes Section 11. (attorney fees may not be awarded to a party in a civil action (UNLESS THE CIVIL ACTION IS CONTESTED WITHOUT TRIAL, OR FULLY CONTESTED AS DETERMINED BY THE COURT)).

12. Rewrites Section 12. (becomes Section 5 of the proposed CS) relating to the Division of Insurance Directors annual report to the Legislature to include an analysis of rate changes for commercial and professional liability and workers' compensation insurance occuring as a result of any recent changes in law, including court decisions in the state involving personal injury or death, and actions or suggested actions to mitigate such rates.

13. Deletes Section 13. (repeals AS 09.17.010(c) - limits on noneconomic damages do not apply to disfigurement and severe physical impairment, and AS 09.17.040(c) - rules governing determining computation of future economic damages).

14. Rewrites Section 14. (becomes Section 6 of the proposed CS) relating to an annual report to the Legislature from the Department of law, with assistance of the Department of Commerce and Economic Development in cooperation of all state agencies, to delete ambiguous language and to include a report on the status of pending civil cases filed by the state against liability insurers and recommended changes to state occupational licensing laws that are intended to reduce civil litigation based on malpractice.

15. Leaves Section 15 unchanged - becomes Section 7 of the proposed CS. (applicability).

16. Deletes Section 16. (Severability clause).

17. Leaves Section 17 unchanged - becomes Section 8 of the proposed CS. (Effective date).

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HCS CSSB 211 (L&C)
PUBLISH DATE: ______

FISCAL NOTE

REQUEST:

Revision Date: 5/4/88
Title: An Act relating to civil liability
Sponsor: Labor and Commerce
Requester: Labor and Commerce

Agency Affected: Commerce & Econ. Dev.
BRU: Division of Insurance
Components: Public Protection

EXPENDITURES / REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	350.0	300.0	250.0	250.0	250.0	250.0
SUPPLIES						
EQUIPMENT						
LA[illegible] & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	350.0	300.0	250.0	250.0	250.0	250.0

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
CAPITAL						

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
REVENUE						

FUNDING: (Thousands of dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND	350.0	300.0	250.0	250.0	250.0	250.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The analysis required in Section 5 for the Director's Annual Report involves a legal and actuarial review of court decisions and an analysis of rate changes resulting from those decisions. This requires a review that present

(CONTINUED - NEXT SHEET)

Prepared by: Donald P. Koch
Division: Insurance
Phone: 465-2571
Date: 5/5/88

Approved by Commissioner: J. Anthony Smith
Agency: Department of Commerce and Economic Development
Date: 5/5/88

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

1628D-1/050588a

ANALYSIS - (CONTINUED)

staff does not have the needed expertise to conduct. The scope of the analysis is not sufficiently clear to give greater precision to the fiscal impact of this proposal. We estimate that a review could be done by an independent actuarial firm with legal assistance. The depth of review would be subject to negotiation and design. We have estimated $250,000 per year for this work. The remaining $100,000 in FY 88 and $50,000 in FY 89 is for participation in the effort required in Section 6. This section requires a report by the Department of Law, which will need the assistance of the Division of Insurance. This participation will require a substantial data collection and analysis effort by the division which it is not geared to accommodate. We expect also to contract for the necessary assistance to develop and implement methods to acquire the data and analyze same.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 211 (Fin)
PUBLISH DATE: Senate 3/24/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: Relating to civil liability amending Civil Rule 82
Sponsor: Senate Judiciary
Requestor: Senate Finance

Agency Affected: Commerce & Econ. Dev.
BRU: Division of Insurance
Components: Public Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	0	25.0	0	0	0	0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	25.0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND	0	25.0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Rick Halford
Division: Senator Rick Halford, Co-chairman Senate Finance Committee
Phone: 465-4958
Date: 3/23/88

Approved by Commissioner:
Date:
Agency:

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

page ___ of ___

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: CSSB 211 (Fin)
Publish Date: Senate 3/24/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act Relating to Civil Liability
Sponsor: Faiks, Abood, Bennett, et al.
Requestor:

Agency Affected: Department of Administration
BRU: Division of Risk Management
Components: Risk Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	(306.0)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	(306.00)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	0.0	(306.00)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
TOTAL	0.0	(306.00)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME	0.0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0.0	0.0	0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)

The final benefit is impossible to accurately project, given that it will only affect liability not yet incurred. Based on the State's past liability claims experience, we project a 20% reduction in estimated ultimate loss and loss expense per fiscal year. The attached projection details the calculations using the State of Alaska's actuarial experience.

Prepared By: Don Hitchcock
Division: Risk Management
Phone: 465-2180
Date: January 18, 1988

Approved by Commissioner: John M. Andrews
Agency: Department of Administration
Date: 1/23/88

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
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- Impacted Agency(ies)

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FISCAL NOTE ANALYSIS
FOR SB 211

CASH FLOW SAVINGS ESTIMATED BY FISCAL YEAR

YEAR OF SAVING	YEAR OF OCCURRENCE						
	1988	1989	1990	1991	1992	1993	TOTAL
FY 88	-0-						
FY 89		306.0					306.0
FY 90		274.0	384.0				658.0
FY 91		360.0	342.0	480.0			1,182.0
FY 92		336.0	448.0	428.0	600.0		1,812.0
FY 93		252.0	420.0	558.0	534.0	750.0	2,514.0
FY 94			316.0	526.0	698.0	668.0	
FY 95				394.0	656.0	872.0	
FY 96					492.0	820.0	
FY 97						616.0	
Future		874.0	1,092.0	1,366.0	1,706.0	2,132.0	
TOTAL		2,400.0	3,000.0	3,750.0	4,686.0	5,858.0	

These represent estimated future payments pattern over a twelve year payout period, i.e., each year.

12 months	12.8%
24 months	11.4%
36 months	14.9%
48 months	14.0%
60 months	10.5%
Balance	36.4%

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: CS SB 211(Fin)
Publish Date: Senate 3/24/88

Revision Date:
Title: An act relating to civil liability...
Sponsor: Faiks, Abood, et al
Requestor: Judiciary

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services	....	....	....	....	....	....
Travel	....	....	....	....	....	....
Contractual	....	....	....	....	....	....
Supplies	....	....	....	....	....	....
Equipment	....	....	....	....	....	....
Land & Structures	....	....	....	....	....	....
Grants & Claims	....	....	....	....	....	....
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	....	....	....	....	....	....
REVENUE	....	....	....	....	....	....

FUNDING: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	....	....	....	....	....	....
Other	....	....	....	....	....	....
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Full-time	....	....	....	....	....	....
Part-time	....	....	....	....	....	....
Temporary	....	....	....	....	....	....

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 03/05/88

Approved by: Arthur H. Snowden, II, Administrative Director Date: 03/05/88
Agency: Alaska Court System

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LEGISLATIVE FINANCE

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 211 (Fin)
PUBLISH DATE: Senate 3/24/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: Relating to civil liability and amending Civil Rule 82
Sponsor: Senate Judiciary
Requestor: Senate Finance

Agency Affected: Dept. of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Rick Halford
Division: Senator Rick Halford, Co-chairman Senate Finance Committee
Phone: 465-4958
Date: 3/23/88

Approved by Commissioner:
Date:
Agency:

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM May 4, 1988

SUBJECT: Civil liability - HCS CSSB 211(L&C)

TO: Representative Dave Donley

FROM: Michael F. Ford *M.F.*
Legislative Counsel

I wanted to bring two issues to your attention regarding HCS CSSB 211(L&C). First, AS 09.17.080(d)(2)(M) in section 4 of the bill appears to require certain environmental damages be awarded under a modified joint and several liability rule. In that same section, these damages appear to fall under a rule of pure joint and several liability under AS 09.17.-080(d)(1). It may be necessary to further amend (d)(1) to provide an exception for (d)(2)(M) if that is the intention of the committee. Second, the language in section 5 regarding insurance rate changes violates the single subject and title requirements of Article II, section 13 of the Alaska Constitution. The analysis of insurance rate changes resulting from changes in statutes is clearly not within the title of the bill. It includes subjects not necessarily related to civil liability, which creates a double subject problem.

Please contact me if you have further questions.

MFF:bb
b5/095

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/31/88

FURTHER REFERRALS: Judiciary
Finance

DATE: 5/3/88

The Labor & Commerce Committee has considered CSSB 211(Fin)am

"An Act relating to civil liability; and providing for an effective date."

RECOMMENDS:

[X] replace with HCS CSSB 211 (L&C) [X] the same title
[ ] attached amendment(s) [ ] a new title

[ ] do pass
[ ] do not pass
[X] no recommendation
[ ] individual recommendations
[ ] additional referral to the ____________ Committee

ADOPTS: [ ] ________letter of intent

ATTACHES NEW FISCAL NOTE(s):

[X] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis

[ ] same as previous fiscal note published ____________
[ ] same as previous zero fiscal note published ____________

SIGNING DO PASS:

Dave Donley (as amended)

SIGNING OTHER RECOMMENDATIONS:

[signature] Ellis no rec
[signature] no rec
[signature] do not pass as amended

Dave Donley
Chairman's signature

COMPARISON OF RESULTS IN JUSTICE CASE

California

(California WITH Tort Reform)

Item	Amount
$32,000 per year for life expectancy of 42 years	$305,619
$75,000 payment on July 1, 1995	28,113
$200,000 payment on July 1, 2005	28,101
$400,000 payment on July 1, 2015	22,125
Present value of future payment as of July, 1985	$383,958
Plus cash payment on July 1, 1985	50,000
Plus attorney fees present value as of July 1, 1985	130,000
Plus costs	15,000
TOTAL	$578,958

Alaska

(Alaska WITHOUT Tort Reform)

Item	Amount
Total Jury Verdict	$1,449,160
Plts. 10% comparative neg.	-144,916
Subtotal	1,304,244
Present value of L.A. Hospital settlement as of July, 1985	-210,201
Subtotal	1,094,043
Collateral benefits pursuant to AS 09.55.548 (b)	- 89,378
Subtotal	1,004,665
Prejudgment Interest @ 10.5% per annum from May 30, 1982 (date of injury) through March 16, 1988	683,534
Subtotal	1,688,199
Rule 82 (a) attorney fees	171,319.90
JUDGMENT	1,859,518.90
Plus Costs (not yet known)	(+)

TORT REFORM WORKS!

In California, the plaintiff receives $2,214,000 from a structured settlement for a present cost of $578,950.00.

In Alaska, the plaintiff receives $1,859,518.90 (+) for a present cost of $1,859,518.90 (+).

The cost to health care consumers in Alaska is three times the amount that it is in California.

Senate Bill 211 will enact reforms benefitting all Alaskan insurance consumers while protecting those the civil justice system serves.

In November of 1987, MICA went to trial on the Justice v. Humana Hospital case. MICA insured each of the three defendants including the hospital on a "tail" policy purchased when Humana bought Community Hospital. The two physician defendants were dropped the day before trial by the plaintiff's attorneys and the hospital became a single defendant.

CASE FACTS:

Justice was seen in the emergency room on two occasions in May of 1982, from a fall in an Anchorage bar. The visits were both in the middle of the night and 25 hours apart. 48 hours later the patient presented himself to Los Angeles County Hospital where he was admitted and discharged the next day. He was admitted yet again five days later, discharged, and finally readmitted twelve days later comatose with a right sided hemiplegia.

LEGAL ACTION:

Separate suits were filed in California and later in Alaska. L.A. County made a settlement with an agreement that if the plaintiff was successful in Alaska, L.A. County could recover 1/3 of the Alaska award to a maximum of $300,000.

TRIAL RESULTS:

MICA tried to join L.A. County Hospital in a joint defense. Certainly they were responsible for the last and longest treatment. Our court would not allow this and further would not allow any negligence by L.A. County to be a defense. The outcome was a verdict with the plaintiff 10% negligent and Humana 90% negligent. The verdict was an award totaling 1.3 million with add-ons for prejudgment interest and Rule 82 increasing the award to in excess of 2 million dollars.

TORT REFORM EFFECTS:

The cost to Alaska to pay for the plaintiff who had already received retribution in California is substantial Tort Reform legislation would have had an absolute impact on the results of this case. Under Tort Reform legislation the extent of L.A. County's negligence would have to be considered, the percentage of fault for Humana would be affected under joint and several liability, collateral source from the L.A. settlement would have to be offset and finally a cap on non-economic losses would have impacted the judgment.

MICA feels this is a excellent representation of the positive effects of California tort reform. Because of our own laws, Alaskans paid in the extreme for a plaintiff that had been compensated elsewhere. Our analysis of the Justice case leads us to the irrevocable conclusion that tort reform legislation will decrease costs to Alaska and its citizens.

ALASKA STATE LEGISLATIVE COMMITTEE

CHAIRMAN
Miss Patricia Oakes
Box 30009
Central, AK 99730
(907) 520-5227

VICE CHAIRMAN
Mr. R. W. Pavitt
130 Seward Street, #205
Juneau, AK 99801
(907) 586-2066

SECRETARY
Mrs. Marian R. Triggs
475 Panorama Drive
Fairbanks, AK 99712
(907) 457-4386

May 8, 1988

Hon. Jund Sund, Chairman
House Judiciary Committee

Dear Chairman Sund:

Although I will be unable to testify at this afternoon's hearing on the Committee Substitute for SB 211, I wish to go on record as spokesman for the Alaska Legislative Committee of the American Association of Retired Persons.

AARP and the State Legislative Committee, representing the legislative interests of the 28,000 older Alaskans who belong to AARP are opposed to the passage of SB 211 this year. We point out that in no state where tort reform has been adopted have liability insurance premiums shown any downward movement.

It is our belief that since the State of Alaska has joined in the suit against the insurance industry, the legislature should await the outcome of that litigation before adopting any legislation on the subject.

Thank you for this opportunity to make our opinion known to the Committee.

Respectfully,

Bob Pavitt

Bob Pavitt

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

John T. Denning *President* Jack Carlson *Executive Director*

ALASKA STATE LEGISLATIVE COMMITTEE

CHAIRMAN
Miss Patricia Oakes
Box 30009
Central, AK 99730
(907) 520-5227

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SECRETARY
Mrs. Marian R. Triggs
475 Panorama Drive
Fairbanks, AK 99712
(907) 457-4386

April 27, 1988

Rep. Dave Donley, Chairman
House Labor & Commerce Committee
Room 113, Capitol
Juneau, Alaska

Dear Chairman Donley:

Inasmuch as I will be unable to attend the continued hearing on SCSSB 211 (Finance) presently before your committee, I am submitting the following testimony in writing, and will appreciate it being added to the hearing record on the bill.

My name is Bob Pavitt, and I'm Vice Chairman of the **AARP ALASKA STATE LEGISLATIVE COMMITTEE** that represents the legislative interests of the 27,000 older Alaskans who belong to AARP.

Our overall concern is that the legislation before you will not accomplish its objective (the lowering of liability insurance premiums), but that it will do substantial violence to the rights of injured parties to recover reasonable compensation for their injuries.

We have serious concerns with 2 sections of the bill--specifically Section 1 and Section 5.

Section 1 We believe that the reduced limitation on non-economic damages (from $500,000 to $100,000) may be discrimminatory with respect to older people, who do not have a great earning potential in their retirement years.

Section 5 We are concerned with the removal of the term "injured party" in the requesting of periodic payments. Obviously, the prospect of a 20 year payoff is not very appealing to a 75-year old injured party.

On the very day (March 23rd) that I testified on this bill before the Senate Finance Committee, the Anchorage Daily News carried the story of a suit filed by the Attorneys General of 8 states against dozens of insurance companies claiming that the industry had conspired to create the current liability crisis. I respectfully submit to you that it might be well to await the results of that litigation before pressing forward with what we consider to be flawed tort reform legislation. Thank you for the opportunity to testify.

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

John T. Denning *President* Jack Carlson *Executive Director*

TORT REFORMS ENACTED IN 1986

	Limits on NonEconomic Damages	Limits on Punitive Damages	Limits on Total Damages	Modified Joint/ Several	Elimination of Joint/ Several	Elimination of Collateral Source	Attorney Fee Regulation	Periodic Payment of Damages	Modified Statute of Limitations	Itemized Verdicts	Pretrial Screening
Alabama											
Alaska	✓	✓		✓		✓		✓		✓	
Arizona											
Arkansas											
California					✓						
Colorado	✓	✓			✓	✓			✓		
Connecticut				✓		✓	✓	✓		✓	
Delaware											
Florida	✓	✓		✓		✓		✓		✓	
Georgia											
Hawaii	✓			✓		✓		✓	✓		
Idaho											
Illinois		✓		✓		✓					
Indiana						✓					
Iowa		✓						✓			
Kansas	✓		✓			✓	✓			✓	✓
Kentucky											
Louisiana											
Maine							✓	✓	✓		✓
Maryland	✓							✓		✓	
Massachusetts	✓					✓	✓		✓	✓	
Michigan	✓			✓		✓		✓	✓	✓	✓
Minnesota	✓	✓				✓			✓	✓	
Mississippi											
Missouri	✓			✓				✓		✓	
Montana											
Nebraska											
Nevada											
New Hampshire	✓	✓					✓		✓		
New Jersey								✓			
New Mexico											
New York				✓							✓
North Carolina											
North Dakota											
Ohio											
Oklahoma		✓									
Pennsylvania											
Rhode Island						✓		✓			
South Carolina											
South Dakota		✓	✓					✓			
Tennessee											
Texas											
Utah	✓				✓						
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Virginia									✓		
Washington	✓			✓			✓	✓	✓		
West Virginia	✓			✓					✓		
Wisconsin	✓						✓			✓	✓
Wyoming					✓						✓

JOINT AND SEVERAL LIABILITY

Questions and Answers

1. What is joint and several liability?

   This is a rule of law that says that if two or more people *combine* to cause harm to another, they are each liable to their victim for the entire amount.

2. What is the reason for the rule?

   Joint and several liability is a rule of FAIRNESS. It applies *only* when each wrongdoer has contributed in causing ***all*** of a victim's damages. Because each wrongdoer has in fact caused all of the victim's damages, it is only fair that the law make each of them responsible to the victim for the entire loss.

3. Why should one wrongdoer pay all the damages?

   It is only fair to make a person who has caused all the damages pay for the losses he has caused, even if others may also be responsible. However, in most cases, one wrongdoer does not pay all the damages. If one wrongdoer compensates the victim, that person can force the others responsible to reimburse him for their share. Joint and several liability puts the burden for distribution of a loss among *those who have caused it*, and not on an innocent victim.

4. Does Alaska have *pure* joint and several liability?

   No! In 1986, the state legislature adopted a *modified* form of joint and several liability, which limits a wrongdoer's liability to no more than twice his percentage of fault. In other words, if a wrongdoer is found to be 10% responsible for harming a victim, he would only have to pay 20% of the damages. This would mean that 80% of the damages must be borne by the innocent victim.

5. Why shouldn't the victim prove the degree of fault of everyone whose fault contributes to his injuries?

In most cases where two or more persons concur to cause damages to a victim, it is extremely difficult, if not impossible, for a victim to prove degrees of fault among wrongdoers. When each wrongdoer concurs to cause the victim's entire loss, it is fair to make each wrongdoer responsible for the whole.

6. How long can a victim wait to sue someone who has harmed them?

Ordinarily, the victim only has two years from the time of the accident or loss. If wrongdoers are liable under joint and several liability, their victim, by suing one wrongdoer, can preserve his rights against the rest. This is a very important right in Alaska, since many times an out-of-state wrongdoer cannot be located in time to meet the deadline for filing suits.

If the rule that those who combine to cause a victim's loss are liable for the entire loss is changed, then many wrongdoers would escape liability completely, since they could not be located in time for a victim to preserve his rights against them.

7. What happens if one guilty person has no money to compensate their victim? Under joint and several liability, who bears the risk of insolvency?

Under *pure* joint and several liability, the risk of insolvency is on the wrongdoers rather than on the innocent victim. The law has for many generations recognized that society is best served by having the wrongdoers bear the loss, because, to be held jointly liable, each must have been found to have caused all the damage. If the rule were abolished, the innocent victim would bear the loss.

Under Alaska's *modified* joint and several liability, since someone cannot be held liable for more than twice their percentage of fault, both the wrongdoer *and* the victim bear part of the risk of insolvency.

8. <u>Why is it important that one of the responsible parties be solvent</u>?

It is important that one of the responsible parties be solvent, so that innocent victims can be compensated for the wrongs done to them.

9. <u>Can you give us some examples</u>?

a. A plane crashes because an engine part was defective and because the airline did not properly inspect and maintain the engine. If the part would not have been defective, <u>or</u> the inspection had been properly performed, the accident would not have happened. If the part manufacturer is insolvent, under *pure* joint and several liability, the families of the passenger can be fully compensated by the airline for their loss. Without joint and several liability, they may receive only 50% of their damages from the airline, even though the airline's failure to inspect <u>directly</u> caused the plane to crash.

b. Leaching of toxic chemicals from a hazardous waste dumpsite has polluted a well which supplies water to a large housing project with expensive homes. Due to the carcinogenic nature of the chemicals, homeowners can no longer even bathe or wash their clothes in the water, let alone use it for cooking or drinking. There is an unusually high incidence of cancer and other serious ailments among subdivision residents, and their once-expensive homes are now worth absolutely nothing.

The dumpsite has been in use for over 15 years, and has changed hands several times. There are no records of who has been dumping, which chemicals, and in what quantities over that period of time. Although many companies have used the site, there are records for only one company which has been dumping PCB's, known carcinogens, during the past 2 years. If this is the only company that can be located, should the homeowners be left to bear the rest of the burden for their losses?

c. A car and a gasoline transport truck both enter an uncontrolled intersection without stopping and collide, causing the gas to ignite and burn adjoining buildings. The car has minimal insurance, and the car's driver has no assets to speak of. Each driver caused all the harm; under joint and several liability, each driver is liable for the whole. Without joint and several liability, the property owners

would bear 50 percent of their loss even though they contributed nothing to the accident!

10. Why should a person who is found to be 10 percent at fault be in a position to pay 100 percent of the damages?

    First of all, in Alaska, **THIS IS NOT POSSIBLE.** Under current law, someone who is found to be 10 percent at fault would not pay more than 20 percent of their victim's damages.

    Even under the *pure* joint and several liability enforced by most other states, this is an infrequent occurrence, although it can happen -- particularly in a complicated case with *multiple* wrongdoers. The greater the number of wrongdoers, the more likely the percentage of fault of each will be low.

    You must keep in mind, however, that -- both in Alaska and in other states -- the 10 percent wrongdoer, to be liable in the first place, must have been found to have been a cause of *all* of the victim's damages. If joint and several liability were abolished to protect the 10 percent wrongdoer, it would also protect those who are 40, 50 and 60 percent at fault , as explained in the examples.

    Also keep in mind that the 10 percent wrongdoer has the right to force the other wrongdoers to reimburse him for any damages beyond his percentage of fault. This places the burden where it should rightfully be -- on someone who caused the harm, rather than on someone already harmed through no fault of their own.

11. How much would the law be changed if wrongdoers who concur in causing damage were not responsible for the entire loss they caused?

    This would be an extremely significant change in the law. It would overturn the carefully balanced legislative policy and design that has governed Alaska and other civil law jurisdictions since the time of the Romans, some two thousand years ago. It would also overrule thousands of well-reasoned cases where the rights of the parties were carefully evaluated.

NATIONAL CAMPAIGN AGAINST TOXIC HAZARDS

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EXCEPTIONS TO ABOLITION OF JOINT AND SEVERAL LIABILITY

1. Hazardous waste
2. Intentional torts
3. Where defendants acted in concert
4. Where defendants conspired to commit a wrongful act
5. Where defendant's share of judgment is uncollectable
6. Economic damages
7. Cases less than $25,000 worth of total damages
8. Fault-free plaintiffs
9. Land sale practices
10. Pollution control cases
11. Security transactoins
12. Anti-trust
13. RICO Act cases
14. Where defendant is more than 25% at fault
15. Environmental pollution
16. Toxic case
17. Aircraft accidents
18. Strict liability cases
19. Product liability cases
20. Motor vehicle accidents
21. Medical expenses
22. Medical malpractice cases
23. Where defendant is more than 50% at fault
24. Situations not found in legislation and "having sound basis in public policy"
25. Defendants strictly liabile for the manufacture and sale of defective product
26. administrative hearings
27. workers' comp cases which implead third parties
28. construction cases
29. contract cases
30. If damages cannot be apportioned
31. Radioactive waste
32. manufacture of generic products
33. business torts

JOINT AND SEVERAL LIABILITY

ABOLITION OR MODIFICATION
AS OF

JULY 1987

ALABAMA

Contributory no changes

ALASKA

1986 - any defendant less than 50 % at fault cannot be held jointly liable for more than two times the percentage of fault.

ARIZONA

1987 - Abolished except for:

1. intentional torts
2. hazardous waste

ARKANSAS

No changes

CALIFORNIA

1986 - Abolished for non-economic damages (Prop. 51).

COLORADO

1986 - Total abolition
1987 - Except in cases in which the defendants:

1. acted in concert
2. conspired to commit a wrongful act.

CONNECTICUT

1986 - Total abolition except where the defendants share of judgment is uncollectable.
1987 - Except for economic damages.

DELAWARE

No changes

FLORIDA

1986 - Abolished except for:

1. cases less than $25,000 worth of total damages
2. intentional torts
3. fault free plaintiffs
4. land sale practices
5. pollution control cases
6. security transactions
7. anti-trust
8. RICO Act cases

GEORGIA

1987 - Abolished, however, a jury may specify particular damages and award a jury verdict severally.

HAWAII

1986 - Abolished in non-economic damages cases except for:

1. a defendant is more than 25 % at fault
2. intentional torts
3. environmental pollution
4. toxic cases
5. aircraft accidents
6. strict liability cases
7. product liability cases
8. motor vehicle accidents

IDAHO

1987 - Abolished except for:

1. intentional torts
2. hazardous wastes

ILLINOIS

1986 - Abolished except for:

1. defendants more than 25 % at fault
2. medical expenses
3. medical malpractice cases
4. environmental cases

INDIANA

1984 - Total abolition

IOWA

1984 - Limited the doctrine so it would not apply to defendants found to bear less than 50 percent of total fault assigned to all parties, leaving them liable for their several amount. Iowa 1984 Act, Secs. 668.1-668.3, 619.17.

KANSAS

1978 - Abolished case law. Brown v. Keill, 580 P.2d 867 (Kan. 1978)

KENTUCKY

No changes

LOUISIANA

1987 - Abolished to the extent that a less than 20 percent defendant would not be responsible for more than 50 percent of the damages awarded.

MAINE

No changes

MARYLAND

Contributory - No changes

MASSACHUSETTS

No changes

MICHIGAN

1986 - The doctrine is fully applicable if the plaintiff is fault free. If a plaintiff is attributed with any degree of fault the doctrine applies as follows:

1. a defendant is severally liable for the degree of fault the court or jury assessed; and
2. there is joint liability for the degree of fault the unpaid portion at the same percentage of fault assessed.

MINNESOTA

No changes

MISSISSIPPI

No changes

MISSOURI

1987 - If the defendant is less at fault than the plaintiff, the defendant is limited to two times the level of fault assessed.

MONTANA

1987 - Abolished except for:

1. defendants more than 50 % at fault

NEBRASKA

No changes

NEVADA

1987 - Abolished except for:

1. product liability cases
2. toxic wastes
3. intentional torts
4. cases in which defendants acted in concert

NEW HAMPSHIRE

1981 - Abolished the doctrine in favor of several liability. N.H. Rev Stat. Ann. Sec. 507.7-a.

NEW JERSEY

No changes

NEW MEXICO

1981 - Abolished by case law. Abolition with exceptions.

1987 - Abolished except for:

1. intentional torts
2. situations not found in the main text of the legislation and "having sound basis in public policy"
3. among defendants who have a relationship imposing vicarious liability
4. defendants held strictly liable for the manufacture and sale of a defective product.

NEW YORK

1986 - Abolished in non-economic damages cases except for:

1. a defendant who is more than 50 % at fault
2. administrative hearings
3. in workers' compensation cases which implead third parties
4. intentional torts
5. toxic torts
6. product liability cases where the responsibility cannot be joined to the action
7. construction cases
8. contract cases
9. motor vehicle cases

NORTH CAROLINA

Contributory no changes

NORTH DAKOTA

1987 - Abolished except for:

1. intentional torts
2. cases in which defendants acted in concert

OHIO

1980 - Total abolition (Ohio Rev Code)

OKLAHOMA

1978 and 1981 - Case law which limits the rule to cases where damages cannot be apportioned or when plaintiff is not at fault.

OREGON

1987 - Limits the doctrine to defendants who are 15 percent or more responsible. The doctrine applies in full in pollution, hazardous waste and radioactive waste cases.

PENNSYLVANIA

No changes

RHODE ISLAND

No changes

SOUTH CAROLINA

Contributory no changes

SOUTH DAKOTA

1987 - Limited joint for those who are 50 % or less responsible for a wrongful action. Defendants pay no more than twice their percentage of fault.

TENNESSEE

Contributory - No changes

TEXAS

1987 - In order to be held jointly liable, a defendant's percentage of responsibly must reach certain thresholds:

1. In negligence and malpractice cases:
   a. "Texas Rule" - defendant's percentage of responsibility must be greater than the plaintiff's; and
   b. 21 % threshold - defendant's percentage of responsibility must be greater than 20 %.
2. In products liability cases a defendants must reach the 21 % threshold.
3. Where the plaintiff is fault free the defendant must reach a 11 % threshold.
4. There is no threshold for defendants in pollution injury cases and toxic torts.

UTAH

1986 - Total abolition.

VERMONT

1981 - Abolished the doctrine in favor of several liability. Vt. Stat. Ann. Tit. 12, Sec. 1036.

VIRGINIA

Contributory no changes

WASHINGTON

1986 - Abolished except for:

1. fault free plaintiff
2. defendants acted in concert
3. hazardous waste
4. business torts
5. manufacturing of generic products

WEST VIRGINIA

1980 - Abolition except in cases were defendants are more than 25 % at fault.

WISCONSIN

No changes

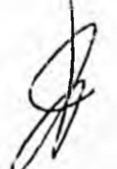
WYOMING

1986 - Total abolition

CITIZENS COALITION FOR TORT REFORM

907-561-6250

April 15, 1988



APR 2 ... 1988

Senator Jalmar (Jay) M. Kerttula
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Senator Kerttula:

Please find enclosed a breakdown of the cost of a recent verdict in favor of the plaintiff and against Humana Hospital and MICA, The Medical Indemnity Corporation of Alaska.

This case is an example of what really happens in our civil courts. Many plaintiff's lawyers have told you that there are not judgements in the State of Alaska in excess of one million dollars. Here, before you, is an example of one. I am certain that many of you have heard Mr. Roller, from the Division of Insurance, testify that jury verdicts are only the tip of the civil litigation iceberg. Below the water level on this iceberg, where we cannot see or measure, are the settled cases. Nevertheless, jury verdicts serve as bench marks, or "shadow verdicts", if you will, and it is against these verdicts that insurance companies attempt to settle claims. There are some interesting facts which can be read between the lines in an evaluation of this judgement.

For the record, the Los Angeles County settlement was $650,000.00 with the provision that the plaintiff would have to return $300,000.00 to California if successful in his Alaska lawsuit. The plaintiff was clearly far more successful in Alaska than he was in California. Please note the difference between the Alaska award of $1,859,518.90 and the California award of 650,000.00. This seems "clear and convincing evidence" of the value of tort reform in California vs. the lack thereof in Alaska.

What is of further interest is that the California settlement was reduced to present value - <u>by the Alaska Court</u> - when it subtracted the amount from the verdict awarded in Alaska. At the same time the Alaska court computed the costs for economic and non-ecomonic costs on the basis of future economic value - as opposed to again using present economic value - when it came to making the award. It seems to me this is a clear inconsistency on the part of Judge Gonzales. Either we should calculate everything as present value or at future value, but not be selective in calculating the deductions at present value and awards at future value.

P.O. Box 201668 • Anchorage, Alaska 99520

Please note the cost of pre-judgement interest of $683,534.00. The Alaska tort reform action in 1986 mandates pre-judgement interest be calculated from the date of filing. Had the 1986 law been in effect in 1982, there certainly would have been substantially less prejudgement interest added to the award in this case. It is also very important to note there was no action taken on the Alaska case for a period of one year while the litigation was pursued in California. The one year lack of action in Alaska forced the pre-judgement interest award to increase $117,446.

Finally I would like to draw your attention to Rule 82 attorney's fees. Please note in the Alaska case alone, the cost was $171,319.90. In its history, MICA has paid out nearly half a million dollars in Rule 82 fees. To its certain knowledge, MICA has never been successful in recovering a single dime for Rule 82 fees when it prevailed. I think this illustrates clearly our contention that Rule 82 is a one-way street. It is awarded when there is a pocket to pick; when there is not a pocket, there is no award. The net effect is to increase the cost of awards by 10% or so in the State of Alaska. Further testament is the fact that we, the consumers, pay a premium rider for Rule 82 fees for every policy written in the State of Alaska.

Obviously the present liability crises is not over. The tort system is a clear and major part of the problem. I would urge your action on the Senate Bill 211, which is presently in Representative Donley's House Labor and Commerce Committee.

Sincerely,

David A. McGuire, M.D.
Chairman, Citizens' Coalition for Tort Reform

MKD03003/vv

Dr. McGuire
4

MICA Medical Indemnity Corporation of Alaska

ALEUT PLAZA
4000 OLD SEWARD HWY., SUITE 203
ANCHORAGE, ALASKA 99503

TO: MICA Executive Committee
MICA Claims Committee

FROM: Janet Johnston,
Claims Manager

DATE: March 17, 1988

RE: Judgement in Justice Case

At 2:00 p.m. this afternoon I was informed by Jim Delaney's office that Judge Gonzales had entered judgement in the Justice case in the amount of $1,859,518.90. That figure is inclusive of prejudgement interest and Rule 82 attorney fees but does not include plaintiff's costs which have yet to be determined at a cost hearing. I do not expect that those will exceed $100,000.

The judgement of was broken down as follows:

$ 1,449,160.00	Amount of the verdict
- 144,916.00	10% plaintiff contributory negligence
$ 1,304,244.00	Subtotal
- 210,201.00	Present value of L.A. County settlement as of July 1985
$ 1,094,043.00	Subtotal
- 89,378.00	Collateral medical benefits
$ 1,004,665.00	Subtotal
+ 683,534.00	Prejudgement interest at 10 1/2% from May 30, 1982 - March 16, 1988
$ 1,688,199.00	Subtotal
+ 171,319.90	Rule 82 attorney fees
$ 1,859,518.90	Final Judgement

To this final judgement figure will be added plaintiff attorney costs as they will be determined by the judge at a cost hearing to be held in the future.

DAVID A. McGUIRE, M.D.
Orthopedic Surgery
DIPLOMAT OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY
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April 15, 1988

RECEIVED
APR 22 1987

Dave Donley, Representative
House Labor & Commerce Committee
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Donley:

I am enclosing a recent memorandum from the staff at Providence Hospital. As you may know, the Supreme Court recently, in its Jackson vs Powers decision, allocated to the Hospital a non-delegable duty relative to care provided within the Emergency Room. This, in the view of the Sisters of Providence, has substantially increased their liability relative to malpractice actions against the Hospital. In their opinion, they already have an unacceptably high exposure, and the Supreme Court decision makes their continued operations untenable without enjoining physicians in the lawsuits provided.

Please note the second motion enacted by the Executive Committee of the staff of Providence Hospital, April 13, 1988. The unhappy fact of the matter is that continued escalation of liability exposure has brought the staff of Providence Hospital and the Administration of Providence Hospital, to very bitter loggerheads. There is more than a possibility that medical services are going to be curtailed as a result of this Supreme Court interpretation and as a result of the attendant liability.

Clearly there are at least two factors operating in this arena. The first is the magnitude of the liability, and the second is the distribution of the liability. Many may not quarrel that the distribution of the liability is appropriate relative to the Supreme Court's decision in Jackson vs Powers. Nevertheless, if that's the case, then the magnitude of the liability must be reduced or simply not tenable for the hospital to continue with the kind of loss exposure that it's had.

I am also enclosing correspondence between our Clinic, Anchorage Orthopedic Associates, and the other large orthopedic clinic in Anchorage, namely the Anchorage Fracture & Orthopedic Clinic. Again, I think the correspondence is self-explanatory. Nevertheless it's worth pointing out that from our point of view,(that is Anchorage Orthopedic Association), we cannot take the risk of interpreting films that are copies because they may miss some important detail. Anchorage Fracture & Orthopedic Clinic does not feel

they can release the films because they've had instances in which the films have been stolen, misplace, lost, etc. If litigation ensues and the films are not available, it's the physician's word against the patient and the plaintiff attorney. Clearly an untenable situation for "risk management". The immediate consequence to the citizens of the State of Alaska is that when I see a patient for a second opinion, I'm compelled to order new X-rays. These X-rays are an approximate cost of $150.00. Given that I see an average of five to ten patients in any given week for second opinions, the arithmetic becomes important.

Representative Donley, this is an important problem, and we cannot afford to continue to ignore it. I understand that the Attorney General is contemplating action against the insurance companies for anti-trust, etc. To the extent that such activities are responsible for the present state of affairs, we support that investigation. To say that that alone is sufficient is clearly short-sighted if not self-serving. I'm certain that you are well aware that the Medical Mutual Insurance Companies in the State of Alaska have nothing whatever to do with Aetna, SIGNA, or any of the other major insurance companies that are being part of this action. To say that the action on the part of those insurance companies has anything whatever to do with the current state of affairs so far as medical liability insurance is concerned is to obscure the issue.

In 1976 and '76, the liability crisis became acute within the State of Alaska. There was a period of time in which medical care was provided only on an emergency basis. There were patients who were denied care because of their affiliation with identifiable subsets of the community. This is an unhappy state of affairs and should not be allowed to occur again. I do not feel that we can afford to ignore any longer that 20 to 40% of the physicians in the State of Alaska are uninsured, and not by choice. The insurance is available, it's simply not affordable. Recent verdicts and settlements in malpractice actions illustrate the point. It's not clear to me that we can afford a system that allocates one individual $1.8 million dollars when he's already received $650 thousand from a settlement in California. The parents of a baby born in Ketchikan recently received $2.2 million dollars and the lawsuit continues. It doesn't take a genius to do the arithmetic to divide these kind of costs amongst the citizens of a state of 500,000 people. I urge your expeditious action to hold a hearing on Senate Bill 211 and the related issue of defining hospital liability.

Sincerely,

David A. McGuire, M. D.

DAM:li

T.B.R. OUTLINES OF ALASKA LAW

TORTS

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P.O. Box 1312
Juneau, Alaska 99802

1982-1

TORTS

PAGE

I. INTENTIONAL TORTS 1

A. Examples 1

1. Assault and Battery 1

2. False Imprisonment 1

3. Emotional Injury 2

4. Intentional Interference with Contract Rights 2

5. Trespass and Conversion 2

II. INJURY TO REPUTATION 2

A. Defamation 2

1. Definition of Libel 2

2. Privilege 3

III. NEGLIGENCE 3

A. Overview 3

1. Duty 3

2. Breach 4

3. Causation 4

4. Damages 4

5. Defenses 4

B. DUTY 4

1. Duty Not to Violate Legislative or Administrative Standard (Negligence _per se_). 4

2. Who is Liable 12

a) Respondeat Superior 12

b) Independent Contractor 12

F. Defenses to Negligence 13

1. Comparative Negligence 13

2. Immunities 14

3. Statute of Limitations 14

IV. PRODUCTS LIABILITY 15

A. Overview 15

B. Strict Liability in Tort 15

1. Duty 15

2. Breach 16

a) Defect in Manufacture 16

b) Defect in Design 16

c) Special Problems with Design Defect Cases 16

3. Causation 18

4. Damages 18

5. Defenses 19

C. Liability Based on Supplier's Negligence 19

1. Duty 19

2. Breach 19

3. Causation 20

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

02–576(2/77)

<u>TORTS</u>

<u>PAGE</u>

I. INTENTIONAL TORTS 1

A. Examples 1

1. Assault and Battery 1

2. False Imprisonment 1

3. Emotional Injury 2

4. Intentional Interference with Contract Rights 2

5. Trespass and Conversion 2

II. INJURY TO REPUTATION 2

A. Defamation 2

1. Definition of Libel 2

2. Privilege 3

III. NEGLIGENCE 3

A. Overview 3

1. Duty 3

2. Breach 4

3. Causation 4

4. Damages 4

5. Defenses 4

B. DUTY 4

1. Duty Not to Violate Legislative or Administrative Standard (Negligence <u>per se</u>). 4

2. Duty of the Owner and Occupier of Land.. 6

3. Duty of the Health Care Provider (Medical Malpractice Act AS 09.55.535-560)..... 7

4. Duty of the Common Carrier 8

5. Duty of the Common Carrier 8

6. Employer's Duty Regarding Defects in Machinery 8

7. Duty of Innkeeper/Bartender............. 9

8. Duty of a Bailee 10

C. Breach 10

1. Means of Establishing 10

2. _Res Ipsa Loquitur_ 10

D. Causation 10

1. Cause-In-Fact 10

2. Proximate Cause 10

E. Damages 11

1. What Damages Can Be Recovered........... 11

a) In General 11

b) Past Damages 11

c) Future Damages 11

d) Interest 12

e) Mitigation of Damages 12

f) Collateral Sources Rule 12

2. Who is Liable 12

a) Respondeat Superior 12

b) Independent Contractor 12

F. Defenses to Negligence 13

1. Comparative Negligence 13

2. Immunities 14

3. Statute of Limitations 14

IV. PRODUCTS LIABILITY 15

A. Overview 15

B. Strict Liability in Tort 15

1. Duty 15

2. Breach 16

a) Defect in Manufacture 16

b) Defect in Design 16

c) Special Problems with Design Defect Cases 16

3. Causation 18

4. Damages 18

5. Defenses 19

C. Liability Based on Supplier's Negligence 19

1. Duty 19

2. Breach 19

3. Causation 20

4. Damages 20

5. Defenses 20

D. Liability Based on Supplier's Representation . 20

1. Express Warrants of Fitness For a Particular Purpose 20
2. Statute of Limitations 21

E. Liability Based on Implied Warranty 21

1. Fitness for a Particular Purpose 21
2. Merchantability 21
3. Defenses on Personalty 22

V. IMMUNITIES AND SPECIAL STATUS PARTIES 22

A. State Tort Claims Act: The State As A Defendant AS 09.50.250 22

B. Suits Against Municipality AS 09.65.070 24

C. Family Immunity 24

D. Death and Survival 25

1. Wrongful Death AS 09.55.580 25

2. Survival Statute AS 09.55.570 25

3. Death or Injury to Minor AS 09.15.010 .. 25

E. Worker's Compensation 26

VI. CONTRIBUTION 26

A. Uniform Contribution Among Joint Tortfeasors Act AS 09.16.010-060 26

B. Indemnity 27

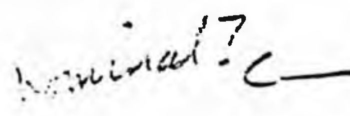
TORTS

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. Long 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).

Mallice 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.

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).

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).

3. Causation:

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

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).

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.

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.

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%.

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).

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

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).

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:

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).

F. Defenses to Negligence

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.

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.

B. Strict Liability in Tort.

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

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).

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

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

"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."

2. 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.

CORRECTION

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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

- Fitness for particular Purpose

E. Liability Based on Implied Warranty.

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 was sold.

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 959 (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. § 2-315; 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 09.30.250, 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 function 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 188 (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 employee 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 250 (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 guardians 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).

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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Juneau, Alaska 99811
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February 19, 1986

MEMORANDUM

TO: Representative Steve Rieger

ATTN: Lisa Rubenstein

FROM: Mark Torgerson MT
Legislative Analyst

RE: Insurance and Tort Reform
Research Request 86-089

You asked this agency to address a number of issues on tort reform, including:

- California's cap on medical malpractice damage awards;
- current regulation of insurance premiums in Alaska, and the effect of damage awards on insurance premiums;
- the impact of insurance rates on State commerce;
- the impact of tort claims on the State treasury; and
- tort reform efforts in other states and Congress.

We contacted private insurance companies, the Alaska Department of Insurance, the Alaska Department of Administrations Division of Risk Management, State and national medical associations, the American Trial Lawyers Association, the Insurance Services Office, and the National Association of Insurance Commissioners.

Effect of California's Limit on Damages in Medical Malpractice Cases

California's Legislature enacted the Medical Injury Compensation Reform Act (MICRA) in 1975. As you know, a section of the act limits the dollar damages for noneconomic losses incurred by an injured party in

a medical malpractice suit to $250,000.[1] According to Ron Neupauer, Underwriting Manager for the Medical Insurance Exchange of California (MIEC), the effect of the section's damage "cap" on jury awards, out-of-court settlements and malpractice insurance rates cannot be easily quantified. Mr. Neupauer explained that the statutory cap was appealed in the courts, and its constitutionality was questionable until the United States Supreme Court recently refused to hear an appeal from the state court, thereby affirming the law's validity. Mr. Neupauer asserted that the provisions in the law were not strictly followed or enforced because of this "constitutional cloud." Mr. Neupauer further stated that the law's effect on the size of damage awards and insurance costs may be discernible in the future.

A recent letter written by Jay Dee Michael of the California Medical Association provides the following information on the size of malpractice awards and on malpractice premiums in California:

	Nationwide	California
Average size of malpractice awards	$974,000	$396,000
Premium increase in average policy since 1975	300 percent	150 percent
Premium increase in average policy in 1985	33 percent	15 percent

We contacted Mr. Michael, who was unsure of the year(s) used to calculate the size of the award and the source of the information. We are attempting to verify these data and will forward our findings to you.

The above average shown for California malpracitice awards conflicts with data provided by the California Board of Medical Quality Assurance. By law, attorneys, insurers and courts must report malpractice settlements, judgments and arbitration awards of $30,000 or more to the board. Ms. Joyce Miller, Administrative Analyst for the board, provided data showing that the average award per reported claim increased by 86 percent between 1980 to 1984, from $153,929 to $286,301. Because this does not include payments for settlements and judgments less than $30,000--which usually comprise the majority of claims--these averages overstate the actual average settlement.

Mr. Neupauer stated that MIEC's average annual increase of premium in the state was just under five percent during the past 10 years. He also stated that MIEC also insures doctors in Alaska, Nevada, Idaho and

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[1]Noneconomic losses in the act include pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.