

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672

5764 HOUSE JUDICIARY

148

Neither is a suspect class. The right asserted is the interest in suing a particular party, which is not a fundamental constitutional right; nonetheless, the interest in redressing wrongs through the judicial process is a significant one. *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983). We, therefore, conclude that the compelling state interest standard does not apply and we may analyze the significant constitutional claims asserted under the fair and substantial relationship test of the state constitution. *Erickson*, 574 P.2d at 12.

[5] We next examine the statutory purpose to determine whether it is a legitimate exercise of the state's police power. *Id.* The purpose of the statute is to encourage construction and avoid stale claims by shielding certain defendants from potential future liability. See *Yarbro v. Hilton Hotels*, 655 P.2d 822, 825-27 (Colo.1982). We believe that these are legitimate government purposes.

The final step is to examine the means to determine whether they substantially further the statutory purpose. *Erickson*, 574 P.2d at 12. In doing so, we do not hypothesize facts which would sustain otherwise questionable legislation. *Isakson v. Rickcy*, 550 P.2d 359, 362 (Alaska 1976).

Scales argues that AS 09.10.055 is unconstitutional because it fails to protect owners, tenants, and materialmen, while protecting others who are similarly situated, such as architects, planners, engineers, and construction contractors. Turner Construction contends that there are substantial differences between these groups justifying the statutory distinction.

Many courts have suggested distinctions to justify the challenged classification. The exclusion of owners, tenants, and others in possession is most often rationalized by the fact that such persons have continuing control over access to and maintenance of the property. *Klein*, 437 N.E.2d at 522-25; *Freezer Storage*, 382 A.2d at 718. Some courts also point to the different

treatment of owners and tenants at common law, such as the larger class of potential plaintiffs which may sue design professionals, the legal theories available to those plaintiffs, and the common law defenses available only to landlords and tenants. *Freezer Storage*, 382 A.2d at 718-20. Others cite the possibility of defective maintenance and alterations. *Yarbro*, 655 P.2d at 827-28.

Various justifications are also found to support the distinction between materialmen and design professionals.⁸ One argument is that, because materialmen provide standard goods manufactured by standard processes, they may be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. *Klein*, 437 N.E.2d at 524; *Freezer Storage*, 382 A.2d at 719. In other words, buildings are more complex than their component parts. *Freezer Storage*, 382 A.2d at 719. Furthermore, design professionals have special expertise; they should be encouraged to experiment and their creativity should not be stifled. *Klein*, 437 N.E.2d at 524; *O'Brien v. Hazelt & Erdal*, 410 Mich. 1, 299 N.W.2d 336, 342 (1980).

We are not persuaded by any of these diverse rationales. One effect of the statute of repose is to eliminate the statutory right of contribution among tortfeasors. In *Arctic Structures v. Wedmore*, 605 P.2d 426, 435 (Alaska 1979), we ruled that the Uniform Contribution Among Tortfeasors Act, AS 09.16.010-060, did not abolish the common law rule of joint and several liability; therefore, each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury. It follows that whenever an unprotected owner is 50% at fault and a protected contractor is 50% at fault, the unprotected owner would be 100% liable for all damages, without a remedy for contribution. The statute of repose, therefore, does not entirely abrogate liability for defective de-

8. For purposes of argument, we assume without deciding that AS 09.10.055 does not protect ma-

terialmen or manufacturers.

sign work, but shifts it. Thus, the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered.

In our view, there is no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction. The shift of liability to unprotected parties decreases their incentive to build in corresponding measure to the increased incentives of protected parties. If anything, the disincentive on the part of owners may be greater than their proportional measure of liability shift, because they may be liable for a product over which they have no control. Moreover, design defects may be catastrophic, and experimental designs shift correspondingly greater unknown risks to owners, giving them even more reason not to finance construction. Thus, we believe that the statutory means are not substantially or rationally related to the ends. We conclude that AS 09.10.055 violates the equal protection clause of the Alaska Constitution.

The decisions of the superior court in File Nos. S-1429 and S-1600 are AFFIRMED.



Robert MERRY, Appellant,

v.

STATE of Alaska, Appellee.

No. A-1635.

Court of Appeals of Alaska.

March 25, 1988.

Rehearing Denied April 12, 1988.

While defendant was on probation for misconduct involving controlled substance in third degree, defendant pled no contest

to another felony. The State then moved to revoke defendant's probation based on the second felony conviction. The Superior Court, Third Judicial District, Anchorage, S.J. Buckalew, Jr., J., revoked defendant's probation and imposed sentence of three and one-half years, and defendant appealed. The Court of Appeals, Coats, J., held that: (1) court's later imposition of consecutive sentence after mistakenly imposing concurrent sentence did not constitute double jeopardy; (2) court's pronouncement of sentence outside presence of defendant and his counsel constituted harmless error; and (3) imposition of sentence for probation violation after violation was considered as aggravating factor at another sentencing proceeding did not violate double jeopardy.

Affirmed.

1. Criminal Law \S 189

Once sentence is legally imposed and not subject to change under criminal rules, double jeopardy bars court from increasing sentence. U.S.C.A. Const. Amend. 5.

2. Criminal Law \S 189

Court's later imposition of consecutive sentence after mistakenly imposing concurrent sentence did not violate constitutional provisions prohibiting double jeopardy; it was clear from sentencing record that court made mistake and that court intended to impose consecutive sentence. U.S.C.A. Const. Amend. 5.

3. Criminal Law \S 987

Not every correction in judgment requires presence of defendant; however, sentencing is critical stage of criminal proceeding, at which defendant should be present.

4. Criminal Law \S 1177

Court's pronouncement of sentence outside presence of defendant and his counsel constituted harmless error, where defendant was given notice of fact that court had made change in sentence on record and defendant never asked court to pronounce sentence in his presence.

✓ F: 101(c)

PROVISIONS FOR BUILDING LAWS

For more than 25 years the design profession, jointly with contractors, has acted to secure state laws which effectively cut off rights of action by plaintiffs for alleged negligence after a reasonable period of time following completion of a project.

These efforts have been largely successful through enactment of what were originally called "statutes of limitation," but now are more properly designated as "statutes of repose." Only two state legislatures (Arizona and Iowa) have failed to pass any kind of legislation along this line.

With few exceptions, these laws cutting off a right of action against A/E's and contractors after the established period of time have been attacked on constitutional grounds. The score stands at 30 states finding them constitutional and 10 holding them unconstitutional. In the remaining 10 states there has been no definitive decision.

The basic legal issue on which the courts have ruled one way or the other on the constitutional question is in reality more of a social or policy issue. Courts which have come down against such statutes argue that they are contrary to the "open courts" provisions in the state constitution to bar an action for injury before the injury has occurred. Thus, where there was a defect in design or construction which was not manifest until years after substantial completion of the project, and beyond the statutory cutoff period, it would be an injustice to dismiss the suit for damages before the injured party had a chance to prove negligence.

The contrary, and majority, view of courts which have passed on the issue is that it may be equally unfair to the designer or contractor to face a negligence claim indefinitely. At some reasonable point in time, a person should not have to face a never-ending possibility of a suit based on work done many years earlier.

Factors favoring a limitation

The courts finding in favor of the constitutionality of statutes of repose also note the problem of proof of fault years after the project is completed. Documents have disappeared and witnesses, if still available, have faulty memories of the facts. Favorable decisions often note that, unlike products, the design and construction of projects are not subject to testing. Finally, the majority view is that the issue is properly one for legislative policy determination, rather than judicial fiat.

What is a reasonable cutoff period following substantial completion? This varies considerably among the state laws, ranging from a low of four years to a high of 15 years, with an average of seven or eight years. Some

attempts are being made to lower the cutoff to five years, but there is a danger that the courts may consider this unduly short.

Now that the basic concept is well established in the majority of states, a series of court decisions have dealt with the question of interpretation of the specific language. Still a current question is whether the statute of repose applies to products incorporated into a structure. The courts are split, depending on the particular facts of the case, and it may be some time before a consensus emerges on the issue.

In a recent Pennsylvania case, for instance, a federal court applying Pennsylvania law in an action against the manufacturer of an oven that had been installed in an industrial building held that the statute did not apply because the oven was not "an improvement to real property." This is language common to all the state statutes of repose.

Contrary to the conclusion in the Pennsylvania case, the Texas Court of Appeals has held that the statute did apply to the manufacturer of a wall heater that allegedly caused carbon monoxide poisoning. The heater, the court said, was an "improvement to real property," and not just a fixture because it was actually built into the wall.

Therein may lie the distinction to guide the courts in subsequent cases: Was the product an integral part of the building, thereby being an "improvement to real property"? Or was the product installed in such a way that it was readily movable, thereby being a fixture? A dissenting justice in the Pennsylvania case said the answer "should turn upon whether their component parts were specifically designed for this purpose or were shelf items intended for many purposes"

The Supreme Judicial Court of Massachusetts recently held that the statute of repose did not protect the supplier of a circuit breaker which had been incorporated into the structure on a permanent basis, but applied only to those who " . . . render particularized services for the design and construction of particular improvements to particular pieces of real property."

As is always the case, each decision turns on its own facts. But the most likely test should be whether the product in question becomes a permanent part of the structure, thereby losing its character as a separate product, just as the bricks and steel in a building are absorbed into and become an integral part of the building. However, as usual, the courts will have the last word. Δ

Milton F. Lunch is former general counsel to the National Society of Professional Engineers, and presently serves as a consultant in engineering and legal matters. His statements in this article should be considered only as general information and not as legal advice.

The scope and legality of statutes of repose

Most courts uphold laws cutting off actions against designers and contractors, but split on the issue of their application to products

By Milton F. Lunch

HOUSING, LAND, PRESENT;
 (101) (C)
 BUILDING LAWS

EXHIBIT "A"

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/Unconstitutional</u>	<u>Citation</u>
Alabama		Unconstitutional	<u>Jackson v. Mannesman Corp.</u> , 437 So.2d 725 (1983).
Alaska	§09.10.055	Undecided	
Arizona	None		
Arkansas	§37-239	Constitutional	<u>Carter v. Hartenstein</u> 455 S.W.2d 918 (1970)
California	§337.1, 337.15	Constitutional	<u>Barnhouse v. City of Pinole</u> , App., 183 Cal.Rptr.881 (Ct.App 1982)
Colorado	§13-80-127	Constitutional	<u>Criswell v. M.J. Brock & Sons, Inc.</u> 601 P.2d 495 (1984)
Connecticut	§52-584a	Constitutional	<u>Patricia O. Ecker v. Town of West Hartford</u> 205 A.2d 219 (1987)
Delaware	§8127	Constitutional	<u>Cheswold Vol. Fire Co. v. Lambertson</u> Const., 489 A.2d 413 (1984)
Dist of Columbia	§12-310	Constitutional	<u>Westerman v. Firemans Fund Ins Co.</u> , 499 A.2d 116 (Ct.App. 1985)
Florida	§95.11	Constitutional	<u>American Liberty Ins Co. v. West & Conyers</u> 491 So.2d 573 (Ct.App 1986)

HOUSING, LAND, PROPERTY
BUILDING LAWS

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/ Unconstitutional</u>	<u>Citation</u>
Georgia	§3-1006	Constitutional	<u>Mullis v. Southern Co Services, Inc.</u> , 296 SE.2d 379 (1982)
Hawaii	§657-8	Undecided*	<u>Shibuya v. Architects Hawaii Ltd.</u> , 647 P.2d 276 (1982)
Idaho	§5-241	Constitutional	<u>Twin Falls Clinic & Hospital Bd v. Hamill</u> , 644 P.2d 341 (1982)
Illinois	§22.3	Constitutional	<u>Matayka v. Melia</u> , 456 N.E.2d 353 (Ill.App. 1983)
Indiana	§34-4-20-1	Constitutional	<u>Beecher v. White</u> , 447 N.E.2d 622 (Ind.App. 1983)
Iowa	None		
Kansas	None		
Kentucky	§413.135	Constitutional	<u>Carney v. Moody</u> , 546 S.W.2d 40 (1982)
Louisiana	§9:2772	Constitutional	<u>Burmester v. Gravity</u> 366 So.2d 1381 (1978)
Maine	§752-A	Undecided	
Maryland	§5-108	Constitutional	<u>Whiting-Turner Con- tracting Co. v. Coupard</u> , 499 A.2d 178 (Ct.App. 1985)

HOUSING, LAND
BUILDING LAWS

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/ Unconstitutional</u>	<u>Citation</u>
Massachusetts	§2B	Constitutional	<u>Keign v. Catalano</u> , 437 N.E.2d 514 (S.Jud.Ct. 1982)
Michigan	§27A.5839	Constitutional	<u>O'Brien v. Hazelet & Erdal</u> , 299 N.W.2d 33 (1980)
Minnesota	§541.051	Constitutional	<u>Calder v. City of Crystal</u> , 318 N.W.2d 838 (1982)
Mississippi	§15-1-41	Constitutional	<u>Anderson v. Fred Wagner, Etc.</u> , 402 So.2d 320 (1981)
Missouri	§516.097	Undecided	
Montana	§93-2619	Constitutional	<u>Reeves v. Ille Electric Company</u> , 551 P.2d 647 (1976)
Nebraska	§25-222,223	Constitutional	<u>Williams v. Kingery Const Co</u> , 404 N.W.2d 32 (1987)
Nevada	§1	Unconstitutional	<u>State Farm Fire and Cas v. All Elec., In</u> 660 P.2d 995 (1983)
New Hampshire	None	Unconstitutional	<u>Henderson Clay Products v. Edgar Wood, Etc.</u> , 451 A.2d 174 (1982)
New Jersey	§2A:14-1.1	Constitutional	<u>Rosenberg v. Town of North Bergen</u> , 293 A.2d 662 (1972)

PROPERTY
BUILDING LAWS

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/ Unconstitutional</u>	<u>Citation</u>
New Mexico	§37-1 27	Constitutional	<u>Howell v. Burk</u> , 568 P.2d 214 (Ct.App. 1977)
New York	None		
North Carolina	§1-46	Constitutional	<u>Lamb v. Wedgewood South Corp.</u> , 302 S.E.2d 868 (1983)
North Dakota	§28-01-44	Undecided	
Ohio	§2305.131	Constitutional	<u>Elizabeth Gamble Deaconess Home v. Turner Const.</u> , 470 N.E.2d 950 (Ct.App. 1984)
Oregon	§12.135	Constitutional	<u>Joseph v. Burns</u> , 491 P.2d 203 (1971)
Pennsylvania	§5536	Constitutional	<u>Freezer Storage, Inc. v. Armstrong Cork Co.</u> 382 A.2d 715 (1978)
Rhode Island	§9-1-29	Constitutional	<u>Walsh v. Gowing</u> , 494 A.2d 543 (1985)
South Carolina		Unconstitutional	<u>Broome v. Truluck</u> , 241 S.E.2d 739 (1978)
South Dakota		Unconstitutional	<u>Daugaard v. Baltic Co-Op. Bldg. Supply Ass'n.</u> , 349 N.W.2d 419 (1984)

<u>State</u>	<u>Statute of Repose</u>	<u>Constitutional/Unconstitutional</u>	<u>Citation</u>
Tennessee	\$28-314	Constitutional	<u>Harmon v. Angus R. Jessup Associates, Inc.</u> , 619 S.W.2d 522 (1981)
Texas	\$5536a	Constitutional	<u>McCulloch v. Fox & Jacobs, Inc.</u> , 696 S.W.2d 918 (Ct.App. 1985)
Utah	\$78-12-25.5	Constitutional	<u>Good v. Christensen</u> 527 P.2d 223 (1974)
Vermont	\$511	Undecided	
Virginia	\$8.01-250	Constitutional	<u>Smith v. Allen Bradley Co.</u> , 371 F.Supp. 698 (1974)
Washington	\$4.16.310	Constitutional	<u>Jones v. Weyerhaeuser Co.</u> , 741 P.2d 75 (Ct. App. 1987)
West Virginia	None		
Wisconsin	\$893.155	Constitutional	<u>United States Fire Ins Co v. E.D. Wesley Co.</u> , 301 N.W.2d 271 (1980)
Wyoming	\$1-3-111	Undecided*	<u>Phillips v. ABC Bldrs'</u> 611 P.2d 821 (1980)

* Previous statute declared unconstitutional. New statute has been adopted by the Legislature, but not ruled upon by the Court.

BUILDING LAW/01 (E)
11/20/86

STATUTES OF REPOSE FOR DESIGN PROFESSIONALS

Held Constitutional

ARKANSAS	<u>Carter v. Hartenstein</u> , 455 S.W. 2d 918 (Ark. 1970); app. dismissed for want of substantial federal question, 401 U.S. 901 (1971)
CALIFORNIA	<u>Regents of the University of California v. Hartford Accident & Indemnity Co.</u> , 131 Cal. Rptr. 112 (Cal. App. 1976)
COLORADO	<u>Yarbro v. Hilton Hotels Corp.</u> , 655 P. 2d 822 (Colo. 1982)
DELAWARE	<u>Cheswold Volunteer Fire Co. v. Lambert & Sons Constr. Co.</u> , 462 A 2d 416 (Del. 1983)
D. C.	<u>Britt v. Schindler Elevator Corp.</u> , 637 F. Supp. 734 (D.D.C. 1986)
FLORIDA	<u>American Liberty Insurance Company v. West & Conyers, Architects and Engineers</u> , 491 So. 2d 573 (Fla. App. 1986)
GEORGIA	<u>Mullis, et al. v. Southern Services Co.</u> , 296 So. 2d 579 (Ga. 1982)
IDAHO	<u>Twin Falls Clinic & Hospital Bldg. Corp. v. Hammill</u> , 644 P. 2d 347 (Ida. 1982)
LOUISIANA	<u>Burmester v. Gravity Drainage District No. 2</u> , 366 So. 2d 1381 (La. 1978)
MARYLAND	<u>Whiting-Turner Contracting Co. v. Coupard</u> , 499 A. 2d 178 (Md. 1985)
MASSACHUSETTS	<u>Klein v. Catalano</u> , 437 N.E. 2d 514 (Mass. 1982)
MICHIGAN	<u>O'Brien v. Hazelet & Erdal</u> , 299 N.W. 2d 336 (Mich. 1980)
MINNESOTA	<u>Calder v. City of Crystal</u> , 318 N.W. 2d 838 (Minn. 1982)
MISSISSIPPI	<u>Anderson v. Fred Wagner & Roy Anderson, Jr.</u> , 402 So. 2d 320 (Miss. 1982)
MONTANA	<u>Reeves v. Ille Electric Co.</u> , 551 P. 2d 647 (Mont. 1976)
NEW JERSEY	<u>Rosenberg v. Town of North Bergen</u> , 293 A. 2d 662 (N.J. 1972)
NEW MEXICO	<u>Terry v. New Mexico State Highway Commission</u> , 645 P. 2d 1375 (N.M. 1982)
NORTH CAROLINA	<u>Lamb v. Wedgewood</u> , 286 S.E. 2d 876 (N.C. App. 1982)
OHIO	<u>Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy</u> , 740 F. 2d 1362 (6th Cir. 1984)
OREGON	<u>Joseph v. Burns</u> , 491 P. 2d 203 (Ore. 1971)
PENNSYLVANIA	<u>Freezer Storage Inc. v. Armstrong Cork Co.</u> , 382 A. 2d 715 (Pa. 1978)
TENNESSEE	<u>Harmon v. Angus R. Jessup Associates, Inc.</u> , 619 S.W. 2d 522 (Tenn. 1981)
TEXAS	<u>Hill v. Forrast & Cotton, Inc.</u> , 555 S.W. 2d 145 (Tex. Civ. App. 1977)
UTAH	<u>Good v. Christensen</u> , 527 P. 2d 223 (Utah 1974)
VIRGINIA	<u>Smith v. Allen-Bradley Co.</u> , 371 F. Supp. 698 (W.D. Va. 1974)
WASHINGTON	<u>Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.</u> , 503 P. 2d 108 (Wash. 1972)

STATUTES OF REPOSE FOR DESIGN PROFESSIONALS

Unconstitutional

- HAWAII Fujioka v. Kam, 514 P. 2d 568 (Hawaii 1973)
- ILLINOIS Skinner v. Anderson, 231 N.E. 2d 588 (Ill. 1967) *
- KENTUCKY Tabler v. Wallace, 704 S.W. 2d 179 (Ky. 1986)
- NEVADA State Farm Fire & Casualty Co. v. All Electric, Inc., 660 P. 2d 995 (Nev. 1983)
- NEW HAMPSHIRE Henderson Clay Products, Inc. v. Edgar Wood & Associates, Inc., 451 A. 2d 174 (N.H. 1982)
- OKLAHOMA Loyal Order of Moose Lodge 1785 v. Cavaness, 563 P. 2d 143 (Okla. 1977)
- SOUTH CAROLINA Broome v. Truluck, 241 S.E. 2d 739 (S.C. 1978)
- SOUTH DAKOTA Daugaard v. Baltic Cooperative Bldg. Supply Assn., 349 N.W. 2d 419 (S.D. 1984)
- WISCONSIN Kallas Millwork Corp. v. Square D. Co., 225 N.W. 2d 454 (Wis. 1974)

* But see, Skinner v. Hellmuth, Obata & Kassabaum, Inc., Oct. 17, 1986, upholding separate classification of A/Es for purpose of two-year cut-off period not related to substantial completion issue (copy enclosed).



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

REFUSE

P. O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

May 17, 1988

MEMORANDUM

TO:

ATTN:

FROM: Gretchen Keiser
Legislative Analyst

RE: Alaska Builder Liability for Construction Flaws
Research Request 88.253

You requested information on state and municipal laws governing builder liability for construction flaws. Specifically, you wanted to know the length of the period of liability following completion of construction.

Under Alaska's Code of Civil Procedure, a person must bring an action to recover ". . . for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property. . ." within six years of substantial completion of an improvement (AS 09.10.055; Attachment A). This statute also allows for actions (within the six-year period) against a person performing or furnishing the design, planning, supervision, or construction of an improvement to recover damages for injuries or wrongful death arising out of a deficiency. According to the statutory citation, this limitation of actions relating to construction was enacted in 1967 (61 SLA 67).

Jim Baldwin, Assistant Attorney General, was not aware of any municipal ordinances specifically addressing the issue of limitation of actions relating to construction, but considered it unlikely that municipalities would establish a limitation of actions which differed from state statute. I contacted the municipal law departments of the home rule municipalities of Anchorage, Juneau and Sitka and all indicated that they have no ordinances addressing this specific issue. They would rely on state statute if the issue arose.

Please contact me if you have any further questions.

Attachment

ATTACHMENT A

Alaska Statute 09.10.055

Collateral references. — Constitutionality and construction of statute authorizing constructive or substituted service of process, and continuation of pending action against foreign representative of deceased nonresident driver

of motor vehicle, arising out of accident occurring in state, 18 ALR2d 644

Probate, in state where assets are found, of will of nonresident which has been admitted to probate in state of domicile, 20 ALR2d 1013

Sec. 09 05 040. Service of process on resident who leaves state after accident. A resident who has operated a motor vehicle, or has owned a motor vehicle operated with the express or implied consent of the owner which has been involved in an accident or collision on a public highway, and who has moved to another state after the accident or collision shall be treated as a nonresident for service of process as provided under AS 09 05 020 and 09 05 030. (1 ch 59 S.L.A. 1963)

NOTES TO DECISIONS

Section operates in conjunction with AR 09 06 020. — In cases arising from motor vehicle accidents in which the defendant subsequently leaves the state, AS 09 05 020 operates in conjunction with this section to authorize service upon an absent defendant by serving the commissioner of revenue. Pursuant to these provisions, the commissioner of revenue is, as a matter of law, appointed as defendant's statutory agent so that service upon him is of the same effect and validity as personal service upon the defendant. *Byrne v. Ugle*, Sup. Ct. Op. No. 722 (File No. 1359), 4M P 2d 716 (1971).

In an action for damages arising from an automobile collision in this state, the statute of limitations is not tolled by the defendant's absence from the state, as provided by AS 09 10 120, when, during the defendant's absence, the plaintiff had the right to proceed against him under AS 09 05 020, which, in conjunction with this section, makes the commissioner of revenue the agent of the absent defendant for purposes of service of process. *Byrne v. Ugle*, Sup. Ct. Op. No. 722 (File No. 1359), 4M P 2d 716 (1971).

Chapter 10. Limitations of Actions.

Section	Section
10 General limitations on civil actions	150 Effect of absence from state or concealment
30 Actions to recover real property in 10 years	140 Disabilities of minority, incompetency and imprisonment
40 Action upon judgment or sealed instrument in 10 years	160 Disability of alien during war
50 Actions to be brought in six years	170 Injunction against commencement of action
55 Certain actions relating to construction in six years	180 Disability
60 Actions to be brought in three years	190 Coexisting disabilities
70 Actions to be brought in two years	200 Acknowledgment or promise
80 Actions to be brought in one year	210 Payment on account
90 Actions for penalty	220 When nonresident's cause of action barred
100 Other actions in 10 years	230 Certain actions relating to real property
110 Accrual of cause of action upon mutual, open, and current account	240 Commencement of action after dismissal or reversal
120 Actions in name of state, political subdivisions, or public corporations	

Collateral references. — 51 Am. Jur. 2d, Limitation of Actions, § 1 et seq.

53 C.J.S., Limitations of Actions, § 1 et seq.

When statute of limitations begins to run against actions to recover interest, 36 ALR 1088

When limitation begins to run against an action to recover on account of removal of mineral from land, 37 ALR 1182

What amounts to commencement of suit to enforce mechanic's lien, 76 ALR 898

Law requiring service of notice before bringing suit, as affecting time from which statute of limitations begins to run, 95 ALR 1148, 3 ALR2d 711

When "bill" deemed to have taken place for purposes of statute of limitations which fixes commencement of period at time of judicial sale, 101 ALR 1348

When limitation commences to run against suit for reformation of instrument, 106 ALR 1338

Character or kind of action or proceeding within operation of statute which permits new action after expiration of period of limitations, upon failure of previous actions commenced within the period, 120 ALR 378, 79 ALR2d 1509

Duress or undue influence as tolling or suspending statute of limitations, 121 ALR 1294

Commencement of action as suspending or running of limitations against claim which is subject of setoff, counterclaim, or recoupment, 127 ALR 909

When statute of limitations commences to run against action to recover tax, 131 ALR 822

War as suspending running of limitations in absence of specific statutory provisions to that effect, 137 ALR 1454, 140 ALR 1518, 141 ALR 1511

Ancillary proceedings as suspending or removing bar of statute of limitations as to judgment, 166 ALR 767

Application and limits of rule that death of person liable does not interrupt running of statute of limitations, 174 ALR 1423

Validity of contractual waiver of statute of limitations, 1 ALR2d 1445

Limitation period as affected by requirement of notice or presentation of claim against governmental body, 3 ALR2d 711

New party brought in after statute has run, 8 ALR2d 8

Fraud as tolling period for bringing action provided in statute creating the right of action, 15 ALR2d 500

First and last day included or excluded for purposes of statute, 20 ALR2d 1249

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statute defining commencement of action, or expressly relating to interruption of running of limitations, 27 ALR2d 236

Promissory estoppel as to statute of limitations, 48 ALR2d 1079

Raising defense of statute by demurrer, equivalent motion to dismiss, or by motion for judgment on pleadings, 61 ALR2d 301

Raising statute by motion for summary judgment, 61 ALR2d 341

Validity of statute enlarging limitation period, 79 ALR2d 1090

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 ALR2d 1399

General appearance as avoiding otherwise effective bar of statute of limitations, 82 ALR2d 1200

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 ALR2d 965

Statute limiting time for probate as applicable to will probated in another jurisdiction, 87 ALR2d 721

Federal court's adoption of state period of limitation, in action to enforce federally created right, as including related or subsidiary state laws or rules as to limitations, 90 ALR2d 265

Extraterritorial operation of limitation applicable to statutory cause of action, other than by reason of "borrowing statute," 95 ALR2d 1162

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 ALR2d 1234

Validity of contractual time period, shorter than statute of limitations, for bringing action, 5 ALR2d 1197

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 ALR2d 1361

Settlement negotiations as stopping reliance on statute of limitations, 39 ALR2d 127

Agreement of parties as stopping reliance on statute of limitations, 43 ALR2d 156

Promissio to settle or perform as stopping reliance on statute of limitations, 44 ALR2d 482

required. In both cases, there must be uninterrupted adverse and notorious possession, but only seven years is required under AS 09 25 050 as opposed to 10 years under this section. *Shilka v Young*, Sup Ct Op No 1460 (File No 3003, 567 P 2d 769 (1977)).

A trust once established is not within the statute of limitations. *Alaska N Ry v Alaska Cent Ry*, 5 Alaska 304 (1915). If beneficiaries were holding land as trustees for the plaintiff or its grantor, the statute would not run until there was some act of disavowal done by said trustees which showed unequivocally that they were holding adversely to the alleged cestui que trust. *Alaska N Ry v Alaska Cent Ry*, 5 Alaska 304 (1915).

An possession of trustee is presumed to be possession of cestui que trust. *Alaska N Ry v Alaska Cent Ry*, 5 Alaska 304 (1915).

Owner of land should not be disturbed in absence of clear proof of surrender of rights. — Before a court would be justified in interfering with an owner's enjoyment of his own land, it ought to be satisfied by the clearest kind of proof that the owner has surrendered that absolute joy dispendably which the law guarantees to him. *Roberts v Jaeger*, 5 Alaska 190 (1914).

Statute does not run until plaintiff acquires title. The statute of limitations begins to run against a trustee under the general land laws of the United States only from the date when he acquires title and an occupancy by another prior to that time will not be deemed adverse to the title of such grantor. *True Conual Mining Co v Langstedt*, 136 F 124 (9th Cir 1905).

To start the statute of limitations running against a plaintiff, who relied on a trustee's deed, he must have been dispossessed and in order to be dispossessed he must have at some time have been seized of title either of fee or freehold and until the issuance of patent to him he was not so seized. *Valentine v McGrath*, 4 Alaska 102 (1910); *Alaska & N.W.T.T Co v Bernhoffer*, 4 Alaska 99 (1910).

It is the delay, the duration of time after title seized, that renews the bar of the statute, this may not be by relation, else one ought be barred before time seized. *Valentine v McGrath*, 4 Alaska 102 (1910).

Thus, the statute of limitations does not begin to run against the claimant of a mining claim before his patent issues. *True Conual Mining Co v*

Langstedt, 136 F 124 (9th Cir 1905). The action of an owner on his own land does not start the running of adverse possession. *Karvonen v Day*, 261 F 2d 611 (9th Cir 1959).

Forfeiture actions. In the absence of a controlling statute a forfeiture action is subject to the same period of limitations as the underlying debt. *Dworkin v First Nat'l Bank*, Sup Ct Op No 409 (File No 929, 444 P 2d 777 (1960)).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the forfeiture of either legal or equitable mortgages. *Dworkin v First Nat'l Bank*, Sup Ct Op No 409 (File No 929, 444 P 2d 777 (1960)).

The six year statute of limitations (AS 09 10 050), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v First Nat'l Bank*, Sup Ct Op No 409 (File No 929, 444 P 2d 777 (1960)).

Quoted in *Alaska Nat'l Bank v Lock*, Sup Ct Op No 1372 (File No 2754, 659 P 2d 1049 (1975)).
 Stated in *Walsh v Kowrick*, Sup Ct Op No 2072 (File No 4655), 611 P 2d 28 (1980).

II. ADVERSE POSSESSION.

A. Generally.

Legal title gives constructive possession until ouster by adverse possession. — A legal title gives a right of possession as well as the legal action and possession, constructive with the right, until there is an ouster by adverse possession. *True Conual Mining Co v Langstedt*, 121 F 709 (9th Cir 1903), *rev'd on other grounds*, 136 F 124 (9th Cir 1905).

Supposition underlying adverse possession. — Adverse possession presupposes the existence of some title of right to possession in another which is adverse to the one claiming title by adverse possession. *Perez v Day & Night Fuel Co*, Sup Ct Op No 532 (File No 944, 451 P 2d 579 (1969)).

The good faith of the claimant is not a relevant issue under the ten-year adverse possession statute. *Lee v Muldoon*, Board of Health v County, Inc., Sup Ct Op No 602 (File No 1103, 406 P 2d 615 (1970)).

Elements required under AS 09 25 050 and this section. Under both AS 09 25 050 applicable when possession is under color of title and this section applicable in other cases, the claimant must satisfy the basic elements of adverse possession: establishing his or her claim. *Bentley Family Trust v Lynn, Kenzie, Inc.*, Sup Ct Op No 2004 (File No 6015, 633P, 656 P 2d 761 (1981)).

Three basic requirements for adverse possession: — (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner. *Shilka v Young*, Sup Ct Op No 1460 (File No 3003, 567 P 2d 769 (1977)). Possession must be open, notorious, visible, continuous for the statutory period and under a claim of right. *City of Anchorage v Nadelet*, Sup Ct Op No 1111 (File No 2040; 530 P 2d 124 (1975)).

Purpose of requirements. — The main purpose of nearly all the requirements is essentially the same, that is, to put the record owner on notice of the existence of an adverse claimant. *Peters v Juneau Douglas Girl Scout Council*, Sup Ct Op No 1018 (File No 1660, 557 P 2d 519 (1978)).

From the standpoint of the true owner, the purpose of the various requirements of adverse possession — that the nonpossessor use the actual, open, notorious, continuous, exclusive and hostile nature of the possession so that he, the owner, may take steps to vindicate his rights by legal action. *Peters v Juneau Douglas Girl Scout Council*, Sup Ct Op No 1018 (File No 1660, 557 P 2d 519 (1978)).
Shilka v Young, Sup Ct Op No 1460 (File No 3003, 567 P 2d 769 (1977)).

Adverse possession gives notice of rights. — Where a person is in visible possession of real property adverse to the world and open and notorious, notice must be taken of his actual rights. A purchaser would be placed upon notice thereby. *Nordberg v Wolfson*, 265 P 2d 507 (9th Cir 1958).

More occupation of the premises even for the statutory period does not establish title. *Ayres v Day & Night Fuel Co*, Sup Ct Op No 532 (File No 944, 451 P 2d 579 (1969)).

Occupant cannot build adversely who admits title in United States. For continuous adverse possession there must be, among other things, an entry under claim of right hostile to the true owner and to the world and an occupation of land cannot build adversely while he admits the title to be in the United States. *True Conual Mining Co v Langstedt*, 136 F 124 (9th Cir 1905).

Effect of patent on adverse claims. Since the issuance of a patent has the effect of cutting off as against the United States and its grantees all adverse claims based on use or occupancy not initiated pursuant to any statute providing for ultimate title in the absence of any color of title, adverse possession by the defendant claiming title by such possession must be shown for the period of its exercise prior to the commencement of proceedings under this section. *Juneau Independent School Dist v Smith*, 13 Alaska 1, 92 F Supp 617 (D Alaska 1956).

When statute of limitations begins to run. — See notes to *True Conual Mining Co v Langstedt*, 136 F 124 (9th Cir 1905); *Valentine v McGrath*, 4 Alaska 102 (1910); and *Alaska & N.W.T.T Co v Bernhoffer*, 4 Alaska 99 (1910), under analysis line 1 (General Consideration).

Burdens of proof upon adverse possessor. — A party claiming title to real property by adverse possession must bear the burden of proving such elements by clear and convincing evidence. *Bentley v P. v Trust v Lynn, Kenzie, Inc.*, Sup Ct Op No 2004 (File No 6015, 633P, 656 P 2d 761 (1981)).

Plaintiff may show adverse possession by his predecessors. An instruction was error which failed to let the jury consider the adverse possession of plaintiff's predecessors in interest in determining whether plaintiff had acquired title by adverse possession. *Ringstad v Gramine*, 12 Alaska 190, 171 P 2d 170 (9th Cir 1949).

Without attempt to transfer title. It is the transfer of possession, not title which is the critical element, because a paper transfer is not necessary to convey adverse possession. The privity required in that there must be a continuous possession by mutual agreement, so that the possession of the true owner shall not constructively intervene. *Ringstad v*

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

Collateral references. — Construction of statute authorizing constructive or substituted service of process on, and continuation of pending action against foreign representative of deceased nonresident driver

of motor vehicle arising out of accident occurring in state, 18 ALR2d 844
 Probate, in state where assets are found of will of nonresident which has been admitted to probate in state of domicile, 20 ALR3d 1031

Sec. 09.05.040. Service of process on resident who leaves state after accident. A resident who has operated a motor vehicle, or has owned a motor vehicle operated with the express or implied consent of the owner which has been involved in an accident or collision on a public highway, and who has moved to another state after the accident or collision shall be treated as a nonresident for service of process as provided under AS 09.05.020 and 09.05.030. (1 ch 59 S.L.A. 1963)

NOTES TO DECISIONS

Section operates in conjunction with AS 09.05.020. — In cases arising from motor vehicle accidents in which the defendant subsequently leaves the state, AS 09.05.020 operates in conjunction with this section to authorize service upon an absent defendant by serving the commissioner of revenue. Pursuant to those provisions, the commissioner of revenue is, as a matter of law, appointed as defendant's statutory agent so that service upon him is of the same effect and validity as personal service upon the defendant. *Byrne v. Ogil*, Sup. Ct. Op. No. 721 (File No. 1359), 4AA P.2d 716 (1971).

In an action for damages arising from an automobile collision in this state, the statute of limitations is not tolled by the defendant's absence from the state, as provided by AS 09.10.130, when, during the defendant's absence, the plaintiff had the right to proceed against him under AS 09.05.020, which, in conjunction with this section, makes the commissioner of revenue the agent of the absent defendant for purposes of service of process. *Byrne v. Ogil*, Sup. Ct. Op. No. 722 (File No. 1359), 4AA P.2d 716 (1971).

Chapter 10. Limitations of Actions.

Section	Section
10 General limitations on civil actions	150 Effect of absence from state or concealment
30 Actions to recover real property in 10 years	140 Disabilities of minority, incompetency and imprisonment
60 Action upon judgment or sealed instrument in 10 years	180 Inability of alien during war
60 Actions to be brought in six years	170 Injunction against commencement of action
65 Certain actions relating to construction in six years	180 Disability
60 Actions to be brought in three years	153 Coexisting disabilities
70 Actions to be brought in two years	200 Acknowledgment or promise
80 Actions to be brought in one year	210 Payment on account
90 Actions for penalty	220 When nonresident's cause of action barred
100 Other actions in 10 years	230 Certain actions relating to real property
110 Annual of cause of action upon mutual, open, and current account	240 Commencement of action after dismissal or reversal
120 Actions in name of state, political subdivisions, or public corporations	

Collateral references. — 61 Am. Jur. 2d, Limitation of Actions, § 1 et seq.
 63 C.J.S., Limitations of Actions, § 1 et seq.

When statute of limitations begins to run against actions to recover interest, 30 ALR 1085

When limitation begins to run against an action to recover on account of removal of mineral from land, 37 ALR 1112

What amounts to commencement of suit to enforce mechanic's lien, 75 ALR 695

Law requiring service of notice before bringing suit, as affecting time from which statute of limitations begins to run, 95 ALR 1188, 3 ALR2d 711

When "bell" deemed to have taken place for purposes of statute of limitations which fixes commencement of period at time of judicial sale, 101 ALR 1348

When limitation commences to run against suit for reform of instrument, 106 ALR 1338

Character or kind of action or proceeding within operation of statute which permits new action after expiration of period of limitations, upon failure of previous actions commenced within the period, 120 ALR 376, 79 ALR2d 1309

Duress or undue influence as tolling or suspending statutes of limitations, 121 ALR 1294

Commencement of action as suspending of running of limitations against claim which is subject of setoff, counterclaim, or recoupment, 127 ALR 909

When statute of limitations commences to run against action to recover tax, 131 ALR 822

War as suspending running of limitations in absence of specific statutory provisions to that effect, 137 ALR 1454, 140 ALR 1518, 141 ALR 1511

Ancillary proceedings as suspending or removing bar of statute of limitations as to judgment, 156 ALR 787

Application and limits of rule that death of person liable does not interrupt running of statute of limitations, 174 ALR 1423

Validity of contractual waiver of statute of limitations, 1 ALR2d 1445

Limitation period as affected by requirement of notice or presentation of claim against governmental body, 3 ALR2d 711

New party brought in after statute has run, 6 ALR2d 6

Fraud as tolling period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500

First and last day included or excluded for purposes of statute, 20 ALR2d 1249

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 ALR2d 236

Promissory estoppel as to statute of limitations, 48 ALR2d 1079

Raising defense of statute by demurrer, equivalent motion to dismiss or by motion for judgment on pleadings, 61 ALR2d 300

Raising statute by motion for summary judgment, 61 ALR2d 341

Validity of statute enlarging limitation period, 79 ALR2d 1080

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 ALR2d 1399

General appearance as avoiding otherwise effective bar of statute of limitations, 92 ALR2d 1200

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 ALR2d 965

Statute limiting time for probate as applicable to will probated in another jurisdiction, 87 ALR2d 721

Federal court's adoption of state period of limitation, in action to enforce federally created right, as including related or subsidiary state laws or rules as to limitations, 90 ALR2d 265

Extraterritorial operation of limitation applicable to statutory cause of action, other than by reason of "borrowing statute," 95 ALR2d 1162

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 ALR3d 1234

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 ALR3d 1197

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 ALR3d 1361

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127

Agreement of parties as estopping reliance on statute of limitations, 43 ALR3d 756

Promises to settle or perform as estopping reliance on statute of limitations, 44 ALR3d 482

Mainly diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 ALR3d 760.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 ALR3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 ALR3d 702.

Validity of contractual provision establishing period of limitations longer than that provided by state statute of limitations, 44 ALR3d 1172.

Relation back of amended pleading substituting true name of defendant for fictitious name used in earlier pleading as to avoid bar of limitations, 45 ALR3d 130.

Legal malpractice by permitting statutory time limitation to run against client's claim, 90 ALR3d 293.

Delay in prosecution of disciplinary proceeding as defense or mitigating circumstance, 93 ALR3d 1057.

Statute of limitations as bar to arbitration under agreement, 94 ALR3d 533.

Laches or acquiescence as defense, so as to bar recovery or arrears of permanent alimony or child support, 5 ALR4th 1015.

Statute limiting time for commencement of action to establish paternity of illegitimate child as violating child's constitutional rights, 18 ALR4th 928.

Claims for expenses of last sickness or funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon, 17 ALR4th 530.

Sec. 09.10.010. General limitations on civil actions. No person may commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute. (1) 101 ch 101 SLA 1962.)

Cross references. — For commencement of action, see Civ R 3, for relation back of amendment to pleading to date of original pleading, see Civ R 15(c).

NOTES TO DECISIONS

This section codifies the general policies of granting repose and ensuring fresh evidence at trial by establishing certain time limits for all civil actions. *Haakanson v Wakefield Seafoods, Inc.*, Sup Ct Op No 1843 (File No 3428, 349); 600 P 2d 1087 (1979).

The defense of the statute of limitations must be specifically pleaded. *Devine v Carionada*, 15 Alaska 232, 143 P Supp 561 (D Alaska 1964).

Foreclosure actions. — The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. *Dworkin v First Nat'l Bank*, Sup Ct Op No 499 (File No 929), 444 P 2d 777 (1964).

In the absence of a controlling statute a foreclosure action is subject to the same

period of limitations as the underlying debt. *Dworkin v First Nat'l Bank*, Sup Ct Op No 499 (File No 929), 444 P 2d 777 (1964).

In a suit to foreclose a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. *Dworkin v First Nat'l Bank*, Sup Ct Op No 499 (File No 929), 444 P 2d 777 (1964).

The six-year statute of limitations (AS 09 10 060), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v First Nat'l Bank*, Sup Ct Op No 499 (File No 929), 444 P 2d 777 (1964).

Tort actions. — A tort action must be commenced within two years after the cause of action has accrued. *Bliverton v*

Marler, Sup Ct Op No 186 (File No No 370 (File No 617), 421 P 2d 634 341; 369 P 2d 3 (1964).

Quoted in *Growth v Noss*, Sup Ct Op

Sec. 09 10 020. When action commenced. (Repealed, 1 ch 27 SLA 1966. For present law, see Civ R 3.)

Sec. 09 10 030. Actions to recover real property in 10 years. No person may bring an action for the recovery of real property, or for the recovery of the possession of it unless commenced within 10 years. No action may be maintained for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action. (1) 103 ch 101 SLA 1962.)

Cross references. — For adverse possession, see AS 09 10 060.

NOTES TO DECISIONS

- I General Consideration
- II Adverse Possession
 - A Generally
 - B Actual Possession
 - C Notorious Possession
 - D Exclusive Possession
 - E Continuous Possession
 - F Hostile Possession

I GENERAL CONSIDERATION.

This section is a statute of repose. *Roberts v Joerg*, 5 Alaska 190 (1914).

And presupposes that there never has been a deed. *Roberts v Joerg*, 5 Alaska 190 (1914).

But section may be basis of new title.

— While this statute purports only to bar the remedy it is clear that it can be the basis of a new title, which may be asserted adversely as well as defensively. *Ringstad v Gagnon*, 12 Alaska 190, 171 P 2d 170 (9th Cir 1948).

This action can be utilized on the basis of a new title. *Apers v Day & Night Fuel Co.*, Sup Ct Op No 532 (File No 944), 451 P 2d 879 (1969).

The statute not only establishes a time limit within which an action to recover real property must be brought, but also constitutes the method by which a claimant may establish a new title through adverse possession. *Bentley Family Trust v Lynn Enters, Inc.*, Sup Ct Op No 3434 (File No 8015, 8038), 656 P 2d 761 (1983).

Such no right of way. — While this section purports only to bar a remedy, it

may be used as the basis of establishing an easement of right of way across another's land. *Hamery v Houston*, Sup Ct Op No 24, 47 (File No 47), 359 P 2d 121 (1961).

And possession right may be protected by action. — In *Noble v Melcher*, 5 Alaska 229 (1917) the court said: "The necessary right then acquired by defendant to a property right, for the protection of which an appropriate action may be maintained by the occupant." *Ringstad v Gagnon*, 12 Alaska 190, 171 P 2d 170 (9th Cir 1948). See notes under section 101, "Adverse Possession."

Applicability of provisions requiring possession of estate within 10 years.

— The provisions of this section that an action may be maintained unless it appears that the plaintiff or his predecessor was seized or possessed of the premises within 10 years is not applicable to any party except a plaintiff. *Justice Indegard v Prud'homme*, 13 Alaska 197 P Supp 617 (D Alaska 1955).

Essential difference between requirements for claim under color of title and one without such color of title as to the number of years of possession.

required. In both cases, there must be uninterrupted adverse and notorious possession, but only seven years is required under AS 09 25.050 as compared to 10 years under this section. *Shible v. Young*, Sup. Ct. Op. No. 1800 (1/14/96), 2001-561 P.2d 769 (1977).

A trust estate established in trust within the statute of limitations, Alaska N. Ry. v. Alaska Cent. Ry., 5 Alaska 204 (1915).

If defendant, see *holding*, land as trustee for the plaintiff or otherwise the statute would not run until there was some act of disavowal of those acts and trustees which showed unequivocally that they were holding adversely to the alleged trust. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

As possession of trustee is presumed to be possession of estate trust. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Owners of land should not be disturbed by absence of their grant of surrender of rights. — Before a court would be justified in interfering with an owner's enjoyment of his own land, it ought to be satisfied by the clearest kind of proof that the owner has surrendered that absolute joint disposition which the law guarantees to him. *Roberts v. Jager*, 5 Alaska 190 (1915).

Statute does not run until plaintiff acquires title. — The statute of limitations begins to run against a grantee under the general land laws of the United States only from the date when he acquires the title and an occupier by another prior to that time will not be deemed adverse to the title of such grantee. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

To start the statute of limitations running against a plaintiff who relied on a licensee trustee's deed, he must have been dispossessed and in order to be dispossessed he must have at some time have been seized of title either of fee or freehold, and until the acquisition of patent to him he was not an owner. *Valentine v. McIntosh*, 4 Alaska 107 (1910); *Alaska N.W.T.C. v. Bernhardt*, 4 Alaska 99 (1910).

It is the delay, the duration of time after title was lost that raises the bar of the statute, this may not be by evasions, this may be barred before time started. *Valentine v. McIntosh*, 4 Alaska 107 (1910).

Then, the statute of limitations does not begin to run against the claimant of a mining claim before his present interest. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Largely in § 124.9(b)(1) (1965). The action of an owner on his own land does not start the running of adverse possession. *Karimov v. Perry*, 201 P.2d 611 (9/1/56).

Forfeiture actions. — In the absence of a controlling statute a forfeiture action is subject to the same period of limitations as the underlying debt. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically prohibits a limitation period governing the enforcement of either legal or equitable mortgages. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

In a suit to foreclose a mortgage the six year period of limitation is controlling and the ten year period pertaining to actions upon sealed instruments is inapplicable. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

The six year statute of limitations, AS 09 10 030, which governs the underlying obligation, or determination of the period of time to which a party is required to raise an action to foreclose a purported equitable mortgage security. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

II. ADVERSE POSSESSION

A. Generally

Legal title gives constructive possession. — A legal title gives a right of possession as well as the legal title and possession coextensive with the right. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Requisition underlying adverse possession. — Adverse possession governs the exercise of some title or right to possession on another which is adverse to the one claiming title by adverse possession. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

The good faith of the claimant is not a relevant issue under the ten year adverse possession statute. *Levi v. Madison Land Hospital & Health Inc.*, Sup. Ct. Op. No. 602 (1/14/96), 2001-408 P.2d 615 (1970).

Elements required under AS 09 25.050 and this section. — Under both AS 09 25.050 applicable when possession is under color of title and this section applicable in other cases, the claimant must satisfy the basic elements of adverse possession in establishing his or her claim. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Three basic requirements for adverse possession are: (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner. *Shible v. Young*, Sup. Ct. Op. No. 1800 (1/14/96), 2001-561 P.2d 769 (1977).

Possession must be open, notorious, visible, continuous for the statutory period and under a claim of right. *City of Anchorage v. Nelder*, Sup. Ct. Op. No. 1111 (1/14/96), 2001-520 P.2d 1224 (1975).

Purpose of requirements. — The main purpose of nearly all the requirements is essentially the same, that is, to put the record owner on notice of the existence of an adverse claimant. *Peters v. Justice Douglas Carl Street Council*, Sup. Ct. Op. No. 1018 (1/14/96), 1991-519 P.2d 828 (1974).

From the standpoint of the true owner, the purpose of the various requirements of adverse possession — that the occupant must use the actual, open, notorious, continuous, exclusive and hostile — is to put him on notice of the hostile nature of the possession so that he, the owner, may take steps to vindicate his rights by legal action. *Peters v. Justice Douglas Carl Street Council*, Sup. Ct. Op. No. 1018 (1/14/96), 1991-519 P.2d 828 (1974).

Adverse possession gives notice of rights. — Where a person is in visible possession of real property adverse to the record and open and notorious, notice must be taken of his actual rights. A purchaser would be placed upon notice thereby. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Here, occupation of the premises, even for the statutory period, does not establish title. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Adverse claimant held adversely who admits title in United States. — To constitute adverse possession, there must be among other requirements, a sixty under claim of right hostile to the true owner and in the open and notorious of land. *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Effect of patent on adverse claims. — Since the issuance of a patent has the effect of cutting off, as against the United States and its grantees, all adverse claims based on use or occupancy not prohibited pursuant to any statute providing for ultimate title, in the absence of any color of title, adverse possession by the defendant claiming title by such government grant be shown for the period of its years prior to the commencement of a proceeding under this section. *Justice Department v. Shand*, Trust v. Smith, 13 Alaska 1, 92 P. 617 (1/14/96).

When statute of limitations begins to run. — See notes to *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Statute of limitations begins to run. — See notes to *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Statute of limitations begins to run. — See notes to *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Statute of limitations begins to run. — See notes to *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Statute of limitations begins to run. — See notes to *Trust Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 204 (1915).

Grannis 12 Alaska 190, 171 F.2d 110 (9th Cir. 1946).

If there is agreement to transfer possession a right. If successive possessors are connected by any agreement or understanding which has for its object a transfer of the rights of the possessor, and is accompanied by a transfer of possession in fact it is sufficient to constitute a continuous possession. *Rogstad v Grannis*, 12 Alaska 190, 171 F.2d 110 (9th Cir. 1946).

Thus, grantee may lack grantor's possession of lands not covered by deed. It is generally held that if, in connection with the conveyance of lands, there are circumstances showing an intent to transfer to the grantee the possession of other adjacent land occupied by the grantor and not covered by the deed, there is treated such a conveyance as if the grantee's occupancy to his own in establishing title by adverse possession to the land not mentioned in the deed. *Rogstad v Grannis*, 12 Alaska 190, 171 F.2d 110 (9th Cir. 1946).

Adverse possession may be lacked. That the adverse possession may be by different occupants where a private estate between them is almost universally held. The essential thing is that the continuity of possession is not broken so that the owner's constructive possession will attach and allow him to recover the land. *Rogstad v Grannis*, 12 Alaska 190, 171 F.2d 110 (9th Cir. 1946).

The adverse possession may be by different occupants where a private estate between them. *Perry v Perry*, Sup. Ct. Op. No. 2120, File No. 4113, 615 P.2d 11 (1960).

Claim by prescription. The requisites for a claim by prescription are essentially the same as for adverse possession except that a prescriptive claim is limited to certain rights in the land of another such as an easement. *City of Anchorage v Nesbitt*, Sup. Ct. Op. No. 1111, File No. 2040, 530 P.2d 1224 (1975).

To establish a prescriptive right to an easement, the user must have been open, continuous, and adverse, under claim of title or right, and with the knowledge and acquiescence of the owner of the servient estate. *Roberts v Jarger*, 5 Alaska 190 (1914).

Use alone for the statutory period, even with the knowledge of the owner, would not establish an easement. *Hannett v Benson*, Sup. Ct. Op. No. 24, File No. 41, 358 P.2d 121 (1961).

A road and bridge used for 20 full years by the public, under conditions creating prescriptive rights, that right becoming vested and determined at the end of 20 years, it was immaterial to decide whether the length of time required in Alaska for a prescriptive right of way is 20 years or 10 years that latter time being the limitation by this section for bringing an action relating to the possession of real property. *Clark v Taylor*, 3 Alaska 256 (1926).

City's use of property by main retaining power line on it. See *City of Anchorage v Hebbert*, Sup. Ct. Op. No. 1111, File No. 2040, 530 P.2d 1224 (1975).

Adverse possession prevailed. Where defendant in eminent domain shown by complainant system entered upon land at a time when he had a right to do so, and under a claim of right, and had ever since been in the actual, exclusive, and continuous possession thereof, holding adversely to the plaintiff and his predecessors in interest during the statutory period, to wit, more than 10 years after the issuance of patent to the plaintiff's predecessor and before the commencement of action, judgment was for defendant. *Noble v McIntosh*, 5 Alaska 729 (1917).

B. Actual Possession

Possession must be actual and continuous. Where the plaintiff has the better and superior right and title, the defendant's alleged adverse possession could not prevail thereon, unless it was actual and continuous, as constructively the plaintiff is in possession by virtue of its superior title and right. *Pacific Coal & Trap Co. v Pioneer Mining Co.*, 205 F.577 (9th Cir. 1913).

Only property actually possessed by claimant during the whole statutory period may be acquired by adverse possession. *Hennelly Family Trust v Lynn Enters. Inc.*, Sup. Ct. Op. No. 2604, File No. 6013, 6034, 658 P.2d 761 (1963).

Actual possession defined. Actual possession means a peace possession which is definite, positive, and notorious. *Pacific Coal & Trap Co. v Pioneer Mining Co.*, 205 F.577 (9th Cir. 1913).

There cannot be constructive possession in two persons claiming to hold adversely at one and the same time. *Pacific Coal & Trap Co. v Pioneer Mining Co.*, 205 F.577 (9th Cir. 1913).

C. Notorious Possession. "Notorious" possession — The requirement that the possession must

have been reasonably visible to the record owner or notorious possession as that of the owner vicia the property he would be put on notice and be able to assert his rights. *Shilba v Young*, Sup. Ct. Op. No. 1600, File No. 2003, 607 P.2d 760 (1977).

Impeded knowledge of adverse possessor's activities. In determining if adverse possession is reasonably visible to the true owner, the test is not whether the owner in fact knows of the adverse possessor's activities, but whether the owner can be charged with such knowledge in relation to impeding such knowledge would generally recognize that various city reports, as well as physical visibility, is relevant evidence that the true owner has been put on notice. *Hennelly Family Trust v Lynn Enters. Inc.*, Sup. Ct. Op. No. 2604, File No. 6013, 6034, 658 P.2d 761 (1963).

Character of the land must be considered with reference to the requirement of sufficient notoriety. Hence, the same acts are not required for unimproved and forested land as for urban lots. *Shilba v Young*, Sup. Ct. Op. No. 1460, File No. 3003, 567 P.2d 759 (1977).

Acts alone may be sufficient to put owner on notice. Where the user has acted, without permission of the true owner, in a manner inconsistent with the true owner's rights, the acts alone without any explicit claim of right or intent to dispossess or — be sufficient to put the true owner — notice of a nonpermissive user. *Peters v Junesau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

Being on the property at least once a year for a half or full day and walking the boundary lines hardly will give indication to the owner that there was a hostile claim. *Shilba v Young*, Sup. Ct. Op. No. 1460, File No. 3003, 567 P.2d 759 (1977).

Flying over property in an airplane gives no notice of possession. *Shilba v Young*, Sup. Ct. Op. No. 1460, File No. 3003, 567 P.2d 759 (1977).

The physical facts of entry and residence in possession may themselves constitute an intent to occupy and to hold as of right sufficient in law to support the acquisition of rights by prescription. *Peters v Junesau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

Repute as owner, without evidence of possession on the land, is not alone sufficient. *Shilba v Young*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

Payment of taxes is a crucial factor although it is only regarded as an assumption with a visible physical presence on the land. *Shilba v Young*, Sup. Ct. Op. No. 1460, File No. 3003, 567 P.2d 760 (1977).

Claimants' leasing of property and exclusion of fibrous timber interference. *Peters v Junesau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

Exclusive dominion over property required. To deprive the record owner of his title, the adverse claimant's acts must "exclude a purpose to exercise exclusive dominion over the property." *Peters v Junesau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

An owner would have no reason to believe that a person was making a claim of ownership inconsistent with his own if that person's possession was not exclusive, but in participation with the owner or with the general public. *Peters v Junesau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

Where possession was actual, open, notorious and continuous, with a claim of ownership, but was not shown to be either exclusive or hostile, the possession was not adverse, and the statute of limitations never began to run. *Type Canal Mining Co. v Latsgaard*, 141 F.709 (9th Cir. 1903), *rev'd on other grounds*, 136 F.124 (9th Cir. 1905).

The exclusive use requirement is often defined quite similarly to certain of the other requirements of adverse possession. *Peters v Junesau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

Total exclusivity is not required. *Peters v Junesau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

A claimant's possession need not be absolutely exclusive, it need only be a type of possession which would characterize an owner's use. *Peters v Junesau Douglas Girl Scout Council*, Sup. Ct. Op. No. 1018, File No. 1660, 1661, 519 P.2d 826 (1974).

File Nos. 1041, 1041; 519 P.2d 426 (1974).

Occasional claimdiggers could not destroy the exclusive character of adverse use where such casual intrusions were legally not considered by the user to interfere or conflict with his own use in allowing strangers to come on the land to dig claims and in allowing friends, relatives and others occasional use of the land (the user was merely acting as any other hospitable landowner might). *Peters v. Juneau Douglas Civil Serv. Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

B. Continuous Possession

Possession must be actual and continuous. See note under this catchline under analysis line II B. Actual Possession.

One of the requirements for acquisition of title by adverse possession is that the possession must be continuous for the statutory period in order to prevent the original owner's possession from constructively attaching to the land thus starting the statute running anew because the owner must be out of possession for 10 years in order for the statute to be able to operate to recover the land. *Ringold v. Brannan*, 12 Alaska 171 (1907) (9th Cir. 1948).

A showing that use was openly adverse to the owner's interest must be for the full statutory period of ten years. If during that period it is established that the adverse claimant has done something to recognize the owner's title, the continuity of the adverse possession period is interrupted and the ten year period of limitation does not begin to run again in the adverse claimant's favor until he repudiate the owner's title. *Ayres v. Day & Night Fuel Co.*, Sup. Ct. Op. No. 572 (File No. 944; 451 P.2d 519 (1969).

F. Hostile Possession

Possession presumed to be with permission. When one enters into possession of use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title. *Hamerly v. Denton*, Sup. Ct. Op. No. 24 (File No. 47; 359 P.2d 121 (1961); *Ayres v. Day & Night Fuel Co.*, Sup. Ct. Op. No. 572 (File No. 944; 451 P.2d 520 (1969); *Peters v. Juneau Douglas Civil Serv. Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

This presumption that one who enters into possession of use of another's property does so with the owner's permission is rebutted by the adverse claimant's showing that he was not on the property by permission and establishing that the record title holder could have been ousted from possession throughout the statutory period. *Peters v. Juneau Douglas Civil Serv. Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

Which presumption may be overcome only by clear evidence of assertion of hostile right. The presumption that one who enters into possession of use of another's property does so with the owner's permission is overcome only by showing that such use of another's land was not only continuous and uninterrupted but was openly adverse to the owner's interest, i.e., by proof of a distinct and positive assertion of a right hostile to the owner of the property. *Hamerly v. Denton*, Sup. Ct. Op. No. 24 (File No. 47; 359 P.2d 121 (1961); *Ayres v. Day & Night Fuel Co.*, Sup. Ct. Op. No. 572 (File No. 944; 451 P.2d 520 (1969).

See note to Title Council Mining Co. v. Langstedt, 1210 (9th Cir. 1903) rev'd on other grounds, 130 F.2d 106 (9th Cir. 1945), under catchline "Exclusive dominion over property required" under analysis line II D. "Exclusive Possession."

As there is no presumption user is hostile. The adverse character of the holding or enjoyment is one of the tests of the sufficiency of that holding or enjoyment and there is no mere reason for indulging in the presumption that a 10 year simple user of a right of way is hostile than there is for indulging in the presumption that any other simple holding of land for 10 years is hostile to the true owner. *Kudaska v. Jaeger*, 5 Alaska 190 (1918).

Acquiescence of owner in hostile acts of possessor. The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the possessor. *Peters v. Juneau Douglas Civil Serv. Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

The word "hostile" is frequently used as a term of art meaning that the claim is "adverse" or under "claim of right," and that it is not subordinate to the title of the true owner. *City of Anchorage v. Neulitt*, Sup. Ct. Op. No. 1111 (File No. 2040; 530 P.2d 1324 (1975).

One determination of when use is permissive as opposed to "hostile" as under a "claim of right," was *City of Anchorage v. Neulitt*, Sup. Ct. Op. No. 1111 (File No. 2040; 530 P.2d 1324 (1975).

The test for determining the existence of the requisite degree of hostility is a fairly objective one. The question is whether or not the claimant acted toward the land as if he owned it. His belief as to the true legal ownership of the land, his good faith or bad faith in entering into possession, i.e., whether he claimed a legal right to enter, or avowed himself a trespasser, all are irrelevant. *Peters v. Juneau Douglas Civil Serv. Council*, Sup. Ct. Op. No. 1018 (File Nos. 1041, 1041; 519 P.2d 426 (1974).

The claimant's beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession, i.e., whether he claimed a legal right to

enter, or avowed himself a trespasser, all are irrelevant. The proper determination of whether the required degree of hostility exists is whether the acts of the claimant are the acts of an owner sufficient to give the record owner notice of the possessor's claim. *Peters v. Juneau Douglas Civil Serv. Council*, Sup. Ct. Op. No. 1018 (File No. 1041; 519 P.2d 426 (1974).

Finding of hostility not clearly erroneous. Although it is clear that the hostility requirement is not satisfied if the adverse claimant had the permission of the record owner to use the property, the trial court's finding of hostility was not clearly erroneous where the only evidence of permission was before the trial court as the record owner's own testimony and this evidence was directly contradicted by the adverse claimant who testified that such conversation had never taken place. *Peters v. Day*, Sup. Ct. Op. No. 2120 (File No. 4113; 615 P.2d 1 (1980).

Collateral references. 51 Am. Jur. 2d, Limitation of Actions, § 24 88 119-122.

51 C.J.S., Limitation of Actions, § 14-42, 118.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors, 76 ALM 844; 160 ALM 2d 1094 (41) and see generally as real property for purpose of determining applicable statute

of limitations, 50 ALM 276; 101 ALM 882; 131 ALM 1371.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitations, 14 ALM 2d 598.

Owner's recovery of land as entry thereon tolling running of statute of limitations for purpose of adverse possession, 76 ALM 844 (42).

Sec. 09.10.040. Action upon judgment or sealed instrument in 10 years. No person may bring an action upon a judgment or decree of a court of the United States, or of a state or territory within the United States, and no action may be brought upon a sealed instrument unless commenced within 10 years. (S. 104 ch. 101 S.L.A. 1962)

NOTES TO DECISIONS

The presence of a seal, where required, is not a mere formality, but is a matter of substance. *Carlin v. Grigsby*, 9 Alaska 378 (1918); see AS 09.25.130.

Instruments purporting to be under seal should be plainly and unequivocally so drawn in order to distinguish them from other instruments of a less solemn character, and the rule as to what constitutes a sealed instrument should be strictly interpreted so that account *Carlin v. Grigsby*, 9 Alaska 378 (1918).

Mere recital without mark, etc., is insufficient. In order to convert a mortgage into a sealed instrument, it is necessary that some seal or mark or mark that can be identified as a seal be affixed thereto, and the mere recital that the same includes seal, whether such recital appears in the body of the instrument, or in the acknowledgment, is insufficient. *Carlin v. Grigsby*, 9 Alaska 378 (1918).

Mortgage as sealed instrument. — The parties to a mortgage may make it a

sealed instrument if they so desire and thus bring it within the section *Carlkin v Grigsby*, 9 Alaska 378 (1938).

The question as to whether or not a mortgage is a sealed instrument is one of fact to be determined by the court upon an inspection of the instrument itself *Carlkin v Grigsby*, 9 Alaska 378 (1938).

Mistake, etc., as ground for correcting a mortgage to make it a sealed instrument, see *Carlkin v Grigsby*, 9 Alaska 378 (1938).

Child support payments are judgments at the time each payment accrued. Thus, the applicable statute of limitations on actions to recover arrearages in child support payments is that applicable for judgments, which is 10 years *Young v Williams*, Sup Ct Op No 1693 (File No 3310), 583 P 2d 201 (1978).

Effect of filing complaint. — The filing of a complaint tolls the applicable statute of limitations and has the legal

effect of commencing an action *Hamilton v Seattle Marine & Fishing Supply Co*, Sup Ct Op No 1401 (File No 2695), 562 P 2d 333 (1977).

Law of place where action brought governs. — A statutory limitation on the time for commencing actions is generally considered to be a matter of procedure, and thus governed by the law of the place where the action is brought *Hamilton v Seattle Marine & Fishing Supply Co*, Sup Ct Op No 1401 (File No 2695), 562 P 2d 333 (1977).

Creditor's efforts to enforce money judgment obtained in state of Washington were not time barred. See *Hamilton v Seattle Marine & Fishing Supply Co*, Sup Ct Op No 1401 (File No 2695), 562 P 2d 333 (1977).

Quoted in *Hobbins v Hobbins*, Sup Ct Op No 2523 (File No 6109), P 2d (1967).

Collateral references. — 34 Am Jur, Limitation of Actions, § 79 91, 137 157 53 C.J.S., Limitation of Actions, § 56 66, 123 132.

Suspension or removal of bar of statute of limitations as against judgment, 21 ALR 1036, 166 ALR 764, 45 ALR2d 967.

See as affecting running of limitations on negotiable instruments, 53 ALR 1174, 97 ALR 617.

Retrospective application of statute of limitations to actions on judgment already barred, 67 ALR 304.

Statute of limitations applicable to interest on judgment, 120 ALR 719.

Part payment or promise to pay judgment as affecting the running of statute of limitations, 45 ALR2d 967.

Sec. 09.10.050. Actions to be brought in six years. No person may bring an action (1) upon a contract or liability, express or implied, excepting those mentioned in AS 09.10.040 or 09.10.055; (2) for waste or trespass upon real property; or (3) for taking, detaining, or injuring personal property, including an action for its specific recovery, except those mentioned in AS 09.10.055, unless commenced within six years. (1) 105 ch 101 SLA 1962, am § 1 ch 61 SLA 1967)

Cross references. — For limitation on action against subdivider in contested transactions, see AS 34.55.030(f).

NOTES TO DECISIONS

Quasi contractual recovery. — Quasi contractual recovery is an implied contract for the purpose of applying statute of limitation *Estate of Waters v Hoodley*, Sup Ct Op No 638 (File No 1169), 474 P 2d 85 (1970).

Relief from dissolved contract. — In seeking relief from a dissolved contract, the action is on an implied contract under the six year statute of limitations *Estate of Waters v Hoodley*, Sup Ct Op No 638 (File No 1169), 474 P 2d 85 (1970).

Mortgage not under seal is governed by this section. — The parties to a mortgage may make it a sealed instrument if they so desire and thus bring it within the 10 year statute. If they do not choose to avail themselves of that opportunity the instrument must perform be governed by the law applicable to instruments not under seal and suit thereon must be brought within six years or the action is barred and the lien expires by operation of law *Carlkin v Grigsby*, 9 Alaska 378 (1938).

Misrepresentation and negligence are tort concepts, not contract, and the two year statute of limitation (AS 09.10.070) respecting torts governs *Austin v Fulton Ins Co*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

Where the essence of a plaintiff's complaint in an action for legal malpractice was negligence, the period of limitation found in AS 09.10.070, rather than this section, applied *Van Horn Lodge, Inc v White*, Sup Ct Op No 2336 (File No 4447), 627 P 2d 641 (1981).

When statute of limitations begins to run in contract actions. — The statute of limitations begins to run in contract causes of action from the time the right of action accrues. This is usually the time of the breach of the agreement, rather than the time that actual damages are sustained as a consequence of the breach *Howarth v First Nat'l Bank*, Sup Ct Op No 1188 (File No 2203), 540 P 2d 486 (1975), aff'd on rehearing, 551 P 2d 934 (1976).

It is not material that the injury from the breach is not suffered until afterward, the commencement of the limitation being contemporaneous with the origin of the cause of action *Howarth v First Nat'l Bank*, Sup Ct Op No 1186 (File No 2203), 540 P 2d 486 (1975), aff'd on rehearing, 551 P 2d 934 (1976).

If plaintiff can prove that defendant bank had a contractual duty "to preserve and protect" his property, including a duty to maintain fire insurance, in consideration for assignment of right, title and interest in all moneys due or to become due to plaintiff under a real estate contract with another party, and the bank does not fulfill its duty either by acting as the insurer of the property or by contracting with an insurance company, then the statute of limitations will not bar recovery, and breach would not occur until plaintiff's property suffered fire damage and additionally defendant bank refused to compensate plaintiff *Howarth v First Nat'l Bank*, Sup Ct Op No 1188 (File No 2203), 540 P 2d 486 (1975), aff'd on rehearing, 551 P 2d 934 (1976).

Statute of limitations begins to run from execution of demand note. — Paper payable on demand is due immediately, so an action may be brought at any time after date and delivery of the note without any further demand than the suit, so that the statute of limitations begins to run from its date *North Am Trading & Transp Co v Byrne*, 4 Alaska 26 (1910).

A promissory note, payable on demand, becomes due immediately and the statute of limitations commences to run on the date of its execution *Backlund v Ferguson*, 11 Alaska 348.

Unless note or circumstances show it was not immediately due. — The rule that paper payable on demand is due immediately may not apply where there is something on the paper, or in the circumstances under which it is given, to show that it was not the intention that it should become due immediately *North Am Trading & Transp Co v Byrne*, 4 Alaska 26 (1910).

Action against bank official by depositor for conversion. — Action against bank official for conversion of payroll checks endorsed by plaintiff for deposit to his bank account and for passing forged checks written on plaintiff's account was governed by six year statute of limitations in this section rather than two-year statute of limitations in AS 09.10.070 *Veet v First Nat'l Bank*, Sup Ct Op No 2629 (File No 5969), 659 P 2d 1233 (1983).

Recharging debris on mining claim. — An action for injury to mining claims by discharge of debris thereon was an action for trespass upon real property and not an

action on the case, and was governed by the six year limitation provided in this section, where the debris was discharged more or less directly over the surface of the ground below, not principally through its deposition in a stream. *Ercog v. Fairbanks Exploration Co.*, 9 Alaska 264, 95 F.2d 859 (9th Cir. cert. denied) 9 Alaska 292, 305 US 615, 59 S. Ct. 74, 811, Ed. 392 (1918).

Tax refunds. The taxpayer is not limited to recovery of overpayments according to § 115010. The common law has long recognized a cause of action in assumpsit to recover overpayments of taxes. Because the statutory remedies do not explicitly supersede the common law remedies, they are intended as a supplement, and the earlier remedy in assumpsit is still available. Hence, a claim for a refund was timely under this section, the six year statute of limitations applicable to recovery of personal property. *State v. Wakefield Fisheries, Inc.*, Sup. Ct. Op. No. 778 (File No. 1397, 1398), 495 P.2d 166 (1972).

Foreclosure actions. In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six year period of limitation is controlling and the ten year period pertaining to actions upon sealed instruments is inapplicable. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six year statute of limitations (this section), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v.*

First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Slipping on ice as breach of implied contractual duty. Where in a suit for injuries suffered by plaintiff when she slipped and fell on ice which had accumulated near the entrance to a lodge where she had been a paying guest, plaintiff contended that she was injured by reason of defendant's breach of their implied contractual duty as innkeepers to keep their premises in reasonably safe condition for their guests and, therefore, that the six year statute of limitations should control, it was held that the controlling statute of limitations was the two year statute governing tort actions, and not the six year statute relating to actions on contract. *Silveston v. Marler*, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 4 (1964).

Applied in *State v. Heeler King Co.*, Sup. Ct. Op. No. 1344 (File No. 2605, 2606, 2607), 569 P.2d 56 (1976), modified on rehearing on other grounds, 562 P.2d 702 (1977); *Clars v. Stack Steel & Supply Co.*, Sup. Ct. Op. No. 2093 (File No. 4104), 611 P.2d 80 (1980); *Municipality of Anchorage v. Sisters of Providence in Wash., Inc.*, Sup. Ct. Op. No. 2383 (File No. 5017, 5018, 5329), 628 P.2d 22 (1981); *Roberts v. Brooks*, Sup. Ct. Op. No. 2544 (File No. 5616), 649 P.2d 710 (1982).

Quoted in *King v. First Nat'l Bank*, Sup. Ct. Op. No. 2525 (File No. 5380), P.2d (1982).

Stated in *Walker v. White*, Sup. Ct. Op. No. 2196 (File No. 4574), 618 P.2d 561 (1980).

Cited in *Oaks v. Rogewer*, Sup. Ct. Op. No. 318 (File No. 580), 409 P.2d 439 (1966); *Pally v. Hepp*, Sup. Ct. Op. No. 513 (File No. 942), 448 P.2d 310 (1968); *Alaska Airlines v. Lockheed Aircraft Corp.*, 430 F. Supp. 134 (D. Alaska 1977); *Straight v. Hill*, Sup. Ct. Op. No. 2256 (File No. 4610), 622 P.2d 425 (1981); *Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.*, Sup. Ct. Op. No. 2286 (File No. 4690), 623 P.2d 324 (1981); *State, N.S.E. Regional Aquaculture Ass'n v. Alea*, Sup. Ct. Op. No. 2488 (File No. 5085, 5086, 5142), 646 P.2d 203 (1982).

Timely suit to enforce policy as interrupting limitations against claimant's amended pleading to reform it, or vice versa, 92 ALR2d 168.

What statute of limitations governs action by contractor for defective or

Collateral referen. — What constitutes a contract in writ within statute, 3 ALR2d 809.

Statute of limitations applicable to action for encroachment, 24 ALR2d 903.

improper performance of work by private building contractor, 1 ALR2d 914.

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 ALR2d 1197.

When cause of action accrues, for purposes of statute of limitations, against action based upon encroachment of building or other structure upon land of another, 12 ALR2d 1265.

Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common law trespass, 15 ALR2d 1228.

Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 ALR2d 1438.

Time limitations as to claims based on uninsured motorist clause, 28 ALR2d 580.

Insurer's failure to pay amount of admitted liability as precluding reliance on statute of limitations, 41 ALR2d 1111.

What statute of limitations covers action for indemnity, 57 ALR2d 831.

What statute of limitations governs action for interference with contract or other economic relations, 58 ALR2d 1027.

What statute of limitation applies to action for surplus of proceeds from sale of collateral, 59 ALR2d 1205.

Change of law as to applicable statute of limitations in contract actions, 70 ALR2d 639.

When statute of limitations begins to run against action to recover money paid by mistake, 79 ALR2d 764.

Limitation of action against insurer for breach of contract to defend, 96 ALR2d 1191.

What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 ALR4th 677.

What statute of limitations governs physician's action for wrongful denial of hospital privileges, 3 ALR4th 1214.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment, 14 ALR4th 1085.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 ALR4th 456.

Sec. 09.10.055. Certain actions relating to construction in six years.

(a) No action, whether in contract (oral or written, sealed or unsealed), 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.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this 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.

(c) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint stock company. (§ 2 ch 61 SLA 1967)

Collateral references. What statute of limitations governs action by contractor for defective or improper performance of work by private building contractor. 1 ALR3d 914

When statute of limitations begins to run on negligent design claim against architect. 90 ALR3d 507

Validity and construction, as to claim alleging design defects, of statute

imposing time limitations upon action against architect or engineer for injury of death arising out of defective or unsafe condition of improvement to test project. 93 ALR3d 1242

Statutes of limitation - actions by purchaser or contractor against vendors or contractors involving defects in houses or other buildings caused by soil instability. 12 ALR3d 866

Sec. 09.10.060. Actions to be brought in three years. (a) No person may bring an action against a peace officer or coroner upon a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected upon an execution, unless brought within three years. This section does not apply to an action for an escape.

(b) No person may bring an action upon a statute for penalty or forfeiture where the action is given to the party aggrieved or to that party and the state unless brought within three years, except where the statute imposing it prescribes a different limitation. (§ 1.06 ch 101 SLA 1962)

Sec. 09.10.070. Actions to be brought in two years. No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise, (2) upon a statute for a forfeiture or penalty to the state, or (3) upon a liability created by statute, other than a penalty or forfeiture; unless commenced within two years. (§ 1.07 ch 101 SLA 1962)

NOTES TO DECISIONS

- I General Consideration
- II Torts
 - A Generally
 - B Strict Liability
 - C Misrepresentation and Negligence
 - D Libel
- III Forfeiture or Penalty to State
- IV Other Statutory Liability
- V Procedure
 - A Generally
 - B Tolling Statute

I. GENERAL CONSIDERATION.

The policy of the law is to allow a reasonable but definitely limited time for the

bringing of an action after which the matter is put to rest. *Byrne v Ogle*, Sup Ct Op No 722 (File No 1359), 488 P 2d 716 (1971)

Purpose of statute of limitations. The goal of the statute of limitations and the substituted service procedure is to provide speedy adjudication of claims. *Byrne v Ogle*, Sup Ct Op No 722 (File No 1359), 488 P 2d 716 (1971)

The purpose of statutes of limitations is to encourage promptness in the prosecution of actions and thus avoid the injustices which may result from the prosecution of stale claims. *Byrne v Ogle*, Sup Ct Op No 722 (File No 1359), 488 P 2d 716 (1971); *McCracken v Davis*, Sup Ct Op No 1389 (File No 2849), 500 P 2d 771 (1977); *Johnson v City of Fairbanks*, Sup Ct Op No 1672 (File No 3444), 583 P 2d 181 (1978)

Statutes of limitations attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses. *McCracken v Davis*, Sup Ct Op No 1389 (File No 2849), 500 P 2d 771 (1977)

This section reflects a state policy that a plaintiff's commencement of action is the affirmative step necessary to assure that his assertion of a claim is timely. *Johnson v City of Fairbanks*, Sup Ct Op No 1672 (File No 3444), 583 P 2d 181 (1978); *DeHusman v City of Anchorage*, Sup Ct Op No 1673 (File No 2996), 583 P 2d 791 (1978)

This section and AS 09.65.500 compared. - See *Haskanson v Wakefield Sealaska, Inc.*, Sup Ct Op No 1943 (File No 3428, 3422), 600 P 2d 1087 (1979)

Insurance adjusters not required to advise on applicability of statutes of limitations. - Insurance adjusters, as a matter of law, are not required to give advice in regard to the potential applicability of statutes of limitations. *Growth v Ness*, Sup Ct Op No 370 (File No 817), 421 P 2d 624 (1966)

Applied in *Lillegraven v Tanga*, Sup Ct Op No 109 (File No 173), 375 P 2d 139 (1962); *State v Baker*, Sup Ct Op No 227 (File No 428), 393 P 2d 893 (1964); *Alaska Airlines v Lockheed Aircraft Corp.*, 430 F Supp 134 (D Alaska 1977)

Quoted in *Meier v City of Ketchikan*, Sup Ct Op No 291 (File No 489), 403 P 2d 34 (1965); *Adkins v Nabors Alaska Drilling, Inc.*, Sup Ct Op No 2056 (File No 4410), 609 P 2d 15 (1980); *Nurman v Nichiro Gyogyo Kaisha, Ltd.*, Sup Ct Op No 2511 (File No 5254), 645 P 2d 191 (1982); *King v First Nat'l Bank*, Sup Ct Op No 2525 (File No 5380), P 2d (1982); *Shiffman v "K", Inc.*, Sup Ct Op

No 2043 (File No 5615, 6112, 657 P 2d 401 (1981)

Cited in *Harrow Dev. Co. v Fulton Ins. Co.*, 418 F 2d 116 (9th Cir 1969); *Robertson v Seidman & Seidman*, 682 F 2d 583 (2d Cir 1978); *Heredia Corp. v Adams*, Sup Ct Op No 2042 (File No 6860, 1966), 610 P 2d 24 (1980)

II. TORTS

A. Generally

This section is generally considered by Alaska courts to be a "tort" statute. *Anderson v Fairchild Hiller Corp.*, 158 F Supp 976 (D Alaska 1971)

It is a "residual" statute in that it governs all claims for injury to the person unless specifically provided otherwise in some other statute. *Anderson v Fairchild Hiller Corp.*, 158 F Supp 976 (D Alaska 1971)

A tort action must be commenced within two years after the cause of action has accrued. *Silverton v Marble*, Sup Ct Op No 186 (File No 3611), 389 P 2d 3 (1964)

The uniform limitations period implicitly allows every victim of tortious conduct in Alaska, regardless of where he resides and regardless of whether the alleged tortious conduct was by a governmental unit or not, to commence an action for damages within two years without complying with any other time limit. *Johnson v City of Fairbanks*, Sup Ct Op No 1672 (File No 3444), 583 P 2d 181 (1978); *DeHusman v City of Anchorage*, Sup Ct Op No 1673 (File No 2996), 583 P 2d 791 (1978)

The statute of limitation as to torts does not usually begin to run until the tort is complete. *Austin v Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968)

When tort complete. - A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. *Austin v Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968)

Municipalities prohibited from requiring shorter notice period for tort claims. - AS 09.65.070, authorizing actions against municipalities, implicitly prohibits municipalities from requiring a potential plaintiff to submit notice of tort claims, as a condition to bringing an action, within a period shorter than the period provided by the statute of limitations. *Johnson v City of Fairbanks*, Sup Ct Op No 1672 (File No 3444), 583 P 2d

181 (1978) *In-House v. City of Anchorage*, Sup Ct Op No 167 (File No 790) 561 P 2d 291 (1978).

Action for unlawful imprisonment

Allegation that defendant in his capacity as United States attorney caused plaintiff to be arrested on criminal complaints issued by codefendants without probable cause or investigation purports to state a claim of tort against defendant subject to a two-year period of limitation under this section. *Williams v. Coughlan*, 11 Alaska 147, 244 P 2d 699h (1957).

Action to enforce liability of third person under Workmen's Compensation Law. From the express language of the Workmen's Compensation Law as to liability of third persons, the right sought to be enforced is based on tort rather than on contract and this action is therefore the applicable statute of limitations. *Becker v. Alaska Air Transp. Inc.*, 14 Alaska 159, 199 P Supp 695 (1 Alaska 1954).

Wrongful interference with right to preserve dead body. There is a claim for relief for wrongful interference with the right to preserve a dead body. *Burns v. Anchorage Funeral Chapel*, Sup Ct Op No 778 (File No 1465), 495 P 2d 70 (1972).

A claim for relief for wrongful interference with the right to preserve a dead body belongs exclusively to the surviving spouse or to the next of kin of the decedent. This substantive right is in the surviving spouse or next of kin, whether the claim is analyzed as a tortious invasion of a property right or infliction of emotional harm. *Burns v. Anchorage Funeral Chapel*, Sup Ct Op No 778 (File No 1465), 495 P 2d 70 (1972).

It is generally the law in this country that the right to possess, preserve and bury, or otherwise dispose of a dead body belongs to the surviving spouse and, if none such, then to the next of kin in the order of their relation to the decedent, that a violation of that right is a tort, and that damages for mental suffering are recoverable for a willful invasion of the rights relating to dead bodies. *Burns v. Anchorage Funeral Chapel*, Sup Ct Op No 778 (File No 1465), 495 P 2d 70 (1972).

Personal injuries resulting from breach of warranty in sale of goods. In an action to recover damages for personal injuries resulting from an alleged breach of warranty in the sale of goods, the two-year statute of limitations for personal injury actions does not apply.

Sinka v. Northern Commercial Co., Sup Ct Op No 747 (File Nos 1360, 1361, 1371) P 2d 116 (1973).

When an action is correctly brought within the framework of the Uniform Commercial Code, the applicable statute of limitations is that provided by the Code, although the damages sought are for personal injuries. *Sinka v. Northern Commercial Co.*, Sup Ct Op No 747 (File Nos 1360, 1361, 491 P 2d 116 (1973).

By the repeated action provided by the Alaska legislature in enacting the Uniform Commercial Code (10 AAC ch 114, 51A 1962) providing in part that "all acts and parts of acts inconsistent with this Act are hereby repealed," the general two-year statute of limitations this section was repealed to the extent that it might otherwise control recovery for personal injuries resulting from breach of warranty under the Code. *Sinka v. Northern Commercial Co.*, Sup Ct Op No 747 (File Nos 1360, 1361, 491 P 2d 116 (1973).

Action against bank official by depositor for conversion. Action against bank official for conversion of payroll checks endorsed by plaintiff for deposit to his bank account and for passing forged checks written on plaintiff's account was governed by six-year statute of limitations in AS 09 10 050 rather than two-year statute of limitations in this section. *Veat v. First Nat'l Bank*, Sup Ct Op No 7629 (File No 5969), 659 P 2d 1233 (1983).

Slipping on ice as breach of implied contractual duty. — See same catchline in note to AS 09 10 050.

B. Strict Liability

There is no other statute specifically limiting the period for bringing strict liability claims. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

To require strict liability claims to be brought within two years is a reasonable interpretation of the public policy of Alaska. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

Although the genesis of strict liability lies in warranty theory, it is now clear that breach of warranty itself was originally considered a species of fraud or misrepresentation, sounding in tort. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

Even in its present form, strict liability is more nearly akin to tortious negligence than to contractual warranty, because no

contract is required and because strict liability may not be disclaimed. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

But longer limitation allowed those in privity with defendant. There are valid reasons for allowing a longer limitation period under AS 45 05 242 (now AS 45 02 125), to plaintiffs who have contracted with the defendant, or who otherwise satisfy the privity requirement, than to those who have not. *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

As to reasons for allowing longer limitation period to plaintiffs contracting with the defendant, see *Anderson v. Fairchild Hiller Corp.*, 358 F Supp 976 (1 Alaska 1973).

Cause of action based on damage to a generator due to engine failure was barred by the two-year statute of limitations applicable to "economic loss" caused by a defective product. *Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.*, Sup Ct Op No 2286 (File No 4690), 623 P 2d 324 (1981).

C. Misrepresentation and Negligence

Misrepresentation and negligence are tort concepts, not contract, and the two-year statute of limitation (this section) respecting torts governs. *Austin v. Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

Negligent misrepresentation is a tort falling under the two-year statute of limitations. *Estate of Waters v. Hoadley*, Sup Ct Op No 618 (File No 1169), 474 P 2d 85 (1970).

A cause of action for misrepresentation in a business transaction is complete when the injured person has been deprived of his property or otherwise has suffered pecuniary loss or has incurred liability as a result of a misrepresentation. *Austin v. Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

Where the essence of a plaintiff's complaint in an action for legal malpractice was negligence, the period of limitation found in this section, rather than AS 09 10 060, applied. *Van Horn Lodge, Inc. v. White*, Sup Ct Op No 2336 (File No 4447), 627 P 2d 641 (1981).

Legal malpractice. — This section is the proper statute to be applied in attorney malpractice actions based on negligence. *Greater Area, Inc. v. Backman*, Sup Ct Op No 2589 (File No 5557), P 2d (1982).

Statute of limitations for legal malpractice does not begin to run until client discovers or reasonably should discover existence of all elements of his cause of action, thus if client discovers his attorney's negligence before he suffers consequential damages, the statute of limitations will not begin to run until client suffers actual damages. *Greater Area, Inc. v. Backman*, Sup Ct Op No 2589 (File No 5557), P 2d (1982).

Negligent failure to procure earthquake coverage. Where plaintiff's claim based upon defendant's negligent failure to procure or cost earthquake coverage, and plaintiff's claim based upon defendant's negligent misrepresentation, did not ripen until the earthquake loss occurred in March 1964, the statute of limitation did not commence to run until that time, and plaintiff's action, instituted in February of 1966, was brought within the two-year statutory period. *Austin v. Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

Where plaintiff's interest was in being protected against earthquake loss, there was no invasion or infringement upon or impairment of such interest until there had been a loss by earthquake, in case until that event occurred such protection could avail the plaintiff nothing. His interest which is legally protected was in being such protection when it was needed, at the time of the loss and not before. Thus, there must be an injury or harm to plaintiff as a consequence of defendant's negligence to serve as a basis for recovery of damages before the tort becomes actionable and before the period of limitation commences to run. *Austin v. Fulton Ins. Co.*, Sup Ct Op No 498 (File No 911), 444 P 2d 536 (1968).

D. Label

When period of limitations begins to run. — Normally the period of limitations for libel begins to run when the libel is "published." *Ches v. Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

"Publication" imparts communication to a third party. *Ches v. Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

But courts have differed on exactly when it occurs. *Ches v. Stern*, Sup Ct Op No 1400 (File Nos 2710, 2711), 561 P 2d 1216 (1977).

When publication occurred. — Where defendant wrote a letter to plaintiff's employer, accusing plaintiff of conduct

which was highly unethical and a gross misapprehension, and a week later the employee wrote a letter to defendant in which he acknowledged that he had received the letter "publication" of the alleged libel occurred on the date the employee wrote his reply. *Chiu v. Stern*, Sup. Ct. Op. No. 1400 (File No. 2710, 2711), 561 P.2d 1216 (1977).

III. FORFEITURE OR PENALTY TO STATE.

Item (2) of this section deals with civil penalties. *State v. American Can Co.*, Sup. Ct. Op. No. 41 (File No. 76), 362 P.2d 196(1).

Action to forfeit contraband. — Since a forfeiture action is independent of any other criminal proceedings, this can only occur as an action must be brought within two years of the seizure. *United States v. Three Thousand Two Hundred Thirty Six Dollars*, 167 F. Supp. 495 (D. Alaska, 1958).

Where seizure was effected in a gambling raid on September 11, 1955 and the libel in rem filed on December 12, 1957, the libel was barred by this section. *United States v. Three Thousand Two Hundred Thirty Six Dollars*, 167 F. Supp. 495 (D. Alaska, 1958).

IV. OTHER STATUTORY LIABILITY.

Tax refunds. — The taxpayer is not limited to recovery of overpayments according to AS 43.16.010. The common law has long recognized a cause of action in assumpsit to recover overpayments of taxes. Because the statutory remedies do not explicitly supersede the common law remedies, they are intended as a supplement, and the earlier remedy in assumpsit is still available. Hence, a claim for a refund was timely under AS 09.10.050, the six year statute of limitations applicable to recovery of personal property. *State v. Wakefield Fisheries, Inc.*, Sup. Ct. Op. No. 729 (File No. 1497, 1398), 495 P.2d 168 (1972).

Borough's levy of past years' taxes. — Six year statute of limitations provides for in AS 09.10.120, rather than two year limitation provided for in AS 09.10.070(a)(3) was applicable to borough's efforts to levy past years' taxes. *Alacum, Inc. v. North Slope Borough*, Sup. Ct. Op. No. 2622 (File No. 6037, 6050), 561 P.2d 1194(3).

Recovery of back pay for discrimination under the Equal Pay for Women Act is limited to that earned within two years prior to commencement

of her suit. *Brown v. Wood*, Sup. Ct. Op. No. 1551 (File No. 2501, 2505), 535 P.2d 100(1976) modified on other grounds 592 P.2d 1250 (1979).

V. PROCEDURE

A. Generally

Amendment related back to date of original complaint. — Since the amendment adding parties plaintiff related back to the date of the original complaint, the two year tort statute of limitations was not bar to prosecution of the claim for relief. *Buena v. Anchorage Funeral Chapel*, Sup. Ct. Op. No. 728 (File No. 1465), 495 P.2d 70 (1972).

Where an amendment to a complaint did not state a new claim for relief but related back to the date of the original complaint, it was not barred by the statute of limitations. *Jakobs v. Holland*, Sup. Ct. Op. No. 1018 (File No. 1724, 1795), 520 P.2d 297(4).

Aid cross claim. — Cross claim more than two years after the cause of a cross claim but less than two years after the original answer was filed and was not barred by this section. *Estate of Thompson v. Mercedes Benz, Inc.*, Sup. Ct. Op. No. 962 (File No. 1672), 514 P.2d 1269 (1973).

Addition of defendant after expiration of statute of limitations. — Trial court did not abuse its discretion in finding that Alaska case law did not mandate the addition of a party defendant after the expiration of the applicable statute of limitations. *McCracker*, Sup. Ct. Op. No. 1389 (File No. 2710, 2711), 561 P.2d 1216 (1977).

Claim not barred. — The day for the running of the statute of limitations fell on a Saturday, when the court was closed, and the following Monday was a legal holiday, the claim which was filed on the next Tuesday was not barred by the statute of limitation. *Davis v. Sturm, Ruger & Co.*, Sup. Ct. Op. No. 1356 (File No. 3141), 557 P.2d 1133 (1976).

Equitable estoppel. — The doctrine of equitable estoppel as a prohibition against unjust reliance upon a statute of limitations is a salutary one and therefore the supreme court adopts the rule for Alaska. *Growth v. News*, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

Both federal and state authorities have established that the doctrine of equitable estoppel is available as a bar to inequitable reliance upon statutes of limi-

tiniana. *Dumelle v. News*, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

Establishing equitable estoppel. — To establish an equitable estoppel it is generally necessary that the party seeking to assert it show that the other party made some misrepresentation, or false statement or acted fraudulently, and that he reasonably relied on such acts or representations of the other party, and due to such reliance did not institute suit timely. *Growth v. News*, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

There is authority to the effect that equitable estoppel requires more than inaction or silence by a person who has no obligation to speak or act. Yet there can be circumstances where inaction or silence combined with acts or representations can give rise to an appropriate situation calling for the application of the estoppel doctrine. *Growth v. News*, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

A party who fraudulently conceals from a plaintiff the existence of a cause of action may be estopped to plead the statute of limitations if the plaintiff's delay in bringing suit was occasioned by reliance on the false or fraudulent representations. *Chiu v. Stern*, Sup. Ct. Op. No. 1400 (File No. 2710, 2711), 561 P.2d 1216 (1977).

Where plaintiffs were never lulled into a false sense of security by any specific conduct on the part of the defendant implying that the statute of limitations would not be raised, there is no evidentiary basis for invocation of the doctrine of equitable estoppel. *Garfield v. Clark*, Sup. Ct. Op. No. 1476 (File No. 2867), 507 P.2d 77 (1977).

Defendants estopped to urge statute of limitations. — Repeated promises to pay the taxes in consideration of forbearance by the city from taking legal steps to collect them in reliance upon which the city forbore to take legal action estopped the defendants from urging the statute of limitations. *Demmert v. City of Klawock*, 14 Alaska 20, 199 F.2d 32 (9th Cir. 1952).

Defendant not estopped to plead statute. — See *Chiu v. Stern*, Sup. Ct. Op. No. 1400 (File No. 2710, 2711), 561 P.2d 1216 (1977).

Waiver of statute. — An escrow agreement as to payment of taxes constituted a waiver of the statute of limitations. *Demmert v. City of Klawock*, 14 Alaska 20, 199 F.2d 32 (9th Cir. 1952).

The running of the limitation period is an affirmative defense which if not pleaded was waived. *Municipality of Anchorage v. Sisters of Providence in Wash., Inc.*, Sup.

Ct. Op. No. 2144 (File No. 5017, 5018, 5129), 628 P.2d 22 (1981).

Application of foreign period of limitations. — Where the foreign limitation qualifies or conditions the right of action, Alaska will apply the foreign period of limitations, even though longer than Alaska's own period of limitations. *Marine Constr. & Design Co. v. Vessel Trim*, Sup. Ct. Op. No. 448 (File No. 821), 414 P.2d 683 (1967).

B. Tolling Statute

Commencement of the statute interrupts the running of the statute. *Silverton v. Marler*, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

And Civ. R. 3 controls. — With respect to the manner of commencing a civil action as it may bear upon the time for commencing the action under a statute of limitations, there is no reason why Civ. R. 3 should not be controlling. *Silverton v. Marler*, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

Definition of "commenced" in Civ. R. 3. — In Civ. R. 3, which states that "a civil action is commenced by filing a complaint with the court," it is to be found the definition of the term "commenced" as used in statutes of limitations. *Chiu v. Stern*, Sup. Ct. Op. No. 1400 (File No. 2710, 2711), 561 P.2d 1216 (1977).

Filing of the complaint tolls the statute of limitations. *Silverton v. Marler*, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

The two year statute did not constitute a defense to plaintiff's claim, because the running of the statutory period was interrupted by the filing of her complaint before the expiration of two years from the date of her injury. *Silverton v. Marler*, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

And not the further act of issuing summons. — See *Silverton v. Marler*, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

Civil R. 27 petition to perpetuate testimony is not a complaint for the purposes of Rule 3 and the statute of limitations. *Chiu v. Stern*, Sup. Ct. Op. No. 1400 (File No. 2710, 2711), 561 P.2d 1216 (1977).

Statutes of limitation aided by substituted service. — Statutes of limitations attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses. In the attainment of those ends, substantial aid is provided by statutes establishing

substituted service. By this means, the equivalent of personal service is made obtainable on absent defendants for purposes of lapse of time. Alaska statutes place an absent defendant in a motor vehicle case on an equal plane with those present within the state. Thus, where substituted service is available, the usual statute of limitations should apply unaltered. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 468 P.2d 716 (1971).

A tolling provision will not operate to suspend a statute of limitations when substituted service is available in an auto accident case. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 468 P.2d 716 (1971).

To apply the tolling statute (AS 09.10.130) to a situation where the defendant is at all times amenable to service is repugnant to the general purpose of statutes of limitations. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 468 P.2d 716 (1971).

In cases arising from motor vehicle accidents in which the defendant subsequently leaves the state, AS 09.05.020 operates in conjunction with AS 09.05.040 to authorize service upon an absent defendant by serving the commissioner of revenue. Pursuant to these provisions, the commissioner of revenue is, as a matter of law, appointed as defendant's statutory agent so that service upon him is of the same effect and validity as personal service upon the defendant. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 468 P.2d 716 (1971).

Tolling of statute by concealment or nondisclosure of negligence. — A concealment or nondisclosure of negligence tolls the statute until the injured party has actual notice of the negligence or, in the exercise of ordinary care, should have known of the negligence. *Sharrow v. Archer*, Sup. Ct. Op. No. 2609 (File No. 6135), 658 P.2d 1311 (1983).

Section was tolled during plaintiff's minority, i.e., until he was 19 years of age. *Turnbull v. Honkowsky*, 274 F. Supp. 733 (D. Alaska, 1967), aff'd, 419 F.2d 104 (9th Cir. 1969).

Collateral references. — 51 Am. Jur. 2d, Limitation of Actions, §§ 102-108; 63 C.J.S., Limitation of Actions, §§ 74, 174-176.

Estoppel against defense of limitations in tort actions. 77 ALR 1044.

Computation of the limitations period provided by this section subsequent to the removal of the disability of minority is to be made by including the first day and including the last. *Tutobull v. Bonkowsky*, 274 F. Supp. 733 (D. Alaska, 1967), aff'd, 419 F.2d 104 (9th Cir. 1969).

Section is not tolled by imprisonment unless plaintiff imprisoned on date of last tort. — AS 09.10.140 does not toll the two year limitation provided by this section where the record in the case does not show that on the latest date of the tortious act plaintiff was imprisoned. *Williams v. McNulty*, 16 Alaska 509, 239 P.2d 150 (9th Cir. 1956). See also *Williams v. Strand*, 16 Alaska 512, 239 P.2d 151 (9th Cir. 1956).

Tolling of statute of limitations during disability of parolee. — See *Hush v. Reid*, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973).

Time spent on parole not to toll section after December 14, 1973. — After December 14, 1973, the date of the opinion in *Hush v. Reid*, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973), holding former AS 11.05.070 (now AS 33.30.310) and AS 33.15.190 unconstitutional in depriving parolees of the right to initiate civil suits, time spent on parole shall not toll the statute of limitations, provided however, that any person on parole as of that date shall, in any event, have one year from that date within which to bring an action. *State v. McCracken*, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

But section was tolled by time spent on parole prior to that date. — See *State v. McCracken*, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

The supreme court's finding in *Hush v. Reid*, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973), that former AS 11.05.070 (now AS 33.30.310) and AS 33.15.190 were unconstitutional in depriving the parolee of access to the courts may not properly be considered retroactive. *State v. McCracken*, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

Limitation of actions as to slanders of title based on recording of instrument purporting to affect title. 39 ALR2d 880.

When statute of limitations begins to run against action for false imprisonment or false arrest. 49 ALR2d 922.

Application of statute of limitations to damage actions against public accountants for negligence in preparation of professional services. 26 ALR2d 1419.

What constitutes "publication" of libel in order to start running of period of limitations. 42 ALR2d 807.

What statute of limitations covers action for indemnity. 51 ALR2d 831.

When statute of limitations commences to run against claim for contribution or indemnity based on tort. 57 ALR2d 867.

What statute of limitations applies to action for contribution against joint tortfeasor. 57 ALR2d 927.

Statute of limitations in illegitimate or bastardy proceedings. 59 ALR2d 685.

Provision of attempt by seller to repair goods as tolling statute of limitations for breach of warranty. 64 ALR2d 1277.

Effect of unpaid employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident. 71 ALR2d 849.

Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident. 72 ALR2d 1085.

Minority of surviving children as tolling limitation period in state wrongful death action. 85 ALR2d 102.

Applicability to action against nurse in her professional capacity of statute of limitations applicable to malpractice. 88 ALR2d 1116.

What statute of limitations governs actions based on strict liability in tort. 91 ALR2d 455.

When does statute of limitations begin to run upon an action by subrogee insurer against third party tortfeasor. 91 ALR2d 814.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedure. 91 ALR2d 218.

What statute of limitations governs damage action against attorney for malpractice. 2 ALR4th 284.

What statute of limitations governs action arising out of frustration contemplated by use of credit card. 2 ALR4th 677.

When statute of limitations begins to run in dental malpractice suits. 1 ALR4th 118.

What statute of limitations governs physician's action for wrongful denial of hospital privileges. 4 ALR4th 1214.

Availability of and time for bringing action against former director, officer, or stockholder in divisive reorganization for personal injuries incurred after final dissolution. 20 ALR4th 414.

Sec. 09.10.080. Actions to be brought in one year. No person may bring an action against a peace officer for the escape of a person arrested or imprisoned on civil process unless commenced within one year. (S 108 ch 101 SLA 1962)

NOTES TO DECISIONS

Only this section and AS 09.10.090 provide for one year statute of limitations. — See *Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc.*, Sup. Ct. Op. No. 940 (File No. 1780), 614 P.2d 223 (1973). No provision whatever is made for a

limitation period of less than one year from the accrual of the cause of action. *Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc.*, Sup. Ct. Op. No. 940 (File No. 1780), 614 P.2d 223 (1973).

Sec. 09.10.090. Actions for penalty. No person may bring an action upon a statute for the penalty given in whole or in part to the person who will prosecute for the same unless commenced within one year after the commission of the offense. If the action is not commenced within one year by a private party, it may be commenced on behalf of the state within two years after the period of limitation by a private party has expired. (S 109 ch 101 SLA 1962)



Engineers
Planners
Economists
Scientists

February 21, 1989

Representative Peter Goll
Co-Chairman, House Judiciary Committee
House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Representative Goll:

Subject: House Bill No. 166, Tort Reform

I am writing to urge your favorable consideration of HB 166, the omnibus tort reform bill.

This bill will bring essential judicial reform to many public and private business sectors. In the case of my own business, reestablishing Statutes of Repose and Limitation, as provided in Sections 09.10.052 and 09.10.070 of the bill, is especially vital.

A copy of a "rationale" paper put out by the American Consulting Engineers Council is attached. This paper lists five important reasons for a strong statute of repose. These are all patently fair reasons which we believe should transcend any argument that a statute of repose is a special interest issue.

The stated purpose of HB 166 is, ". . . to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." For companies such as CH2M HILL, which has been established in Alaska for over 20 years, the fulfillment of that purpose by passing statutes of repose and limitation is essential to the future stability of our business.

Thank you in advance for your positive support

Sincerely,

Dan M. Rowley, P.E.
Alaska Regional Manager

bjc:079:34



American Consulting Engineers Council

1015 Fifteenth Street, N.W. Washington, D.C. 20005

202-347-7474

December, 1987

Rationale for

STATUTES OF REPOSE

For actions arising out of "improvements to real property" a special statute exists in many states to limit the time a claim can be brought for design deficiencies. These special statutes are commonly called "statutes of repose." They differ from statutes of limitations in that the time period in which to bring an action usually begins to run from the date of substantial completion of the project. Under a statute of limitations, the time period begins on the date of injury or discovery thereof.

There are several important reasons to support a strong statute of repose:

1. Unlike most products, the useful life of an improvement to real property can last for decades and even centuries. Evidence relative to any claim brought years after completion might be lost or destroyed, and witnesses may no longer be available. In addition, it is terribly expensive and virtually impossible to maintain records involving all past projects.
2. Data on claims filed for design deficiencies demonstrate conclusively that the vast majority of design cases arise within the first five years after completion of a project.
3. Once the owner accepts the project, all maintenance and subsequent improvements are beyond the control of other parties, including the designers of the project. Improper maintenance and repairs (or inattention to necessary maintenance and upgrading) can lead to numerous claims, and it is not fair to bring the design professional into the suit.
4. Without a statute of repose, design professionals may be unfairly exposed to evolving standards and technology being applied to a dated project. Often, it is very difficult for a defendant to prove what the "state-of-the-art" standards were at the time the project was designed. As a result, a defendant's design might be judged against current standards.
5. The expense of living with liability exposure for an infinite period of time is an unfair burden both for design professionals and their clients. The cost of insurance to cover all past work, no matter how long ago it was designed, against the threat of litigation is an expense carried by design professional and client alike.

It should be understood that even if the time period to make a claim against a design professional has expired under a statute of repose, an injured plaintiff still has recourse to seek and obtain compensation. A statute of repose for design deficiencies merely helps the plaintiff to focus the action on the party or parties who may be truly at fault.



Alaska Academy of Trial Lawyers

P.O. Box 102323 • Anchorage, Alaska 99510 • (907) 258-4040

Office: 540 L Street, Suite 102 • Anchorage

Board of Governors
W. Michael Moody
President

Dan A. Hensley
Vice President,
Civil

James H. McCormac
Vice President,
Criminal

James B. Pentlage
Secretary/Treasurer

Paul J. Coasman

Robert M. Libbey

L. Anna Luce

Dennis M. Mestas

Eric T. Sanders

Michael J. Schneider

Russell L. Winner

February 16, 1990

The Honorable Peter Goll
House of Representatives
P.O. Box V
Juneau, Alaska 99811

Re: Collateral Source Rule

Dear Representative Goll:

Thank you for the opportunity to comment concerning the collateral source rule. Before addressing the specific provisions of section 10 of CSHB166, I would like to offer general observations about the collateral source rule in Alaska.

For well over 100 years, the common law rule was that a wrongdoer should pay all the damages he caused. Accordingly, the law did not allow the wrongdoer to benefit from amounts the victim received from collateral sources. That rule has already been changed in Alaska. As part of the 1986 tort reform package, the legislature enacted AS 09.17.070. In a nutshell that statute provides that after a trial results in an award to the injured victim, the defendant may ask for a hearing and present evidence as to the collateral benefits received by the victim. The victim may introduce evidence as to the premiums he paid for the collateral benefits, as well as the attorneys' fees he incurred in obtaining the award for his injuries. If the collateral benefits exceed these amounts, the judge is required to reduce the injury award by the amount of excess collateral benefits.

That statute adequately covers the collateral benefit question. It was enacted as part of the compromise legislation agreed to by the tort reform group. Yet as soon as the compromise legislation was passed, they initiated new efforts to make further inroads on victims' rights under the guise of changing the collateral source rule. I am confident the people lobbying you have no underlying facts to show the current statute does not work.

The Honorable Peter Goll
February 16, 1990
Page 2

It is curious that you were visited by doctors about this proposal. In medical malpractice cases collateral benefits are not controlled by AS 09.17.070 but by AS 09.55.548. The doctors probably do not know or understand this. Sometimes they are so eager to do away with the civil justice system that they become mere pawns of the insurance industry's "reform" group.

I assume the "reformers" claim that victims are receiving windfalls or double recovery. This is simply not the case. Virtually every health, automobile or liability insurance policy contains a subrogation clause. Those provisions provide that if monies are paid to the insured, who later recovers from a third party those same damages, the insurance company must be reimbursed. Such provisions are almost universal and prevent double recovery. As a person representing victims for the past 15 years, I assure you they are not receiving double recovery.

This is no "free lunch" on this issue. As you know, the costs of health insurance and workers compensation insurance are already too high. If the innocent insurer is denied its subrogation rights, it will have a worse loss experience. This will be reflected in higher rates, whether we are talking about health insurance, collision insurance, or workers compensation insurance. Instead of the wrongdoer's liability insurer paying the victim's loss, the loss will be improperly shifted to some other entity. There will not, however, be any net saving to consumers.

By the same token, changing the collateral source rule would have virtually no impact on liability insurance rates. In a 1986 filing with the Florida Insurance Commissioner, Aetna Insurance Company projected that changing the collateral source rule would lower liability insurance rate by only .4% (.004)! That amounted to \$2.00 on a \$500.00 premium. Even the most rabid "reformers" would have to admit this is an insignificant amount. Since AS 09.17.070 already changed the common law rule, however, any premium reduction from this proposed additional change would be nonexistent.

The Honorable Peter Goll
February 16, 1990
Page 3

As noted above, existing AS 09.17.070 mandates that the trial judge shall reduce an award by the amount of the excess collateral benefits. Given the existence of that remedy, it is difficult to see why further legislation is even being requested. It is certainly not required. I will, however, point out problems with the specific language of the proposal.

First, the collateral sources listed in section (a) are generally subrogated to the victim's rights and therefore have the right to the return of their money. For example, employers and their workers compensation insurers have a statutory lien and the right to recover their payments in the event the victim is successful in a lawsuit against a third party. See AS 23.30.015(a) & (i). This proposed statute is inconsistent with that existing workers compensation statute. It is also inconsistent with federal statutes giving the United States government the right to subrogated reimbursement of its payments to injured workers. See 5 U.S.C. § 8131. I cannot see how the state can successfully override a controlling federal statute.

As noted above, virtually all insurance policies have subrogation clauses. The prospect of declaring all those subrogation clauses void should give pause to legislators faced with this proposal. As written, however, this proposal is even more suspect. It does not void all such clauses, but arbitrarily takes away the right to subrogation if a defendant in a civil action elects to pursue the procedure outlined in the proposed statute. Thus if Friendly Health Insurance pays two identical claims to two victims, it would have subrogation rights in respect to both payments. If one of the wrongdoers elected to follow the procedure in the proposed statute, the election would deprive the insurer of its subrogation rights with respect to that claim. From a constitutional point of view, it is difficult to see what rational basis the legislature might have to justify giving this power to wrongdoers.

Since existing AS 09.17.070 already remedies any problem in the collateral source arena, I suspect the main reason the "reformers" are pushing the new bill is to

The Honorable Peter Goll
February 16, 1990
Page 4

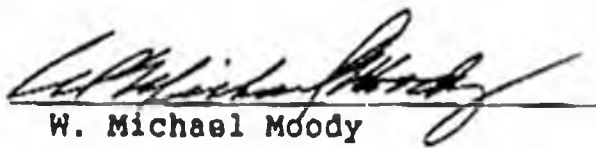
change the procedural aspects. They want all this information dumped in the laps of jurors. The obvious reason is a hope to prejudice jurors against the victim. The wrongdoers obviously want to put into evidence collateral payments in hopes the jury will, in effect say "Hey, this guy has already been paid. What's he doing here?" Their confusion could well result in victims being denied the damages to which they are entitled. There is simply no reason to inject such collateral issues into the trial. The trial should focus on the liability of the wrongdoer and the total damages sustained by the victim. Any necessary adjustments are already adequately covered by AS 09.17.070. That statute is carefully drawn, requires that an award be reduced by excess collateral benefits, and sets out a precise formula by which that determination is to be made. That statute handles the matter in a fair, well defined way. It should not be changed.

Thank you again for the opportunity to comment on this matter. If anything in this letter is unclear or if you have additional questions, I would be pleased to discuss them. If you or members of the Judiciary Committee have additional questions, the Academy would be pleased to comment upon them or provide any testimony you desire.

Very truly yours,

ATKINSON, CONWAY & GAGNON

By


W. Michael Moody

WMM:ijn
5698

Caps

LEW

CONSTITUTIONAL CHALLENGES TO WASHINGTON'S LIMIT ON NONECONOMIC DAMAGES IN CASES OF PERSONAL INJURY AND DEATH

In 1986 the Washington legislature passed a tort reform act¹ to ameliorate a perceived crisis in the availability and cost of liability insurance.² One of the act's provisions limits the amount of noneconomic damages recoverable in personal injury and wrongful death actions.³ Cases to which this damages limit applies began coming to trial only in the past few months. In October 1987, one judge applied the limit to reduce a jury verdict by over one million dollars.⁴

TOPS
ATT LYBECK
MARSHALL

ORIMENT—

CKLIN
SLAM
AN

FOR
ACHMAN

1. Tort Law Revisions (Tort Reform Act), ch. 305, 1986 Wash. Laws 1354 (codified as amended in watered titles of WASH. REV. CODE (1987)).

2. *Id.* § 100.

3. *Id.* § 301 (codified at WASH. REV. CODE § 4.56.250 (1987)). The section provides in relevant part as follows:

[(1)] (b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

4. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6 (Wash. Super. Ct. Oct. 30, 1987). In *Sofie* the jury awarded the plaintiff \$1,345,833, of which the jury allocated \$1,154,592 to noneconomic damages. Special Verdict Form at 2. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6 (Wash. Super. Ct. Oct. 30, 1987). The court reduced noneconomic damages to \$125,136 and granted the plaintiff a judgment of \$316,377, in conformity with the statutory cap. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6, slip op. at 2-3 (Wash. Super. Ct. Oct. 30, 1987).

Some trial courts have held the Washington limit unconstitutional. *E.g.*, *Carter v. Fibreboard Corp.*, No. 87-2-03555-7 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988) (defense of Section 4.56.250 damages limit struck down as violative of equal protection and jury trial guarantees of Washington constitution); *Foster v. Fibreboard Corp.*, No. 87-2-05629-5 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (defense of Section 4.56.250 struck down on equal protection and jury trial grounds).

SCHMIDT
W. SCHORFFLIN
S. SCOTT
EBREE
TURNBULL
TERS
WANG
WIEBE

THE ASSISTANT
T. A. DARROW

Similar damages limits have been challenged in other states on numerous federal and state constitutional grounds, including substantive due process,⁵ equal protection,⁶ a right of trial by jury,⁷ special legislation,⁸ special privilege,⁹ and a right of access to the courts.¹⁰ By a slight majority, courts have declared the limits unconstitutional.¹¹

This Comment considers the constitutionality of the Washington cap on noneconomic damages. The Comment briefly reviews the recent legislation of medical malpractice and tort reform damages ceilings and judicial decisions on the constitutionality of such ceilings. The Comment then analyzes the constitutionality of the Washington limit under the substantive due process and equal protection guarantees of the federal and state constitutions.¹² Because under the federal constitution a court should give the statute only minimal scrutiny, the statute probably does not offend fourteenth amendment protections. Under the Washington Constitution, however, a court should give the statute intermediate scrutiny. Under intermediate scrutiny a court probably will hold that the limit violates the state equal protection guarantee, but a court probably will not hold the limit violative of substantive due process. Under the right of trial by jury guarantee of the state constitution, the statute also is unconstitutional.¹³

5. *E.g.*, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 157, 695 P.2d 665, 679, 211 Cal. Rptr. 368, 382, *appeal dismissed*, 474 U.S. 892 (1985).

6. *E.g.*, *Arneson v. Olson*, 270 N.W.2d 125, 129 (N.D. 1978).

7. *E.g.*, *Boyd v. Bulala*, 647 F. Supp. 781, 788 (W.D. Va. 1986).

8. *See, e.g.*, *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736, 743 (1976) (citing ILL. CONST. art. IV, § 13 prohibition of special legislation).

9. *E.g.*, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657, 668-69 (1977).

10. *E.g.*, *Smith v. Department of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987). For an annotated list of many of the recent decisions in this area, see Table: Reported Decisions on the Constitutionality of Medical Malpractice and Tort Reform Damages Limits [hereinafter Table], *infra* p. 675. For citations to these decisions, see *infra* notes 38-49.

11. *See infra* Table p. 675.

12. Federal and Washington constitutional challenges are considered separately here because the proper standard of review in substantive due process and equal protection challenges of the damages limit should be higher under the Washington Constitution than under the federal constitution. *See infra* notes 106-28 and accompanying text.

13. For additional commentary on the constitutionality of the Washington noneconomic damages limit, see Wiggins, Hamitiaux & Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193 (1986/87); Development in the Law, *The 1986 Washington Tort Reform Act: Noneconomic Damages Cap (RCW 4.56.250)*, 23 WILLAMETTE L. REV. 215 (1987).

Washington's Noneconomic Damages Limit

I. BACKGROUND

A. Insurance Crises and Damages Limits

Many damages limits now in effect are part of state medical malpractice legislation of the mid-1970's.¹⁴ During that period, state legislatures perceived that medical malpractice insurance had become widely unavailable and increasingly expensive.¹⁵ Virtually all legislatures responded to this insurance crisis by enacting laws to control medical malpractice litigation.¹⁶ In at least one-fifth of the states, these laws included provisions to limit recoverable damages.¹⁷ The provisions limit either the liability of each defendant,¹⁸ the recovery of each plaintiff,¹⁹ or both.²⁰ Nearly all the limits are flat figures²¹ that apply either to noneconomic damages only,²² nonmedical damages only,²³ or all damages.²⁴

A different insurance crisis arose in the mid-1980's. During that period, the cost of liability insurance increased not only for health care providers²⁵ but also for day care centers, architects, commercial fishermen, and other businesses and professions.²⁶ Many businesses and local governments found liability insurance difficult to obtain.²⁷ In

14. See, e.g., statutes cited *infra* notes 18-24.

15. See Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 759-60 (1977); Note, *Fein v. Permanente Medical Group: Future Trends in Damage Limitation Adjudication*, 80 NW. U.L. REV. 1643, 1649 n.49 (1986).

16. See, e.g., Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH. L. REV. 419, 419 (1979).

17. See Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 945 (1984).

18. E.g., TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988).

19. E.g., OHIO REV. CODE ANN. § 2307.43 (Anderson 1981).

20. E.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); NEB. REV. STAT. § 44-2825 (Supp. 1986).

21. E.g., OHIO REV. CODE ANN. § 2307.43 (Anderson 1981) (\$200,000 limit on general damages); W. VA. CODE ANN. § 55-7B-8 (Michie Supp. 1987) (\$1,000,000 limit on noneconomic damages).

22. E.g., CAL. CIV. CODE § 3333.2 (West Supp. 1988).

23. E.g., LA. REV. STAT. ANN. § 40:1299.42 (West 1977 & Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988).

24. E.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); NEB. REV. STAT. § 44-2825 (Supp. 1986).

25. Bell, *supra* note 17, at 939; Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 195 n.1 (1985), reprinted in 35 DEF. L.J. 359 (1986).

26. Newsday, Oct. 29, 1985, at 11, col. 3.

27. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 333-34 n.19 (1987) (citing U.S. ATTY'S GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6-14 (1986)).

Washington State, a legislative committee formed to study the crisis found that it had been caused by a combination of poor management practices in the insurance industry and rising litigation costs and awards.²⁸

Washington was one of a number of states to respond to the crisis by enacting tort reform legislation²⁹ that included a limit on the recovery of noneconomic damages.³⁰ Under the Washington statute, the limit varies with the plaintiff's life expectancy and the average annual state wage.³¹ The limit at present ranges from \$125,136 for a male aged sixty-four or older to \$632,606 for a newborn female.³²

Washington imposes no other statutory ceiling on damages recoverable in personal injury and wrongful death actions. Other states have limited recovery of damages in common-law causes of action by such legislation as automobile accident victim compensation acts³³ and in statutory causes of action by such legislation as dram-shop acts,³⁴ governmental tort claims acts,³⁵ and wrongful death

28. JOINT STUDY COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY, REPORT TO THE LEGISLATURE (Nov. 13, 1985) (copy on file with the *Washington Law Review*).

29. Sugarman, *supra* note 27, at 347. Among other things, Washington's act limits noneconomic damages, provides for review of plaintiffs attorneys fees, modifies joint and several liability, modifies the statute of limitations for malpractice cases, and permits structured awards or periodic payments of future economic damages over \$100,000. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 233 n.3 (1987).

30. Sugarman, *supra* note 27, at 348 & n.115 (citing a \$500,000 limit in Alaska that does not apply to "disfigurement or severe physical impairment," a \$450,000 limit in Florida, a \$350,000 limit in Maryland, a \$400,000 limit in Minnesota that does not apply to "pain, disability or disfigurement," and an \$875,000 limit in New Hampshire); Reistrup, *The Final Frontiers*, Nat'l L.J., Dec. 7, 1987 at 13, col. 1 (citing a \$400,000 limit in Idaho, a \$250,000 limit in Kansas, a review of the reasonableness of awards over \$250,000 in North Dakota, and a \$500,000 limit in Oregon).

31. WASH. REV. CODE § 4.56.250(2) (1987).

32. See *id.*; 6 WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, WASH. PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS, App. B ("Life Expectancy Table [Revised]") (2d ed. Supp. 1984) (based on WASH. STATE INS. COMM'R, COMMISSIONERS STANDARD ORDINARY TABLE OF MORTALITY (1980)); WASH. STATE EMPLOYMENT SEC. DEPT LABOR MKT. & ECON. ANALYSIS BRANCH, AVERAGE ANNUAL STATE WAGE (1986). The limit for a 64-year-old or older male is calculated by multiplying 0.43 (the statutory factor) by a life expectancy of 15 years (the statutory minimum life expectancy) by \$19,401 (the average annual state wage).

33. See, e.g., the Illinois statute cited in *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (recovery for certain noneconomic loss tied to amount of medical expenses).

34. E.g., ILL. ANN. STAT. ch. 43, para. 135 (Smith-Hurd Supp. 1987) (\$15,000 to \$40,000 limits on recovery from liquor supplier for injuries inflicted by intoxicated person).

35. E.g., MD. CTS. & JUD. PROC. CODE ANN. § 5-403 (Supp. 1987) (liability of local government may not exceed \$200,000 per individual claim and \$500,000 per total claims arising from same tortious occurrence); N.H. REV. STAT. ANN. § 507-B:4 (Supp. 1987) (limits of \$150,000 per claimant and \$500,000 per occurrence on amount recoverable in personal injury action against governmental subdivision).

Washington's Noneconomic Damages Limit

acts.³⁶ Under the federal Price-Anderson Act, Congress imposes a limit of \$560,000,000 on the liability of a federally-licensed nuclear power plant for damages arising from a nuclear accident.³⁷

B. Judicial Response to Damages Limits

Several reported decisions address the constitutionality of medical malpractice and tort reform damages limits. The medical malpractice limits of California,³⁸ Indiana,³⁹ and Nebraska⁴⁰ have been upheld. The tort reform limit of Florida⁴¹ and the medical malpractice limits of Illinois,⁴² New Hampshire,⁴³ North Dakota,⁴⁴ Ohio,⁴⁵ and Virginia⁴⁶ have been invalidated. Courts had split as to the constitutionality of the Texas medical malpractice damages cap, but the Texas Supreme Court recently held the limit invalid.⁴⁷ The constitutionality of the medical malpractice limits of Idaho⁴⁸ and Louisiana⁴⁹ have been considered but not fully decided in reported decisions; those courts remanded the issue to the trial level. Damages limits in state automo-

36. *E.g.*, ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1959) (recovery for wrongful death limited in some instances to from \$20,000 to \$30,000).

37. Price-Anderson Act, 42 U.S.C. § 2210 (1983 & Supp. 1986).

38. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

39. *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

40. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

41. *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987).

42. *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

43. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

44. *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

45. *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (Ohio C.P. 1985); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ohio C.P. 1976) (dictum).

46. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986).

47. *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (constitutional under federal constitution; court certified to Texas Supreme Court whether cap was valid under Texas constitution); *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986) (unconstitutional); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244 (Tex. Ct. App. 1987) (constitutional), *overruled*. *Lucas v. United States*, No. C-6181 (Tex. May 11, 1988) (WESTLAW, Allstates database); *Detar Hosp. v. Estrada*, 694 S.W.2d 359 (Tex. Ct. App. 1985) (unconstitutional); *Malone & Hyde, Inc. v. Hobrecht*, 685 S.W.2d 739 (Tex. Ct. App. 1985) (unconstitutional); *Baptist Hosp. v. Baber*, 672 S.W.2d 296 (Tex. Ct. App. 1984) (unconstitutional).

In *Lucas* the certified question of whether the cap was constitutional under the Texas Constitution was answered in the negative by the Texas Supreme Court in May 1988. The Texas court held that the damages limit violated the open courts provision of the Texas Constitution. *Lucas v. United States*, No. C-6181 (Tex. May 11, 1988) (WESTLAW, Allstates database).

48. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). On remand, the limit was held unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing *Jones v. State Bd. of Medicine*, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

49. *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985).

to study the crisis
management
litigation costs and

respond to the crisis
limit on the recov-
erage statute, the
average annual
\$25,136 for a male
female.³²

damages recover-
ies. Other states
causes of action
in compensation
legislation as dram-
atic wrongful death

AND AFFORDABILITY,
Washington Law Review.
Washington's act limits
modifies joint and several
permits structured awards
of, *Washington's Partial
Liability*, 62 WASH. L.

in Alaska that does not
in Florida, a \$350,000
to personal disability or
in *Final Frontiers*, Nat'l
\$1,000 limit in Kansas, a
and a \$500,000 limit in

45. WASH. PRACTICE,
Table [Revised]" (2d
STANDARD ORDINARY
DEPT LABOR MKT. &
The limit for a 64-year-
by a life expectancy of
the annual state wage).
478, 283 N.E.2d 474
expenses).

) (\$15,000 to \$40,000
d person).

87) (liability of local
er total claims arising
app. 1987) (limits of
ble in personal injury

bile accident victim compensation acts,⁵⁰ dramshop acts,⁵¹ governmental tort claims acts,⁵² and wrongful death acts⁵³ also have been challenged on constitutional grounds.

The United States Supreme Court validated two damages ceilings under the federal constitution. In *Duke Power Co. v. Carolina Environmental Study Group*⁵⁴ the Court upheld the federal Price-Anderson Act limit on nuclear power plant liability.⁵⁵ In *Fein v. Permanente Medical Group*⁵⁶ the Court dismissed the appeal from the California Supreme Court's ruling that California's medical malpractice noneconomic damages limit was constitutional. The Court dismissed the appeal for want of a substantial federal question.⁵⁷

50. *E.g.*, *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (Illinois auto accident victim recovery limit unconstitutional).

51. *E.g.*, *Cunningham v. Brown*, 22 Ill. 2d 23, 174 N.E.2d 153 (1961) (Illinois dramshop act damages cap constitutional); *McGuire v. C & L Restaurant*, 346 N.W.2d 605 (Minn. 1984) (Minnesota dramshop act damages cap unconstitutional).

52. *E.g.*, *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983) (holding unconstitutional a statute that denied recovery of noneconomic damages and limited recovery of economic damages from state and its subdivisions, but upholding a statute that denied recovery of punitive damages); *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704 (1979) (statutory limit of \$50,000 per claimant in recovery against governmental subdivisions for bodily injury constitutional), *appeal dismissed*, 445 U.S. 921 (1980).

53. *E.g.*, *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) (wrongful death act recovery limit of \$25,000 constitutional).

54. 438 U.S. 59 (1978).

55. The Court held that the limit did not deny fifth amendment due process because the limit was supported by the need to encourage private industry to participate in the development of nuclear energy resources and by the federal government's commitment to protect the public from the consequences of a nuclear disaster. *Id.* at 84-87. The limit did not deny equal protection because the differing treatment of those injured in nuclear accidents and those injured in other types of accidents was justified by the "general rationality" of the Act. *Id.* at 93-94.

56. 474 U.S. 892 (1985).

57. *Id.* at 892. Justice White dissented to the dismissal on the grounds that the appeal raised the unresolved issue of whether due process requires a statutory compensation scheme to be a quid pro quo for the common-law or statutory remedy it replaces. *Id.* at 894-95 (White, J., dissenting).

Because *Fein* was a summary disposition, its precedential value is unclear. See *Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) ("[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'" (brackets original) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973))). Indeed, subsequent decisions by federal courts on the federal constitutionality of state medical malpractice damages limits have not recognized the *Fein* dismissal as precedential or persuasive. See, e.g., *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986) (Texas medical malpractice damages cap unconstitutional under federal and state equal protection guarantees); *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (Virginia cap unconstitutional under jury trial right of state and federal constitutions).

II. CONSTITUTIONALITY OF THE WASHINGTON LIMIT

A. *United States Constitution: Due Process and Equal Protection*

The fourteenth amendment to the United States Constitution provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁵⁸ Under these clauses, Washington's damages cap is subject to attack on the grounds that it denies substantive due process by depriving personal injury plaintiffs of property without providing an adequate benefit in return⁵⁹ and denies the equal protection of the laws by discriminating against or among injured plaintiffs. These challenges are considered, first, by determining the appropriate standard of review, and second, by applying the appropriate standard to the statute. Because the federal constitution requires only minimal scrutiny of the statute, the statute probably does not offend either due process or equal protection.

1. *Standard of Review*

The United States Supreme Court currently subjects legislation challenged on substantive due process and equal protection grounds to three standards of review.⁶⁰ The Court applies the same standard whether the legislation is challenged on substantive due process or equal protection grounds.⁶¹ Strict scrutiny is applied where the effect of legislation is either to create a suspect classification⁶² or to infringe

58. U.S. CONST. amend. XIV, § 1.

59. Since the 1930's the United States Supreme Court has more often applied equal protection than substantive due process analysis to legislation challenged on fourteenth amendment grounds, and has rarely declared state legislation unconstitutional on substantive due process grounds. *Johnson v. E. Pitt*, 217 N.W.2d 771, 775 (N.D. 1974); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 352 (3d ed. 1986). The Washington Supreme Court has become similarly disenchanted with substantive due process. See *Aetna Life Ins. v. Washington Life & Disability Guar.*, 83 Wash. 2d 523, 533-34, 520 P.2d 162, 169 (1974); *Seattle Times v. Tielsch*, 80 Wash. 2d 502, 512, 495 P.2d 1366, 1371 (1972) (Finley, J., dissenting) ("the now dormant specter of substantive due process"). Nevertheless, the United States and Washington Supreme Courts still recognize a substantive due process barrier to unreasonable state regulation. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (state criminal abortion statute violates due process); *State v. Santos*, 104 Wash. 2d 142, 148, 702 P.2d 1179, 1183 (1985) (substantive due process requires accuracy in establishing paternity).

Although a number of courts have considered substantive due process challenges of statutory damages caps, no reported decisions have invalidated medical malpractice or tort reform damages ceilings on substantive due process grounds. See *infra* Table p. 675.

60. See 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 323-26 (1986).

61. *Id.* at 323.

62. E.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (classification based on race).

on a fundamental right.⁶³ Legislation is unconstitutional under strict scrutiny if it is not necessary to the promotion of a compelling state interest. The Court recently has applied intermediate scrutiny to review legislation that creates classifications based on gender, alienage, or legitimacy.⁶⁴ Under the intermediate standard, legislation is unconstitutional if it does not both serve important governmental objectives and bear a substantial relationship to the accomplishment of those objectives.⁶⁵ Rational basis, or minimal, scrutiny is applied to most economic and social welfare legislation. Under the rational basis test there is a strong presumption of constitutionality,⁶⁶ and legislation is invalid only if the classification created by the legislation is not rationally related to any conceivable legitimate legislative purpose.⁶⁷

The federal constitution requires only minimal scrutiny of the Washington damages ceiling. Strict scrutiny is inappropriate because the ceiling neither creates suspect classifications nor affects fundamental rights. The limit creates only economic⁶⁸ and age⁶⁹ classifications. The Court has not held such classifications suspect.⁷⁰ Further, the right to compensation for personal injuries is not fundamental under

63. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy).

64. 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 326-27 (1986). The intermediate standard is known also as "means-focus," "means scrutiny," and the "substantial relationship" test. *See Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399, 407 (1976), *cert. denied*, 431 U.S. 914 (1977); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831 (1980). The Court does not appear to have applied intermediate scrutiny to legislation challenged on substantive due process grounds under the federal constitution, nor has any other court in a reported decision applied intermediate scrutiny to a federal substantive due process challenge of a medical malpractice or tort reform damages cap.

65. *See Craig v. Boren*, 429 U.S. 190, 197 (1976).

66. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

67. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). At least one commentator suggests that the Court should give the rational basis test "teeth" such that a court would consider whether a basis exists in reality rather than merely in the court's imagination. G. GUNTHER, *CONSTITUTIONAL LAW* 604-05 (11th ed. 1985).

68. Washington's limit creates the following economic classifications: First, it classifies according to whether damages are economic or noneconomic and discriminates in the case of the latter, and second, it classifies according to whether damages are above or below the limit and discriminates in the case of the former.

69. Washington's limit classifies according to age by permitting plaintiffs with shorter life expectancies less recovery than plaintiffs with longer life expectancies. For example, Plaintiff A, a newborn male, has a life expectancy of 70.83 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. Plaintiff B, a 63-year-old male, has a life expectancy of 15.38 years. *Id.* The average annual state wage is \$19,401. WASH. STATE EMPLOYMENT SEC. DEP'T LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. The statute limits Plaintiff B's noneconomic damages to \$128,307. However, Plaintiff A's limit is \$590,894.

70. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83 (1978) (economic classification not suspect); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (age classification not suspect); 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON*

strict scrutiny of state action is applied to racial classification, alienage, and national origin. This level of scrutiny is unconstitutional because it is not rationally related to the government's interest in the classification.

Further, the government's interest in the classification is not rationally related to the government's interest in the classification.

Further, the government's interest in the classification is not rationally related to the government's interest in the classification.

CONSTITUTIONAL LAW: This is known also as the "rational basis" test. See *Jones v. State Bd.*, 438 U.S. 175 (1977); *Carson v. Seelye*, 409 U.S. 401 (1972). The court has applied this test to a wide range of government actions.

One commentator has argued that a court would be oversteering its imagination. G.

First, it classifies the cases in the case of the plaintiff below the limit and

plaintiffs with shorter life expectancies. For example, Plaintiff A, a 63-year-old male, has a life expectancy of 15.38 years. Plaintiff B, a 63-year-old female, has a life expectancy of 18.86 years. *Id.* Assuming an average annual state wage of \$19,401, Plaintiff B's noneconomic damages are limited to \$128,307, while Plaintiff A might recover noneconomic damages of up to \$157,338.

80. See *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

81. The legislature's reasoning might have been that pain and suffering damages should be greater for a plaintiff who will have to endure pain and suffering longer. This "assumes that in all cases the injured victim will have ongoing injuries and ongoing future suffering, which is clearly not the case. . . . [Not] all injured victims will continue to suffer for the future." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (granting motion to strike defense of noneconomic damages cap on equal protection and right to jury trial grounds).

the federal constitution.⁷¹ A fundamental right is one explicitly or implicitly guaranteed by the constitution.⁷² The right to recover in tort is not so guaranteed.⁷³

Intermediate scrutiny also is inappropriate under the federal constitution. The United States Supreme Court has applied the intermediate standard only to classifications based on gender,⁷⁴ alienage,⁷⁵ and legitimacy.⁷⁶ The Court recently gave minimal rather than intermediate scrutiny to classifications based on age⁷⁷ and on the type and degree of personal injury where the affected right was the right to collect full damages.⁷⁸ The statute's age-based classification does incidentally create a gender-based classification, because women generally have longer life expectancies than men.⁷⁹ The gender-based classification, however, is only incidental to the age-based classification and does not reflect invidious gender-based discrimination. It therefore should not trigger intermediate scrutiny.⁸⁰ The apparent purpose of the age-based classification is to increase the potential recovery as the potential life span increases.⁸¹ It is consistent with this purpose that if women live longer, they suffer greater noneconomic loss and should be allowed greater recovery.

Minimal scrutiny also is proper under the 1978 decision of the United States Supreme Court to apply minimal scrutiny to a damages

CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 335 (1986) (age classification not suspect).

71. *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985); see *Duke Power Co.*, 438 U.S. at 83-84.

72. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

73. *Boyd v. Bulala*, 647 F. Supp. 781, 787 (W.D. Va. 1986).

74. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

75. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

76. *E.g.*, *Lalli v. Lalli*, 439 U.S. 259, 268, 275-76 (1978).

77. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

78. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83-84 (1978).

79. Between birth and age 98, women have greater life expectancies than men. For example, Plaintiff B, a 63-year-old male, has a life expectancy of 15.38 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. However, Plaintiff C, a 63-year-old female, has a life expectancy of 18.86 years. *Id.* Assuming an average annual state wage of \$19,401, Plaintiff B's noneconomic damages are limited to \$128,307, while Plaintiff C might recover noneconomic damages of up to \$157,338.

80. See *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

81. The legislature's reasoning might have been that pain and suffering damages should be greater for a plaintiff who will have to endure pain and suffering longer. This "assumes that in all cases the injured victim will have ongoing injuries and ongoing future suffering, which is clearly not the case. . . . [Not] all injured victims will continue to suffer for the future." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (granting motion to strike defense of noneconomic damages cap on equal protection and right to jury trial grounds).

limit similar to the Washington cap. In *Duke Power Co. v. Carolina Environmental Study Group*⁸² the Court found that the Price-Anderson Act's \$560,000,000 nuclear power plant liability limit was "a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'"⁸³ In the Price-Anderson Act, Congress encouraged the availability of nuclear power by reducing the liability of nuclear power plants.⁸⁴

Washington's noneconomic damages limit seems to have arisen out of a similar legislative effort. The Washington legislature sought to encourage the availability and affordability of liability insurance for governmental, professional, and other entities by reducing the awards of some personal injury plaintiffs. Particularly because the Court in *Duke Power Co.* considered a damages limit, *Duke Power Co.* is strong authority that a damages cap should not be given more than minimal scrutiny under the federal constitution.⁸⁵

2. Application of Review

Under a rational basis standard of review, Washington's noneconomic damages limit probably does not violate the federal constitutional guarantee of substantive due process. The test is whether the challenged law is rationally related⁸⁶ to a valid state objective.⁸⁷ This suggests two inquiries: First, whether there is a valid state objective, and second, whether the statute has a rational relation to that objective.

Any conceivable legitimate state objective satisfies the first requirement. The stated purpose of the Washington Tort Reform Act was to "create a more equitable distribution of the cost and risk of injury and

82. 438 U.S. 59 (1978).

83. *Id.* at 83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

84. *Id.* at 84.

85. A majority of recent decisions supports this conclusion. See *infra* Table p. 000. In *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), the New Hampshire Supreme Court concluded that heightened scrutiny of New Hampshire's recovery limit was not required under the federal constitution, since the United States Supreme Court had applied heightened scrutiny only in "cases involving classifications based upon gender and illegitimacy." *Id.* at 831. Instead, the *Carson* court went on to apply heightened scrutiny—the substantial relationship test—under the state constitution. *Id.*

86. The dictionary definitions of the key components of this test might be useful references, since courts sometimes have little guidance in applying the test other than the plain meaning of these words. "Rationally" means reasonably or sensibly. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1885 (1981). "Related" means "connected by reason of an established or discoverable relation." *Id.* at 1916. Compare the key component of the substantial relationship test: "Substantial" means materially, importantly, or essentially. See *id.* at 2280.

87. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955).

Carolina
Pr... Ander-
t was "a clas-
t to structure
c life." ⁸³ In
availability of
r plants. ⁸⁴

ve arisen out
re sought to
insurance for
ig the awards
the Court in
Co. is strong
than minimal

ngton's non-
eral constitu-
whether the
ective. ⁸⁷ This
ate objective,
tion to that

fin... require-
m Act was to
of injury and

s (1976).

p. 000. In Carson
Court concluded
under the federal
scrutiny only in
331. Instead, the
p test—under the

useful references,
plain meaning of
s THIRD NEW
by reason of an
omponent of the
essentially. See *id.*

increase the availability and affordability of insurance."⁸⁸ The legisla-
ture determined that a serious liability insurance problem existed
within the state. Insurance unavailability and unaffordability had
caused some entities either to cease operating, for want of insurance,
or to operate without insurance. Without insurance, many entities
might be unable to pay tort judgments due injured plaintiffs. Under
these facts, making liability insurance more available and affordable
seems a valid legislative objective.

Moreover, the damages limit appears rationally related to the legis-
lature's purpose. The limit is arbitrary to the extent that it relies on
the product of an individual's age, the average annual state wage, and
the figure 0.43.⁸⁹ However, the Court in *Duke Power Co.* did not find
this kind of arbitrariness fatal to the constitutionality of the statute.⁹⁰
Limiting recoverable noneconomic damages could rationally be
related to a reduction in insurer uncertainties and liabilities. This
reduction could rationally be related to an increase in insurance avail-
ability and a reduction in insurance rates. Because there appears to be
a rational relation between the damages limit and a valid state objec-
tive, the limit probably is not unconstitutional on federal substantive due
process grounds.

Under rational basis review, Washington's limit similarly does not
appear to violate the federal equal protection guarantee.⁹¹ The proper
test is whether the challenged classification is rationally related to a
conceivable legitimate governmental purpose.⁹² This test is virtually
identical to the substantive due process test and is equally deferential
to the legislature. The legislature's desire to make liability insurance
available and affordable to governmental, professional, and other enti-
ties is a legitimate governmental purpose.⁹³ The economic⁹⁴ and age⁹⁵
classifications created by the damages cap seem rationally related to
that purpose, because it is rational to believe that these classifications

88. 1986 Wash. Laws ch. 305, § 100.

89. See WASH. REV. CODE § 4.56.250(2) (1987).

90. *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 86 (1978).

91. *Contra Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (Washington's noneconomic damages cap denies equal protection under rational basis test).

92. *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (pertinent inquiry is whether classification advances legitimate legislative goals in a rational fashion); *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959) (legislative classification valid if based upon a state of facts that reasonably can be conceived to constitute a distinction or difference in state policy)

93. See *supra* text accompanying note 88.

94. See *supra* note 68.

95. See *supra* note 69.

will reduce tort judgments, insurer liability, and insurance rates.⁹⁶ The age classification, for example, is rationally related to the legitimate objective of allowing relatively greater compensation for noneconomic loss to plaintiffs who will endure their intangible losses over a longer period of time.⁹⁷ Because these classifications are rationally related to a legitimate governmental purpose, they do not unconstitutionally deny equal protection under the federal constitution.

B. *Washington Constitution: Due Process and Equal Protection*

A court should apply a higher standard of review to substantive due process and equal protection challenges to the statute under the Washington Constitution than under the federal constitution. The United States Supreme Court acknowledges the authority of state courts to interpret state constitutional guarantees to be more protective of individual rights than the federal counterparts.⁹⁸ Washington courts in a number of cases have exercised this authority.⁹⁹

The Washington Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."¹⁰⁰ Although this adopts verbatim the federal due process guarantee,¹⁰¹ Washington courts have held that federal case law interpreting the federal due process clause does not bind judicial interpretation of the state due process clause.¹⁰² The Washington Constitution provides further that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."¹⁰³ While the Washington Supreme Court has held that this provision and the federal equal protection provision are substan-

96. It is irrelevant that the cap is not the most direct or complete means by which the legislature could achieve its objective, because the legislature is free to attack perceived problems one step at a time. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

97. *Contra Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) ("There is no rational relationship for distinguishing between two individual victims otherwise similarly situated with respect to injury simply because of age.").

98. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

99. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 493 (1984).

100. WASH. CONST. art. I, § 3.

101. Compare *id.* with U.S. CONST. amend. XIV, § 1, cl. 3.

102. *Petstel, Inc. v. County of King*, 77 Wash. 2d 144, 153, 459 P.2d 937, 942 (1969). However, federal case law is given great weight and prevails to the extent it affords greater protection. *Id.*; *Olympic Forest Products v. Chaussee Corp.*, 82 Wash. 2d 418, 422, 511 P.2d 1002, 1005 (1973) (procedural due process challenge).

103. WASH. CONST. art. I, § 12. This section is entitled, "Special Privileges and Immunities Prohibited."

tially identical despite their differing language,¹⁰⁴ Washington courts also consistently have held that the Washington equal protection provision may be interpreted to provide greater individual rights than the federal guarantee.¹⁰⁵

1. *Standard of Review*

Washington courts reviewing legislation under the state constitution use the same three standards of review currently applied by the United States Supreme Court under the federal constitution.¹⁰⁶ However, Washington courts do not apply these standards in the same manner as the United States Supreme Court. Instead, Washington courts sometimes subject challenged legislation to higher standards of review than are applicable under the federal constitution.

For example, in *State v. Wood*¹⁰⁷ the Washington Supreme Court noted that the United States Supreme Court had not yet found gender-based classifications suspect and thus subject to strict scrutiny.¹⁰⁸ The Washington court held, however, that under the Washington equal protection guarantee gender was a suspect classification "requiring strict scrutiny to determine whether the State has demonstrated a compelling state interest to uphold such classification."¹⁰⁹ Again, in *Darrin v. Gould*¹¹⁰ the Washington Supreme Court acknowledged that the United States Supreme Court had found neither that gender-based classifications were suspect, nor that education was a fundamental right.¹¹¹ Nevertheless, the Washington court held that an education free from sexual discrimination was a fundamental right under the Washington Constitution.¹¹² *Wood, Darrin, and other Washington*

104. *State v. Perrigoue*, 81 Wash. 2d 640, 503 P.2d 1063 (1972). The federal provision requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4.

105. See, e.g., *Darrin v. Gould*, 85 Wash. 2d 859, 868, 540 P.2d 882, 888 (1975); *State v. Alfonso*, 41 Wash. App. 121, 126, 702 P.2d 1218, 1221 (1985).

106. See, e.g., *State v. Rice*, 98 Wash. 2d 384, 655 P.2d 1145 (1982) (strict scrutiny); *Griffin v. Department of Social & Health Servs.*, 91 Wash. 2d 616, 590 P.2d 816 (1979) (minimal scrutiny); *State v. Wood*, 89 Wash. 2d 97, 569 P.2d 1148 (1977) (strict scrutiny); *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975) (intermediate scrutiny); *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wash. App. 225, 660 P.2d 1124 (1983) (minimal scrutiny).

107. 89 Wash. 2d 97, 569 P.2d 1148 (1977).

108. *Id.* at 100, 569 P.2d at 1150.

109. *Id.* The United States Supreme Court has held that gender-based classifications deserve intermediate, but not strict, scrutiny. E.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

110. 85 Wash. 2d 859, 540 P.2d 882 (1975).

111. *Id.* at 865-66, 540 P.2d at 886-87.

112. *Id.* at 870, 540 P.2d at 888. The right to an education free from sexual discrimination is provided by the Washington Constitution. WASH. CONST. art. IX, § 1.

decisions, as well as case law in other states and considerations of public policy, strongly suggest that Washington courts should apply a higher standard of review to Washington's noneconomic damages cap.

a. *Washington Case Law*

Under Washington case law the right to be compensated for personal injuries is important enough that statutes burdening the right trigger intermediate scrutiny.¹¹³ In 1975 the Washington Supreme Court held in *Hunter v. North Mason School District*¹¹⁴ that

{t}he right to be indemnified¹¹⁵ for personal injuries is a substantial property right Statutory classifications which substantially burden such rights as to some individuals but not others are permissible under the equal protection clause of the Fourteenth Amendment only if they are "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."¹¹⁶

Application of this intermediate standard should be extended to the right to the full recovery of noneconomic damages. A damages cap significantly affects the right to be indemnified. Indemnification is the restoration of the victim of a loss,¹¹⁷ and in Washington such restoration includes compensation for noneconomic loss.¹¹⁸ Washington's

113. See *Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 20 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988). No reported Washington decisions have characterized the right to recover in tort as "fundamental" so as to trigger strict scrutiny in substantive due process or equal protection analysis.

114. 85 Wash. 2d 810, 539 P.2d 845 (1975).

115. The *Hunter* court seems to have meant "indemnified" to include the proper elements of negligence damages, which at the time of *Hunter* included noneconomic damages such as pain and suffering.

116. *Hunter*, 85 Wash. 2d at 814, 539 P.2d at 848 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (additional citations omitted). The standard applied in *Hunter* is more intense than the rational basis test. See *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399, 407 (1976), cert. denied, 431 U.S. 914 (1977); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 830-31 (1980); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244, 249 (Tex. Ct. App. 1987). But see *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585, 600 (1980). The *Johnson* court applied "the fair and substantial relationship test" to Indiana's damages cap in the apparent belief that it was invoking only minimal scrutiny. See 404 N.E.2d at 600-01.

The United States Supreme Court's decision in *Duke Power Co. v. Carolina Envtl. Study Group* three years after *Hunter* suggests that the *Hunter* court was incorrect to apply intermediate scrutiny under the federal constitution. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). The *Hunter* court instead might safely have relied solely on the state equal protection clause. See *Sibley v. Board of Supervisors*, 477 So. 2d 1094, 1104-07 (La. 1985); *Carson*, 424 A.2d at 831.

117. See BLACK'S LAW DICTIONARY 692 (5th ed. 1979).

118. See *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984). The court in *Shaw* noted that Washington law permitted recovery of damages for pain and suffering and other noneconomic damages, and that under Washington law such damages were compensatory. *Id.* at 1208.

limit in one case reduced the aggregate damages award by eighty-six percent.¹¹⁹ This is as significant an infringement on the right to indemnification as was the statute challenged in *Hunter*, which statute effectively eliminated the plaintiff's cause of action.¹²⁰

b. Case Law in Other States

In some cases, courts in other states have applied intermediate scrutiny to state due process and equal protection challenges of damages caps. While the rational basis test has been applied more often, the decisions to invoke intermediate scrutiny show greater sensitivity to the discriminatory effect of damages ceilings and the nature of the interests at stake. In one case, a court invoked intermediate scrutiny partly in reliance on the Washington Supreme Court's decision in *Hunter v. North Mason School District*.¹²¹

In *Carson v. Maurer*¹²² the New Hampshire court cited the Washington court's holding in *Hunter* that the right to recover for personal injuries is a substantial property right.¹²³ The *Carson* court found that characterization compelling, concluding that "the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test."¹²⁴ The court acknowledged that the United States Supreme Court had restricted application of intermediate scrutiny to cases involving classifications based on gender and illegitimacy, but announced that it was free to grant individuals greater protections under the state constitution.¹²⁵

119. See *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6, slip op. at 2 (Wash. Super. Ct. Oct. 30, 1987).

120. The *Hunter* court invalidated a Washington statute that required persons with claims against certain governmental bodies to either file their claims with those bodies within 120 days of the date the claim arose or forfeit those claims. 85 Wash. 2d at 811 n.1, 539 P.2d at 846 n.1.

121. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (citing *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975)).

122. 120 N.H. 925, 424 A.2d 825 (1980).

123. 424 A.2d at 830.

124. *Id.* Some courts have relied on other grounds to review medical malpractice damages ceilings under intermediate scrutiny. In *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978), the North Dakota court relied on its earlier use of intermediate scrutiny of a statute that limited tort recoveries in *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974). The *Hassett* court had found that the United States Supreme Court's then-recent introduction of a new intermediate analysis closely approximated the test historically used by the North Dakota court. 217 N.W.2d at 775. In *Sibley v. Board of Supervisors*, 477 So. 2d 1094, 1107-08 (La. 1985), the Louisiana court found that a damages limit classified people based on their physical condition, a classification prohibited under the Louisiana Constitution.

125. 424 A.2d at 831.

In *Jones v. State Board of Medicine*¹²⁶ the Idaho Supreme Court held that intermediate scrutiny was applicable where "the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute."¹²⁷ The discriminatory character of the Washington limit is apparent on its face. The limit facially discriminates against aged and noneconomically injured plaintiffs. While there may be a rational relationship between the classification and the declared purpose of the statute, the lack of a substantial relationship is indicated by the fact that a reduction in awards of noneconomic damages cannot force insurers to offer coverage at reasonable rates.

c. Public Policy Considerations

Public policy considerations also compel the use of an intermediate standard of review. First, courts should carefully scrutinize legislation that supports a special interest at the expense of a disadvantaged class. Second, severely injured victims whose noneconomic damages are limited might as a result receive less than full compensation even for their economic damages. Noneconomic damages often are that part of the plaintiff's award that pays the attorney's fee. A reduction in noneconomic damages may mean that the attorney's share of the total judgment must be paid from monies that were allocated by the court to economic damages, such as past and future medical expenses.

2. Application of Review

The discriminatory classifications that Washington's damages limit creates, rather than the statute's aggregate effect on those it regulates, render the statute unconstitutional under intermediate scrutiny. In other words, a court should hold that the statute violates the Washington Constitution's equal protection guarantee but not the substantive due process guarantee.

A statute satisfies the substantive due process requirement when it is substantially related¹²⁸ to the promotion of a legitimate governmental

126. 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977).

127. 555 P.2d at 411. The court invoked an intermediate standard of review in weighing an equal protection challenge to Idaho's damages limit, but seemed to invoke only a rational basis standard to consider a substantive due process challenge to the limit. See *id.* at 409-10. This comports with the United States Supreme Court's omission to apply intermediate scrutiny in the context of substantive due process.

128. "Substantially" means materially, importantly, or essentially. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1981).

Supreme Court the discrimination apparent on its lack of relationship of the statute's Washington limit is against aged and is a rational relationship purpose of the statute by the facts cannot force

an intermediate rationalize legislation disadvantaged class. Damages are limited on even for their that part of the A reduction in share of the total cost by the court total expenses.

the damages limit whose it regulates, intermediate scrutiny. In states the Washington statute the substantive

intermediate when it is rationalize governmental

(1977). of review in weighing an make only a rational basis See *id.* at 409-10. This intermediate scrutiny in the

See WEBSTER'S THIRD

interest.¹²⁹ The stated object of the Tort Reform Act was to create a more equitable tort compensation system and increase the availability and affordability of liability insurance.¹³⁰ This appears to be a legitimate governmental interest.¹³¹

The statute probably is not substantially related to that interest. Although there is evidence that damages ceilings reduce damages awards,¹³² and while it may be rational to believe that a reduction in damages will lead to an eventual reduction in rates,¹³³ there is no apparent substantial relationship between a reduction in damages judgments and an increase in insurance availability and affordability. The mid-1980's insurance crisis was caused in part by bad insurance company management practices.¹³⁴ Further, insurance companies are not obliged to increase availability and decrease rates as their uncertainties and liabilities decrease. In view of these other influences on insurance availability and rates, the relationship between the statute's means and end seems rational but not substantial.

Yet even if there is not a substantial relationship between the statute and the legislature's purpose, courts are likely to discredit a substantive due process challenge for three reasons. First, courts may refuse to apply intermediate scrutiny to the challenge, even while applying such scrutiny to an equal protection challenge.¹³⁵ Second, courts may avoid substantive due process challenges if they can dispose of a case on equal protection grounds. Washington courts rarely in recent years have invalidated legislation on substantive due process grounds.¹³⁶ Third, Washington courts may defer to the decisions of courts in other

129. Recent Washington decisions appear not to have applied the substantial relationship test to a substantive due process challenge. The stated test is based on the test applied in *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

130. 1986 Wash. Laws ch. 305, § 100.

131. See *supra* text accompanying note 88.

132. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 416 (1987). Professor Danzon found that "[t]he average impact of statutes to limit all or part of the plaintiff's recovery has been to reduce average severity by twenty-three percent." *Id.*

133. See *supra* text accompanying notes 89-90.

134. See *supra* note 28 and accompanying text.

135. E.g., *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). But see *supra* notes 60-61 and accompanying text. There appear to be no recent Washington decisions in which a court applied intermediate scrutiny to a statute challenged on substantive due process grounds.

136. See *Aetna Life Ins. v. Washington Life & Disability Guar.*, 83 Wash. 2d 523, 533-34, 520 P.2d 162, 169 (1974); *Seattle Times v. Tielsch*, 80 Wash. 2d 502, 512, 495 P.2d 1366, 1371 (1972) (Finley, J., dissenting).

states, which courts have consistently rejected substantive due process challenges to medical malpractice damages limits.¹³⁷

These considerations probably will influence a court not to find a substantive due process violation but will not interfere with the determination of the equal protection challenge. Under the equal protection guarantee of the state constitution, the statute should be stricken. The state equal protection test is whether the statute's classifications have a fair and substantial relation to the object of the legislation.¹³⁸ This test differs slightly from due process intermediate scrutiny. It examines whether the statute's discriminatory effect, rather than the statute's aggregate effect, bears a substantial relationship to the statute's purpose.

Courts that have used intermediate scrutiny to review medical malpractice damages limits either have found that the limits failed the substantial relationship test¹³⁹ or have remanded the cases to the trial courts for further factual determinations.¹⁴⁰ The North Dakota court in *Arneson v. Olson*¹⁴¹ applied intermediate scrutiny to that state's medical malpractice damages ceiling and found the ceiling violative of the state equal protection guarantee. The court found that the limit benefited physicians but denied adequate compensation to plaintiffs with proven meritorious claims and did nothing toward the elimination of nonmeritorious claims.¹⁴²

The New Hampshire Supreme Court in *Carson v. Maurer*,¹⁴³ in applying intermediate scrutiny to a medical malpractice damages cap challenged under the New Hampshire equal protection guarantee, also found no substantial relationship between the cap and the legislative purpose. The court rather found that "[i]t is simply unfair and unrea-

137. See, e.g., *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244 (Tex. Ct. App. 1987). The courts in *Fein* and *Rose* applied minimal, rather than intermediate, scrutiny.

138. See *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975).

139. See *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980). *Contra* *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (purported to invoke substantial relationship test but in fact decided equal protection challenge under rational basis test).

140. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977); *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985). On at least one of these remands, the limit was held unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing *Jones v. State Bd. of Medicine*, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

141. 270 N.W.2d 125, 135 (N.D. 1978).

142. *Id.* at 135-36.

143. 120 N.H. 925, 424 A.2d 825, 837 (1980).

tive process
 not to find a
 with the deter-
 he equal protec-
 ould be stricken.
 's classifications
 he legislation.¹³⁸
 ate scrutiny. It
 rather than the
 ship to the stat-
 ew medical mal-
 limits failed the
 cases to the trial
 th Dakota court
 y to that state's
 iling violative of
 nd that the limit
 tion to plaintiffs
 ard the elimina-

v. *Maurer*,¹⁴³ in
 tice damages cap
 n guarantee, also
 nd the legislative
 unfair and unrea-

695 P.2d 665, 211 Cal.
 Facilities, 735 S.W.2d
 minimal, rather than

114, 539 P.2d 845, 848

Maurer, 120 N.H. 925,
 404 N.E.2d 585 (1980)
 al protection challenge

s), cert. denied, 431 U.S.
 On at least one of these
 pp. 781, 785 n.2 (W.D.
 th Dist. Idaho Nov. 3,

sonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."¹⁴⁴

Washington's cap denies equal protection for similar reasons. The cap denies adequate compensation to the most seriously injured plaintiffs, plaintiffs with proven meritorious claims, and imposes on them the burden of supporting the insurance industry. The legislative object of preserving insurance availability and affordability is not substantially related to the classifications of plaintiffs according to whether their damages are economic or noneconomic, whether their noneconomic damages are above or below an arbitrary limit, or whether they are young or old.¹⁴⁵ The difference between economic loss and noneconomic loss is that economic loss is quantified by doctors, hospitals, and employers, who establish the monetary value of past and future medical care and lost wages, whereas noneconomic loss is quantified by laypersons who sit on juries. There is no substantial relationship between the distinction and the legislative purpose. The distinction merely enforces a suspicion of claims for noneconomic loss.

The statute's classifications may not even have a substantial relationship to a reduction in insurer uncertainty and liability. Although the statute forbids the instruction of juries as to the existence of a limit, it seems likely that citizens eventually will learn that the limit exists.¹⁴⁶ Such knowledge might encourage juries that wish to avoid the statute to categorize their awards as economic damages, which are unlimited under the statute.

Additionally, the legislature cannot guarantee that a reduction in insurer uncertainty and liability will be passed along to the entities

144. 424 A.2d at 837. There are many analogies between automobile guest statutes—and the reasons for abolishing such statutes—and contemporary tort reform legislation. Consider the discussion of guest statutes in W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 215-17 (5th ed. 1984). Washington repealed its guest statute in 1974. *Id.* at 216 n.84.

145. A 55-year-old male who has suffered severe and permanent injuries is limited to \$177,610 in noneconomic damages, whereas a 25-year-old male who has suffered severe injuries from which he will completely recover within a year can recover as much as \$399,102 in noneconomic damages. See WASH. REV. CODE § 4.56.250 (1987); WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32; WASH. STATE EMPLOYMENT SEC. DEP'T LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. "There is no substantial relationship or rational basis asserted which the court could accept for that difference in classification." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987).

146. For example, a front-page newspaper story in the *Seattle Times* recently announced that a trial court judge had ruled the Washington limit unconstitutional. *Judge Rules Lid on Injury Awards Unconstitutional*, *Seattle Times*, Feb. 20, 1988, at 1, col. 4.

that must buy liability insurance. Aggregate awards may have dropped after medical malpractice damages caps were imposed in the mid-1970's, but there might be no relationship between the drop in awards and the promise of available and affordable liability insurance.

The classifications are not substantially related to the legislative end. While a rational relationship might exist between the classifications and the end, this relationship does not rise to the level of substantiality. The damages limit therefore denies the equal protection of the laws guaranteed by the Washington Constitution.¹⁴⁷

C. *Washington Constitution: Right of Trial by Jury*

Washington's limit on damages requires the trial court to reduce the jury's determination of noneconomic damages when the jury's award exceeds the statute's ceiling. This interference with the jury function raises another constitutional challenge. The Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate."¹⁴⁸ The word "inviolate" in the provision means "freedom from substantial impairment" but does not prohibit modification of administrative details that do not affect the enjoyment of the right to a jury trial.¹⁴⁹

Washington's noneconomic damages limit abridges the jury trial guarantee.¹⁵⁰ The guarantee limits the authority of the legislature to take away the right to a jury trial.¹⁵¹ The damages limit does more than modify administrative details; it substantially impairs the jury trial right.

More than one court already has invalidated a damages limit on right to jury trial grounds. In *Boyd v. Bulala*¹⁵² a federal district court judge held that both the federal and Virginia constitutional guarantees of the right to a jury trial were violated by Virginia's \$750,000 limit on

147. Because Washington's equal protection guarantee does not prohibit the grant of special privileges or immunities to municipal corporations, the damages limit probably is not unconstitutional on state equal protection grounds when applied to a municipality. See WASH. CONST. art I, § 12.

148. *Id.* art. I, § 21.

149. *State v. Furth*, 5 Wash. 2d 1, 18-19, 104 P.2d 925, 933 (1940).

150. *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987); accord *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (Virginia damages ceiling violates federal and Virginia guarantees of right to jury trial). *Contra Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (Indiana damages cap does not violate jury trial provision of Indiana constitution).

151. *State v. Ellis*, 22 Wash. 129, 131, 60 P. 136, 137 (1900), *overruled on other grounds*, *State v. Lane*, 40 Wash. 2d 734, 246 P.2d 474 (1952).

152. 647 F. Supp. 781 (W.D. Va. 1986).

Washington's Noneconomic Damages Limit

may have
e imposed in the
ween the drop in
ability insurance.
ne legislative end.
he classifications
el of substantial-
protection of the

ourt to reduce the
the jury's award
the jury function
gton Constitution
ain inviolate."¹⁴⁸
om from substr
of administrative
to a jury trial.¹⁴⁹
ges the jury trial
the legislature to
it does more
in the jury

damages limit on
eral district court
tional guarantees
\$750,000 limit on

hibit the grant of special
limit probably is not
uality. See WASH.

ash. Super. Ct. order on
781 (W.D. Va. 1986)
ht to jury trial). *Contra*
diana damages cap does

on other grounds, State

damages recoverable in medical malpractice actions.¹⁵³ The court found that the federal jury trial guarantee provided the right to have the jury determine not only liability but damages.¹⁵⁴ According to the court, the statutory limit, which required "entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury," had no permissible basis.¹⁵⁵ At least two Washington trial courts, on pre-trial motions, have rejected the defense of the damages limit partly on right of trial by jury grounds.¹⁵⁶

The determination of the plaintiff's damages, including noneconomic damages,¹⁵⁷ is a question of fact for the jury.¹⁵⁸ The statutory cap, in effect, permits the legislature to reexamine and modify the findings of the jury. This interference is especially inappropriate in view of the authority of a judge to set aside an excessive verdict and order a new trial, enter judgment notwithstanding the verdict, or order remittitur where the evidence does not support the verdict. This authority is well-established both at common law and in modern court rules.¹⁵⁹ Unlike a statutory damages cap, these judicial interventions are exercised neither arbitrarily nor in disregard of the facts proved at trial.

Washington's damages cap ignores facts proved at trial. It takes into account only the plaintiff's age and the average annual state wage and not the seriousness of either the injury or the loss. The statute

153. *Id.* at 789; see also *Smith v. Department of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987) (Florida tort reform damages cap invalidated partly because it denies plaintiff constitutional benefit of jury trial). The *Boyd* court later refused to reconsider its holding. *Boyd v. Bulala*, 672 F. Supp. 915 (W.D. Va. 1987).

154. 647 F. Supp. at 788 ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935))).

155. *Id.* at 789.

156. *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987); *Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 30 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988). In *Foster*, King County Superior Court Judge Ellington declared that the limit "renders the right to a jury trial not substantive, not fully extended." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987).

157. *Power v. Union Pac. R.R.*, 655 F.2d 1380, 1388 (9th Cir. 1981) (under Washington law, amount of damages for loss of companionship is left to trier of fact); *Farman v. Farman*, 25 Wash. App. 896, 611 P.2d 1314 (1980) (amount of damages for intentional infliction of emotional distress is question for trier of fact).

158. *Shea v. City of Spokane*, 17 Wash. App. 236, 562 P.2d 264 (1977) (proof of damages is question of fact for jury). *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1888) (where amount of damages is not fixed, agreed upon, or liquidated, jury must be called unless waived).

159. Some such common-law rules have become court rules. *E.g.*, WASH. SUPER. CT. CIV. R. 59(a)(5) (judge may set aside excessive verdict and order new trial).

"invades the province of the jury and restricts the jury's ability to assess damages."¹⁶⁰ It is therefore unconstitutional under the Washington Constitution.¹⁶¹

III. CONCLUSION

Washington's damages limit violates the state equal protection and right of trial by jury guarantees. Under the state equal protection provision, courts should give the statute intermediate scrutiny. This standard of review is supported by Washington case law, case law in other states, and public policy considerations. Because the statute's classifications are not substantially related to a legitimate legislative interest, the statute denies tort plaintiffs the equal protection of the laws. The statute denies the right of trial by jury because it materially invades the province of the jury to find facts.

State constitutional guarantees of due process and equal protection should not be understood by courts merely to restate the fourteenth amendment. Washington courts can and do grant greater protections of individual rights under the state constitution. Such protection is warranted in the review of legislation that classifies and affects the rights of tort victims.

Marco de Sa e Silva

160. *Boyd v. Bulala*, 647 F. Supp. 781, 789 (W.D. Va. 1986).

161. The limit by its terms applies to all "action[s] seeking damages for personal injury or death." WASH. REV. CODE § 4.56.250(2) (1987). Nevertheless, the limit is not unconstitutional on jury trial grounds as to all such actions, but rather only to actions for personal injury. Whether a person is entitled to a jury trial under the Washington Constitution depends on whether the right existed in 1889, when the Washington Constitution was adopted. *Firchau v. Gaskill*, 88 Wash. 2d 109, 558 P.2d 194 (1977). The right to a jury trial in a civil action existed in Washington in 1889. See *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1888) (breach of warranty action); *Northern Pac. R.R. v. Holmes*, 3 Wash. Terr. 543, 18 P. 76 (1888) (negligence action). The state constitution therefore preserves the right. On the other hand, the cause of action for wrongful death did not exist until created by the legislature in 1917, 1917 Wash. Laws ch. 123, § 1. Although parties to a claim for wrongful death have a right to a jury trial, that right is statutory and not constitutional.

The distinction may cause a court to sever the application of the damages limit as to personal injury actions but leave intact the limit as to wrongful death. *Contra Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 31 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988) (jury trial right exists regardless of "whether the right was created by statute or existed at common law"). Severance would, in effect, amend Washington's wrongful death act to provide for a limit on noneconomic damages. Such a limit is probably constitutional under the Washington jury trial guarantee. See *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958). *But see White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983).

ary ability to
ider the Wash-

protection and
protection pro-
iny. This stan-
se law in other
atute's classifi-
slative interest,
f the laws. The
terially invades

qual protection
the fourteenth
ater protections
h protection is
and affects the

o Sa e Silva

or personal injury or
no? unconstitutional
for personal injury.
stitution depends on
adopted. *Firchau v.*
a civil action existed
149 (1883) (breach of
76 (1883) (negligence
er hand, the cause of
17. 1917 Wash. Laws
a jury trial that right

as limit as to personal
v. *Fibreboard Corp.*,
n Feb. 19, 1988) (jury
or existed at common
to provide for a limit
the Washington jury
but see *White v. State*,

Washington's Noneconomic Damages Limit

TABLE: REPORTED DECISIONS ON THE CONSTITUTIONALITY OF MEDICAL MALPRACTICE AND TORT REFORM DAMAGES LIMITS. This Table gathers in chronological order recent decisions on the constitutionality of medical malpractice and tort reform damages limits. The Table does not include cases that have been overruled or that merely follow binding precedent. Where both a state and federal court have decided the constitutionality of the same statute, the Table reports both decisions. For citations to the following cases, see footnotes 38-49.

CASE	LIMIT	STANDARD OF REVIEW	HELD	GROUND S
<i>Wright v. Central DuPage Hosp.</i> (Ill. 1976)	\$500,000 ^A	Q	UC	SL ³
<i>Jones v. State Bd. of Medicine</i> (Idaho 1976)	Variable ^A	NA	C	AC ³
<i>Simon v. St. Eliz'th Med. Cntr.</i> (Ohio C.P. 1976)	\$200,000 ^G	RB/I	R	DP, ^B EP ^B
<i>Prendergast v. Nelson</i> (Neb. 1977)	\$500,000 ^A	Q	UC ^D	EP ^B
<i>Arneson v. Olson</i> (N.D. 1978)	\$300,000 ^A	RB	C	SP ³
<i>Johnson v. St. Vincent Hosp.</i> (Ind. 1980)	\$500,000 ^A	I	UC	EP ^B
<i>Carson v. Maurer</i> (N.H. 1980)	\$250,000 ^{NE}	Q	C	DP, ^B EP, ^B JT ³
<i>Baptist Hosp. v. Baber</i> (Tex. App. 1984)	\$500,000 ^{NM}	I	UC	EP ³
<i>Malone & Hyde, Inc. v. Hobrecht</i> (Tex. App. 1985)	\$500,000 ^{NM}	RB	UC	EP ^Q
<i>Fein v. Permanente Medical Group</i> (Calif. 1985)	\$250,000 ^{NE}	NA	UC	<i>Baptist Hosp.</i>
<i>Detar Hosp. v. Estrada</i> (Tex. App. 1985)	\$500,000 ^{NM}	RB	C	DP, ^B EP ^Q
<i>Hoffman v. United States</i> (9th Cir. 1985)	\$250,000 ^{NE}	RB	UC	EP, ^B AC ³
<i>Duren v. Suburban Comm'y Hosp.</i> (Ohio C.P. 1985)	\$200,000 ^G	RB	C	EP ^F
<i>Sibley v. Board of Supervisors</i> (La. 1985)	\$500,000 ^{NM}	Q	UC	Q ^B
<i>Waggoner v. Gibson</i> (N.D. Tex. 1986)	\$500,000 ^{NM}	Q	R	EP ³
<i>Boyd v. Bulala</i> (W.D. Va. 1986)	\$750,000 ^A	RB	UC	DP, ^B EP, ^B AC ³
<i>Lucas v. United States</i> (5th Cir. 1986)	\$500,000 ^{NM}	RB	C	DP, ^Q EP ^B
<i>Smith v. Dep't of Ins.</i> (Fla. 1987)	\$450,000 ^{NE}	RB	C	DP, ^F EP ^F
<i>Lucas v. United States</i> (Tex. 1988)	\$500,000 ^{NM} \$150,000 ^{NE}	NA	UC	AC, ³ JT ³

Explanation of symbols:

Type of damages limited: A = All damages; G = General damages; NE = Noneconomic damages; NM = Nonmedical damages

Standard of review: I = Intermediate; RB = Rational basis; NA = Not applicable; Q = Unclear

Holding: C = Constitutional or not unconstitutional; UC = Unconstitutional; D = Dictum; R = Not decided in reported case, remanded to trial court for decision as to constitutionality

Grounds for court's decision: AC = Right of access to courts; DP = Due process; EP = Equal protection; JT = Right of trial by jury; SL = Special legislation; SP = Special privilege; Q = Unclear

Constitution relied on by court: B = Both federal and state constitutions; F = Federal constitution only; S = State constitution only; Q = Unclear

L. AMES LUCE
DAN A. HENSLEY

LAW OFFICES
Luce & Hensley
A PROFESSIONAL CORPORATION
1015 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501

TELEPHONE (907) 278-1111
FAX (907) 277-4164

March 27, 1990

Rep. Peter Goll, Co-Chairman
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: House Bill 166 -- Jackson vs. Power

Dear Representative Goll:

I have been advised that the hospital and medical profession are requesting that the Committee adopt Section 17 of House Bill 166 as originally introduced by Representative Cotten, which would for all practical purposes provide the hospitals in our state with immunity for medical negligence to patients in the hospitals' emergency rooms. While members of the medical profession represent that this section of the bill would merely place the law in the same status as before the Alaska Supreme Court decision of Jackson v. Power, nothing could be further from the truth.

The effect of this bill would be to grant virtual immunity to the hospitals for liability, an area where extreme care and vigilance is necessary if quality patient care is to be achieved. Not only would this legislation abolish the hospitals' liability for emergency room negligence based upon nondelegable duty as established in Jackson v. Power, but it would, for all practical purposes, abolish recovery based upon theories of apparent authority and ostensible agency.

Since the Jackson v. Power decision, the hospitals of this state have had no problems covering the risk for negligent patient care in their emergency rooms through insurance. The hospitals have the option, if they so choose, to pass any additional costs incurred to the doctors utilizing these facilities. What should not be permitted is for the hospitals to have uninsured doctors operating their emergency services and

Rep. Peter Goll
March 27, 1990
Page TWO

leaving patients with no recourse to recover for the negligent injuries that have received. I have enclosed for your review a position paper which I have prepared on the Jackson v. Power issue and a copy of the Alaska Supreme Court decision.

I will be glad to answer any further questions concerning this matter, as I represented Mr. Brett Jackson, who lost both of his kidneys and sustained other horrible injuries as the result of negligent medical care in the hospital's emergency room, against Fairbanks Memorial Hospital. I further had the opportunity of handling Mr. Jackson's case upon appeal to the Alaska Supreme Court. These issues were extensively debated before the House Labor and Commerce Committee during the last session and Representative Donley felt that this section of the Bill did not have sufficient merit to include in the Labor and Commerce substitute that was forwarded for the consideration of the Judiciary Committee.

Very truly yours,

LAW OFFICES OF LUCE & HENSLEY



Ames Luce

LAL:fs
Enclosures
lal.let.gol.hou.com

L. AMES LUCE
DAN A. HENSLEY

LAW OFFICES
Luce & Hensley
A PROFESSIONAL CORPORATION
1016 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501

TELEPHONE 307-276-9100
FAX 307-277-4884

HOSPITAL LIABILITY IN THE EMERGENCY ROOM

HB-166 AND JACKSON V. POWER

Various hospital and medical special interest groups have supported legislation contained in Section 17 of HB 166 which would invalidate the Alaska Supreme Court's decision in Jackson v. Power, 743 P.2d 1376 (Alaska 1987). This decision held that a hospital would be financially responsible for negligent acts committed in the hospital emergency room, unless done by a physician of the patient's "own choice." This theory of liability is based upon the premise that a business should be financially responsible for the civil injury that is caused as a result of the business operation. Further, that when involved in areas of high risk of injury to the public, and where duties are mandated by statute and public policy considerations, a business should not be permitted to delegate the civil responsibility for injury caused to a citizen to another person who may not be financially responsible.

What the Alaska Supreme Court specifically held in Jackson was that the hospital, having assumed the duty to staff an emergency room, should not be allowed to avoid legal responsibility to patients injured there as the result of doctor negligence by claiming that its emergency room doctors were "independent contractors." As a matter of public policy, the patient was looking to the hospital and not to a specific doctor of the patient's choice for emergency room care.

The Supreme Court applied the law as it existed in other sectors of our society to the modern hospital situation. The Supreme Court had previously ruled in Alaska Airlines v. Sweat, 586 P.2d 916 (Alaska 1977), that an airline could not disclaim liability for injury or death to passengers when it had hired someone else other than one of its "employees" to operate its air routes or fly its planes. The risk of injury or death from negligent operation was too great to permit, as a matter of public policy, such a delegation of responsibility and with it the concern for safety of the passengers.

In 1990 it can no longer be argued with any validity that modern hospitals are mere sanitary waysides for the convenience of the doctor and the patient. The modern hospital is at the center of our modern health care system. It is in the business

of providing quality health care and sets the health care standards for the community. It is required to maintain and staff emergency rooms not only by State statute, but by the requirements of its own bylaws and its certification from the Joint Commission on the Accreditation of Hospitals (JCAH).

Prior to the decision in Jackson v. Power, various courts in the United States had utilized different legal theories under which to hold hospitals liable for negligent physician care when the physician was "not chosen by the patient." Irrespective of the legal theories applied, the overwhelming majority of the recently reported cases have held the hospital responsible. Such situations usually occur either in the emergency room, in the providing of anesthesia, or in the providing of radiology or pathology services. These areas of health care delivery are the responsibility of the modern hospital. The theories of recovery against the hospital have included implied agency, ostensible agency, apparent authority, estoppel, and like doctrines. They required various degrees of proof on the part of an injured patient, and often led to uneven and unjust results.

Hospitals outside of Alaska have dealt with these issues of civil liability by simply requiring that physicians with staff medical privileges carry liability insurance and by insuring their own remaining risk. Alaska hospitals are unique in this respect, in that they did not require mandatory insurance from physicians who are members of their medical staff. (The refusal of many of the doctors in Alaska to carry liability insurance is also unique.) Indeed, Providence Hospital and Humana Hospital in Anchorage are the only hospitals, in their respective nationwide hospital systems, which do not have such a requirement. They have not done so in Alaska because of the resistance of the same doctors that are the leaders in the tort reform movement! They have now joined forces to attempt to not only nullify the effect of the Jackson decision, but to also do away with the theories of ostensible agency and apparent authority. Such a law would leave at risk the better than 75,000 citizens of this state who yearly seek and obtain care from hospital emergency rooms.

Providence Hospital is the fourth largest private sector employer in the State of Alaska and has an annual budget that substantially exceeds \$100 million. Even though it is a "nonprofit institution", it has an advertising budget in excess of several hundreds of thousands of dollars annually. It is simply unconscionable for Providence and Humana Hospitals not to require their physicians to be insured, and then to spend thousands of dollars in an effort to reverse the decision of Jackson v. Power, which protects the civil rights of their patients. Since the date of the Jackson decision, the hospitals of the state have insured for the risk of injury to patients in their emergency rooms. The state hospitals now seek to shift this risk to the injured patient.

The passage of Section 17 of HB 166 will either deny or substantially increase the burdens and difficulties upon injured patients obtaining a just recovery. It will not promote quality health care in the hospital setting in this state and would constitute horrible public policy.

mem.tor.ref.jac.hb.166.2

This case presents an issue of first impression in this state, concerning health care delivery in hospital emergency rooms. The question that we must resolve is whether a hospital may be held vicariously liable for negligent health care rendered by an emergency room physician who is not an employee of the hospital, but is, instead, an independent contractor. We hold that the hospital in this case had a non-delegable duty to provide non-negligent physician care in its emergency room and, therefore, may be liable.

I

On the evening of May 22, 1981, sixteen year old Brett Jackson was seriously injured when he fell from a cliff. Jackson was airlifted to Fairbanks Memorial Hospital (FMH). Shortly after midnight, he was received in the hospital's emergency room.

Jackson was examined by respondent John Power, M.D., one of two emergency room physicians on duty at the time. Dr. Power's examination revealed multiple lacerations and abrasions of the patient's face and scalp, multiple contusions and lacerations of the lumbar area, several broken vertebrae and gastric distension, suggesting possible internal injuries. Dr. Power ordered several tests, but did not order certain procedures that could have been used to ascertain whether there had been damage to the patient's

kidneys. Jackson had, in fact, suffered damage to the renal arteries and veins which supply blood to and remove blood from the kidneys. This damage, undetected for approximately 9 to 10 hours after Jackson's arrival at FMH, ultimately caused Jackson to lose both of his kidneys.

II.

Jackson and his mother, Linda Estrada, (hereinafter referred to collectively as Jackson) filed suit. In their complaint they alleged negligence in the diagnosis, care and treatment Jackson received at FMH. Jackson moved for partial summary judgment seeking to hold FMH vicariously liable as a matter of law for the care rendered by Dr. Power. In support of his motion, Jackson advanced three separate theories: (1) enterprise liability; (2) apparent authority; and (3) non-delegable duty.

After briefing and argument, the superior court held, as a matter of law, that FMH could not be held liable under an enterprise liability theory, and that genuine issues of material fact precluded summary judgment on the two remaining theories.¹ We subsequently granted Jackson's petition for review of the court's ruling.

1. The superior court also rejected three motions for summary judgment by various respondents seeking to have Linda Estrada's claim against them dismissed on the

(Footnote Continued)

III

Initially, it is important to clarify the exact issue that we have been asked to resolve. Jackson has conceded, for purposes of this appeal, that Dr. Power was not an employee of FMH, but an independent contractor employed by respondent Emergency Room, Inc. (ERI), and that ERI and FMH are separate legal entities. Traditional rules of respondeat superior are, therefore, inapposite. Jackson also makes no claim that FMH was itself negligent in its selection, retention, or supervision of Dr. Power. Consequently, we have no occasion to consider the doctrine of corporate negligence.² Jackson asks us to resolve only whether a hospital should be vicariously liable, as a matter

(Footnote Continued)

ground that it was time barred by the statute of limitations. None of the respondents cross-petitioned for review of that issue.

2. The doctrine of corporate negligence holds that a hospital owes an independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise the medical treatment provided by members of its medical staff. See Tucson Medical Center v. Miserch, 545 P.2d 958, 960 (Ariz. 1976); Darling v. Charleston Community Mem. Hosp., 211 N.E.2d 253 (Ill. 1965); Pedroza v. Bryant, 677 P.2d 166, 170 (Wash. 1984); Johnson v. Misericordia Community Hosp., 301 N.W.2d 156 (Wis. 1981). See generally, Janulis & Hornstein, Damned If You Do, Damned If You Don't: Hospitals' Liability for Physicians' Malpractice, 64 Neb. L. Rev. 689, 702-08 (1985); Note, Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence, 32 Rutgers L.J. 342, 360-72 (1979).

of public policy, for the negligence or malpractice³ of an independent contractor/physician, committed while treating a patient in the hospital's emergency room, under theories of (1) enterprise liability; (2) apparent authority; or (3) non-delegable duty.

IV

As previously noted, this case presents this court with an issue of first impression.⁴

The generally accepted rule is that, where an employment relationship exists between the physician and the hospital, the hospital will be liable, under the traditional rule of respondeat superior, for any negligence or malpractice which results in injury to a hospital patient. E.g., Binq v. Thuning, 143 N.E.2d 3, 9 (N.Y. 1957); Weldon v. Seminole Municipal Hospital, 709 P.2d 1058, 1059 (Okla. 1985). Conversely, no liability attaches to the hospital

3. Jackson has yet to prove that any negligence or malpractice did in fact occur. In order to resolve the issue presented here, however, we must assume negligence. We, of course, express no opinion as to the actual merits of Jackson's claim.

4. In Baker v. Werner, 654 P.2d 263, 267 n.6 (Alaska 1982), Baker appealed the trial court's rejection of his theory of vicarious liability in a wrongful death action against a physician, hospital and attending nurse. Because we upheld the jury's finding that the defendants were not negligent, we did not reach the merits of the issue, "any theory of vicarious liability [being] irrelevant." Id.

when the physician is an independent contractor. E.g. Greene v. Rogers, 498 N.E.2d 867, 871 (Ill. App. 1986); Hill v. St. Clare's Hosp., 490 N.E.2d 823, 827 (N.Y. 1986). See generally Comment, The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians, 50 Wash. L. Rev. 385 (1975) (hereinafter "Comment, Hospital Responsibility").

Jackson concedes that Dr. Power was an independent contractor; however, he asserts that Alaska's law of respondeat superior mandates a result different than that which would be reached under the general rule.⁵ Jackson argues that our decision in Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972), establishes that the law of "vicarious legal responsibility" in Alaska is "enterprise liability." Thus, he contends, if the enterprise impacts society and the negligent act occurred during an activity performed for the benefit or in the interest of the enterprise, the enterprise is liable.

5. The trial court decided the issue of the applicability of enterprise liability as a matter of law. We scrutinize questions of law under a de novo or independent judgment standard of review. Hicklin v. Orbeck, 565 P.2d 159, 163 n.6 (Alaska 1977), rev'd on other grounds, 437 U.S. 518, 57 L. Ed. 2d 397 (1978). When reviewing a question of law, it is our "duty to adopt the rule of law that is most persuasive in light of precedent, reason and policy." Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

Jackson's argument proves unpersuasive. First, Jackson's interpretation of Fruit is flawed. A close reading of that case shows that we did not view "enterprise liability" as a separate theory of liability or a distinct cause of action. Rather, enterprise liability was seen as one of two widely accepted theories used by courts to justify imposition of vicarious liability in an established employer/employee context. Id. at 138-39. As was noted in Fruit:

[T]he "enterprise" theory . . . finds liability whenever the enterprise of the employer would have benefited by the context of the act of the employee but for the unfortunate injury.

The rule of respondeat superior however, . . . is limited to requiring an enterprise to bear the loss incurred as a result of the employee's negligence. The acts of the employee need be so connected to his employment as to justify requiring that the employer bear that loss.

Id. at 140-41 (emphasis added) (footnotes omitted). See generally Morris, Enterprise Liability and the Actuarial Process -- the Insignificance of Foresight, 70 Yale L. J. 554 (1961).

Additionally, our decisions since Fruit show that we have applied the theory of respondeat superior only in an employer/employee context, unless one of the well established exceptions to that rule exists. See, Parker

Drilling v. O'Neill, 674 P.2d 770, 775 (Alaska 1983);
Williams v. Alyeska Pipeline Service Co., 650 P.2d 343, 349
(Alaska 1982); Hammond v. Bechtel Inc., 606 P.2d 1269, 1273
(Alaska 1980); Barton v. Lund, 563 P.2d 875, 876 (Alaska
1977); Luth v. Rogers & Babler Construction, 507 P.2d 761,
763-64 (Alaska 1973). Jackson's theory presents no such
exception.

Finally, the cases from other jurisdictions cited
by Jackson provide little support for his theory; those
cases deal only with theories of apparent agency or
corporate negligence. Moreover, although at least two
courts appear to have implicitly indicated a willingness to
recognize a theory of enterprise liability, see Alden v.
Providence Hospital, 382 F.2d 163, 166 (D.C. Cir. 1967);
Adamski v. Tacoma General Hospital, 579 P.2d 970, 977 & n.5
(Wash. App. 1978), to date, no court has explicitly embraced
that concept.⁶

In short, Jackson's theory of enterprise liability
is not yet the law in Alaska.

6. Some commentators have suggested an
enterprise tort doctrine as a basis for imposing liability
for any tort occurring as part of the hospital enterprise.
See Southwick, Hospital Liability: Two Theories Have Been
Merged, 4 J. Legal Med. 1, 3-5 (1983); Comment, Hospital
Responsibility, supra at 418-19.

Jackson next argues that the trial court erred in holding that genuine issues of material fact prevented it from granting summary judgment on his theory of apparent authority.

Although we have recognized the doctrine of apparent authority in other contexts, see City of Delta Junction v. Mack Truck, 670 P.2d 1128, 1129-30 (Alaska 1983) (national distributor and local franchise); Perkins v. Willacy, 431 P.2d 141, 142 (Alaska 1967) (husband and wife), this is the first time we have been asked to apply this doctrine to a hospital-independent contractor/physician relationship.

Cases from other jurisdictions show a strong trend toward liability against hospitals that permit or encourage patients to believe that independent contractor/physicians are, in fact, authorized agents of the hospitals.⁷ These courts have held hospitals vicariously liable under a

7. The only exception to this modern trend of which we are aware is Greene v. Rogers, 498 N.E.2d 867 (Ill. App. 1986). In Greene, the court specifically refused to apply apparent agency to a hospital-emergency room doctor relationship because "[t]he absence of the power to control the decision-making of the emergency room physician demands that the independent relationship between hospital and emergency room physician be recognized." Id. at 871. We view Greene as an aberration dependent upon reasoning which is not particularly persuasive.

doctrine labeled either "ostensible" or "apparent" agency or "agency by estoppel." See Porubiansky v. Emory University, 275 S.E.2d 163, 168 (Ga. App. 1981); Paintsville Hospital v. Rose, 683 S.W.2d 255, 257 (Ky. 1985); Mehlman v. Powell, 378 A.2d 1121 (Md. 1977); Grewe v. Mt. Clemens General Hospital, 273 N.W.2d 429, 432-33 (Mich. 1978); Arthur v. St. Peters Hospital, 405 A.2d 443 (N.J. Super. 1979); Hannola v. City of Lakewood, 426 N.E.2d 1187, 1192 (Ohio App. 1980); Weldon, 709 P.2d at 1060; Themins v. Emanuel Lutheran Charity Bd., 637 P.2d 155, 158-59 (Or. App. 1982); Adamski v. Tacoma General Hospital, 579 P.2d 970, 977 (Wash. App. 1978); see generally Janulis & Hornstein, supra at 696-702. Although courts and commentators often use these terms interchangeably, they are not theoretically identical.

The "ostensible" or "apparent" agency theory is based on Section 429 of the Restatement (Second) of Torts (1965), which provides:

One who employs an independent contractor to perform services for another, which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Two factors are relevant to a finding of ostensible agency:

(1) whether the patient looks to the institution, rather

than the individual physician, for care; and (2) whether the hospital "holds out" the physician as its employee. Simmons v. St. Clair Memorial Hospital, 481 A.2d 870, 874 (Pa. Super. 1984); see also Irving v. Doctors Hospital of Lake Worth, 41 So. 2d 55, 60-61 (Fla. App. 1982); Smith v. St. Francis Hospital, 676 P.2d 279, 282 (Okla. App. 1984).

"Agency by estoppel," in contrast, is predicated on the arguably stricter standard of the Restatement (Second) of Agency § 267 (1958). Section 267 provides:

One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Under this theory, there must be actual reliance upon the representations of the principal by the person injured. Mehlman, 378 A.2d at 1123.

Thus, theoretically, there need be no causal relationship between the principal's conduct and the plaintiff's reliance to warrant a conclusion of ostensible agency; such a causal relationship and such a change of position, however, is the essence of estoppel to deny agency.

Janulis & Hornstein, supra at 697.

Jackson, in essence, asks us to adopt a rule of ostensible agency. FMH, on the other hand, requests that we follow Greene and refuse to apply this doctrine in the

hospital-physician context or, alternatively, that we adopt a rule which is essentially estoppel by agency. Although we find nothing antithetical about applying the doctrine of apparent authority to a hospital-independent contractor/physician relationship, we perceive no reason to adopt a special rule in this area. We believe that traditional rules of apparent authority provide sufficient guidelines.

In City of Delta Junction, we defined the doctrine of apparent authority in Alaska as follows:

Apparent authority to do an act is created as to third persons by written or spoken word or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

670 P.2d at 1130 (quoting Restatement (Second) of Agency § 27, at 103 (1958)). We went on to emphasize that it is the principal's conduct that gives rise to his liability and not the conduct of the alleged agent; "one dealing with an alleged agent must prove that the principal was responsible for the appearance of authority, by doing something or permitting the alleged agent to do something that led others, including the plaintiff, to believe that the agent had the authority he purported to have." Id. (quoting W. Seavy, Handbook of The Law of Agency § 8, at 13 (1964)).

Relying on City of Delta Junction, the trial court held that existing factual disputes required Jackson to

submit his apparent authority theory to the jury. When reviewing the denial of a motion for summary judgment, we must determine whether genuine issues of material fact exist, and if not, whether the moving party is entitled to judgment as a matter of law. Alaska R. Civ. P. 56(c); Shattin v. Dillingham City School District, 617 P.2d 9, 11 (Alaska 1980). In reaching this decision we must draw all reasonable inferences in favor of the non-moving party and against the movant. Id.

Drawing all reasonable inferences in the light most favorable to FMH, the record shows the following: at the time of Jackson's accident, FMH was the only civilian hospital north of Anchorage providing emergency room services in Alaska. Two road signs in Fairbanks note the location of the hospital. However, neither of these signs specifically refer to the existence of emergency room services. The signs were not constructed or situated by FMH. In fact, FMH does no advertising at all.

From the time of its establishment in 1972, FMH has never staffed its emergency room with its own physician employees, but has always relied upon local physicians to provide that service. Prior to the formation of ERI in 1977, FMH's emergency room was serviced by three local clinics, each providing one physician on a nightly basis. After 1977, ERI provided one physician on a nightly basis who

worked a 14-hour graveyard shift (6:00 p.m. to 8:00 a.m.).⁸ While on duty in the emergency room, the ERI physician was "in charge" and no FMH personnel were responsible for either scheduling or monitoring the emergency room physicians. No contractual arrangement existed between FMH and ERI for the provision of emergency room physicians.

In apparent non-life threatening situations the first person an incoming patient sees at the emergency room is the admissions clerk. Immediately adjacent to the clerk's desk is a sign which indicated that physicians from ERI were working in the emergency room. Although the exact state of Jackson's awareness is not entirely clear, there is evidence suggesting that he was admitted in a conscious state.⁹ Neither Jackson nor his mother selected FMH as the place of treatment nor Dr. Power as Jackson's physician.

8. The clinics continued to provide an additional physician for the graveyard shift on a rotation basis.

9. Jackson testified at his deposition that he recalled being placed in the helicopter but had no recollection of being removed from it, being taken to FMH, or of meeting the doctor who treated him. On the other hand, the medical records indicate that Jackson appeared to be neurologically stable, completely oriented and gave no indication that he was unconscious or in distress. Moreover, at his deposition, Dr. Power testified that "Jackson was talking" and "completely oriented."

From the above, a jury could conclude that FMH held itself out as providing emergency care services to the public. A jury could also find that Jackson reasonably believed that Dr. Power was employed by the hospital to deliver emergency room service. It is also possible, however, that a jury could find to the contrary.¹⁰

Unless the evidence allows but one inference, the question of apparent authority is one of fact for the jury. City of Delta Junction, 670 P.2d at 1131; Themins, 637 P.2d at 159; Adamski, 579 P.2d at 978. In the case at bar, the record is not susceptible to a single inference. Thus, the trial court properly denied summary judgment on this issue.

VI

Jackson's final point is that the trial court erred in refusing to rule, as a matter of law, that FMH, as a general acute care hospital, has a non-delegable duty to provide non-negligent physician care in its emergency room. In essence, Jackson's position is that when a hospital

10. In this regard, we agree with the weight of authority that application of apparent authority in the hospital/emergency room physician situation does not require an express representation to the patient that the treating physician is an employee of the hospital. Nor is direct testimony as to reliance required absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was rendered. See cases cited supra p. 10.

undertakes to operate an emergency room as an integral part of its health care enterprise, public policy dictates that it not be allowed to insulate itself from liability by shunting that responsibility onto another.

FMH, on the other hand, argues that a hospital does not have a non-delegable duty to guarantee safe treatment in its emergency room. Physicians, not hospitals, FMH asserts, have a duty to practice medicine non-negligently. Thus, according to FMH, a hospital cannot be held to have delegated away a duty it never had.

The trial court ruled that "[t]here cannot be a non-delegable duty if there is no contractual relationship." Since it was unclear from the evidence whether or not there was any contractual relationship between ERI and FMH, the court denied Jackson's motion for summary judgment. Initially, we note the trial court's erroneous characterization of the issue. By holding that there can be no "non-delegable duty if there is no contractual relationship," the court confused the question of the existence of a duty with the issue of whether a duty is non-delegable. The flaw in this reasoning is self-evident. As FMH points out, a party cannot be held to have delegated away a duty it never had. Thus, the threshold question is whether FMH had a duty to

provide emergency room care. Only if it did, is it necessary to determine what that duty entailed.

FMH is licensed as a "general acute care hospital."¹¹ As such, it is required to comply with state regulations designed to promote "safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." AS 18.20.060. These regulations provided, at the time of Jackson's accident, that an acute care hospital shall "insure that a physician is available to respond to an emergency at all times." Former 7 AAC 12.110(c)(2).¹² Thus, at a minimum, the law imposed a duty on FMH to provide emergency care physicians on a 24-hour basis.

FMH, however, voluntarily assumed a much broader duty. At the time of Jackson's accident, FMH was accredited by the Joint Committee on the Accreditation of Hospitals

11. A general acute care hospital is a "facility which provides hospitalization for inpatient medical care of acute illness or injury and obstetric care." 7 AAC 12.100.

12. In 1983, this regulation was amended to provide that "[a] general acute care hospital must provide . . . [among other services not relevant here] emergency care services." 7 AAC 12.105 (emphasis added).

(JCAH).¹³ In order to receive and maintain accreditation,¹⁴ FMH had to comply with the JCAH's standards promulgated in the Accreditations Manual For Hospitals, Emergency Services. Standard I mandates that all accredited hospitals implement a well defined plan for emergency care based on community need and the capability of the hospital. The JCAH standards also mandate, among other things, that: (1) FMH's emergency room be directed by a physician member of the active medical staff (Standard II); (2) FMH's emergency room be integrated

13. The JCAH was formed in the early 1950's by the American College of Surgeons, the American College of Physicians, the American Hospital Association, and the American Medical Association. Its purpose was to establish minimum hospital standards for patient care. For details of the program, see Dornette, The Legal Impact on Voluntary Standards in Civil Actions Against the Health Care Provider, N.Y.L. Sch. L. Rev. 925, 925-28 (1977); Holbrook & Dunn, Medical Malpractice Litigation: The Discoverability and Use of Hospitals' Quality Assurance Committee Records, 16 Washburn L.J. 54, 57 (1976).

14. Hospitals voluntarily seek accreditation for financial and professional prestige reasons. First, accreditation by the JCAH means the hospital qualifies to participate in the federal Medicare and Medicaid programs. Accreditation by JCAH is deemed substantial compliance with the Medicare conditions of participation. 42 U.S.C. § 1395bb (1982); 42 C.F.R. § 405.1901(d) (1986). See generally, Dornette, supra n.13 at 927, Holbrook & Dunn, supra n.13, at 58. Second, JCAH accreditation is often a prerequisite to obtaining approval of internship and residency programs. See generally, American Medical Association Directory of Accredited Residencies 3 (1975-76), quoted in Dornette, supra n.13, at 928. Finally, the institution's reputation and standing in the community is affected by whether it receives JCAH accreditation. See Holbrook & Dunn, supra n.13.

with other units and departments of the hospital (Standard III); (3) that emergency care be guided by written policies and procedures; and (4) that the quality of care be continually reviewed, evaluated and assured through establishment of quality control mechanisms (Standard V).

Additionally, FMH's own bylaws provided for the establishment and maintenance of an emergency room. Article X, section 1(d) (1) (b) of FMH's Medical Bylaws provides for an emergency room as one of the services of the hospital. Article XI, section 3(e) provides for the creation of an emergency room committee which is required among other things to:

- (a) formulate rules and regulations for the continuous coverage of the emergency room; and
- (b) supervise the clinical work in that department.

Based upon the above, it cannot seriously be questioned that FMH had a duty to provide emergency room services and that part of that duty was to provide physician care in its emergency room. Having so determined, we must next ascertain whether FMH's duty to provide physician care in the emergency room is non-delegable. That is, we must determine whether, having assumed the duty to staff an emergency room, FMH should be allowed to avoid responsibility for the care rendered therein by claiming that

the physicians it provides are not its employees. We conclude that it cannot.

A non-delegable duty is an established exception to the rule that an employer is not liable for the negligence of an independent contractor. W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on The Law of Torts, § 71 at 511-12 (5th ed. 1984). According to the late Professor Prosser, such a duty "may be imposed by statute, by contract, by franchise or by charter, or by the common law." Id. Among the duties considered non-delegable are the following:

[T]he duty of a carrier to transport its passengers in safety, of a railroad to fence its tracks properly or to maintain safe crossings, and of a municipality to keep its streets in repair; the duty to afford lateral support to adjoining land, to refrain from obstructing or endangering the public highway, to keep premises reasonably safe for business visitors, to provide employees with a safe place to work; the duty of a landlord to maintain common passageways, to make repairs according to covenant, or to use proper care in making them, and no doubt others.

Id. (footnotes omitted). However:

It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.

Id. at 512 (emphasis added). Accord, Alaska Airlines v. Sweat, 568 P.2d 916, 925-26 (Alaska 1977).

Our principal decision on non-delegable duty is Sweat, 568 P.2d 916. In that case, Sweat sued Alaska Airlines for injuries sustained in an air crash while traveling aboard a Chitina Air Service plane. Id. at 922. Chitina had been engaged under a contract with Alaska Airlines to service a portion of Alaska Airlines' regularly scheduled routes. Id. at 921, 922. Alaska Airlines contended that Chitina was an independent contractor and therefore it was not liable for Chitina's negligence. Id. at 923. The trial court found Alaska Airlines vicariously liable based on Restatement (Second) of Torts § 428. Id. On appeal, we affirmed the trial court's decision on the alternative ground that Alaska Airlines owed a common law non-delegable duty of safety to its passengers. Id. at 925. We reasoned:

We believe that the responsibility of a common carrier for the safety of its passengers is so important that the carrier should not be permitted to transfer it to another. A scheduled common carrier such as Alaska is given a monopoly or semi-monopoly primarily for the purpose of furnishing safe and reliable scheduled air transportation. It should not be permitted to barter away its responsibility to the traveling public by means of contracts with other carriers. If this were permissible, an air carrier could avoid liability by engaging in independent contracts for furnishing food, maintenance of its planes and

conceivably even for supplying crews. Regardless of whether such contracts may be permitted by regulatory authorities, the traveling public is entitled to look for protection to the certificated carrier responsible for the scheduled route.

Id. at 926.

We have little trouble concluding that patients, such as Jackson, receiving treatment at a hospital emergency room are as deserving of protection as the airline passengers in Sweat. Likewise, the importance to the community of a hospital's duty to provide emergency room physicians rivals the importance of the common-carriers' duty for the safety of its passengers. We also find a close parallel between the regulatory scheme of airlines and hospitals. Undoubtedly, the operation of a hospital is one of the most regulated activities in this state. Besides the license,¹⁵ and certificate of need,¹⁶ requirements mentioned above, a hospital must comply with state regulations promulgated to control its activities, AS 18.20.070, 7 AAC 12.610; adopt a state approved risk management program "to minimize the risk of injury to patients," AS 18.20.075; and undergo "annual inspections and investigations" of its facilities, AS

15. See AS 18.02.020.

16. See AS 18.07.031.

mandates the rule we adopt today. Not only is this rule consonant with the public perception of the hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered, it also treats tort liability in the medical arena in a manner that is consistent with the commercialization of American medicine. Finally, we simply cannot fathom why liability should depend upon the technical employment status of the emergency room physician who treats the patient. It is the hospital's duty to provide the physician, which it may do through any means at its disposal. The means employed, however, will not change the fact that the hospital will be responsible for the care rendered by physicians it has a duty to provide.

This holding is necessarily limited. We do not change the standard of care with which a physician must comply, nor do we extend the duty which we find non-delegable beyond its natural scope. Our holding does not extend to situations where the patient is treated by his or her own doctor in an emergency room provided for the convenience of the doctor. Such situations are beyond the scope of the duty assumed by an acute care hospital. Rather our holding is limited to those situations where a patient comes to the hospital, as an institution, seeking emergency room services and is treated by a physician provided by the hospital. In such situations, the hospital shall be

Brett JACKSON and Linda Estrada, Petitioners,

v.

John POWER, M.D.; Fairbanks Memorial Hospital; Lutheran Hospital and Homes Society of America, Inc.; Emergency Room, Inc.; William H. Montano, M.D.; and George Vrablick, M.D., Respondents.

No. S-1677.

Supreme Court of Alaska.

Oct. 16, 1987.

Medical malpractice action was brought against hospital. The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., denied patient summary judgment and petition for review was filed. The Supreme Court, Burke, J., held that: (1) hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician under enterprise liability; (2) genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public precluded summary judgment for patient on apparent authority theory; and (3) general acute care hospital's duty to provide physicians for emergency room care was nondelegable.

Affirmed in part, reversed in part, and remanded.

1. Hospitals ⇌7

Doctrine of corporate negligence holds that hospital owes independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise medical treatment provided by members of its medical staff.

2. Hospitals ⇌7

Generally accepted rule is that where employment relationship exists between physician and hospital, hospital will be liable, under traditional rule of respondeat superior, for any negligence or malpractice which results in injury to hospital patient,

and conversely, no liability attaches to hospital when physician is independent contractor.

3. Hospitals ⇌7

Hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician, ~~contractor~~ while treating patient in hospital's emergency room under theory of enterprise liability.

4. Hospitals ⇌7

Two factors are relevant to finding of ostensible agency in hospital context, including whether patient looks to institution, rather than individual physician, for care and whether hospital holds out physician as its employee.

5. Principal and Agent ⇌137(2)

Under theory of agency by estoppel, there must be actual reliance upon representation of principal by person injured.

6. Principal and Agent ⇌99

Traditional rules of apparent authority are applicable to hospital-independent contractor/physician relationship.

7. Judgment ⇌181(33)

Genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public and whether patient reasonably believed that physician was employed by hospital to deliver emergency room service precluded summary judgment for patient in medical malpractice action against hospital on theory of apparent authority.

8. Principal and Agent ⇌159(1)

Application of apparent authority in hospital/emergency room physician situation does not require express representation to patient that treating physician is employee of hospital; nor is direct testimony as to reliance required absent evidence that patient knew or should have known that treating physician was not hospital employee when treatment was rendered.

9. Hospitals ⇌7

Hospital licensed as general acute care hospital had duty to provide emergency

room services and provide physician care.

10. Hospitals ⇌7

General acute care was nondelegable; hospital could not shield itself by claiming that it was not responsible for results of negligence when law imposed duty to provide that health

11. Master and Servant ⇌7

Nondelegable duty to rule that hospital is liable for negligence of

12. Hospitals ⇌7

Rule that general acute care hospital's duty to provide patient room care is nondelegable standard of care which hospital must comply and does not vary where patient is treated by doctor in emergency room; nondelegable nature of doctor's

13. Hospitals ⇌7

Acute care hospital's duty to provide emergency room care as a matter of public policy; malpractice claim by patient who came to hospital emergency room service and by hospital as a matter of public policy to provide no emergency room

Michael Cohn, I
Law Office
Anchorage, for petitioners

James J. Delaney, Wiles, Hay
Anchorage, for respondents
Memorial Hosp. and
Inc.

Peter J. Maass
Anchorage, for
M.D. and Emergency
Room

David C. Cross
Anchorage, for Hospital
Anchorage

JACKSON v. POWER

Cite as 743 P.2d 1376 (Alaska 1987)

Alaska 1377

room services and part of duty was to provide physician care in emergency room.

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

10. Hospitals ⇐7

General acute care hospital's duty to provide physicians for emergency room care was nondelegable, and thus hospital could not shield itself from liability by claiming that it was not responsible for results of negligently performed health care when law imposed duty on hospital to provide that health care.

11. Master and Servant ⇐315

Nondelegable duty is established exception to rule that employer is not liable for negligence of independent contractors.

12. Hospitals ⇐7

Rule that general acute care hospital's duty to provide physicians for emergency room care is nondelegable does not change standard of care with which physician must comply and does not extend to situations where patient is treated by his or her own doctor in emergency room provided for convenience of doctor.

13. Hospitals ⇐7

Acute care hospital was vicariously liable as a matter of law for negligence or malpractice committed by physician on a patient who came to hospital seeking emergency room services; physician was provided by hospital as part of its nondelegable duty to provide nonnegligent physician care in emergency room.

Michael Cohn, Dan A. Hensley, L. Ames Luce, Law Offices of L. Ames Luce, Anchorage, for petitioners.

James J. Delaney, Howard A. Lazar, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, for respondents Fairbanks Memorial Hosp. and Lutheran Hosp. & Homes Soc.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for respondents John Power, M.D. and Emergency Room, Inc.

David C. Crosby, Council & Crosby, Juneau, for Health Ass'n of Alaska, amicus curiae.

OPINION

BURKE, Justice.

This case presents an issue of first impression in this state, concerning health care delivery in hospital emergency rooms. The question that we must resolve is whether a hospital may be held vicariously liable for negligent health care rendered by an emergency room physician who is not an employee of the hospital, but is, instead, an independent contractor. We hold that the hospital in this case had a non-delegable duty to provide non-negligent physician care in its emergency room and, therefore, may be liable.

I

On the evening of May 22, 1981, sixteen year old Brett Jackson was seriously injured when he fell from a cliff. Jackson was airlifted to Fairbanks Memorial Hospital (FMH). Shortly after midnight, he was received in the hospital's emergency room.

Jackson was examined by respondent John Power, M.D., one of two emergency room physicians on duty at the time. Dr. Power's examination revealed multiple lacerations and abrasions of the patient's face and scalp, multiple contusions and lacerations of the lumbar area, several broken vertebrae and gastric distension, suggesting possible internal injuries. Dr. Power ordered several tests, but did not order certain procedures that could have been used to ascertain whether there had been damage to the patient's kidneys. Jackson had, in fact, suffered damage to the renal arteries and veins which supply blood to and remove blood from the kidneys. This damage, undetected for approximately 9 to 10 hours after Jackson's arrival at FMH, ultimately caused Jackson to lose both of his kidneys.

II

Jackson and his mother, Linda Estrada, (hereinafter referred to collectively as Jack-

son) filed suit. In their complaint they alleged negligence in the diagnosis, care and treatment Jackson received at FMH. Jackson moved for partial summary judgment seeking to hold FMH vicariously liable as a matter of law for the care rendered by Dr. Power. In support of his motion, Jackson advanced three separate theories: (1) enterprise liability; (2) apparent authority; and (3) non-delegable duty.

After briefing and argument, the superior court held, as a matter of law, that FMH could not be held liable under an enterprise liability theory, and that genuine issues of material fact precluded summary judgment on the two remaining theories.¹ We subsequently granted Jackson's petition for review of the court's ruling.

III

[1] Initially, it is important to clarify the exact issue that we have been asked to resolve. Jackson has conceded, for purposes of this appeal, that Dr. Power was not an employee of FMH, but an independent contractor employed by respondent Emergency Room, Inc. (ERI), and that ERI and FMH are separate legal entities. Traditional rules of *respondent superior* are, therefore, inapposite. Jackson also makes no claim that FMH was itself negligent in its selection, retention, or supervision of Dr. Power. Consequently, we have no occasion to consider the doctrine of corporate

1. The superior court also rejected three motions for summary judgment by various respondents seeking to have Linda Estrada's claim against them dismissed on the ground that it was time barred by the statute of limitations. None of the respondents cross-petitioned for review of that issue.
2. The doctrine of corporate negligence holds that a hospital owes an independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise the medical treatment provided by members of its medical staff. See *Tucson Medical Center v. Musevch*, 113 Ariz. 34, 545 P.2d 958, 960 (1976); *Darling v. Charleston Community Mem. Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166, 170 (1984); *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156 (1981). See generally, Janulis & Hornstein, *Damned If You Do, Damned If*

negligence.² Jackson asks us to resolve only whether a hospital should be vicariously liable, as a matter of public policy, for the negligence or malpractice³ of an independent contractor/physician, committed while treating a patient in the hospital's emergency room, under theories of (1) enterprise liability; (2) apparent authority; or (3) non-delegable duty.

IV

As previously noted, this case presents this court with an issue of first impression.⁴

[2] The generally accepted rule is that, where an employment relationship exists between the physician and the hospital, the hospital will be liable, under the traditional rule of *respondent superior*, for any negligence or malpractice which results in injury to a hospital patient. *E.g.*, *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 11, 143 N.E.2d 3, 9 (N.Y.1957); *Weldon v. Seminole Municipal Hospital*, 709 P.2d 1058, 1059 (Okla.1985). Conversely, no liability attaches to the hospital when the physician is an independent contractor. *E.g.* *Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 547, 498 N.E.2d 867, 871 (1986); *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 499 N.Y.S.2d 904, 908, 490 N.E.2d 823, 827 (1986). See generally Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Phy-*

You Don't: Hospitals' Liability for Physicians' Malpractice, 64 Neb.L.Rev. 689, 702-08 (1985); Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence*, 32 Rutgers L.J. 342, 360-72 (1979).

3. Jackson has yet to prove that any negligence or malpractice did in fact occur. In order to resolve the issue presented here, however, we must assume negligence. We, of course, express no opinion as to the actual merits of Jackson's claim.
4. In *Baker v. Werner*, 654 P.2d 263, 267 n. 6 (Alaska 1982), Baker appealed the trial court's rejection of his theory of vicarious liability in a wrongful death action against a physician, hospital and attending nurse. Because we upheld the jury's finding that the defendants were not negligent, we did not reach the merits of the issue, "any theory of vicarious liability [being] irrelevant." *Id.*

sicians, 50 Wash after "Comment ty").

Jackson conceded independent contractor asserts that Alaska superior mandates that which would general rule.⁵ decision in *Fruit* 133 (Alaska 1972 of "vicarious liability" is "enterprise liability" tends, if the negligent act ty performed for est of the enterprise liable.

[3] Jackson's suasive. First, *J Fruit* is flawed. case shows that "enterprise liability" as ability or a distinct enterprise liability widely accepted justify imposition established employment *Id.* at 138-39.

[T]he "enterprise liability whenever employer would text of the act the unfortunate

....

The rule of ever, ... is liability to bear the of the employer of the employer his employer that the employer

5. The trial court liability of enterprise We scrutinize qu or independent *Hicklin v. Orbeck*, 1977), rev'd on o S.Ct. 2482, 57 L viewing a question adopt the rule of light of precedent *Ha*, 591 P.2d 12