

## 21 PRE-EXISTING INJURIES AND APPORTIONMENT OF DAMAGES

As a general rule in Alaska (and in other states), a defendant whose acts precipitate the development of a latent condition or aggravate a plaintiff's pre-existing condition is liable only for the amount of harm actually caused by the defendant's negligence.<sup>258</sup> However, it is often difficult to determine how much of plaintiff's injury is due to the pre-existing condition, and how much to the aggravation caused by the defendant's conduct.

In Alaska, the plaintiff bears the burden of proof on the issue of the extent of the injury brought about by the accident. The plaintiff has the burden, whether or not the pre-existing condition was asymptomatic, as long as the injuries can be "roughly apportioned between the pre-existing condition and defendant's negligence." However, in those situations where the medical experts are unable to determine the extent of aggravation, the defendant may be required to bear all damages, because his or her conduct created the uncertainty as to apportionment of the injury.<sup>259</sup>

### Product Liability

In connection with a product liability case where there was an issue regarding the extent to which the failure of a seatbelt enhanced the injuries that otherwise would have been sustained by plaintiff, the Alaska Supreme Court noted that an apportionment of damages instruction did not affect the issue of allocation of fault.<sup>260</sup> A jury that holds a defendant liable for all of the plaintiff's damages under an apportionment instruction is still free to allocate fault to other wrongdoers. The court went on to hold that Alaska adopts the majority rule for policy reasons. The proven wrongdoer must bear the burden of limiting its liability by apportioning the injury between enhanced and non-enhanced injuries, since it would be unfair to require a plaintiff (who has already shown the defect to be a substantial factor in causing his or her injuries) to try another case based upon what **might** have happened, absent the product defect.

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<sup>258</sup> *Hester v. Pub. Employees' Retirement Bd.*, 817 P.2d 472, 475 (Alaska 1991) (citing *LaMoureaux v. Totem Ocean Trailer Exp.*, 632 P.2d 539, 544 [Alaska 1981]).

<sup>259</sup> *Tolan v. ERA Helicopters*, 699 P.2d 1265, 1272 (Alaska 1985) (citing *LaMoureaux*, 632 P.2d at 545 ("[A] decision to place the entire liability on the defendant is an extreme measure, and we do not believe that it should be done absent a showing of compelling injustice to the plaintiff.")).

<sup>260</sup> *General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Alaska 1998).

## Workers' Compensation

In the workers' compensation context, the fact that one injury would be independently sufficient to cause the disability does not mean that the work-related injury is not also a cause of the continuing disability. For an employee to establish an aggravation claim under the workers' compensation law, the employment need only have been a substantial factor in bringing about the disability.<sup>261</sup> In fact, if the last employment was a substantial factor in bringing about the disability, the last employer is responsible for the entire disability, regardless of whether prior employment was also a substantial factor.<sup>262</sup> In other words, a compensable workers' compensation claim arises when a work-related injury aggravates a pre-existing condition.<sup>263</sup>

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<sup>261</sup> *DeYonge v. Nana/Marriot*, 1 P.3d 90, 96 (Alaska 2000).

<sup>262</sup> *Wells v. Swalling Constr. Co.*, 944 P.2d 34, 37 (Alaska 1997); see also *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 233-34 (Alaska 1997) (citing *Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1159 [Alaska 1993]).

<sup>263</sup> *Phillip Weidner & Assoc., v. Hibdon*, 989 P.2d 727 (Alaska 1999); see also Tab 27 Workers' Compensation.