27 MEDICAL MALPRACTICE

In 1997, the Legislature enacted changes to the statutes governing medical malpractice as part of its Tort Reform revisions. These changes apply only to causes of action accruing[1] on or after August 7, 1997. As a result of these statutory changes, the Alaska Supreme Court promulgated rule changes which affect cases filed on or after August 7, 1997.

Medical malpractice actions are subject to the provisions set forth in AS 09.55.530 *et seq.*, as well as the other statutory provisions pertaining to actions for personal injuries or wrongful death, such as the statutory caps on general damages and punitive damages, pure several liability, the statute of limitations for personal injury and wrongful death, the statute of repose, and the limitations on the recovery of damages for wrongful death.[2] The 1997 Tort Reform revisions expanded Alaska's ten year statute of repose[3] to include subsection c, which tolls (stops the running of) the period for repose when the litigation involves the presence of a newly discovered foreign body "in the body of the injured person."[4]

Other 1997 revisions to the malpractice statutes (1) expand the definition of health care provider to include not only governmentally owned or operated hospitals, but also ambulatory surgical facilities and other organizations whose primary purpose is the delivery of health care (including health maintenance organizations, individual practice associations, integrated delivery systems, preferred provider organizations or arrangements, and physical hospital organizations); (2) define "professional negligence" as "a negligent act or omission by a health care provider in rendering professional services"; and (3) define the scope of "professional services."[5]

In a malpractice action, plaintiff has the burden of proving by a preponderance of the evidence: (1) the degree of knowledge or skill possessed, or the degree of care ordinarily exercised under the circumstances, at the time of the act complained of, by health care providers in the field or specialty in which the defendant is practicing; (2) that the defendant either lacked this degree of knowledge or skill or failed to exercise this degree of care; and (3) that as a proximate result of this lack of knowledge or skill, or the failure to exercise this degree of care, plaintiff suffered injuries that would not otherwise have been incurred.[6] Injury alone does not raise a presumption of

---

[1] This is generally the date of injury, but is usually defined to be the date on which the plaintiff reasonably should know that he or she has a claim.

[2] *See* Tab 3 Statutes of Limitations; Tab 8 Several (Not Joint) Liability; Tab 11 Punitive Damages; Tab 12 Wrongful Death Claims; and Tab 15 Cap on Non-Economic.

[3] A statute of repose limits liability by limiting the time during which a cause of action may arise. In contrast, "statutes of limitation" extinguish the right to prosecute an accrued cause of action after a set period of time.

[4] *See* AS 09.10.055(c).

[5] *See* AS 09.55.560(1)-(5).

[6] *See* AS 09.55.540(a).

negligence. AS 09.55.540(b) and AS 09.55.550.[7] Furthermore, the injury caused by the health care provider must "arise out of" medical services or treatment.[8] Thus, a sexual assault by a physician does not arise out of medical treatment unless the health care provider has disguised his or her misdeed as part of the medical treatment.[9]

On the other hand, failure to diagnose is malpractice because a provider has a duty to act with the degree of knowledge, skill, or care ordinarily exercised by health care providers in the provider's field or specialty. For example, the Alaska Supreme Court held that negligent failure to diagnose a pregnancy that results in a birth of a healthy child gives rise to a cause of action for medical malpractice, and damages that may be assessed against the health care provider include compensation for expenses incurred through the time of childbirth, including the mother's emotional distress.[10] However, hospitals are granted immunity for acts or omissions of emergency room physicians, if: (1) the hospital gives notice that the doctors are independent contractors by posting a sign and publishing annually in a local newspaper in the manner prescribed by the statute; (2) the emergency doctors maintain their own insurance in the required amount; and (3) the hospital exercises reasonable care in granting, reviewing, and revoking privileges to practice in the hospital.[11]

A physician who performs an independent medical examination at the behest of a third-party does not have a physician-patient relationship with the party he examines. Accordingly, an IME doctor cannot be liable for medical malpractice.[12]

Informed Consent

AS 09.55.556 sets forth the requirements for obtaining a patient's informed consent. The health care provider must inform the patient of the common risks and reasonable alternatives to the proposed treatment, unless the risk not disclosed is too commonly known or is too remote to require disclosure, or the patient indicated that he or she would undergo the procedure regardless of the risk, or under certain other circumstances. The Alaska Supreme Court has held that a material issue prevented summary judgment in favor of the physician with regard to the adequacy of informed consent, even though the physician discussed the risk of scarring with the patient, and videos viewed by the patient emphasized that the procedure would result in permanent

[7] *See* AS 09.55.540(b); AS 09.55.550. Such was the case when Guess and Rudd successfully defended the first Norplant implant litigation brought in Alaska. The plaintiff claimed that the physician committed malpractice both in the method he used to remove the implant and by failing to give proper birth control advice after the removal, resulting in an unwanted pregnancy. The claim was dismissed when plaintiff was unable to support her claim of medical malpractice with expert testimony.

[8] *D.D. v. Ins. Co. of North America*, 905 P.2d 1365, 1369-70 (Alaska 1995).

[9] *Id.*

[10] *See M.A. v. United States*, 951 P.2d 851 (Alaska 1998).

[11] *See* AS 09.65.096.

[12] *Smith v. Radecki*, 238 P.3d 111, 117 (Alaska 2010).

scars.[13] Merely identifying the risk is not necessarily sufficient. The physician must explain the nature and severity of the risk, and the likelihood of its occurrence, in lay terms. In addition, 7 AAC 12.120(c) requires that a physician, or one of the particular designees specified in the regulation, confirm that the patient's medical record contains a "signed informed consent" before a surgical procedure begins.[14]

Advisory Expert Panel

Twenty (20) days after the filing of the Answer to the medical malpractice Complaint, the court shall appoint a three-person advisory panel unless the court decides that such a panel opinion is not necessary.[15] The revised statute makes it clear that its provisions apply to both public and private health care providers.[16] Nothing in AS 09.55.536 addresses whether the court should appoint multiple panels where there are multiple claims of medical malpractice against health care providers with different specialties (e.g., where plaintiff sues a physician, one or more nurses, and the hospital, and alleges separate claims against each), but at least one court in another state has held that it is within the court's discretion to do so.[17] Although the statute says that the court "shall" appoint an advisory panel, the decision is within the court's discretion.[18]

Alaska Civil Rule 72.1 provides that either party may request the appointment of an expert advisory panel, and that the parties may suggest that the court appoint specific professions or specialties to the panel. This rule also requires the parties to produce all discoverable medical records in their possession, custody or control, including the reports of consulting experts if those reports are to be submitted to the panel. The parties are also to file a list of all medical records, medical reports and medical literature which they intend to make available to the panel. As a practical matter, however, the panel is rarely called because few doctors will participate.

If appointed, the expert advisory panel has considerable authority to interview the parties, compel the attendance of witnesses, consult with specialists, compel the production of medical records, etc.[19] In practice, however, the panel rarely resorts to exercise of its subpoena power, nor does it typically bring in outside specialists not previously involved in the patient's treatment. Within thirty (30) days after its selection, the panel is required to make a written report to the parties and the court answering

---

[13] *Korman v. Mallin*, 858 P.2d 1145 (Alaska 1993).

[14] *Sweet v. Sisters of Providence in Wash.*, 895 P.2d 484, 493-94 (Alaska 1995).

[15] *See* AS 09.55.536(a).

[16] *See* AS 09.55.536(a) and (i).

[17] *Kletnieks v. Brookhaven Mem'l Ass'n*, 385 N.Y.S. 2d 575, 581 (N.Y. App. Div. 1976).

[18] *Kaiser v. Sakata*, 40 P.3d 800 (Alaska 2002).

[19] *See* AS 09.55.536(b).

specific questions set forth in the statute[20] (and any other questions submitted to the panel by the court).[21] The court may grant the panel an additional 30 days to complete the report.[22] The statute is silent as to whether additional extensions of time may be granted for the panel to complete the report. Before the 1997 revisions, the panel usually took 60 to 90 days to complete and submit their report.

The report of the panel, with any dissenting or concurring opinion, is admissible in evidence to the same extent as though its contents were in-court testimony by the persons preparing it. Either party may submit testimony to support or refute the report.[23] No discovery may be conducted until the report has been received or 60 days after selection of the panel, whichever occurs first.[24] However, the court can relax this prohibition upon a showing of good cause.[25] In addition, Alaska Civil Rule 72.1(g) provides that, except by leave of court, no discovery may be conducted until the report has been filed or until 60 days have elapsed from the date the case became at issue (i.e., the date the last defendant filed his or her Answer), whichever occurs first, unless the court decides to stay discovery for good cause.[26]

As noted above, in Tab 3 - Statutes of Limitations, the Alaska Supreme Court has held that claims alleging medical malpractice causing personal injuries are subject to Alaska's two-year statute of limitations, even if plaintiff alleges that the physician breached implied contractual duties to plaintiff.[27] Rather than attempting to characterize a plaintiff's action as sounding more in tort or contract, the court looks to the nature of the injury claimed.[28] The three-year contract statute of limitations most likely applies to professional malpractice actions claiming economic loss. Conversely, if a plaintiff suffers principally personal or reputational injury, the two-year statute of limitations applies.[29]

---

[20] As part of its 1997 Tort Reform efforts, the Legislature revised the questions the panel is required to answer pursuant to AS 09.55.536(c)(1-8).

[21] *See* AS 09.55.536(c).

[22] *See* AS 09.55.560(f).

[23] *See* AS 09.55.536(e).

[24] *See* AS 09.55.536(f).

[25] *See* AS 09.55.536(f).

[26] Rule 72.1(g), which mandates no discovery without leave of court until the Panel files its report or 60 days after selection of the Panel, is applicable only to cases filed on or after August 7, 1997. However, confusion is bound to arise because AS 09.55.560(f), from which the Supreme Court made the changes to Rule 72, applies to causes of action accruing on or after August 7, 1997.

[27] *Pedersen v. Flannery,* 863 P.2d 856 (Alaska 1993).

[28] *Breck v. Moore*, 910 P.2d 599, 603 (Alaska 1996).

[29] *Id.*

Voluntary Arbitration

Alaska statutes provide for voluntary arbitration of medical malpractice claims where there is such an agreement. The agreement cannot be a prerequisite to the receipt of health care and the form of the agreement must first be approved by the Attorney General of the State ofAlaska.[30] Damage awards are to be made by category of loss, with any future damages to be paid in whole or in part by periodic payments rather than lump-sum.[31] AS 09.55.548 also provides that a claimant can only recover damages from the health care provider that exceed amounts received by the claimant from collateral sources.[32]

The Alaska Supreme Court has held that a determination that the health care provider breached its professional duty must be based upon expert testimony.[33] Now, pursuant to AS 09.20.185(a) and Evidence Rule 702(c), persons testifying as an "expert" on the issue of the appropriate standard of care must be board certified experts in the same practice area as the defendant, or in an area directly related to a matter at issue. However, the Alaska Supreme Court recognized an exception that expert testimony was not needed in non-technical situations where negligence is evident to lay people.[34]

---

[30] *See* AS 09.55.535(b).

[31] *See* AS 09.55.548(a).

[32] *See* AS 09.55.548(b).

[33] *Kendall v. State, Division of Corrections*, 692 P.2d 953 (Alaska 1984).

[34] *D.D. v. Wrangell General Hospital*, 5 P.3d 225, 228 (Alaska 2000).

Appendices:

Alaska R. Civ. P. 72.1
Alaska R. Ev. 702
AS 09.55.530 - 560
AS 09.10.055
AS 09.65.096
AS 09.20.185
7 AAC 12.120

Rule 72.1. Expert Advisory Panels in Health Care Provider Malpractice Actions.

(a) **Identification of Action.** Either party in a health care malpractice action subject to AS 09.55.536 may request that the court appoint an expert advisory panel to evaluate the claim. The request should identify the specialty of the health care provider named as defendant. Either party may recommend that the court appoint specific professions or specialties to the expert advisory panel.

(b) **Appointment of Panel.**

(1) After the case is at issue and a party has requested the appointment of an expert advisory panel (or the court has raised the issue), the court shall nominate a three person panel and notify the parties of the names, professions and specialties of the persons so nominated. The court may initially nominate alternate panel members if it believes nominees may be disqualified. Within 10 days after service of this notice, either party may move to disqualify a nominee, citing the reasons for the motion. The other party may submit an opposition within five days after service of the motion for disqualification. No reply may be filed.

(2) The nominated panel members must inform the court within 10 days of the notice of appointment of any financial relationship with a party or party's attorney, of any other reason which would cause the nominee to be biased in the case or present an appearance of bias, and of any other reason why the nominee cannot serve on the panel. The court shall disqualify a nominee if the nominee is biased for or against a party or if a conflict of interest raises a substantial appearance of bias.

(3) If additional nominees are required, the parties must be given the opportunity to recommend nominees' professions or specialties and move to disqualify as provided above.

(c) **Submission of Medical Records.**

(1) Within 30 days after service of the court's initial panel nominations, the plaintiff and each health care provider defendant shall serve on other parties one legible copy of all discoverable medical records in such party's possession, custody, or control. Original exhibits which are impractical or impossible to copy must be made available to all parties for review. Medical reports of consultants retained by a party for the advancement or defense of the case and medical literature must also be served on other parties if such literature or reports is to be submitted to the panel.

(2) Each party shall file with the Clerk and serve on each other party a list of all medical records, medical reports and medical literature which the party will transmit or make available to the panel.

(3) Medical records include medical records of hospitals, physicians, or other health care providers, addressing an issue of health relevant to the plaintiffs' complaint, whether generated before or subsequent to the event giving rise to the claim and whether generated by the health care provider named in the complaint or by other health care providers. Medical records also include autopsy reports and exhibits such as x-rays and slides.

(4) Upon agreement of the parties or order of the court, and after a reasonable time for inspection, each party shall submit to each member of the panel one legible copy of such party's medical records, medical reports and medical literature, and notify the panel members of the availability and location of original exhibits for which submission to the panel is impractical or impossible. If the plaintiff serves the defendant with medical reports of consultants, the defendant has 30 days to serve medical reports of its consultants on the plaintiff. Thereafter, the reports may be submitted to the panel. Any additional reports may be submitted only with leave of the court.

(5) A party may file and serve on each member of the panel a notice advising the panel of further relevant medical records of which the noticing party does not have possession, custody or control.

(6) In the event a party fails or is unable to submit relevant medical records to the panel, and the panel is unable to obtain access to such records by reason thereof, any party or the panel may apply to the court for leave to obtain such records by court order. The court may delay further proceedings until the panel is provided with the additional medical records.

(7) Within 30 days after service of the court's initial panel nominations, each party shall serve upon the panel and all other parties the information and materials required to be disclosed under Rule 26(a)(1)(A), (B), (C), and 26(a)(2).

(d) **Preliminary Findings of Fact and Conclusions of Law.** A party may move the court to resolve issues of fact or law prior to submission of the case to the panel, or to furnish instructions of fact or law to the panel. Submission of the case to the panel will be deferred pending determination of the motion by the court.

(e) **Instructions to Panel.** The court shall provide the panel with a written order which states:

(1) The questions listed in AS 09.55.536, clarified or changed as the court deems appropriate to the case.

(2) That the panel is to prepare and submit to the court a list of all persons interviewed, a list of treatises or medical literature used by the panel in its deliberations, and a list of exhibits it examined (such as X-rays, slides, and other items which are not reproducible on paper).

(3) The general nature of the allegations made against each health care provider and of the answer to those allegations. Alternately, the court may submit a copy of the complaint and the answer and advise the panel that they are to address only the medical issues.

(4) That the panel or the Alaska State Medical Association is to retain copies of medical records submitted to them until further notice from the court. The court may make special provision for the safekeeping or retention by the Clerk of Court of X-rays or other original exhibits.

(5) That the panel must maintain a recording of any testimony or oral statements of witnesses and shall keep copies of all written statements the panel may receive or take, whether from witnesses, consultants, or other sources.

(6) That the panel is to review the case of each health care provider individually and render an individual, separate opinion with regard to the allegations against each health care provider.

(7) The name and location of the court personnel who might assist the panel, and that the panel may communicate with the court concerning any questions it may have, or make any requests for assistance.

(8) Any matters of fact or law on which the court has ruled, and that the panel is to review the matter in light of the court's finding and instructions on the law.

(9) That in the event parties are named as defendants who are not health care providers, the panel's consideration is to be directed to the health care providers only.

(10) That the panel is not to communicate with the parties or their attorneys, except to arrange to obtain or review an original exhibit in the possession of one of the parties, or to arrange an examination of the plaintiff, or to arrange an interview with the plaintiff or health care provider, or to arrange the scheduling of the testimony of a panel member at a deposition or at trial.

(f) **Interviews by the Panel.**

(1) If an attorney desires to be present at an interview of his or her client by the panel, the attorney must give reasonable notice of an intent to do so to the other parties so they may also appear at the interview. If the attorney for the person being interviewed does not appear, no other attorney or party may appear. An attorney appearing before the panel may not question his or her client or any other persons appearing before the panel, nor may an attorney or party cross-examine witnesses or ask questions of the panel. A person being interviewed by the panel may not be accompanied by any representative other than the person's attorney.

(2) Any party may request the panel to interview any person or party.

(g) **[Applicable to cases filed before August 7, 1997.] Discovery.** Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until 80 days have elapsed from the date the case is at issue, whichever is first to occur, unless discovery is further stayed for good cause by order of the court.

(g) **[Applicable to cases filed on or after August 7, 1997.] Discovery.** Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until 60 days after selection of the panel, whichever is first to occur, unless discovery is further stayed for good cause by order of the court.

(Added by SCO 837 effective August 1, 1987; amended by SCO 1172 effective July 15, 1995; and by SCO 1281 effective August 7, 1997)

Note to SCO 1281: Paragraph (g) of this rule was amended by ch. 26, § 42, SLA 1997. According to § 55 of the Act, the amendment to Civil Rule 72.1 applies "to all causes of action accruing on or after the effective date of this Act." The amendment to Rule 72.1 adopted by paragraph 7 of this order applies to all cases **filed** on or after August 7, 1997. See paragraph 17 of this order. The change is adopted for the sole reason that the legislature has mandated the amendment.

Annotations

Cases

Under this rule, advisory panel interviews are not mandatory but merely optional. **Gerber v. Juneau Bartlett Memorial Hosp.**, Op. No. 5276, 2 P3d 74 (Alaska 2000).

Rule 702. Testimony by Experts.

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified asthe evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) No more than three independent expert witnesses may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(c) **[Applicable to cases filed on or after August 7, 1997.] Professional Negligence Cases.** In an action based on professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard of care except as provided in AS 09.20.185.

(Added by SCO 364 effective August 1, 1979; amended by SCO 793 effective March 15, 1987; by SCO 1172 effective July 15, 1995; by SCO 1269 effective July 15, 1997; and by SCO 1281 effective August 7, 1997)

Note: In 1996, the legislature enacted AS 12.45.037 relating to the admissibility of expert testimony about criminal street gang activity. According to § 11 ch. 60 SLA 1996, this statute has the effect of amending Evidence Rule 702 to allow expert testimony to be admitted in a criminal prosecution to show criminal gang characteristics, activity, and practices.

Note to SCO 1281: In 1997 the legislature enacted AS 09.20.185 which prohibits a person from testifying as an expert in a professional negligence action unless the person has the qualifications listed in AS 09.20.185(a). According to ch. 26, § 51, SLA 1997, this statute has the effect of amending Evidence Rule 702 by requiring certain qualifications for a person testifying as an expert witness. According to § 55 of the session law, AS 09.20.185 applies "to all causes of action accruing on or after the effective date of this Act." However, Rule 702(c), adopted by paragraph 15 of this order, is applicable to all cases **filed** on or after August 7, 1997. See paragraph 17 of this order.

Sec. 09.55.530. Declaration of purpose. The legislature considers that there is a need in Alaska to codify the law with regard to medical liability in order to establish that the law in Alaska in this regard is the same as elsewhere. (§ 1 ch 49 SLA 1967)

NOTES TO DECISIONS

Cited in M.A. v. United States, 951 P.2d 851 (Alaska 1998); D.P. v. Wrangell Gen. Hosp., 5 P.3d 225 (Alaska 2000).

Sec. 09.55.535. Voluntary arbitration. (a) A patient and any health care provider may execute an agreement to submit to arbitration any dispute, controversy, or issue arising out of care or treatment by the health care provider during the period that the agreement is in force or that has already arisen between the parties. Execution of an agreement under this subsection by a patient may not be made a prerequisite to receipt of care or treatment by the health care provider.

(b) An agreement to arbitrate executed before care or treatment is provided must clearly provide in bold print on the face of the agreement that execution of the agreement by the patient is not a prerequisite to receiving care or treatment. If this subsection is not complied with by the health care provider, the agreement to arbitrate is void. The form to be used shall be approved in advance by the attorney general of the state to assure it fairly informs both parties to the agreement and properly protects their interests.

(c) The agreement must provide that the person receiving health care may revoke the agreement within 30 days after execution by notifying the health care provider in writing. The period for revocation shall be tolled during any period that the person receiving health care is physically unable to execute a revocation. The health care provider may not revoke the agreement after its execution.

(d) An arbitration agreement entered into by the parents or legal guardian of a minor person receiving health care is binding upon the minor person.

(e) An agreement to arbitrate between a patient and a hospital must be reexecuted each time a person is admitted to a hospital. The agreement may be extended by written agreement of all parties to apply to care after hospitalization. A person receiving outpatient care from a hospital or clinic or a member of a health maintenance organization may execute an agreement with the hospital that provides for continuation of the agreement for a continuing program of treatment or during continued membership.

(f) Upon the filing of a malpractice claim that is subject to an agreement to arbitrate, the claim shall be submitted to an arbitration board. The arbitration board shall consist of three arbitrators: one arbitrator designated by the claimant or claimants, one arbitrator designated by the health care provider or providers against whom the claim is made, and a third arbitrator designated by mutual agreement who shall serve as chairperson of the board. If the parties cannot agree on the third person, the court will provide a choice of three or more persons who might serve as chairperson of the arbitration board, which shall be from a list of qualified arbitrators furnished by the attorney general. Claimant or claimants together and health care provider or providers together may each strike one or more names so that after each side has done so at least one name remains, providing a basis for the final selection by the court.

(g) The attorney general shall prepare a list of persons consisting of lawyers or other persons qualified to serve as chairperson of an arbitration board. They shall be selected on basis of their technical expertise, judicial temperament, and capability of impartially acting on malpractice claims. The attorney general shall submit a list of at least three

names whenever requested to do so by the court along with detailed biographical information on each person listed.

(h) Each member of the arbitration board shall receive reasonable compensation to be paid by the court based on the extent and duration of services rendered. The court shall pay the costs of expert witnesses called by the board and the costs of expert witnesses called by the parties to the arbitration up to a maximum of three witnesses for each side and $150 per day for each expert witness.

(i) The arbitration board may appoint an expert advisory panel, with the powers of the expert advisory panel under AS 09.55.536, to advise the board on the medical facts of the case.

(j) The court shall specify the shortest practical deadline for completion of the work of the arbitration board, taking into account all the circumstances and the nature of the case.

(k) The provisions of the Uniform Arbitration Act, AS 09.43.010 — 09.43.180, apply to arbitrations under this section if they do not conflict with the provisions of this section; arbitrations under this section shall be conducted in accordance with procedures established by any rules of court which may be adopted and according to provisions of AS 09.55.540 — 09.55.548 and AS 09.55.554 — 09.55.560, and AS 09.65.090. (§ 33 ch 102 SLA 1976; am § 22 ch 177 SLA 1978; am § 1 ch 105 SLA 1988)

Cross references. — For purpose of 1978 Act, see § 1, ch. 177, SLA 1978, as amended by § 8, ch. 46, SLA 1982, in the Temporary and Special Acts.

Collateral references. — Arbitration of medical malpractice claims, 84 ALR3d 375.

Sec. 09.55.536. Expert advisory panel. (a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider, including a person providing services on behalf of a governmental entity, when the parties have not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after filing of answer to a summons and complaint a three-person expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. When the action is filed, the court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions.

(b) The expert advisory panel may compel the attendance of witnesses, interview the parties, physically examine the injured person if alive, consult with the specialists or learned works they consider appropriate, and compel the production of and examine all relevant hospital, medical, or other records or materials relating to the health care in issue. The panel may meet in camera, but shall maintain a record of any testimony or oral statements of witnesses, and shall keep copies of all written statements it receives.

(c) Not more than 30 days after selection of the panel, the panel shall make a written report to the parties and to the court, answering the following questions and other questions submitted to the panel by the court in sufficient detail to explain the case and the reasons for the panel's answers:

(1) Why did the claimant seek medical care?

(2) Was a correct diagnosis made? If not, what was incorrect about the diagnosis?

(3) Was the treatment or lack of treatment appropriate? If not, what was inappropriate about the treatment or lack of treatment?

(4) Was the claimant injured during the course of evaluation or treatment or by failure to diagnose or treat?

(5) If the answer to question 4 is "yes," what is the nature and extent of the medical injury?

(6) What specifically caused the medical injury?

(7) Was the medical injury caused by unskillful care? Explain.

(8) If a medical injury had not occurred, what would have been the likely outcome of the medical case?

(d) In any case in which the answer to one or more of the questions submitted to the panel depends upon the resolution of factual questions that are not the proper subject of expert opinion, the report must so state and may answer questions based upon hypothetical facts that are fully set out in the opinion. The report must include copies of all written statements, opinions, or records relied upon by the panel and either a transcription or other record of any oral statements or opinions; must specify any medical or scientific authority relied upon by the panel; and must include the results of any physical or mental examination performed on the plaintiff. Each member shall sign the report and the signature constitutes the member's adoption of all statements and opinions contained in it; however, a member may, instead of signing the report, submit a concurring or dissenting report that complies with the requirements of this subsection. A member may not attest to any portion of the report as to which the member is not qualified to give expert testimony.

(e) The report of the panel with any dissenting or concurring opinion is admissible in evidence to the same extent as though its contents were orally testified to by the person or persons preparing it. The court shall delete any portion that would not be admissible because of lack of foundation for opinion testimony, or otherwise. Either party may submit testimony to support or refute the report. The jury shall be instructed in general terms that the report shall be considered and evaluated in the same manner as any other expert testimony. Any member of the panel may be called by any party and may be cross-examined as to the contents of the report or of that member's dissenting or concurring opinion.

(f) Discovery may not be undertaken in a case until the report of the expert advisory panel is received or 60 days after selection of the panel, whichever occurs first. However, the court may relax this prohibition upon a showing of good cause by any party. If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant the panel an additional 30 days.

(g) Members of a panel are entitled to travel expenses and per diem in accordance with state law pertaining to members of boards and commissions for all time spent in preparing its report. If a panel member is called upon as a witness at trial or upon deposition, the member is entitled to payment of an expert witness fee, which may not exceed $150 per day. All expenses incurred by the panel shall be paid by the court. However, in any case in which the court determines that a party has made a patently frivolous claim or a patently frivolous denial of liability, it shall order that all costs of the expert advisory panel be borne by the party making that claim or denial.

(h) Parties to the case and their counsel may not initiate communication out of court with members of the panel on the subject matter of its inquiry and report or cause or solicit others to do so, except through ordinary discovery proceedings.

(i) This section applies regardless of whether a party in the action or the health care provider whose professional services are the subject of the action is a governmental entity or in the public or private sector. (§ 33 ch 102 SLA 1976; am § 23 ch 177 SLA 1978; am §§ 22 — 25 ch 26 SLA 1997)

Revisor's notes. — In 1994, "Discovery may not" was substituted for "No discovery may" in (f) of this section to conform the section to the current style of the Alaska Statutes.

Cross references. — For purpose of 1978 Act, see § 1, ch. 177, SLA 1978, as amended by § 8, ch. 46, SLA 1982, in the Temporary and Special Acts.

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

Effect of amendments. — The 1997 amendment, effective August 7, 1997, in subsection (a), inserted ", including a person providing services on behalf of a governmental entity," in the first sentence; rewrote subsection (c); in subsection (f), added "or 60 days after selection of the panel, whichever occurs first," at the end of the first sentence; and added subsection (i).

Editor's notes. — Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply

"to all causes of action accruing on or after August 7, 1997."

NOTES TO DECISIONS

Chapter 102, SLA 1976, enacted in violation of Alaska Const., art. II, § 14. — Where the free conference committee recommended adoption of a version of ch. 102, SLA 1976, that differed in many respects from the version originally passed by the house; the free conference committee's bill was passed by the senate by a recorded vote; but in the house there was no roll call or recorded vote and the free conference committee bill was passed there by a simultaneous voice vote, this voice vote constituted "final passage" of ch. 102, SLA 1976, and thus violated the recorded vote requirement of Alaska Const., art. II, 14. Plumley v. George E. Hale, M.D., Inc., 594 P.2d 497 (Alaska 1979).

Constitutionality holding is to be applied prospectively. — Although the supreme court held that ch. 102, SLA 1976, was enacted in violation of the recorded vote requirement of Alaska Const., art. II, § 14, the supreme court held that its holding in this case should be applied prospectively in light of its conclusions that its decision was one of first impression, that substantial reliance had followed from the legislature's alternative interpretation of law, that undue hardship would have resulted from retroactive application of its holding, and that the rationale of the holding did not compel retroactivity. Plumley v. George E. Hale, M.D., Inc., 594 P.2d 497 (Alaska 1979).

Section was not invalidated. — Since neither ch. 102, SLA 1976, nor any other bill previously enacted into law by voice vote, will be overturned by its interpretation of Alaska Const., art. II, § 14, the supreme court did not invalidate this section. However, in order to effectuate the goals of fairness and intelligent advocacy, the supreme court held that this section would not be applicable in the malpractice actions consolidated for this appeal. Plumley v. George E. Hale, M.D., Inc., 594 P.2d 497 (Alaska 1979).

Lifting ban on discovery before panel report. — Good cause to lift the discovery ban is demonstrated as a matter of law when no report has been issued after 80 days have elapsed from the filing of answer, if the party wishing to begin discovery is not responsible for the delay. Roethler v. Lutheran Hosps. & Homes Soc'y of Am., 709 P.2d 487 (Alaska 1985).

Constitutionality. — This section does not unconstitutionally deprive a litigant of due process of law, does not impair his right to a jury trial, and does not violate separation of powers principles by impermissibly delegating judicial power to members of the panel. Keyes v. Humana Hosp. Alaska, 750 P.2d 343 (Alaska 1988).

This section does not unconstitutionally deprive medical plaintiffs of their right of access to the courts. Keyes v. Humana Hosp. Alaska, 750 P.2d 343 (Alaska 1988).

Panel has discretion concerning interviews. — The plain language of subsection (b) of this section permits, but does not require the panel to interview witnesses, and while interviewing the injured party may often constitute good practice, the decision whether to conduct the interview lies within the sound discretion of the expert advisory panel. Gerber v. Juneau Bartlett Mem. Hosp., 2 P.3d 74 (Alaska 2000).

Expert testimony not required. — Where the claims did not raise strict medical malpractice issues requiring expert testimony, whether the hospital exercised reasonable care in supervising the patient represented a factual question for the jury's resolution under an ordinary negligence framework, and it was error to require patient to present expert testimony regarding the hospital's alleged breach of its duty of care. D.P. v. Wrangell Gen. Hosp., 5 P.3d 225 (Alaska 2000).

Report advisable. — A trial court should have waited for an expert panel report, even though this section does not require the completion of such a report in order for a malpractice trial to proceed, where the trial court's actions gave the parties a reasonable expectation that a panel would complete a report before trial, and where various motions regarding submissions were made by the parties, although the court never ruled on those motions and neither did it submit the case to the panel for review. Taylor v. Johnston, 985 P.2d 460 (Alaska 1999).

Waiver. — Where the plaintiff failed to object at the trial level to allowing the trial to proceed before the expert advisory panel completed its review, he waived that issue on appeal. Taylor v. Johnston, 985 P.2d 460 (Alaska 1999).

Applied in Kendall v. State, Div. of Cors., 692 P.2d 953 (Alaska 1984); Martinez v. Ha, 12 P.3d 1159 (Alaska 2000).

Quoted in Snyder v. Foote, 822 P.2d 1353 (Alaska 1991).

Stated in National Chiropractic Mut. Ins. Co. v. Doe, 23 F. Supp. 2d 1109 (D. Alaska 1998).

Cited in Korman v. Mallin, 858 P.2d 1145 (Alaska 1993).

Collateral references. — Validity and construction of state statutory provision relating to limitations on amount of recovery in medical malpractice claim and submission of such claim to pretrial panel, 80 ALR3d 583.

Disclosure of privileged proceedings of hospital medical review or doctor evaluation processes, 60 ALR4th 1273.

Sec. 09.55.540. Burden of proof. (a) In a malpractice action based on the negligence or wilful misconduct of a health care provider, the plaintiff has the burden of proving by a preponderance of the evidence

(1) the degree of knowledge or skill possessed or the degree of care ordinarily exercised under the circumstances, at the time of the act complained of, by health care providers in the field or specialty in which the defendant is practicing;

(2) that the defendant either lacked this degree of knowledge or skill or failed to exercise this degree of care; and

(3) that as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

(b) In malpractice actions there is no presumption of negligence on the part of the defendant. (§ 1 ch 49 SLA 1967; am § 34 ch 102 SLA 1976)

NOTES TO DECISIONS

Construction with other statutes. — This section describes what a plaintiff must establish in a medical malpractice action and is irrelevant to the issue of a standard for "professional incompetence" under AS 08.64.326. Halter v. State, 990 P.2d 1035 (Alaska 1999).

The language of this section is so clear and unambiguous that the supreme court is foreclosed from broadening the standard contained therein through judicial construction. Poulin v. Zartman, 542 P.2d 251 (Alaska 1975), unmodified on rehearing, 548 P.2d 1299 (Alaska 1976).

"Loss of chance" doctrine. — A "loss of chance" doctrine, which would permit plaintiffs to pursue claims even when the defendant's action was unlikely to cause injury as long as it reduced the chance of recovery, would contravene the section's unambiguous rejection of any presumption of negligence. Crosby v. United States, 48 F. Supp. 2d 924 (D. Alaska 1999).

Optometrists were not included in this section prior to 1976. Steele v. United States, 463 F. Supp. 321 (D. Alaska 1978).

Expert testimony. — In medical malpractice actions the jury ordinarily may find a breach of professional duty only on the basis of expert testimony; however, the primary limitation to this rule is that expert testimony is not needed in non-technical situations where negligence is evident to lay people. Trombley v. Starr-Wood Cardiac Group, 3 P.3d 916 (Alaska 2000).

Requirements of surgeon's report. — It is incumbent upon a surgeon to describe accurately and fully in his report of an operation everything of consequence that he did and which his trained eye observed during an operation. Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964).

To have maximum probative force, the report should be dictated immediately after the operation. Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964).

Informing patient of hazards of operation. — There is good law in support of the argument that a doctor need not inform the patient of all the hazards involved in an operation; that doctors frequently tailor the extent of their preoperative warnings to the particular patient to avoid the unnecessary anxiety and apprehension which such appraisal might arouse in the mind of the patient. Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964).

Absence of surgeon's personal recollection or of recorded facts no defense. — Under the circumstances of the instant case, the court would not permit the absence of a surgeon's personal recollection or of recorded facts to serve as a defense in an action for malpractice. Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964).

Expenses for rearing healthy child following pregnancy misdiagnosis. — Negligent failure to diagnose a pregnancy gives rise to a cause of action for medical malpractice and is compensable to the extent that damages are ordinarily allowable in malpractice cases, but no recovery may be awarded for expenses of rearing a healthy child born as a result of the misdiagnosis. M.A. v. United States, 951 P.2d 851 (Alaska 1998).

Prima facie case of negligence. — See Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964).

Failure of trial court to make finding of lack of informed consent was not clearly erroneous. Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964).

"Similar communities" instruction did not convey a standard of conduct more lenient than a national standard instruction. Priest v. Lindig, 583 P.2d 173 (Alaska 1978), remanded on other grounds, 591 P.2d 1299 (Alaska 1979).

Cited in Baker v. Werner, 654 P.2d 263 (Alaska 1982); D.P. v. Wrangell Gen. Hosp., 5 P.3d 225 (Alaska 2000).

Stated in Yako v. United States, 891 F.2d 738 (9th Cir. 1989); Korman v. Mallin, 858 P.2d 1145 (Alaska 1993).

Collateral references. — Qualification of medical expert witness, 33 Am. Jur. POF2d, pp. 179-210.

Proximate cause, 13 ALR2d 11.

Aggravation of injuries as mitigating damages in action against physician or surgeon for malpractice, 50 ALR2d 1055.

Necessity of expert evidence to support an action for malpractice against a physician or surgeon, 81 ALR2d 597.

Competency of physician or surgeon of school of practice other than that to which defendant belongs to testify in malpractice case, 85 ALR2d 1022.

Competency of general practitioner to testify as expert witness in action against specialist for medical malpractice, 31 ALR3d 1163.

Competence of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality, 37 ALR3d 420.

Necessity and sufficiency of showing of medical

witness' familiarity with particular medical or surgical technique involved in suit, 46 ALR3d 275.

Patient's failure to return, as directed, for examination or treatment as contributory negligence, 100 ALR3d 723.

Propriety, in medical malpractice case, of admitting testimony regarding physician's usual custom or habit in order to establish nonliability, 10 ALR4th 1243.

Standard of care owed to patient by medical specialist as determined by local "like community," state, national, or other standards, 18 ALR4th 603.

Manufacturer's package insert recommendations as evidence of standard of care, 82 ALR4th 166.

Sec. 09.55.546. Advance payments. In an action to recover damages under AS 09.55.530 — 09.55.560, no advance payment made by the defendant health care provider or the professional liability insurer of the defendant to or on behalf of the plaintiff is admissible as evidence or may be construed as an admission of liability for injuries or damages suffered by the plaintiff; however, a final award in favor of the plaintiff shall be reduced to the extent of any advance payment. The advance payment shall inure to the exclusive benefit of the defendant or the insurer making the payment. (§ 35 ch 102 SLA 1976)

Sec. 09.55.547. Pleading of damages. In a cause of action against a health care provider for malpractice, the complaint or any other pleadings may not contain an ad damnum clause or monetary amount claimed against the defendant health care provider, except as necessary for jurisdictional purposes. (§ 35 ch 102 SLA 1976)

Sec. 09.55.548. Awards, collateral source. (a) Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages by category of loss. The court may enter a judgment that future damages be paid in whole or in part by periodic payments rather than by a lump-sum payment; the judgment must include, if necessary, other provisions to assure that funds are available as periodic payments become due. Insurance from an authorized insurer as defined in AS 21.90.900 is sufficient assurance that funds will be available. Any part of the award that is paid on a periodic basis shall be adjusted annually according to changes in the consumer price index in the community where the claimant resides. In this subsection, "future damages" includes damages for future medical treatment, care or custody, loss of future earnings, or loss of bodily function of the claimant.

(b) Except when the collateral source is a federal program that by law must seek subrogation and except death benefits paid under life insurance, a claimant may only recover damages from the defendant that exceed amounts received by the claimant as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory. Evidence of collateral sources, other than a federal program that must by law seek subrogation and the death benefit paid under life insurance, is admissible after the fact finder has rendered an award. The court may take into account the value of claimant's rights to coverage exhausted or depleted by payment of these collateral benefits by adding back a reasonable estimate of their probable value, or by earmarking and holding for possible periodic payment under (a) of this section that amount of the award that would otherwise have been deducted, to see if the impairment of claimant's rights actually takes place in the future. (§ 35 ch 102 SLA 1976; am § 7 ch 30 SLA 1992)

Effect of amendments. — The 1992 amendment, effective May 16, 1992, in subsection (a), deleted "or from the Medical Indemnity Corporation of Alaska" preceding "is sufficient" in the fourth sentence and made a stylistic change in the fifth sentence.

NOTES TO DECISIONS

Constitutionality. — Subsection (b) is a reasonable legislative response to a perceived malpractice insurance crisis and does not violate substantive due process rights. Reid v. Williams, 964 P.2d 453 (Alaska 1998).

As the classification between negligent doctors and

other tort defendants in subsection (b) bears a fair and substantial relation to attainment of the legitimate government objective of lowering the cost of such actions, it does not violate equal protection rights. Reid v. Williams, 964 P.2d 453 (Alaska 1998).

Enhanced attorney's fees and actual costs. — It was not an abuse of discretion to deny prevailing medical malpractice plaintiff's motion for enhanced attorney's fees and actual costs. Reid v. Williams, 964 P.2d 453 (Alaska 1998).

Sec. 09.55.550. Jury instructions. In medical malpractice actions the jury shall be instructed that the plaintiff has the burden of proving the health care provider's negligence or wilful misconduct in accordance with the standard of proof specified in AS 09.55.540. The jury shall be further instructed that injury alone does not raise a presumption of the health care provider's negligence or misconduct. (§ 1 ch 49 SLA 1967; am § 36 ch 102 SLA 1976)

NOTES TO DECISIONS

This section specifically rules out any presumptions of negligence in malpractice cases. Poulin v. Zartman, 542 P.2d 251 (Alaska 1975), unmodified on rehearing, 548 P.2d 1299 (Alaska 1976).

Applied in Priest v. Lindig, 583 P.2d 173 (Alaska 1978).

Collateral references. — Propriety and effect of instruction or argument directing attention to injury to defendant's professional reputation or standing, 74 ALR2d 662.

Propriety and effect of instructions in civil case on the weight or reliability of medical expert testimony, 86 ALR2d 1038.

Sec. 09.55.554. Immunity for oral contracts. A cause of action against a health care provider does not arise for breach of an oral contract to provide a cure or achieve a specific medical result. (§ 37 ch 102 SLA 1976)

Revisor's notes. — In 1994, "A cause of action against a health care provider does not arise" was substituted for "No cause of action against a health care provider arises" to conform the section to the current style of the Alaska Statutes.

Cross references. — For other immunity provisions related to health care providers, see AS 09.65.090, 09.65.091 and 09.65.095.

Sec. 09.55.556. Informed consent. (a) A health care provider is liable for failure to obtain the informed consent of a patient if the claimant establishes by a preponderance of the evidence that the provider has failed to inform the patient of the common risks and reasonable alternatives to the proposed treatment or procedure, and that but for that failure the claimant would not have consented to the proposed treatment or procedure.

(b) It is a defense to any action for medical malpractice based upon an alleged failure to obtain informed consent that

(1) the risk not disclosed is too commonly known or is too remote to require disclosure;

(2) the patient stated to the health care provider that the patient would undergo the treatment or procedure regardless of the risk involved or that the patient did not want to be informed of the matters to which the patient would be entitled to be informed;

(3) under the circumstances consent by or on behalf of the patient was not possible; or

(4) the health care provider after considering all of the attendant facts and circumstances used reasonable discretion as to the manner and extent that the alternatives or risks were disclosed to the patient because the health care provider reasonably believed that a full disclosure would have a substantially adverse effect on the patient's condition. (§ 37 ch 102 SLA 1976)

NOTES TO DECISIONS

Physician must explain risk in lay terms. — Merely identifying a risk does not necessarily provide a patient with the information necessary for an informed decision. For a trial court to decide on summary judgment that doctor has disclosed sufficient information to allow a reasonable patient to make an informed decision about treatment, the record must establish that the physician explained to the patient

in lay terms the nature and severity of the risk and the likelihood of its occurrence. Korman v. Mallin, 858 P.2d 1145 (Alaska 1993).

Expert testimony as to disclosure standards not required. — The scope of disclosure required under subsection (a) must be measured by what a reasonable patient would need to know in order to make an informed and intelligent decision about the proposed treatment. Under the reasonable patient rule, a physician must disclose those risks which are "material" to a reasonable patient's decision concerning treatment. Under this view, expert testimony concerning the professional standard of disclosure is not a necessary element of the plaintiff's case because the scope of disclosure is measured from the standpoint of the patient. Korman v. Mallin, 858 P.2d 1145 (Alaska 1993).

Signed informed consent. — The requirements set forth in 7 AAC 12.120 (c) are not inconsistent with this section. The regulations, simply impose a supplemental requirement that the patient's medical record contain a "signed informed consent" before a surgical procedure may begin. Sweet v. Sisters of Providence, 895 P.2d 484 (Alaska 1995).

Validity of regulation. — The trial court in an evidentiary hearing did not adequately investigate the application of 7 AAC 12.120(c) which requires a signed informed consent before a surgical procedure because there was an insufficient factual basis from which to conclude that the regulation either was or was not obscure and whether or not it could be fairly interpreted to set the standard of care. Sweet v. Sisters of Providence, 895 P.2d 484 (Alaska 1995).

Hospital's duty to obtain consent. — This section did not impose a duty on a hospital to obtain a patient's consent before her physicians proposed and ordered blood transfusions. Ward v. Lutheran Hosps. & Homes Soc'y of Am., Inc., 963 P.2d 1031 (Alaska 1998).

Collateral references. — Modern status of views as to general measure of physician's duty to inform patient of risks of proposed treatment, 88 ALR3d 1008.

Duty of medical practitioner to warn patient of subsequently discovered danger from treatment previously given, 12 ALR4th 41.

Liability for failure of physician to inform patient of alternative modes of diagnosis or treatment, 38 ALR4th 900.

Medical practitioner's liability for treatment given child without parents' consent, 67 ALR4th 511.

Malpractice: physician's duty, under informed consent doctrine, to obtain patient's consent to treatment in pregnancy or childbirth cases, 89 ALR4th 799.

Sec. 09.55.560. Definitions. In AS 09.55.530 — 09.55.560,

(1) "health care provider" means an acupuncturist licensed under AS 08.06; an audiologist or speech-language pathologist licensed under AS 08.11; a chiropractor licensed under AS 08.20; a dental hygienist licensed under AS 08.32; a dentist licensed under AS 08.36; a nurse licensed under AS 08.68; a dispensing optician licensed under AS 08.71; a naturopath licensed under AS 08.45; an optometrist licensed under AS 08.72; a pharmacist licensed under AS 08.80; a physical therapist or occupational therapist licensed under AS 08.84; a physician or physician assistant licensed under AS 08.64; a podiatrist; a psychologist and a psychological associate licensed under AS 08.86; a hospital as defined in AS 18.20.130, including a governmentally owned or operated hospital; an employee of a health care provider acting within the course and scope of employment; an ambulatory surgical facility and other organizations whose primary purpose is the delivery of health care, including a health maintenance organization, individual practice association, integrated delivery system, preferred provider organization or arrangement, and a physical hospital organization;

(2) "board" means an arbitration board established under AS 09.55.535;

(3) "panel" means an expert advisory panel established under AS 09.55.536;

(4) "professional negligence" means a negligent act or omission by a health care provider in rendering professional services;

(5) "professional services" means service provided by a health care provider that is within the scope of services for which the health care provider is licensed and that is not prohibited under the health care provider's license or by a facility in which the health care provider practices. (§ 37 ch 102 SLA 1976; am § 24 ch 177 SLA 1978; am § 6 ch 56 SLA 1986; am § 9 ch 131 SLA 1986; § 26 ch 2 FSSLA 1987; am § 9 ch 6 SLA 1990; am § 1 ch 14 SLA 1991; am §§ 26, 27 ch 26 SLA 1997; am § 19 ch 42 SLA 2000; am § 1 ch 18 SLA 2002)

Sec. 09.10.055. Statute of repose of 10 years. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, or property damage unless commenced within 10 years of the earlier of the date of

(1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage; however, the limitation of this paragraph does not apply to a claim resulting from an intentional or reckless disregard of specific project design plans and specifications or building codes; in this paragraph, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or to use the improvement in the manner for which it was intended; or

(2) the last act alleged to have caused the personal injury, death, or property damage.

(b) This section does not apply if

(1) the personal injury, death, or property damage resulted from

(A) prolonged exposure to hazardous waste;

(B) an intentional act or gross negligence;

(C) fraud or misrepresentation;

(D) breach of an express warranty or guarantee;

(E) a defective product; in this subparagraph, "product" means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce; or

(F) breach of trust or fiduciary duty;

(2) the facts that would give notice of a potential cause of action are intentionally concealed;

(3) a shorter period of time for bringing the action is imposed under another provision of law;

(4) the provisions of this section are waived by contract; or

(5) the facts that would constitute accrual of a cause of action of a minor are not discoverable in the exercise of reasonable care by the minor's parent or guardian.

(c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body that has no therapeutic or diagnostic purpose or effect in the body of the injured person and the action is based on the presence of the foreign body. (§ 2 ch 61 SLA 1967; am § 3 ch 28 SLA 1994; am § 5 ch 26 SLA 1997)

Sec. 09.65.096. Civil liability of hospitals for certain physicians. (a) A hospital is not liable for civil damages as a result of an act or omission by an emergency room physician who is not an employee or actual agent of the hospital if the hospital provides notice that the emergency room physician is an independent contractor and the emergency room physician is insured as described under (c) of this section. The hospital is responsible for exercising reasonable care in granting privileges to practice in the hospital, for reviewing those privileges on a regular basis, and for taking appropriate steps to revoke or restrict privileges in appropriate circumstances. The hospital is not otherwise liable for the acts or omissions of an emergency room physician who is an independent contractor. The notice required by this subsection must (1) be posted conspicuously in all admitting areas of the hospital; (2) consist of a sign at least two feet high and two feet wide, with print at least two inches high; (3) be published at least annually in a newspaper of general circulation in the area; and (4) be in substantially the following form:

Notice to Hospital Users and
Notice of Limited Liability

(Name of hospital) may not be responsible for the actions of emergency room physicians in (name of hospital's emergency room). The following emergency room physicians are independent contractors and are not employees of the hospital: (List specific emergency room physicians)

(b) This section does not preclude liability for civil damages that are the proximate result of the hospital's negligence or intentional misconduct.

(c) A hospital is not immune from liability under (a) of this section for an act or omission of an emergency room physician who is an independent contractor unless the emergency room physician has liability insurance coverage in the amount of at least $500,000 for each incident and $1,500,000 for all incidents in a year, and the coverage is in effect and applicable to those health care services offered by the emergency room physician that the hospital is required to provide by law or by accreditation requirements.

(d) In this section,

(1) "emergency room physician" means a physician who does not have an ongoing physician-patient relationship with the emergency room patient and who provides emergency health care services in a hospital emergency room;

(2) "hospital" has the meaning given in AS 18.20.130 and includes a governmentally owned or operated hospital;

(3) "independent contractor" means an emergency room physician who is not an employee or actual agent of the hospital in connection with the rendition of the health care services. (§ 30 ch 26 SLA 1997)

Sec. 09.20.185. Expert witness qualification. (a) In an action based on professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard of care unless the witness is

(1) a professional who is licensed in this state or in another state or country;

(2) trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue; and

(3) certified by a board recognized by the state as having acknowledged expertise and training directly related to the particular field or matter at issue.

(b) The provisions of (a) of this section do not apply if the state has not recognized a board that has certified the witness in the particular field or matter at issue. (§ 15 ch 26 SLA 1997)

7 AAC 12.120. SURGICAL SERVICE. (a) A registered nurse with knowledge and experience in surgical techniques and procedures must have supervisory responsibility for the surgical suite and, in cooperation with the surgical committee of the medical staff, if the hospital has one, and the infection control committee, establish policies and procedures for the surgical service.

(b) A list of which surgical privileges are held by individual members of the medical staff must be available in the surgical suite for reference by the supervisor.

(c) Before a surgical procedure begins, either the surgeon or the person responsible for administering anesthesia, and the surgical supervisor or his designee shall confirm the patient's identity and the site and side of the body to be operated upon, and ascertain that the patient's medical record contains a complete history and physical examination for the current admission, appropriate current screening tests based on the needs of the patient, and signed informed consent for the surgery. In the case of an emergency, the history and physical examination requirements are waived.

(d) A daily register of operations must be maintained.

(e) Emergency equipment, including thoracotomy and tracheotomy sets and a defibrillator, must be available in the surgical suite area when surgery is being performed.

(f) As determined by medical staff under 7 AAC 12.110(c)(9), anatomical parts, tissues, and foreign objects which have been removed by operation, must be referred to a pathologist designated by the hospital. A report of the pathologist's findings must be filed in the patient's medical record.

(g) A registered nurse must be present to circulate for each surgical procedure.

(h) A rural primary care hospital or a critical access hospital must meet the standards set out in 7 AAC 12.130 if its governing body elects to offer surgical service. (Eff. 11/19/83, Register 88; am 5/4/97, Register 142; am 9/1/2000, Register 155)

Authority: AS 18.20.010 AS 18.20.060