

7 COMPARATIVE NEGLIGENCE

In voter initiatives and statutes dating back to 1986, Alaska adopted a "pure" comparative-negligence statutory scheme that was generally referred to as "tort reform."

Under a pure comparative-negligence system, the trier of fact allocates the "fault" for some transaction or accident, as between all the potentially liable parties to that transaction or accident. One effect of this system is that a plaintiff's damages are reduced, in proportion to the percentage of negligence attributed to the plaintiff by the finder of fact.¹

In order for the trier of fact to be able to "compare" the fault of the potentially liable parties to a transaction or accident, logically all the potentially liable parties need to be present at a single trial, so the trier of fact can evaluate the testimony and evidence that pertains to each party.

Alaska's comparative-fault statute, AS 09.17.080, also seems to contemplate a single trial and a single trier of fact. The statute requires "the" fact-finder to make specific findings of the percentage of the total (100%) fault that should be 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 could have been added as a party but was not.

Despite the logic behind "comparative" fault systems, and the language of the state's comparative-fault statute, the Alaska Supreme Court has refused to restrict Alaska claimants to a statutory system of comparative fault decided in a single trial. For example, the Alaska Supreme Court has ruled that the state's comparative-fault statutes do **not** mandate a single action or a single trial for each injury or accident.²

In 2006, the Alaska Supreme Court expressly held that a "common-law right of contribution" exists in this state, notwithstanding the tort reform initiatives and comparative-fault statutes that expressly abolished Alaska contribution claims twenty years earlier.³ The procedural results of re-introducing contribution claims in Alaska, at

¹ *Kaatz v. State of Alaska*, 540 P.2d 1037 (Alaska 1975); *Fancyboy v. Alaska Village Elec. Coop.*, 984 P.2d 1128, 1133 (Alaska 1999); AS 09.17.060 and 09.17.080. The Alaska Supreme Court has held that this statutory scheme is facially constitutional. See *Evans v. State*, 56 P.3d 1046 (Alaska 2002).

² See *Universal Motors, Inc. v. Neary*, 984 P.2d 515, 516 (Alaska 1999) (permitting a plaintiff whose tort action against one potential tortfeasor was previously adjudicated to bring a subsequent and separate tort action against another potential tortfeasor for the same accident and injuries).

³ *McLaughlin v. Hughes, Thorsness et al.*, 137 P.3d 267, 272 (Alaska 2006).

the same time that a statutory system of "comparative fault" remains in place, are unclear and will doubtless generate further Alaska Supreme Court decisions.

However, at least one important procedural change has been clearly announced in the 2006 *McLaughlin* decision: in Alaska, third-party cross-claims by an original defendant are apparently no longer mandatory, but may instead be brought in a separate and later action seeking "common-law contribution."⁴

A plaintiff's ordinary negligence will reduce his or her recovery in cases involving strict product liability.⁵ However, the Alaska Supreme Court has suggested that comparative negligence will not apply in medical malpractice cases.⁶

Without explicitly adopting the so-called "seatbelt defense," the Alaska Supreme Court has held that automobile accidents are foreseeable, and that most studies indicate that the use of a seatbelt is more advantageous than non-use. Consequently, the court has held that the failure to wear a seatbelt is relevant evidence for the purpose of apportioning damages. If, under the facts of the case, a reasonable person would have used a seatbelt and plaintiff suffered more severe injuries as a result of not wearing a seatbelt, the jury may consider this factor in assessing damages.⁷

Alaska's public policy bars a person who has been convicted of a crime from imposing liability on others for the consequences of that antisocial conduct. "[I]f the injured person has violated a statute designed to prevent a certain type of risk, he is barred from recovery for harm caused by violation of the statute if, but only if, the harm

⁴ For example, if an Alaska plaintiff named Mr. Smith sues Alaska Defendant Ms. Jones, and Defendant Jones knows about a potentially liable Mr. Green who was not sued by plaintiff Smith, then Defendant Jones is not required to assert her third-party claims against Mr. Green in the original lawsuit filed by plaintiff Smith. Instead, Defendant Jones can proceed to trial and obtain a verdict in the case as originally filed by the plaintiff. If, after receiving the verdict and resulting judgment, Defendant Jones thinks she has been required to pay an amount greater than her conduct should require, then Jones can still sue Mr. Green in a separate action seeking "common-law contribution." If that occurs, Mr. Green will be permitted to re-litigate the earlier jury's percentage allocations of fault. *McLaughlin, supra*, at 275.

⁵ See *Ingersoll-Rand Co.*, 14 P.3d 990 (Alaska 2000). For more information on product liability, see 13.

⁶ See *Johns Heating Service v. Lamb*, 46 P.3d 1024 (Alaska 2002). For more information on medical malpractice, see Tab 27.

⁷ See *Hutchins v. Schwartz*, 724 P.2d 1194, 1199 (Alaska 1986).

resulted from a risk of the type against which the statute was intended to give protection."⁸

In addition, AS 09.65.210(5) provides that a person who suffers injury or death may not recover damages for that injury or death if it occurred while the person was engaged in conduct constituting a violation of AS 28.35.030 (driving while intoxicated). Consequently, the statute bars a dramshop action against a liquor licensee which allegedly over-served a patron who was subsequently injured or killed when driving while intoxicated. In *Sowinski v. Walker*, the court held that a liquor licensee who sells alcohol to a minor was only responsible for the percentage of fault allocated to it by the jury and that it was improper for the trial court to shift the minors' assigned fault to the liquor licensee.⁹ This decision overturned the court's earlier decision in *Loeb v. Rasmussen*, 822 P.2d 914, 916 (Alaska 1991), in which the court had held that AS 04.21.020 was an "exceptional statute" designed to protect minors, such that fault allocated to a minor would be imposed upon the liquor licensee.

Appendices:

AS 09.17.080

AS 09.65.210

AS 28.35.030

⁸ See *Ardinger v. Hummell*, 982 P.2d 727, 735 (Alaska 1999) (quoting Restatement (Second) of Torts § 889 cmt. b 1979). For liability and apportionment of damages among multiple tortfeasors, see Tab 8.

⁹ 198 P.3d 1134, 1148 (Alaska 2008).

Sec. 09.17.080. 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 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. (§ 1 ch 139 SLA 1986; am §§ 15, 16 ch 14 SLA 1987; am 1987 Initiative Proposal No. 2, § 1; am §§ 11 — 13 ch 26 SLA 1997)

Sec. 09.65.210. Damages resulting from commission of a felony or while under the influence of alcohol or drugs. A person who suffers personal injury or death or the person's personal representative under AS 09.55.570 or 09.55.580 may not recover damages for the personal injury or death if the injury or death occurred while the person was

(1) engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the party defending against the claim proves by clear and convincing evidence that the felony substantially contributed to the personal injury or death;

(2) engaged in conduct that would constitute the commission of an unclassified felony, a class A felony, or a class B felony for which the person was not convicted and the party defending against the claim proves by clear and convincing evidence

(A) the felonious conduct; and

(B) that the felonious conduct substantially contributed to the personal injury or death;

(3) fleeing after the commission, by that person, of conduct that would constitute an unclassified felony, a class A felony, or a class B felony or being apprehended for conduct that would constitute an unclassified felony, a class A felony, or a class B felony if the party defending against the claim proves by clear and convincing evidence

(A) the felonious conduct; and

(B) that the conduct during the flight or apprehension substantially contributed to the injury or death;

(4) operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance in violation of AS 28.35.030, was convicted, including conviction based on a guilty plea or plea of nolo contendere, and the party defending against the claim proves by clear and convincing evidence that the conduct substantially contributed to the personal injury or death; or

(5) engaged in conduct that would constitute a violation of AS 28.35.030 for which the person was not convicted if the party defending against the claim proves by clear and convincing evidence

(A) the violation of AS 28.35.030; and

(B) that the conduct substantially contributed to the personal injury or death. (§ 1 ch 139 SLA 1986; am § 31 ch 26 SLA 1997)

Revisor's notes. — Formerly AS 09.17.030. Renumbered in 1994.

Cross references. — 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, rewrote this section.

Editor's notes. — Section 9, ch. 139, SLA 1986 provides that this section applies "to all causes of action accruing after June 11, 1986."

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."

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance. (a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance;

(2) when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.08 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of an alcoholic beverage, an intoxicating liquor, an inhalant, and a controlled substance.

(b) Except as provided under (n) of this section, driving while under the influence of an alcoholic beverage, inhalant, or controlled substance is a class A misdemeanor. Except as provided under (p) of this section, upon conviction,

(1) the court shall impose a minimum sentence of imprisonment of

(A) not less than 72 consecutive hours and a fine of not less than \$1,500 if the person has not been previously convicted;

(B) not less than 20 days and a fine of not less than \$3,000 if the person has been previously convicted once;

(C) not less than 60 days and a fine of not less than \$4,000 if the person has been previously convicted twice and is not subject to punishment under (n) of this section;

(D) not less than 120 days and a fine of not less than \$5,000 if the person has been previously convicted three times and is not subject to punishment under (n) of this section;

(E) not less than 240 days and a fine of not less than \$6,000 if the person has been previously convicted four times and is not subject to punishment under (n) of this section;

(F) not less than 360 days and a fine of not less than \$7,000 if the person has been previously convicted more than four times and is not subject to punishment under (n) of this section;

(2) the court may not

(A) suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment under (1) of this subsection;

(B) suspend imposition of sentence;

(3) the court shall revoke the person's driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.181, and may order that the motor vehicle, aircraft, or watercraft that was used in commission of the offense be forfeited under AS 28.35.036; and

(4) the court may order that the person, while incarcerated or as a condition of probation or parole, take a drug or combination of drugs intended to prevent the consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law.

(c) *[Repealed, § 34 ch 119 SLA 1990.]*

(d) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under this section shall supply the judge,

prosecutor, defendant, and an agency involved in the defendant's treatment with information and reports concerning the defendant's past and present assessment, treatment, and progress. Information compiled under this subsection is confidential and may only be used in connection with court proceedings involving the defendant's treatment, including use by a court in sentencing a person convicted under this section, or by an officer of the court in preparing a presentence report for the use of the court in sentencing a person convicted under this section.

(e) A person who is sentenced to imprisonment for 72 consecutive hours upon a first conviction under this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

- (1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and
- (2) the additional period of confinement did not exceed 12 hours.

(f) *[Repealed, § 34 ch 119 SLA 1990.]*

(g) Notwithstanding (b) of this section, if the court imposes probation under AS 12.55.102 the court may reduce the fine required to be imposed under (b) of this section by the cost of the ignition interlock device.

(h) The court shall order a person convicted under this section to satisfy the screening, evaluation, referral, and program requirements of an alcohol safety action program if such a program is available in the community where the person resides, or a private or public treatment facility approved by the division of alcoholism and drug abuse, of the Department of Health and Social Services, under AS 47.37 to make referrals for rehabilitative treatment or to provide rehabilitative treatment. If a person is convicted under (n) of this section, the court shall order the person to be evaluated as required by this subsection before the court imposes sentence for the offense.

(i) A program of inpatient treatment may be required by the authorized agency under (h) of this section only if authorized in the judgment, and may not exceed the maximum term of inpatient treatment specified in the judgment. A person who has been referred for inpatient treatment under this subsection may make a written request to the sentencing court asking the court to review the referral. The request for review shall be made within seven days of the agency's referral, and shall specifically set out the grounds upon which the request for review is based. The court may order a hearing on the request for review.

(j) If a person fails to satisfy the requirements of an authorized agency under (i) of this section, the court

(1) may impose any portion of a suspended sentence; however, if the person was convicted under (n) of this section, the court shall impose a part or all of the remaining portion of any suspended sentence;

(2) may punish the failure as contempt of the authority of the court under AS 09.50.010 or as a violation of a condition of probation; and

(3) shall order the revocation or suspension of the person's driver's license, privilege to drive, and privilege to obtain a driver's license until the requirements are satisfied.

(k) Imprisonment required under (b)(1)(A) of this section shall be served at a community residential center or, if a community residential center is not available, at another appropriate place determined by the commissioner of corrections. Imprisonment required under (b)(1)(B) — (F) of this section may be served at a community residential center or at a private residence if approved by the commissioner of corrections. Imprisonment served at a private residence must include electronic monitoring. The cost of imprisonment resulting from the sentence imposed under (b)(1) of this section shall be paid to the state by the person being sentenced provided, however, that the cost of imprisonment required to be paid under this subsection may not exceed \$2,000. Upon the person's conviction, the court shall include the costs of imprisonment as a part of the judgment of conviction. Except for reimbursement from a permanent fund dividend as

provided in this subsection, payment of the cost of imprisonment is not required if the court determines the person is indigent. For costs of imprisonment that are not paid by the person as required by this subsection, the state shall seek reimbursement from the person's permanent fund dividend as provided under AS 43.23.065. While at the community residential center or other appropriate place, a person sentenced under (b)(1)(A) of this section shall perform at least 24 hours of community service work. A person sentenced under (b)(1)(B) of this section shall perform at least 160 hours of community service work, as required by the director of the community residential center or other appropriate place, or as required by the commissioner of corrections if the sentence is being served at a private residence. In this subsection, "appropriate place" means a facility with 24-hour on-site staff supervision that is specifically adapted to provide a residence, and includes a correctional center, residential treatment facility, hospital, halfway house, group home, work farm, work camp, or other place that provides varying levels of restriction.

(l) The commissioner of corrections shall determine and prescribe by regulation a uniform average cost of imprisonment for the purpose of determining the cost of imprisonment required to be paid under (k) of this section by a convicted person.

(m) If the act for which a person is convicted under this section contributes to a motor vehicle accident, the court shall order the person to pay the reasonable cost of any emergency services that responded to the accident, if the convicted person or the convicted person's insurer has not already paid the cost of the emergency services. If payment is required under this subsection, the payment shall be made directly to the emergency service and shall be equal to the actual cost of responding to the accident or the previous year's annual average cost of responding to a motor vehicle accident, whichever is higher. In this subsection, "emergency service" includes a peace officer, fire department, ambulance service, emergency medical technician or emergency trauma technician.

(n) A person is guilty of a class C felony if the person is convicted under (a) of this section and has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense. For purposes of determining minimum sentences based on previous convictions, the provisions of (r)(4) of this section apply. Upon conviction, the court

(1) shall impose a fine of not less than \$10,000 and a minimum sentence of imprisonment of not less than

- (A) 120 days if the person has been previously convicted twice;
- (B) 240 days if the person has been previously convicted three times;
- (C) 360 days if the person has been previously convicted four or more times;

(2) may not

(A) suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration of the license under (o) of this section;

(4) may order that the person, while incarcerated or as a condition of probation or parole, take a drug or combination of drugs, intended to prevent the consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) shall order forfeiture under AS 28.35.036 of the vehicle, watercraft, or aircraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(6) shall order the department to revoke the registration for any vehicle registered by the department in the name of the person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle or is registered as a co-owner under a business name, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

(o) Upon request, the department shall review a driver's license revocation imposed under (n)(3) of this section and may restore the driver's license if

(1) the license has been revoked for a period of at least 10 years;

(2) the person has not been convicted of a criminal offense since the license was revoked; and

(3) the person provides proof of financial responsibility.

(p) If the court determines that the person has successfully completed a court-ordered treatment program, the court may suspend up to 75 percent of the mandatory minimum sentence required under (b)(1) of this section and up to 50 percent of the minimum fines required under (b)(1) of this section. This subsection does not apply to a person who has already participated in a court-ordered treatment program two or more times. In this subsection, "court-ordered treatment" means a treatment program for a person who consumes alcohol or drugs and that

(1) requires participation for at least 18 consecutive months;

(2) includes planning and treatment for alcohol or drug addiction;

(3) includes emphasis on personal responsibility;

(4) provides in-court recognition of progress and sanctions for relapses;

(5) requires payment of restitution to victims and completion of community work service;

(6) includes physician approved treatment of physical addiction and treatment of the psychological causes of addiction;

(7) includes a monitoring program and physical placement or housing; and

(8) requires adherence to conditions of probation.

(q) For purposes of this section, the director of the division within the department responsible for administration of this section or a person designated by the director may request and receive criminal justice information available under AS 12.62. In this subsection, "criminal justice information" has the meaning given in AS 12.62.900.

(r) In this section,

(1) "inhalant" has the meaning given to the phrase "hazardous volatile material or substance" in AS 47.37.270;

(2) "operate an aircraft" means to navigate, pilot, or taxi an aircraft in the airspace over this state, or upon the land or water inside this state;

(3) "operate a watercraft" means to navigate a vessel used or capable of being used as a means of transportation on water for recreational or commercial purposes on all waters, fresh or salt, inland or coastal, inside the territorial limits or under the jurisdiction of the state;

(4) "previously convicted" means having been convicted in this or another jurisdiction of any of the following offenses; however, convictions for any of these offenses, if arising out of a single transaction and a single arrest, are considered one previous conviction:

(A) operating a motor vehicle, aircraft, or watercraft in violation of this section or in violation of another law or ordinance with similar elements, except that the other law or ordinance may provide for a lower level of alcohol in the person's blood or breath than imposed under (a)(2) of this section;

(B) refusal to submit to a chemical test in violation of AS 28.35.032 or in violation of another law or ordinance with similar elements; or

(C) operating a commercial motor vehicle in violation of AS 28.33.030 or in violation of another law or ordinance with similar elements, except that the other law or ordinance may provide for a lower level of alcohol in the person's blood or breath than imposed under AS 28.33.030(a)(2). (§ 50-5-3 ACLA 1949; am § 1 ch 107 SLA 1955; am § 1 ch 121 SLA 1967; am § 45 ch 32 SLA 1971; am § 4 ch 74 SLA 1974; am §§ 2, 3 ch 152 SLA 1978; am § 28 ch 94 SLA 1980; am § 10 ch 129 SLA 1980; am § 21 ch 45 SLA 1982; am §§ 13 — 15 ch 117 SLA 1982; am §§ 13 — 15 ch 77 SLA 1983; am §§ 4, 5 ch 57 SLA 1989; am §§ 23, 24, 34 ch 119 SLA 1990; am §§ 6, 7 ch 188 SLA 1990; am §§ 22, 23 ch 3 SLA 1992; am § 8 ch 59 SLA 1993; am § 17 ch 55 SLA 1994; am §§ 3 — 7 ch 80 SLA 1995; am § 1 ch 87 SLA 1995; am §§ 5 — 7 ch 143 SLA 1996; am §§ 9 — 11 ch 63 SLA 2001; am §§ 27 — 33 ch 60 SLA 2002)