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Hon. Charles Flinn - Chairman, Supreme Court - MSBA Joint Task Force on ADR
Dennis Johnson, Esq. - MTLA
James Deye - Regional Director, American Arbitration Association

June 22, 1989 - Alternative Compensation Systems and Damages

James Erickson - Personal injury plaintiff
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George Priest - Professor of Law, Yale University
Val Jerich - Personal injury plaintiff
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Steve Young, Esq. - Winthrop & Weinstine

July 12, 1989 - Collateral Source Statutes and Attorneys' Fees

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Mike Lindberg, Esq. - Association of Minnesota Counties
Richard Thomas, Esq. - MDLA

September 13, 1989 - Helmet Law, Seat Belts, Liquor Liability, Homeowners Insurance Exclusions

Rolf Sonnesyn, Esq. - MDLA
Robert Hauer, Esq. - MTLA
Brian Mahoney, M.D. - Minnesota Medical Association
Robert Johnson - Insurance Federation of Minnesota
Peter Strauss - Chicago, Illinois, Alliance of American Insurers
James Wicka, Esq. - MADD
William Sieben, Esq. - MTLA

October 17, 1989 - Draft Legislation

James Loizeaux, C.P.A. - Minnesota Society of CPAs.
William Jepsen, Esq. - MTLA
John Herman, Esq. - Minnesota Society of American Architects

CORRECTION

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I. Process, Methodology and Goals

The Legislature provided for the creation of a study commission on the civil justice system in 1988.[1] The six-member study commission, appointed in 1988, was composed of:

Robert E. Bowen, Hennepin County District Judge, retired.

John W. Carey, attorney at law, Sieben, Gross, Von Holtum, McCoy & Carey.

James F. Hogg, President and Dean, William Mitchell College of Law.

Dennis J. Johnson, President, MADD.

Joan S. Morrow, attorney at law, Rider, Bennett, Egan & Arundel

Dennis M. Sobolik, attorney at law, Brink, Sobolik, Severson, Vroom & Malm

Joan Morrow chaired the Commission. The Reporter for the Commission was Professor Michael K. Steenson, Margaret H. and James E. Kelley Professor of Tort Law, William Mitchell College of Law.

The Commission held ten public hearings, beginning in January, 1989, and ending in October, 1989. The initial hearings were held at the William Mitchell College of Law. Beginning in May, the hearings were held at the State Capitol. Notice of the hearings was given to all interested parties, including attorneys, business persons, injured and disabled persons, judges and insurers. No one who asked to testify at Commission hearings was refused that opportunity. The Commission heard testimony from over 50 witnesses during the hearings and received voluminous written submissions.

Following each hearing the Commission met in afternoon sessions, open to the public, to discuss the issues set for hearing. The Commission elicited suggestions from interested persons of topics to be covered. The hearing topics included punitive damages; joint and several liability; comparative fault; statutes of limitations and repose; alternative dispute resolution and incentives to alternative dispute resolution; alternative compensation systems and testimony from injured persons on damages; the collateral source statute and attorneys' fees; damages, additur and remittitur, caps on damages, and periodic payments; and the helmet law, seat belts, homeowners' insurance, and liquor liability. At the tenth hearing the Commission heard testimony on draft legislation addressing many of the areas of concern. In addition, the Commission held two day-long public meetings to consider its recommendations and findings.

The Commission had the benefit of testimony from the following persons:

January 25, 1989 - Punitive Damages

Janet Dolan, Esq. - General Counsel, Tennant Company
John Stanoch, Esq. and Paul Godlewski, Esq. - MTLA
Michael Ehrlichman - Director, United Handicapped Federation State Council on Disabilities
Phillip Cole, Esq. - Past President, MDLA
Theodore Olson, Esq. - Washington, D.C. - Civil Justice Coalition
Timothy R. Thornton, Esq. - General Counsel, Northwest Airlines

February 14, 1989 - Joint and Several Liability

Steve Young, Esq. - Winthrop & Weinstine, former Dean, Hamline Law School
John Stanoch, Esq. - MTLA
John Hottinger, Esq. - MDLA
William Huestis - President, Road Rescue, Inc.
David Lillehaug, Esq. - Minnesota Justice Foundation
Richard Benson, C.P.A. - Arthur Andersen & Co.

March 16, 1989 - Comparative Fault

David Prince, Esq. - Professor, William Mitchell College of Law
Victor Schwartz, Esq., Washington, D.C. - Adjunct Professor, Georgetown University
John Stanoch, Esq. - MTLA
George Soule, Esq. - MDLA
G. Alan Cunningham, Esq. - Faegre & Benson

April 12, 1989 - Statutes of Limitation and Repose

Richard Bland, Esq. - Midwest Medical Insurance Co.
Mary Belgrade, Esq. - Chicago, Illinois, Alliance of American Insurers
Steve Sunde, Esq.
Robert A. Awsumb, Esq. - MDLA
Victoria Lemberger, Esq. - Minnesota Hospital Association
Reed MacKenzie, Esq.

May 10, 1989 - Alternative Dispute Resolution and Incentives to Alternative Dispute Resolution

Nancy Welsh, Esq. - Director, Mediation Center

Theodore Smetak, Esq. - MDLA
Hon. Charles Flinn - Chairman, Supreme Court - MSBA Joint Task Force on ADR
Dennis Johnson, Esq. - MTLA
James Deye - Regional Director, American Arbitration Association

June 21, 1989 - Alternative Compensation Systems and Damages

James Erickson - Personal injury plaintiff
Fred Pritzker, Esq. - MTLA
George Priest - Professor of Law, Yale University
Val Jerich - Personal injury plaintiff
John Stanoch, Esq. - MTLA
Steve Young, Esq. - Wintnrop & Weinstine

July 12, 1989 - Collateral Source Statutes and Attorneys' Fees

Richard Bland, Esq. - MMIC
Martin Connor, Esq. - Washington, D.C. - President, American Tort Reform Association
William Jepsen, Esq. - MTLA
John Stanoch, Esq. - MTLA
Mark Hallberg, Esq.
P. Kenneth Kohnstamm, Esq. - Assistant Attorney General, State of Minnesota
Mike Lindberg, Esq. - Association of Minnesota Counties
Richard Thomas, Esq. - MDLA

September 13, 1989 - Helmet Law, Seat Belts, Liquor Liability, Homeowners Insurance Exclusions

Rolf Sonnesyn, Esq. - MDLA
Robert Hauer, Esq. - MTLA
Brian Mahoney, M.D. - Minnesota Medical Association
Robert Johnson - Insurance Federation of Minnesota
Peter Strauss - Chicago, Illinois, Alliance of American Insurers
James Wicka, Esq. - MADD
William Sieben, Esq. - MTLA

October 17, 1989 - Draft Legislation

James Loizeaux, C.P.A. - Minnesota Society of CPAs.
William Jepsen, Esq. - MTLA
John Herman, Esq. - Minnesota Society of American Architects

Peder Larson. Esq. - Minnesota Chapter of Associated Builders and Contractors
Thomas Schmidt. Esq. - Civil Justice Coalition
Richard Thomas. Esq. - MDLA
Kathleen Gaylord. Esq. - Northwest Airlines

The Commission's analysis has focused on the tort system in general, including common and statutory law. The overriding concern of the Commission in analyzing the civil justice system has been in perpetuating a fair and balanced approach to the sometimes incompatible goals of the tort system, accountability and compensation. The Commission has taken the position that tort law must consider the following goals:

1. Accountability.
2. Compensation.
3. Predictability.
4. Consistency of results.
5. Risk prevention.
6. Speed of resolution.
7. Accessibility to the system.
8. Fairness of the system.
9. Reasonableness of the costs of the system.

II. Summary of Recommendations

The Commission makes a number of recommendations for legislative change in the law governing tort claims. These recommendations are unanimously endorsed by all Commission members. The Commission considered other proposals, many of which were supported by some Commission members; however, because none won unanimous support, a requirement for Commission endorsement, the Commission offers no recommendations on those proposals.

The Commission's recommendations are as follows:

A. Comparative Fault

1. The Comparative Fault Act should be amended to provide for the application of comparative fault principles in cases involving claims for economic loss.

2. The definition of "fault" in the statute should be amended in four respects:

a. Primary assumption of risk should be explicitly excluded as

conduct subject to comparison under the act.

b. The doctrine of last clear chance should be abolished.

c. The statute should be amended to provide that evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages should not be considered in determining the cause of an accident, but only in determining the damages a claimant is entitled to recover.

d. The defense of complicity in actions brought under the Civil Damage Act, section 340A.801, should no longer be a complete defense but should be subject to apportionment under section 604.01, the Comparative Fault Act.

B. Statutes of Repose.

Section 541.051, the statute of repose governing claims arising out of improvements to real property, should be amended to exclude from the statute certain products liability actions.

C. Punitive Damages.

1. Subdivision 1 of section 549.20 should be amended to provide for a "deliberate disregard" standard in place of the current "willful indifference" standard, and the deliberate disregard standard should be more specifically defined.

2. Section 549.20, subdivision 2, should be amended to strengthen the standards required to impose liability for punitive damages on a principal or employer for the acts of an agent or employee.

3. A new subdivision 4 should be added to section 549.20 that will require bifurcation of the punitive damages issue upon the request of the defendant.

4. A new subdivision 5 should be added to section 549.20 that will provide specific direction to the courts to review any punitive damages award in light of the factors in section 549.20, subdivision 3.

D. Civil Damage Act

1. Section 340A.801 should be amended to permit social host liability where

the social host makes alcoholic beverages available to a minor.

2. The complete defense of complicity should be a partial defense subject to comparison under the Comparative Fault Act.

E. Caps on Damages; Enumeration of Damages.

Sections 549.23, the statutory cap on certain kinds of damages, and section 549.24, requiring enumeration by the finder of fact of certain types of damages, should be repealed.

F. Collateral Sources.

Section 65B.51 and section 548.36 should be amended to require a reduction of any jury verdict first by any collateral sources that must be deducted under the statutes and second, by the claimant's percentage of fault, if any.

G. Seat Belts and Motorcycle Helmets.

1. The penalties for failure to wear seat belts should be increased.

2. Motorcycle helmets should once again be mandatory for all motorcycle operators and passengers.

3. Seat belt evidence should continue to be inadmissible in civil litigation.

4. The current helmet law provision precluding recovery for damages a motorcycle operator or passenger could have avoided by wearing a helmet should be preserved.

H. Household Exclusion in Homeowners' Policies.

The household exclusion should be eliminated through an amendment to section 65A.295.

I. Penalties for Failure to Carry Automobile Insurance.

The penalties for failure to carry automobile insurance as required by the No-Fault Automobile Insurance Act and to carry proof of insurance coverage should be increased through amendments to sections 65B.67, 169.791 and 169.793.

J. Medical Assistance Liens.

Section 256B.042 should be amended to bring the State's right to reimbursement for medical assistance payments into line with reimbursement rights under the No-Fault Act, and the nature of the State's reimbursement right should be clarified so that resolution of tort claims is facilitated.

K. Alternative Dispute Resolution.

The Commission approves in substantial part the Final Report of the Minnesota Supreme Court and Minnesota State Bar Association Task Force on Alternative Dispute Resolution.

1. The Commission approves Part I. with the exception of subpart D.. 1. The Task Force recommendation states that the judge has the power to disagree with the alternative dispute resolution process adopted by the parties and may order the parties to utilize one of the non-binding ADR processes. The Commission takes the position that if the parties agree to the alternative resolution process to be used, the judge should not have the power to interfere with that choice.

Second, as to the timing of the conference, subpart D.1 states that if the parties are unable to agree on the ADR process or the timing of the process, "the court shall schedule a conference with the parties within the next 30 days." The Commission takes the position that the court, within 30 days, should schedule a conference to take place at some later date.

2. The Commission takes no position on Part II of the report, which deals with the training and qualification of neutral persons for court annexed and court referred ADR programs.

L. State and Municipal Tort Liability.

The legislature should study the desirability and financial feasibility of raising the caps on damages for the state and its political subdivisions.

M. Mandatory Automobile Liability Insurance.

The legislature should study the mandatory automobile liability insurance limits in Minnesota, with a view toward increasing those limits.

N. Attorneys Fees

Legislative intervention in the form of regulation of contingent fees is unwarranted.

III. Introduction and Analysis

The tort system in Minnesota is not and cannot be a uniform system of liability and compensation. Rather, it is a patchwork, dealing with such diverse issues as products liability, medical malpractice, and the liability of dram shops and other providers of alcoholic beverages. While there are common problems that transcend these pockets of tort law, each area presents its own problems and each may require different solutions. Moreover, the tort system in Minnesota and other states does not stand alone. The tort system is driven in substantial part by the institution of insurance. The presence of insurance makes possible broad-based compensation for persons who are injured in automobile accidents, by defective products, through medical malpractice, or because of other types of negligent misconduct. The charge of the Commission did not include an examination of issues of insurance availability and affordability, although those issues on occasion were part of the presentations made by witnesses testifying before the Commission. A prior Minnesota report has raised questions concerning the impact of tort reform on the affordability and availability of insurance, concluding that modifications of tort law do not guarantee either a reduction of insurance costs or an increase in the availability of insurance.[2]

Nor can the tort system be viewed solely as a structure of the common law. In many cases the right to recover in a tort action is controlled in whole or in part by statute. Any view of the tort system thus must take into consideration not only the decisions of the courts, but also those of the legislature, both of which must be viewed against the backdrop of the institution of insurance.[3]

Civil justice reform efforts frequently focus on the role of the common law in creating inequities in the civil justice system, but the critical role played by the legislature must also be considered. Both the legislature and courts have a role in establishing rights and liabilities in the system and both must be examined in determining whether the system operates fairly.

The legislature's role may have a significant impact on tort law. The Minnesota legislature has created compensation schemes that both supplant and supplement tort recoveries. The two most prominent are workers' compensation and no-fault automobile insurance. In cases where workers' compensation benefits are received by an injured employee, workers' compensation is the employee's exclusive remedy. In motor vehicle accident cases, an injured person has the right to receive no-fault automobile insurance benefits in exchange for some restrictions on the right to recover in tort.[4] The legislature has taken other action that limits tort recoveries in certain types of cases, and has enacted legislation that governs various aspects of tort litigation, such as the way fault is compared and distributed among parties to tort litigation.[5]

The approach taken by the Minnesota Supreme Court to personal injury law has varied over the years. On occasion the court has taken liberal positions in expanding tort law,[6] but more recently the court has taken a relatively conservative position in personal injury cases. More recent decisions have shown due regard for the place of fault in tort law and for the need to limit liability in order to avoid turning the tort system into one that operates essentially as a compensation system without regard to fault.[7]

Those testifying before the Commission recognized the need of a tort system, in part to ensure accountability and in part to ensure compensation. The American approach to the problem of safety relies heavily on the tort system to ensure accountability. While in other countries there is a greater degree of government involvement in resolving safety issues, in the United States the tort system is a necessary supplement to government regulation.

The need for accountability is not the sole goal of the tort system, however.[8] Tort law is also intended to provide compensation in cases where someone has been injured through the fault of another. The problem for legislatures, courts, and the Commission is in striking an appropriate balance between those two goals.

The tort system as it exists today in Minnesota has a strong fault basis. Although the principle of strict liability has been accepted in Minnesota in products liability cases and cases involving abnormally dangerous activities, strict liability has had limited application. The court has indicated an intent to limit strict liability for abnormally dangerous activities and has in effect supplanted strict liability theory in products liability cases with negligence theory.[9]

The civil justice system as it operates in Minnesota may be analyzed in a number of ways. The analysis could focus on the insurance system, on the structure of the common law to determine whether the system has been unduly extended by liberalizing decisions permitting new theories of recovery, on the damages that are recoverable under the system, or the means used to resolve the cases, on the methods of dividing damages among multiple tortfeasors, on the basis of apportioning fault among parties to the litigation, on the liability of particular parties, such as the state and its municipalities, or on alternative compensation schemes.

To reiterate and re-emphasize, the Commission's analysis has focused on the tort system in general, including common and statutory law. The overriding concern of the Commission in analyzing the civil justice system has been in perpetuating a fair and balanced approach to the sometimes incompatible goals of the tort system, accountability and compensation. The Commission has taken the position that tort law must consider the following goals:

1. Accountability.
2. Compensation.
3. Predictability.
4. Consistency of results.
5. Risk prevention.
6. Speed of resolution.
7. Accessibility to the system.
8. Fairness of the system.
9. Reasonableness of the costs of the system.

IV. Recommendations

A. Comparative Fault and Joint and Several Liability

1. Introduction

Comparative fault and the rule of joint and several liability have generated a significant amount of legislative activity in the past few years. The trend in the United States has been toward the adoption of comparative fault and negligence statutes and procedures. Most of the statutes enacted have been modified comparative fault or negligence statutes, in which a plaintiff will be barred from recovery if the plaintiff's fault is greater than, or in some states equal to, the defendant's fault. Several states have adopted pure comparative negligence or fault statutes or procedures under which a plaintiff is not barred from recovery even if the plaintiff is more at fault than the defendant or defendants. The plaintiff's recovery, however, is reduced by the plaintiff's percentage of fault.

The comparative fault and negligence statutes differ significantly from jurisdiction to jurisdiction. Minnesota has one of the more detailed comparative fault statutes in the United States. It contains detailed provisions governing the losses subject to comparison, the types of fault that are subject to comparison, the impact of settlement on comparative fault determinations, and how the rule of joint and several liability applies.

2. The Minnesota Experience

Prior to the adoption of comparative negligence, contributory negligence was a complete defense to negligence claims in Minnesota. In cases where the plaintiff was not contributorily negligent the plaintiff was entitled to recover damages against the defendant. If the plaintiff sued two or more defendants and one of those defendants

could not pay, the remaining defendant or defendants would be responsible for the uncollectible share of the insolvent defendant and would be obligated to pay the plaintiff 100 percent of the plaintiff's damages under the rule of joint and several liability.

Minnesota first adopted comparative negligence in 1969, modeling its statute after Wisconsin's. The 1969 comparative negligence statute was a modified statute, barring claimant from recovery if the claimant's fault was equal to or greater than the fault of the person against whom recovery was sought. The 1969 statute took no position on the rule of joint and several liability, but the Minnesota Supreme Court has taken the position that the rule of joint and several liability was not affected by the adoption of the statute.[10] In Maday v. Yellow Taxi Co.,[11] a case that arose before the 1978 amendments of the comparative negligence statute, the Minnesota Supreme Court took the position that "It has always been the law of this state that parties whose negligence concurs to causae injury are jointly and severally liable although not acting in concert."[12]

In 1978 the statute was amended in several ways. It adopted a broad definition of "fault," paving the way for a comparison not only of claims based on negligence but also claims based on breach of warranty and strict liability. The definition also provided for the comparison of various types of plaintiff misconduct falling under a general heading of contributory negligence.

The 1978 amendments also modified the rule of joint and several liability for the first time. Taking a middle position between full retention and complete abolition of joint and several liability, the legislature adopted a loss reallocation provision that required a defendant's uncollectible share of a judgment to be absorbed by the remaining parties to the litigation, including the plaintiff. Joint and several liability was retained for parties in the chain of manufacture and distribution. The amendments also changed the cutoff point for recovery, barring recovery by a claimant only where the claimant's fault is greater than the fault of the person against whom recovery is sought. Under the 1969 version a claimant was barred from recovery if the claimant's fault was equal to or greater than the fault of the person against whom recovery was sought.

In 1986, the legislature amended the act again to modify the rule of joint and several liability by providing that the State and its municipalities, if less than 35 percent at fault, cannot be held liable for more than twice their percentage of fault.

In 1988 the legislature again amended the rule of joint and several liability by providing that a defendant whose percentage of fault is 15 percent or less cannot be held liable for more than 4 times that percentage of fault. The rule does not apply in cases involving environmental torts.

There is thus a division in the rules applicable to joint and several liability. To summarize, the State and its municipalities are jointly and severally liable with other defendants if their percentage of fault is 35 percent or more. If their percentage of fault less than 35 percent, the State and its municipalities may be held liable for no more than twice their percentage of fault. Defendants other than the state and its municipalities are jointly and severally liable with the other defendants if their percentage of fault exceeds 15 percent. If their percentage of fault is 15 percent or less, they may be held liable for no more than 4 times that percentage of fault. Defendants who have committed environmental torts or defendants in products liability cases who are in the chain of manufacture and distribution remain jointly and severally liable with no limitation. The current Minnesota position is thus a patchwork, depending on the type of claim and the status of the defendant involved in the litigation.

3. Commission Recommendations Regarding Comparative Fault

The subjects of comparative fault and joint and several liability have received a significant amount of attention nationwide. The Commission has made four recommendations for modification of the Comparative Fault Act but no recommendation as to joint and several liability, solely because of lack of unanimity.

There are four adjustments that should be made to the Comparative Fault Act, one to expand the types of claims that are subject to comparison and three that relate to the definition of "fault" in the statute.

First, the statute should be amended to provide for the application of comparative fault principles in cases involving claims for economic loss. The Act as it currently reads applies only to claims involving personal injury, wrongful death, and property damage, but not to cases involving economic loss. On its face, therefore, the act does not apply to cases involving economic losses, even though those losses result from the negligence of another party. This means that claims for professional liability, such as legal or account malpractice, or cases involving breach of warranty that result solely in economic loss, could be excluded from the statute, even though contributory negligence is a valid defense to those claims.

On occasion, the Minnesota courts have applied comparative fault principles to economic loss claims. For example, the Minnesota Supreme Court has applied comparative fault principles in a case involving a claim for economic loss arising out of a negligent misrepresentation,[13] the Minnesota Court of Appeals has applied the Comparative Fault Act to a case involving accountant malpractice.[14] A statutory amendment will give the courts clear authority to apply comparative fault principles to cases involving claims for economic loss; however, any legislative amendment applying comparative fault principles to claims for economic loss has to be accomplished with

the clear idea that the defenses to claims for economic loss will not be expanded by such an amendment. If contributory negligence is not a defense to a certain kind of claim for economic loss, such as in a breach of warranty claim where the claimant's negligence had nothing to do with the creation of the defect in the product, then contributory negligence would not be made a defense by the amendment.[15]

Second, the definition of "fault" in the statute should be amended in four respects. The definition should first be amended to exclude primary assumption of risk as conduct that is subject to comparison. If primary assumption applies in a case, the defendant simply owes no duty to the plaintiff and there is nothing to compare. As an example, the Minnesota Supreme Court applied the primary assumption of risk concept in a case involving the deaths of firefighters who were attempting to put out a fire that broke out around an 11,000 gallon liquid propane tank. The Court held that the firefighters assumed the risk in the primary sense and that the trustees in the wrongful death case arising from their deaths were therefore precluded from recovery.[16] The Court noted that where primary assumption applies, the defendant owes no duty to the plaintiff.[17]

A second change in the definition should be to eliminate the doctrine of last clear chance, a common law doctrine developed to ameliorate the harsh effect of the common law rule which made contributory negligence a complete bar to recovery. To illustrate the application of the last clear chance, or discovered peril doctrine, if a defendant discovered that the plaintiff was in a position of peril, even as a result of the plaintiff's own prior negligence, that the defendant saw that the person harmed was in that position, and had enough time and the opportunity to avoid that harm, but negligently failed to do so, the plaintiff's contributory negligence would not be a legal cause of the plaintiff's injury.[18] With the advent of comparative fault, the doctrine of last clear chance is no longer necessary and should be abolished.[19] Most of the jurisdictions that have considered the last clear chance issue have held that comparative negligence voids last clear chance.[20]

The third change is to eliminate the defense of complicity in claims arising under the Civil Damage Act should be subject to comparison and apportionment under the statute. This is discussed at length in Part IV., D of this Report.

Finally, the statute should be amended to provide that evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages should not be considered in determining the cause of an accident, but only in determining the damages to which a plaintiff is entitled to recover.

In summary, the Commission makes the following recommendations:

1. The Comparative Fault Act should be amended to provide for the

application of comparative fault principles in cases involving claims for economic loss.

2. The definition of "fault" in the statute should be amended in four respects:

a. Primary assumption of risk should be clearly excluded as conduct subject to comparison under the act.

b. The doctrine of last clear chance should be abolished.

c. The statute should be amended to provide that evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages should not be considered in determining the cause of an accident, but only in determining the damages a plaintiff is entitled to recover.

d. The defense of complicity in actions brought under the Civil Damage Act, section 340A.801, should no longer be a complete defense but should be subject to comparison and apportionment under section 604.01, the Comparative Fault Act.

4. The Problem of Joint and Several Liability

The rule of joint and several liability involves complex considerations, as demonstrated by the frequent legislative activity in the area and by the variety of legislation the states have adopted. Over thirty states have modified the rule of joint and several liability. The approaches the states have taken varies, but the primary approaches are as follows:

1. Complete abolition of the rule of joint and several liability.

2. Modification of the rule of joint and several liability by providing for the reallocation of loss among the remaining parties to the litigation, including the plaintiff where the plaintiff is at fault.

3. Elimination of joint and several liability for noneconomic loss but retention of the rule for economic loss.

4. Elimination of joint and several liability only for losses under a specified amount.

5. Elimination of joint and several liability for defendants who are under a certain

percentage of fault.

6. Limitation of joint and several liability to a multiple of a defendant's percentage of fault if the percentage is below a certain cutoff.

7. Elimination of joint and several liability only where the plaintiff is at fault or is more at fault than the defendant.

8. Elimination of joint and several liability except for certain types of actions. Depending on the jurisdiction, exceptions have been created for intentional torts, environmental torts, products liability and strict liability actions, professional malpractice claims, asbestos-related torts, aviation torts, actions arising from the manufacture of medical devices or pharmaceutical products, and claims arising from automobile accidents.

There is no clear rationale for either the limitations on joint and several liability or the exemptions from those limitations. The variance in recent legislative responses to the rule of joint and several liability is the product of political compromise. The reality of the debate over the rule of joint and several liability is that there is no objective path that provides a ready basis for reform of the rule. The Commission sought through many hours of discussion to arrive at a consensus on a more uniform rule for joint and several liability. Its inability to do so, despite a strong desire on the part of all Commission members to find a point of agreement, is suggestive of the polarity this issue produces.

5. Proposed Comparative Fault Legislation

With the suggested changes, the Comparative Fault Act would read as follows:

COMPARATIVE FAULT; EFFECT

Subdivision 1. Scope of application. Contributory fault ~~shall~~ does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, ~~or~~ in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed ~~shall~~ must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Subd. 1a. Fault. "Fault" includes acts or omissions that are in any

measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity in actions under Minn. Stat. § 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Subd. 2. Personal injury or death: settlement or payment. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of the injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subd. 3. Property damage or economic loss; settlement or payment. Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subd. 4. Settlement or payment; admissibility of evidence. Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subd. 5. Credit for settlements and payments: refund. All settlements and payments made under subdivision 2 and 3 shall be credited against any final settlement or judgment: provided however, that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for any amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person

entitled to such damages.

604.02 APPORTIONMENT OF DAMAGES

Subdivision 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except in cases where liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299E - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01, a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2.

If the state or a municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for a percentage of the whole award no greater than twice the amount of fault, including any amount reallocated to the state or municipality under subdivision 2.

Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

B. Statutes of Limitation and Repose

1. The Minnesota Experience

Minnesota has various statutes prescribing the time in which actions must be brought. Section 541.05, subd. 1 (5) establishes a six year statute of limitations for negligence actions. Section 541.05, subd. 2 imposes a four year statute of limitations on strict liability actions "arising from the manufacture, sale, use or consumption of a product."

Section 541.07 imposes a two year statute of limitations for various intentional torts, including libel, slander, assault, battery, and false imprisonment. It also imposes a two year statute of limitations in "all actions against physicians, surgeons, dentists, other health care professionals . . . and veterinarians . . . hospitals, sanatoriums, for malpractice, error, mistake or failure to cure, whether based on contract or tort."

Section 573.02, subdivision 1 requires that wrongful death actions be brought within three years of the date of the death of the decedent, but in no event more than six years from the act or omission that resulted in death.

Overlaying the statutes of limitations is the tolling provision. The tolling provision suspends the running of a statute of limitations during the claimant's period of disability. For example, the tolling statute suspends the running of the statute of limitations in cases where the claimant is under the age of 18 years, is insane, or imprisoned under a criminal charge.[21]

Statutes of limitation limit the time, after a claim accrues or an injury occurs, in which an action may be brought. The time at which a statute of limitations begins to run depends on the type of statute and how it is interpreted by the courts, absent a definitive provision in the statute itself.

A statute of repose, on the other hand, imposes an outside limitation on the time in which an action may be brought, conditioned on a certain event or occurrence that is independent of the time the claim accrues or the injury occurs.[22]

In general, tort statutes of limitations will run from the time damage or injury occurs or the discovery of the damage or injury. In medical malpractice cases in Minnesota the general rule is that the two-year statute of limitations begins to run from the date of termination of treatment,[23] which means that the statute could run before the injury is discovered or not start to run for years following the injury. At no point, however, has the legislature defined the time at which the statute begins to run.

For products liability cases there is no statute of repose but rather a safe useful life statute, Section 604.03, that limits liability according to a variety of factors, but

imposes no definite outside limitation on the time a products liability action may be brought. In Hodder v. Goodyear,[24] the Supreme Court substantially limited the potential reach of the useful life statute by making it a factor for the jury to consider in determining the comparative fault of the parties to products liability litigation. A finding that the useful life of a product has expired is not an automatic bar to recovery

2. The History of Section 541.051 - Improvements to Real Property

Section 541.051 is a true statute of repose. It applies to cases involving the liability of "any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property" or the "owner of the real property." Actions to recover damages for injury to person or property, including wrongful death, must be brought within two years of the discovery of the damage or injury, but in no event "shall such a cause of action accrue more than ten years after substantial completion of the construction." As enacted there was a ten year statute of repose in the statute. There was an interim limitation of fifteen years, from 1980 to 1986, when the time limitation was reduced to ten years.

As enacted, the statute applied only to persons "performing or furnishing the design, planning, supervision, or observation of construction or construction" of improvements to real property.

In 1977, in Pacific Indemnity Co. v. Thompson-Yaeger, Inc.,[25] the Supreme Court held the statute unconstitutional, stating that there is "no basis for including within the protection of the statute persons who construct or design improvements to real estate, and excluding other persons against whom third parties might bring claims should they incur injury, such as owners and material suppliers." The Court concluded that the statutory classification scheme was unconstitutional because of the exclusions.

Following Pacific Indemnity, the legislature corrected the constitutional deficiency by amending the statute to include "any person performing or furnishing the design, planning, supervision, materials, or observation of construction" as well as the owner of the real property. In Sartori v. Harnischfeger Corp.,[26] the Court held the statute constitutional against assertions that it violated the due process and remedies clauses of the Minnesota Constitution.

Following the abolition of privity of contract and the adoption of discovery rules in tort statutes of limitations, the trade associations of contractors and architects threatened by the possibility of expanding liability, introduced statutes of repose limiting their liability in state legislatures.[27] Over forty jurisdictions adopted statutes of repose. Minnesota's statute was enacted in 1965.

The problem that has arisen with section 541.051 is not with the time limitations,

Ratner. :: is with the scope of the statute. The Minnesota Supreme Court has interpreted the term 'improvement to real property' as:

> [A] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.[28]

The appellate and federal courts in Minnesota have applied the statute to a variety of real property improvements, including removable pipes covering a grain auger installed below ground level;[29] an unfinished steel stairway;[30] light fixtures and light fixture components;[31] a switch gear compartment and electrical cables;[32] an industrial rock crusher;[33] a crane located in a mining facility;[34] and a concrete molding machine and conveyor system.[35]

3. The Commission's Recommendations

The Commission's primary concern over section 541.051 is the unpredictability that has been spawned by a statute that sometimes applies so as to create a statute of repose and shorter statute of limitations than applies to most products liability actions. This has resulted in an unduly large amount of appellate court activity, lost claims, and potential legal malpractice problems. In a sense, a statute intended to avoid discrimination has worked a reverse discrimination by exempting from liability only a certain class of product manufacturers while other product manufacturers are subject to liability without the benefit of a statute of repose.

In cases involving improvements to real property, the Commission is convinced that there are good and independent reasons justifying the statute of repose, but that those reasons do not extend to products liability cases in general. In cases involving real estate improvements, a number of enuties, including suppliers of building materials, contractors, subcontractors, and workers, all come together for a limited time to construct an improvement. After a certain time it becomes difficult to sort out liability issues. In addition, real property improvements have an indefinite life, and after the improvement is finished there is no access to the property, unlike cases involving products. This combination of attributes may justify separate treatment of claims arising out of improvements to real property, but it does not justify inclusion of standard products liability claims in a statute intended to address a different problem. The Commission therefore recommends that section 541.051 be amended to exclude from the statute certain products liability actions. The recommended language, which in part tracks the Virginia Code provision, is as follows:

> (d) The limitations prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery installed upon real

property.

The Commission considered other statutes of repose but determined that any potential problems were not significant enough to justify action.

Achieving uniformity of statutes of limitations is arguably a desirable goal. Although a suggestion was made to the Commission advocating uniformity, the Commission determined that comprehensive review and change was unnecessary at this point.

4. Constitutionality of Section 541.051

Questions concerning the constitutionality of statutes of repose have arisen in Minnesota and other jurisdictions, in particular because of the distinctions that have made between persons who participate in the construction of improvements to real property and other similarly situated persons. Any time a statute of repose limits the liability for one group of individuals but not another similarly situated group, the statute is subject to constitutional attack on various bases, including equal protection and due process challenges. The Minnesota experience with statutes of repose makes a more extended discussion of the constitutional issues necessary in light of the recommendation the Commission has made for amendment of the statute of repose.

In Pacific Indemnity Co. v. Thompson-Yaeger, Inc.,[36] the Minnesota Supreme Court held Section 541.051 unconstitutional insofar as it provided immunity from suit for a limited class of defendants, persons "performing or furnishing the design, planning, supervision, or observation of construction or construction of such improvement to real property . . . "

The Court concluded that the statute was unconstitutional, stating that there was "no basis for including within the protection of the statute persons who construct or design improvements to real estate, and excluding other persons against whom third parties might bring claims should they incur injury, such as owners and material suppliers. Legislative classifications must apply uniformly to all persons who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be natural and reasonable, not fanciful and arbitrary."[37]

A more detailed analysis, and one which the Minnesota Supreme Court cited with approval in Pacific Indemnity, appears in the Illinois Supreme Court's analysis in Skinner v. Anderson.[38] As in other statutes, the Illinois statute distinguished persons who perform and furnish the "design, planning, supervision of construction or construction" of improvements to real property, from other classes, such as

materialmen, who are ignored by the statute, and owners and occupants of property, who are specifically excepted. In Skinner the Court stated that:

> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property, or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It can not be said that the one event is more likely than the other to occur within four years after construction is completed. The problems are sometimes with distinctions between owners of the property, on the one hand, and architects and contractors on the other, or between architects and contractors and building product suppliers.

Making the distinctions may be easier, however, if the purpose of the statutes is considered. In Cape Henry v. National Gypsum,[39] the Virginia Supreme Court said that:

> We conclude that the General Assembly intended to perpetuate a distinction between, on the one hand, those who furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers or suppliers, at the direction of architects, designers, and contractors, and, on the other hand, those who furnish machinery or equipment. Unlike ordinary building materials, machinery and equip. ent are subject to close quality control at the factory and may be made subject to independent manufacturer's warranties, voidable if the equipment is not installed and used in strict compliance with the manufacturer's instructions. Materialmen in the latter category have means of protecting themselves which are not available to the former. We construe [the Virginia statute of repose] to cover the former category and to exclude the latter.

The Court reaffirmed this position in Grice v. Hungerford Mechanical Corp..[40]

In Cape Henry, the issue concerned the application of the statute to defects in exterior wall panels. The Court concluded that the panels were ordinary building materials. In Grice, the Court concluded that an electrical panel box and the instructions for assembling, wiring, grounding, and installing the unit during construction of a particular building are determined by the specifications and plans provided by the architect or other design professional, and no instructions are received from the

manufacturer.

The Virginia statute includes an exception not only for suppliers or manufacturers of equipment or machinery, but it also exempts those entities when they supply "other articles." The Virginia Supreme Court has concluded that the language "other articles" is superfluous.[41]

In Pacific Indemnity, the Court noted that constitutional challenges had been made to similar statutes in fifteen other states at the time of its decision. The Court noted that in ten states the statutes had been upheld and in five the statutes were held unconstitutional. One of the states upholding its statute was Virginia. At the time of the challenge, the first part of the Virginia statute was substantially the same as the Minnesota statute challenged in Pacific Indemnity. The United States District Court for the Western District of Virginia held the statute constitutional in Smith v. Allen-Bradley Co.,[42] but the constitutional challenge in the case was solely a due process challenge based on the fact that the statute barred the plaintiff's action before it accrued. The court rejected the challenge.

The Virginia statute was amended in 1973 to exclude manufacturers or suppliers of equipment or machinery:

> This limitation shall not apply to the manufacturer or supplier of any equipment or machinery or any other articles which are installed in or become a part of any real property either as improvements or otherwise.[43]

It may seem inconsistent that the Commission is recommending an exception from a statute that was held constitutional by the Virginia Supreme Court and seemingly disapproved by the Minnesota Supreme Court in Pacific Indemnity; however, the constitutional challenges to the Minnesota and Virginia statutes were not the same and the exemption that is embodied in the Virginia statute was not at issue in the Virginia case disapproved by the court in Pacific Indemnity. In addition, although the Minnesota statute as it existed when Pacific Indemnity was held unconstitutional because of equal protection problems, exemption of products liability defendants should not run create the same problem. Once the function of the statute of repose in real property improvement cases is recognized there should be no problem in understanding that exclusion of products liability defendants from the statute of repose will not frustrate that function.

C. Punitive Damages

1. The Minnesota Experience

The punitive damages issue must be viewed against a complex backdrop of legislative limits on punitive damages, judicial limits imposed by the Minnesota Supreme Court, the constitutional concerns raised in the Supreme Court of the United States, the empirical data on punitive damages, and the reasons for punitive damages.

Minnesota has recognized the right to recover punitive damages since 1862. The purpose of punitive damages is to punish certain defendants as well as to deter the defendants and others from engaging in conduct that is detrimental to the interests of society.[44]

The right to recover punitive damages is currently controlled by Minn. Stat. Section 549.20, which reads as follows:

> Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.
>
> Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:
>
> (a) the principal authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal was reckless in employing the agent, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.
>
> Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly

situated persons, and the severity of any criminal penalty to which the defendant may be subject.

In 1986 the legislature added Minn. Stat. Section 549.191:

> Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

Section 549.20 was part of the 1978 tort reform package. The legislature established a "clear and convincing evidence" standard for the award of punitive damages, required a showing of "willful indifference to the rights or safety of others" to justify an award of punitive damages, limited the circumstances under which an award of damages could be made against a master or principal and established a list of factors for the guidance of the trier of fact in awarding punitive damages. The 1986 statute addressed another concern, one raised primarily by physicians but experienced by many defendants, of automatic pleading of punitive damages claims without an adequate basis for those claims.

The statutory restrictions on punitive damages are coupled with restrictions placed on the availability of punitive damages by the Minnesota Supreme Court. The Court has consistently held that punitive damages are not available in cases involving breach of contract, absent the commission of a separate and independent tort.[45] The Court has also held that punitive damages are unavailable in products liability cases involving only claims for property damage.[46] The Court in Eisert also held that punitive damages were unavailable in wrongful death cases, a holding reversed by the legislature in 1983 through an amendment of the wrongful death act.[47]

2. Punitive Damages Issues and Other States' Legislative Responses

The Minnesota response to punitive damages issues has parallels in other states that have enacted legislation regulating the availability of punitive damages. Those issues, many of which have been addressed in the Minnesota legislation, include the following:

1. Should punitive "damages" be available at all in the civil justice system, since they are a penalty and are unrelated to compensation for injuries?
2. If punitive damages are available, what evidentiary standard should apply?
3. What standard of conduct must the plaintiff prove to justify an award of punitive damages?
4. When should a principal or employer be held liable for punitive damages for the acts of an agent or employee?
5. How should multiple punitive damages award for the same conduct be avoided or regulated?
6. Should punitive damages awards be limited and if so, how?
7. Who should benefit from an award of punitive damages?
8. Should punitive damages issues be tried separately from the other issues in a torts case?
9. How should frivolous punitive damages claims be limited?
10. Who should decide whether punitive damages should be awarded?
11. Who should decide the amount of the punitive damages award?
12. What should the appropriate standard of review of punitive damages awards be?

Recent legislative responses to punitive damages deal with some of these issues. Several states have limited punitive damages, either by placing a cap on the damages, by limiting punitive damages awards to a fixed multiple of compensatory damages, or through some combination of a cap and a multiple of compensatory damages. As with joint and several liability, there may be an exclusion for certain types of actions.

Several states have adopted a clear and convincing evidence standard for punitive damages. One has adopted the criminal burden of proof requiring proof beyond a reasonable doubt. Several states require the payment of punitive damages awards, in all or part, to state funds.

Two states place restrictions on multiple damages awards. Four states require bifurcated trials. Four states also preclude the assertion of a punitive damages claim in the original complaint, requiring a prima facie showing of liability before the complaint can be amended to include a punitive damages claim. Five states provide an FDA government standard defense.[48] The question of whether these measures are necessary or sufficient responses to the questions raised by punitive damages awards must be further considered in light of the potential constitutional problems created by unlimited and arbitrary awards not subject to established guidelines and in light of the empirical data available on the punitive damages issue.

3. The Constitutionality of Punitive Damages

In Browning-Ferris Industries v. Kelco Disposal, Inc.,[49] the Supreme Court of the United States held that the excessive fines clause of the Eighth Amendment is inapplicable to punitive or exemplary damages awards in civil suits involving private parties. The petitioners in the case also asked the Court to review the punitive damages award to determine whether it violated the due process clause of the Fourteenth Amendment, but the Court declined because the due process argument was not raised before either the district court or court of appeals.

Justice Brennan, joined by Justice Marshall, concurred in the Court's opinion, but with the understanding that the Court preserved the opportunity for a holding that the due process clause limits the imposition of punitive damages in civil cases. Justice Brennan's concern was that

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following instruction: "In determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts." . . . Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of the government . . . I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.[50]

Justice O'Connor, joined by Justice Stevens, concurred in part and dissented in part. Justice O'Connor agreed with the Court that the due process claims were not properly raised, but she disagreed with the Court's conclusion that the Eighth Amendment's excessive fines clause is inapplicable to civil suits between private parties.[51]

While the due process issue is open, the Court has not yet granted review in any case raising that issue. This term the Court has denied certiorari in three cases raising the due process issue.[52] In a fourth case the Court, per Justice Kennedy, granted a stay of execution and enforcement of the judgment of the Alabama Supreme Court pending a decision on the petitioners' writ for certiorari.[53] No action has yet been

taken on a fifth case raising the issue.[54]

4. The Commission's Recommendations

A remaining issue is whether the problems surrounding punitive damages are serious enough to justify legislative action. The studies on the number, amount, and impact of punitive damages are inconclusive.[55] There are suggestions in Minnesota and elsewhere that punitive damages are necessary to achieve deterrence, yet there appears to be an acknowledgement that punitive damages may not effectively deter dangerous conduct.[56] There is a concern over the increase in the number and amount of punitive damages,[57] yet the available data show that the concern is perhaps unfounded. There is no clear evidence of abuse of punitive damages in Minnesota.

Nonetheless, the Commission is concerned about the lack of predictability of punitive damages awards caused by the lack of clear guidelines for awarding punitive damages and for determining when a principal or employer will be held liable in punitive damages for the acts of an agent or employee. The Commission is also concerned about the procedures for awarding punitive damages, particularly where the issues of compensatory damages and punitive damages issues are not bifurcated. Finally, the Commission is concerned about the current lack of a clear legislative direction to the courts to specifically scrutinize punitive damages awards in light of the statutory standards. Accordingly, the Commission makes the following recommendations.

First, the Commission recommends that subdivision 1 of section 549.20 be amended to provide for a "deliberate disregard" standard in place of the current "willful indifference" standard, and that the deliberate disregard standard be more specifically defined. The Commission is concerned that the "willful indifference" standard is not a stringent enough standard to separate the claims that justify an award of punitive damages from claims that may involve nothing more than reckless behavior. The suggested standard is as follows:

> Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a ~~willful indifference to~~ deliberate disregard for the rights or safety of others.
>
> A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
>
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the rights or safety of others; or

(b) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Second, the Commission recommends that subdivision 2 of section 549.20 be amended to strengthen the standards required to impose liability for punitive damages on a principal or employer for the acts of an agent or employee. The Commission has two concerns. First, the standard that subjects the principal to liability for employing an agent should be the same as the standard necessary to impose punitive damages on the principal under subdivision 1 of section 549.20. Second, for the principal to be held liable for the acts of a managerial agent, the agent should have the authority to act at a policy making level in the corporation. Absent such an amendment, a principal or employer may be held liable for the misconduct of a lower level employee who has no significant responsibilities for corporate decision making. The proposed amendment implementing these changes is as follows:

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal ~~was reckless~~ deliberately disregarded a high probability that the agent was unfit in employing the agent, or

(c) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment, or

(d) the principal or a managerial agent described in subdivision 2(c) of this section, of the principal ratified or approved the act while knowing of its character and probable consequences.

Third, the Commission recommends that a new subdivision 4 be added to section 549.20 that will require bifurcation of the punitive damages issue upon the request of the defendant. Bifurcation will en[illegible] a greater degree of fairness to the defendant who is subject to the pun[illegible]es claim. The evidence appropriate only to the punitive damages issue w[illegible] introduced in the trial on the liability and compensatory damages issues. The suggested amendment reads as follows:

Subd. 4. In a civil action in which punitive damages are sought, the trier of fact shall, if requested to do so by any party, first determine whether compensatory damages are to be awarded. Evidence of the financial

condition of the defendant and other evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages are to be awarded.

Fourth, the Commission recommends the addition of a new subdivision 5 to section 549.20 that will provide specific direction to the courts to review any punitive damages award in light of the factors in section 549.20, subdivision 3. This recommendation is intended to require detailed judicial scrutiny of punitive damages awards. The suggested amendment reads as follows:

Subd. 5. The trial judge shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 of this section and shall make specific findings with respect to them. On appeal, if any, the appellate court shall also review the award in light of the factors set forth in subdivision 3 of this section. Nothing in this section shall be construed to preclude or limit the trial judge's or the appellate court's authority to limit punitive damages.

D. Civil Damage Act

1. Social Host Liability

Minn. Stat. § 340A.801, the Civil Damage Act, applies only to a person who illegally sells intoxicating liquor. The act reads as follows:

Subdivision 1. Right of Action. A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.

Subd. 2. Actions. All suits for damages under this section must be by civil action in a court of this state having jurisdiction.

Subd. 3. Comparative Negligence. Actions under this section are governed by section 604.01.

Subd. 4. Subrogation claims denied. There shall be no recovery by any insurance company against any liquor vendor under subrogation clauses of the uninsured, underinsured, collision, or other first party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or part under this section. The provisions of section 65B.53, subdivision 3, do not apply to actions under this section.

As it now exists, the Civil Damage Act only allows actions against sellers of alcoholic beverages, defined in Minn. Stat. section 340A.101, subd. 2 as "any beverage containing more than one-half of one percent alcohol by volume." There is no room for any common law negligence action against a seller of alcoholic beverages, nor is a negligence action permitted against social hosts, no matter what the circumstances. The Civil Damage Act is not only restrictive in its application, but it is also the exclusive remedy that exists for injuries that occur because alcoholic beverages provided to another result in intoxication and injury.

In 1972, the Minnesota Supreme Court concluded in Ross v. Ross[58] that an action under the Civil Damage Act as it then read permitted a cause of action "against every violator whether in the liquor business or not." The Court's opinion was based on its interpretation of the legislative history of the Act, dating back to 1911.

In 1972 the Act permitted actions "against person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person." Ross involved a Civil Damage Act claim against two men who furnished intoxicating liquor to a minor, causing the death of the minor in a car accident.

In addition to permitting Civil Damage Act actions against any violator of the Act whether in the liquor business or not, the Supreme Court held in 1973 in Trail v. Christian,[59] that a common law negligence action could be brought against a seller of nonintoxicating liquor, defined to include 3.2 beer. Although the Civil Damage Act did not make the sale of 3.2 beer actionable, the Supreme Court in Trail stated that "[w]e will not promote legislative silence to legislative preemption. To do so would immunize a certain segment of the liquor industry, namely dispensers of 3.2 beer, from liability for negligent conduct which causes serious injury to innocent third persons."[60]

2. Social Host Liability and Commission Recommendations

Trail aside, the Supreme Court has interpreted the Civil Damage Act to be the sole source of recovery for injuries caused when a person furnishes alcoholic beverages to another. In 1977 the legislature amended the Act by deleting the word "giving" from the Act. That deletion precluded any actions such as in Ross. The court held in Cady v. Coleman that the words "[a]ny person" who sells or barters liquor means "a person in

the business of providing liquor, and not a social host who happens to receive some consideration from his guests in return for drinks he provides.[61] In Walker v. Kennedy,[62] the Court adhered to its holding in Cady, but left open the issue of whether a social host could be held liable for furnishing liquor to a minor. The Court subsequently answered that question in Holmquist v. Miller,[63] holding that the Civil Damage Act preempts a cause of action against a social host for negligently serving alcohol, whether to a minor or adult. The Court held in Meany v. Newell[64] that an employer is not liable under the Civil Damage Act for furnishing alcohol to an employee.

Subsequent amendments to the Act removed the word "bartering," leaving an illegal sale as the only basis for imposing liability under the Act, and expanded the definition of an illegal sale to include "alcoholic beverages," now defined to include 3.2 beer.

More recently, in Stevens v. Thielen,[65] and Beseke v. Garden Center, Inc.,[66] the Court of Appeals, following Holmquist, held that the Civil Damage Act preempts any common law negligence action against a social host if the host's action is even remotely related to the negligent furnishing of alcohol to another. In Stevens the Court of Appeals refused to impose common law social host liability on a parent who provided his daughter with two kegs of strong beer for her sixteenth birthday party, where the consumption of some of the beer led to the intoxication and related death of one of the guests at the party. In Beseke the Court of Appeals extended this immunity to a claim for negligent supervision of students who became intoxicated at a school function.

As it currently stands, Minnesota law clearly prohibits actions against social hosts who furnish intoxicating liquor to guests, whether the guests are adults or minors. Liability under the Civil Damage Act is precluded because the Act applies only to commercial vendors of intoxicating liquor and preempts the common law. As the Court of Appeals stated in Stevens, "[a]ny change in the law . . . should come from the legislature."[67]

Nationally, the courts have been reluctant to impose social host liability on those who negligently serve alcohol to others.[68] The primary reason for that reluctance is the difficulty involved in establishing reasonable standards of conduct for people in a social setting and the uncertainty that would result from any attempts to impose liability for all social hosts in the variety of situations where the issue would arise. The result differs when the issue is whether social host liability should be imposed on a social host who negligently furnishes alcohol to a minor.[69] In that situation the courts are much more willing to impose liability on social hosts.

The Commission therefore recommends that social host liability be permitted in cases where a person knowingly provides or furnishes alcoholic beverages to a person

under the age of 21 years. The Commission recommends that this be accomplished by an amendment to the Civil Damage Act, adding a new subdivision 5, permitting common law actions in such cases. The proposed amendment reads as follows:

> Subd. 5. Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.

4. The Defense of Complicity

a. Background

The defense of complicity in Civil Damage Act cases was first advanced by the Minnesota Supreme Court in Turk v. Long Branch Saloon.[70] The defense of complicity prevents a person from recovering in a Civil Damage Act case against a vendor of alcoholic beverages if the person "knowingly and actively" participated in the events leading to the intoxication of the person who caused injury to the claimant. It is a complete defense. The Court's construction of the defense was based upon its assumption that the Civil Damage Act "was intended solely to protect 'innocent third persons.'"

In 1977 the Civil Damage Act was amended to state that comparative fault applied to claims under the Civil Damage Act, raising the possibility that complicity would be an apportionable defense under the Comparative Fault Act. That issue was raised in Herriv v. Muzik.[71] In Herriv the Supreme Court held that the 1977 amendment did not enlarge the class of beneficiaries the Civil Damage Act was intended to protect and that the defense of complicity would remain a complete defense.

b. Commission Recommendations

The defense of complicity imposes a penalty on a person who provides alcoholic beverages to another. It precludes recovery by the person who contributes to the other's intoxication. Comparison of this penalty to the treatment given to social hosts under the Civil Damage Act results in an inconsistency that is difficult to explain. No equivalent penalties are imposed on social hosts who furnish alcoholic beverages to another person who is injured or in turn causes injury to some other person. Yet, the defense of complicity in essence penalizes someone who would fall in the category of social host if a Civil Damage Act claim were brought against that person. The treatment is not symmetrical.

In addition, complicity is difficult to distinguish from other facets of contributory negligence already subject to comparison under the Comparative Fault Act, section

604.01, subdivision 1a. A claimant's conduct constituting secondary assumption of risk, misuse of a product, and an unreasonable failure to mitigate or to avoid damages are all subject to comparison under the Comparative Fault Act as types of contributory negligence.[72] Complicity fits more readily into this grouping of defenses than as a separate, complete bar to recovery in Civil Damage Act cases.

The same conduct will receive inconsistent treatment, depending on whether the injured person brings suit against the intoxicated driver who was driving at the time of the accident or against the bar that illegally sold alcoholic beverages to the intoxicated driver. If the injured person, after knowingly and actively participating in the intoxication of the driver, gets into the driver's car and is injured in an accident, the injured person's actions would likely constitute contributory negligence that would reduce but not bar recovery unless the injured person's percentage of fault exceeds the negligent driver's; however, if the injured person brings suit against the bar, recovery will be completely barred by the complete defense of complicity.

The Commission therefore recommends that the defense of complicity no longer be a complete defense but rather that it be considered a partial defense subject to comparison under the Comparative Fault Act. This can be achieved by amending the definition of "fault" in the Comparative Fault Act, section 604.01, subdivision 1a, to include the defense of complicity. That proposed legislation is contained in part IV., A. of this Report.

E. Intangible Losses

In 1986, the Legislature enacted Minn. Stat. section 549.23, which places limits on the damages recoverable in a civil action:

> Subdivision 1. Definition. For purposes of this section, "intangible loss" means embarrassment, emotional distress, and loss of consortium. Intangible loss does not include pain, disability or disfigurement.
>
> Subd. 2. Limitation. In civil actions, whether based on contract or tort, the amount of damages per person for intangible losses may not exceed $400,000.
>
> Subd. 3. Jury not informed of limitation. The court may not inform the jury of the existence of the limitation in subdivision 2.
>
> Subd. 4. Not new action. This section does not create a new cause of action for intangible loss.

This statute was accompanied by section 549.24, which requires damages awards to be broken into the categories noted in section 549.23:

> The court shall require the jury to specify amounts for past damages and future damages as defined in section 604.07. Within each category of damages, the jury must further specify amounts for intangible loss as defined in section 549.23.

Section 604.07, the discount statute, was repealed in 1988, but the special verdict requirement continues.

The Commission recommends repeal of both statutes for a number of reasons. The cap should be repealed because it has been ineffective: it applies only to a very small category of cases. Further, the Commission disfavors caps on damages, believin that remittitur by trial courts can rectify excessive damages awards. Section 549.24 should be repealed because the repeal of the discount provision makes it unnecessary. Finally, repeal avoids the problems that exist when damages elements are specifically enumerated in verdict forms, leading to a potential tendency by juries to overvalue th. damages in a tort claims.

F. Deductions under the No-Fault and Collateral Source Statutes

1. Introduction

The common law collateral source rule precluded the reduction of a tort recove: by amounts received by the plaintiff from other sources, including insurance coverage, even if the net result was a double recovery by the plaintiff of the same losses.[73] Th: rule has been modified in various ways through the enactment of specific provisions providing either for subrogation by insurers making payments to the plaintiff or by offset provisions intended to give the defendant, or the defendant's insurer, the right t offset tort liability by insurance payments made the plaintiff.

The Workers' Compensation Act contains provisions that give a workers' compensation insurer a right of subrogation or reimbursement,[74] the No-Fault Act contains both subrogation[75] and offset[76] provisions, and a new collateral source statut enacted by the legislature as part of its 1986 tort reform package provides for an offs: of certain insurance benefits in cases where subrogation rights are not asserted.

Both the No-Fault Act and collateral source statute create problems with their offset provisions in cases where a plaintiff is at fault in causing the accident that led t: the plaintiff's injuries and damages. In such cases the plaintiff's tort recovery must be

reduced by both the insurance benefits the plaintiff has received and, according to the Comparative Fault Act, by the plaintiff's percentage of fault.

2. The No-Fault Act and Resultant Problems

The No-Fault Act currently requires a reduction of a plaintiff's tort recovery through an offset provision in section 65B.51, subdivision 1:

> With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by section 65B.41 to 65B.71, there shall be deducted from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible.

To illustrate the operation of this section, assume that the plaintiff, injured through the negligence of an insured driver, receives $5,000 in medical expenses from her insurer, and then brings suit against the driver. Assume that the plaintiff recovers a total of $10,000 in the tort action, consisting of $5,000 in damages for past medical expenses and $5,000 in damages for pain and suffering. Section 65B.51, subdivision 1, prevents the plaintiff from recovering twice for her economic loss by requiring a reduction of the $10,000 tort recovery by the $5,000 in medical expenses received by the plaintiff from her insurer. The plaintiff's net tort recovery will thus be $5,000, which represents her uncompensated pain and suffering. The result is fair. The $5,000 from the tort recovery coupled with the $5,000 in no-fault benefits the plaintiff received from her own insurer gives the plaintiff full compensation.

If the plaintiff was also at fault in causing the accident, a second reduction of the tort recovery must be made. Section 604.01, subd. 1 of the Comparative Fault Act mandates a reduction of the plaintiff's tort recovery by the plaintiff's percentage of fault. Neither the Comparative Fault Act nor the No-Fault Act states which reduction must be made first; however, the Minnesota Supreme Court in Parr v. Cloutier,[77] decided that a tort recovery should be reduced first by the plaintiff's percentage of fault and then by any no-fault benefits received by the plaintiff.

To illustrate the impact of the decision, assume the same facts as in the first hypothetical, but with the additional fact that the plaintiff and defendant are each 50% at fault in causing the accident. Now the plaintiff's recovery must be reduced by the amount of no-fault benefits and by the plaintiff's percentage of fault. The order of reduction is critical. If Parr is followed and the plaintiff's recovery is reduced first by the plaintiff's percentage of fault and second by the amount of no-fault benefits received, the plaintiff receives nothing from the defendant. The $10,000 tort recovery is reduced by the plaintiff's percentage of fault, 50 percent, to $5,000, and then by the

amount of no-fault benefits the plaintiff received, $5,000, leaving the plaintiff with no tort recovery. On the other hand, if the tort recovery is reduced first by $5,000, the fault benefits the plaintiff received, reducing the tort recovery to $5,000, and then by the plaintiff's percentage of fault, 50 percent, the plaintiff will be entitled to receive $2,500, or one-half of the uncompensated damages awarded to the plaintiff for pain an suffering. The result is fair to the plaintiff, who is not barred from recovering uncompensated elements of loss from the defendant, and fair to the defendant, who is entitled to have those uncompensated damages reduced by the plaintiff's percentage of fault. To follow the Court's decision in Parr does more than prevent a double recover of economic loss: it permits an invasion and undue reduction of damages that are not covered by the No-Fault Act. In some cases it may completely preclude tort recovery, despite the fact that the plaintiff is less at fault than the defendant.

3. The Commission's Recommendations

The Minnesota Supreme Court in another context has recognized the unfairness c utilizing the offset provision in section 65B.51, subdivision 1, to permit a reduction of elements of loss that are not covered by no-fault payments.[78] Given the unfairness of the procedure adopted by the Court in Parr and the Court's subsequent recognition that the offset provision in section 65B.51, subdivision 1, should not be used in a way that permits an undue reduction of elements of a tort recovery for which no-fault benefits are not available, the Commission recommends that section 65B.51, subdivision 1 be amended to require a reduction of a plaintiff's tort recovery first by the no-fault benefits received by the plaintiff and second by the plaintiff's percentage of fault. The recommended amendment to section 65B.51 is as follows:

> Subdivision 1. [DEDUCTION OF BASIC ECONOMIC LOSS BENEFITS.] With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by section 65B.51 to 65B.71, ~~there shall be deducted~~ the court shall deduct from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible. In any case where the claimant is found to be at fault under section 604.01, the deduction for basic economic loss benefits must be made before the claimant's damages are reduced under 604.01, subdivision 1.

4. The Collateral Source Statute and Commission Recommendations

The same potential problem exists in cases involving the collateral source statute, Section 548.36. The statute provides for the reduction of a plaintiff's tort recovery by certain collateral sources, as defined by the statute. To avoid the Parr problem, the

Commission recommends that section 548.36, subdivision 3 be amended to make it parallel to the suggested amendment of section 65B.51, subdivision 1:

Subd. 3. [DUTIES OF THE COURT.] (a) The court shall reduce the award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2).

(b) If the court cannot determine the amounts specified in paragraph (a) from the written evidence submitted, the court may within ten days request additional written evidence or schedule a conference with the parties to obtain further evidence.

(c) In any case where the claimant is found to be at fault under section 604.01, the reduction required under paragraph (a) shall be made before the claimant's damages are reduced under section 604.01, subdivision 1.

G. Seat Belts and Motorcycle Helmets

1. The Minnesota Experience

There are two questions that relate to the use of motorcycle helmets and seat belts. One relates to civil litigation and whether evidence of failure to wear seat belts and motorcycle helmets should be admissible in civil litigation to reduce or bar an injured person's recovery. The other relates to the penalties that should be imposed for failure to wear helmets or seat belts. Minnesota currently takes different, arguably inconsistent, positions with respect to seat belts and motorcycle helmets.

The law currently requires the use of passenger restraint systems for children:

(a) Every motor vehicle operator, when transporting a child under the age of four on the streets and highways of this state in a motor vehicle equipped with factory-installed seat belts, shall equip and install for use in the motor vehicle, according to the manufacturer's instructions, a child passenger restraint system meeting federal motor vehicle safety standards.

(b) No motor vehicle operator who is operating a motor vehicle on the streets and highways of this state may transport a child under the age of four in a seat of a motor vehicle equipped with a factory-installed seat belt, unless the child is properly fastened in the child-passenger restraint system. Any motor vehicle operator who violates this subdivision is guilty of a petty misdemeanor and may be sentenced to pay a fine of not more than $25.[79]

Although there are exceptions, there are also seat belt requirements for drivers and other passengers of motor vehicles:

> A properly adjusted and fastened seat belt shall be worn by:
>
> (1) the driver of a passenger vehicle;
>
> (2) a passenger riding in the front seat of a passenger vehicle; and
>
> (3) a passenger riding in any seat of a passenger vehicle who is older than three but younger than 11 years of age.
>
> A person who is 15 years of age or older and who violates clause (1) or (2) is subject to a fine of $10. The driver of the passenger vehicle in which the violation occurred is subject to a $10 fine for a violation of clause (2) or (3) by a child of the driver under the age of 15 or any child under the age of 11. A peace officer may not issue a citation for a violation of this section unless the officer lawfully stopped or detained the driver of the motor vehicle for a moving violation other than a violation involving motor vehicle equipment. The department of public safety shall not record a violation of this subdivision on a person's driving record.[80]

While the law mandates the use of seat belts and child restraint systems in certain situations, evidence of failure to use seat belts or restraint systems is inadmissible in civil litigation, pursuant to a specific statutory limitation:

> Proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.[81]

In contrast, only motorcycle riders under the age of 18 are required to wear helmets:

> No person under the age of 18 shall operate or ride a motorcycle on the streets and highways of this state without wearing protective headgear that complies with standards established by the commissioner of public safety; and no person shall operate a motorcycle without wearing an eye-protective device except when the motorcycle is equipped with a wind screen.[82]

And, although seat belt evidence is inadmissible in civil litigation, failure to wear a motorcycle helmet will result in a reduction of the damages that could have been avoided had the injured rider worn a helmet:

> In an action to recover damages for negligence resulting in any head injury to an operator or passenger of a motorcycle, evidence of whether or not the injured person was wearing protective headgear that complied with standards established by the commissioner of public safety shall be admissible only with respect to the question of damages for head injuries. Damages for head injuries of any person who was not wearing protective headgear shall be reduced to the extent that those injuries could have been avoided by wearing protective headgear that complied with standards established by the commissioner of public safety. For the purposes of this subdivision 'operator or passenger' means any operator or passenger regardless of whether that operator or passenger was required by law to wear protective headgear that complied with standards established by the commissioner of public safety.[83]

Prior to a 1977 amendment, the law required all motorcycle riders to wear protective headgear:

> When operating a motorcycle on the streets and highways of this state, the operator and passenger, if any, shall wear protective headgear that complies with standards established by the commissioner of public safety; and no person shall operate a motorcycle unless he is wearing an eye-protective device of a type approved by the commissioner, except when the motorcycle is equipped with a wind screen.

The 1977 amendment repealed the mandatory helmet law, except for persons under the age of 18 years. It also added the provision currently in subdivision 6 that precludes the recovery of damages that could have been avoided had the motorcycle operator or passenger worn approved headgear.

2. Commission Recommendations

In analyzing the requirements, penalties, and impact on civil litigation, the Commission has come to the conclusion that the penalties for failure to wear seat belts should be increased, that motorcycle helmets should once again be mandatory for all operators and passengers, that seat belt evidence should continue to be inadmissible in civil litigation, and that the current helmet law provision precluding recovery for damages the operator or passenger could have avoided by wearing a helmet should be preserved.

The reason for requiring increased penalties for failure to wear seat belts is simply

a recognition of the increased safety factor that is likely to result if the penalties are increased. Currently, wearing of seat belts is the single most significant means of reducing serious injury and death in automobile accidents. The Commission specifically recommends an increase in the fine for failure to wear seat belts and repeal of the limitation on a peace officer's authority to issue citations for failure to wear seat belts unless the officer has made a stop for a moving violation other than a violation involving motor vehicle equipment. The implementing legislation, amending Minnesota Statutes 1988, section 169.686, subdivision 1, is as follows:

> Subdivision 1. [SEAT BELT REQUIREMENT.] A properly adjusted and fastened seat belt shall be worn by:
>
> (1) the driver of a passenger vehicle;
>
> (2) a passenger riding in the front seat of a passenger vehicle; and
>
> (3) a passenger riding in any seat of a passenger vehicle who is older than three but younger than 11 years of age.
>
> A person who is 15 years of age or older and who violates clause (1) or (2) is subject to a fine of ~~$10~~ $50. The driver of the passenger vehicle in which the violation occurred is subject to a ~~$10~~ $50 fine for a violation of clause (2) or (3) by a child of the driver under the age of 15 or any child under the age of 11. ~~A peace officer may not issue a citation for a violation of this section unless the officer lawfully stopped or detained the driver of the motor vehicle for a moving violation other than a violation involving motor vehicle equipment.~~ The department of public safety shall not record a violation of this subdivision on a person's driving record.

Precluding introduction of seat belt evidence in civil litigation may seem inconsistent with the position the Commission has taken on penalties, particularly when the Comparative Fault Act defines "fault" as failure to mitigate damages or an unreasonable failure to avoid damages. Failure to wear seat belts might fit comfortably within those aspects of fault; however, the Commission is acutely aware that in Wisconsin, where seat belt evidence is admissible, the experience has been that routine automobile accident cases are turned into more lengthy trials because of the introduction of seat belt mitigation evidence through the use of expert witnesses. Rather than making litigation more expensive and complex, the Commission recommends that seat belt evidence not be admissible, but that motor vehicle operators and passengers be strongly encouraged to wear seat belts through increased penalties and better public education preceding enforcement of those penalties.

The Commission was also impressed by medical testimony indicating that in many cases serious head injuries and death can be avoided if motorcycle operators and passengers are required to wear helmets.[84] Those who argue that motorcyclists should have the right to decide whether to wear a helmet because their decision is a personal

one ignore not only the emotional cost to friends and family when they are injured, but the societal cost in emergency treatment, long-term medical care, nursing home and rehabilitation costs and loss of productivity.

Although the mandatory helmet law was repealed in 1977, the Commission recommends that the mandatory helmet law be reinstated for the same reasons that it is recommending an increase in the penalties for failure to wear seat belts. The amending legislation, which would add a new subdivision 8 to section 169.974, is as follows:

> Subd. 8. [Helmet use requirement]. Protective headgear shall be worn by:
>
> (1) The operator of any motorcycle or other vehicle defined in section 169.01, subdivision 4; and
>
> (2) Any passenger on a motorcycle or other vehicle defined in section 169.01, subdivision 4.
>
> Any operator or passenger who violates this subdivision is guilty of a petty misdemeanor and may be sentenced to pay a fine of not more than $25.

Finally, the Commission recommends no change in the current law precluding recovery of damages the motorcycle operator or passenger could have avoided by wearing a helmet. There is no indication that the law has posed any particular difficulties in civil litigation.

H. The Household Exclusion in Homeowners Insurance

A household exclusion clause contained in a homeowner's policy excludes liability insurance coverage for any bodily injury to an insured or a resident relative of the insured. For example, if a parent negligently injures the parent's child while riding a lawnmower and at the same time also injures the minor child of a next door neighbor, the parent would have liability insurance coverage under the homeowner's policy for the injury sustained by the neighbor child but not for the injury sustained by the parent's own child.

In Anderson v. Stream,[85] the Minnesota Supreme Court abolished parental immunity, completing a chain of decisions beginning with Balts v. Balts,[86] where the court abolished immunity in suits brought by parents against their children, and Silesky v. Kelman,[87] in which the Court first limited the scope of parental tort immunity.[88] Following Balts and Silesky, the Court abolished interspousal tort immunity in 1969 in Beaudette v. Frana.[89]

Although household exclusions are void in cases where statutory coverage is required and the exclusion is inconsistent with the statute mandating coverage, there no statutory prohibition against utilization of a household exclusion in homeowners insurance policies. Yet, the allowance of household exclusion clauses within homeowners' policies seems inconsistent with the broadening of tort liability achieved b the abolition of intrafamily tort immunities.

The Commission finds it noteworthy that both the courts[90] and legislature[91] of Minnesota have condemned household exclusionary clauses in relation to automobile insurance. In Beaudette v. Frana,[92] the Supreme Court recognized "that the social gain of providing tangible financial protection for those whom an insured wrongdoer ordinarily has the most natural motive to protect transcends the more intangible social loss of impairing the integrity of the family relationship."[93] In Hime v. State Farm Fir & Casualty Co.,[94] the Court applied the Baudette rationale to explain the Minnesota position on family exclusions in automobile insurance cases, concluding that "this same social gain transcends the arguable social loss of impairing insurance contract provision that provide for familial exclusions." It is the opinion of this Commission that this public policy should extend to homeowner's insurance contracts. Doing so would eliminate the problems the Commission has identified, namely, that most homeowners believe they have household coverage and are unaware of the significant gap in coverage that often leaves injured persons uncompensated merely because the negligen party is a relative.

While the Commission is not unmindful of the affront to freedom of contract in recommending elimination of the household exclusion, it is convinced that the public interest in favor of eliminating the exclusion outweighs other considerations. Insurers are in a position to increase premiums to reflect the increased risk they are assuming, as those carriers who have been offering household coverage have done for years.

In addition, although questions may be raised concerning the possibility of fraud and collusion between family members should the exclusion be eliminated, the instance of collusion are rare and have not been a problem in the area of automobile insurance claims.

The Commission considered two primary alternatives in recommending the elimination of the household exclusion. The first was to let the insured elect whether or not to have liability coverage, leaving the insurer and insured with some latitude in contracting for the coverage; however, representatives of the insurance industry convinced the Commission that it would be better to mandate this coverage than to make it a matter of election by the insured, with the attendant litigation that has been spawned by other mandatory offer or election provisions in the automobile insurance context.

The second alternative, and one which the Commission recommends, is complete elimination of the household exclusion. This would be accomplished by an amendment to the statutory provisions governing homeowner's insurance. The proposed amendment amends section 65A.295 by adding a new subpart (e), which reads as follows:

(e) [Certain Provisions Prohibited.] No homeowner's insurance policy may contain a provision excluding coverage for members of the same household.

I. Penalties for Failure to Carry Automobile Insurance

The Commission is concerned that there are currently insufficient incentives for motor vehicle owners to procure the insurance required by the No-Fault Automobile Insurance Act. Accordingly, the Commission recommends that the penalties for failure to carry the necessary insurance be increased to provide the necessary incentives. The implementing legislation is as follows:

Minnesota Statutes 1989 Supplement, section 65B.67, subdivision 4, is amended to read:

Subd. 4. [PENALTY]. (a) A person who violates this section is guilty of a misdemeanor. A person who violates this section within ten years of the first of two prior convictions under this section, or a statute or ordinance from another state in conformity with this section, is guilty of a gross misdemeanor.] the operator of a motor vehicle or motorcycle who violates subdivision 3 and who causes or contributes to causing a motor vehicle or motorcycle accident that results in the death of any person or in substantial bodily harm to any person, as defined in section 609.02, subdivision 7a, is guilty of a gross misdemeanor. In addition to any sentence of imprisonment which the court may impose on a person convicted of violating this section, the court shall impose a fine of not less than $500 nor more than the maximum amount authorized by law. The same prosecuting authority who is responsible for prosecuting misdemeanor violation of this section is responsible for prosecuting gross misdemeanor violations of this section.

(b) In addition to the criminal penalty, the driver's license of an operator convicted under this section shall be revoked for not more than 12 months. If the operator is also an owner of the motor vehicle or motorcycle, the registration of the motor vehicle or motorcycle shall also be revoked for not more than 12 months. Before reinstatement of a driver's license or

registration, the operator shall file with the commission of public safety the written certificate of an insurance carrier authorized to do business in this state stating that security has been provided by the operator as required by section 65b.48.

(c) The commissioner shall include a notice of the penalties contained in this section on all forms for registration of motor vehicles or motorcycles required to maintain a plan of reparation security.

Minnesota Statutes 1989 Supplement, section 169.791, subdivision 6, is amended to read:

Subd. 6. [PENALTY.] Any violation of this section is a misdemeanor. In addition to any sentence of imprisonment which the court may impose, the court shall impose a fine of not less than $500 nor more than $700.

Minnesota Statutes 1989 Supplement, section 169.793, subdivision 2, is amended to read:

Subd. 2. [PENALTY.] Any person who violates any of the provisions of subdivision 1 is guilty of a misdemeanor. In addition to any sentence of imprisonment which the court may impose, the court shall impose a fine of not less than $500 nor more than $700.

J. Medical Liens

Pursuant to section 256B.042, the State of Minnesota has a lien against any cause of action the person receiving medical assistance has against third persons. Section 256B.042, subd. 5, currently provides that, following any judgment, award, or settlement of a cause of action, the state, after deduction of reasonable costs and attorney fees, is entitled to recover the full amount of medical assistance paid to or on behalf of the injured person. The remainder is paid to the plaintiff, although in any event the plaintiff is entitled to receive at least one-third of the award following the deduction of costs and attorney fees.

The existence of the lien and the method of its calculation present problems that the Commission recommends be solved legislatively. The existence of the lien frequently frustrates and delays settlement of personal injury claims because of a lack of clarity in the guidelines used to determine the amount of the lien. The method of calculation of the lien is inconsistent with the way reimbursement is calculated in other insurance settings. In cases involving other insurance payments, such as in no-fault cases, the insurer's right to reimbursement is limited by the amount of benefits paid and is permitted only to the extent necessary to prevent a double recovery of loss. The

medical assistance lien does more, however. The lien may be asserted against elements of damage for which no medical assistance coverage has been paid. The Commission therefore recommends the following amendment to section 256B.042:

256B.042 THIRD PARTY LIABILITY

Subdivision 1. When the state agency provides, pays for or becomes liable for medical care, it shall have a lien for the cost of the care upon any and all causes of action which accrue to the person to whom the care was furnished, or to the person's legal representatives, as a result of the injuries which necessitated the medical care.

Subd. 2. The state agency may perfect and enforce its lien by following the procedures set forth in sections 514.69, 514.70 and 514.71, and its verified lien statement shall be filed with the appropriate court administrator in the county of financial responsibility. The verified lien statement shall contain the following: the name and address of the person to whom medical care was furnished, the date of injury, the name and address of the vendor or vendors furnishing medical care, the dates of the service, the amount claimed to be due for the care, and, to the best of the state agency's knowledge, the names and addresses of all persons, firms, or corporations claimed to be liable for damages arising from the injuries. This section shall not affect the priority of any attorney's lien. The state agency is not subject to any limitations period referred to in 514.69 or 514.71 and has one year from the date notice is received by it under subdivision 4 to file its verified lien statement. The state agency may commence an action to enforce the lien within one year of (1) the date the notice is received or (2) the date the recipient's cause of action is concluded by judgment, award, settlement, or otherwise, whichever is later.

Subd. 3. The attorney general, or the appropriate county attorney acting at the direction of the attorney general, shall represent the state agency to enforce the lien created under this section or, if no action has been brought, may initiate and prosecute an independent action on behalf of the state agency against a person, firm, or corporation that may be liable to the person to whom the care was furnished.

Subd. 4. Notice. The state agency must be given notice of monetary claims against a person, firm, or corporation that may be liable to pay part or all of the cost of medical care when the state agency has paid or become liable for the cost of that care. Notice must be given as follows:

(a) Applicants for medical assistance shall notify the state or local

agency of any possible claims when they submit the application. Recipients of medical assistance shall notify the state or local agency of any possible claims when those claims arise.

(b) A person providing medical care services to a recipient of medical assistance shall notify the state agency when the person has reason to believe that a third party may be liable for payment of the cost of medical care.

(c) A person who is a party to a claim upon which the state agency may be entitled to a lien under this section shall notify the state agency of its potential lien claim before filing a claim, commencing an action, or negotiating a settlement. Notice given to the local agency is not sufficient to meet the requirements of paragraphs (b) and (c).

Subd. 5. Costs deducted. Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has filed its lien, including compensation for liquidated, unliquidated, or other damages, ~~reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and other collection costs~~ the state agency may be reimbursed for medical expenses paid, but only to the extent of those expenses and only to the extent that recovery on the claim absent the lien would produce a duplication of benefits or reimbursement of the same loss. The lien shall be enforceable against the plaintiff only if the state agency, upon demand by the plaintiff, agrees to pay a share of the attorney fees and costs incurred to prosecute the claim, in such proportion as the amount of the state agency's lien bears to any eventual recovery on the claim.

Upon settlement, the state is authorized to negotiate and reduce its liens for reimbursement in accordance with facts and circumstances including, but not limited to, comparative fault, the likelihood of recovery, causation and the limits of recovery.

K. Alternative Dispute Resolution

Because of the increasing costs associated with litigation, and the need for alternative methods of settling lawsuits more expeditiously and at a lower cost, the Commission recognizes the importance of alternative dispute resolution. The Commission has examined the report of the Minnesota Supreme Court and Minnesota

State Bar Association Task Force on Alternative Dispute Resolution[95] and endorses most of the recommendations made in Part I of the Summary of Recommendations in that report.

The recommendations in Part I of the report are as follows:

I. ADMINISTRATION & STRUCTURE

A. ATTORNEYS AND LITIGANTS SHOULD HAVE AVAILABLE TO THEM ALTERNATIVE DISPUTE RESOLUTION PROCESSES

B. NOTICE AND CONSIDERATION OF ADR PROCESSES

1. Upon filing of the lawsuit, the court administrator in the county shall give notice to attorneys of ADR providers available to the district.

2. ADR processes currently used by the court system shall be included in the options to be presented to the parties.

3. Attorneys shall be required to communicate the information to their clients at the commencement of the lawsuit.

C. MANDATORY PARTIES' CASE MANAGEMENT AND ADR SELECTION PROCESS

1. Within 45 days of the filing of the case, the parties shall meet to discuss case management issues, including the selection of an ADR process and the timing of the ADR process. Within 60 days of the filing of the case the attorneys shall communicate the results, in writing, to the court.

D. DISCRETIONARY JUDICIAL CONFERENCE

1. If the parties cannot agree on the appropriate ADR process, or the timing of the ADR process, or if the court does not approve the parties agreement regarding the ADR process, the court shall schedule a conference with the parties within the next 30 days. The ADR processes available will be discussed. If no agreement on the process is reached or if the judge disagrees with the process selected, the judge may order the parties to utilize one of the non-binding ADR processes.

2. The decision to refer a case to an ADR process shall not be

based on the type of case involved. The judge shall determine, on a case by case basis, whether a dispute is appropriate for resolution by an ADR process.

3. The Court should encourage parties to participate in ADR processes. Sanctions should only be imposed if there was failure to participate in the process in accordance with the order of the court.

E. SELECTION OF NEUTRAL

1. Parties shall choose their own qualified neutral if they can agree. If the parties are unable to agree, the court may appoint the neutral.

2. In appropriate circumstances, excluding mediation, the court, upon agreement of the parties, may appoint an individual who does not qualify under standards promulgated for neutrals if the court bases its appointment on legal or other professional training or experience.

F. SITE OF ADR PROCESS

1. The appropriate setting for the ADR process may be determined by agreement of the parties and the neutral or order of the court.

G. ATTENDANCE AT ADR PROCEEDINGS

1. Non-binding ADR program sessions shall not be open to the public except with the consent of the parties.

2. Attorneys for the parties shall be permitted to attend all ADR proceedings.

3. Processes aimed at settlement of the case, such as mediation, mini-trials, or med-arb, shall be attended by individuals with the authority to settle the case.

4. Processes aimed at reaching a decision on the case, such as arbitration or summary jury trial, need not be attended by individuals with the authority to settle the case, so long as they are reasonably accessible.

H. CONFIDENTIALITY OF PROCEEDINGS

1. Statements made and documents produced in a mediation, mini-trial, or summary jury trial may not be used by a party or a third party at a subsequent proceeding on the same case or in a collateral proceeding. In binding arbitration and when the time period for de novo review expires in non-binding arbitration, admissions, sworn testimony and documents produced may be used in subsequent proceedings for any purpose.

2. The notes, records, and recollection of the neutral shall be private and protected from disclosure, unless required by law, or in connection with a judicial challenge to, or enforcement of, an arbitration award.

3. The appropriate rules and statutes shall be amended to include provisions relating to ADR, including the Data Privacy Act and the Supreme Court Rules on Public Access to Records of the Judicial Branch. . .

The Commission approves Part I, with the exception of subpart D., 1. That recommendation states that the judge has the power to disagree with the alternative dispute resolution process adopted by the parties and may order the parties to utilize one of the non-binding ADR processes. The Commission takes the position that if the parties agree to the alternative resolution process to be used, the judge should not have the power to interfere with that choice.

Second, as to the timing of the conference, subpart D.1 states that if the parties are unable to agree on the ADR process or the timing of the process, "the court shall schedule a conference with the parties within the next 30 days." The Commission takes the position that the court, within 30 days, should schedule a conference to take place at some later date.

The Commission takes no position on Part II of the report, which deals with the training and qualification of neutral persons for court annexed and court referred ADR programs.

The Commission recommends the enactment of enabling legislation facilitating judicial adoption and implementation of alternative dispute resolution procedures consistent with the Minnesota Supreme Court and Minnesota State Bar Association Task Force recommendations on Alternative Dispute Resolution.

L. State and Municipal Tort Liability

In 1962, in Spanel v. Mounds View School District No. 621,[96] the Minnesota Supreme Court prospectively abolished municipal tort immunity. The legislature responded in 1963 by enacting Minn. Stat. chapter 466, which abolished local governmental unit tort immunity, but imposed a cap on individual claims of $25,000 for wrongful death claims and $50,000 for personal injury claims, subject to a cap of $300,000 per occurrence. In 1975, in Nieting v. Blondell,[97] the Court prospectively abolished state tort immunity, although not on constitutional grounds. The legislature responded by enacting the state tort claims statute with a limit on liability of $100,00 for death and other claims, subject to a $500,000 per occurrence limit.

In 1976 the legislature increased the cap for municipal liability to $100,000 for wrongful death or other injury, bringing that limit into line with the limit on state tort liability, but preserving the $300,000 per occurrence cap on damages. In 1983 the legislature increased the individual limits on liability to $200,000 under both tort claims statutes and increased the per occurrence limits to $600,000 under both statutes.

The caps in both statutes have been subject to constitutional attack and the Minnesota Supreme Court held both constitutional against equal protection and due process attacks.[98] In both cases the court noted that the statutes limiting state and municipal tort liability have legitimate governmental purposes: "protection of the fiscal integrity and financial stability of the State" and its political subdivisions.[99] The Court concluded that the limitations on liability were rationally related to a legitimate governmental purpose and were therefore constitutional.

The Commission has considered the limitations on the liability of the State of Minnesota and its municipalities, and the arguments for and against expanding that liability. The Commission is aware of the inequities that arise when seriously injured individuals are severely restricted in the amount of money they are able to collect from the state or political subdivisions when the cap applies, as well as of the problems that arise when the state or municipalities are held liable for performing governmental functions that are obligatory and the governmental bankruptcy that could arise from unlimited liability.

The Commission has experienced some frustration at the lack of claims data to support the extent of the exposure of the state and its municipalities to tort liability. Absent that data it is difficult to make any concrete recommendation concerning an increase in caps on damages. However, the Commission does recommend that the legislature give serious consideration to directing the state and municipalities to collect data on claims experience and, thereafter, to raising the caps on damages for political subdivisions, particularly given the fact that many of those subdivisions have insurance

limits in excess of the caps.

M. Mandatory Automobile Liability Insurance

When the no-fault automobile insurance act was originally enacted in 1975 the required limits for automobile liability insurance were set at $25,000 bodily injury per person, subject to a $50,000 per occurrence limit, and $10,000 for property damage. That limit was increased in 1985 to $30,000 bodily injury per person with a $60,000 per occurrence limit, and $10,000 in property damage.[100] In many cases, the mandatory limits are inadequate to fully compensate the injured individual.

The Commission recommends that the legislature study the automobile liability insurance limits, with a view toward increasing those limits.

N. Attorney Fees

Criticism of civil litigation frequently focuses on the contingent fee arrangement plaintiffs make with their attorneys. Under the contingent fee arrangement the attorney receives a set percentage of a tort recovery, usually between 25 and 50 percent, rather than an hourly fee. The attorney's compensation is thus contingent on success in the lawsuit. The contingent fee arrangement is virtually the sole method used to finance personal injury litigation.

There are numerous arguments that have been made for and against the contingent fee arrangement. The chief attribute of the contingent fee is that it allows an injured person to obtain access to the best available legal counsel and to obtain access to the courts, regardless of means. The chief criticisms are that the contingent fee fosters conflicts of interest and frivolous litigation, and overcompensates some attorneys.[101]

No one has seriously argued that the contingent fee arrangement should be completely abolished in favor of the English rule, which requires the losing party to pay the other party's attorneys fees, but there have been numerous suggestions for limiting the contingent fee, usually based on a sliding scale that reduces the amount of the contingent fee as the damages award increases.

The consensus of the Commission is that there is no justification for legislative intervention in the area of contingent fees. There is nothing inherently unfair about the contingent fee arrangement. The arrangement is a matter of contract between the plaintiff and the plaintiff's attorney. While numerous formulae for determining fees have been proposed over the years, none have been workable or fair for all cases to which they could apply. The Commission is of the opinion that peer pressure and

attorney education are the best means of ensuring that the contingent fee will not be abused.

Accordingly, the Commission recommends that there be no legislative intervention into the area of contingent fee arrangements.

ENDNOTES

1. Act of April 12, 1988, ch. 503, § 4, 1988 Minn. Laws 375, 378, provided as follows:

> The speaker of the house of representatives and the majority leader of the senate shall each appoint three persons to a commission to study the civil justice system and current and alternative methods of compensating injured persons. Not later than January 1, 1990, the study commission shall report its findings to the legislature along with any recommendations for legislative action.

2. See The Commercial Liability Insurance Crisis, Report of the Governor's Blue Ribbon Comm'n (Jan. 1987).

3. See Henderson, "Crisis" in Accident Loss Reparations Systems: Where We Are and How We Got There, 1976 Ariz. St. L.J. 401; George L. Priest, Testimony to the Minnesota Injury Compensation Study Commission, June 21, 1989.

4. In general, a person injured through the negligent driving of another may recover damages in excess of those covered by the payment of no-fault benefits and for pain and suffering if the injured person is able to meet one of the "tort thresholds" in the no-fault act. To meet those thresholds the injured person must show medical expenses in excess of $4,000, permanent injury, permanent disfigurement, a disability that lasts for 60 days or more, or the injury must result in the death of the person. See Minn. Stat. § 65B.51 (1988).

5. See Minn. Stat. § 604.01 - .02 (1988).

6. See, e.g., Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975) (abolishing state tort immunity); McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) (adopting strict liability in tort for defective products); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962) (abolishing municipal tort liability).

7. There are many examples of cases where the Minnesota Supreme Court has acted to prevent what it perceived to be an undue expansion of tort liability. See, e.g., Mahowald v. Minnesota Gas. Co., 344 N.W.2d 856 (Minn. 1984) (limiting the scope of strict liability for abnormally dangerous activities); Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982) (refusing to allow recovery for loss of parental consortium); Stadler v. Cross, 295 N.W.2d

552 (Minn. 1980) (disallowing recovery by bystanders suffering emotional distress). In products liability cases the Court has effectively limited strict liability in tort through application of negligence principles in cases involving design defects and failure to warn claims. See Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922 (Minn. 1986); Bilotta v Kelley Co., 346 N.W.2d 616 (Minn. 1984).

8. See, e.g., F. Harper, F. James & O. Gray, The Law of Torts §§ 13.1 - .2 (2d ed. 1986

9. See Germann v. S.F. Smithe Co., 395 N.W.2d 922 (Minn. 1986); Bilotta v. Kelley Co. 346 N.W.2d 616 (Minn. 1984).

10. See Maday v. Yellow Taxi Co., 311 N.W.2d 849, 850 (Minn. 1981); Ruberg v. Skell Oil Co., 297 N.W.2d 746, 751-52 (Minn. 1980)

11. 311 N.W.2d 849 (Minn. 1981).

12. Id. at 850.

13. See Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986).

14. See Halla Nursery, Inc. v. Baumann-Furne & Co., 438 N.W.2d 400 (MInn. Ct. App 1989), review granted.

15. See Peterson v. Bendix Home Systems, Inc., 318 N.W.2d 50 (Minn. 1982).

16. See Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1980).

17. Id. at 348-49.

18. See, e.g., Jacoboski v. Prax, 290 Minn. 218, 187 N.W.2d 125 (1971).

19. In the Minnesota Civil Jury Instruction Guides (3d ed. 1986), the Civil Jury Instructio Guides Committee of the State District Judges Association took the position "that th discovered peril doctrine is inconsistent with the Comparative Fault Act." See id., JIG 143 Comment; Uniform Comparative Fault Act § 1, comment (1977).

20. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 67 (5th ed. 1984). The Minnesota appellate courts have not been directl presented with an opportunity to rule on the issue. The court of appeals, however, ha assumed the applicability of the doctrine. See Thorn v. Glass Depot, 373 N.W.2d 79 (Minn. Ct. App. 1985).

21. Minn. Stat. § 541.15 (1988).

22. See McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose. 30 Amer. U.L. Rev. 579, 582-87 (1981).

23. The rule was adopted in Schmidt v. Esser, 178 Minn. 82, 86, 226 N.W.2d 196, 197 (1929), and the Minnesota courts have continuously followed that rule since that time. See Johnson v. Winthrop Laboratories Division of Sterling Drug, Inc., 291 Minn. 145, 190 N.W.2d 77 (1971); St. Aubin v. Burke, 434 N.W.2d 282 (Minn. Ct. App. 1989), rev. denied. However, in Offerdahl v. University of Minnesota Hospitals and Clinics, 426 N.W.2d 425 (Minn. 1988), the Minnesota Supreme Court held that a "single act" exception applied in a situation where the alleged tort is a single act of surgery, complete at the time of the surgery, and where no continuous course of treatment could cure or relieve the condition created by the allegedly tortious action. In such a case the statute of limitations runs from the date of the surgery. Id. at 428-29.

24. 426 N.W.2d 826 (Minn. 1988).

25. 260 N.W.2d 548 (Minn. 1977).

26. 432 N.W.2d 448 (Minn. 1988).

27. See McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Amer. U.L. Rev. 579, 587 (1981).

28. Kloster-Madsen, Inc. v. Tafi's, Inc., 303 Minn. 59, 63, 226 N.W.2d 603, 607 (1975).

29. See Farnham v. Nasby Agri-Systems, Inc., 437 N.W.2d 760 (Minn. Ct. App. 1989), rev. denied.

30. See O'Connor v. M.A. Mortenson Co., 424 N.W.2d 92 (Minn. Ct. App. 1988), rev. denied.

31. See Citizen's Sec. Mut. Ins. Co. v. General Elec. Corp., 394 N.W.2d 167 (Minn. Ct. App. 1986), rev. denied.

32. Kemp v. Allis-Chalmers Corp., 390 N.W.2d 848 (Minn. Ct. App. 1986).

33. Moen v. Rexnord, Inc., 659 F. Supp. 988 (D. Minn. 1987), aff'd, 845 F.2d 1027 (8th Cir. 1988).

34. See Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988).

35. See Thorp v. Price Bros. Co., 441 N.W.2d 817 (Minn. Ct. App. 1989).

36. 260 N.W.2d 548 (Minn. 1977).

CORRECTION

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HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

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35. See Thorp v. Price Bros. Co., 441 N.W.2d 817 (Minn. Ct. App. 1989).

36. 260 N.W.2d 548 (Minn. 1977).

37. Id. at 555.

38. 38 Ill. 2d 455, 231 N.W.2d 588 (1967).

39. 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985).

40. ___ Va. ___, 374 S.E.2d 17 (1988).

41. Grice, ___ Va. at ___, 374 N.W.2d at 19.

42. 371 N.W.2d 698, 701 (W.D. Va. 1974).

43. Va. Code § 8.01-250.

44. See, e.g., Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 837 (Minn. 198 Haugen & Tarkow, Punitive Damages in Minnesota: The Common Law a Developments under Section 549.20 of the Minnesota Statutes, 11 Wm. Mitchell L. R 353, 356 (1985).

45. See, e.g., Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46 (Minn. 1983).

46. See Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 198

47. See Act of June 14, 1983, ch. 347, section 2, 1983 Minn. Laws 2397-98.

48. Source authority for the punitive damages legislation is American Tort Reform Ass Legislative Reform in the Punitive Damages Area as of June 30, 1989.

49. 109 S. Ct. 2909 (1989).

50. Id. at 2923.

51. Id. at 2924. Justice O'Connor's concern with punitive damages has been raised others:

> Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. . . Since then, awards more than 30 times as high have been sustained on appeal. . . The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. . . Similarly, designers of airplanes and motor vehicles have been

forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages. . .

> The trend toward multi-million dollar awards of punitive damages is exemplified by this case. A Vermont jury found that Browning-Ferris Industries, Inc. . . . tried to monopolize the Burlington roll-off waste disposal market and interfered with the contractual relations of Kelco Disposal, Inc. . . The jury awarded Kelco $51,000 in compensatory damages (later trebled) on the antitrust claim, and over $6 million in punitive damages. The award of punitive damages was 117 times the actual damages suffered by Kelco and far exceeds the highest reported award of punitive damages affirmed by a Vermont court. . . .

Id. (citations omitted).

52. See Volkswagen of America, Inc. v. Gibbs, 110 S. Ct. 418 (1989); Clardy v. Sanders, 110 S. Ct. 376 (1989); Combined Ins. Co. v. Ainsworth, 110 S. Ct. 376 (1989).

53. See Healthamerica v. Menton. 110 S. Ct. 226 (1989).

54. See Clayton Brokerage Co. of St. Louis, Inc. v. Jordan, No. 88-1483.

55. See American Bar Association, Report of the Action Comm'n to Improve the Tort Liability System 17 (1987); S. Daniels, Project Director, Punitive Damages: Storm on the Horizon?, American Bar Foundation, preliminary Report of the Punitive Damages Project (1986); Daniels, Punitive Damages: The Real Story, Amer. Bar Assoc. Jour. (Aug. 1, 1986).

56. See Testimony of Phillip Cole, Esq., Past President, MDLA, before the Minnesota Injury Compensation Study Comm'n, Jan. 25, 1989.

57. See Testimony of Theodore B. Olson on Behalf of the Minnesota Civil Justice Coalition 11-14 (Jan. 25, 1989).

58. 294 Minn. 115, 200 N.W.2d 149 (1972).

59. 298 Minn. 101, 213 N.W.2d 618 (1973).

60. Id. at 112, 213 N.W.2d at 625.

61. 315 N.W.2d 593 (Minn. 1982).

62. 338 N.W.2d 254 (Minn. 1983).

63. 367 N.W.2d 468 (Minn. 1985).

64. 367 N.W.2d 472 (Minn. 1985).

65. 394 N.W.2d 834 (Minn. Ct. App. 1986).

66. 401 N.W.2d 428 (Minn. Ct. App. 1987).

67. 394 N.W.2d at 837.

68. See Lussnig and Ream. Social Host Liability and Minor Guests. For the Defense (August. 1989); Comment. 102 Harv. L. Rev. 549 (1988).

69. See Sage v. Johnson. 437 N.W.2d 582 (Iowa 1989), listing the jurisdictions.

70. 280 Minn. 438. 159 N.W.2d 903 (1968).

71. 374 N.W.2d 275 (Minn. 1985).

72. See Minnesota Civil Jury Instruction Guides. JIG 130 (3d ed. 1986).

73. See. e.g., Hueper v. Goodrich. 314 N.W.2d 828 (Minn. 1982).

74. See Minn. Stat. § 176.061 (1988)

75. See Id. § 65B.53, subds. 2, 3, 6. 8 (1988).

76. See Id. § 65B.51, subd. 1.

77. 297 N.W.2d 138 (Minn. 1980).

78. See Tuenge v. Konetski. 320 N.W.2d 420 (Minn. 1982). In Tuenge the jur determined that the plaintiff's claimed wage loss was less than the no-fault benefi received by the plaintiff for lost wages. The Supreme Court held that the plaintiff's tor award could be reduced only by the amount of damages received by the plaintiff for wag loss. To do otherwise would permit a reduction of uncompensated elements of loss.

79. Minn. Stat. section 169.685 (1988).

80. Id. section 169.686. subd. 1.

81. Id. section 169.685, subd. 4.

82. Id. section 169.974, subd. 4(a).

83. Id. section 169.974, subd. 6.

84. See Testimony of Dr. Brian Mahoney Before the Minnesota Injury Compensation Study Comm'n (Sept. 13, 1989).

85. 295 N.W.2d 595 (Minn. 1980).

86. 273 Minn. 419, 142 N.W.2d 66 (1966).

87. 281 Minn. 431, 161 N.W.2d 631 (1968).

88. In Silesky, the Court limited immunity to cases "(1) where the alleged negligent act involves an exercise of reasonable parental authority over the child," or "(2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. . . ." Id. at 442, 161 N.W.2d at 638.

89. 285 Minn. 366, 173 N.W.2d 416 (1969).

90. See, e.g., Burgraff v. Aetna Life & Cas. Co., 346 N.W.2d 627 (Minn. 1984).

91. See Minn. Stat. § 65B.43, subd. 5 (1988).

92. 285 Minn. 366, 173 N.W.2d 416 (1969).

93. 273 Minn. 419, 142 N.W.2d 66 (1966).

94. 284 N.W.2d 829 (Minn. 1979).

95. Minnesota Supreme Court and Minnesota State Bar Association Task Force on Alternative Dispute Resolution, Final Report (July 1989).

96. 264 Minn. 279, 118 N.W.2d 795 (1962).

97. 306 Minn. 122, 235 N.W.2d 597 (1975).

98. See Snyder v. City of Minneapolis, 441 N.W.2d 781 (Minn. 1989) (municipal tort liability); Lienhard v. State, 431 N.W.2d 861 (Minn. 1988) (state tort liability).

99. Lienhard, 431 N.W.2d at 867; Snyder, 441 N.W.2d at 789.

100. See Minn. Stat. § 65B.49, subd. 3 (1988).

101. See American Bar Association, Report of the Action Commission to Improve the Tort Liability System 25-27 (1987).

APPENDIX

PROPOSED LEGISLATION

TABLE OF CONTENTS BY SECTION AND TOPIC

A bill for an act

relating to civil actions; prohibiting exclusion of any member of a household from homeowners insurance policies; addressing reduction of damages in an action under no-fault automobile insurance; establishing a minimum fine for failure to purchase automobile insurance; increasing the fine for failure to use seat belts; establishing minimum and maximum fines for failure to produce proof of automobile insurance and for using a false automobile insurance identification card; requiring use of protective headgear on motorcycles; clarifying the execution of a state agency lien for medical assistance in a civil case; preserving common law tort law claims against adults who knowingly alcoholic beverages to minors; changing the standard for awarding punitive damages; addressing when a principal may be held liable for punitive damages for an act of the principal's agent; requiring a separate trial to address punitive damages; requiring the court to review a punitive damages award; making the contributory negligence rule apply to damages resulting from economic loss; redefining fault; abolishing the doctrine of last clear chance; repealing the limit on intangible loss damages and the requirement that a jury specify amounts for past, future and intangible loss damages; amending Minnesota Statutes 1989 Supplement, sections 65B.67, subdivision 4; 169.791, subdivision 6; 169.793, subdivision 2; Minnesota Statutes 1988, sections 65A.295; 65B.51, subdivision 1; 169.686, subdivision 1; 169.974, by adding a subdivision; 256B.042, subdivision 5; 340A.801, by adding a subdivision; 541.051, subdivision 1; 548.36, subdivision 3; 549.20, subdivisions 1 and 2, and by adding two subdivisions; 604.01, subdivisions 1, 1a, and 3; repealing Minnesota Statutes 1988, sections 549.23 and 549.24.

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

Section 1. Minnesota Statutes 1988, section 65A.295, is amended to read:

65A.295 [HOMEOWNER'S INSURANCE COVERAGE.]

(a) Every insurer writing homeowner's insurance in this

state shall make available at least one form of homeowner's policy for each level of peril coverage offered by the insurer in which the insured has the option to specify the dollar amount of coverage provided for structures other than the dwelling and for personal property. The premium must be reduced to reflect the reduced risk of lesser coverage.

(b) A written notice must be provided to all applicants for homeowner's insurance at the time of application informing them of the options provided in paragraph (a).

(c) Coverage for structures other than the dwelling is the coverage provided under "Coverage B. Other Structures" in the standard homeowner's policy. Coverage for personal property is the coverage provided under "Coverage C. Personal Property" in the standard homeowner's package policy.

(d) "Level of peril" refers to basic, broad, and all risk levels of coverage.

(e) No insurer may include in any homeowner's insurance policy a provision excluding coverage for members of the same household.

Sec. 2. Minnesota Statutes 1988, section 65B.51, subdivision 1, is amended to read:

Subdivision 1. [DEDUCTION OF BASIC ECONOMIC LOSS BENEFITS.] With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by sections 65B.41 to 65B.71, there-shall-be-deducted the court shall deduct from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible. In any case where the claimant is found to be at fault under section 604.01, the deduction for basic economic loss benefits must be made before the claimant's damages are reduced under section 604.01, subdivision 1.

Sec. 3. Minnesota Statutes 1989 Supplement, section 65B.67, subdivision 4, is amended to read:

Subd. 4. [PENALTY.] (a) A person who violates this section

is guilty of a misdemeanor. A person who violates this section within ten years of the first of two prior convictions under this section, or a statute or ordinance from another state in conformity with this section, is guilty of a gross misdemeanor. The operator of a motor vehicle or motorcycle who violates subdivision 3 and who causes or contributes to causing a motor vehicle or motorcycle accident that results in the death of any person or in substantial bodily harm to any person, as defined in section 609.02, subdivision 7a, is guilty of a gross misdemeanor. In addition to any sentence of imprisonment which the court may impose on a person convicted of violating this section, the court shall impose a fine of not less than $500.

Sec. 4. Minnesota Statutes 1988, section 169.686, subdivision 1, is amended to read:

Subdivision 1. [SEAT BELT REQUIREMENT.] A properly adjusted and fastened seat belt shall be worn by:

(1) the driver of a passenger vehicle;

(2) a passenger riding in the front seat of a passenger vehicle; and

(3) a passenger riding in any seat of a passenger vehicle who is older than three but younger than 11 years of age.

A person who is 15 years of age or older and who violates clause (1) or (2) is subject to a fine of $10 $50. The driver of the passenger vehicle in which the violation occurred is subject to a $10 $50 fine for a violation of clause (2) or (3) by a child of the driver under the age of 15 or any child under the age of 11. ~~A peace officer may not issue a citation for a violation of this section unless the officer lawfully stopped or detained the driver of the motor vehicle for a moving violation other than a violation involving motor vehicle equipment~~ The department of public safety shall not record a violation of this subdivision on a person's driving record. The same prosecuting authority who is responsible for prosecuting misdemeanor violations of this section is responsible for prosecuting gross misdemeanor violations of this section.

Sec. 5. Minnesota Statutes 1989 Supplement, section

169.791, subdivision 6, is amended to read:

Subd. 6. [PENALTY.] Any violation of this section is a misdemeanor. In addition to any sentence of imprisonment which the court may impose, the court shall impose a fine of not less than $500 nor more than $700.

Sec. 5. Minnesota Statutes 1989 Supplement, section 169.793, subdivision 2, is amended to read:

Subd. 2. [PENALTY.] Any person who violates any of the provisions of subdivision 1 is guilty of a misdemeanor. In addition to any sentence of imprisonment which the court may impose, the court shall impose a fine of not less than $500 nor more than $700.

Sec. 7. Minnesota Statutes 1988, section 169.974, is amended by adding a subdivision to read:

Subd. 8. [HELMET USE REQUIRED.] Protective headgear shall be worn by:

(1) The operator of any motorcycle or other vehicle defined in section 169.01, subdivision 4; and

(2) Any passenger on a motorcycle or other vehicle defined in section 169.01, subdivision 4.

Any operator or passenger who violates this subdivision is guilty of a petty misdemeanor and may be sentenced to pay a fine of not more than $25.

Sec. 8. Minnesota Statutes 1988, section 256B.042, subdivision 5, is amended to read:

Subd. 5. [COSTS DEDUCTED.] Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has filed its lien, including compensation for liquidated, unliquidated, or other damages, ~~reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and other collection costs~~ the state agency

may be reimbursed for medical expenses paid, but only to the extent of those expenses and only to the extent that recovery on the claim absent the lien would produce a duplication of benefits or reimbursement of the same loss. The lien is enforceable against the plaintiff only if the state agency, upon demand by the plaintiff, agrees to pay a share of the attorney fees and costs incurred to prosecute the claim, in such proportion as the amount of the state agency's lien bears to any eventual recovery on the claim.

Upon settlement, the state agency may negotiate and reduce its lien for reimbursement in accordance with the facts and circumstances of the case, including, but not limited to, comparative fault under section 604.01, the likelihood of recovery, causation, and applicable limits of recovery.

Sec. 9. Minnesota Statutes 1988, section 340A.801, is amended by adding a subdivision to read:

Subd. 5. Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.

Sec. 10. Minnesota Statutes 1988, section 541.051, subdivision 1, is amended to read:

Subdivision 1. (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion

of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

(b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury or, in the case of an action for contribution or indemnity, upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

(c) Nothing in this section shall apply to actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession.

(d) The limitations prescribed in this section do not apply to the manufacturer or supplier of any equipment or machinery installed upon real property.

Sec. 11. Minnesota Statutes 1988, section 548.36, subdivision 3, is amended to read:

Subd. 3. [DUTIES OF THE COURT.] (a) The court shall reduce the award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2).

(b) If the court cannot determine the amounts specified in paragraph (a) from the written evidence submitted, the court may within ten days request additional written evidence or schedule a conference with the parties to obtain further evidence.

(c) In any case where the claimant is found to be at fault under section 604.01, the reduction required under paragraph (a) must be made before the claimant's damages are reduced under section 604.01, subdivision 1.

Sec. 12. Minnesota Statutes 1988, section 549.20, subdivision 1, is amended to read:

Subdivision 1. (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show ~~a willful indifference to~~ deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Sec. 13. Minnesota Statutes 1988, section 549.20, subdivision 2, is amended to read:

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal ~~was reckless in employing the agent~~ deliberately disregarded a high probability that the agent was unfit, or

(c) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment, or

(d) the principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

Sec. 14. Minnesota Statutes 1988, section 549.20, is amended by adding a subdivision to read:

Subd. 4. In a civil action in which punitive damages are sought, the trier of fact shall, if requested to do so by the defendant, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Sec. 15. Minnesota Statutes 1988, section 549.20, is amended by adding a subdivision to read:

Subd. 3. The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

Sec. 16. Minnesota Statutes 1988, section 604.01, subdivision 1, is amended to read:

Subdivision 1. [SCOPE OF APPLICATION.] Contributory fault ~~shall~~ does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, or in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed ~~shall~~ must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Sec. 17. Minnesota Statutes 1988, section 604.01, subdivision 1a, is amended to read:

Subd. 1a. [FAULT.] "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to

fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Sec. 18. Minnesota Statutes 1988, section 604.01, subdivision 3, is amended to read:

Subd. 3. PROPERTY DAMAGE OR ECONOMIC LOSS; SETTLEMENT OR PAYMENT.] Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss shall does not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Sec. 19. [REPEALER.]

Minnesota Statutes 1988, sections 549.23 and 549.24 are repealed.

Sec. 20. [EFFECTIVE DATE; APPLICATION.]

Section 1 is effective May 1, 1991, and applies to all insurance policies providing homeowners coverage that are executed, issued, issued for delivery, delivered, continued, or renewed on or after that date. Sections 2, 8, and 10 to 19 are effective the day following final enactment and apply to all causes of action arising on or after that date. Sections 3 to 7 are effective August 1, 1990, and apply to violations occurring on or after that date. Section 9 is effective August 1, 1990 and applies to causes of action arising on or after that date.

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Compliments of
Max Gruenberg
F.Y.I.

April 11, 1989

The Honorable Dave Donley
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Re: H.B. 166

Dear Representative Donley:

As you know, I am the president of the Alaska Academy of Trial Lawyers, an organization of nearly 200 lawyers from all over Alaska. The recent hearings held by your committee have been the subject of much discussion and concern by the members of the Academy in relation to the lack of scheduled hearings to address toxic and environmental issues. I understand there now will be hearings to address these areas and you are to be congratulated for this. We believe the hearings will clearly reflect that H.B. 166 is harmful to the civil rights of those victims harmed by toxic or environmental torts.

The recent disaster in Valdez has highlighted the inappropriate nature of many aspects of this bill. This bill will have an absolutely devastating effect upon the abilities of victims of future environmental or toxic torts to recover full compensation for their damages and injuries under state law.

The impact of the bill is such that it will not only harm individuals such as fisherman, but it will also harm organizations such as native corporations. For instance, have you considered, in any depth, how this bill is going to impact the rights of native corporations to recover for damages to their lands as a result of toxic or environmental torts? This is presently a very interesting question. The previously passed tort reform bill (AS 09.17.010) contains a $500,000.00 limit for non-economic damages. Therefore, it is certainly arguable that every native corporation in the

Prince William Sound has been limited by the legislature to $500,000.00 for non-economic loss as a result of the damage to their ancestral lands. Certainly, this defense is going to be raised, and it will ultimately be litigated, but this is simply one example of the devastating nature that so-called "tort reform" can have in the environmental area.

Of equal concern in relation to the $500,000.00 limitation in AS 09.17.010 is the argument that it limits punitive damages claims to $500,000.00. Imagine that! In Valdez, where the gross, criminal negligence has resulted in hundreds of millions, if not billions, of dollars in damages the punitive damages claims of each native corporation, each fisherman, each processor, etc. may be limited to $500,000.00 under state law! Even the State of Alaska's claims may be limited to $500,000.00!

As another example, the recent initiative doing away with joint and several liability is going to have a severe impact in the Valdez disaster. You can bet that the oil companies and the insurance companies are going to ultimately sue everybody in sight trying to lay off some liability, claiming that other parties are responsible for a portion of the incredible damages that have occurred. In this respect a terrible disservice to the citizens of Alaska was performed by the Coalition For Tort Reform.

Further, the six-year statute of repose proposed in the present bill H.B. 166 is disastrous in relation to environmental and toxic torts. In many instances, the damages caused by environmental pollution go on for many, many years beyond the six years. In other instances, the acts of neglect are not discovered as they have been hidden by the polluters. This has occurred over and over again across the United States. Polluters don't generally advertise that they have polluted, and quite often the environmental disaster is not apparent immediately -- unlike the Valdez situation.

As you know, environmental interests are coming together across this state, nationally and internationally, to address the Valdez situation. The so-called contingency plan of the oil companies has been found to be grossly inadequate, and governmental controls to protect us all need to be erected and strengthened. Similarly, we would hope that your committee would step back a pace or two and re-examine this bill in light of the Valdez disaster.

Frankly, I believe you will see increasing efforts to link so-called "tort reformers" with the Valdez disaster as the public becomes more aware of the limitations of liability passed in Alaska in the last several years. I am sure neither you nor your committee wish to be seen as assisting the oil companies and other special interests in further dismantling the legal system which provides at least some protection for victims of environmental disasters.

Indeed, the legislature would be doing a far greater service to consider repealing the limitations passed in 1986 rather than extending them further. At the very least, exceptions for toxic and environmental torts should be made and clearly the limitations provisions of AS 09.17.010 should be clarified or eliminated.

On behalf of the Academy membership, I urge you to reconsider this bill in light of the Valdez disaster. I look forward to reporting to the membership the actions of yourself and your committee in this regard.

Sincerely yours,

ALASKA ACADEMY OF TRIAL LAWYERS

Dennis M. Mestas
President

cc: House Labor & Commerce Committee:

Max F. Gruenberg, Jr.
David Finkelstein
H. A. "Red" Boucher
Virginia M. Collins
Loren Lemar.
Mark Boyer

INTRODUCTION

Hayden
11B166

A statute of limitations is a law that requires a party who believes himself or herself to have been injured to bring an action against the responsible party within a certain time frame. Most states and the District of Columbia have enacted such statutes to protect architects, engineers and others in the construction industry from exposure to unlimited liability on individual projects.

These laws attempt to strike a reasonable balance between the interests of those who may be potentially "harmed" and the rights of defendants to be free of potential suits after a reasonable period of time. In states where no such legislation is in effect, design professionals face a lifetime of liability on each of their projects.

Most state laws relating to design professionals are actually "statutes of repose." These are laws that set time periods within which a suit may be filed regarding a cause of action regardless of when the cause occurred. The usual statute of limitations starts to run from the data of injury or other cause of action and actions brought after the end of the statutory time period are barred. The statute of repose establishes the beginning of the time period not the cause of action, such as an injury, but another event, such as the substantial completion of a building. When the specified time period has expired, suits for actions occurring after that period are barred.

State statutes of limitations for design professionals and the construction industry come under attack in the courts periodically, and may in fact be found to be unconstitutional. A review of the case law referred to in those situations will provide a complete understanding of the problems involved in an individual state. It is important that AIA state and local components, as well as individual architects, closely monitor activity relative to their state's statutes and that industry members now seeking new or amended laws carefully review related legislative and judicial activity to track a well-defined path through the legislative process.

AIA's "Compendium: State Statutes of Limitations" is timely and should be a useful working tool for those dealing with this issue.

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Volume XVIII, No. 8
(Replaces Volume IX, No. 6)

STATUTES OF LIMITATION AND REPOSE

Almost thirty years have passed since the enactment in 1961 of the first special statute of limitation for lawsuits against architects, engineers and others who design and build construction projects. During this period, much interest has been focused on the legislative programs that led to the enactment of such statutes and their interpretation by the courts once enacted.

This issue of *Guidelines for Improving Practice* updates Volume IX, Number 6; it will review some of that history and provide an update on the current status of statutes of limitation and repose for architects and engineers. It should be recognized, however, that new court decisions interpreting these statutes are being handed down with increasing frequency and some of the following information could quickly become out of date. Therefore, if the need arises, an attorney should be consulted to determine the precise status of the statutes of limitation or repose in any given jurisdiction.

The earlier Guideline reports on this subject have been identified as statutes of limitation, whereas in more recent years the courts have generally identified these statutes as statutes of repose. The essential difference between the two is that a statute of limitation refers to a limited period of time during which a plaintiff must file an action after the cause of action accrues; that is from the time the injury or damage was first discovered or reasonably should have been discovered. This limited period of time is usually in the two to three year range. A statute of repose, on the other hand, bars an action for injury or damage after a stated period of time following substantial completion of the project. Thus, injury or damage flowing from a constructed facility more than the number of years stated in the law (on the average between seven and eight years) is barred and the question of the alleged negligence of the design professional is not subject to legal procedures.

Statutes of repose have been challenged on constitutional grounds in almost every state which has enacted such a law. Most of these challenges have failed, but as shown in the following tabulation, some courts have rejected the statute of repose in cases where the injury or damage occurred after the statute had run out, and the plaintiff was denied the opportunity to present evidence of alleged negligence. Those courts which have rejected the constitutional challenges have noted that in striking a balance between the interests of potential plaintiffs and the interests of potential defendants who have a right to be free from suit after the passage of a reasonable period of time, the plaintiff is still free to pursue a claim against the owner or tenant in possession of the building; therefore the plaintiff is not left without a remedy.

In addition to the constitutional issue, the courts in many cases have had occasion to interpret the statutes in terms of those protected by it, the precise language as to scope of coverage by types of projects, and, in some cases, differences between patent (obvious) and latent (hidden) alleged defects. The following tabulation is summarized from a detailed review of the reference to the state codes and the pertinent court decisions. This comprehensive information is available to those architects and engineers, as well as to their attorneys, who may need such detail.

STATE BY STATE STATUS OF STATUTES OF LIMITATION AND REPOSE

Alabama—Seven year statute enacted in 1975 ruled unconstitutional in 1983.

Alaska—Six year statute enacted in 1967 held unconstitutional in 1988.

Arizona—No special statute has been enacted.

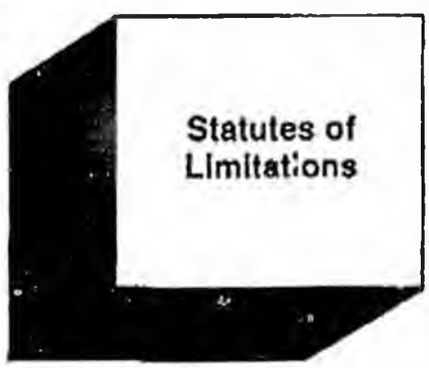
Arkansas—Five year (contract) and four year (tort) statute enacted in 1967 upheld in 1970, and U.S. Supreme Court dismissed further challenge because no federal question was involved.

California—Four year (patent defects) and ten year (latent defects) statutes enacted in 1967 and 1971 upheld in 1976 and 1982.

Connecticut—Seven year statute enacted in 1969 upheld in 1988.

Delaware—Six year statute enacted in 1970 upheld in 1984.

District of Columbia—Ten year statute



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enacted in 1972 upheld in 1986.

Florida—Fifteen year statute for patent defects and four years for latent defects enacted in 1980 upheld in 1986.

Georgia—Eight year statute enacted in 1968 upheld in 1982.

Hawaii—Ten year statute enacted in 1983. No cases to date on validity of the statute; previous statutes held unconstitutional in 1973 and 1982.

Idaho—Six year statute enacted in 1965 upheld in 1982.

Illinois—Two year statute of limitations for architects and engineers enacted in 1983 upheld in 1986; four year statute of repose held unconstitutional in 1967.

Indiana—Ten year statute enacted in 1967 upheld in 1983.

Iowa—No special statute enacted.

Kansas—Two year (patent defects) and ten year (latent defects) enacted in 1963. No reported cases, but held by trial court to bar malpractice action against an architect in 1977.

Kentucky—Five year statute enacted in 1966 held unconstitutional in 1985.

Louisiana—Ten year statute enacted in 1964 upheld in 1978.

Maine—Ten year statute enacted in 1975. No reported cases.

Maryland—Ten year statute enacted in 1979 upheld in 1985.

Massachusetts—Six year statute enacted in 1968 upheld in 1982.

Michigan—Six year statute enacted in 1967 upheld in 1980.

Minnesota—Ten year statute enacted in 1980 upheld in 1982.

Mississippi—Ten year statute enacted in 1966 upheld in 1982.

Missouri—The year statute enacted in 1976. No reported cases.

Montana—Ten year statute enacted in 1971 upheld in 1976.

Nebraska—Ten year statute enacted in 1972 upheld in 1987.

Nevada—Twelve year statute enacted in 1985 following 1965 statute being held unconstitutional in 1983. No reported cases on 1985 statute.

New Hampshire—Six year statute enacted in 1965 held unconstitutional in 1982.

New Jersey—Ten year statute enacted in 1967 upheld in 1972.

New Mexico—Ten year statute enacted in 1967 upheld in 1977.

New York—No separate statute for design professionals, but general malpractice law applied to cut off actions against design professionals on contract claims after six years following issuance of certificate of completion, and three years for claims based on negligence. Personal injury action by person with no prior relationship to design professional not covered by three year limit for negligence claim.

North Carolina—Six year statute enacted in 1963 upheld in 1983.

North Dakota—Ten year statute enacted in 1967 upheld in 1988.

Ohio—Ten year statute for negligence enacted in 1963 upheld in 1984; contract actions governed by fifteen year statute of limitations.

Oklahoma—Ten year statute enacted in 1978 held unconstitutional in 1987; appeal pending before state supreme court.

Oregon—Ten year statute enacted in 1971 upheld in 1971.

Pennsylvania—Twelve year statute enacted in 1965 upheld in 1978.

Puerto Rico—Ten year statute under ancient Spanish "plazo decenal" concept (imposing presumption of liability by design professionals if damage occurs within ten years of substantial completion, but absolute immunity after ten years) upheld in 1988.

Rhode Island—Ten year statute enacted in 1975 upheld in 1985.

South Carolina—Thirteen year statute enacted in 1986 after ten year statute enacted in 1970 was held unconstitutional in 1978. No reported cases under 1986 statute.

South Dakota—Ten year statute enacted in 1966 held unconstitutional in 1984.

Tennessee—Four year statute enacted in 1965 upheld in 1981.

Texas—Ten year statute enacted in 1975 upheld in 1987.

Utah—Seven year statute enacted in 1967 upheld in 1974.

Vermont—Eight year statute under general tort law enacted in 1959 applied to dismiss action against design professional in 1976.

Virginia—Five year statute enacted in 1964 upheld in 1974.

Washington—Six year statute enacted in 1967 upheld in 1972.

West Virginia—Ten year statute enacted in 1983. No reported cases.

Wisconsin—Six year statute enacted in 1979 following 1976 statute being held unconstitutional in 1975. No reported cases under 1979 statute.

Wyoming—Ten year statute enacted in 1973 held unconstitutional in 1980.

that the former record owner would have received the notice, would have prevented foreclosure by paying off the State's lien, and then would have allowed Emerson to continue his adverse possession. The causal connection between the allegedly defective notice and Schnabel's present predicament is too attenuated to confer standing upon him.

The causation aspect of standing has never been well developed by this court. However, federal courts have addressed the issue at length. To have standing in federal court, a litigant must show that *but for* the challenged action, his injury would not have occurred. *See Warth v. Seldin*, 422 U.S. 490, 504–08, 95 S.Ct. 2197, 2207–2210, 45 L.Ed.2d 343, 358–59 (1975) (in a challenge of restrictive zoning practices, litigants lacked standing because they failed to allege facts showing that, "absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield"). In *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40–45, 96 S.Ct. 1917, 1225–1227, 48 L.Ed.2d 450, 462–64 (1976), the Court held that the causation requirement of standing is not merely prudential, but is mandated by Article III.[3]

In Alaska state courts, standing restrictions are prudential, rather than constitutionally mandated. In this case, the party entitled to notice was the 1957 record owner. That person, whomever he may be, does not claim that the notice was defective. Under these circumstances, it is imprudent to entertain such a claim by one who was not injured by the alleged violation. To do so would be a misallocation of judicial resources.

Schnabel's alternative basis for standing is that he seeks to protect not his own rights but the rights of a third party—namely, the former record owner. A litigant can have standing to protect the constitutional rights of a third party when a special relationship exists between the two, and when the third party's rights would otherwise go unasserted. This court allowed standing on this basis in *Wagstaff v. Superior Court, Family Court Division*, 535 P.2d 1220, 1226 (Alaska 1975). However, in Schnabel's case, this basis for standing is totally inapposite. Schnabel seeks to vindicate the rights of the former record owner not to *protect* that person, but instead to possess adversely *against* him. In other words, Schnabel is not an appropriate representative.

For these reasons, I would affirm the superior court's holding that Schnabel lacks standing. As for the defense of laches, I agree that it would otherwise bar Schnabel's claim. However, a person who lacks standing to raise a claim cannot unreasonably delay in asserting it.

3. The *Warth* and *Simon* opinions have been criticized, primarily because the Supreme Court required such a high degree of certainty in the causal connection. *See* L. Tribe, *American Constitutional Law* 129–34 (2d ed. 1988).

TURNER CONSTRUCTION COMPANY, INC., Petitioner,

v.

Robert SCALES and Kip Clapper, Respondents.

Phillip IVERSON d/b/a Iverson Construction Company, Petitioner,

v.

DeWayne B. CARSON and Robert J. Kottre d/b/a K & W Doors, Respondents.

Nos. S–1429, S–1600.

Supreme Court of Alaska.

April 1, 1988.

Action was brought against construction company and others for loss as result of fire in apartment complex. The Superi-

or Court, Third Judicial District, Anchorage, Douglas J. Serdahely and Joan M. Katz, JJ., ruled six year statute of repose unconstitutional and petitions for review were filed. The Supreme Court, Burke, J., held that six-year statute of repose on suits against design professionals violated equal protection clause of State Constitution.

Affirmed.

1. Limitation of Actions ⇐165

Statute of repose differs from statute of limitations in that former may bar cause of action before it accrues, because statute begins to run from specific date unrelated to date of injury so that cause of action thus precluded is damnum absque injuria, loss without remedy, while in contrast, statute of limitations begins to run when plaintiff's cause of action accrues or is discovered and thus operates to prevent plaintiff from sleeping on his or her rights.

2. Constitutional Law ⇐42.2(2)

Injured party's interest in invalidating six-year statute of repose on suits against design professionals was as great as that of materialmen or defendant in possession, so that injured party had standing to assert claim that statute violated equal protection clause of State and Federal Constitutions because it did not protect all defendants similarly situated and two-year savings period unfairly discriminated against parties injured in seventh and eighth year after construction. AS 09.10.055; Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐213.1(1)

When plaintiff challenges statute on state and federal equal protection grounds, first question Supreme Court must consider is whether constitutional claimant asserts fundamental constitutional right or statute uses a suspect classification and if answer to either question is yes, then statute is unconstitutional under federal standard absent compelling state interest. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 1.

4. Constitutional Law ⇐249(3)
Limitation of Actions ⇐4(2)

Six-year statute of repose on suits against design professionals classified defendants based on their occupation or nature of work they performed and classified plaintiffs based on time of their injury, so that neither was suspect class, and right asserted was interest in suing particular party, which was not fundamental constitutional right, but as interest in redressing wrongs through judicial process was significant one, compelling state interest standard did not apply and Supreme Court would analyze significant constitutional claims asserted under fair and substantial relationship test of State Constitution. Const. Art. 1, §§ 1, 7.

5. Constitutional Law ⇐249(3)
Limitation of Actions ⇐4(2)

There was no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and goals of encouraging construction, and thus six-year statute of repose on suits against design professionals violated equal protection clause of state constitution. AS 09.10.055; Const. Art. 1, §§ 1, 7.

Paula Williams and Dan Cadra, Law Offices of Roy W. Matthews III, Anchorage, for petitioner Turner Const. Co.

Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for petitioner Philip Iverson.

Joseph A. Kalamarides, Kalamarides & MacMillan, Anchorage, for respondent Robert Scales.

Jeffrey M. Feldman and Stuart A. Ollanik, Gilmore & Feldman, Anchorage, and Jeffrey D. Jefferson, Nordstrom, Steele & Jefferson, Kenai, for respondent DeWayne B. Carson.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

The question in these consolidated cases is whether AS 09.10.055, the six-year statute of repose on suits against design professionals, violates the Alaska Constitution. The superior court ruled the statute unconstitutional. We affirm.

I. FACTS AND PROCEEDINGS

Turner Construction v. Scales, File No. S-1429. Robert Scales suffered property damage when a fire occurred in the Winterbrook Apartments in 1984.[1] Turner Construction Company built the apartments in 1978. Scales sued Turner Construction and others for his loss, alleging in part that the fire was caused by Turner Construction's negligent construction and installation of a fireplace.

[1] Turner Construction asserted that Scales' cause of action was barred by AS 09.10.055, the six-year statute of repose[2] governing actions against design professionals such as architects, engineers and contractors, and moved for judgment on the pleadings. Scales moved to strike the defense on the ground that the statute is unconstitutional. Superior Court Judge Douglas J. Serdahely granted Scales' motion, concluding that AS 09.10.055 violates the due process[3] and equal protection[4] clauses of the Alaska Constitution.

Iverson v. Carson, File No. S-1600. DeWayne B. Carson was injured in 1985, while attempting to install an automatic garage door opener in his home. Phillip Iverson built the home in 1978; the garage door was originally installed by a subcontractor.

Seven months after his injury, Carson sued Iverson and the subcontractor. Iverson moved for summary judgment, based on the six-year statute of repose, because Carson was injured six and a half years after substantial completion of the improvement. Superior Court Judge Joan M. Katz denied Iverson's motion, concluding that AS 09.10.055 violates the equal protection clause[5] of the Alaska Constitution.

II. THE STATUTE

The statute in question was enacted in 1967. It provides in part:

> (a) No action, whether in contract, in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought *against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement* more than six years after substantial completion of an improvement.
>
> (b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, *which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred.* In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

1. Given the procedural posture of these cases, we must assume the allegations in the plaintiffs' complaints are true. *Freezer Storage v. Armstrong Cork*, 476 Pa. 270, 382 A.2d 715, 717 (1978).

2. A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded is *damnum absque injuria*, a loss without a remedy.

In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

3. Alaska Const. art. I, § 7.

4. Alaska Const. art. I, § 1.

5. *Id.*

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of the state for the bringing of any action.

(d) The limitation prescribed by this section *shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise* of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

AS 09.10.055 (Emphasis added).

The House Judiciary Report notes that this section "places a ... statute of limitation on lawsuits against architects, designers and builders." 1967 House Journal 261. It is clear, however, that the House intended to enact a statute of repose. An explanatory report by the Judiciary Committee stated in part:

> [T]he time begins running upon 'substantial completion' of the improvement; consequently this bill limits not only the bringing of the cause of action, but in effect prevents the cause of action from arising when an injury occurs after the time limitation has expired. An action based on a defect not discovered until after the time limitation has expired would likewise be precluded.

Id. at 365.[6]

III. EQUAL PROTECTION

[2] Scales and Carson argue that AS 09.10.055 violates the equal protection clauses of the state and federal constitutions because (1) it does not protect all defendants similarly situated and (2) the two-year savings period in subsection (b) unfairly discriminates against plaintiffs injured in the seventh and eighth years after construction. The design professionals contend that the injured plaintiffs lack standing to challenge the statute on the first of these grounds, because the plaintiffs are not members of the class of unprotected defendants. The design professionals further contend that the statute is constitutional.

Standing. The injured plaintiffs' first constitutional claim is based on the rights of third parties—potential defendants, such as owners and tenants, who are not protected by the statute.[7] Every court which has addressed the issue has concluded that persons such as the plaintiffs are proper parties to assert this claim, because they are precluded from asserting their own rights against defendants who might otherwise be liable; the statute narrows the group against which recovery is available. *McClanahan v. American Gilsonite*, 494 F.Supp. 1334, 1342–44 (D.Colo.1980); *Shibuya v. Architects Hawaii*, 65 Hawaii 26, 647 P.2d 276, 282 (1982). The injured plaintiffs' interest in invalidating the statute is as great as that of the materialman or the defendant in possession. *Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514, 523 (1982). We find this reasoning persuasive, therefore, we conclude that the injured plaintiffs have standing to assert the equal protection challenge.

[3] *Equal protection.* When a plaintiff challenges a statute on state and federal equal protection grounds, the first question we must consider is whether the constitutional claimant asserts a fundamental constitutional right or the statute uses a suspect classification. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978). If the answer to either question is "yes," then the statute is unconstitutional under the federal standard absent a compelling state interest. *Id.*

[4] This statute classifies defendants based on their occupation or the nature of the work they perform; it classifies plaintiffs based on the time of their injury.

6. AS 09.10.055 is one of many state statutes enacted as a result of a concerted national lobbying effort by design professionals sparked by an increase in their potential liability for design and construction defects. *See, e.g.*, Collins, *Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality*, 29 Fed'n of Ins.Couns.Q. 41, 44–45 (1978).

7. The statute expressly excludes from its protection owners, tenants and others in possession. AS 09.10.055(d). Most courts construe the statute to exclude materialmen and manufacturers of component parts as well.