

## 15 ALASKA'S STATUTORY CAP ON NON-ECONOMIC DAMAGES

As part of a package of "tort reform" legislation adopted in 1997, Alaska repealed and re-enacted AS 09.17.010. AS 09.17.010 provides that, in actions seeking to recover damages for personal injury or wrongful death, damages for non-economic losses are limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other non-pecuniary damage. Non-economic damages for all claims arising out of a single injury or death may not exceed \$400,000 or the injured person's life expectancy multiplied by \$8,000, whichever is greater. However, for damages due to severe disfigurement or severe permanent physical impairment, the limit increases to \$1 million or the injured person's life expectancy multiplied by \$25,000, whichever is greater. The statute specifically notes that multiple injuries sustained by one person as a result of a single incident will be treated as a single injury.<sup>1</sup> Although one could argue that death should obviously be included in the definition of "severe permanent physical impairment," the language of the statute clearly suggests that the cap on non-economic damages for wrongful death is subject to the lower limit set forth in subsection (b) of the statute.

The Alaska Supreme Court considered the constitutionality of the reenacted AS 09.17.010 in *Evans v. State* and *C.J. v. State of Alaska*.<sup>2</sup> The *Evans* court held that the non-economic "damages caps do not deny substantive due process rights,"<sup>3</sup> and do not "violate the right of access to the courts."<sup>4</sup> In *C.J.*, the court upheld the cap on non-economic damages as applied to the facts in a specific case. In *C.J.*, the victim was sexually assaulted in three different ways within one criminal episode and her damages against the state were limited to \$400,000 for non-economic damages.<sup>5</sup> *C.J.* appealed the cap, arguing it violated equal protection to limit non-economic damages for a class like her who were severely injured in the tort and not limit the economic damages for those with damages less than \$400,000.<sup>6</sup> The court applied a minimum scrutiny review after determining the interests at stake were only economic.<sup>7</sup> The court recognized

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<sup>1</sup> AS 09.17.010(d).

<sup>2</sup> *Evans v. State*, 56 P.3d 1046 (Alaska 2002); *C.J. v. State of Alaska*, 151 P.3d 373 (Alaska 2006).

<sup>3</sup> *Evans*, 56 P.3d at 1055.

<sup>4</sup> *Id.* at 1056-57.

<sup>5</sup> *C.J.*, 151 P.3d at 377.

<sup>6</sup> *Id.* at 378.

<sup>7</sup> *Id.* at 380.

there will be severely injured persons who are under-compensated as a result of the legislation, but the statute is substantially related to its goal of lowering insurance rates.<sup>8</sup> Thus, the Alaska Supreme Court found the cap on non-economic damages constitutional, affirming the decision in *Evans*.

The *C.J.* decision also further clarified how the court will define a "single incident." In interpreting this language, the court cited favorably an Indiana case which found an economic cap should apply for each act of negligence of a doctor in a medical malpractice case.<sup>9</sup> Applying the same logic to the case before, the Alaska Supreme Court found the \$400,000 cap should apply to each sexual assault and not just one for the entire crime.<sup>10</sup> The court gave the example of a car accident that causes multiple injuries would fall under one cap.<sup>11</sup> Each act would have a \$400,000 cap when the alleged negligence results in multiple acts that cause distinct injuries.<sup>12</sup>

In *L.D.G., Inc. v. Brown*, the Supreme Court clarified that when more than one dependent is making a derivative claim, such as loss of consortium, "a single damages cap calculated under section (b) should be applied to the aggregate non-economic damages awarded."<sup>13</sup> In that case the decedent had two dependents and their total non-economic damages were reduced to a single limit under the statute. The Court also confirmed that in the case of a death, as stated in the statute, the lower calculation of \$400,000 or \$8,000 per year for life expectancy applies. The court did not adopt plaintiff's theory that the higher cap should apply because "an injury that leads to death is obviously the ultimate in 'severe permanent impairment.'"<sup>14</sup>

Unanswered issues remain, including:

- (1) Will the provision relating to "severe permanent physical impairment or severe disfigurement" be extended to cases of severe **mental or emotional** impairment?

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<sup>8</sup> *Id.* at 381.

<sup>9</sup> *Id.* citing *Medical Assurance of Indiana v. McCarty*, 808 N.E.2d 737, 743 (Ind. App. 2004).

<sup>10</sup> *Id.* at 384.

<sup>11</sup> *Id.* at 383.

<sup>12</sup> *Id.* at 383, fn. 51.

<sup>13</sup> 211 P.3d 1110, 1136 (Alaska 2009).

<sup>14</sup> *Id.* at 1135.

- (2) Will separate caps be applied to separate defendants in an action, or will the court impose a single cap?
- (3) Will the plaintiff be permitted to obtain a gross verdict (before reduction for comparative negligence) in excess of the applicable statutory cap, such that the ultimate judgment is still at or below the cap?

AS 09.65.320 precludes the victim of a motor vehicle accident from recovering non-economic damages if he was injured while operating a motor vehicle without insurance. The statute requires that victim be aware that he was not in compliance with mandatory insurance laws, and certain exceptions apply. For example, the prohibition against the recovery of non-economic losses does not apply if the person responsible for the accident:

- (1) was driving while under the influence of an alcoholic beverage, inhalant, or controlled substance;
- (2) acted intentionally, recklessly, or with gross negligence;
- (3) fled from the scene of the accident; or
- (4) was acting in furtherance of an offense or in immediate flight from an offense that constituted a felony at the time of the accident.

The statute applies to all civil actions accruing on or after October 24, 2004. Similar statutes have been upheld in other jurisdictions,<sup>15</sup> but to date we are unaware of any Alaska case law construing AS 09.65.320.

#### Appendices:

AS 09.17.010  
AS 09.17.040  
AS 09.17.900  
AS 09.65.320

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<sup>15</sup> E.g., *Lawson v. Hoke*, Oregon Supreme Court Slip Op. No. S-51044 (Ore. 2005).

**Sec. 09.17.010. Noneconomic damages.** (a) In an action to recover damages for personal injury or wrongful death, all damage claims for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

(b) Except as provided under (c) of this section, the damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed \$400,000 or the injured person's life expectancy in years multiplied by \$8,000, whichever is greater.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (b) of this section may not exceed \$1,000,000 or the person's life expectancy in years multiplied by \$25,000, whichever is greater, when the damages are awarded for severe permanent physical impairment or severe disfigurement.

(d) Multiple injuries sustained by one person as a result of a single incident shall be treated as a single injury for purposes of this section. (§ 1 ch 139 SLA 1986; am § 9 ch 26 SLA 1997)

**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 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

**Non-economic cap did not apply.** — Because permanently losing the normal use of a body system necessary for day-to-day life constitutes severe physical impairment, and the former section imposed a \$500,000 cap on non-economic damages unless the

victim has suffered "severe physical impairment," the superior court properly removed this issue from the jury's consideration. *State v. Johnson*, 2 P.3d 56 (Alaska 2000).

**Sec. 09.17.040. Award of damages; periodic payments.** (a) In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

- (1) past economic loss;
- (2) past noneconomic loss;
- (3) future economic loss;
- (4) future noneconomic loss; and
- (5) punitive damages.

(b) The fact finder shall reduce future economic damages to present value. In computing the portion of a lump-sum award that is attributable to future economic loss, the fact finder shall determine the present amount that, if invested at long-term future interest rates in the best and safest investments, will produce over the life expectancy of the injured party the amount necessary to compensate the injured party for

(1) the amount of wages the injured party could have been expected to earn during future years, taking into account future anticipated inflation and reasonably anticipated increases in the injured party's earnings; and

(2) the amount of money necessary during future years to provide for all additional economic losses related to the injury, taking into account future anticipated inflation.

(c) Subsection (b) of this section does not apply to future economic damages if the parties agree that the award of future damages may be computed under the rule adopted in the case of *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967).

(d) In an action to recover damages, the court shall, at the request of an injured party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment.

(e) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

(f) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will.

(g) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments required under (d) of this section, the court shall, in addition to the required periodic payments, order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees. (§ 1 ch 139 SLA 1986)

**Revisor's notes.** — In 1986, the number "665" was substituted for "655" to correct a manifest error in subsection (c). In 1988, a reference to "(d) of this section" was substituted for "(c) of this section" to correct a manifest error in subsection (g).

**Cross references.** — For effect of this section on Alaska Rules of Civil Procedure 49 and 58, see §§ 5 and 7, respectively, ch. 139, SLA 1986, in the Temporary and Special Acts.

#### NOTES TO DECISIONS

**Legislative intent.** — Although the plain language of subsection (b) does not specifically designate

the categories of damages that must be reduced to present value, the legislative intent appears to have

been that the trier of fact should so reduce all future economic damages. *Sherbahn v. Kerkove*, 987 P.2d 195 (Alaska 1999).

**No Reduction where damages to be used immediately.** — Since courts are obliged to avoid construing a statute in a way that leads to a glaringly absurd result, and since the purpose of reducing future damages is to avoid overcompensating a plaintiff for future loss, where the plaintiff would be using the entire award for medical treatment almost immediately, that award should not be reduced to present value. *Sherbahn v. Kerkove*, 987 P.2d 195 (Alaska 1999).

**Prejudgment interest not awarded as to future damages.** — Prejudgment interest should be awarded only as to past damages; it should not be awarded as to any future damages, discounted or nondiscounted, except as to future damages which

were discounted to a date earlier than the date of trial. *McConkey v. Hart*, 930 P.2d 402 (Alaska 1996).

**Future damages in wrongful death cases.** — The clear legislative purpose of subsection (b) is to require the reduction of present value of future economic damages in wrongful death cases in the absence of an agreement of the parties to do otherwise. *Beck v. State, DOT & Pub. Facilities*, 837 P.2d 105 (Alaska 1992).

**Future medical costs.** — There was no error in calculating future medical costs by taking into account projected inflation, since the use of that method did no more than recognize the same realities as the statute which provides that "future anticipated inflation" should be taken into account before applying a market discount rate. *Stone v. Fluid Air Components*, 990 P.2d 621 (Alaska 1999).

*Sec. 09.17.050. [Renumbered as AS 09.65.170.]*

**Sec. 09.17.900. Definition.** In this chapter, "fault" includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. (§ 1 ch 139 SLA 1986; am § 14 ch 26 SLA 1997)

**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, in the first sentence, inserted ", or intentional" and made minor stylistic changes.

**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

**Defendant guilty of both negligent and intentional conduct.** — Where special verdict form showed that jury found defendant guilty of both intentional and negligent conduct, and that the compensatory damage award was based only upon the negligent conduct, it was not error to reduce this portion of the award by a percentage based on plaintiff's own negligence, and to award interest and attorney fees against defendant based on this reduced amount. *Cummings v. Sea Lion Corp.*, 924 P.2d 1011 (Alaska 1996).

**Negligence in dog bite case.** — Under Alaska law, any parental negligence where a child sustained a dog bite would not bar the parents' claim but would only diminish proportionately the amount they are entitled to receive in damages. *Sinclair v. Okata*, 874 F. Supp. 1051 (D. Alaska 1994).

Quoted in *Borg-Warner Corp. v. Avco Corp.*, 850 P.2d 628 (Alaska 1993).

Cited in *Bell Helicopter Textron, Inc. v. United States*, 755 F. Supp. 269 (D. Alaska 1990).

**Sec. 09.65.320. Nonrecovery for damages for noneconomic losses resulting from operating a motor vehicle while uninsured.** (a) Except as provided in (b) of this section, in an action to recover damages for personal injury or wrongful death, 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 noneconomic losses if the injury or death occurred while the person was operating a motor vehicle and the person knew that the person was not in compliance with the motor vehicle liability insurance provisions of AS 28.22.011 or, if applicable, the motor vehicle liability insurance provisions of AS 28.20. In this subsection, "damages for noneconomic losses" means the compensation claimed for the losses identified in AS 09.17.010(a).

(b) The prohibition against the recovery of noneconomic losses in (a) of this section does not apply if the person who is liable for the personal injury or wrongful death

(1) was driving while under the influence of an alcoholic beverage, inhalant, or controlled substance;

(2) acted intentionally, recklessly, or with gross negligence;

(3) fled from the scene of the accident; or

(4) was acting in furtherance of an offense or in immediate flight from an offense that constitutes a felony as defined in AS 11.81.900 at the time of the accident. (§ 1 ch 172 SLA 2004)

**Revisor's notes.** — Enacted as AS 09.65.300 and renumbered in 2004.

**Effective dates.** — Section 1, ch. 172, SLA 2004, which enacted this section, took effect October 24, 2004.

**Editor's notes.** — Section 6, ch. 172, SLA 2004, provides that this section applies "to a civil action that accrues on or after October 24, 2004."