IN THE TRIAL COURTS FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs

JOSEPH HAZELWOOD,

Defendant.

No. 3AN 89-7217; 3AN 89-7218

TRIAL BY JURY
MARCH 16, 1990
PAGES 7696 THROUGH 7777

VOLUME 41-A

TRIAL BY JURY
MARCH 19, 1990
PAGES 7778 THROUGH 7849

VOLUME 41-B

Original

H & M Court Reporting
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BEFORE THE HONORABLE KARL JOHNSTONE
Superior Court Judge

Anchorage, Alaska
March 16, 1990
8:47 a.m.

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EXHIBIT INDEX

EXHIBIT	DESCRIPTION	PAGE
AF	Master's License, Captain Knowlton	7704
117	Cassette tape inbound	7712

PROCEEDINGS

MARCH 16, 1990

(Tape: C-3680)

(0860)

(On record - 8:47 a.m.)

(Jury Not Present)

THE CLERK: Superior Court for the State of Alaska, Third District with the Honorable Karl Johnstone presiding, is now in session.

THE COURT: You may be seated. Counsel, I've got copies of some instructions here. I'd like to -- why don't you come on up and get them? So we'll be talking about the same things, I've copied the defendant's proposed jury instructions and the state's proposed jury instructions and I've numbered them so, we'll have a reference point to discuss from. And I took the originals as you filed them, and I numbered the originals as you filed them and then I made copies of the original package after being numbered so that is part of the official record, what you have right now, by number. So when you refer to a number, you'll be referring to a number that's in the official record.

MR. MADSON: Okay.

MR. ADAMS: Your Honor, I'd like to file another jury instruction. I'm giving Mr. Madson a copy

with three supplemental memoranda.

THE COURT: If you'll just give me a moment to reread your response here. Would you log these in? These have not been filed. These are the originals?

MR. ADAMS: Those are the originals.

THE COURT: File the originals downstairs, Mr. Adams, and bring copies up. Here you are. Will you log these in?

Pat, the originals are being maintained downstairs. I'll have to use the originals -- do you have a copy of the originals?

MR. ADAMS: Yeah, I have another copy, Your Honor.

THE COURT: Okay. Pat, will you make sure they get downstairs?

THE CLERK: Yes.

THE COURT: Thank you. (Pause) All right, let's take care of the pending motion which is a motion to reconsider. Do you wish to be heard any further on it, Mr. Madson?

MR. MADSON: I don't believe so and certainly, not at any great length, Your Honor. I think what I outlined there in the written motion pretty well sets it out. And I think, first of all, I think it was error to allow a late witness to testify as to a matter

of law, but secondly, as I explained in the memorandum that I discovered afterwards that Coast Guard policy doesn't even permit it. And at the very least, I think the jury should be entitled to have the regulations as some kind of a guide to them to allow them to consider the opinion as to -- whether or not it was made to show some kind of bias motive or anything on the part of the Coast Guard. That's essentially it.

MR. ADAMS: Your Honor, I reviewed the tape of Lieutenant Commander Falkenstein and he never mentioned the word, bridge, from what I could hear. He just said and I quote, "being under the direction and control means that the individual directing the vessel's movement through the water, the individual who has the con must have the pilotage endorsement." The word, bridge, is not there and whether "having the con" means the person's on the bridge is a whole 'nother story and that would be an opinion. I think the other witnesses have testified to that fact. Con means control. I mean he just said the person having direction has the con which is just what the statute says. And he expressed no opinion.

MR. MADSON: Well, Your Honor, I don't know how in the world from all the other testimony that's been heard here, one can say you've got the con and

you're not on the bridge. You know, that's obviously what he meant. The con was the person who was actually up there on the bridge, not somewhere else.

THE COURT: All right. Your application is denied, Mr. Madson. The witness did not decline to answer the question. He answered the question. Frankly, had he declined, I would have ordered him to answer it anyway and the statute would permit me to do that.

Are there any motions now that the defendant or the state wishes to make?

MR. MADSON: Yeah, there's a couple evidentiary matters we could probably clear up.

THE COURT: Okay.

MR. MADSON: One thing is the -- I don't have the number of the exhibit. It's not been moved into evidence. It was Captain Knowlton's license. We discussed it and I don't have the exhibit list in front of me but it was -- he was the master of the ARCO Juneau and Captain Beevers testified about the course he took and he also testified from the license that Captain Knowlton had a pilotage endorsement that only extended up to Busby Island. It did not go to the pilot station.

THE COURT: Was it a defense exhibit?

MR. MADSON: I believe it was, Your Honor.

MR. ADAMS: We can find it, Your Honor, if we can open the cabinet.

THE COURT: Okay. I don't remember the number and it would be of some help if you could dig it up.

MR. MADSON: Right. It was exhibit A-F. Would you like to see?

THE COURT: You're offering it at this time?

MR. MADSON: I would, Your Honor, because there was testimony about it and because it was examined by Captain Beevers and I think it comes in -- it would certainly come in under 803.23 which is the catch all hearsay exception where it has the indicia of reliability and truthfulness. Certainly, his license is required by law; it is required by law to be kept on the vessel. There's absolutely no showing, I think, or any serious argument can be made that it was not authentic, that it wasn't Captain Knowlton's license and that it did not contain the proper endorsement, so I think with that indicia of reliability, it should be admitted, even though it is technically -- it's not a business record offering as such.

THE COURT: Is there going to be an objection to that exhibit?

MR. COLE: No.

THE COURT: Okay, without objection, it's admitted.

EXHIBIT AF ADMITTED

MR. MADSON: The other thing we were talking about, Your Honor, and we know what the Court said as far as the jury is concerned yesterday but we were discussing this and it seems that it would be appropriate to sequester the jury for deliberations. We're coming up on the anniversary of the oil spill and I think it's highly likely that there's going to be demonstrations and they may be in front of the court house with people know what's going on. The press is, of course, going to pick this up.

It's little by little gaining momentum right now and I think it's going to be virtually impossible to insulate the jury from outside influences and I don't know what effect, if any, this would have but it certainly raises the fear of a potential mistrial if the jury was exposed to let's say demonstrations outside the court house or other activity that would perhaps interfere with their ability to be fair and totally impartial in this case.

And it just seems that in the interest of trying to be completely -- avoid the chance of a mistrial that

the additional inconvenience of the jury probably isn't really going to be that significant.

And secondly, I think, it would enhance the jury's ability to come to a verdict if they are sequestered, because then they're going to be put in a place where, I think, they're going to be working harder than knowing they can go home any time they want to. It's been a long trial.

THE COURT: You mean they'll reach a verdict so they can go home is what you're suggesting?

MR. MADSON: So we can all go home. But we're really more concerned about the -- I think if it wasn't coming up on -- in another week, we're looking at anniversary date here and I just know as sure as I'm standing here there's going to be all kinds of new activity coming up.

THE COURT: Is there some reason why you waited until this late date to ask it? Is there some change of circumstances have occurred or is it just in general?

MR. MADSON: No, we're not aware of any change in circumstance, Your Honor. We never requested the jury to be sequestered for all these eight weeks. I think that would have been -- that was just too much. But we started looking at jury deliberations and the

fact that all of a sudden, it's dawning on us that good grief, here we are coming up on the 23rd here shortly and just start thinking about it, we thought well, there should be may be a difference between sequestering for the whole period of the trial and then just for a much shorter period of time for just jury deliberations as such 'cause they were talking just a few days at the most, hopefully.

THE COURT: All right. The rule covers this. Rule 27 in the Alaska Criminal Rule says that "a request for overnight sequestration shall be made by the parties before the jury is sworn unless good cause is shown for a later request" and you haven't made any showing of good cause here except as a general cautionary feeling on your part. I'm going to deny your request at this time.

Anything else we can take up as far as applications now?

MR. MADSON: I don't think there's anything else pending -- wait a minute, there is too. There is one other thing and that's exhibit 117. That's the inbound tape.

THE COURT: Yes, sir.

MR. MADSON: I think, Your Honor, it's already been ruled to a certain extent but we reviewed

the transcript of the testimony and of the conference that we had with regard to the objection and it may not have been picked up on the record. We had a conference right up there at the bench and I wanted to make sure that the record reflects that the tape was objected to on the grounds of relevancy plus the other additional items that we mentioned such as the purpose for which it was offered, you know, is to just to compare the voices and now that we've had testimony which is uncontroverted that it's not really a true and accurate reproduction of the original. I still am not entirely sure what the state is going to use it for but if it's just to compare the way he sounds -- Captain Hazelwood sounds on that tape versus the other tape, I think this would probably be in the nature of a motion to reconsider.

The Court was kind of hesitant about admitting it to the jury, but then I think you said the witness should be required to testify to the jury to show whether or not we had any reason to believe it wasn't a true and accurate reproduction and we did that. The state has not countered that so I think at this point we've made a sufficient showing that it is not a reliable reproduction as far as comparing the nature of the way a person speaks, not the words, just how fast

or how slow.

So, I would ask the Court to reconsider and then, even if it is admitted and does go to the jury, there's some other voices on there which are pure hearsay. There's another person talking; this three-hour report, don't know who that is. The Coast Guard person is on there....

THE COURT: Are the words being offered for the truth of the matter contained in them?

MR. MADSON: I don't know why they're offered...

THE COURT: The other persons?

MR. MADSON: ...Your Honor, you'll have to ask the state.

THE COURT: Mr. Cole?

MR. COLE: Your Honor, I think it all goes to the issue of -- goes to weight and not admissibility. That has been our position from the beginning. As to -- well, our position is that it goes to the weight and not to the admissibility.

THE COURT: He's objected to the other voices, Mr. Cole. Do you want to address the entire objection? Other voices are on the tape apparently, not just Captain Hazelwood's. As I understand your offer, you're trying to show Captain Hazelwood's voice at the

time coming in contrasted with the time when he reported the spill and thereafter in order to prove that he was under the influence at the time of the spill. Is that a correct summary of your...

MR. COLE: Yes.

THE COURT: ...reasoning?

MR. COLE: And it also is being offered to show that they declared themselves a pilotage vessel on the three-hour inbound tape.

MR. MADSON: On that point, Your Honor, it is not, in our opinion, Captain Hazelwood's voice that's saying that they're a pilotage vessel. It's some other person whose voice has never been identified. So that's pure hearsay. It certainly is offered for the truth of the matter asserted.

MR. COLE: It's offered to show why the watch stander or the VTS person did what he did which is write that down on an exhibit.

THE COURT: How long is the tape? When I turn it on and listen to it, how long will it take me to listen to it?

MR. COLE: About a minute.

THE COURT: The entire tape?

MR. COLE: It's about a minute.

MR. MADSON: It's not very long.

MS. HENRY: Yes, Your Honor, Mr. Le Cain says one thing; Mr. Shepherd says something in response and then Captain Hazelwood says something. It's about four sentences.

THE COURT: Let's hear it.

(1515)

(Exhibit 117 played)

THE COURT: Any further argument?

MR. MADSON: Well, I think it's important to note, Your Honor, that this conversation is not recorded as it really happened. In other words....

THE COURT: Just a minute. Mr. Cole, what are you doing?

MR. COLE: I was going to hand you this because it shows you. That's...

THE COURT: This is the outbound. This is what he filled out?

MR. COLE: Yes, on the inbound.

THE COURT: Okay, you can take this back. I understand that.

MR. COLE: Okay.

THE COURT: That's the inbound and outbound, isn't it?

MR. COLE: Inbound and outbound.

MR. MADSON: In other words, Your Honor, this

recording was not made in like Mr. Siedlick testified in real time. You take a portion here; you take a portion here some hours later and you put them together on one tape. And that's what happened here. In other words, what was necessarily said at the three-hour reporting time was not necessarily at the same speed or pitch as what happened later when you hear what's been referred to as Captain Hazelwood's voice. That's where he said the difficulties were of this tape. So we have a composite of different times and places -- and places too, because the ship was obviously moving along.

I may have missed it also, but I don't think Mr. Le Cain identified his voice. Ms. Henry said that's who it was but I don't recall Mr. Le Cain being shown or listening to this tape and said, yeah, that's me saying this. So we have a pure hearsay statement offered for the truth of the matter asserted which is did the vessel have pilotage by an unknown person.

And all of this is hearsay so if it's admissible at all, it should have only Captain Hazelwood's voice and nothing else on it.

THE COURT: The objection is overruled. I find that it's a duplicate under Evidence Rule 1001, that the original is either lost or destroyed under Evidence Rule 1004 and there is not a genuine question raised as

to the authenticity of the original and there is no circumstance in which it would be unfair to admit the duplicate in lieu of the original in this case. Your argument goes to the weight to be given this document. The witness testified that it accurately reflected what he heard from the original when he played it back. Of course, you can argue the weight to be given this document. 117 is admitted without the provision at this time.

EXHIBIT 117 ADMITTED

What else can we take up now from the defendant's point of view?

MR. MADSON: Well, Your Honor, the Court ruled under 101, but I assume then that the hearsay objection then is also overruled?

THE COURT: That's correct. It's overruled. 1001, yes.

MR. MADSON: I can't think of anything else at the moment. I pondered this this morning and I think the time would probably be better spent on the instructions -- the only thing I can think of, Your Honor, might be somewhat useful is to maybe go over some instructions that we don't have any disagreement about and we could at least clear that up and might save some time later on. In other words, the boiler

plate type stuff.

THE COURT: Okay, what I am doing is preparing a Court's set of instructions which will put them in the chronology that they would normally be given and I haven't completed them yet. There's a few handwritten instructions and until I get them completed which will probably take another hour or two, I don't think it would do any good to go with that package. And they're in the order which I would be giving them. I'm going to go back to the office and massage them some more and then give you each a copy of the best I've got in about an hour and a half, two hours.

And then we can start talking in terms of the Court's instructions and you'll see that they overlap, both state and defense instructions quite a bit. And we'll be talking in at least some meaningful fashion.

I anticipated there would be post-trial motions that would normally be made. And I take it there are no post trial motions at this time?

MR. MADSON: (Negative nod)

THE COURT: Okay. You're shaking your head negative.

MR. MADSON: That's right.

THE COURT: Okay. Are there any applications by the state?

MR. COLE: No, we have none. No, we have none, Your Honor.

THE COURT: Okay. I received the supplemental memorandum regarding impossibility and the definition of operating a watercraft. Once again, I want to reiterate and I expected this and it doesn't -- there's nothing new on here and I take it you could find no cases that would be contrary to your position or in support of your position, Mr. Adams, that creating a risk must be a real risk and not a potential risk?

MR. ADAMS: No, Your Honor, we found no authority.

THE COURT: Okay. Do you want to be heard further on your requested instruction on impossibility? I've told you what the Court's inclination is. It's not in granite, but it's getting harder and harder in view of absence of any authority to the contrary.

MR. ADAMS: Well, Your Honor, it would be our position that because it was impossible for the vessel to be refloated under its own power that doesn't create a risk consistent with refloating that vessel. However, it was a risk that the actions of trying to remove the vessel created. And that would be to bend the longitudinals more which Professor Vorus testified to, that he observed damage down in San Diego that was

consistent with a grinding motion of longitudinals which decreased strength of the vessel, increasing the risk that it would knuckle as the tide went down.

As it turned out, the vessel simply crushed and created a cathedral effect at bulkhead 23. However, the actions of grinding it for over an hour increased the risk and so, we should be allowed to argue to that effect. That is something totally separate from a risk of refloating the vessel.

THE COURT: What was the risk that was created by doing this?

MR. ADAMS: Your Honor, the risk that was created was as the vessel was ground into the rocks, it decreased the strength at bulkhead 23 and causing a greater risk of the vessel as the tide came down would knuckle. That's, I believe. what it's called. And instead of crushing the vessel which is what happened, the vessel breaks in half and releases even more oil.

THE COURT: So, the risk is -- the actions created risk to the vessel?

MR. ADAMS: That's correct. The star...

THE COURT: That would be the property of another, you're referring to?

MR. ADAMS: No. And then, okay, at bulkhead 23, the starboard tank and the center cargo tank were

ruptured. The port tank was not ruptured. If that vessel had knuckled as opposed to crushed, the port tanks would have ruptured, releasing a tremendous amount more of oil. Instead of having a vessel that released 250,000 barrels, we would have had a vessel that released 400 or 500,000 barrels of oil. And that would have increased the damage.

That was a risk that was created by grinding that vessel into the rocks. Those longitudinals run the length of the vessel. They're I-beams and their strength is developed -- and I mean their strength is created solely by their -- or 99% by their longitudinal, their straightness. As soon as those I-beams are twisted, they lose a tremendous amount of strength.

The amount of damage at bulkhead 23 was substantial. And Professor Vorus testified that he saw damage that was consistent with the twisting of those longitudinals which was different than running into straight into a reef. There's no reason that those longitudinals would be as twisted as they were because they would have just been crushed up. They looked like rocks had been ground into them.

The testimony is that the vessel was impaled on rocks. There's a picture of a rock that's almost the

size of a Volkswagen jammed up in there.

And as that vessel twisted back and forth, and back and forth, it decreased the strength, increasing the risk that the vessel would knuckle as the tide fell.

THE COURT: Do you have citations to the record that supports your assertion of these facts? My recollection is a little different than yours and I'm wondering what evidence you're drawing on here to support that this was all done by Captain Hazelwood, that there was longitudinals that were going to be damaged by Captain Hazelwood doing this and that there would be extra millions of gallons of oil spilled. I don't remember any testimony along those lines and I'd like to hear you specifically recite the record that you're talking about.

(2107)

MR. ADAMS: When Professor Vorus testified, he was asked "did you see any evidence down in San Diego that was consistent with twisting the vessel?" He testified that he saw scratch marks that were perpendicular to an axis -- to a radial from the point of rotation -- perpendicular lines...

THE COURT: I recall that part of the testimony.

MR. ADAMS: He also testified that he saw evidence in the longitudinals that were evidence that the longitudinals were damaged consistent with twisting. He also testified, if I'm not mistaken, that that increased -- or decreased the strength of the vessel, increasing the risk of more damage as the tide went down, creating more of a risk.

And we're talking about a risk here. And it would be a reasonable inference that if holing tanks -- hole in the nine or ten tanks that were holed caused this amount of damage, that holing the rest of the tanks or however many tanks would have been damaged if it would have knuckled is consistent with more damage. And we don't have to prove damage, just the risk of damage.

THE COURT: I understand that, Mr. Adams. Okay.

MR. COLE: Judge, we have one other point there that Mr. Adams hasn't talked about. And that's the argument that I told you about when we talked about this the other time. Captain Hazelwood's actions of moving this vessel back and forth created also a risk of holing the port side tanks. By moving the vessel back and forth the way he did created a risk of that. It created a risk that he would hit one of the port

side tanks and cause it to be punctured and Professor Vorus testified about that and so did Mr. Milwee. I believe there's a reasonable inference based on this activity because you heard testimony that he was swinging it around a hundred feet at the bow and it had to be almost twice that much in the aft section. In other words, it was a distance of over a hundred feet. And we believe that, you know, with the fact that there are rocks in the area that could puncture that...

THE COURT: Are there rocks -- was there evidence that there were rocks in the area that he could have punctured?

MR. COLE: I think so.

THE COURT: You can...

MR. COLE: You have to look at the fathom marks.

THE COURT: Maybe you could point to the record for me to show where the rocks were that he could have punctured. First of all, was there any testimony that there were soundings made of rocks in the area that he could have hit?

MR. COLE: There's testimony of soundings made all around the ship.

THE COURT: Okay.

MR. COLE: And their expert himself said that

if he had turned -- if he had just turned it one way, he would have gone around in a circle.

(2258)

THE COURT: David, would you get those two cases for me, please? The two cases you were researching I gave you from the bench yesterday?

(Pause)

MR. COLE: Well, I can't tell what that one is but that looks like a 6 to me, Your Honor. That marker right there. It's difficult to see but there is a fathom mark.

THE COURT: You're showing me exhibit -- what numbers?

MR. COLE: A-K.

THE COURT: Okay. Is there any other evidence you wish to call the Court's attention to that would establish that there was a real risk involved?

MR. COLE: No.

MR. MADSON: Your Honor, I think the Court is really keyed into it. What the state is talking about here is a theoretical risk and not a real -- and more particularly what the statute requires is a substantial risk. Their argument is totally -- left that word out as if it didn't exist. Well, it's a very substantial part of the statute if I can use that phrase because

that's what it really means. You can risk a lot of things, but unless it's -- other than just in theory, a possibility, it has to be not only just a potential one but it has to exist and it has to be for whatever substantial means. Whether it's 50% or more than 50% or whatever, but it has to be a real risk as the Court has already pointed out.

You know, we can sit here all day and look at a fathom chart and say, well if the vessel could have moved this far, this could have happened. Or if -- a lot of things could have happened, but I think the testimony was clear by part of everybody that there was no damage at all that was attributable to any twisting action on the part of Captain Hazelwood. There was crushing damage from tides; there was damage that may have been caused by the tugs moving it back and forth; damage that was caused afterwards.

There was absolutely no testimony to show that specifically this could have happened as a result of Captain Hazelwood's minimal actions with the rudder and power. In fact, most of the witnesses agreed that the amount of power -- in fact, they all did. They all agreed the amount of power used was insuffi -- just so insignificant that it couldn't really move the vessel forward one inch and sideways very little. So, in

fact, it couldn't move at all. It was virtually impossible.

THE COURT: Were you about to say something?

MR. ADAMS: Well, Your Honor, there's one other issue as far as the use of the evidence of refloating and that's to establish that he was impaired. You've tentatively ruled that we could argue that to the jury, that that was evidence of his impairment irregardless of whether it was impossible. And in the case of Comeau versus State, I cited in my supplemental memo there, refers to that impairment and recklessness are pretty much synonymous when the state proves that a person is actually driving a motor vehicle while he's impaired. And we would request that we be able to argue that not only is it evidence of his level of impairment, it's also evidence of his state of mind, that he was acting recklessly and negligently.

(2561)

THE COURT: All right. Well, I've given it a lot of thought and we can't find much more on the subject than counsel has been able to give us, but what I can find leads me to believe that criminal mischief requires an actual risk and not a speculative risk and in determining whether the crime of criminal mischief

in the second degree is committed, an objective assessment of the degree of risk presented by the alleged reckless conduct has to be made.

Reckless, endangerment, criminal mischief is defined in terms of the risks produced by defendant's conduct and not intent and factual impossibility eliminates the risk essential to the commission of the crime. Based on the evidence, reasonable minds can't differ. In my opinion, it was factually impossible for there to be any additional oil loss or be any additional damage to property of another as the term is being used in this case.

And on November 17, 1989, in response to the Court's order, the state stated that the phrase, "property of another" as used for the purpose of the indictment includes the fisheries, wildlife, vegetation, shoreline and other aspects of Prince William Sound. It does not include the Exxon Valdez itself. So, the very de minimus testimony that there may have been additional damage to the Exxon Valdez itself does not constitute creating a risk of damage to property of another as the term is used in the indictment.

There is no evidence in the record that would support an argument that additional oil was lost or

could have been lost by the defendant's alleged maneuvering on Bligh Reef. There is no evidence in the record to support an argument that any additional damage to property of another could have occurred as a result of his actions. It being factually impossible for that to have occurred, based on the record the Court has before it.

There was a substantial amount of evidence admitted on the question. In my way of thinking, evidence of what the defendant did in trying to move the vessel off could be considered and state could argue that is evidence of his impairment, based on the record before the Court. So what he did and the knowledge that other people say that he should have had or that a captain should have that not knowing what the circumstances were could result in additional damage or loss is evidence of impairment.

We'll leave it up to the jury to determine what weight to give that evidence. So the evidence came in for that purpose. It's come in so much and so often however, this Court, I believe, needs to give an instruction to limit the jury's consideration to that charge.

So, it's the Court's intention to give an instruction that will provide the jury information that

they're to consider the actions by Captain Hazelwood in running the engines and making any maneuvers if they find any were made as evidence of count -- and I forget the count of the information...

UNIDENTIFIED: One.

THE COURT: Count one of the information and not as evidence of count one of the indictment, counts two and three of the information. I don't know exactly how I'm going to word that, but I'll get it together and we'll discuss the wording of it but the jury will be so instructed and limited -- their consideration of that evidence will be limited to the DWI only.

Next issue, I think, we need to discuss is the issue of operating a watercraft. There's been a second supplemental memorandum regarding the definition of operating a watercraft. I'm aware of the statutory definition; I'm aware of the case law that's been cited. I've already come to the conclusion earlier that captain on the bridge issuing helm orders navigating or anybody who was using the vessel in that fashion is operating a watercraft as the term is used.

However, I thought it was the state's intention to show that after the engines were turned off finally at crossing 1:41 that the captain could still be found guilty for operating a watercraft, for using a vessel -

- that is used for transportation or capable of being used for transportation. Is that the state's intention to go on that theory?

MR. ADAMS: If we could just have a minute, Your Honor.

(Pause)

MR. ADAMS: Your Honor, the state is only going to argue that the operation continued until 1:41 a.m.

THE COURT: Until the engines were finally turned off?

MR. ADAMS: That's correct.

THE COURT: Okay, and I take it the defendant's position is that he cannot be found guilty of operating a watercraft after it went aground?

MR. MADSON: That's absolutely correct, Your Honor. And the Rickendahler case, I think, supports that. That's Rickendahler versus Dimond Drilling Company 19 F.2nd 124. It's cited in the state's -- a case the state attached in their motion. It's cited in there but I think it's important to note that in the state's definition and now, they're trying to define watercraft, the cases that they've cited all have to do with such things as workmen's compensation and matters like this where there's a very, very liberal

construction given to what is a watercraft in order for injured seamen to recover.

And I think that's pointed out in all the cases but the Rickendahler case in deciding that very issue said that a vessel which is not on navigable waters, that is not on the water, and is incapable of being used at that time, it had holes in the hull. In fact, it was not completed yet; it was still being built, was not in fact a vessel under the terms that can be used by means of as capable of being used as a means of transportation.

So our argument is when the Exxon Valdez is on a reef and impossible to move it, by its own power. In other words, it took a lot of time and a lot of effort to get it off of there, it's certainly is incapable of being used as a means of transportation at that point. Whether the engine is able to run or not, it simply can't transport anything from Point A to Point B. It couldn't go one inch and so I think under the definition, you have both things. It wasn't on water at the time. It was, in fact, on land. It was impaled. And secondly, because of the holes in the hull, just like in Rickendahler, it was incapable of being used as a means of transportation, so whether the engines were running -- an engine ran or not is not the

question because the engine could be used for a number of things. And as the Court has heard, there was testimony that was used to maneuver the vessel ever so slightly. It could just turn a little bit but it certainly couldn't be used under the terms as defined in the statute.

Now, the difference and where we're having difficulty here is because, I think, there's no definition by the legislature on operation of a motor vehicle and we had a lot of cases that show under state law that a motor vehicle, a car or a bus or a truck, you don't need those qualities of movement. In other words, you can be stuck in the snow, in the mud or have a lot of problems with a car but it still has to be at least number one, operable, that it has to be -- you have to operate something on it. Now, in that context, I suppose it could be said that the Exxon Valdez was operable because the engine worked, but that's all.

THE COURT: The rudder worked also.

MR. MADSON: Pardon me?

THE COURT: The rudder worked.

MR. MADSON: The rudder and the engine worked. So, in that sense, you can say it's operable but then the other part is -- and here's the basic distinction is that under motor vehicle definition, there isn't any

so the Court had to interpret one and say it doesn't matter. But here, for whatever reason, the legislature did this and I certainly can't say one reason or the other, but they did say -- they apparently took the standard definition of a watercraft and put that in the statute, to operate a watercraft. And it's a broad definition but it still requires some movement, some way of transporting something.

Now, it could be a barge with no engine at all. That could be a watercraft, probably under that definition, a means of transportation. I don't know. We don't have to reach that issue, but that's one of the things that comes up quite often and in fact, the case that the state cited in support of their theory was just that. It was a vessel that didn't have an engine, but it was capable of being moved from one place to another.

Now for under maritime law, for purposes of recovery under workmen's compensation acts, it was a vessel. Under our law if it didn't have an engine, I don't know. It apparently would not be a watercraft because -- or maybe it is. I don't know. Maybe sail boats come under that. I don't know. An engine, I don't think, is the criteria. I think the basic criteria is what it says there, is capable of being

used as a means of transportation and I don't think there's any argument that after the Exxon Valdez crunched into that rock and stayed there, there was no way to transport anything.

MR. ADAMS: Nothing further, Your Honor.

THE COURT: I'm going to look at this a little more before I make a final decision but I'm looking at it from the point of view of the defendant's theory of the case and the state's theory of the case. The defendant's theory of the case is that Captain Hazelwood was maneuvering this vessel to keep it on the rocks. He was using the rudder and the engine control to keep it on the rocks; he was intentionally -- your theory is that he was intentionally swinging the bow around to keep it on the rocks, doing what was necessary. And I think under that theory that it might be considered that he was using that motor -- that watercraft for either transporting people to keep 'em on the rocks or to navigate to keep it on the rocks. Now, I'm not sure about that, but that's my inclination so far.

MR. MADSON: Well, I just point out once again, Your Honor, I think the Court is zeroing in on only part of that definition and I'd just encourage the Court to kind of look again at capable of being used a

means of transportation and look at the transporting aspect of it.

THE COURT: Well, as I said, it's not final. I was just giving you a little idea which way I'm heading so far. And if I do go that direction, I might be giving an instruction to the state something to the effect that the Exxon Valdez after the engines were turned off at approximately 1:41 and the Exxon Valdez was hard aground, the Exxon Valdez was no longer capable of being used for navigation or transportation, something along those lines, so the jury can't consider anything past that.

(3314)

I'd like to go the instruction number 9 of the state's proposed instructions. I have -- that's the indictment in this case charges. The state's proposed number 9. I have changed that to eliminate all of it after -- this is on the indictment. All of it after dangerous means starting with the words, "to wit" down to the word, "oil." I've proposed to eliminate that language. Mr. Cole, do you wish to be heard on that or Mr. Adams?

MR. ADAMS: No.

MR. MADSON: I would agree with that, Your Honor, to just state the terms of the statute...

MR. COLE: No, that's fine.

THE COURT: Okay, state's instruction number 17, the middle paragraph, I propose to eliminate. Does the state wish to be heard on that?

MR. COLE: No.

MR. MADSON: I agree, Your Honor. It was on my list of things to bring up on the instructions. I think that instruction has been held to be impermissible.

THE COURT: Not yet, but it's close.

MR. MADSON: It's certainly been criticized, let's put it that way.

THE COURT: The word presumption was held impermissible, I know. Okay. State's instruction number 23, the definition of wildly dangerous means, has a sentence that's added to it. "An oil spill may be considered a widely dangerous means." The Court has ruled already that that's within the definition that the jury may consider an oil spill Is there an objection to that language?

MR. MADSON: Oh certainly, Your Honor. I think that's an issue that the jury is entitled to find. Widely dangerous means is one of the elements of the offense and by giving this instruction, the Court is virtually giving a directed verdict on that

element. I think it's something the jury can agree or disagree with.

MR. ADAMS: Well, Your Honor, if the law said an oil spill must be considered widely dangerous means, that would be a directed verdict -- well, a directed verdict on this particular issue. It doesn't state "must"; it says "may". And the Court has already ruled as a matter of law and there are a lot of times that sentences such as this are included where there's permissive language in there.

THE COURT: I rule there's -- I deny the application to dismiss; I didn't rule as a matter of law that the oil spill was widely dangerous means. I said it could be within the definition as given by widely dangerous means. Does that language track the statute exactly?

MR. ADAMS: Of widely dangerous means?

THE COURT: Except for the last sentence?

MR. ADAMS: Yes, I believe so, Your Honor. Except for the last sentence.

THE COURT: Let's see. What's the statutory definition number, Mr. Adams?

MR. ADAMS: Your Honor, I believe the definition of widely dangerous means comes at the very end of 11.46 4...

THE COURT: Okay, I see it now. Mr. Madson, do you intend on arguing that the oiled beaches and the oil that was spilled was not widely dangerous means?

MR. MADSON: I was going to argue that's something the jury certainly can consider in determining whether or not that element has been proven beyond a reasonable doubt by the state, Your Honor. The problem with that last sentence is whether or not it tells the jury directly. It certainly gives a strong inference that that's what the Court is saying and I think it simply is inappropriate to do that in the situation where there's different elements and this is one of them. I mean they have to prove it was by widely dangerous means.

And by telling the jury, well, the Court says you can consider this, that's true, but I think it just gives too much emphasis to this one particular element. I think they're all subject to jury interpretation and who's to say? It's up to the jury to decide that as well as any of the other elements, recklessness or anything else.

THE COURT: Well, something has to be done to prevent you from arguing that since the word, oil spill, is not contained in that statutory definition that therefore the state hasn't proved its case.

That's what I want to avoid having happen.

MR. MADSON: I was just simply -- I wasn't going to argue oil spill in those terms, Your Honor. I was just going to refer to the statute and say what is required for the state to prove and that element as well within those, you know, definitions, what evidence have they heard, whether or not it comes within this or not, beyond a reasonable doubt.

THE COURT: Okay, at this time I'm provisionally going to give the instruction as suggested by the state unless you can come up with some other instruction that will cover my concerns, Mr. Madson.

Okay, instruction number 24, state's instruction. Given the state's bill of particulars that the property of another does not include the Exxon Valdez itself and given that there's been evidence of damage to the vessel and given that there's been evidence that some ten millions approximately gallons of oil was lost which I assume the jury would infer had some value in excess of $100,000, I think we need to define this with some degree of specificity. Would counsel object to using the bill of particulars as set forth by Mr. Cole and add to it, "nor the cargo or the contents"? Would the defendant have any objection to that?

MR. MADSON: Well, maybe the Court can read that bill of particulars again, Your Honor. I'm not sure I remember it exactly.

(3931)

THE COURT: I would propose the instruction to read as follows: "Property of another means property in which a person has an interest which the defendant is not privileged to infringe, whether or not the defendant also has an interest in the property and whether or not the person from whom the property is obtained or withheld also obtained the property unlawfully. The phrase, 'property of another' as used for the purpose of the indictment includes fisheries, wildlife, vegetation, shoreline and other aspects of Prince William Sound. It does not include the Exxon Valdez or its cargo or its contents itself."

MR. MADSON: I think that's appropriate. I would not have any objection to that.

MR. COLE: We don't have any objection to that.

(4002)

THE COURT: Okay, state's instruction number 30. That doesn't seem to track the statute, counsel, but perhaps there was reason for you deviating from that. Is there a pattern instruction that this is

derived from or...

MR. ADAMS: Yes, Your Honor, this instruction came by way of jury instructions that come from DWI trials in district court that are used in the misdemeanor section of our office. What I did, I found this instruction in the DWI packet that we have and changed it to not refer to .05 by breath alcohol but by blood alcohol. That's the only changes I've made to it. If it's not what's tracked in the statute, then something is wrong in the district court because that's one they've been using as far as I know.

THE COURT: Did you look at the statute?

MR. ADAMS: Yes, I did.

THE COURT: The statute doesn't talk in terms of inferences; it talks in terms of presumptions, number one. 28.35.033 talks about presumptions and chemical analysis of breath and it doesn't deal with chemical analysis of blood. Now, would that make any difference in your proposal that we're talking about presumptions? Subsection 1 says if there was 0.05% or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of intoxicating liquor. And then it goes if there was an excess of 0.05% but less than 0.10% by weight of alcohol in a person's blood, that fact does

not give rise to any presumption the person was or was not under the influence of intoxicating liquor but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor. Now, you use the word inference rather than presumption and I'm wondering if it...

MR. ADAMS: Your Honor, the reason I use inference is that what I got out to the district court and what I'll do is -- I propose to take a closer look at this instruction and compare it to the statute and see if the district court has one that they use for blood alcohol as opposed to breath alcohol and I can....

THE COURT: Okay, you might look at what the Alaska pattern jury instructions are if there are any on this.

MR. ADAMS: There aren't any on DWI.

THE COURT: They're just on Title 11, are they?

MR. ADAMS: Right. What I did was I went and received a DWI packet from the district court. It did not have this instruction in it. I looked at files in our office where this instruction has been given. I found this instruction and then changed it to blood

alcohol. I'll go check with the district court and see if they have one for blood alcohol. But this is the one they use the word inference or infer for breath alcohol in the instruction I received, so I'll change it if I can find another one.

(Tape: 3682)

(0075)

THE COURT: That's not the only thing I'm finding difficult with this but I just wanted to find out if there was a pattern instruction.

Does it make any difference that the statute deals in terms of the amount of alcohol in the person's blood at the time alleged? Does that make any difference because this was a test taken approximately ten hours after the time alleged or about -- maybe not ten but maybe nine hours, eight and a half, nine hours after the time alleged that he was operating a watercraft while under the influence.

MR. ADAMS: Well, Your Honor, it would be our position that using retrograde extrapolation back to midnight, between midnight or whenever the pilot left the vessel, 11:30 or so until 1:41, that's the time alleged and using retrograde extrapolation, if the jury finds that retrograde extrapolation proves that Captain Hazelwood's blood was in excess of .1, it may be

inferred or however the language of the statute that he was intoxicated. That's a permissive presumption.

THE COURT: Are there any cases to support your theory that we can use retrograde extrapolation to apply this statute?

MR. ADAMS: No, I'm aware of none.

THE COURT: Do you know of any cases to the contrary that would suggest that we cannot apply retrograde extrapolation or evidence of a blood test taken hours afterwards to apply this statute?

MR. ADAMS: I'm aware of none.

MR. MADSON: Your Honor, I'm aware of one. What the state has done here is they say under Alaska law, well they eliminated one very important phrase here and that's the chemical analysis of the person's blood or breath. I don't think that's really the criteria we should consider, but right after that it says "by a test taken within four hours." And they just eliminated that from the law altogether like it's meaningless.

Williams versus state, unfortunately I don't have the cite...

THE COURT: What statute are you referring to?

MR. MADSON: The one that talks about -- I

don't have the number here because I'm just looking at instruction 30, but that's the theory of DWI by a breath test or blood test. The .10 theory, that's what they're talking about here. In other words, a person can be found guilty of DWI by being under the influence, number one, regardless of his blood alcohol content or breath content or number two, the .10 theory and that's what this refers to. And that statute -- I don't have it, it's 11.28...

THE COURT: Okay, it's 28.35.030 is the one about four hours and the one you're tracking your instruction from is 28.35.033.

MR. ADAMS: That's correct, Your Honor, and I don't think that .033 requires that it be within four hours. My reading of it didn't require it within four hours.

MR. MADSON: Well, I think Williams in the footnote there talks about this and says certainly a test taken outside the four-hour limit can be used to infer intoxication but not under that theory. There's no other purpose of having that test requirement there for blood alcohol. And certainly there's no law that says retrograde extrapolation can be used to go back under the .10 theory to show that.

There has to be a time -- a limiting time here

and that's what the legislature did. They put the four hours in to get around this and say if it's within four hours, the test is presumed to be valid and can be used to establish that at the time alleged his blood alcohol was at a certain level, but that's the only purpose of this. And it can be used to allege it in the sense that he was operating while impaired or while intoxicated but not to show that what his blood alcohol content really was because just look at it. The blood examination accurately established to be .10% or greater at the time. Well, we certainly heard plenty of testimony that -- even their own experts said you can't accurately do this. It's at best an extrapolation and based on a lot of assumptions.

I'd ask that the Court to maybe withhold any -- I'm sorry I didn't bring Williams with me, but I....

THE COURT: I'm going to. I'm going to hold off on it. It sounds like you're not geared -- you've not got the statute and you're not geared to argue that. (Pause) There was no instruction in the state's package that I could find that indicated the jury was under the obligation to consider each of the charges separately and I include one of those and it will be in your package.

Okay, since counsel has -- let me ask you this,

Mr. Madson. Are you prepared at this time to argue these instructions? There were several instructions that the state proposed with some citations. Would you like some time to get geared up for that?

MR. MADSON: Well, Your Honor, I was probably prepared to argue some but since the Court wanted something in writing, we were kind of gearing up to do that.

THE COURT: Okay. The ones I was referring to were the ones that was attached to the defendant's trial memorandum re jury instructions. Would you need some time to prepare for those?

MR. MADSON: The ones attached to what?

THE COURT: Trial memorandum re jury instructions.

MR. MADSON: Oh. Oh.

THE COURT: There were several instructions. I don't mind holding off on this and coming back on Monday. By then, I'll have this package in your hands. The Court's instructions.

MR. MADSON: I think -- just as a starting point, I could certainly say one thing, Your Honor, and that's with regard to the pilotage instructions that they've attached. I've read their case that they cited. I think it's Michael versus State and I don't

know if the Court has seen that one yet or not.

There seems to be a South Dakota case based on an earlier case which allowed the jury to hear rules of the road, so to speak, statutes involved how a motor vehicle should be operated and then the jury was told well, you can consider these and then -- consider them in the context of whether or not the defendant was acting recklessly if he violated these statutes. That seems to be -- from what I can find and I was researching this yesterday, is that these cases seem to stand alone. South Dakota seems to be pretty far removed from the trend here.

I know of no case in Alaska that I was ever involved with that in a manslaughter case where you're talking about a result, a death, where the jury is allowed to consider speeding violations or things -- separate statutory or regulatory violations of an operation of a motor vehicle to consider whether he's acting recklessly.

The term recklessly has been defined by our statute and it just kind of comes in in that context. However, more importantly, the problem I have with those instructions is that the state is trying to use the regulations from a totally different jurisdiction. That is the federal government and federal Coast Guard

regulations or statutes and impose them here to enforce a state law. It's a little bit off the track but I mean I do have a case that says the state simply can't do this. You can't enforce or try to enforce other jurisdiction's statutes by way of your own.

Now, the state of course is arguing -- would argue that they're not trying to do that. They're just trying to say if a violation of this federal statute or Coast Guard reg, you can consider that as far as recklessness is concerned. Well, I just object to that entire theory altogether. I just have never ever seen that done. It's so bizarre to me that I just think it's beyond argument, but even if that were the case, there's been so much controversy about this pilotage thing that I think it certainly could be argued to the jury at this point as to what it means and whether or not it's reckless or not but to take it in terms of an actual citing the statute or regulation and saying well, then, you know, you have to fined -- I guess you have to find that he is beyond a reasonable doubt, he violated that and then consider that as whether or not he, beyond a reasonable doubt, was guilty of recklessness. And the two just don't go hand in hand.

I mean these regulations were -- I mean the

penalty involved, for instance, of this pilotage thing is a $500 civil fine. That's the importance the government places on it. The federal government. The state wants to argue if you violate that, you're guilty of a sentence up to five years. And it just makes no sense.

THE COURT: Mr. Madson, state's instructions 39 through 45. Do I infer from your comments that you object to those instructions?

MR. MADSON: Yes.

THE COURT: Okay. Is there anything else you wish to add to your trial memorandum in support of the request for those jury instructions?

MR. ADAMS: 39 through 45, Your Honor?

THE COURT: That's correct.

MR. ADAMS: No, Your Honor. I'd like to respond to Mr. Madson's argument about the Coast Guard regulations, but that's separate.

(0498)

THE COURT: Okay, I will not be giving instructions 39 through 45. I find them to be a comment on the evidence. That would be akin to almost directing the verdict in some cases. Their argument, and I don't find Michaels versus State to be authority for those instructions nor Westinghouse or any of the

Captain of the Port orders or any treatises on point -- to be authority to give these instructions.

Let's start with state's instruction number 1, Mr. Madson.

MR. MADSON: One second, Your Honor. I'm going back to what the Court said is -- what about instruction 38 -- number 38?

THE COURT: We haven't got to that. I just asked you about 39 through 45. That's all I was concerned with at the time. We didn't discuss that one...

MR. MADSON: Oh, okay.

THE COURT: ...so there's been no ruling on that.

MR. MADSON: Okay.

THE COURT; Let's go back to number 1. Any objection to number 1?

MR. MADSON: No.

THE COURT: Number 2?

MR. MADSON: No.

THE COURT: Number 3?

MR. MADSON: No. There's a typo there obviously, but I mean the emphasis was is all one word. The second line.

THE COURT: I'm sure that we can get that

squared away. Number 4?

MR. MADSON: This appears to be the regular commonly used pattern instruction, Your Honor. I, you know, have no objection to that.

THE COURT: Okay. I think that's the one I gave at the beginning of the case and it is a pattern. Now, the order in which the state presented these instructions will not be the order in which the Court gives them by any means but the word unlawfully as proposed in instruction number 5 will be given by the Court in another place. Is there any objection to that one?

MR. MADSON: No.

THE COURT: Number 6?

MR. MADSON: No objection.

THE COURT: Number 7?

MR. MADSON: Probably, it should include information, Your Honor, just to make sure the covered...

THE COURT: The indictment and the information are the charging documents?

MR. MADSON: Right.

THE COURT: Is that agreeable to the state?

MR. ADAMS: Yes.

THE COURT: Number 9, we've gone through

that. Number 10?

MR. MADSON: No objection to that.

THE COURT: Number 11?

MR. MADSON; No objection.

THE COURT: Number 12?

MR. MADSON: No objection.

THE COURT: Number 13?

MR. MADSON: Yeah, I object to that one.

THE COURT: Your grounds?

MR. MADSON: That there was no evidence of an admission or confession, Your Honor. And I think it simply probably goes to a statement made by Captain Hazelwood which the state would argue was an admission but I think under the statutory definition or the definition here, it doesn't even come within this, to say that the inference -- inference of guilt or intend to prove guilt because it wasn't given in the context of the total situation.

In other words, the only evidence of an admission would be the statements by Captain Hazelwood to Mr. Myers, an Exxon official, and it just was totally out of context of the whole picture so I would object to it.

THE COURT: Argument is not necessary. All of Captain Hazelwood's statements, the recordings, the

statement by Fox, came in as an admission. Otherwise they wouldn't have come in because of hearsay. Number 13 will be given. Your objection is noted, however.

Number 14?

MR. MADSON: No objection.

THE COURT: Number 15?

MR. MADSON: No objection. I think that's required.

(0738)

THE COURT: Number 16?

MR. MADSON: Just seems to be -- I think this is a pattern jury instruction. I'm not sure but...

THE COURT: It's real close to it. They vary a little bit. The last paragraph varies in some cases, but this is one of the ones I did.

MR. MADSON: I guess the last sentence is the only thing that I was -- didn't ring a bell as I'd seen before, but the rest of it is certainly consistent with other jury instructions.

THE COURT: Okay. 17, we've amended.

MR. MADSON; Uh-huh (affirmative).

THE COURT: Number 18?

MR. MADSON: No objection.

THE COURT: Okay. Number 19?

MR. MADSON: Well, it's a definition of

negligently but I would object to it being used in this case. I think we need the definition of criminal negligence which this one is not. The state has eliminated substantial as far as a risk is concerned and it should be a gross deviation, not just a deviation.

THE COURT: The state filed a trial memorandum on this point. That's what you're referring to?

MR. MADSON: Yes.

THE COURT: Okay, Mr. Adams are you handling this argument?

MR. ADAMS: Yes.

THE COURT: Okay. I read your trial memorandum. You would concede that negligent driving would be an ordinary civil standard of negligence, would you not?

MR. ADAMS: Your Honor, I haven't thought that issue through. I'd like to refer to the statute and read it real closely to see what the legislature stated and what the case law is.

THE COURT: I'm just referring to Comeau citations by the state here, page 115, 758 P.2nd 108 at 115 and 116. "In context, the reason for inclusion of an actual endangerment requirement in the negligent

driving provision is obvious because the statutory definition of negligence incorporates the same standard of ordinary care used in cases of civil negligence. The added requirement of actual endangerment is necessary to protect against the possibility" and it goes on. I just assumed that they were referring to the same civil standard of negligence.

MR. ADAMS: I'm not familiar with that case, Your Honor. I mean I can...

THE COURT: Why then should we deviate from the statutory definition of criminal negligence for negligent discharge of oil?

MR. ADAMS: Well, Your Honor, in Reynolds, the case -- the Reynolds -- Court says "we conclude in the absence of legislative direction something greater than proof of simple negligence should be required for conviction for driving while license is suspended."

Here we had the legislature saying negligence. They don't say with criminal negligence. When the legislature -- not all the time, but in some cases, when they require criminal negligence, they say criminal negligence. Here they're not saying criminal negligence; they're saying negligence. And there's absolutely no reason to infer that when the legislature says negligence, they mean criminal negligence in these

circumstances.

THE COURT: Well, what did Gregory mean then that said "we conclude that in the absence of legislative direction, something greater than proof of simple negligence should be required for conviction for driving while driver's license is suspended."

MR. ADAMS: In that -- in the DWI statute, there is no specification for required mens rea and so they had to infer what the legislature wanted and because of the severe penalties, the ten-day mandatory minimum and the one year loss of license under the DWI -- driving while license suspended statute, the Court said simple negligence is not enough. We're going to have to infer criminal negligence and they gave the clear impression that if the Court had -- or if the legislature had said that the mens rea for DWLS was negligence as opposed to criminal negligence, that the Court would have absolutely no discretion to do anything other than uphold that statute.

I'm aware of no authority which says a person cannot be held criminally liable under a negligent standard, and in fact, La Fave in substantive criminal law specifically says that people can be held criminally liable for a negligent standard. It's rare. I mean, granted, it is rare. Usually under the common

law, they call it culpable negligence which is essentially recklessness standard, but they do recognize, under some circumstances, the person can be held criminally liable.

THE COURT: In Reynolds, was there anything in the definition of the commercial fishing violation he was charged with that had the term, negligent, in it?

MR. ADAMS: No, it was silent.

THE COURT: So, in that case, they said we determine that at least simple negligence has to be proved?

MR. ADAMS: Right. Exactly.

THE COURT: And was the issue in that case whether it should be criminally negligent or just negligent or was it....

MR. ADAMS: The issue whether they should be -- I think that case came before the revision of the criminal code, I believe, where we had a criminally negligent standard. So the issue there was whether it was negligence or recklessness.

THE COURT: That case came in 1982, after we had the criminal negligence?

MR. COLE: Judge, the case on point is State versus Septien and that's the one I wrote the brief

for. It specifically addresses that issue that was addressed in dicta in Reynolds.

THE COURT: I am referring to Mr. Adams' trial memorandum where he is arguing this very issue, whether we should use simple negligence or criminal negligence.

MR. ADAMS: Well, Your Honor, in light of the language, it says at legislative direction and we have legislative direction here. It says negligence and it doesn't seem reasonable to infer that when the legislature says negligence, they actually mean criminal negligence. This Court -- the rules of statutory construction require the Court to give -- or to accept the meaning of the statute unless it's ambiguous. There's nothing ambiguous about the word negligence.

THE COURT: Well, how about in Gregory? What does the DWLS statute say in terms of negligence?

MR. ADAMS: It's silent. See, that's why the Court had to infer. The various district courts around the state were either using the criminal negligence standard or a recklessness standard under the DWLS and in the Gregory case, they used a criminal negligence standard and defendant appealed, saying no, it's silent, you should make me -- the mens rea should be recklessness and the Court of Appeals said no, criminal

negligence is enough to convict this person, but they specifically said negligence is not enough because of severe penalties and they went on to say without legislative direction, negligence is not enough. So we infer criminal negligence. Here we have legislative direction so it must be negligence standard. And there is -- well...

THE COURT: Since the statute talks in terms of just the word negligence and not criminal negligence, you're saying that is legislative direction?

MR. ADAMS: That's correct, yes. And there are statutes which state that a person can be convicted with criminal negligence. I believe that -- I can't cite a statute right off the top of my head which contains the word, criminal negligence, but there are plenty of them in Title 11 which state the mens rea is criminal negligence. And the legislature could have said criminal negligence. Could have called it criminal negligent discharge of oil but they called it negligent discharge of oil.

MR. MADSON: Your Honor, on that point, it's unclear whether the legislature actually meant civil or criminal negligence, but I don't think we can just take that one word out of the context of the entire statute

we're dealing with here. If the Court looks at the criminal penalties involved, they also use the term "knowingly". That's a term that is certainly addressed by our criminal code in this definition. They say if it's knowingly done, -- oil is knowingly discharged, it is a Class A misdemeanor. If it is done negligently, it's a Class B.

It would seem to me the legislature was looking at the different mens rea requirements and it didn't -- it wouldn't make any sense to go from knowingly all the way down to civil negligence and still have a penalty that's up to six months in jail. I mean there's quite gap there between a knowingly requirement which is a pretty severe standard of proof that somebody knowingly discharged a quantity of oil and all the way down to a civil standard of just being negligent and yet the penalty involved is still a very great one. It's still up to six months as opposed to one year.

So in looking at it in context of what the legislature was attempting to do, it seems to me that they were inferring, if not using the word, they were trying to make it clear that criminal negligence must be the standard and I -- this is -- and I just learned yesterday that the -- and I was aware of the statute

that's being introduced down there; it's in committee right now in Juneau to up the penalties for negligent discharge of oil or negligent operation of a tanker. It's been modified now to try to create a law which didn't exist before as we've argued already. The legislature is now arguing with this, trying to come up with a law that covers this for the future. Negligent operation of a tanker. It was the government's position there -- the state's position that the negligent requirement and it just said negligent as far as the statute is concerned, required criminal negligence.

Now, I know that's in a different context but it's still in the same subject matter and the state seems to be, once again, taking the position elsewhere contrary to what they're saying here.

THE COURT: Okay, I don't have a lot of authority to go by on this but it seems that the Title 11 deals in terms of criminally negligent offenses. They use the term, criminally negligence and then there's a definition of criminal negligence. This is found in another title altogether and it deals in terms of negligence.

If the legislature had intended it to be criminal negligence, I think they would have used it.

They exhibited the ability to use it in Title 11 so why didn't they in the statute in question here. I think that is a -- the term negligent as used should be given a civil meaning and the courts have given civil meanings to the term negligent in a criminal context as set forth in Reynolds and I've discussed the difference between them in Gregory.

In Gregory, the law was silent on the term and the Court held that because of the severe minimum penalties for violation of the DWLS statute, the state had to prove more than simple negligence. In this case, there is direction and there are no severe minimum penalties that exist in the statute that I can see. So we're going to give instruction number 19 as it has been submitted.

(1280)

(Pause)

(1315)

THE COURT: Number 20? Mr. Madson, is there an objection to?

MR. MADSON: Yes, there is, Your Honor. The state is totally wrong on this one. What they've done is combine recklessness and negligence and say it applies equally. The term reckless should not be in there at all. This is a negligent standard. In other

words, to determine recklessness on the part of somebody, the state has to prove that he actually knew of and consciously disregarded the risk and that requires then that he -- that knowing his intelligence, his knowledge of the situation, his background, all his education, all these things that he knew of and disregarded, that's -- unfortunately I was proposing an instruction I was going to have in hopefully today and certainly Monday that covered the same thing as far as recklessness is concerned because there's a state decision on that. Unfortunately, I don't have it with me and I can't for the life of me remember the name of it, but it's one I've cited earlier in fact on this topic.

Secondly, if you're going to use this to determine negligence, it should judge his actions according to standard of care that a reasonably prudent person would employ, not necessarily tanker captain. That could be argued under the same or similar circumstances, but I don't think the term, tanker captain, is necessary. That's up to argument whether or not it was negligence or not in the same or similar circumstances. But certainly recklessness doesn't belong in there.

MR. ADAMS: Your Honor, in drafting this

instruction, I didn't mean to intend -- or didn't intend that this be used as a standard of conduct for what the definition of reckless or negligent is. All this is designed is to show what a reasonable person is. In these circumstances, a reasonable person would have -- is the reasonably prudent tanker captain. You can apply this instruction back to the previous two in determining what a reasonable person is.

An instruction like this has been used for ages as far as what a reasonable person is and what a reasonable doctor is is what a reasonable doctor is. What a reasonable driver is what a reasonable drier is and it wasn't designed to change the standard of care. It's just a definition of what a reasonable person is.

THE COURT: This might fit into a civil context but I don't believe it has any place in this case. Instruction number 20 as proposed by the state is, I believe, argumentative and an improper comment on the evidence. I will not be giving instruction number 20.

Anything with number 21, Mr. Madson?

MR. MADSON; No, Your Honor. No problem.

THE COURT: Number 22, Mr. Madson?

MR. MADSON; I'm just checking to insure they're all covered, Your Honor, but it looks like that

this tracks the statutory language. Yeah, I have no problem.

THE COURT: Number 25?

MR. MADSON: No problem. That's correct. Your Honor, could we take a short break? I've got to run across the hall for a minute.

THE COURT: We'll come back in about 10 or 15 minutes.

THE CLERK: Please rise. This Court stands in recess.

(Off record - 10:22 a.m.)

(On record - 10:45 a.m.)

(1467)

THE COURT: We'll go through a few more here and then, we'll call it a day and come back on Monday where I can give you a copy of the Court's proposed instructions. We're on state's number 26.

MR. MADSON: That's all right, Your Honor, I have no objection.

THE COURT: All right, now we're going to contrast number -- state's number 27 and defendant's number 4. First, where did you get number 27, Mr. Adams?

MR. ADAMS: That is out of the standard district court DWI packet. That's the one that...

THE COURT: Okay, that's verbatim?

MR. ADAMS: That's verbatim, yes.

THE COURT: Okay. Where did you get number 4?

MR. MADSON: Same place, Your Honor. This is the one that's given in every case in Fairbanks since I've been there for 20 years. It's standard operating procedure to give this instruction. I think it just does a better job than 27 does.

THE COURT: But does the state have any objection to number 4 -- defendant's number 4?

MR. COLE: I think they both say essentially the same thing.

THE COURT: Okay, I'll give instruction number 4 in place of number 27. State's number 31?

MR. MADSON: No objection, Your Honor. I'm sorry. I was day dreaming here a second.

THE COURT: State's 32?

MR. MADSON: The only question I had on that, that modifies the definition. I wasn't sure when that took effect and I wanted to check that out, but otherwise, I wouldn't have any objection if it was in effect at the time.

MR. ADAMS: Your Honor, the only thing that was taken out of this definition from the statutory is about the wrongful abortion.

MR. MADSON: Let me say it's okay for now, Your Honor, unless I find out for some reason that it simply wasn't in effect at the time of the Valdez incident. I have no reason to believe it wasn't; I just know it was modified by A. Before, the definition was just under B.

THE COURT: Okay, unless I hear differently from you, I'll leave the burden on you to...

MR. MADSON: That's fine.

THE COURT: ...let me know. It will be given. It looks to me, Mr. Madson, it's the same as it's been for several years. Number 33?

MR. MADSON; Okay, that's no problem.

THE COURT: Number 34? Other than the term, criminally negligent, any objection to it?

MR. MADSON: No, Your Honor. I wouldn't have any objection anyway. I think my concern would be that negligent would be defined elsewhere anyway.

THE COURT: All right. So, 34 is okay?

MR. MADSON: Yeah, it's okay.

THE COURT: 35?

MR. MADSON; That's all right.

THE COURT: 37?

MR. MADSON: That's all right. That's pattern instruction.

THE COURT: All right, some of the boiler plate instructions in the back, I've changed a little bit. I've put in a different order. There are a few that were not given that should be given by the Court. When I give you the package, I'll be asking your what specific instructions you object to in the package and if there are some of those in the back you have problems with, we can deal with them then. But for the most part, they're okay; they're just out of order and I've consolidated a couple and some of them are duplicitous so I've improved on them somewhat.

Let's do number 38. Mr. Adams, do you have any statutory or any case law to support such an instruction?

MR. ADAMS: Your Honor, I had this South Dakota case and the way I found that was I used West Law and put in some instructions about violation of a regulation as evidence of recklessness and I came up with that case and I reviewed it and it -- Mr. Madson described it accurately. It's a case where a person parked a motor vehicle on a road and just left it there and violated a number of rules of the road. At his trial for manslaughter, the jury was instructed regarding those violations of rules of the road and they were described. My instruction here was -- what I

proposed to do is draft instructions different than that upon further discussion between Ms. Henry and I. We decided that we would give an instruction of what the offense is. The bottle to throttle one is the one we're talking about in particular and the .04. And then there's the pilotage regulation. Those are evidence of -- can be used as evidence.

THE COURT: The Court did not take judicial notice of the 04, if you recall.

MR. ADAMS: Then if the Court is going to refuse to take judicial notice of the 04, then supposing you're not going to allow us to instruct the jury on that statute; however, the bottle to throttle, the four-hour Coast Guard regulation, the 33 CFR part 95, the jury has been informed of that and if they find that there is a violation, and that's a simple statute, a simple regulation.

If a person consumes alcohol within four hours of assuming duties on board the vessel, he's in violation of it and every single tanker captain that came in here testified that they're aware of that regulation. It's something that they...

THE COURT: So that's part of the evidence on recklessness is what you're asserting?

MR. ADAMS: That's correct, yes. We would

argue...

THE COURT: And that's in evidence already, isn't it?

MR. ADAMS: That's correct, yes.

THE COURT: Is there anything that would prevent you from arguing that without this instruction?

MR. ADAMS: No. However, I just based on that South Dakota case. It's a new case. They found no error in instructing the jury in that manner. We can argue that but based on that case, I proposed the jury instruction.

THE COURT: Okay, why don't you go ahead and propose the one Monday morning. Let me have it by no later than Monday morning. It would be helpful if I could get it by this afternoon, but I understand it may be difficult. I thought you were going to redraft an instruction?

MR. ADAMS: Yes, I am. But my question is may I redraft an instruction for the pilotage violation also, under 46 USC 8502 or are you limiting solely to the bottle to throttle regulation, because...

THE COURT: I said you could redraft an instruction; I didn't say I'd give it.

MR. ADAMS: Right. I understand that. I understand that. But are you contemplating both the

pilotage violation and the bottle to throttle or just solely the bottle to throttle?

THE COURT: Mr. Adams, those are your instructions. I'm not contemplating anything. We can argue that, but my inclination is whenever you start commenting on an item of evidence, you unfairly highlight that item and it may, in the eyes of the jury, take on greater meaning than it should and I consider that as evidence, the four-hour rule as evidence. That's been admitted and you're certainly entitled to argue that that goes to a person's recklessness if he's going to violate a regulation if the jury finds that he drank, that's a regulation. You can argue that maybe effectively. I don't know, but to highlight that one particular item of evidence in an instruction may give undue influence to it and that's what my concern is and I generally don't do that.

MR. ADAMS: I'll draft additional instructions, Your Honor.

THE COURT: Okay.

MR. ADAMS: And I'll look for additional authority.

(1960)

THE COURT: Okay. Now, is there going to be any objection to the Court giving lesser included

offenses to the DWI?

MR. ADAMS: Your Honor, our concern deals with the word, driving, and it's reckless driving and negligent driving and it's unclear whether that applies to a motor -- to a watercraft. I think that in the definition of operate under 2835.030, it's called operate a watercraft and operate is different than drive. Someone drives a car. A car has tires. Or someone drives a snow machine.

THE COURT: Does the definition of reckless driving or negligent driving contain the definition of motor vehicle or a watercraft?

MR. MADSON: Well, there's two ways you can approach this, Your Honor. I would say, yes, it does. That the...

THE COURT: What's the statute?

MR. MADSON: Well, I don't have it right in front of me. That's one of the problems. I don't have it right here, but in addition to that under Title 5, it certainly does. There, negligent and reckless operation of a watercraft is covered and it's a penalty and it's a criminal crime and it's addressed in there under operation while under the influence or while intoxicated. So there are really two statutes saying the same thing, but if there was any question of

whether or not you can recklessly or negligently operate a watercraft, the answer is in Title 5.

It says -- we've already went through this on the preemption thing, but the Court ruled that the state was not preempted from enforcing its state laws and regulations concerning commercial watercraft which this was. And under Title 5, then it says for recreational and any other purpose, it is illegal to operate either negligently or recklessly. And then the next one is while under the influence. So...

THE COURT: Let me ask Mr. Adams again. Is there any objection to...

MR. ADAMS: Well, Your Honor, this morning, I reviewed the negligent driving and reckless driving. I have an objection based on the word, driving. Driving has a meaning of driving a car, driving a snow machine, so...

THE COURT: You're suggesting it should be operating...

MR. ADAMS: Well, I mean I don't think...

THE COURT: ...a watercraft? The term, operate a watercraft while recklessly or negligently. Is that what you're saying?

MR. ADAMS: Right. If my memory serves me correctly, Title 5, the definition of watercraft

specifically says for recreational purposes. It does not say for other purposes. It says recreational purposes. It has the language used or capable of being used as a means of transportation for recreational purposes. Title 5 does not apply to a commercial vessel. Therefore, we are looking solely at Title 28.

THE COURT: Are you saying that there is no such crime as operating a commercial watercraft negligently or recklessly?

MR. ADAMS: I'm not aware -- unless the crime of reckless driving in Title 28 applies. Now, I have not looked real closely at Title 5 to see if that would apply but I'm just giving my memory the definition of watercraft. I'll go back and look at Title 5 to see if it does apply and if Mr. Madson is correct, then we're not going to have an argument because if there is a statute against reckless operating a watercraft in Title 5, then that applies. I'll take a look at it. As far as my position now is that drive means to drive a land vehicle, drive a snow machine or drive an air boat on land.

MR. MADSON: Air boat?

THE COURT: You would concede an air boat would be...

MR. ADAMS: Well, see that's -- Mr. Madson is familiar with that case where someone who was driving an air boat on land and he was convicted driving while intoxicated for driving his air boat. He tried to go from the Chena River up to a bar in his air boat...

MR. MADSON: Darn near made it too, I might add.

MR. ADAMS: ...and he was convicted of driving, because he was on the road, on his air boat. So this issue has been approached before.

(2143)

THE COURT: Okay. Well, why don't we leave it until Monday morning. (Pause) Looking at defendant's number 2. The defendant has already agreed on an elements instruction for operating a watercraft while intoxicated under number 26 of the state's instructions. I'm not sure I understand what number 2 is all about now.

MR. MADSON: It's not necessary any more, Your Honor.

THE COURT: Okay, number 2 is withdrawn then?

MR. MADSON: Uh-huh (affirmative).

THE COURT: Defendant's instruction number 16. Mr. Adams?

MR. ADAMS: No objection, Your Honor.

THE COURT: Okay. That's about all we can go over right now. What I'll do is I'll put together a package of the ones the Court is going to be proposing based on this hearing today and what the Court would expect might occur but I'll leave open room for argument on the ones we haven't discussed and we can meet back on Monday morning at say, 9 o'clock. How does -- is there anything else we can do now?

MR. MADSON: The only thing I can think of Your Honor is if we can -- if the Court wants to set some time limits on argument. That will be the next thing that comes up and give us some idea of what to shoot for in terms of preparation.

THE COURT: How much time do you need, Mr. Cole? Are you going to be breaking it up in any way or are you going to handle both sides of it?

MR. COLE: I'm going to handle both sides.

THE COURT: How much time do you think you need?

MR. COLE: Three and a half hours.

THE COURT: I'd like to do it in a day.

MR. COLE: Oh, yes. My part's going to be done in that.

THE COURT: Is that going to be enough for

you? Two or three hours?

MR. MADSON: Oh, well, we say two or three hours. If we say three hours each, I think we can do it in a day. If we start looking at three and a half hours or longer, then I don't know any jury that's going to sit there. I wouldn't wish that on anybody, to listen to two lawyers for eight hours.

THE COURT: How much time do you need?

MR. MADSON: I would say three hours would be the minimum and I would like to keep it at that.

THE COURT: That would be the maximum then too, right?

MR. MADSON: Maximum and minimum, yeah. It's going to take that long and if I'm exceeding that, then I'm probably going too far. Three hours would be my guess.

THE COURT: Well, if we get started at 8:30 which we won't. We probably won't get started until 9 if we're lucky. 9 until 12. That would be three. An hour for lunch. 1 until 4 is three more. Instructions are going to last about an hour; they're so lengthy. It's 5 o'clock. That's stretching it. I don't mind doing it but three hours seems a little long to me for both of you, but I think that's an outside estimate, I imagine.

MR. COLE: That's an outside estimate for me, Your Honor.

THE COURT: I generally don't restrict argument but we'll restrict it this time to not more than three hours in total for the state or the defendant and I'll let you know if you're getting close to it.

Anything else we can do?

MR. MADSON: I don't think so.

MR. COLE: Judge, all we would ask is maybe if you could keep the courtroom open for a couple minutes so that we could look at the exhibits after you're done here. Is that okay?

THE COURT: We require -- the in-court will have to stay here then.

MR. COLE: Well, at least sometime between now and closing, we'd like to spend a half an hour and get...

THE COURT: Why don't we do that when Scott gets back here? He's much more familiar with the exhibits and then on Monday, you all can make sure all the exhibits are in and we can take that up on Monday sometime.

MR. COLE: Okay.

THE COURT: Last chance. Okay. We're in

recess on this.

THE CLERK: Please rise.

(Off record - 11:06 a.m.)

CONTINUED

CERTIFICATE

SUPERIOR COURT)
) SS.
STATE OF ALASKA)

I, Georgi Ann Haynes, Certified Professional Court Reporter for the Third Judicial District, State of Alaska, hereby certify:

That the foregoing pages contain a full, true and correct transcript.

That this transcript was prepared to the best of my knowledge and ability from Third Judicial District Gyyr tapes.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 20th day of June, 1990.

_____
Notary Public in and for Alaska
My commission expires: 1/10/91

IN THE TRIAL COURTS FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs

JOSEPH HAZELWOOD,

Defendant.

No. 3AN 89-7217; 3AN 89-7218

TRIAL BY JURY
MARCH 19, 1990
PAGES 7778 THROUGH 7849

VOLUME 41-B

H & M Court Reporting
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BEFORE THE HONORABLE KARL JOHNSTONE
Superior Court Judge

Anchorage, Alaska
March 19, 1990
9:11 o'clock a.m.

APPEARANCES:

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PROCEEDINGS

MARCH 19, 1990

(Tape: C-3684)

(48)

(Jury not present)

THE CLERK: ... the Honorable Karl S. Johnstone presiding is now in session.

THE COURT: You may be seated. Thank you.

I just received a couple additional instructions. Why don't you log these in, Scott? It looks like they're originals.

MR. MADSON: Your Honor, I have something in addition. It was filed this morning, but I think it's -- what I did is the court requested it have a memorandum on proposed instructions. There's been a radical change here. I think it certainly would require the court to consider our latest request.

THE COURT: Why don't you tell me what your latest request is? Is this request as of today, now?

MR. MADSON: Yes. Yeah. Your Honor, the court already has in its proposed instructions the lesser included offenses of reckless driving and negligent driving under DWI. In thinking about this, pondering a little bit more and looking at cases involving lesser included offenses in Alaska it

appeared to me that it was more appropriate to put the lesser included offenses of reckless driving and negligent driving as lesser included of criminal mischief in the second degree.

Now, on the surface that obviously sounds strange because the elements are totally different, but on the Alaska approach that's taken they don't take the elements approach. And the Alaska cases all indicate you must look to the facts, and whether or not the facts and the evidence justify the lesser included, whether they fall within the technical elements, or not.

So, what we have here, and I think I point it out in my memorandum, is essentially that the jury in looking at the criminal mischief case has to find recklessness, obviously. And they have to find, then, that there was the risk of damage to property over $100,000 by widely dangerous means.

Now, the jury could easily, it was certainly contested throughout this trial, they could easily find that there was no -- that the risk involved was not a substantial one, but at the same time in order to find that the defendant acted recklessly they'd have to find he did so by the operation of a vessel.

Now, there's two statutes that come into play

here and I've raised them both. One is under Title 5, which is the -- that's water craft under that section, and also, then, under Title 28. Either one applies.

But certainly under Title 28, since under any definition, or at least it's the definition that's in our Title 28 Motor Vehicle Statutes, a vessel which is self propelled is a motor vehicle, even though there's a second definition of watercraft. It is still a motor vehicle.

And under the section called Driver, that means you either drive, or that you have actual physical control over that motor vehicle. The court's already found that Captain Hazelwood had actual physical control. What we have is a driver of a motor vehicle. And that simply fits all the necessary requirements of a lesser included offense.

So, in summary, Your Honor, what we're saying is that we're withdrawing our request that reckless driving and negligent driving be lesser included of DWI, but that they be made lesser included offenses of the felony charge.

THE COURT: Mr. Adams?

MR. ADAMS: Well, Your Honor, I haven't had time to read defendant's request in detail. I skimmed through it. The State has no opposition to a lesser

included of reckless driving or negligent driving to the DWI charge. I think under Title 5 that that's appropriate.

However, as far as the criminal mischief, again, I haven't had time to really review the request, but it seems like they're completely different charges. One we have criminal mischief, which involves recklessly creating a risk of damage to the property of another in excess of $100,000 and a person who negligently drives, or recklessly drives.

If the jury finds that the defendant did anything reckless it's inconceivable that they could find him not guilty of criminal mischief in the second degree. This court can rule as a matter of law for the purpose of these motions that oil is a widely dangerous means that property of another was risked and in excess of $100,000. So, reckless driving can't be a lesser included offense of the criminal mischief.

As far as negligent driving, again, they're comparing apples and oranges. The elements are different.

What the State would request is an opportunity to review the defendant's proposed instruction, review their authority, and file something in writing later on this afternoon. Right now I'm not

prepared to go forward on the argument.

THE COURT: Mr. Madson, do you wish to be heard any further on this issue? Just on this issue.

MR. MADSON: Just on this issue, Your Honor.

I think there's only one case that needs to be reviewed and it's already been quoted by the State and it's been quoted by myself...

THE COURT: Comeau.

MR. MADSON: And that's Comeau. That's right.

And I think one needs to look very closely at the language in there of what the court says is the test for a lesser included offense. That would cause me to rethink this after re-reading this case. It appeared to me quite clear that Mr. Adams is correct.

It isn't that it's not an elements approach. They very clearly take the approach that you must look at the facts of a given case in the interest of fairness and justice as to whether or not a lesser included should be available to the defendant, not because the elements fit but because the facts fit.

So, I would just urge the court to look at that case once again with that request in mind.

(285)

THE COURT: All right. I gave some thought to this already. It's something that I was wondering

about over the weekend. I saw counsel down here, and you can infer that I was doing about the same thing you were.

Whether we can -- I don't think I'll be doing this, Mr. Madson, and the reason is I think that the criminal mischief statute focuses on the risk that is created, whereas the other statutes you're asking to be lesser included focus on the conduct. And I think even under the conduct theory of lesser included they would not be included offenses.

So, my inclination is -- and I'm going to -- as I say once again, it's not final, but it's real close to final. I'm going to do a little more research on it since you have requested it, but my inclination is that you will not be getting a lesser included of reckless and negligent driving to the criminal mischief charge. They will remain, if you ask me for them, to the DWI.

I don't know if your -- assuming you don't get the lesser included in the criminal mischief, did you want to continue having them for the DWI?

MR. MADSON: No, Your Honor. We're putting it all or nothing here. We've discussed this at great length and I might add that we have certainly conferred with the defendant, because it's ultimately his choice

as to whether to ask for lesser includeds, or not. And it's our position that they really belong under the criminal mischief and not the other.

THE COURT: Mr. Adams, since the State has not requested any lesser included I assume that they have no objection to withdrawal, then, to the DWI?

MR. ADAMS: No, Your Honor.

THE COURT: Am I correct in that assumption?

MR. ADAMS: No objections, Your Honor, to withdrawal.

THE COURT: Okay. Well, let's go on to matters we can handle right now.

Let's go on to the State's newly proposed instructions. And for purposes of the record I'll number them. The first one we'll talk about is the instruction that starts out "If you find that the defendant operated a watercraft while intoxicated..." We'll number that State's Sup 1.

MR. MADSON: What was that number, Your Honor?

THE COURT: Supplemental 1.

MR. MADSON: Supplemental.

THE COURT: Have you found the one I'm talking about?

MR. MADSON: Yes.

THE COURT: Okay. Is there objection to that?

MR. MADSON: Yes, there is, Your Honor.

THE COURT: Okay. Before you state your grounds I wanted to make sure there was, or was not objection.

Mr. Adams?

MR. ADAMS: Your Honor...

THE COURT: I read both cases, incidentally.

MR. ADAMS: The Comeau and Saint John case?

THE COURT: Uh-huh (affirmative).

MR. ADAMS: The only thing I'd like to point out, Your Honor, is on page 113 of Comeau -- and that case relied on Saint John and quoted some language of the Saint John case which talks about permissive inferences.

When the State is proving a DWI charge by use of reckless conduct, in essence instead of relying on the .10 or above theory, the State is saying defendant drove recklessly. And under those circumstances the court in Saint John is real clear that the State is entitled to an instruction that the jury may infer that a person who is driving while intoxicated is reckless.

THE COURT: Where does it say that?

MR. ADAMS: It says that on page 113, on the...

THE COURT: The State's entitled to that

instruction? Whereabouts on that page?

MR. ADAMS: Well, I'll read -- it's on the first full paragraph of the right hand side, the very last paragraph, which starts about two thirds of the page down. "Second, relying on case law prohibiting the use of mandatory presumptions in criminal cases...." And it has a long string of citations, "We held that the legal relationship between drunken driving and recklessness should have been communicated to the jury in the form of a permissiveness, rather than a mandatory presumption."

And that is the instruction that you've called State Supplemental 1, that if the jury finds that the defendant operated a watercraft while intoxicated you may, but are not required to infer that the defendant acted recklessly, or negligently.

I believe in the Saint John case the trial judge, now looking on the left hand column of page 113, last partial paragraph, first sentence. In Saint John, another drunken driving manslaughter case, the trial judge instructed the jury that it was required to find that the defendant acted recklessly if he drove while intoxicated.

The court said that as a matter of law the Saint John court recognized that it was recklessness,

per se, to drive while intoxicated, however relying on a number of U.S. Supreme Court cases, two, to be precise, they said that you can't instruct a jury about a mandatory presumption. You take away their job, essentially.

THE COURT: I didn't read the cases you cited as giving the court a mandate to give a State's proposed instruction. I read the cases as a conclusion by an appellate court that the trial court was in error in giving a presumption instruction and reversed the court for that. It was a defense issue. It wasn't a State's request for an instruction. It was the defendant's objection to the State's request. And as I...

MR. ADAMS: Your Honor, excuse me. I don't mean to imply that you have to do this. It's just a proposed instruction. And there is authority that if you gave that proposed instruction that would not be in error. By no means am I arguing that you have to give it otherwise it is error.

This is a proposed instruction that would be appropriate as a matter of law pursuant to Saint John. So, it's your discretion. However, we argue that it is appropriate.

THE COURT: Okay. I'm not going to be giving

it, Mr. Adams. If we had lesser includeds of reckless operation of a water craft, or negligent operation of a water craft that might be something I'd consider, however, they've been withdrawn and for purpose of determining whether or not the defendant recklessly created a risk I think the issue is different than the reckless conduct of the elements on reckless operating of a watercraft.

And I believe it is permissive. And I don't think it's error not to. I think it would be argumentative. It might be improperly commenting on the evidence, or highlighting the evidence unnecessarily.

State's Supplemental 1 will not be given.

And why don't you use this as the official record, Scott, because I'm writing down on this. That will be the official thing that will go in the file.

State's Supplemental 2 starts out, "A Coast Guard regulation prohibits..."

(590)

And I think we can deal with that instruction together with the other two. The other one starts out, "Coast Guard regulations prohibit an individual...." And the third one, "At the time of the grounding the Exxon Valdez...." So, they'll be State's Supplemental

2, 3 and 4.

As I understand, the regulations that you're referring to in the instructions are in evidence. Is that correct, Mr. Adams?

MR. ADAMS: My notes are unclear about the one about the .04 percent Coast Guard regulation.

The first one is clearly in evidence. You took judicial notice of the four hour requirement. And that's in -- that's where our requirement is in 33 CFR Title 95.

THE COURT: And that was taken...

MR. ADAMS: And that was taken judicial notice. My notes are unclear whether the .04 percent -- I don't think it was but I included that in the event that it was. I'm not making a representation one way or the other.

That instruction accurately outlines the law, again, in Title 95 of...

THE COURT: Why should I give State's Supplemental 2 to start off with? What legal authority do you have to give an instruction on a particular item of evidence that's admitted? Why would I want to highlight this item of evidence more than the testimony, opinion testimony given by experts that the defendant operated recklessly?

MR. ADAMS: Well, again, Your Honor, relying on the Martin case from South Dakota, which I believe is a December 1989 South Dakota Supreme Court case where the court gave an instruction where the last sentence was identical to this sentence, about violating a regulation -- and let's emphasize that the regulation in South Dakota was not a criminal regulation. It was a traffic infraction. You park your vehicle on the side of the road you have to have lights on it. You must park it off the side of the road if you don't. Those type of things, where a person gets a ticket, two or three points on his license.

And the court gave an instruction which said this is what the infraction is. And in the last sentence, "If you find beyond a reasonable doubt that the defendant violated this regulation, you may consider such violation along with all other evidence, facts, and circumstance in determining whether or not the conduct and acts of the defendant were reckless and negligent.

Now, relying on the Martin case this instruction would be appropriate. And it doesn't highlight any other evidence -- well, it does highlight this evidence because it rises to the level of a

violation of a regulation.

The putting of the vessel on autopilot in Prince William Sound is not being highlighted in the instruction because that does not violate a regulation. It violates the Exxon operation manual, but it doesn't violate a regulation. Therefore we're not posing an instruction. This rises to a different level. This is more -- this is better evidence of recklessness.

Now, based on the Martin case we propose this jury instruction. It's, of course, left to your discretion. But, there is authority for this instruction.

You want me to continue with the rest?

THE COURT: Sure. Let's do Supplemental 3.

MR. ADAMS: Well, my same arguments apply to that one.

That Coast Guard regulation, if you do take judicial notice of that, provides that a person can not operate a vessel other than a recreational vessel when the individual has a blood alcohol concentration of .0 percent by weight, or greater.

Now, again evidence of that violation is greater. I mean, it's entitled to more weight. The jury's entitled to consider that as greater weight of the negligence or recklessness than some other

violation, or some other piece of evidence of negligence or recklessness.

THE COURT: The statute, or the regulation that I recall that I did not take judicial notice of was a statute that was couched in terms of a .04 percent blood alcohol being considered intoxicated. Now is that the one you're referring to?

MR. ADAMS: Yes. That's 33 CFR, part 95, again.

THE COURT: And I don't have that right in front of me, but I think that it was couched in some terms that in reading it, if a person came to the conclusion that Captain Hazelwood had a .04 they would have to conclude he was intoxicated.

MR. ADAMS: That's correct, yes.

THE COURT: Well, I'm standing by my original ruling. That will not come in. It won't come in either in the form of instructions, or taking judicial notice of it.

MR. ADAMS: Now going on to Supplemental 4, which raises some other issues. Here about a month ago, or three weeks ago I filed a motion for the court to take judicial notice of Prince William Sound pilotage law. On Friday the court stated that you were not going to use the State's jury instructions 39

through 45, which were a recitation of that law, on the grounds that they were argumentative.

However, you still haven't ruled on whether you're going to take judicial notice of the law, and the law as represented by 46 USC 8502, which requires, "Any coastwise sea-going vessel in pilotage waters to be under the direction and control of a licensed officer with pilotage." That's clear as -- that is the law.

THE COURT: That's in evidence, isn't it?

MR. ADAMS: I'm not sure if it is, or not. Have you taken judicial notice of that?

THE COURT: Is the statute a regulation requiring pilotage in evidence? I thought it was? I mean, listen, I don't know if it is, or not. And there's been so much evidence I would expect that in arguing this motion you know the answer to that.

MR. ADAMS: That's what I requested the judicial notice for, if it's not. I'm not sure if it is. The purpose of my argument now is to delineate what Mr. Cole can argue tomorrow as far as what are the Prince William Sound pilotage laws, and whether he can get up and say, "The court has taken judicial notice of this law. This is what was required," and use Lieutenant Commander Falkenstein's chart that shows

pilotage, non-pilotage, and go right down the line and see that there was a violation.

THE COURT: Mr. Adams, did the court take judicial notice? Mr. Purden just shook his head as if to say we had not taken judicial notice.

Were we even asked to take judicial notice of the pilotage regulations?

MR. ADAMS: By my motion, yes. I mean my motion was...

THE COURT: 21st of February.

MR. ADAMS: February 21.

THE COURT: So, we haven't had a chance to rule on this motion is what you're saying?

MR. ADAMS: That's correct. Yes.

THE COURT: Let me take a look at it.

(Pause)

Specifically, which statute or regulation do you wish the court to take judicial notice of?

MR. ADAMS: Well, Your Honor, the State would request the court taken judicial notice first of 46 USC 8502.

THE COURT: What else?

MR. ADAMS: In addition to that, the State requests that you take judicial notice of Captain of the Port Order 1-80.

(Pause)

THE COURT: Okay. Next.

MR. ADAMS: And Commander McCall's September 1986 memorandum.

THE COURT: That's in evidence, isn't it?

MR. ADAMS: I believe so, but what it is -- Prince William Sound pilotage law is an aggregate of those three things. And they all three have to be read together.

THE COURT: My question is, it is in evidence?

MR. ADAMS: Yes, it is in evidence.

THE COURT: Now, how about the Captain of the Port Order 1-80? Is it in evidence?

MR. ADAMS: No, it's not.

THE COURT: Was it offered in evidence at any time? What's the exhibit number if it was?

MS. HENRY: It was marked, but I don't think it was offered.

MR. ADAMS: It wasn't offered, Your Honor.

(Pause)

Your Honor, the State's request...

THE COURT: Just a second. Do you have it in as marked?

THE CLERK: I haven't found it yet.

MS. HENRY: Want me to try and look for it?

THE COURT: Do you have that number down?

MS. HENRY: No. I don't. My list doesn't go that far.

THE COURT: It would be helpful if Mr. Cole were here to assist us on this. Is he around someplace to be arguing this? It might be nice if he were here so he would know what the court's orders are if he's going to be doing the arguing. Where is Mr. Cole?

MR. ADAMS: He is in his office.

THE COURT: Let's get him over here. He's going to be arguing these instructions to the jury, isn't he?

MR. ADAMS: Yes.

THE COURT: Okay.

(Pause)

All right. So we have the September 1986 letter in evidence. We don't have the Captain of the Port Order in evidence and we don't have 46 8502 in evidence. Is that correct?

MS. HENRY: That's correct. That's my understanding.

THE COURT: So, your request, as I understand, you want the court to take judicial notice of those three items?

MR. ADAMS: That's correct, Your Honor.

THE COURT: Okay. Mr. Madson. This is timely made, by the way, Mr. Madson. It has not been ruled on by the court on the February 21st...

MR. MADSON: I wasn't going to argue that, Your Honor.

Essentially what I'm going to say is let's start back at the beginning and ask the question why this particular instruction, or this Supplemental 4 and 2 should be given at all, or 3 for that matter. And, of course, I think that one has pretty well been covered, because the court did not take judicial notice of that .04.

But, let's go back to the only authority to date that the State has cited for this proposition, which, again, is a single jurisdiction in South Dakota. And there, at least -- at the very least, the bottom line there was the court said that these instructions that give particular emphasis to certain operating rules of the road...

THE COURT: Let's get back on track. The question is shall we take judicial notice under evidence rule 201 and 202 and 203 of 46 8502 and Captain of the Port Order 1-80.

MR. MADSON: Well, I don't think the court could stop there, Your Honor. This opens up the door.

You know. You can take judicial notice of it.

THE COURT: Okay. Let's start over again.

Ms. Henry, we do have admitted 46 USC 8502. It's Exhibit 107. Exhibit 108, contrary to your statement, the Captain of the Port Order was not admitted, nor offered. So, we have two out of the three offered, the 1986 letter -- and admitted -- the 46 USC 8502. We're now talking about Captain of the Port Order 1-80 only at this time.

MR. MADSON: I thought that one was -- that was offered before, or not offered?

THE COURT: Not admitted, nor offered.

THE CLERK: That I know of.

MR. MADSON: Okay.

THE COURT: That was according to Mr. Purden, our in-court deputy, here. He says that the USC section exhibit is 107 and it was admitted.

MR. ADAMS: The problem with the 1-80, Captain of the Port Order is you can't stop there, Your Honor.

You can take judicial notice. I think the court has to take judicial notice of 33 CFR Captain of the Port Orders and waivers. In other words, the secretary of the Department of Transportation did not set up Prince William Sound for special pilot indorsements here, I think. The Coast Guard did that.

They also allow the Captain of the Port to do this, and also, issue waivers.

That goes to -- that simply at one time -- if I'm thinking correctly the 1-80 is the one for daylight passage. And then, the problem is after that McCall did an internal memo -- that's the one that hasn't been offered into evidence -- in September of 1986. That one broadened the daylight passage to include night.

Then we have the ALAMAR letter. See, all these things kind of fit in there. And I think the court...

THE COURT: The ALAMAR letter is in evidence.

MR. MADSON: Yeah. That's all in evidence. So, the court has taken judicial notice of the statute. I don't have any problem with that. That's in there. And it could be argued. I think everyone can argue.

You've heard, you know, a week of testimony, if not more, about what does this mean? You know, what does pilotage mean, and whether or not it was violated or not. But to emphasize this as evidence of reckleness when we have all these contrasting views of pilotage and contrasting letters, memorandums and everything else. It simply plays a much greater role than necessary in this whole case.

I don't have any argument with the State being

able to use that statute, because the key words there were direction and control, and what does that mean. And we've heard all kinds of varying testimony about when it's necessary and when it isn't.

And secondly, the importance of this is just way, way over extended here. It's a $500 civil fine for this statute. That's like the administrative regulations for the Coast Guard. You know, that's all they can do is say, "Well, we might take action on your license," under Supplemental 2, or 3, but to give these things the importance, to say if you violate these you make this quantum leap and say this is recklesness under our State statute is just -- it's beyond me.

So, in other words, I don't have any problems. The court has already had that in evidence, 46 8502. And I think we are free to argue the meaning of that in the context of this case.

THE COURT: My specific question was do you have any objection to the court taking judicial notice of the Captain of the Port Order 1-80?

MR. MADSON: Yes.

THE COURT: Okay. That's what we're talking about.

MR. MADSON: Yeah. Okay. I do. Because you can't limit it to just that.

THE COURT: We have in evidence 46 8502. And we have the September 1986 letter in evidence. And in order to get this in evidence the court's being requested to take judicial notice of it so it can be argued. That's what the purpose of this is.

I'm not dealing with the instruction.

MR. MADSON: Right. Let me just ask the court, you said the internal mem -- that's September '86, is that in evidence? I don't believe it is. That's why I'm wondering. Not 1-80, but memorandum from McCall dated September '86?

THE COURT: What is the ALAMAR letter dated?

MR. CHALOS: Your Honor, if I may, the ALAMAR letter is September 19, 1986. The internal memo that we're talking about is September 3rd, 1986.

MR. MADSON: They're two separate things.

MR. CHALOS: I think that was offered but wasn't admitted.

THE COURT: Have a seat, Mr. Cole. You can participate in this.

Okay. Mr. Adams, you've asked in your memorandum, the last page, it says, "This court should, therefore, take judicial notice of the Prince William Sound pilotage law applicable to coastwise vessels which was in effect when the Exxon Valdez grounded."

That law is represented in 46 USC 8502. That's in evidence.

Together with the procedure set forth in Captain of the Port Order 1-80, that's going to be taken judicial notice of in a moment, and Commander McCall's September 1986 memorandum of procedures which were in place with only minor changes for over nine years prior to the grounding.

If that's what you want, this court will take judicial notice of that and that will come into evidence as having been taken judicial notice of.

MR. ADAMS: Thank you.

THE COURT: And that's what you want, isn't it? The 1986 memorandum from Commander McCall?

MR. MADSON: Your Honor, that was an internal memo. Nobody ever saw that except the Coast Guard, you know.

THE COURT: Okay. It's not one that was disseminated to the...

MR. MADSON: No. The ALAMAR letter is a different one. That's already evidence. That's Exhibit B. Defendant's Exhibit B is the ALAMAR letter.

THE COURT: Was there an offer of the 1986 memorandum in evidence? I thought it was offered and rejected.

MR. CHALOS: Right.

MR. MADSON: I think that's correct.

MR. COLE: It was never offered, Your Honor. It was marked.

MR. ADAMS: Again, the letter, itself...

THE COURT: What's the number of it, Mr. Adams?

MS. HENRY: It should be the one right after 1-80.

THE COURT: My recollection is that the ALAMAR letter came in -- parts of it came in.

The memorandum there was an objection to. The court ruled against admissibility on hearsay grounds.

MR. ADAMS: Okay.

THE COURT: Now that's my recollection. And I don't remember what Exhibit it was. And maybe, since you're asking for it you can give us some clue to what exhibit you're talking about.

UNIDENTIFIED SPEAKER: I don't have a copy of it, Your Honor.

(Pause)

THE COURT: Did you find an exhibit number for it?

MS. HENRY: Your Honor, if I recall when those were marked we thought we were going to mark the third

one, too. Apparently we did not. It would have been the next one in order. So, since it apparently was not marked we did not have it marked, nor did we offer it.

But, as to the third one, the 1-80 was marked. We did not offer it.

THE COURT: I clearly recall talking about this in this case, the 1986 Internal Memorandum. Mr. Cole, don't you remember that?

MR. COLE: Yes. I remember.

THE COURT: And do you remember the court rejecting its admission?

MR. COLE: Yes. I remember that.

(1348)

THE COURT: Okay. The court will not be taking judicial notice of that internal memorandum. That is not a proclamation of law as the rule 200 series refers to. I've already ruled on it's admissibility and there's no reason to take it under advisement any further. So, your request to take judicial notice of that document is denied.

I'm going to take judicial notice of Captain of the Port Order 1-80. It will come into evidence. If you will get us an exhibit that's properly marked it will be admitted, if we don't have one already.

I'll leave that up to you, Mr. -- before you

can argue it it has to come into evidence.

MS. HENRY: It's been marked as 118.

THE COURT: Pardon?

MS. HENRY: It's been marked 118, Plaintiff's 118.

THE COURT: 118. That doesn't sound right to me.

THE CLERK: No. Captain of the Port Order 1-80 is Exhibit State's 108.

THE COURT: 108.

MS. HENRY: 108. I'm sorry.

THE COURT: Okay. 108's admitted.

EXHIBIT 108 ADMITTED

Okay. Now let's talk about the instructions based on these regulations.

Do you wish to be heard any further, Mr. Adams, on the instructions? That would be State's Supplemental 2, which I've denied. We won't even discuss it any more.

State's 3 and 4.

MR. ADAMS: You have denied 2, Your Honor?

THE COURT: That's correct. I've already ruled that that was not admissible in evidence. That regulation was not admissible in evidence.

MR. ADAMS: Oh. That was 3, the one that was

not admissible into evidence.

THE COURT: Oh. Let me see. Let me see 2. I'm sorry.

That's the one with four hours. Is this the one with four hours?

Okay. Number 3 is not going to be given.

MR. ADAMS: Number 4, Your Honor, just that instruction, again, summarizes what the law was in effect at the time, coastwise pilotage tankers. And, again, it is law that that was what the pilotage tankers were required to follow. They certainly are going to argue that the ALAMAR letter somehow waived it, even though the first two sentences of ALAMAR clearly discuss non-pilotage tankers, and Captain Martineau specifically admitted that applied only to non-pilotage tankers.

They're entitled to argue that, however, this, again, rises to the level of the regulation. It is a law that the Captain of the Port has authority to issue.

THE COURT: Is there a regulation in evidence that relates to this four hour limitation?

MR. ADAMS: The four hour limitation, yes. You took judicial notice of the four hour limitation. And now, that's number 2. Number 4 goes to the

pilotage law.

MR. MADSON: Your Honor, I'm not so sure that judicial notice was taken on that four hour. I'd have to look back and think about that, but I don't believe so.

THE COURT: Mr. Cole, did the court take judicial notice of it?

MR. COLE: Yes. You took judicial notice of it. That's my -- I'm trying to remember who it was through.

(Pause)

THE COURT: That's one of them. What's the statutory citations to that?

MR. ADAMS: It's 33 CFR 95. I can give you an exact cite.

33 CFR section 95.045.

THE COURT: It seems to me we did take judicial notice of that. Was there an exhibit marked?

MR. COLE: Yes. There is an exhibit marked?

THE COURT: Why don't you come up here and see if you can help Mr. Purden find it?

(Side conversation)

THE COURT: Is it 33? Why don't you see if you can find it over there?

THE CLERK: (Indiscernible - away from mike)

THE COURT: Did the court take judicial notice of it?

MR. MADSON: It wasn't admitted. I don't believe the court did.

MR. COLE: Well, there's two sections that were in that. One of them dealt with...

THE COURT: Let's get the exhibit so we can look at the exhibits.

(Pause)

Exhibit 33 is the document that the court did not take judicial notice of, Mr. Cole, Mr. Adams.

MR. ADAMS: That was...

THE COURT: That's the one I did not take judicial notice of. It's the one that talks about an individual is intoxicated when he has a blood alcohol of 10 percent, or .04. This was offered and it was rejected by the court, Exhibit 33.

(Pause)

MR. COLE: Judge, this also contains the 95.045 four hour. And that's the part that I think that you took judicial notice of. There's a second and third page, 95.045. I know you're right on the first part, well, as for as the .04, because I remember that discussion with Mr. Prouty and Mr. Madson.

But my recollection is that when we talked

about the four hour limit that that was admitted. It was in one of the witnesses that -- I believe it was one of the crew members' alcohol policies for drinking.

THE COURT: So, you're requesting the court to take notice of 33 95.045?

MR. COLE: Yes.

THE COURT: Mr. Madson? You know the regulation, I take it. You don't need to...

MR. MADSON: Yeah. I do, Your Honor. My recollection was while there was testimony the court did not take judicial notice of that. That's how I remember what happened. And, of course, just because there's testimony doesn't mean that the court can take judicial notice of a particular Coast Guard regulation.

THE COURT: There's a request now. If there was not a request, then there is a request now and there was testimony. I remember the testimony at least.

MR. MADSON: Well, I would object to that, Your Honor. I don't believe the court should take judicial notice of that.

You know, one thing is it kind of lulls us into a sense of false security when the court makes a certain ruling, and then we go on, and don't maybe cross examine witnesses and do certain things. And

then, after the case is all over they come and say now we want you to take judicial notice.

(Pause)

THE COURT: All right. The court will take judicial notice of 33 95.045 (A), (B), (C), and (D). And we'll have to have this -- Exhibit 33 consists of three pages. The portion of 33 which the court rejected, which was a standard of intoxication, 33 95.020 is on a separate page from the section 33 95.045. Would counsel have any objection to separating those two and making a separate exhibit of the latter?

MR. MADSON: I would -- I have to look at it, Your Honor, but I would just say that section -- the court has over our objection taken judicial notice of should be the only one that goes in. Nothing else.

MR. ADAMS: We have no objection to that, Your Honor.

THE COURT: Why don't you go ahead and get a copy made of just that section, pass it by Mr. Madson, just of 95.045? You can blank out the rest of it and that will be exhibit -- what number shall we make that now?

(Pause)

EXHIBIT 180 ADMITTED

It will be Exhibit 180. It's admitted.

All right. The court will not be giving State's proposal Supplemental 2, nor State's Supplement 4 for reasons similar to the reason not given the package requested by the State, that they're argumentative, that they're unduly commenting on a particular item of the evidence, highlighting it unnecessarily.

(Side conversation)

THE COURT: Okay. I gave counsel a numbered copy of the court's proposed instructions. They're not in final form yet, but they're getting closer. I numbered them so we'll have a reference point to discuss them. I have an unnumbered copy which we'll be using eventually for a final numbering.

Let's start with the defendant. Any objections to the court's proposed instructions?

MR. MADSON: Which ones, Your Honor?

THE COURT: Any objection to the court's proposed instructions? That's the package of instruction I gave you Friday.

MR. MADSON: Oh, yeah. Yeah. I do.

THE COURT: You can start out with the number that you're referring to and we'll discuss them.

MR. MADSON: Perhaps the court can refer to my written memorandum that was filed today, but it starts

with instruction 30. That's the negligent discharge one.

THE COURT: So, up to 30 there is no objection?

MR. MADSON: I believe the only thing I did was talk about lesser includeds in that.

THE COURT: Okay. I'll be pulling out the lesser includeds so we won't need to discuss the lesser includeds. And there'll be no verdict form for the lesser includeds. And there'll be no transition instructions for the lesser included. Any definitial instructions that pertain just to the lesser includeds will be eliminated as well.

So, 30.

(2130)

MR. MADSON: Okay. Number 30, the court can see by my memorandum, what I propose doing is changing that one to insert a third -- you've got first paragraph, second paragraph, and third. And that should read that, "Third, that the negligence of Captain Hazelwood was the legal cause of the discharge of oil."

And then I have two proposed instructions 22 and 23, and they define legal cause and superseding cause. And the reason I requested those, Your Honor,

was after the court indicated last Friday it was going to give the civil standard of negligence it seemed only fair and only proper that if the civil standard is going to be applied to Captain Hazelwood, that he should be entitled to the defenses of a civil standard, and that includes superseding cause and proximate, or legal cause.

And, so, those two instructions, I think would be appropriate.

THE COURT: Let's start with the proposed instruction 24 by the defendant in lieu of instruction 30. And we would add the final two paragraphs to any instruction. The final two paragraphs of instruction 30.

So, do you object to 24 in lieu of 30?

MR. ADAMS: Yes, Your Honor. This is not a civil case. And the standard of negligence that we're using is not a civil standard of negligence. We're using a criminal standard of simple negligence. It's not used often. However, it is used in negligent driving. It's used in fishery cases. And it's going to be used in this case.

Therefore, the only causation questions are criminal causation questions. And what Mr. Madson is trying to do here is argue that because we're using a

definition of negligence that is used in civil cases, that automatically this is a civil case. Well, that's not the case.

And I believe that the Wren case -- Wren vs State establishes the proximate cause. And that is 34, which you're using. And, "That it's not necessary for the defendant's actions or inactions in this case to be the sole proximate cause for the risks that were created in this case," and so on.

The other case that talks about intervening causes, Kuzmider (ph) -- you're familiar with that one? That's equally applicable to a case where the State -- where the court's going to be using a negligence standard mental state. And that essentially goes along with that instruction right there. We don't need to get into issues of proximate cause, superseding cause, intervening -- you could have restatement of tort section 4.04 and 4.02(B) in here for the rest of the week. We could be arguing about that.

This is not a civil case. It's a criminal case.

THE COURT: Do you think that there should be some language regarding substantial factor? Causation is generally defined in terms of being a substantial factor in bringing about the outcome. And that was not

proposed by the State. Do you think that that would be appropriate?

MR. ADAMS: No, Your Honor.

THE COURT: You do not think...

MR. ADAMS: If the instruction that we use for causation comes from a criminal case and talks about criminal causation, then we're not going to have an objection to it. But we start talking about restatement of torts, and the Alaska Supreme Court definitions of intervening and superseding cause, we're going to be getting into a quagmire.

THE COURT: Well, did you track the pattern instruction with this proposed 34?

MR. ADAMS: This proposed 34 came out of Wren vs State. And that's how we got that instruction. That's W-r-e-n.

(2392)

THE COURT: David, would you go get the pattern jury instructions for criminal cases, please?

Let's go on to the next objection. We'll come back to this one.

MR. MADSON: Yes, Your Honor. Let me look and see here. Where's the next one? Oh, no. I want to go on my instructions.

My requested 21, which has to do -- I'm trying

to find it in the court's numbered one.

THE COURT: We are now going on the court's proposed instructions. So, when you come to one that you object to let me know.

MR. MADSON: That's what I'm looking for right now, Your Honor. And for the life of me, I can't seem to find it.

THE COURT: You may not have it.

MR. MADSON: That very well might not be in there. That's the problem, I think.

THE COURT: Okay. 38 may be.

MR. MADSON: Yeah. I would either have a separate one, or add my requested 21 right after the first paragraph of the court's 38, for "Operating a watercraft means to navigate, or use..."

THE COURT: Where did you get this proposed instruction 21, Mr. Madson?

MR. MADSON: This came from actual physical control, the definition, Your Honor, under Department of Public Safety vs Conley, and the cases are Jacobson and...

THE COURT: What are the citations for them?

MR. MADSON: It's in my memorandum where that came from. It's 754 P.2d 234, Lathan vs State, 707 P.2d 941, and Jacobson vs State, 551 P.2d 935.

THE COURT: Are these Alaska cases?

MR. MADSON: Yeah.

And what they did in Conley, and this is exactly where it came from -- in a footnote, I believe, it's -- yeah, footnote 4 on page 235 in Conley, the state supreme court quoted the Montana Supreme Court case the definition of actual physical control. And that's the precise wording that I took from there. They apparently cited with approval. They indicated that that's what Montana meant. And I think it's necessary to put this in the proper focus.

(Pause)

THE COURT: Mr. Adams, I understand that operate a watercraft is defined by our statute, and the cases that are cited by the State go to driving motor vehicles, cars, and they're not exactly the same. However, I want to find out for sure that if you -- if you really object to that statute being given -- that instruction, "The term operating a watercraft means exercise of actual physical control of watercraft. Actual physical control means existing, or present bodily, restrain, directing influence, domination, or regulation."

MR. ADAMS: Your Honor, I believe Mr. Cole's here to argue this.

MR. COLE: I just think the term actual physical control in the sense of operating a watercraft is misleading. That's not what happens on the bridge of a tanker. The captain doesn't have actual physical control.

The other part of the sentences -- if you take away actual physical control I don't have any problem with, you know, present bodily, restrain, directing influence, domination or regulation. But, actual physical control, it doesn't take into consideration the difference between operating a motor vehicle and the operations behind the navigation of a tanker.

A captain doesn't go up and take actual physical control of the throttle, except in very rare circumstances. And very rarely does he ever take the helm. And so, if you put the words actual physical control in there the problem that you have there is that you confuse the jury. And it's not in accordance with what they heard six weeks of testimony, that here's the captain, he's responsible, he's the person at the con. They are the one that guide and direct this vessel.

Then, it's got to confuse them. And under the term actual physical control, unless we have proved some time in the course of this trial that Captain

Hazelwood had actually touched the wheel during the time that we're alleging he was intoxicated, this is directed verdict.

THE COURT: No, Mr. Cole. That's why the definition says "actual physical control means...." That's the whole purpose of this instruction, to define what actual physical control means. It means, "...existing, or present bodily restraint, directing influence, domination, or regulation."

It would seem to me that would be your theory of the case, that when the captain is below if he is still directing influence, domination or regulating the navigation, or the use of that vessel, he would be in actual physical control.

MR. COLE: The only thing that I have a problem with in this instruction is the words "actual physical". If it's changed to "The term water -- 'operating a watercraft' means exercise of control over the watercraft. Control means existing, present bodily, retrain, directing influence, domination or regulation."

I think that more accurately reflects what goes on on the bridge of a vessel.

THE COURT: So we would have to have definitions of operating a watercraft, the statutory

definition and this definition. That's going to be difficult, Mr. Madson.

I'm going to give the statutory definition. That's a given. So how do we hear both of your problems here.

MR. MADSON: Well, Your Honor, you know, I didn't make these statutes. I mean, I can only go by what they say. And they say, "Drive or operate."

Drive or operate definition under Title 28 says actual physical control of drive.

THE COURT: Well, Mr. Madson, operate a watercraft is a statutory definition.

MR. MADSON: I agree.

THE COURT: And that's defining an operation of watercraft is what we're dealing with here, and not a motor vehicle. So, I'm going to give this statutory definition. And if we can somehow combine both of your areas of concern here into a continuing definition I'll do that. Otherwise it's going to be just like it's given.

I think Mr. Cole has a legitimate concern that perhaps the jury is not going to know what operate a watercraft means here. You might be able to argue that he was down below. He wasn't using or navigating the vessel if he was down below.

MR. MADSON: Well, Your Honor...

THE COURT: But, with yours it might give them the way to find that he was.

MR. MADSON: There should be no distinction between a boat, and a car, or a bus as far as the danger to the public is concerned. It is the person that is directing the control, the influence of that vehicle, that is the cause for the legislature to come around and say, "This is a crime."

(2949)

Now, if the court just reads this definition of a watercraft to navigate or use a vessel capable of being used as a means of transportation on water, that covers everybody. I mean, if I want to hire someone to take me from place to place I'm using one. The jury is going to be totally confused about that.

Or navigate? Does that mean the guy that's sitting there in the chart just taking fixes. There has to be something else here to show that the person that has dominating influencing and controlling, and actual physical control is what the state law seems to require. And I don't think they made a distinction between the two.

So, I think it should be given as I proposed and I don't know what more I can say about it.

MR. COLE: Judge, I have another solution to help you. What if you use the following? You say, "The term to navigate or use a watercraft means to exercise control over the watercraft. Control means to be present bodily, restrain, directing influence, domination or regulation on the vessel"?

THE COURT: Okay. I propose this: a middle paragraph between the two. "The phrase 'navigate or use a vessel' means existing, or present bodily, restrain, directing influence, domination or regulation of the vessel."

MR. COLE: We have no objection.

MR. MADSON: Would you read that again, Your Honor? I may not have caught it all.

THE COURT: It would be a middle paragraph.

MR. MADSON: This is instruction 38 now?

THE COURT: Yes. It would be in the middle between the two paragraphs on instruction 38. The new paragraph would read as follows, " The phrase 'navigate or use a vessel' means existing or present bodily, restrain, directing influence, domination or regulation of the vessel."

MR. MADSON: That sounds pretty much like what I was requesting if I'm hearing you correctly. If I'm correct in my -- the way I perceive it I guess I

wouldn't have any objection.

THE COURT: Okay. I'll be giving that middle paragraph. That takes care of the definitial problem.

Let's go to the next objection that you have to the court's instructions and anything you would like to have in its place.

MR. MADSON: I think that might cover it, Your Honor. I believe that's pretty much it.

THE COURT: Okay. Let me get into the Alaska pattern jury instructions for causation.

MR. MADSON: There's one other one that Mr. Adams gave me and I was going to request it be given too, so there's no problem on it. The court, I think has it up there. That's the one on separate crimes counts.

THE COURT: That should be in there already. Isn't it in the proposed jury instructions? It should be right before the indictment instruction. 19.

MR. MADSON: Yep. You're right.

THE COURT: Let me just see if I can find causation here.

(Pause)

Well, I can't find the causation instruction right now.

MR. COLE: My understanding is that there's

not a causation in the thing.

I would refer you, maybe there's a couple sources in the last trial that you and I did. We had the David Williams murder trial and we gave an instruction to the jury on this same thing.

I would agree that as I remember in criminal law the defendant doesn't have to be the sole proximate cause. He has to be a cause. And I believe you're correct that in some fashion I've seen language that says not only has to be a cause, but he has to be a substantial cause. And I can't remember where I've seen that, but you're right.

THE COURT: David, why don't you see if we can scratch that up from the David Williams' instructions.

We'll come back to that in a moment.

Okay. Now we'll go to the State's objections to the court's proposed instructions.

MR. MADSON: Your Honor, just to make sure, I know that this happened the other day, last Friday, but on 35 I just want to make sure that there was an objection to that instruction. I'm quite sure that happened before.

THE COURT: You were going to come up with something on that?

MR. MADSON: No. Not that one. That one's

not the -- there was another one that I found. That was a physical injury one?

THE COURT: Okay. No. That's...

MR. MADSON: Yeah. And I did not. That's correct. So I have no objection to serious physical injury definition, rather. But, I did last Friday object to this, the last sentence.

THE COURT: Frankly, I don't like this instruction, counsel. 35. I told you that I was waiting for Mr. Madson to come with a different approach to it. And I was concerned that he might -- if we didn't include that, he might argue that since oil spill is not included in the definition it is, therefore, not a widely dangerous means. And I'm a little concerned about that. I'd like to find some way that would address that concern. Maybe you can give me a suggestion here.

I don't like the statement, "An oil spill may be considered a widely dangerous means." It's certainly permissive, but it would seem to me to be a comment on the evidence.

(3456)

MR. COLE: Judge, Mr. Madson agreed not to argue this, because it's not in there. It can't be won. I don't have any problem with that.

But, if he's going to argue that, I think that under evidence rule 303, and you're not putting in a presumption at all, all that you're indicating is that they can consider that by using the word may. It's not creating an inference. It's not creating a presumption. All it is indicating is that this is not limited by what is actually in the instruction.

THE COURT: And that was my conclusion in an earlier pre-trial hearing, that the language did not prohibit the jury from considering an oil spill being a widely dangerous means. I'm wondering if there's some other way we can handle this language, though. It seems to be pretty directive.

MR. MADSON: Your Honor...

THE COURT: Even though it says "may" it seems to point something out. All we have to do is find an oil spill, and that's not enough.

MR. MADSON: Your Honor, I didn't mean to interrupt, but I just want to comment on some of the evidence.

Remember, I objected to some of the evidence coming in, especially the Fish and Wildlife officer that testified about dead birds, and things like that. And I said it was totally irrelevant to this. And if I recall, Ms. Henry said the relevance was it goes to

show that an oil spill was a poison within this definition.

I think it's arguable. And I think that's one of the elements the jury has to find. And I think the State can argue it. And I think I can argue as to whether or not it fits this definition.

MR. COLE: The only other suggestion I can have for the court is to put in a last sentence that says, "This is not..." -- words to the effect that this is not an inclusive list.

THE COURT: Okay. Mr. Madson, I'm going to give it as is on the basis that the "may be" makes it permissive. I think that would be the best way to handle this, given my earlier court ruling.

All right. Now we'll go the State's objections.

MR. ADAMS: Your Honor, before we go through the objections, we need to address the presumption instruction regarding BA levels, blood alcohol levels.

And I filed a jury instruction last week. And I've since changed that. I found a memo on this issue today. It's entitled Trial Memorandum Regarding Applicability of AS 2835.033 Presumptions. And attached to that memorandum is a new instruction which tracks for the most part the prior instruction, except

for the last paragraph is changed.

And the State would request that that instruction be given in lieu of the previous one. And the authority for that can be found in Dresnick vs State 697 P.2d 1059. And the court specifically discussed AS 2835.033 and stated, "We are satisfied that the presumptions established in AS 2835.033(A) reflect a legislative judgment regarding the interrelationship between blood alcohol levels and competence to drive. We believe that a jury considering drunk driving, assault involving motor vehicles, manslaughter and negligent homicide cases should be made aware of this legislative judgment."

Now, that is applicable to this case. We have a case where defendant is accused of operating a motorcraft while intoxicated. The jury is entitled to find out what the legislature feels about levels of intoxication and impairment with regard to the blood alcohol level.

We have evidence before the jury that defendant had a .061 some 10-1/2 hours after the grounding. There's been evidence regarding retrograde extrapolation. And the jury should be entitled to hear what the legislature thinks about that.

There is nothing in that statute, nor is there

anything in Dresnick which states that that only applies to blood alcohol tests, or breath tests within four hours of the incident. That requirement is contained in 2835.030(A)(2). And there are cases that -- I believe Mr. Madson has cited the Wilson case, but that doesn't say that it's only applicable to cases that come in with a .04 -- I mean, excuse me, within four hours.

I tried to read all the cases that are cited in .033 last night and I couldn't find one that used the words, "These presumptions are only applicable to cases, or tests within four hours." And I have an instruction here, which I did not make a copy of. I apologize. It's a standard DWI instruction, which we're not proposing to give because we feel that this instruction applies only to the test within four hours. And the second paragraph of that instruction says, "If you find that defendant took a breath test within four hours of the offense alleged, and that an accurate result was obtained, you may infer from such result that the defendant's breath alcohol content at the time of the test was equal to, or less than the defendant's breath alcohol content at the time he operated a motor vehicle."

Now, that is the instruction that applies to

when a test was taken within four hours. And it says the presumption applies. But, there is an inference you can infer. And we don't have that here. We're not asking for this instruction. We're simply asking for the instruction which gives an idea of what the legislature feels about BA levels.

THE COURT: Would it make any difference that it was not conducted -- the chemical analysis of the person's breath was not conducted and performed according to methods approved by the Department of Public Safety?

MR. ADAMS: In .033, I believe, one of the latter paragraphs, it does state that. I don't have specific recollection if this test was taken, if you followed those directions if that mandates that this presumption would not apply.

If I could review the statute.

I believe it just requires substantial compliance. For instance, Your Honor, there's a case out there which -- well, I believe that the intoximeters are required to be calibrated every 60 days. And there's a case out there where an intoximeter was calibrated on the 61st day. And defendant raised the objection that the intoximeter was not calibrated within the Department of Public Safety

regulations, and therefore the test was not taken in compliance with those regulations. The court of appeals said substantial compliance is all that's requited and one day is not going to make a difference.

We have substantial compliance in this case.

THE COURT: Was full information concerning the test made available to the defendant?

MR. ADAMS: Was full information regarding the test...

THE COURT: Was full information regarding the test made available to the defendant?

MR. ADAMS: What kind of information, if I may -- about how...

(4060)

THE COURT: About the samples, themselves? All three samples, the results of all three samples made available to the defendant?

MR. COLE: The litigation packet was provided.

THE COURT: What was provided in the litigation packet?

MR. COLE: The litigation packet that Dr. Peat brought to trial, pursuant to his subpoena contained full laboratory analysis, all the steps that were taken, copies of the chemists' notes, protocol of the laboratory. He had it up there in the stand...

THE COURT: All three tests?

MR. COLE: All three tests, yes. He had the whole entire packet.

MR. ADAMS: In addition, Your Honor, Dr. Peat related to me that he was contacted by someone representing the defendant to retest these -- to get the tests, and they could be retested. No one ever followed up on that. So, they had access to all of the tests to retest them if they wanted.

THE COURT: Do you know of any DWI case, Mr. Adams, where this type of an instruction was given, where the test was taken more than four hours after the time alleged?

MR. ADAMS: No. I do not.

(Pause)

Your Honor, we're not asking for any kind of a presumption or inference that the jury is allowed to infer that the results taken at 10:30 are what the results were at midnight. That is what -- we're not asking for that presumption, or that inference.

(Tape: C-3685)

(003)

We're asking for an inference that a person -- if the jury finds that Captain Hazelwood had a blood alcohol of over .10 at 12 o'clock, or shortly

thereafter, then they can use the legislative judgment about the interrelationship between blood alcohol level and ability to drive.

We're not asking for an inference that...

Your Honor, in addition, Mr. Madson brought this up in his opening, about the BA levels and that they're not allowed to presume, or that the .06 is not in and of itself evidence establishing negligence. I mean, excuse me, establishing that the defendant was intoxicated.

THE COURT: All right. Mr. Madson.

MR. MADSON: Well, that part is certainly true, Your Honor. When the State gave their opening and starts talking about a .04 I felt I had to say something on that point. So, that was simply improper rebuttal to the State's opening.

But, you know, we're really getting into a situation where the State is asking this court to ask on some extremely thin ice. I think they've totally missed the point. And I would urge the court to read the footnote in Williams, when they really set out what this presumption means, and why the four hour requirement is there.

And there's other cases. Let's see. Cole is one, too. I think that's an excellent example. If you

look at Cole, remember the evidence of intoxication was his driving, and the fact that an accident happened. There was -- this happened again.

The accident occurred sometime prior to -- some hours before the actual taking of the blood test. Now, the State was not allowed to, or did not -- I don't know if they just recognized it, or the judge did it -- the case doesn't set that out, doesn't make it clear. But, it was very clear there was no presumption given to the jury. The only evidence was, like we had in this case, it's identical to this case, where you have a test taken some hours later, well beyond the four hour limitation. And then, the evidence is confined to whether or not he was under the influence at the time, in other words, visibly and noticeably impaired, not the presumption.

And in Williams they set out the reason for that. The legislature, as in Dresnick has created this inference, or presumption that if a test is taken within four hours this presumption arises. Now, the fact that you can take the test and extrapolate here does not give rise to the inference. All that does is create a way, or a means, of saying well, this is what the blood alcohol was at that time, but that doesn't give rise to the use of the presumption, or the

inference here. And I think Williams really sets that out. If you look at that and Comeau and it makes sense, because there it wasn't done.

And I don't know of any case where it's been done, where the test was taken outside the four hours. I've had numerous manslaughter cases where the test is taken, you know, an accident, somebody's brought to the hospital. Blood test. It's within an hour or two, and this is done. But, I've never had one where it's been a situation like this, because this is designed for the .10 theory of intoxication. But, that's why the legislature says it only applies because it only makes sense if this test is done within this period of time. Because beyond that it's anybody's guess.

It's not to say, like in Williams the court said, well, it's certainly relevant evidence of what a blood alcohol content could be at an earlier time. But, it does not give rise to the presumption. And that's exactly what they said in there.

(180)

THE COURT: All right. Mr. Adams, I won't be giving that instruction either.

I've concluded that the inferences that are permitted under 28 35.033 are inferences on evidence that was gained as a result of tests by the Department

of Public Safety, either through the intoximeter, or approved blood tests, that the tests that were administered were not administered in accord with the methods approved by the Department of Public Safety, and that to give that instruction would be error.

Your request is, however, noted.

Any other suggestions to the court's proposed instructions, Mr. Adams?

MR. ADAMS: Well, Your Honor, hearing instruction 37, I believe that we agreed to that instruction on Friday, however it was something that was just put forth to us without a memo outlining that instruction. And upon closer review we believe that it has certain words in it that are not appropriate under the law.

In specifics, the words noticeable and noticeably. In the sixth line down it says, "...great or small, that it adversely effected and noticeably impaired his actions, reactions or mental processes...."

I don't believe that the law requires that a person be noticeably impaired. And that that's going to give the jury the wrong idea that instead of a driving while intoxicated charge we have a drunk driving charge. And in district court that that's an

argument, and something that the district courts always rely on. And it's something -- it's the difference between -- in a driving while impaired case all you have to do is prove the person was impaired. And impaired means not only his physical abilities, but his mental abilities. And when you put something in here it changes it from a driving while impaired to someone who's stumble down drunk. And that puts an unfair burden on the State. All we have to do is prove that he was impaired, not that he was stumble down drunk.

THE COURT: So, you would argue that at this time you'd eliminate the word "noticeably" on the sixth line and you'd eliminate the phrase "to a noticeable degree" on the next to last line, is that correct?

MR. ADAMS: Yes, Your Honor. I believe that those are the only two incidences where those words are used.

THE COURT: This is your last shot at this instruction. Is there anything else you wanted to argue about it?

MR. ADAMS: In our office and in the Anchorage District Courts the instruction that we proposed is the one that's used. It's always used.

And, if this is the one that's used up in the fourth Judicial District, as Mr. Madson states, then we

feel that that's wrong. That puts an improper burden on the state.

THE COURT: You have no objection to the instruction, then, 37, if we eliminate the term "noticeably" in the sixth line, and "to a noticeable degree" in the second to last line, is that correct?

MR. ADAMS: That's correct, yes.

THE COURT: Your Honor, I got this instruction from Judge Zimmerman's chambers. It is consistently and routinely given by all the district court in Fairbanks.

Now, maybe there's a distinction between drunk drivers in Fairbanks and Anchorage. Maybe in Fairbanks they have to be noticeable while here they can drive around without being noticed. But, there has to be some way of knowing when a person is impaired.

I mean, we just have to look at this in a common sense way. Certainly the test is: was he impaired? I mean, that's what driving while intoxicated is all about. But, how do you translate that to a jury, and what do they look for when they do that?

You can either have a blood test, 1, or else there's evidence of impairment.

What's the evidence of impairment that his

physical or mental abilities that you could notice it? The routine one is the police officer saying yes, I gave him these tests. He couldn't perform the tests right. His mental abilities were a little bit screwed up. He couldn't count. He couldn't do this. He couldn't walk the line. These are noticeable impairments.

If you take away that language, or those words, and also, I might add, the State of Alaska was certainly represented and has been represented in prosecuting cases in Fairbanks routinely. And I don't know if they ever objected to this, or if they have, if it ever was taken up on appeal. I'm certainly not aware of a case that construed this. But, my gosh, it's been around for a long time. This is the first time I've heard an objection to it.

THE COURT: All right. I'll eliminate the word "noticeably" and "to a noticeable degree". I think that's the way it should be. There's lots of people who can mask their impairment so as not to appear noticeably impaired, but certainly can be considered impaired based on their actions and their judgment calls.

Mr. Adams, next?

MR. ADAMS: If I could just have one moment,

Your Honor.

THE COURT: Yes, sir.

(Pause)

MR. ADAMS: That's it, Your Honor.

(370)

THE COURT: Okay. There is an instruction that I think we need to -- 28, Court's proposed 28.

Mr. Madson, the Court's proposed 28.

MR. MADSON: Which one?

THE COURT: 28.

(Pause)

MR. MADSON: That's out. Yeah.

THE COURT: Pardon?

MR. MADSON: What about it, Your Honor? I mean...

THE COURT: That's, is that correct?

MR. MADSON: Yeah.

THE COURT: Okay. I wanted to make sure. Okay. So, we'll take all the lesser includeds out.

Now, I'm going to formulate a new causation instruction, Mr. Madson, that will talk in terms of the defendant's conduct must be a cause, a legal cause, which will be defined as a proximate cause of the harm. It need not be the only cause, but it must be a cause. And a cause will be defined as it being a substantial

factor in bringing about the outcome of the event. something along those lines. That's what I'll be doing.

MR. MADSON: That probably would cover it. That's the concern I had.

THE COURT: Something like that okay with you, Mr. Cole?

MR. COLE: That's fine, Your Honor.

THE COURT: Okay. David, you can get cracking on that.

Mr. Madson, you've requested instruction 24, which has a third element, "That the negligence of Captain Hazelwood, if any, was the legal cause of the discharge of oil."

I'm not going to be giving that, Mr. Madson. That's included in the second element. And I'll be giving an instruction on causation, what that means. I will not be giving that as the third element.

MR. MADSON: Okay. That's fine. That'll cover it.

THE COURT: Okay. Are there any other instructions that we need to discuss at this time from the State's point of view that haven't been covered? Maybe you'll want to talk it over with all three of you there before we...

(Pause)

MR. ADAMS: Your Honor, is your ruling that you're not going to be giving a lesser included to the criminal mischief?

THE COURT: That's correct.

(Side conversation)

THE COURT: Unless there's something dramatic happens between now and late this afternoon. I can't foresee that, but if there's some case law that says, "yes, that is," and it would be error to refuse to give it, I will not be giving it.

MR. ADAMS: Nothing further, then, Your Honor.

THE COURT: Okay. From the defendant point of view?

MR. MADSON: No. Nothing.

THE COURT: Okay. I think the numbers will have to be changed, since we're withdrawing some of them. We'll withdraw the ones that won't be necessary any more. We'll renumber them. I'll make the changes that we've talked about today. I'll pull out the lesser included verdict forms.

Now, counsel, to avoid a problem I'd request that you hang around here and you go through the exhibits so we don't have any problem with exhibits on the morning of argument tomorrow morning. We've got

all morning. This is as good a time as any to go through them.

There's going to be an exhibit -- you're going to submit 180, I believe. And if there is a problem that develops you can notify me this morning, or this afternoon and we can take that up then.

Anything else we can do?

How about -- Mr. Madson, I don't know how they do it in Fairbanks, or how they do it in New York, Mr. Chalos, but if both parties agree to waive their presence during playbacks, they may do so.

My standard procedure is to call the attorneys for each question that's asked unless it's a question like, "May we have pencils", in which case I'd call you and say is it okay. But, normally I'd call you and say, "Come on down. Let's resolve the question. And if they wanted a playback we'd find out from them what they wanted. And if you didn't want to be present, I would instruct the jury that nobody be present except the in-court deputy, the bailiff and the jury. And that they would be required to listen and not talk in the jury box. If they need to take a restroom break notify Mr. Purden, and then they listen to the completion of it and then they go back to the jury room.

If there was any discussion took place Mr. Purden would be instructed to stop the recording, notify me, and I'd notify counsel.

Does counsel wish to be present during playbacks?

MR. MADSON: No, Your Honor. We would waive presence during any playbacks.

THE COURT: On the behalf of the defendant?

Does the state wish to be present at any playbacks?

MR. COLE: No. We wouldn't.

THE COURT: Any objection to them having a sufficient supply of paper pads and pencils in the jury room?

MR. MADSON: Certainly not.

THE COURT: Okay. Any objection to them having their notes that they've been taking for the last seven weeks in the jury room?

MR. MADSON: Oh, I'd request it, Your Honor, otherwise we're going to have playback for the next six months.

THE COURT: Any objection?

MR. COLE: No.

THE COURT: How about a video -- was there a video? There was a video, wasn't there? How about a

video machine in the jury room in case they need to use it?

MR. MADSON: I would object to that, Your Honor. The tape is in evidence, but to put special emphasis on that video, which is of oiled beaches and stuff like that, to let them play at any time they want. If they request that that video be played, then that's something we can take up. But, to have the actual machine in there, and who knows what else they can get. I mean, it's possible to watch As The World Turns on that thing, I think.

THE COURT: Okay. Any objection to if they request it we'll take it up at that time?

MR. ADAMS: We can take it up at that time.

THE COURT: How about a cassette tape recorder so they can play...

MR. MADSON: I have the same objection with that, Your Honor.

The tape is evidence, but the recorder never came in. If they want to play it they can request the court, we can be heard on that and they can come in and hear it. But, to have it available and to take that one piece of evidence and play it as many times as they want really gives them a lot of undue emphasis on one item.

THE COURT: All right. Mr. Cole.

MR. COLE: I think that they should have the tape...

THE COURT: Recorder?

MR. COLE: The recorder. Yes.

There's a number of tapes in evidence. They're entitled to listen to the tapes. They're admitted. They should be entitled to have that back there and listen to those tapes.

THE COURT: All right, is that tape player -- can you get us one that doesn't have a radio function on it?

MR. COLE: Yes. I can bring one of those over.

THE COURT: And have the tapes, themselves, been protected against erasure?

MR. COLE: I believe, yes. They have.

THE COURT: Okay. Over objection, the jury will be permitted to have a tape player to play the cassettes.

Make sure that you get the right cassettes to the jury and that there aren't any that inadvertently get to the jury.

MR. COLE: There's one that's not supposed to go in, and we'll make sure that we grab it.

THE COURT: Anything else you can think of before we...

MR. MADSON: No.

THE COURT: Okay. I'll start working on these instructions. And if you have anything you come up with here that's important enough to call me, let me know. And in the meantime I'll get you a copy of the instructions later this morning, or early afternoon.

We'll stand in recess.

THE CLERK: Please rise This court stands in recess subject to call.

(670)

(Off record - 10:50 a.m.)

CONTINUED