
NOTE

TORT REFORM IN ALASKA: MUCH ADO ABOUT NOTHING?

This Note discusses some of the provisions put into place by the 1997 Alaska Tort Reform Act, focusing on the Act's punitive damages caps, its adjustments to Alaska's several liability system, and the new statute of repose it enacts. The Note argues that, even though the 1997 Act was very controversial at the time it was passed, the laws that it enacts will have little effect on most Alaska tort victims. In reality, the number of awards affected by this Act are minimal, and a study of Alaska jury verdicts reveals that most large damages awards are reduced on appeal. Similarly, the joint and several liability reforms and the new statute of repose make, at best, cosmetic changes to Alaska tort law that will have little effect on the average Alaska tort victim. The Note concludes that the controversy over the tort bill, as far as the average Alaska citizen is concerned, is really "much ado about nothing."

If we want an environment that is conducive to rational economic development, the creation of jobs and a higher standard of living for all Alaskans, enactment of meaningful tort reform is paramount. Mere token reform is not enough. Every Alaskan should thoroughly understand that the stakes are high, and the battle will not be easy, but that we can prevail.¹

Welcome to the brave new world of corporatism, compliments of corporate director Brian Porter and HB 58 (tort reform). Those 50 words of the Seventh Amendment are dead and the malignancy is [spreading] to the others. HB 58 is right out of the pages of Adolf Hitler's "Mein Kampf" and Karl Marx's "Das Capital." Our legal system is now privatized and our state CEO

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1. Brian Porter, *Tort Reform Must Be Meaningful To Be Effective*, ANCHORAGE DAILY NEWS, Mar. 28, 1997, at B10.

will sign it into law. Corporatism now governs us. What happened to America?²

I. INTRODUCTION

In 1997, the Alaska State Legislature approved yet another controversial bill reforming the state's tort law system.³ Among other things, this bill capped punitive and non-economic damages awards in Alaska, continued the state liability allocation system's metamorphosis from joint and several liability to pure several liability, and enacted a new statute of repose of ten years.⁴ This bill did not become law without a fight.⁵ Businesses and the Alaska insurance industry lobbied hard for its passage.⁶ These groups ar-

2. Joseph T. Dugan, *Letters From the People*, ANCHORAGE DAILY NEWS, Apr. 7, 1997, at B5.

3. 1997 Alaska Sess. Laws 26 (codified as ALASKA STAT. §§ 09.17.010-09.17.900) (LEXIS 1998).

4. See ALASKA STAT. § 09.10.055 (LEXIS 1998) (establishing new statute of repose); *id.* § 09.17.010 (capping non-economic damages); *id.* § 09.17.020 (capping punitive damages); *id.* § 09.17.080(a) (modifying several liability provisions). Among other things, the 1997 Tort Reform Act also made various rules regarding expert witness qualification, offers of judgment, attorney contingent fee agreements, and "damages resulting from commission of a felony or while under influence of alcohol or drugs." *Id.* § 09.65.210(1), (3)(B)(4) (barring a person from recovering damages for injury or death if that person was committing a felony at the time of the death or injury and that felony "substantially contributed to the personal injury or death," or, among other things, if that person were "operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance" and that conduct substantially contributed to the person's injury or death); see also *id.* § 09.20.185 (requiring testifying expert witnesses to be trained and licensed professionals); *id.* § 09.30.065 (requiring offeree to pay opponent's costs and attorney's fees if final judgment rendered is "at least five percent less" than the opponent's pre-trial offer); *id.* § 09.60.080 (requiring attorney contingency fees to be calculated on damages before any punitive damages have been deducted from the award).

In the interests of space, this Note does not consider all of these changes to Alaska's tort law system embodied in the 1997 Tort Reform Act. Instead, this Note chooses to examine only the punitive damages caps, the reforms to the liability allocation system, and the statute of repose amendments.

5. See Maureen Clark, *Tort Reform Bill Is Law; Jury Awards Capped*, ANCHORAGE DAILY NEWS, May 10, 1997, at E1 ("I started this [tort reform legislation] the first year that I got into the Legislature and this is the fifth year. Needless to say, it's the only thing that's taken five years," [Representative Brian Porter, (R-Anchorage)] said. ").

6. See Natalie Phillips, *Suit Sets Sights on Tort-Reform Law; Lawyers Say Measure Limiting Civil Awards Unjust*, ANCHORAGE DAILY NEWS, Feb. 18, 1998,

gued that defending meritless lawsuits and paying high non-compensatory damages awards harmed the Alaska business environment and kept the prices of insurance premiums unnaturally high.⁷ Leading the charge for the other side, groups of Alaska trial attorneys fought against the bill.⁸ They contended that damages caps unjustly discriminate against tort victims with high damages, that several liability foretells the possibility of unpaid tort verdicts, and that there is “no guarantee that the reforms will lower insurance rates.”⁹

Judging from the rhetoric employed by each side, all groups in this fight have the best interests of the average Alaska citizen at heart.¹⁰ One side fights to keep Alaska’s business environment healthy and sane, while the other works to protect and defend the fundamental rights of Alaska tort victims. Both of these are certainly admirable goals, and it is no wonder that tort reform in Alaska has created such controversy. Equally disturbing are the images of a business driven into bankruptcy by an undeservingly large punitive damages award and a tort victim who cannot recover for her injuries because of arbitrary and unjust damages caps. Clearly, if the tort system in Alaska routinely led to such results, then reform would be necessary.

Yet, for all the bluster, as far as average Alaska tort victims and citizens are concerned, tort reform advocates and their opponents are engaged in little more than much ado about nothing. Like most tort reform legislation, the 1997 Tort Reform Act did

at B1 (noting that members of industry, medicine and insurance organizations organized a “hard push” for the bill’s passage).

7. See Natalie Phillips, *Tort Reform Battle Heats Up in Juneau; Both Sides Appeal to Human Element*, ANCHORAGE DAILY NEWS, Mar. 23, 1997, at B1 (“[Reformers] say the cost of defending frivolous lawsuits and rising insurance premiums stifle business.”).

8. See Phillips, *supra* note 6, at B1 (noting that “state trial lawyers fought hard to block the law’s passage”).

9. *Id.* at B1; see also Kevin Sean Mahoney, Note, *Alaska’s Cap on Non-economic Damages: Unfair, Unwise and Unconstitutional*, 11 ALASKA L. REV. 67, 72 (1994) (“A common argument raised by those challenging the constitutionality of damages caps has been that such caps violate the constitutional guarantee of equal protection.”).

10. According to Governor Tony Knowles, “[the bill] recognizes the need for Alaska businesses to operate in a reasonably predictable environment.” Maureen Clark, *Gov. Knowles signs measure limiting civil liability*, ASSOCIATED PRESS POL. SERVICE, May 9, 1997, available in 1997 WL 2524193. Mauri Long, then-president of the Alaska Academy of Trial Lawyers, said, “I think that, overall, the impact will be that it will be more difficult for regular folks who are injured to bring cases when they are not offered a settlement by an insurance company that is reasonable.” Ingrid Martin, *Tort Reform Law Gives Fans, Foes Much to Consider*, ALASKA J. COM. 1, Dec. 22, 1997, available in 1997 WL 15283956.

not address significant elements of Alaska tort law and it will not have a lasting impact on Alaska tort victims.¹¹ What little effect the bill has mainly will involve only those groups who fought so strenuously for and against it. Big businesses and insurance companies, who are commonly the defendants and the financially responsible parties in tort suits, have won a reprieve from a handful of large damages awards made each year.¹² Trial lawyers have lost the chance to secure the occasional big punitive or non-economic damages award for their clients and correspondingly large contingency fees for themselves.¹³ The large majority of Alaska tort victims have not lost anything, for the 1997 Tort Reform Act makes only a few relatively minor changes to a tort system in which few Alaska citizens participate anyway.¹⁴

In its reforms of Alaska's damages allocation system, the bill makes some minor changes that do little more than overturn a few Alaska Supreme Court holdings and alter the outcomes of some very fact-specific situations.¹⁵ While the bill implements some new damages caps, a study of Alaska tort verdicts illustrates that the

11. *But see Voice of the Times*, ANCHORAGE DAILY NEWS, Feb. 21, 1998 at D9 ("Regarding lower rates, early benefits already have been achieved. State Farm Mutual Automobile Insurance Company and United Services Automobile Association have just announced rebates totaling about \$12 million for Alaska policyholders. The rebates, the insurance companies said, are attributable in part to tort reform. State Farm also has reduced auto insurance rates in Alaska by an average 2.4 percent."). Of course, insurance companies were some of the prime supporters of the 1997 Tort Reform Act, and could be expected to laud its benefits to the public once it had passed. *See Keeping States on Course*, Bus. Ins. 8, 1997 WL 8294967 (June 30, 1997) (insurance industry publication approvingly noting the passage of Alaska's tort reform package).

12. *See, e.g.*, Andrew F. Popper, *A One-Term Tort Reform Tale: Victimized the Vulnerable*, 35 HARV. J. ON LEGIS. 123, 126-27 (1998) (discussing the battle in the U.S. Congress between consumer advocates and business interests over the passage of the tort-reforming 1997 Volunteer Protection Act, and dismissing insurance and industry justifications for tort reform as "the polite stuff of lobbying"). Popper argues that "[t]he [tort-reform] bills proposed and the laws passed provide no protection for consumers, furnish no incentive for greater safety, and significantly constrict the rights of the powerless, arguments about promoting 'market opportunity' notwithstanding." *Id.* at 127.

13. *See* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 863-64 (1996) (identifying plaintiff's lawyers interests in keeping the potential for large damages awards in the tort system).

14. *See, e.g.*, Gil B. Fried, *Punitive Damages and Corporate Liability Analysis in Sports Litigation*, 9 MARQ. SPORTS L. J. 45, 51-52 (1998) (noting that scholars have wondered why the general public is not more involved in the tort reform movement and hypothesizing that "[t]he lack of public conviction can be traced to the limited number of tort claims that are actually filed").

15. *See infra* notes 108-72 and accompanying text.

caps would have restricted full damages recovery in only a handful of cases over the past few years.¹⁶ Punitive and non-economic damages rarely are awarded in Alaska tort cases, and they are almost never awarded at amounts that would be reduced by the new caps.¹⁷ So while the beat goes on, and each side makes the same impassioned arguments, what Alaskans should have learned from the continuing debate is that they should not have paid much attention to it in the first place. For most Alaskans, and for most Alaskan tort victims, tort reform will make little difference.

Part II of this Note briefly details the development of the contemporary tort reform movement in the United States over the past fifteen years. Part III examines Alaska tort reform from 1986 – when Alaska first capped damages and made its real shift from joint and several to several liability – to 1997. Part IV discusses the provisions of the 1997 Tort Reform Act, focusing on the bill’s shift toward several liability, its new statute of repose, and its new punitive and non-economic damages caps. Part V concludes that, while some of the bill’s damage apportionment modifications helped complete Alaska’s move to a several liability system, these changes mostly are cosmetic and will do little to affect Alaska’s liability allocation scheme. Tort victims who use a little foresight when conducting their lawsuits will be no worse off than they were before the 1997 Tort Reform Act passed. Tort victims also should have little problem successfully navigating the 1997 Tort Reform Act’s new statute of repose. In addition, the damages caps included in the 1997 bill may make Alaska businesses feel better, but they will do little to modify tort law outcomes in Alaska. This Note ultimately contends that tort reform, as it has been experienced in Alaska, does little to address the concerns of those who should have been the most directly affected by its passage – tort victims. If meaningful tort reform is needed in Alaska, it will not come from a bill such as this.

II. TORT REFORM IN THE UNITED STATES

State legislatures throughout the United States addressed their tort systems in the 1970s and again in the 1980s.¹⁸ In the mid-1970s, many states enacted tort reform measures to counteract the “medical malpractice crisis.”¹⁹ In 1986, more than sixty percent of

16. See *infra* notes 173-237 and accompanying text.

17. See *id.*

18. See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 504 (1998) (discussing these two “most recent waves” of tort reform).

19. See Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 429 (1992) (observing that, since the

the states again passed tort reform to safeguard the availability of liability insurance.²⁰ During each reform wave, state legislatures

mid-1970s, most states have enacted tort reform dealing with medical malpractice lawsuits); *see also* Chamallas, *supra* note 18, at 503-04 (describing the medical malpractice tort reform measures enacted in the 1970s as indicative of a “damages hierarchy” in which non-economic (or non-pecuniary) damages are “less essential to a fair system of compensation than damages for economic loss”); Glen O. Robinson, *The Medical Malpractice Crisis of the 1970’s: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5, 6-27 (1986) (summarizing the medical malpractice crisis events of the early to mid-1970s and its tort reform responses, and noting that the tort reform changes of the 1970s at least had the appearance of immediately addressing the medical malpractice crisis, whether or not they caused any lasting changes in the system). Robinson concludes that the tort reform measures enacted by the states to counteract the medical malpractice crisis were “more show than substance.” Robinson, *supra*, at 30. With regard to the reform measures contemplated in the 1980s at the perceived renewal of the medical malpractice crisis, Robinson notes:

If, as the saying goes, past is prologue, it is difficult to foresee any major tort reform arising out of the 1980’s update of the malpractice crisis of the 1970’s. A continuation of political wrestling between the medical profession and the plaintiff’s bar, accompanied by state legislatures’ fitful intervention to convey their “concern” to both constituencies by making some marginal adjustments in liability-related rules, is more likely to occur.

Id. at 35.

20. *See* Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 628 n.1 (1988) (noting that of the states *not* enacting tort reform legislation in that year, seven did not have legislative sessions, several others considered legislation, and some others set up committees to examine tort reform). Such action was relatively rare at the time, as tort law generally was made by judicial opinion, not by legislation. *See* Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 1 (1997) (“Tort law in America is built on the bedrock of state common law.”).

A 1994 study examined the results of state tort reform initiatives enacted in the mid-1980s in Colorado and New York, and concluded that these initiatives did not make much difference. As one author wrote:

The 1986 tort reform measures enacted in Colorado were viewed as constituting a major overhaul of the state’s liability structure. Four changes were thought important: 1) Joint and several liability was entirely abolished; 2) Non-economic damages were limited to \$25,000; 3) The statute of limitations for civil actions was shortened from four years to two years; and 4) Court awards were to be reduced by the amounts received from other (collateral) sources.

Following reforms, the general liability loss ratios in Colorado dropped sharply and remained relatively stable. Other things apparently remaining more or less constant; the general liability insurance carriers became more profitable. The authors of the study put this rather artfully in their abstract: “(t)he liability reform measures generated a onetime shift in the profitability of general liability insurance.”

created laws aimed at combating alleged public fears that the tort system was running out of control and wreaking havoc in various industries such as medicine and insurance.²¹ In the 1970s, legislatures identified public worries that increasing medical malpractice claims were raising physician insurance costs to the point that such costs would lead to a decrease in the availability of essential medical services.²² In 1986, legislatures reacted to a nationwide “insurance crisis” in an expression of “concern about the decreasing availability and rising cost of liability insurance”²³ that they blamed partially on the burgeoning tort law system.²⁴ This latter “crisis” was characterized by the inability of businesses and municipalities to obtain the insurance they needed at reasonable prices.²⁵ Because of the increased price of insurance and its total unavailability for some activities, certain businesses, and even some municipalities, remained uninsured or had to dramatically increase the prices of their goods and services.²⁶

Philip Shuchman, *It Isn't That the Tort Lawyers Are So Right, It's Just That the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485, 536 (1997) (quoting W. Kip Viscusi & Patricia Born, *The Performance of the Liability Reform Experiments: New York and Colorado*, 16 J. PROD. & TOXICS LIAB. 1, 1 (1994)).

21. See, e.g., W. John Thomas, *The Medical Malpractice “Crisis”: A Critical Examination of a Public Debate*, 65 TEMP. L. REV. 459, 460 (1992) (“Increases in the frequency and severity (or size) of [medical malpractice] claims in the 1960s and 1970s caused cries of outrage in the medical profession and general public alike.”).

22. See Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Reality*, 60 LAW & CONTEMP. PROBS. 153, 153-54 (1997) (“Unexpected and dramatic growth in claims during the 1970s led to a rapid growth in physician malpractice insurance premiums, in some cases sufficient to threaten the continuing availability of valued specialty services (for example, obstetrical services in some states).”); see also Elizabeth Swire Falker, *The Medical Malpractice Crisis in Obstetrics: A Gestalt Approach to Reform*, 4 CARDOZO WOMEN’S L. J. 1, 2-4 (1997) (observing that many obstetricians ceased to practice because they were being sued so frequently, and the rate at which they were sued caused their insurance premiums to rise dramatically).

23. Mahoney, *supra* note 9, at 67.

24. See *id.*

25. See *id.* at 67-68.

26. The lack of adequate insurance coverage, if it existed, certainly would have been noticed in a state like Alaska, which is “especially dependent on the insurance industry.” David G. Stebing, *Insurance Regulation in Alaska: Healthy Exercise of a State Prerogative*, 10 ALASKA L. REV. 279, 309 (1993) (describing the scheme for insurance regulation in Alaska and emphasizing that this regulation is a state function). As one author has written, “[w]hether on land or at sea, regardless of occupation, Alaskans are more likely to die on the job than workers anywhere else in the nation.” See *id.* (quoting Doug O’Harra, *Man Overboard!*, ANCHORAGE DAILY NEWS, May 2, 1993, at D10). O’Harra’s article indicates that during the 1980s, the yearly number of job-related deaths in Alaska was five times

Critics and scholars disagreed as to the causes of this “crisis” in insurance pricing and availability, with many failing to see any connection at all between rising insurance prices and expanding tort liability.²⁷ A consortium of insurance companies and sizeable corporations, joined by the Reagan Administration, blamed the tort law system for their financial woes.²⁸ Many “consumer advocates,” on the other hand, argued that the insurance industry only sought to profit from a natural, self-generated downturn in profitability by reforming the tort system to their advantage.²⁹ The two sides were well-defined and their arguments were forcefully clear.

the national average, while commercial fishermen perish “at an annual rate about 25 times greater than the national average for on-the-job fatalities.” *Id.* at 309 (quoting O’Harra, at D8). Stebing notes that Alaskans are at risk of drowning in the unusually cold waters, threatened by potentially devastating earthquakes, and “plagued [by] employment and environmental hazards,” before concluding that “the risks of living in Alaska mandate the presence of financially sound insurance companies.” *Id.* at 309-10.

A Governor’s Task Force on Regulatory Reform addressed the insurance question in Alaska in 1993. *See id.* at 310. This Task Force concluded in part that “[t]he cost of health and other insurance and bonding is prohibitive for most small businesses,” and recommended, as one of many potential solutions, instituting tort reform in Alaska. *See id.* (quoting GOVERNOR’S TASK FORCE ON REGULATORY REFORM, FINAL REPORT (Mar. 19, 1993)).

27. *See* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2024 (1998) (describing the 1980s insurance crisis as one “that many commentators believe was caused by the cyclical effect of changes in interest rates on insurance premiums and collusion by the insurance industry”); *see also* Popper, *supra* note 12, at 131-32 (categorizing insurance industry claims that the “insurance crisis” is attributable to the tort law system as “baseless”).

28. *See* James J. Scheske, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. OF AIR L. & COM. 627, 632 (1988) (“On the one hand a coalition of insurance companies and large corporations allegedly formed a powerful political coalition promoting reform of the tort system to control escalating costs. The Reagan Administration led the fight for reform as well.” (citations omitted)).

29. *See* Ralph Nader, *The Corporate Drive to Restrict Their Victims’ Rights*, 22 GONZ. L. REV. 15, 18 (1986/1987) (describing tort reform as “one of the most unprincipled public relations scams in the history of the American industry”). Nader notes:

The “insurance crisis” has little to do with lawsuits. It is a self-inflicted phenomenon which last occurred in the mid-seventies, and invariably provokes frenetic talk of a litigation explosion, with calls for legislative limits on victim’s rights. The current cycle began several years ago when interest rates were high. The industry cut prices and insured poor risks in order to obtain premium dollars to invest at these high rates. When interest rates, and this investment income, dropped, the industry responded by sharply increasing insurance premiums and reducing availability . . .

Id. at 18-19 (citations omitted).

In one corner stood “big business,” arguing that tort reform was necessary for it to avoid bankruptcy. In the other stood trial attorneys and victims’ advocates, claiming that reform was a “degradation of the just norms of the common law” and a danger to tort victims everywhere.³⁰

Legislative action in 1986 illustrates that tort reformers carried much of the day.³¹ Many states modified and often eliminated joint and several liability, a liability allocation system that holds each tortfeasor whose conduct proximately caused the plaintiff’s indivisible injury potentially liable for that plaintiff’s full damages.³² Under this system, a tortfeasor responsible for ten percent of a plaintiff’s injuries could find itself financially responsible for one hundred percent of the plaintiff’s recovery, if concurrent tortfeasors were insolvent or immune.³³ Industries argued that joint and several liability treated financially responsible entities unfairly by perpetuating a system in which injured victims would sue marginally responsible “deep pockets” to guarantee compensation for their injuries.³⁴ The states responded to the concerns raised by opponents of joint and several liability by enacting a number of dif-

30. *Id.* at 29.

31. *See* Manzer, *supra* note 20, at 633-35. The author points out that numerous other reforms were enacted by state legislatures during the 1986 legislative sessions, but that the two here mentioned (modification of joint and several liability and caps on non-economic damages) were those most widely enacted by the state legislatures. *See id.* Other reforms adopted include “eliminating the collateral source rule, reestablishing many sovereign immunities, limiting liability for certain activities or actors, providing for periodic rather than lump-sum award payments, and limiting punitive damages.” *Id.* at 633-34 (footnotes omitted).

32. *See id.* at 635.

33. *See* Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1300 (1997) (describing a case in which a party one percent at fault paid eighty-six percent of the victim’s damages).

34. *See* Note, “Common Sense” Legislation: *The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1776 (1996). According to the author, “[c]lassical reformers stressed that it was normatively unfair to hold a single defendant fully liable when that defendant was only remotely involved in causing the harm.” *Id.* The author distinguishes between these classical tort reformers, who “call for the elimination of legal rules that are particularly expensive for defendants,” *id.* at 1767, and modernist tort reformers, who “recognize that, although many of the pro-plaintiff common law rules adopted in the Progressive Era have defects, these rules serve important insurance and deterrence functions.” *Id.* at 1771. The author notes that many modernist tort reformers are actually in favor of joint and several liability, or at least “more supportive” of it than most classical tort reformers. *Id.* at 1777.

ferent provisions designed to allay some of the perceived unfairness of this system.³⁵

In 1986, many states also capped the non-economic and punitive damages that a jury could award a tort victim.³⁶ Non-economic damages are damages for intangible injuries such as pain and suffering.³⁷ The 1986 caps set limits in a range from \$250,000 to \$875,000 on the amount of damages a jury could award.³⁸ Punitive damages constitute money awarded “to plaintiffs in excess of full compensation for their injuries.”³⁹ They usually are justified as necessary to punish particularly malevolent tortfeasors and to deter similar conduct by others.⁴⁰ Reformers frequently argued that punitive damages were “out of control,” and pointed to large jury verdicts that included substantial punitive damage awards as evidence of their claims.⁴¹ Opponents of the 1986 damages caps attacked them as a violation of victims’ equal protection guarantees, in that they discriminated against tort victims whose damages exceeded the amount they could recover.⁴² In the following years, a number of state courts struck down these caps as unconstitutional.⁴³ Nevertheless, by 1986, tort reformers had won sizeable victories in states all over the country.

35. See Cardi, *supra* note 33, at 1302-03.

36. See Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 297 (1997) (noting that several state legislatures capped punitive damages in the 1980s); see also Mahoney, *supra* note 9, at 72 (noting that, in 1986, more than thirty states in addition to Alaska passed tort reform, and that many of these tort reform measures contained non-economic damages caps).

37. Non-economic damages have been defined in Alaska as “compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other non-pecuniary damages.” Mahoney, *supra* note 9, at 68 n.4 (citing ALASKA STAT. § 09.17.010 (Michie Supp. 1993)).

38. See Manzer, *supra* note 20, at 637. New Hampshire set the highest cap, at \$875,000, while Colorado established the lowest at \$250,000 “unless clear and convincing evidence indicates greater damages warranted.” *Id.* at 637 n.56.

39. Philip Ackerman, *Some Don’t Like It Hot: Louisiana Eliminates Punitive Damages For Environmental Torts*, 72 TUL. L. REV. 327, 328 (1997).

40. See *id.* at 329-30; see also Salbu, *supra* note 36, at 250-59 (discussing positions of punitive damages supporters and opponents in the tort reform battle).

41. See Ackerman, *supra* note 39, at 335 (citing Alex Kozinski, Editorial, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A14).

42. See generally Mahoney, *supra* note 9.

43. See David A. Saichek, *Putting a Lid on Caps*, 69 WIS. LAW. 5, 5 (Dec. 1996) (noting that, as of December 1996, caps on non-economic damages had been struck down in Oregon and Washington, and caps in medical malpractice cases had been found unconstitutional in Texas, Kansas, North Dakota, New Hampshire, Alabama and Ohio).

III. TORT REFORM IN ALASKA, 1986-1997

The Alaska legislature first took on the task of reforming the tort system in 1976, when it addressed the “crisis in medical malpractice insurance” by passing a series of laws designed to lower the cost of medical malpractice insurance.⁴⁴ In 1986, in response to the “insurance crisis,” the Alaska legislature acted again and passed the Limitations on Civil Liability Act.⁴⁵ This Act began

44. See 1976 Alaska Sess. Laws 102 (codified at ALASKA STAT. §§ 09.55.530-09.55.560) (Michie 1996); Reid v. Williams, 964 P.2d 453, 456 (Alaska 1998) (discussing a provision of the 1976 “comprehensive medical malpractice reform package intended to alleviate a perceived crisis in medical malpractice insurance costs”); Plumley v. Hale, 594 P.2d 497, 498 n.3 (Alaska 1979) (“Chapter 102 SLA 1976 established a comprehensive system to furnish hospitals and individual health care providers with medical malpractice insurance.”).

45. See ALASKA STAT. § 09.17.080 (Michie 1996); see also Laurence Keyes, *Alaska's Apportionment of Damages Statute: Problems for Litigants*, 9 ALASKA L. REV. 1, 1-3, 9-14 (1992) (summarizing Alaska Supreme Court cases prior to 1986 and detailing the passage of the 1986 Act). Keyes provides an excellent analysis of the 1986 damages allocation system statute. See generally *id.* The text of the original Alaska Statutes section 09.17.080 reads:

Apportionment of damages. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under [Alaska Statutes section] 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under [Alaska Statutes section] 09.16.040.

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

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under [Alaska Statutes section] 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

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

ALASKA STAT. § 09.17.080 (Michie 1986), reprinted in Keyes, *supra*, at 2 n.5.

Alaska's transformation to a several liability system and placed statutory limits on certain damages.⁴⁶ Because it was in the 1980s, and not in 1997, that Alaska switched from joint and several liability to a several liability system, the 1997 legislature had little ground left to cover when it made further modifications to Alaska's liability allocation scheme with the 1997 Tort Reform Act. By 1997, there was not much of Alaska's old damages scheme left to reform.

A. Joint and Several Liability in Alaska, 1986-1997

Before 1986, the Alaska Supreme Court had indicated that it would be "receptive to both proportionate fault and proportionate contribution," two important elements in a several liability system.⁴⁷ With the 1986 Tort Reform Bill, the Alaska legislature began putting into place just such a system.⁴⁸ In turn, this damage apportionment scheme was amended by a voter initiative that moved Alaska even farther toward several liability.⁴⁹ This occurred in 1987, when the Citizens Coalition for Tort Reform fought for a ballot initiative and successfully amended Alaska Statutes section 09.17.080(d), the section in the 1986 Act that had retained some vestiges of the concurrent tortfeasor joint and several liability apportionment system.⁵⁰ Section (d), prior to amendment, had provided that "a party who is allocated less than fifty percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party."⁵¹ The new liability allocation system, which went into effect on March 5, 1989, provides that "[t]he court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."⁵²

46. See Keyes, *supra* note 45, at 15 (noting that, in 1986, "the legislature settled on a version of the act which provided for modified joint and several liability").

47. *Id.* at 9.

48. *See id.*

49. *See id.* at 15-18. Keyes identifies *Lake v. Construction Machinery*, 787 P.2d 1027 (Alaska 1990), as a case dealing with this pre-ballot initiative. The Alaska Supreme Court there explained the operation of Alaska Statutes section 09.17.080 by saying, "[u]nder the new statute, the finder of fact must fix the damage awards, and determine the respective percentages of fault. The court then enters judgment on the basis of modified joint and several liability." *Id.* at 13 (quoting *Lake*, 787 P.2d at 1029-30 (citations omitted)).

50. *See id.* at 15-18.

51. ALASKA STAT. § 09.17.080(d) (Michie 1986) (before repeal).

52. *Id.* § 09.17.080(d) (LEXIS 1998). *See Hughes v. Foster Wheeler Co.*, 932 P.2d 784, 792 (Alaska 1997) for an interesting note on the reach of Alaska Statutes section 09.17.080. In that case, the Alaska Supreme Court held that, while

Subsequent cases applying this new post-ballot initiative Tort Reform Act made clear that, by 1989, Alaska had a several liability system. As the U.S. District Court summarized in *FDIC v. Whitmore*,⁵³

[f]or claims for torts which occurred prior to June 11, 1986, the Alaska Uniform Contribution Among Tortfeasors Act applies retroactively; for torts occurring between June 11, 1986, and March 5, 1989, the Alaska Uniform Contribution Among Tortfeasors Act applies, as modified by the Tort Reform Act of 1986, AS 09.17.010.900; for claims for torts which occurred after March 5, 1989, *pure comparative fault principles, with no right of contribution, apply*.⁵⁴

This view of the post-ballot Tort Reform Act as a statute enacting several liability in Alaska is consistent in all of the cases interpreting the section. For instance, in *Smith v. Ingersoll-Rand Co.*,⁵⁵ the Ninth Circuit characterized the 1986 Tort Reform Act as codifying “the Alaska Supreme Court’s adoption of comparative negligence.”⁵⁶ It further described the 1997 damages allocation system amendments as “minor textual changes.”⁵⁷ In *Robinson v. Alaska Properties and Investment, Inc.*,⁵⁸ the U.S. District Court sitting in Alaska also characterized Alaska’s damages allocation system as one in which joint and several liability had been abolished, with several liability replacing it.⁵⁹ According to the court, the state of

the statute mandated that several liability be applied to findings of fault, joint and several liability was still acceptable when attorney’s fees were being determined. *See id.* As the court wrote,

the clear implication [of Alaska Civil Rule 82(e)] is that, in types of litigation where [Alaska Statute section] 09.17.080 is not invoked, attorney’s fees need not be apportioned by fault. Here there were no damages awarded pursuant to 09.17.080, and it follows that the statute is inapplicable to the award of attorney’s fees and costs in this case.

Id. Other Alaska cases similarly have identified that holding parties jointly and severally liable for attorney’s fees and costs is within the discretion of the courts. *See, e.g.,* In re Soldotna Air Crash Litigation, 835 P.2d 1215, 1223 (Alaska 1992); *Moses v. McGarvey*, 614 P.2d 1363, 1367-68 (Alaska 1980). *But see* *Noffsinger v. State*, 850 P.2d 647, 650 (Alaska 1993) (finding that Alaska Statutes section 09.17.080(d) “has no direct bearing in the criminal context, where the court’s authority to require payment of restitution exists independently of its authority to order payment of damages in civil matters”).

53. No. A92-0060-CV, 1994 WL 594607 (D. Alaska Feb. 11, 1994).

54. *Id.* at *3 n.20 (emphasis added).

55. Nos. 96-35072, 96-35121, 96-35523, 96-35968, 1998 WL 80630 (9th Cir. Apr. 14, 1998).

56. *Id.* at *3; *see also* *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975) (establishing comparative negligence in Alaska).

57. *Id.* at *4 n.4.

58. 878 F. Supp. 1318 (D. Alaska 1995).

59. *See id.* at 1322.

the law in Alaska in 1995 was that “the plaintiff may recover from each potential tortfeasor who is joined as a party, only the proportion that his fault bears to [the] total damages.”⁶⁰

The Alaska Supreme Court’s only real concerns with the implications of the 1980s reforms to the liability allocation system were in the details. In *Ogle v. Craig Taylor Equipment Co.*,⁶¹ the court had to interpret the Tort Reform Act’s language that it applied to “all causes of action accruing after [its] effective date.”⁶² The court was required to decide whether this language referred to the time at which the plaintiff acquired his tort cause of action, or the time at which the plaintiff subsequently perfected his action for contribution.⁶³ In *Ogle*, the plaintiff’s tort cause of action had accrued prior to the passage of the Tort Reform Act, while his cause of action for contribution had accrued after its passage.⁶⁴

The *Ogle* plaintiff had sued two concurrent tortfeasors who caused his injury, and settled with one.⁶⁵ The settling defendant then assigned its contribution claim against the other defendant to the plaintiff *Ogle*.⁶⁶ *Ogle* then sued the remaining defendant for contribution, but the lower court ruled that the defendant was liable under the 1986 Tort Reform Act only for contribution related to its relative fault.⁶⁷ This amount was less than the *pro rata* contribution amount the defendant would have been liable for under the law prior to the 1986 Tort Reform Act.⁶⁸

The Alaska Supreme Court decided that the Act would apply only when the plaintiff’s injury occurred on or after June 11, 1986 (effective date of Act).⁶⁹ In the absence of clear legislative intent one way or another, this policy ensured that a tortfeasor’s liability for an accident occurring prior to June 11, 1986 would not subsequently change in amount after the date when the cause of action for contribution arose.⁷⁰ Here, this decision also ensured that the

60. *Id.*

61. 761 P.2d 722 (Alaska 1988).

62. *Id.* at 724 (quoting Tort Reform Act, June 11, 1986. Ch. 139 §§ 9, 11, SLA 1986).

63. *See id.*; *see also* Caspersen v. Alaska Workers’ Compensation Bd., 786 P.2d 914, 915 (Alaska 1990) (upholding rule reached in *Ogle*).

64. *See Ogle*, 761 P.2d at 724.

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.* at 725.

70. *See id.* at 724-25. The court cited *Slaughter v. Pennsylvania X-Ray Corp.*, 638 F.2d 639 (3d Cir. 1981), as the only other case that it had found directly on point. *See* 761 P.2d at 725. There, the Third Circuit had ruled that “the change from equal shares to contribution according to relative fault affected substantive

non-settling defendant lived up to the agreement made between the plaintiff and the settling defendant. If the Alaska Supreme Court had ruled otherwise, the non-settling defendant would have had the benefit of using the 1986 Tort Reform Act to reduce its contribution payment, even though the plaintiff and the settling defendant seemed to have formed an agreement based on the belief that the pre-1986 Tort Reform Act contribution requirements would apply to all parties.

In *Borg-Warner Corp. v. Avco Corporation (Lycoming Division)*,⁷¹ Borg-Warner was a defendant who sued several third-party defendants for contribution.⁷² The court refused to allow Borg-Warner to join these contribution claims to the trial where it was found liable for the victim's death, and ordered that they must be decided at a separate trial.⁷³ On appeal, Borg-Warner argued that the pre-ballot initiative Tort Reform Act required the jury to allocate comparative fault among both first- and third-party claims all at one time.⁷⁴ However, the Alaska Supreme Court found nothing in the statute's legislative history that supported this view, and held that "in certain circumstances a separate trial allocating fault among first- and third-party defendants is appropriate."⁷⁵

In *Navistar International Transportation Corporation v. Pleasant*,⁷⁶ the Alaska Supreme Court decided, among other things, that the trial court had not erred when it refused to allow prejudgment interest on the victim's damages for future non-economic and economic losses.⁷⁷ Prior to the 1986 Tort Reform Act, prejudgment interest on future economic damage awards had been allowed, but future damages were not reduced to present value.⁷⁸ The 1986 Tort Reform Act required their reduction to present value.⁷⁹ In *Navistar*, the appellant contended that allowing Pleasant to recover prejudgment interest on both his past and future economic and non-economic damages would amount to a "double recovery" for Pleasant, since prejudgment interest was allowed only on the theory that the plaintiff should be paid at the time of his injury, and not at the (sometimes much later) time of the trial.⁸⁰ In other

rights because it changed the amount of the potential liability of the tortfeasors." *Id.* at 725 (citing *Slaughter*, 638 F.2d at 644-45).

71. 850 P.2d 628 (Alaska 1993).

72. *See id.* at 630.

73. *See id.*

74. *See id.* at 631.

75. *Id.* at 632.

76. 887 P.2d 951 (Alaska 1994).

77. *See id.* at 958.

78. *See id.*

79. *See id.*; *see also* ALASKA STAT. § 09.17.040(b) (LEXIS 1998).

80. *See Navistar*, 887 P.2d at 958-59.

words, the interest made up for the money that the plaintiff lost by waiting until the time of the trial to receive the money due him at the time of his injury. But, Navistar argued, there was no rationale for awarding prejudgment interest on future damages, since these damages were not due the plaintiff at the time between his injury and the trial.⁸¹ The Alaska Supreme Court agreed, on the grounds that “it is . . . a double recovery to permit prejudgment interest on future sums which are discounted only to the time of the trial, for such sums are greater than they would be if they were discounted to the time of injury.”⁸² Only if future damages were discounted to the time of the injury would it make sense to allow prejudgment interest, for then the “interaction of the discount rate and the intervening period” would prevent double recovery.⁸³

The court later refused to extend this holding in *McConkey v. Hart*,⁸⁴ because it reasoned that the Alaska state legislature, through the 1986 Tort Reform Act, had assumed that past and present damages would be decided using the time of the trial, and not the time of the injury, as a “reference point.”⁸⁵ It still concluded that the tort victim could not recover prejudgment interest on future damages, but this time on the ground that the statute made clear that the victim was not due the future damages until after the trial.⁸⁶ Thus, all the court’s dealings with the 1986 Tort Reform Act made it clear that the only controversial parts of the Act were in the details. Alaska had switched to several liability by March 5, 1989. All the 1997 Tort Reform Act would do is continue the minute adjustments begun by the Alaska Supreme Court after the passage of the 1986 Act.

B. 1986 Damages Caps

Finally in 1986, in a move similar to those of many other state legislatures, the Alaska Legislature also included in its Tort Reform Act a limit on the amount of non-economic damages a plaintiff could recover for an injury based upon negligence.⁸⁷ In the first section of the Act, the Alaska Legislature limited those damages to \$500,000.⁸⁸ These caps were controversial then, as they are now, but the years in between the passage of the 1986 and 1997 Acts

81. *See id.* at 959.

82. *Id.*

83. *See id.* at 960.

84. 930 P.2d 402 (Alaska 1996).

85. *Id.* at 406.

86. *See id.*

87. *See Mahoney, supra* note 9, at 68.

88. *See id.* (citing ALASKA STAT. § 09.17.010 (c) (Michie 1996) (prior to amendment)).

have demonstrated that the controversy is largely unfounded, as tort verdicts rarely would be affected by these caps. By 1997, Alaskans were faced with a liability allocation system that already had been amended, and a tort system that rarely awarded large punitive damages to plaintiffs. The 1997 Tort Reform Act that ultimately was enacted would make few real changes to the tort system, and would not live up to the controversy it created.

IV. THE 1997 TORT REFORM ACT

A. The Storm Before the Calm

The battle over the 1997 Tort Reform Act's passage was prolonged, and it was passionate. At times, it took on the characteristics of a mudslinging political campaign. Anti-reform groups placed advertisements starring an eight-year old girl named "Sara" who, although uninjured, had been strapped to a wheelchair in support of the claim that girls like her "would never get [their] day in court" if the Tort Reform bill became law.⁸⁹ The conflict also at times turned physical – Steve Conn, Executive Director of the Alaska Public Interest Research Group and a tort reform opponent, and Frank Dillon, Executive Director of the Alaska Trucking Association and a supporter of tort reform, came to blows during a legislative hearing on the bill.⁹⁰

The bill's vetoed predecessor was denounced by the Association of Trial Lawyers of America as one of the contemporary "attacks on the [tort] system at the state level."⁹¹ Its passage in 1997 was lauded by the Risk Management Society as a "grand slam" in its section on state legislation entitled, appropriately enough, "Sometimes You Win."⁹² Reform opponents argued that the 1997 Tort Reform Act would deny tort victims their fair day in court and block the full recovery of their damages.⁹³ Business and industry described it as providing a "reasonably predictable envi-

89. See Natalie Phillips, *Critics "Appalled" By Group's Tort-Reform Ad*, ANCHORAGE DAILY NEWS, Apr. 17, 1997, at B1 (describing adverse reaction to advertisement placed by the Alaska Action Trust, a group of trial lawyers opposed to the passage of the tort reform bill).

90. See Natalie Phillips, *Tort Reform Hearing Degenerates Into Fistcuffs*, ANCHORAGE DAILY NEWS, Feb. 26, 1997, at A1 ("The ongoing tussle over efforts to rewrite Alaska's laws regarding injury lawsuits degenerated into some kind of physical combat at a legislative hearing in Anchorage on Monday.").

91. *Our Next 50 Years*, TRIAL (Association of Trial Lawyers of America / President's Page, Boston), Sept. 1, 1996, at 1.

92. Anne B. Allen, *Statehouse Scoreboard: Legislative Wins, Losses, and Delays*, RISK MGMT., Aug. 1, 1997, at 58.

93. See Phillips, *supra* note 6, at B1.

ronment,” where Alaska businesses and insurance companies might operate in peace.⁹⁴

Governor Knowles fought “intense pressure from business interests,” and vetoed the first proposed tort reform bill, passed by the Republican legislature in 1996.⁹⁵ It had taken tort reform sponsor Brian Porter four years to push the bill through the legislature.⁹⁶ The vetoed bill capped punitive damages at \$300,000, or three times the amount of the compensatory damages, whichever was greater, and awarded seventy-five percent of any punitive damage award to the state’s general fund.⁹⁷ Native American, commercial fishing and environmental groups all fought to kill the bill, partially on the ground that it would disturb the Exxon Valdez settlement.⁹⁸ Trial lawyers and “victim’s rights advocates” also fought the bill, as they argued it would deny some tort victims a full recovery of their damages. One tort reform opponent, former Alaska State Attorney General Charlie Cole, said the vetoed bill should be called the “wrongdoer’s civil relief act,” since it absolved big businesses and insurance companies from their duties to make tort victims whole.⁹⁹ After the bill was defeated, the Alaska State Chamber of Commerce vowed to start gathering signatures to place a tort reform initiative on the 1998 ballot.¹⁰⁰

In response to the controversy over the vetoed bill, Governor Knowles convened a Task Force on Civil Justice Reform, which conducted a study of the Alaska tort system. The Task Force was composed of business and industry leaders, trial lawyers, and civic organization representatives.¹⁰¹ The group conducted a “thorough study . . . of Alaska’s civil liability system,” held numerous public hearings and presented a report detailing its findings to Governor Knowles in December 1996.¹⁰² According to Governor Knowles, “[t]he task force proposals [were] designed to decrease the costs of

94. See Clark, *supra* note 5, at B1 (quoting Governor Knowles).

95. See Ralph Thomas, “Extreme” Tort Reform Draws Veto, Knowles Call Bill “Flawed”; GOP Promises to Try Again, ANCHORAGE DAILY NEWS, June 15, 1996, at A1.

96. See Ralph Thomas, Tort Reform Resurges, ANCHORAGE DAILY NEWS, Feb. 20, 1997, at B1.

97. See Liz Ruskin, Top Lawyers Buck Tort Bill, ANCHORAGE DAILY NEWS, May 30, 1996, at A1.

98. See Thomas, *supra* note 95, at B1.

99. See Ruskin, *supra* note 97, at A1.

100. See Thomas, *supra* note 95, at A1.

101. See *Opinion: Lawyer Litigants*, ANCHORAGE DAILY NEWS, Mar. 9, 1998, at B7.

102. *Talking Points for the Week* (Dec. 9, 1996) <<http://www.gov.state.ak.us/talkingpts/talk1209.htm>> (describing the Advisory Task Force on Civil Justice Reform as “business-dominated”).

resolving cases, discourage frivolous litigation, promote fair compensation for injured parties and promote the predictability of outcomes.”¹⁰³ Some recommendations from this task force eventually were incorporated into the bill that became law in August 1997.¹⁰⁴

The arguments both for and against the 1997 bill’s passage were heated and intense. The groups fighting over the new bill simply restated the same positions that had been taken years ago, both in Alaska and across the country.¹⁰⁵ Those businesses and industries supporting the bill’s passage argued that it would make Alaska’s business environment much more secure, because businesses no longer would have to operate in fear of potentially devastating damage awards entered against them. Opponents of the bill, mostly trial lawyer groups and coalitions with a direct stake in seeing large jury awards continue, argued that the new bill was special interest legislation whose sole purpose was to erode the rights of Alaska tort victims by offering unethical blocks against the recovery of damages to which victims might be entitled. As one commentator has noted:

The kind of reform that occurs in our legislatures with respect to tort law is usually the result of a funny kind of alliance between two types of repeat players: the plaintiffs’ lawyers, on one side, and the categories that give rise to defendants in tort law – the injurer categories – on the other. They both have certain interests. . . . Potential defendants primarily seek to reduce their exposure to lawsuits and damages. . . . The plaintiffs’ lawyers, on the other hand, are interested in something that will give rise to large amounts of damages every once in a while.¹⁰⁶

B. After the Battle

According to the “Legislative Intent” section of the 1997 Tort Reform Act, the purpose of the new bill is to do the following:

103. *Talking Points for the Week* (Dec. 23, 1996) <<http://www.gov.state.ak.us/talkingpts/talk1223.htm>>.

104. See Natalie Phillips, *Task Force Recommends Cap on Punitive Damage Awards*, ANCHORAGE DAILY NEWS, Dec. 10, 1996, at B1; Natalie Phillips, *Tort Reform Battle Heats Up in Juneau: Both Sides Appeal to Human Element*, ANCHORAGE DAILY NEWS, Mar. 23, 1997, at B1.

105. There is surely also a political element to this fight. In the recent Florida tort reform battle, the tort reformers were nearly all Republicans, while those fighting tort reform were nearly all Democrats. See Shuchman, *supra* note 20, at 550 n.1; see also John Lindauer, *Lindauer: I Stand Apart From My Opponents*, Voice of the Times, ANCHORAGE DAILY NEWS, Aug. 19, 1998, at B7 (“I stand apart from my opponents. For example, Senator Taylor and Mr. Ross both are lawyers opposed to tort reform, and advocate policies that are hostile to rural Alaska.”).

106. See Calabresi & Cooper, *supra* note 13, at 863-64 (footnote omitted).

(1) encourage the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost, and complexity of litigation without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others;

...

(3) encourage individual savings and economic growth by fostering an environment likely to control the increase of liability insurance rates to individuals and businesses resulting in a savings to the state, municipalities, and private businesses that are self-insured;

(4) encourage the traditionally recognized Alaska values of self-reliance and independence by underscoring the need for personal responsibility in making choices and personal accountability for the consequences of those choices;

(5) alleviate the high cost of malpractice insurance premiums that discourage physicians, architects, engineers, attorneys, and other professionals from rendering needed services to the public. . . .¹⁰⁷

Consistent with earlier tort reform trends in both Alaska and the nation, the 1997 Tort Reform Act further changed Alaska's previous reforms of the joint and several liability system, and added additional caps to the amount of non-economic damages that Alaska tort victims may recover. It also changed the statute of repose in Alaska. Yet the changes to the damages apportionment mostly were cosmetic, as Alaska's real shift from a joint and several liability system to a system of pure several liability took place in the years following the passage of the first Tort Reform Act in 1986. Similarly, the damage caps incorporated in the 1997 Tort Reform Act will have little effect on Alaska tort law, for cases rarely arise in Alaska where the caps would effect the amount of damages awarded.

C. Tinkering With Several Liability

Though most changes to Alaska's liability allocation system evolved in the 1980s, the 1997 Tort Reform Act modified the existing Alaska damages apportionment scheme in a couple of ways that help continue Alaska's move toward a system of several liability.¹⁰⁸ The 1997 Act made changes to the damages allocation

107. 1997 Alaska Sess. Laws 26 § 1.

108. ALASKA STAT. § 09.17.080 (LEXIS 1998), as amended in 1997, reads as follows:

Apportionment of damages

(a) In all actions involving fault of more than one person, including third-party defendants and persons who have settled or otherwise been released, the court, unless otherwise agreed by all parties, shall instruct

scheme that tightened Alaska's embrace of the several liability principles approved by the ballot initiative of 1987.¹⁰⁹ Most importantly, the 1997 Tort Reform Act amended the 1986 Act to dictate that the court make findings indicating "the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages."¹¹⁰ This had the effect of deleting the distinction that had existed in the legislation between "persons" and "parties," so that juries would no longer be restrained from finding that a non-party litigant was at fault.

When the scope of Alaska's 1986 transformations to the joint and several liability system are considered, the small size of the 1997 transformations becomes apparent. These are not sweeping changes to Alaska tort law. They are minor modifications to a

the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages unless the person was identified as a potentially responsible person, the person is not a person protected from a civil action under AS 09.10.055, and the parties had a sufficient opportunity to join that person in the action but chose not to; in this paragraph, "sufficient opportunity to join" means the person is

(A) within the jurisdiction of the court;

(B) not precluded from being joined by law or court rule; and

(C) reasonably locatable.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. Except as provided under AS 23.30.015 (g), an assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that action and may not be used as evidence of civil liability in another action.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault

109. *See id.*

110. ALASKA STAT. § 09.17.080(a)(2) (LEXIS 1998).

doctrine of several liability whose existence was not in question before this legislation was passed.¹¹¹

1. *Benner v. Wichman*. The Alaska State Legislature amended the bill to make it possible for factfinders to assign fault to a non-litigant. It modified the Alaska Supreme Court's holding in *Benner v. Wichman*¹¹² to ensure this result.¹¹³ As the bill states, [i]n enacting this bill, it is the intent of this legislature as a matter of public policy to . . .

(8) ensure that in actions involving the fault of more than one person, the fault of each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages and available as a litigant be determined and awards be allocated in accordance with the fault of each, thereby modifying *Benner v. Wichman* . . .¹¹⁴

In *Benner*, the plaintiff was a crane operator who worked on a construction job with the defendant, a backhoe operator.¹¹⁵ *Wichman* was injured while working and subsequently sued *Benner*.¹¹⁶ He argued that *Benner's* negligence was a cause of his injuries.¹¹⁷ *Benner* counterclaimed for summary judgment, arguing that the court should consider the negligence of non-parties to the litigation in *Wichman's* suit.¹¹⁸ *Benner* contended that the jury should "apportion liability among anyone responsible, including those not party to the action."¹¹⁹ *Benner* based his argument on the Tort Re-

111. This phenomenon of state "tort reform" bills aimed like rifle shots at smaller, specific issues" is not unique to Alaska. See Kenneth D. Kranz, *Tort Reform 1997-98: Profits v. People?*, 25 FLA. ST. U. L. REV. 161, 161-62 (Winter 1998). As Kranz notes in his discussion of tort reform efforts in Florida, "[t]hese bills typically reduce or eliminate liability in a particular circumstances that has been the subject of a particular court decision." *Id.* at 162.

112. 874 P.2d 949 (Alaska 1994).

113. See ALASKA STAT. § 09.17.080(c) (LEXIS 1998) (making it possible to assess fault against a person not a party, while not subjecting that person to civil liability).

114. *Id.* § 1(8).

115. See *Benner*, 874 P.2d at 950-51.

116. See *id.* at 951.

117. See *id.*

118. See *id.*

119. *Id.* at 955. The proposed jury instruction read:

Under Alaska law, a party is only responsible for the portion of damages [equal] to that party's percentage of fault.

The defendants claim that the plaintiff's harm resulted, in whole or in part, from the plaintiff's own negligence and/or the negligence of others, not parties to this litigation such as BC Excavating and Statewide Petroleum.

form Ballot Initiative passed in 1988.¹²⁰ As discussed above, this initiative amended Alaska Statutes section 09.17.080(d) to read, “[t]he court shall enter judgment against each party liable on the basis of several liability in accordance with that party’s percentage of fault.”¹²¹ Benner acknowledged that he could have joined the parties and made them part of the litigation, but he argued that the statute made joinder unnecessary.¹²²

The Alaska Supreme Court recognized that the “resolution of [the] issue turn[ed] on the interpretation of ‘party,’ within the meaning of AS 09.17.080(d).”¹²³ It first noted that defendants in Alaska still had an avenue for joining other potentially liable defendants, namely that of equitable apportionment, and disapproved of several Alaska court cases that held that Alaska defendants “can not bring in persons who share in the responsibility for the injury.”¹²⁴ It also considered a Florida Supreme Court decision that had interpreted its own comparative fault provision as allowing a jury to apportion damages among parties who were party to the litigation, and not only to the accident.¹²⁵ The Alaska court distinguished that statute from the case before it by reasoning that the Florida statute being interpreted did not define the term “party”.¹²⁶

In order to assess fault to the plaintiff and/or others, you must decide that it is more likely true than not true:

1. that the plaintiff and/or others were negligent, and
2. that such negligence was a legal cause of plaintiff’s harm.

Id. at 951 n.2.

120. *See id.* at 955.

121. *Id.*; *see also* ALASKA STAT. § 09.17.080(d) (LEXIS 1998).

122. *See Benner*, 874 P.2d at 955.

123. *Id.* at 956.

124. *See id.* at 956 (quoting *Owens v. Robbins*, No. 151-90-354 Ci., 1, 2-3 (Alaska Super. Ct. Sept. 27, 1991)). The *Owens* court had written that an Alaska “deep pocket” defendant might still be liable for one hundred percent of a plaintiff’s damages, even if defendant’s percentage of fault were very small, since “contribution no longer exists and since the Supreme Court has rejected equitable indemnity.” *Owens*, No. 151-90-354 Ci., at 2-3. The district court had voiced a similar opinion, based on its prediction that the Alaska Supreme Court would not adopt equitable indemnity in the face of the ballot initiative. *See Carriere v. Cominco Alaska, Inc.*, 823 F. Supp. 680, 688 (D. Alaska 1993) (“[Allowing equitable indemnity as a means of joining defendants] presumes that the Alaska Supreme Court would in substance veto the 1987 initiative. It supposes that the court can construct an implied cause of action for indemnity even though the voters had eliminated a tortfeasor’s ability to hold another tortfeasor responsible through the repeal of the statutory provision for contribution.”).

125. *See Benner*, 874 P.2d at 956.

126. *See id.*; *see also* *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993). The Florida Supreme Court had been construing its comparative fault law, which read in relevant part: “Apportionment of damages. In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party’s

The Alaska statute, in contrast, defined “party” as a “party to the action, including third-party defendants and persons who have been released under AS 19.16.040.”¹²⁷ Since “party” was defined in the statute, the court ruled that the definition applied to the entire statute.¹²⁸ Thus, “party” could only mean “party to the action,” and the statute could not be read to allow the jury to assign a percentage of fault to parties who were causes of the accident, but who had not been joined by the litigants to the lawsuit.¹²⁹

Alaska Statutes section 09.17.080 was based in large part on the Uniform Comparative Fault Act, except that the ballot initiative amended its liability apportionment scheme from modified joint and several to several liability.¹³⁰ The Comment to the Uniform Comparative Fault Act considered a situation identical to the one presented in this case:

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will have run on him, etc. . . . Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable.¹³¹

percentage of fault and not on the basis of the doctrine of joint and several liability.” FLA. STAT. ANN. § 768.81(3) (West 1993). The *Fabre* court wrote:

By its clear terms, judgment should be entered against each party liable on the basis of that party’s percentage of fault Clearly, the only means of determining a party’s percentage of fault is to compare that party’s percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants.

623 So.2d at 1185.

127. ALASKA STAT. § 09.17.080(a) (Michie 1996). Alaska Statutes section 09.16.040 had been repealed by the initiative at the time this case was decided, but the court here noted that “[r]epealed statutes relating to the same subject matter may be *in pari materia* . . . and therefore may be construed together.” *Benner*, 874 P.2d at 957 n.18 (citation omitted). “Party” is also used in Alaska Statutes section § 09.17.080(a)(2), which states that “the percentage of the total fault of all of the parties to each claim is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under § 09.16.040.” *See Benner*, 874 P.2d at 955 n.15.

128. *See Benner*, 874 P.2d at 958. As the court noted, “it is a general principle of statutory construction that ‘the same words used twice in the same act have the same meaning.’” *Id.* at 957 (quoting 2A Norman J. Singer, SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992)).

129. *See Benner*, 874 P.2d at 957-58.

130. *See id.* at 958 n.19.

131. Uniform Comparative Fault Act § 2 cmt., 12 U.L.A. 50 (Supp. 1993).

While the Comment envisions both parties making sure to join all necessary parties, the real result of an inability to assign fault to non-litigants is to add pressure to the defendant to join all potential defendants. If the defendant does not, he or she might be held responsible for that portion of the plaintiff's injury caused by an unjoined party.

The 1997 Tort Reform Act modified *Benner* and Alaska Statutes section 09.17.080(a), and in so doing shifted the burden. Under the Act, the jury may allocate fault to any person, even if they are not a party to the litigation, "unless that person was identified as a potentially responsible person . . . and the parties had a sufficient opportunity to join that person in the action but chose not to."¹³² The new statute goes on to define "sufficient opportunity to join" as when "the person is . . . within the jurisdiction of the court; . . . not precluded from being joined by law or court rule; and . . . reasonably locatable."¹³³ This new rule forecloses the possibility that defendants will have to pay for damages they did not cause, but leaves open the slight possibility that a tort victim may win a case and not adequately be compensated for his or her injuries.

Predictably, this new rule has met with some anger from tort reform opponents. In a complaint filed in 1998 challenging the constitutionality of this legislation, the plaintiff in *Evans v. Alaska*¹³⁴ described the effect of the legislature's overruling this case as:

The legislation, if given effect, establishes that fault may be allocated to persons who were not actually parties to a legal action which significantly compromises Plaintiffs' rights to be made whole. Plaintiffs' rights to fair and just compensation and the equal protection and due process of law is significantly diluted and compromised if in fact fault may be allocated to a non-party.¹³⁵

Yet, it is unlikely that tort victims will be left holding the empty bag of an unenforceable judgment against a tortfeasor whom they

132. ALASKA STAT. § 09.17.080(a)(2) (LEXIS 1998) (as amended in 1997).

133. *Id.* § 09.17.080(a)(2)(A)-(C).

134. No. 4BE-98-32 Civil (Alaska Super. Ct. Feb. 16, 1998).

135. *Id.* at 4. In early 1998, this lawsuit was brought in Alaska superior court contesting the constitutionality of the 1997 Tort Reform Act. This lawsuit was filed on behalf of David "Buddy" Kutch Jr., a 16-year-old Bethel resident who was rendered quadriplegic after a snowmobile accident in December 1997. Emboldened by a recent Illinois Supreme Court ruling overturning a 1995 tort-reform law in that state, the group of trial attorneys challenging the law argued in their filing in superior court that, among other things, the Act denied "certain basic and fundamental rights" and robbed tort victims of the "constitutional and common law rights to fair, just and reasonable compensation for their injuries." *Id.* at 2, 3.

did not join. After all, in the event that a plaintiff fails to join a defendant against whom a judgment is reached in a different proceeding, there is nothing stopping the plaintiff from then suing the non-party tortfeasor. Hence, this rule is necessary to complete Alaska's movement to a several liability system, but it will have little impact on the rights of Alaska tort victims. Tort victims with the foresight to join all potentially liable parties easily can avoid the pitfalls created by the Act's overruling of *Benner*.

2. *Jackson v. Power*. The Tort Reform Act also explicitly overruled the Alaska Supreme Court case *Jackson v. Power*.¹³⁶ In *Jackson*, the Alaska Supreme Court held that a hospital could be liable for negligent health care provided by an emergency room physician who acted as an independent contractor, and who was not an employee of the hospital.¹³⁷ The *Jackson* plaintiff had fallen from a cliff and subsequently had been diagnosed by the physician in the hospital's emergency room.¹³⁸ The physician did not detect damage to the plaintiff's kidneys, and because of this oversight, the plaintiff lost both organs.¹³⁹

While finding the plaintiff's theory of hospital enterprise liability unpersuasive, the court did agree with his contention that the hospital might be held responsible for an independent contractor's negligence under an "apparent authority" theory.¹⁴⁰ According to the court, a principal grants "apparent authority" to another person to act with regard to a third person when he "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."¹⁴¹ The hospital, according to the court, gave Jackson reason to believe that the emergency room doctor was the hospital's agent, even though the doctor was working as an independent contractor.¹⁴² The Alaska Supreme Court concluded that the trial court properly

136. 743 P.2d 1376 (Alaska 1987). The *Evans* plaintiff contended that, "[t]he legislation neither offers nor presents any rational basis for the overruling of the common law as set forth in *Jackson v. Powers* . . . and is contrary to Article IV, Section 15 of the Constitution of Alaska which permits the legislature to change only the rules of administration, practice and procedure." See *Evans*, No. 4BE-98-32 Civil, at 6 (citation omitted).

137. See *Jackson*, 743 P.2d at 1377.

138. See *id.*

139. See *id.*

140. See *id.* at 1381-82.

141. *Id.* at 1381 (quoting *City of Delta Junction v. Mack Trucks*, 670 P.2d 1128, 1130 (Alaska 1983)).

142. See *id.*

had denied summary judgment on the issue of the physician's apparent authority to act on behalf of the hospital.¹⁴³

More importantly, in *Jackson* the court ruled that the hospital, as a matter of law, had a non-delegable duty to provide non-negligent physician care in its emergency room.¹⁴⁴ The plaintiff had argued that public policy prevented a hospital emergency room from protecting itself from liability by "shunting" the responsibility to provide non-negligent care onto contracting physicians simply because they were independent contractors and not employees.¹⁴⁵ The court noted that the main characteristic of duties that made them non-delegable was "*that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.*"¹⁴⁶ It reasoned that the numerous statutes governing the management of hospitals

manifest the legislature's recognition that it is the hospital as an institution which bears ultimate responsibility for complying with the mandates of the law. It is the hospital that is required to ensure compliance with the regulations and thus, relevant to the instant case, it is the hospital that bears final accountability for the provision of physicians for emergency room care. We, therefore, hold that a general acute care hospital's duty to provide physicians for emergency room care is non-delegable.¹⁴⁷

The 1997 Tort Reform Act added a new section to deal with this case.¹⁴⁸ The purpose of the new section was to "ensure that hospitals that comply with the disclosure requirements set out in this Act are not liable for the negligence of emergency room physicians who are acting as independent contractors."¹⁴⁹ Essentially, hospitals in Alaska have been given the right to delegate what the Alaska Supreme Court has termed a "non-delegable duty."¹⁵⁰ The new Alaska Statutes section absolves hospitals of liability for the actions of their independent contractors when they "[provide] notice that the emergency room physician is an independent contractor and the emergency room physician is insured as described under (c) of this section."¹⁵¹ This notice consists of a two-foot square

143. *See id.*

144. *See id.* at 1382.

145. *See id.*

146. *Id.* at 1383 (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 512 (5th ed. 1984)).

147. *Jackson*, 743 P.2d at 1384-85.

148. *See* ALASKA STAT. § 09.65.096 (LEXIS 1998).

149. 1997 Alaska Sess. Laws 26 § 1(6).

150. *Jackson*, 743 P.2d at 385.

151. ALASKA STAT. § 09.65.096 (LEXIS 1998).

sign that must be “posted conspicuously in all admitting areas of the hospital.”¹⁵²

If nothing else, this section illustrates what big business has at stake in tort reform litigation. In this situation, Alaska hospitals have avoided potentially damaging tort verdicts in a very fact specific situation. There seems little other reason for inserting a provision like this into the 1997 Tort Reform Act. Tort victims will not benefit from the provision, and may even be harmed in some circumstances. It is doubtful that some emergency room patients or those individuals accompanying them will have the time or the ability to observe or understand the implications of such a sign.¹⁵³ Many are unconscious when they arrive, most do not have a choice of which emergency room to attend, and few would be in a position to refuse to enter an emergency room when suffering a potentially life-threatening injury because they read a sign informing them that the hospital might not be liable for the negligence of some of the physicians there.¹⁵⁴

Similarly, the 1997 Tort Reform Act’s insurance requirement mandates that an emergency room physician have liability insurance amounting to at least \$500,000 per incident and “\$1,500,000 for all incidents in a year.”¹⁵⁵ It is unclear how these two numbers are supposed to operate in conjunction with one another. The insurance floor on the yearly number of incidents might conceivably serve as a liability ceiling for parties injured by emergency room physicians working for hospitals as independent contractors. A patient injured by a negligent independent contractor emergency room physician might have no recourse but to sue the physician. If that patient happened to come along in December, and the physician has had a bad year, somebody like Jackson might be left with no kidneys and no money to show for it.

No matter how these numbers work together, several factors must combine before the tort victim might be left with unrecoverable damages. Specifically, a patient must be injured by an independent contractor in a hospital emergency room and also have injuries so great that they exceed the doctor’s required insurance

152. *Id.*

153. For instance, in *Jackson v. Powers*, the plaintiff had suffered “multiple lacerations and abrasions of [his] face and scalp, multiple contusions and lacerations of the lumbar area, several broken vertebrae and gastric distension” 743 P.2d at 1377. At his deposition, he testified 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.” *Id.* at 1381 n.9.

154. *See id.* at 1381-82 (“Neither Jackson nor his mother selected FMH as the place of treatment nor Dr. Power as Jackson’s physician.”).

155. ALASKA STAT. § 09.65.096(c) (LEXIS 1998).

coverage of \$500,000 per incident.¹⁵⁶ Like the other 1997 Act changes to the Alaska damages allocation system, this modification affects only one fact-specific situation. It transfers liability for negligent emergency room care in some situations from the hospital to the independent contractor emergency room physicians it employs. While this could lead to circumstances in which the injured patient cannot recover fully, as when the physician's liability insurance does not extend as deeply as the hospital's might have, the patient is not left to suffer without any hope of compensation. It is an extremely unlucky tort victim who finds herself injured by the string of circumstances contemplated by this section. The tort victim who will be unable to recover anything in these circumstances likely does not exist.

3. *Lake v. Construction Machinery, Inc.* While tinkering with the state's several liability provisions, the legislature also overruled *Lake v. Construction Machinery, Inc.*,¹⁵⁷ the Alaska Supreme Court case that had applied the pre-ballot initiative version of Alaska Statutes section 09.17.080 to a case involving an injured worker's suit against several defendants.¹⁵⁸ In *Lake*, the plaintiff suffered an injury in the scope of his employment after falling fifty feet from a manlift.¹⁵⁹ He sued several defendants, including the manufacturer, the distributor and several intermediate vendors of the manlift.¹⁶⁰ The distributor, in a partial affirmative defense, claimed that the plaintiff's damages had to be determined "among all parties allegedly responsible for Lake's injury, including the employer."¹⁶¹

The plaintiff moved to strike this defense on the ground that the Alaska Workers' Compensation Act contained an exclusive liability provision that precluded third parties from asserting contribution claims against the employer.¹⁶² The Alaska Workers' Compensation Act provided that

[t]he liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee . . . and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death.¹⁶³

156. *See id.*

157. 787 P.2d 1027 (Alaska 1990).

158. *See id.* at 1028.

159. *See id.*

160. *See id.*

161. *Id.*

162. *See id.*

163. ALASKA STAT. § 23.30.055 (LEXIS 1998).

In other words, an employee who had collected workers' compensation benefits could then sue third parties for damages and recover without the third parties having the benefit of factoring the employer's proportion of fault into their allocation of damages, "even if the employer's negligence was a proximate cause of the employee's injury."¹⁶⁴ The distributor responded that the purpose of the 1986 Act implementing several liability in Alaska would be foiled if the jury were not allowed to consider the employer's fault when allocating liability among concurrent tortfeasors.¹⁶⁵

The court began its analysis by presuming that the legislature that had enacted the 1986 Act had contemplated the Workers' Compensation Act.¹⁶⁶ It noted that while the legislature in Alaska Statutes section 09.17.080(a)(2) had empowered the jury to allocate fault among "each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040," an employer did not really come under any of these various classifications.¹⁶⁷ It concluded that the legislature's failure to amend the Workers' Compensation Act when it amended Alaska Statutes section 09.17.080(a)(2) indicated that it was satisfied with the first Act's exclusive liability and employer reimbursement provisions.¹⁶⁸ So an employer's liability was relevant only when a third party tortfeasor sought to prove the employer was entirely at fault, or that the employer's actions were a superseding cause of the tort victim's injury.¹⁶⁹ The court recognized that this might be unjust for third-party defendants who could use the employer's fault as cause for reducing their proportion of responsibility for damages, but remained

unpersuaded that we should alter these holdings in the case before us For example, we have no knowledge of the financial impact of deviating from the exclusive liability provision of the workmen's compensation statute. That is a matter which could be clarified by legislative hearings, a process not available to this court Decisions concerning such matters are typically a legislative function.¹⁷⁰

The Alaska Legislature responded to the court's plea, and reconciled yet another fact-specific situation with Alaska's system

164. *Lake*, 787 P.2d at 1029 (citing *State v. Wein Air Alaska*, 619 P.2d 719, 720 (Alaska 1980)).

165. *See id.* at 1030.

166. *See id.*

167. *Id.* (quoting ALASKA STAT. § 09.17.080 (Michie 1996) (prior to amendment)).

168. *See id.* at 1030-31.

169. *See id.* at 1031.

170. *Id.* at 1029 (quoting *State v. Wein Air Alaska*, 619 P.2d 719, 720 (Alaska 1980)).

of several liability. In order to “ensure that one of several tortfeasors is not held responsible for the negligence of an employer,”¹⁷¹ the Legislature altered Alaska Statutes section 09.17.080 to clarify that all parties would be held severally liable and found responsible only for their actual proportionate share of the allocated damages.¹⁷² This amendment successfully smoothed the interaction of the Workers’ Compensation Statute with Alaska’s several liability principles. It did not deny Alaska tort victims their fair day in court, for they will still be paid for their injuries. The amendment affects only those who do the paying.

4. *Conclusion.* The changes brought by the 1997 Act make sense, but they will not make a big difference. They are not major changes and are addressed to fact-specific situations that are unlikely to occur with frequency in Alaska tort law. A plaintiff who joins all necessary parties will nearly always recover fully for his or her damages in the type of situation envisioned in *Benner*. It is only the exceedingly unlucky and extraordinarily rare plaintiff who would be affected by the legislature’s overruling of *Jackson v. Powers*. A *Lake* plaintiff will not lose any money; he or she will just receive it from a different source. Those who lament Alaska’s move to a several liability system should not be too upset by the passage of the 1997 Tort Reform Act. It is only the latest of a series of small steps in a journey the bulk of which was taken years ago.

D. Capping Damages

1. *Punitive Damages Already Awarded Sparingly in Alaska.* More than anything else, the controversy over the punitive damages caps in the 1997 Tort Reform Act illustrates the degree to which the interests of those who debate Alaska tort reform are divorced from the interests of actual Alaska tort victims. Nationwide, punitive damages are hardly ever awarded in tort cases, despite the fact that stories of outrageous and ridiculous punitive damages awards often are used by tort reform advocates to prove that the tort system has gotten out of control.¹⁷³ Instead,

171. 1997 Alaska Sess. Laws 26 § 1.

172. See ALASKA STAT. § 09.17.080(d) (LEXIS 1998) (as amended in 1997).

173. See Fried, *supra* note 14, at 59 (“Additional research has quantified that only 1.5% of personal injury awards contain any punitive damages.”); see also Stephen Daniels and Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71, 71-78 (1998) (blaming the repeated attacks on the punitive damages system, in the face of substantial evidence that punitive damages infrequently are awarded, on the useful-

the beliefs that punitive damages awards are “common, unduly large, and capricious,” either in Alaska or in the United States as a whole, are simply wrong.¹⁷⁴

In Alaska, punitive damages serve a number of purposes, but even prior to the 1997 Tort Reform Act, recovering them in an Alaska tort case was no easy task.¹⁷⁵ Traditionally, the Alaska Supreme Court has held that punitive damages are to be used “to punish the wrongdoer and to deter the wrongdoer and others like him from repeating the offensive act.”¹⁷⁶ Whether or not punitive damages are awarded depends on such factors as “the wrongdoer’s motive, state of mind, and degree of culpability.”¹⁷⁷ The Alaska Supreme Court has ruled that punitive damages are to be used sparingly, as they are a severe remedy whose frequent employment does not find favor with the law.¹⁷⁸ The court’s reluctance to award punitive damages finds parallels in the Alaska legislation dealing with such damages, even prior to the 1997 amendments.¹⁷⁹ For in-

ness of such emotional arguments to special interest groups engaged in reforming the tort system to their own benefit). The authors write that “[t]he task for the reform partisans has been convincing policymakers, key elites including the media, and the public that punitive damages and the entire civil justice system have changed so dramatically and with such negative consequences that fundamental policy changes are needed.” *Id.* at 77. One author has characterized the viewpoint that interest groups are able to promote tort reform in the face of a mass of empirical data that illustrates their claims are embellished or distorted, as the “jaundiced view.” *See* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717-20 (Fall 1998). Galanter describes the “jaundiced view” as comprised of a variety of “legal legends” and folklore. *See id.* at 721-23. These legends range from such “global characterizations” as “the legal system ‘is no longer fair’” to such “atrocious stories” as the case of a woman who successfully (at least initially) litigated a medical malpractice claim after a CAT scan allegedly robbed her of her psychic powers. *See id.* at 726-29.

174. Andrea Moore Hawkins, *Balancing Act: Public Policy and Punitive Damages Caps*, 49 S.C. L. REV. 293, 300-01 (citing, among others, an American Bar Foundation study finding that, out of 25,267 civil jury verdicts, punitive damages were awarded in only 4.9% of the cases).

175. *See, e.g.*, *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995).

176. *Id.* at 209 (quoting *State Farm Mut. Auto Ins. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992)).

177. *Id.* (quoting *Alyeska Pipeline Serv. Co. v. O’Kelley*, 645 P.2d 767, 774 (Alaska 1982)).

178. *See id.* at 210 (citing *State Farm*, 831 P.2d at 1266; *Alyeska Pipeline Serv. Co. v. Beadles*, 731 P.2d 572, 574 (Alaska 1987)).

179. *See* *Lee Houston & Assocs. Ltd. v. Racine*, 806 P.2d 848, 856 (Alaska 1991) (citing to the pre-amendment statute on punitive damages as support for its holding that “the plaintiff must prove by clear and convincing evidence that the defendant’s conduct was outrageous, such as acts done with malice, bad motive, or reckless indifference to the interests of another”).

stance, the court has cited to the pre-amendment language dictating that “[p]unitive damages may not be awarded in an action . . . unless supported by clear and convincing evidence.”¹⁸⁰

To justify his or her claim for punitive damages, a plaintiff in an Alaskan tort case “must prove by clear and convincing evidence that the defendant’s conduct was outrageous, such as acts done with malice, bad motive, or reckless indifference to the interests of another.”¹⁸¹ The Alaska Supreme Court also has held that a trial court in Alaska need not even submit a punitive damages issue to a jury if there is no evidence that would allow that jury to infer that the defendant acted with actual malice in a case.¹⁸² The Alaska Supreme Court has upheld a trial court’s decision refusing to submit a punitive damages issue to a jury in a case where the plaintiff had sued her physician based on his report to her that she had the HIV virus, which report later turned out to be a false positive.¹⁸³ The court decided that the defendant doctor’s action of seeking counseling for the plaintiff after the false positive result illustrated a concern for her well-being that was inconsistent with an award of punitive damages.¹⁸⁴

As an additional bar to a tort plaintiff’s recovering large amounts of punitive damages, Alaskan courts have the ability to review punitive damages for excessiveness on appeal.¹⁸⁵ Courts consider punitive damages excessive if they are “manifestly unreasonable.”¹⁸⁶ A court that finds a punitive damages award unrea-

180. See *Chizmar*, 896 P.2d at 210 (citing *Lee Houston*, 806 P.2d at 856) (quoting ALASKA STAT. § 09.17.020 (LEXIS 1998) (alteration in original)).

181. *Lee Houston*, 806 P.2d at 856 (citing *Hayes v. Xerox Corp.*, 718 P.2d 929, 934 (Alaska 1986)). While the plaintiff does not have to prove that the defendant acted with actual malice, he or she must at least prove that the defendant acted with “reckless indifference to the rights of others” and that the defendant’s conduct was “conscious action in deliberate disregard of [those rights].” *Chizmar*, 896 P.2d at 210 (quoting *State v. Haley*, 687 P.2d 305, 320 (Alaska 1984) (alteration in original)).

182. See *State Farm Mut. Auto Ins. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992) (“Malice may be inferred if the acts exhibit ‘a callous disregard for the rights of others.’” (quoting *O’Kelley*, 645 P.2d at 774)).

183. See *Chizmar*, 896 P.2d at 210-11.

184. See *id.* at 210; see also *Wien Air Alaska v. Bubbel*, 723 P.2d 627, 631 (Alaska 1986) (finding that no reasonable juror could conclude that defendant was indifferent to the consequences of his actions when defendant attempted to remedy the consequences of the act).

185. See, e.g., *Norcon, Inc. v. Kotowski*, Nos. S-6390, S-6420, 1998 WL 909909, at *17 (Alaska Dec. 31, 1998).

186. See, e.g., *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945, 949 (Alaska 1986) (citing *American Nat’l Watermattress v. Manville*, 642 P.2d 1330, 1340 (Alaska 1982)).

sonable will vacate a jury's award and order a remittitur, whose amount will be the maximum amount that the jury might have awarded that would not be considered excessive.¹⁸⁷ Factors that go to whether or not a punitive damages award is excessive include "the compensatory damage amount, magnitude of the offense, importance of the policy violated, and the defendant's wealth."¹⁸⁸ These factors are similar to those involved in the federal test.¹⁸⁹ The United States Court of Appeals for the Ninth Circuit, for example, remanded an Alaska case in which the ratio of punitive-to-compensatory damages awarded at the lower level was 130 to 1.¹⁹⁰

187. See, e.g., *Exxon Corp. v. Alvey*, 690 P.2d 733, 742 (Alaska 1984) ("[M]aximum possible recovery approach is more appropriate in a remittitur context, because it comes closer to approximating the decision made by the jury.").

188. *Alaskan Village*, 720 P.2d at 949. The Court also has remarked that there exists no exact ratio between the amount of compensatory damages and the amount of punitive damages awarded, and that a high ratio may be indicative, but not dispositive, of a punitive damage award's excessiveness. See *Norcon*, 1998 WL 909909, at *17. In approving a case in which the punitive damages award was seventy times that of the compensatory damages, the court wrote that it has:

refused to prescribe a definite ratio between compensatory and punitive damages. Though comparing punitive and actual damage awards is one way to determine if punitive damages are excessive, other factors, such as the magnitude and flagrancy of the offense, the importance of the policy violated, and the defendant's wealth, are equally important to the determination.

Cameron v. Beard, 864 P.2d 538, 551 (Alaska 1993) (citations omitted); see also *Sturm, Ruger & Co. v. Day*, 615 P.2d 621, 624 n.3 (Alaska 1980) (noting that the relationship between punitive and compensatory damages may be of slight value or "totally inapplicable" depending on the individual case).

189. See, e.g., *BMW v. Gore*, 517 U.S. 559, 575-87 (1996) (identifying as "guideposts" that must be considered: (1) "degree of reprehensibility of the defendant's conduct"; (2) "ratio [of punitive damage award] to the actual harm inflicted on the plaintiff"; and (3) "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct").

190. See *Ace v. Aetna Life Ins.*, 139 F.3d 1241, 1248 (9th Cir. 1998) ("Although not dispositive itself, the ratio of punitive-to-compensatory damages . . . is far beyond any approved by Alaska courts.").

2. *1997 Caps.* The 1997 Tort Reform Act limits a tort victim's recovery for non-economic and punitive damages. According to the "Legislative Intent" section of the bill, its purpose with regard to these damage caps is to ensure that Alaska law provides "reasonable, but not excessive, punitive damage awards against tortfeasors sufficient to deter conduct and practices that harm innocent Alaskans . . . and businesses resulting in a savings to the state, municipalities, and private businesses that are self-insured."¹⁹¹

The bill attempts to do this by first limiting the types of damages for non-economic classes for which a tort victim may recover to "compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage."¹⁹² It also caps the amount of damages that a tort victim may recover at "\$400,000 or the injured person's life expectancy in years multiplied by \$8,000, whichever is greater."¹⁹³ Personal injury claim recoveries are limited to the greater of \$1 million or the person's life expectancy in years multiplied by \$25,000 when the damages are awarded for severe physical impairment or severe disfigurement.¹⁹⁴ The Act describes the following test for the awarding of punitive damages:

The fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

(1) was outrageous, including acts done with malice or bad motives; or

(2) evidenced reckless indifference to the interest of another person.¹⁹⁵

When determining how much punitive damages to award, the factfinder "may consider" such factors as

(1) the likelihood at the time of the conduct that serious harm would arise from the defendant's conduct;

(2) the degree of the defendant's awareness of the likelihood described in (1) of this subsection;

(3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct;

(4) the duration of the conduct and any intentional concealment of the conduct;

(5) the attitude and conduct of the defendant upon discovery of the conduct;

191. 1997 Alaska Sess. Laws 26, § 1(2) & § 1(3).

192. ALASKA STAT. § 09.17.010(a) (LEXIS 1998).

193. *Id.* § 09.17.010(b).

194. *See id.* § 09.17.010(c).

195. *Id.* § 09.17.020(b).

- (6) the financial condition of the defendant; and
- (7) the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.¹⁹⁶

In what may be the most controversial provision, the Act limits the amount of punitive damages that may be recovered in most cases to either three times the amount of compensatory damages that the plaintiff received or \$500,000, whichever is greater.¹⁹⁷ In addition, fifty percent of the plaintiff's punitive damages award must be deposited into the general fund of Alaska.¹⁹⁸

3. *Alaska Damage Awards.* In December 1996, the Governor's Advisory Task Force on Civil Justice Reform issued a report setting out some of the conclusions it had reached after studying court system data regarding Alaska tort cases.¹⁹⁹ A number of the conclusions it presented support the argument that the 1997 Tort Reform Act will have little effect on most tort victims in Alaska.

The Task Force determined that there had been little change in the number of personal injury cases filed in Alaska since 1988, and that the 1993 Alaska rate of 159 tort lawsuits filed per 100,000 population placed the state near the low end of the twenty-eight states studied by the National Center for State Courts in that year.²⁰⁰ In fact, one expert testifying before the Task Force noted that while automobile accident lawsuits had been growing at a rate of about four percent in the rest of the country, the number of automobile accident lawsuits in Alaska had remained steady at around 825 a year.²⁰¹ These findings seemed to undermine tort reform advocate claims that tort reform in Alaska was needed in or-

196. *Id.* § 09.17.020(b)(1)-(7).

197. *See id.* § 09.17.020(c)(1)-(2). The jury may make greater awards if it determines that the tortfeasor's conduct was motivated by financial gain and that the tortfeasor knew of the consequences of its conduct. *See id.* § 09.17.020(g). A different cap system also is used in the case of "an action against an employer to recover damages for an unlawful employment practice prohibited by [Alaska Statutes section] 18.80.220." *Id.* § 09.17.020(h).

198. *See id.* § 09.17.020(j).

199. *See generally* OFFICE OF THE GOVERNOR, REPORT OF THE GOVERNOR'S ADVISORY TASK FORCE ON CIVIL JUSTICE REFORM, December 1996 (on file with *Alaska Law Review*) (hereinafter TASK FORCE REPORT).

200. *See id.* at 97.

201. *See* Natalie Phillips, *Alaska Problems Ill-Defined, Tort Reform Task Force Told*, ANCHORAGE DAILY NEWS, Sept. 4, 1996, at B1.

der to curtail a “litigation explosion” allegedly sweeping the state. More importantly for the purposes of this Note, a Judicial Council study of Alaska tort cases turned up few instances of tort awards that would have been affected by the 1997 Tort Reform Act. The Task Force had requested that the Alaska Judicial Council²⁰² conduct a study of jury awards and damages awards in Alaska tort cases. The Judicial Council analyzed the 233 cases that it discovered in the period of 1985 to 1995 that involved jury trials of tort claims in Alaska.²⁰³ The Council analyzed the verdicts “in terms of case type, parties to the case, plaintiff and defendant verdicts, liability/outcomes, allocation of fault, damages, costs and fees, offers of judgment, appeals, and length of case.”²⁰⁴

The Council found that, of the type of tort cases that typically went to trial in Alaska, thirty-seven percent were automobile cases, seventeen percent were premises liability cases, and thirteen percent were medical malpractice cases.²⁰⁵ Of the cases that went to trial, the plaintiffs were successful roughly half of the time.²⁰⁶ The defendants were generally more successful in premises liability and medical malpractice cases, while the plaintiffs had greater success in automobile and employment cases.²⁰⁷ When damages were awarded in these cases, they most frequently were awarded for past economic losses, such as lost wages and unpaid medical bills.²⁰⁸ Non-economic damages comprised about one-third of the awards, and the Judicial Council concluded that “juries seldom made awards” for loss of consortium, loss of enjoyment of life, and emotional distress.²⁰⁹ Punitive damages were awarded in only six percent of the cases studied by the Council, even though they were

202. *See id.* The Alaska Judicial Council “is an independent state agency established by the Alaska Constitution in the judicial branch of state government.” *See* Alaska Judicial Council Home Page (visited Feb. 12, 1999) <<http://www.ajc.state.ak.us/>>. Its duties include judicial selection, judicial evaluation and retention, and research into the administration of justice. *See id.*

203. *See generally* APPENDIX C: REPORT FROM ALASKA JUDICIAL COUNCIL: MEMORANDUM FROM SUSANNE DI PIETRO AND TERI CARNS TO THE GOVERNOR’S TASK FORCE ON CIVIL JUSTICE REFORM 3 (Nov. 13, 1996) (on file with *Alaska Law Review*) (hereinafter DI PIETRO and CARNS).

204. *See* TASK FORCE REPORT, *supra* note 199, at 105.

205. *See* DI PIETRO and CARNS, *supra* note 203, at 3 (ranking the cases in descending order of frequency as employment (7%, or 17 cases) general injury (7%, or 17 cases), general property damage (7%, or 16 cases), intentional torts (5%, or 12 cases), product liability (3%, or 7 cases), insurance bad faith cases (about 1%), and two common carrier cases (less than 1 %)).

206. *See id.* at 4.

207. *See id.*

208. *See id.* at 7.

209. *See id.* at 8.

requested by the plaintiffs in twenty-seven percent of the cases.²¹⁰ In addition, the damages awarded by juries were oftentimes rather low. For example, in fifty-eight percent of the superior court cases studied by the Judicial Council, juries awarded damages of less than the superior court's jurisdictional limit of \$50,000.²¹¹ Around one-third of the jury verdicts were for less than \$10,000.²¹² The Council concluded that, "[o]verall, about 61% of all jury verdicts awarded damages under \$20,000."²¹³

The Judicial Council also analyzed Alaska tort jury verdicts in each year from 1988 to 1996. During these years, there were a total of seven jury verdicts for more than \$1 million.²¹⁴ The average jury award in each of the 114 cases with plaintiff awards during these years, excluding awards over \$1 million, was \$97,309.²¹⁵ Alaska juries made some large awards in the tort cases studied, but they were relatively few. Six percent of the damage awards exceeded \$500,000, and another nine percent of the awards were from \$100,000 to \$500,000.²¹⁶ Juries awarded punitive damages seventeen times in fifteen of the 233 cases studied.²¹⁷ Half of the punitive damages awards were for under \$60,000.²¹⁸ Juries awarded punitive damages in, among other things, four intentional tort cases, two employment cases, two personal injury cases, one property damage case, one insurance bad faith claim and one automobile accident involving a drunken driver.²¹⁹

While the parties appealed only one quarter of all the tort cases studied, they appealed six of the fifteen cases involving punitive damages.²²⁰ Courts reversed two of these six awards and the parties settled the remaining four out of court.²²¹ The largest punitive damages award made was \$25,300,000, but this judgment was

210. *See id.*

211. *See id.*

212. *See* DI PIETRO and CARNS, *supra* note 203, at 8.

213. *Id.*

214. *See id.* at 14. It should be noted that the figures summed up in the table are not indicative of any reductions to the awards made at the trial or appellate level. *See id.* at 14 n.1.

215. *See id.* The average jury payout in all cases with plaintiff awards was \$576,642, but it should be noted that this average includes the \$25 million verdict but does not reflect its adjustment on appeal.

216. *See* DI PIETRO and CARNS, *supra* note 203, at 8.

217. *See id.* at 8-9. In two of the cases, punitive damages were awarded in two separate instances. *See id.*

218. *See id.* at 9.

219. *See id.*

220. *See id.* at 11.

221. *See id.* at 9.

settled for a different sum out of court on appeal.²²² In total, there were four punitive damages verdicts of greater than \$250,000 in the cases analyzed by the Judicial Council, and two of these verdicts were affected on appeal.²²³ The Judicial Council summarized its findings as follows:

When they made awards, juries tended to give less than the amount requested in the complaint: the bulk of superior court awards were less than \$50,000. In both superior and district court verdicts, damages for economic losses were more common than those for non-economic losses, and awards for future losses of any kind were relatively rare. Juries awarded punitive damages in only 15 of the 233 cases studied, and many of those awards were less than \$60,000.²²⁴

The Judicial Council's findings for Alaska are consistent with a national study undertaken by the Department of Justice in 1995.²²⁵ The Department of Justice conducted a twelve-month study of approximately 762,000 state court civil cases in the nation's seventy-five most populous counties, and discovered that in the 12,000 cases decided by juries, the plaintiffs received punitive damages in only six percent of the 6,200 cases that they had won.²²⁶ More tellingly, a Department of Justice comparison of the mean and median awards suggested that the awards are not evenly distributed, indicating that "large awards, the ones that catch the media's attention, are extremely rare compared to smaller awards."²²⁷ It seems true that, based on the results achieved by groups studying punitive damages in both Alaska and the nation, "punitive damages are really a trivial part of tort law."²²⁸

The Judicial Council's analysis indicates that there are few cases whose awards likely would be affected by the 1997 Tort Reform Act in Alaska. Punitive damages rarely are awarded in Alaska tort cases, and those that are awarded are seldom large enough to meet or exceed the damages caps put into place by the 1997 Tort Reform Act. Indeed, since the Act was passed, few cases have made reference to the damage caps put in place by the Act. Some cases have addressed the Act's requirement that a plaintiff prove by clear and convincing evidence that the wrongdoer's conduct "was outrageous, such as acts done with malice or

222. *See id.*

223. *See id.*

224. *Id.* at 13.

225. *See* Ackerman, *supra* note 39, at 336 (citing CAROL J. DEFANCES ET AL., U.S. DEP'T OF JUSTICE, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 13 (1995)).

226. *See id.* (citing DEFANCES, *supra* note 225, at 1).

227. *Id.*

228. Calabresi & Cooper, *supra* note 13, at 861.

bad motives or reckless indifference to the interests of another person.”²²⁹ However, the 1997 Tort Reform Act did little to amend this standard, established by the 1986 reforms, and so cannot be blamed for any decisions refusing to award punitive damages because this standard was not met.²³⁰

For instance, in *Albertson v. Sisters of Providence Hospital, Inc.*,²³¹ the Ninth Circuit upheld a lower court ruling that a plaintiff fired for failure to seek treatment for his drug abuse problem could not sue the defendant employer for employment discrimination under the Americans with Disabilities Act.²³² The court of appeals also agreed with the trial court that the plaintiff could not sustain a punitive damages action against the defendant, as he could not “prove by clear and convincing evidence” that the defendant’s actions were outrageous, or characterized by any of the other language in the statute dealing with the punitive damages requirements.²³³ The post-amendment standard applied in this case is exactly the same as it was before: the “clear and convincing” standard must be met before punitive damages are awarded.

The Alaska Supreme Court also dealt with punitive damages issues after the passage of the 1997 Tort Reform Act, in *Veco, Inc. v. Rosebrock*.²³⁴ Like courts before it, the Alaska Supreme Court acknowledged that punitive damages in Alaska “are disfavored and are allowed only within narrow limits.”²³⁵ It then remanded a trial court’s award of punitive damages because it was unable to determine whether the court had awarded punitive damages based on direct liability, or whether they had been awarded incorrectly on a theory of vicarious liability.²³⁶ The court never reached the issue of whether the punitive damages award would have had to be

229. ALASKA STAT. § 09.17.020(b) (LEXIS 1998).

230. See, e.g., *Ace v. Aetna Life Ins.*, 139 F.3d 1241, 1246 n.14 (9th Cir. 1998) (“The [Alaska Statutes section 09.17.020] was amended in August 1997 to make minor textual changes . . .”). The plaintiff in this case was forced to live in her car for a period of time in 1993 after her insurance company unjustly refused to pay for an operation on her right leg. See *id.* at 1243; see also Liz Ruskin, *Jury Tells Insurer to Pay Up: Punitive Damages Total \$16.5 Million*, ANCHORAGE DAILY NEWS, June 1, 1996, at A1. The award later was reduced on appeal to the Ninth Circuit. See *Ace*, 139 F.3d at 1248-49.

231. No. 97-35964, 1998 WL 560073 (9th Cir. Sept. 1, 1998).

232. See *id.* at *2.

233. *Id.* at *3 (citing *Ace*, 139 F.3d at 1246 (quoting ALASKA STAT. § 09.17.020(b)(1) (LEXIS 1998))).

234. Nos. S-7080, S-7120, 1998 WL 881190 (Alaska Dec. 18, 1998).

235. *Id.* at *16.

236. See *id.* at *17. Punitive damages may not be awarded in Alaska based on vicarious liability for acts of employees outside the scope of their employment. See *id.* at *16.

remitted because of the Tort Reform Act. Had the plaintiff's \$1.5 million punitive damages award been properly awarded in the first place, it would have been reduced.²³⁷ However, the supreme court's remand indicates how rarely punitive damage awards survive the appeals process in Alaska intact, and thus emphasizes how little effect the 1997 Tort Reform Act will have on punitive damages in Alaska.

E. A New Statute of Repose – Meeting the Challenge of the *Turner* Court

The 1997 Tort Reform Act also addressed the Alaska Supreme Court's decision in *Turner Construction Co. v. Scales*.²³⁸ In *Turner*, the court had found Alaska's six-year statute of repose on suits against design professionals unconstitutional on the ground that it violated the equal protection clause of the Alaska Constitution.²³⁹ The 1997 Tort Reform Act rewrote the statute of repose to deal with the Alaska Supreme Court's concerns.²⁴⁰

In *Turner*, two plaintiffs had sued the construction company that built their apartment building after plaintiffs were injured in unrelated incidents involving a defective fireplace and a faulty garage door opener.²⁴¹ In both cases, the defendants claimed that the plaintiffs' causes of action were barred by the six-year statute of repose dealing with actions against design professionals.²⁴² The statute the defendants relied on provided in part that

(a) No action, whether in contract . . . in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction 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 im-

237. See *id.* at *2.

238. 752 P.2d 467 (Alaska 1988). For a critique of the Alaska Supreme Court's decision in this case, see Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 267-71 (1998).

239. See *Turner*, 752 P.2d at 472.

240. See 1997 Alaska Sess. Laws 26, § 1(8) (describing the legislative intent of part of the new Act as to "enact a statute of repose that meets the tests set out in *Turner*").

241. See *Turner*, 752 P.2d at 469. The Alaska Supreme Court consolidated the cases.

242. See *id.* "Design professionals" include "architects, engineers, and contractors." *Id.* A statute of repose differs from a statute of limitations in that "the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury." *Id.* at 469 n.2.

provement more than six years after substantial completion of an improvement.²⁴³

While the statute protected most design professionals from lawsuits, it expressly excluded from its jurisdiction such parties as owners and tenants of the property.²⁴⁴ The plaintiffs first contended, and the court agreed, that they had standing to challenge the statute because the statute narrowed the group of potentially liable parties from whom the plaintiffs might successfully seek recovery.²⁴⁵ The court then decided to apply a “fair and substantial relationship” equal protection analysis to the statute, as the plaintiff’s right to seek recovery in courts, while not a fundamental constitutional right, was a “significant one.”²⁴⁶

Applying this level of equal protection analysis, the court first asked whether the statute had been a valid use of the government’s legislative authority.²⁴⁷ It determined that it had been, since its design to “encourage construction and avoid stale claims by shielding certain defendants from potential future liability” was a proper state goal.²⁴⁸ The court then considered, as the last step in its analysis, whether the statute substantially furthered this purpose.²⁴⁹ It concluded that it did not, since the statute treated owners and tenants of the property differently than it did the design professionals whom it specifically protected.²⁵⁰ The court held that no

243. ALASKA STAT. § 09.10.055 (Michie 1996) (amended 1997) (quoted in *Turner*, 752 P.2d at 469). The court described this as a typical state statute passed around that time as a result of the lobbying efforts of design professionals. *See Turner*, 752 P.2d at 470 n.6.

244. *See Turner*, 752 P.2d at 470 n.7 (citing ALASKA STAT. § 09.10.055(d) (Michie 1996) (amended 1997)).

245. *See id.* at 470.

246. *Id.* at 470-71. If the plaintiff had asserted a fundamental constitutional right, or if the statute had used a suspect classification, then the court would have ruled the statute “unconstitutional under the federal standard absent a compelling state interest.” *Id.* at 470.

247. *See id.* at 471.

248. *Id.*

249. *See id.*

250. *See id.* In Professor McGreal’s analysis:

The court *never* offered any factual or logical argument to dispute the state’s reasons for the statute of repose. Instead the court’s sole argument against the law was that the statute of repose *might* discourage some construction. Upon analysis, however, we see that the court offers no facts in support of this argument, and the logic of the argument is flawed While the court correctly identified a possible increase in liability of non-design professionals, the court drew the wrong conclusion from that fact [If lawsuits against design professionals do not include non-design professionals as joint tortfeasors] there will be cases (perhaps significant in number) where the statute of repose can protect

justification for this different treatment could support the result that, in the case where an owner and a design professional were both equally at fault for a plaintiff's injuries, the owner would be responsible for the entire damages since he had no right of contribution against the protected design professional.²⁵¹ The court concluded that the statute of repose was unconstitutional, as "there is no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and materials suppliers, and the goal of encouraging construction."²⁵²

The 1997 Tort Reform Act created a new statute of repose that is not nearly as harsh as the one invalidated by the *Turner* court.²⁵³ Most importantly, it does away with the distinction between design professionals and owners and tenants that existed in the 1967 statute of repose.²⁵⁴ The new statute of repose extends the plaintiff's time for bringing an action to within ten years of either "substantial completion of the construction" or the "last act alleged to have caused the personal injury, death, or property damage."²⁵⁵ The statute does not apply in such cases as intentional concealment of defects, fraud, gross negligence, and breach of warranty.²⁵⁶

This new statute of repose ensures that plaintiffs injured by faulty construction will not be injured by Alaska's several liability system. Before *Turner*, a plaintiff injured by shoddy handiwork in an apartment building might have been left with unrecoverable damages. If the design professional were eighty percent at fault, but protected by the statute of repose, then the plaintiff might

design professionals from liability *without* a threat of harm to non-design professionals.

McGreal, *supra* note 238, at 269-70.

251. See *Turner*, 752 P.2d at 471-72. The court relied on its earlier holding that the Uniform Contribution Among Tortfeasors Act had not abolished joint and several liability in Alaska. See *id.* at 471 (citing *Arctic Structures v. Wedmore*, 605 P.2d 426, 435 (Alaska 1979)); see also ALASKA STAT. § 09.16.010-.060 (Michie 1996) (amended 1997). Therefore, "the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered." *Turner*, 752 P.2d at 472.

252. *Turner*, 752 P.2d at 472.

253. See ALASKA STAT. § 09.10.055 (LEXIS 1998).

254. See *Turner*, 752 P.2d at 470 (quoting ALASKA STAT. § 09.10.055(d) (Michie 1996) (repealed 1997) ("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."))

255. ALASKA STAT. § 09.10.055 (LEXIS 1998).

256. See *id.* § 09.10.055(b).

have recovered only twenty percent of his damages from the unprotected owner or tenant of the apartment. Under the new system, a plaintiff who is able to recover anything at all will be able to recover it from all potentially responsible parties, for the new statute eliminated the unconstitutional discrimination that the old statute of repose imposed upon non-design professionals. This new statute of repose extends the time that plaintiffs have for recovery from six (or eight, in the case of non-design professionals) to ten years, and ensures that all potentially responsible parties are denied immunity during this time period. It also protects the plaintiff from most of the egregious violations, like fraud or intentional concealment, that his apartment builders might commit. Like the other changes in the 1997 Tort Reform Act, the new statute of repose will do little to harm injured plaintiffs. And, by being constitutional, it is actually an improvement over the older statute of repose.

V. CONCLUSION

An examination of the several liability and damages caps provisions incorporated into the 1997 Tort Reform Act reveals that potential tort victims were right not to become too involved in debating the merits of its passage. Those groups with the most at stake in tort reform legislation were not the tort victims, but those who stood to gain or lose the most depending on how the tort system was altered, or “reformed.” So it is not surprising that plaintiffs lawyers groups comprised a sizeable contingent of those opposing the bill’s passage, as they stood to gain the most from retaining a tort system in which sizeable punitive and non-economic damages were awarded, no matter how infrequently. Neither is it surprising that the traditional defendants in these types of cases, be it insurance companies or big businesses, would fight to impose punitive damages caps and to ensure that the several liability system originated in the 1986 tort reform legislation would receive the legislative attention it needed to dissuade any further instances of “deep pocket” defendants paying more than their fair share of any tort recovery.

But it remains true that what “is usually missing from reform proposals in legislatures, however, is the significant presence of people who are looking specifically to the interests of those who are injured and to the administrative costs of granting such people recovery.”²⁵⁷ Tort victims are injured once, and it is only at the time of their injuries that they care about the tort system. Plaintiff’s lawyers and insurance companies, on the other hand, repeat-

257. Calabresi & Cooper, *supra* note 13, at 864.

edly are implicated in the tort system, and they have the most interest in seeing it changed, or not changed, for their benefit. And while the public may claim they have the interests of big business or of tort victims at heart, the lack of involvement of average citizens in the hotly contested tort reform battle in Alaska seems to indicate that perhaps they only have convinced themselves "as we all do, that what is good for them is also good for the plaintiffs and the country."²⁵⁸ But it seems that the average Alaska citizens may know best, and express the most intelligent view on their interests by refraining from much involvement in the tort reform debate. The battle over tort reform will go on, in Alaska and elsewhere, but it most likely will continue to be a battle between players whose interests in the tort system are not the same as the interests of tort victims themselves. And thus, as many Alaskans may have guessed already, for all its sound and fury, the tort reform debate in Alaska will continue to be much ado about nothing.

Christopher T. Stidvent

258. *Id.*