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The Top Five Things Civil Defense Lawyers Need to Know About Using Artificial Intelligence in Their Legal Practices

By John T. Sly, Esq.

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Artificial Intelligence (AI) has transformed various industries, and the legal sector is no exception. Civil defense lawyers have an opportunity to leverage AI to enhance their legal practices. AI technologies can streamline processes, improve research efficiency, and even predict outcomes. But, there are serious caveats. Here are the top five things civil defense lawyers need to know about using AI in their legal practices.

1. LEGAL RESEARCH ENHANCEMENT

AI-powered tools have revolutionized legal research, saving valuable time for civil defense lawyers. Traditional legal research could be time-consuming, involving scouring through volumes of documents and precedents. However, AI-driven platforms can swiftly analyze vast databases, highlighting relevant case law, statutes, and regulations. This efficiency allows lawyers to allocate more time to critical thinking and strategy development.

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WHAT'S INSIDE

IDCA President's Letter

Amanda Richards
IDCA President

Dear Members:

At IDCA, we do not take for granted the fact that in our profession there are a multitude of organizations our members can join. In fact, as I write this letter there are numerous flyers and letters in my inbox seeking membership to a variety of organizations. In this sea of committees and organizations we pride ourselves on ensuring that our members receive true benefit from their yearly membership in this organization. We are mindful of the need to tailor our efforts to ensure IDCA is current and relevant to today's defense counsel. I am very proud of how far we have come.

Over the past several months, our Board of Directors has been actively engaged in various initiatives aimed at enhancing our profession and supporting our members. From growing our IDCA Forum, to working to provide you continuing legal education (CLE) programs, to developing a strategic plan to better advocate on legislative matters, our association has been working diligently to provide valuable resources and opportunities for growth.

Our IDCA Forum continues to grow. If you have not visited the Forum, please log on, and interact with the membership. This is a great way to meet members, share ideas, and develop new strategies in defending cases. I encourage each of our members to post often on the Forum to help us grow our community. The more we use the forum, the more each of us benefits from this tool.

We have been working with our Legislative Committee to develop a stronger lobbying arm of IDCA. If there are issues you would like to see IDCA work on for the upcoming legislative session please reach out and let us know.

Our Annual Meeting is just around the corner and I encourage all of you to clear your calendars and sign up. Pat Sealey, our President-Elect, has put together an engaging seminar with something for everyone. We have slated amazing speakers with diverse areas of expertise to speak on a variety of topics including: the best way to prepare our witnesses, unemployment claims, and navigating the new world of AI, and much, much more. We look forward to seeing you all in September.

The Annual Meeting would not be possible without our generous sponsors who help us grow this event every year. There are sponsorship opportunities still available and I encourage you to provide your support if you haven't already. From law firm sponsors to exhibitor tables, sponsorship of this event is a great way to contribute to this organization. We thank you in advance for your support.

I hope you enjoy the rest of your summer and I will see you all in September!

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One can use ChatGPT, Bing, and Gemini for general legal concepts and iterate with them to tailor responses to the facts of a particular case. However, as will be noted throughout this article, lawyers must be very careful not to share confidential information on open AI platforms. Those platforms will incorporate whatever is inputted by a user into its own large language model (LLM) from which it learns. None of us want future users to find confidential information about our clients in the responses they receive from AI.

Lawyers also must be careful to understand that AI has inherent "hallucination" proclivities. What does that mean? AI does not know what it does not know. So, AI may produce apparently reliable information that may be wrong or completely false. For example, in a high-profile case in New York, a lawyer submitted a filing in connection with a case involving aviation. Apparently, he created most, if not all, of the filing through the use of ChatGPT. He happily submitted his filing which contained supportive case citations and quotes only to later learn that the citations were false and the quotes were hallucinations of ChatGPT.

As we move forward with the implementation of AI, third parties like Westlaw and Lexis-Nexis have been incorporating AI into their searches while putting guardrails on the responses based on their already existing reliable databases. It is strongly recommended that whatever legal research you derive from AI tools is run against Westlaw or Lexis-Nexis or some other reliable citation service.

2. DOCUMENT CREATION, ANALYSIS, AND REVIEW

AI's capabilities extend to document creation, analysis and review, a critical aspect of civil defense cases. Instead of manually sifting through documents to identify relevant information, AI-powered algorithms can quickly identify key details, potentially even uncovering insights that might have been overlooked. This significantly reduces the chances of missing essential evidence and streamlines the preparation process for lawyers. These points can then be incorporated into new documents such as discovery demands, discovery responses, contracts, etc. Again, it is the lawyer's responsibility to ensure that whatever is created meets legal requirements. One cannot simply hand over responsibility to AI.

Third parties have already begun incorporating AI capabilities into their products. For example, Casetext has a product called CoCounsel. CoCounsel is built on OpenAI's GPT-4, customized for the legal industry. It can read, comprehend, and write at a postgraduate level. These kinds of value-added third-party products based on AI databases will become integral parts of everyday legal work. Likewise, the paid version of ChatGPT has various "GPTs" that are trained on specific areas of knowledge.

3. PREDICTIVE ANALYTICS FOR CASE OUTCOMES

Predictive analytics, fueled by AI, offer civil defense lawyers an edge when assessing potential case outcomes. By analyzing historical case data, AI algorithms can provide insights into the likelihood of success for a particular defense strategy. This enables lawyers to make informed decisions and advise clients more accurately regarding potential settlements or trial prospects. While not foolproof, predictive analytics can guide strategies and resource allocation effectively.

What may this mean for day-to-day practice? Rather than simply searching for prior cases seeking something that may persuade a particular judge or jury, AI will be able to analyze cases and prior decision of particular judges and the results of jury trials in particular jurisdictions to be able to predict outcomes. It will also be able to suggest modifications to arguments that may prove to be more successful.

Predictive analytics in the law is still in its infancy. However, as historical data is fed into AI engines, we will soon see a revolution in how we integrate our research into the facts and arguments of a particular case.

4. AUTOMATION OF ROUTINE TASKS

Civil defense lawyers often find themselves buried under a mountain of administrative tasks that eat into their productive time. AI-powered automation tools can handle routine tasks like scheduling, document sorting, and even initial client interactions. This automation liberates lawyers from mundane responsibilities, enabling them to focus on more complex, intellectually demanding aspects of their cases.

For those already operating in the Microsoft Office Suite, Co-Pilot is an add-on that will link all of the apps you are already using into a seamless whole. Further, it will use the power of ChatGPT behind the scenes to produce new more precise results for the user. For example, rather than sorting for an hour to find the email you received last October (we've all been there), Co-Pilot will be designed to have all of your emails, calendar, notes, PowerPoints, and documents available and searchable in a confidential manner..

5. ETHICAL AND PRIVACY CONSIDERATIONS

While the potential of AI is exciting, civil defense lawyers must be attuned to the ethical and privacy considerations surrounding its use. AI algorithms require data to learn and make accurate

predictions. This data might include sensitive client information. Lawyers must ensure that they comply with legal and ethical standards when sharing client data with AI platforms. Moreover, understanding how AI arrives at its conclusions is crucial when presenting such insights in court; transparency is key to maintaining credibility.

The American Bar Associations' House of Delegates adopted a Resolution dated August 12-13, 2019, which notes:

> That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.

112 2019A (americanbar.org)

CONCLUSION

Artificial Intelligence has ushered in a new era of efficiency and effectiveness in the legal field, and civil defense lawyers stand to benefit significantly. From streamlining research to predicting case outcomes, AI offers a plethora of tools that can transform legal practices. However, it is essential to strike a balance between the advantages AI provides and the ethical considerations it raises. Civil defense lawyers must stay informed about the latest AI developments in the legal sector, continually adapting their strategies to harness AI's power effectively.

As AI technology continues to evolve, civil defense lawyers should invest time in understanding how these tools can be integrated seamlessly into their practices. While AI can handle many tasks, the human touch remains indispensable, particularly in interpreting complex legal nuances and crafting persuasive arguments. By embracing AI as a valuable assistant rather than a replacement, civil defense lawyers can position themselves at the forefront of a tech-savvy legal landscape, offering clients the best of both worlds—cutting-edge technology and expert legal acumen.

2024 Case Law Updates in the Areas of Torts and Negligence

By Brendan P. McGuire
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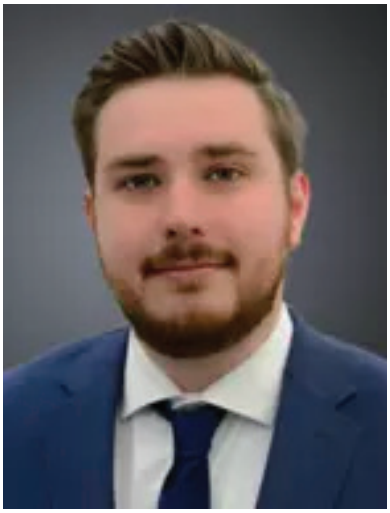
Brendan P. McGuire

This article will provide summaries of three Iowa Supreme Court cases from the previous term in the areas of torts and negligence. Specifically, these cases include: *Singh v. McDermott*, 2 N.W.3d 422 (Iowa 2024); *Penny v. City of Winterset and Christian Dekker*, 999 N.W.2d 650 (Iowa 2023); and *Vagts v. Northern Natural Gas Company*,— N.W.3d—, 2024 WL 3075432 (Iowa June 21, 2024).

SIMRANJIT SINGH V. MICHAEL WALTER MCDERMOTT, 2 N.W.3D 422 (IOWA 2024)

Case No. 22-1337
Submitted: October 24, 2023
Filed: February 2, 2024
Amended: April 15, 2024

This Iowa Supreme Court Opinion concerns an appeal from the Iowa District Court of Cass County, and was on review from the Iowa Court of Appeals. Justice David May delivered the opinion of the court, in which all justices joined.

In the early morning hours on January 26, 2019, Simranjit Singh was driving a semi-truck hauling a load of fish from Washington State to Massachusetts on I-80 in Cass County. *Singh*, 2 N.W.3d at 424. While Singh was traveling on I-80, he was unable to avoid a cow that appeared on the road and his truck struck and killed the cow, which injured Singh and damaged his truck.[1] *Id.* The Defendant, Michael McDermott, owned the cow and owned property which abutted I-80 and contained fences and gates for the confinement of his cattle. *Id.* Singh filed a petition against McDermott, which pled a single count of negligence and claimed that "McDermott was negligent in allowing his cow to travel into the highway where Singh was travelling." *Id.*

Approximately two months before trial, McDermott moved for summary judgment on the basis that Singh lacked sufficient evidence to show he was negligent.[2] *Id.* Singh's resistance argued that McDermott's "negligence lies in the undisputed fact that the cow strayed onto I-80 in the middle of the night and was unattended at the time [that Singh's] truck collided with it."[3] *Id.* Both McDermott and Singh cited *Klobnack v. Wildwood Hills, Inc.*, 668 N.W.2d 799 (Iowa 2004) in support of their arguments.[4] *Singh*, 2022 WL 22685842, at *2. The district court granted McDermott's motion and dismissed the case. *Singh*, 2 N.W.3d at 424. Singh appealed, the case was transferred to the Iowa Court of Appeals which affirmed the district court's decision[5], and Singh applied for further review with the Iowa Supreme Court. *Id.*

The Iowa Supreme Court framed the issue presented on appeal as "whether the district court committed legal error by granting summary judgment." *Id.* The Court's analysis began with consideration of "whether the record here contains sufficient evidence to support a finding that McDermott was negligent," and a review of the legal principles governing negligence cases in Iowa. *Id.* at 425. To do this, the Court first considered the duty of care imposed upon cattle owners under Iowa law. *Id.* For much of the twentieth century, Iowa law imposed both a statutory and common-law duty of care upon livestock owners. The statutory duty arose from a "fencing in" statute until the Iowa Legislature appealed the statute in 1974. The traditional common-law duty, however, survived the statute's repeal. *Id.* (citing *Klobnack*, 688 N.W.2d at 803). Therefore, the common-law duty of care governed the Court's analysis in this case.[6] *Id.*

The Court first addressed this common-law duty in *Flesch v. Schlue*, 191 N.W. 63 (Iowa 1922), a case which predated the "fencing in" statute. *Id.* Like this case, *Flesch* involved a horse that was loose on a highway and ended up being struck by a vehicle. *Id.* (citing *Flesch*, 191 N.W. at 63). The horse owner's duty of care was described in this jury instruction, which the Court approved:

> "Ordinary care by the defendant, of his horse, would be such care as an ordinarily prudent and careful farmer exercises under like circumstances. If the ordinary, careful, and prudent farmer puts his horse in a barn and shuts and latches the doors thereto, or puts it in the yard properly fenced and properly closes and secures the gates, then that would be ordinary care."

Id. at 425-26 (citing *Flesch*, 191 N.W. at 63-64). With this standard in mind, the Court concluded that McDermott owed a similar duty of ordinary care as an "ordinarily prudent and careful farmer exercises under like circumstances" to keep cows out of the highway. *Id.* at 426 (citing *Flesch*, 191 N.W. at 63).

Next, the Court considered whether the record contained evidence which would allow a finding that McDermott breached his common-law duty of ordinary care, which involved consideration of both direct and circumstantial evidence. *Id.* Ultimately, the Court found no direct evidence of negligence, and that "[t]he record shows no act or omission by McDermott that was inconsistent with the care that an ordinarily prudent and careful farmer would exercise in containing cattle." *Id.* For example, the record contained no evidence of any unmended defects in McDermott's fence, nor any evidence that McDermott failed to secure the fence's gate. *Id.* at 426-27. As such, the Court declined to hold that the cow's mere presence on I-80 provided sufficient evidence of McDermott's negligence. *Id.* at 427. The Court then considered the existence of any circumstantial evidence, which it viewed through Singh's *res ipsa* claim. *Id.* To decide whether *res ipsa* could apply, the Court first considered whether there was "substantial evidence" that Singh's injury "was caused by an instrumentality under the exclusive control and management of the defendant." *Id.* As Singh requested, the Court specifically assumed that the cow was within McDermott's fenced property near I-80 on the night of the accident. *Id.* at 428. The Court then turned to the second *res ipsa* element, which requires substantial evidence that "the occurrence causing the injury is of such a type that in the ordinary course of things would not have happened if reasonable care had been used." *Id.* (citing *Banks v. Beckwith*, 762 N.W.2d 149, 152 (Iowa 2009)). The Court determined this case fell into a category of cases for which expert testimony was necessary to establish foundational facts on the second element of *res ipsa*. *See id.* Because the record lacked any expert testimony or other evidence that "in the ordinary course of things," the cow would not have escaped "if reasonable care had been used" by McDermott, the *res ipsa* doctrine could not apply. *Id.* at 429. In conclusion, the Court affirmed the district court and court of appeals rulings. *Id.*

As a final note, the Court recognized that courts in other jurisdictions have differed as to whether *res ipsa* can apply to cases involving animal escapes.[7] *Id.* Rather than adopt any special rule for this category of cases, the Court determined each case should be evaluated individually under general principles of law. *Id.* "When plaintiffs advance *res ipsa* theories, Iowa courts should apply general *res ipsa* principles, as we have here." *Id.* If sufficient evidence is presented to establish the requirements of *res ipsa loquitor*, then the case should be submitted to the jury. *Id.* But where, as here, sufficient evidence was not presented, dismissal is appropriate. *Id.*

JAMES R. PENNY V. CITY OF WINTERSET AND CHRISTIAN DEKKER, 999 N.W.2D 650 (IOWA 2023)

Case No. 22-1026
Submitted: November 16, 2023
Filed: December 29, 2023

This Iowa Supreme Court Opinion concerns an appeal from the Iowa District Court of Madison County, and was on review from the Iowa Court of Appeals. Chief Justice Susan Christensen delivered the opinion of the court, in which all justices joined.

On March 30, 2018, Christian Dekker, a police officer for the City of Winterset, was home on his dinner break when he received a call that there was an unresponsive female in the parking lot of a local motel. *Penny*, 999 N.W.2d at 651. Dekker responded to the call with his overhead lights and siren on. *Id.* As Dekker traveled northbound on North 10th Street toward its intersection with Highway 92, Penny was traveling westbound on Highway 92.[8] *Id.* When Dekker approached the intersection, he slowed his vehicle and looked to his left and right.[9] *Id.* Based on his observations, Dekker believed it was appropriate to proceed through the intersection without making a full stop at the stop sign. *Id.* Dekker drove through the intersection at approximately 25-30 mph with no brake applied while, at the same time, Penny entered the intersection at approximately 50-55 mph. *Id.* at 651-52. Neither Dekker nor Penny saw one another, and their vehicles collided at the intersection of Highway 92 and North 10th Street. *Id.* at 652. Penny sustained a traumatic brain injury, a lower-back fracture, and an injury to his right knee in the collision, while Dekker sustained cuts and abrasions to his head. *Id.*

Thereafter, Penny filed a petition against the City of Winterset and Dekker, which alleged Dekker was reckless and that the City was vicariously liable for the alleged recklessness. *Id.* The defendants filed a motion for summary judgment, which argued that no reasonable jury could find that Dekker acted recklessly, and Penny resisted. *Id.* The district court granted the defendants' motion. *Penny v. City of Winterset*, 2022 WL 20637096 (June 3, 2022). Therein, the district court observed that "Officer Dekker slowed considerably as he approached the intersection, the traffic on the roadway was much lighter, Officer Dekker did not navigate his way through traffic, and he did not accelerate as he went through the intersection . . . Because Officer Dekker had no reason to believe that any traffic present did not hear or see his approach, his assumption that the path in front of him would remain clear was reasonable. Further, no reasonable jury could find that his driving was reckless under Iowa Code section 321.231." *Id.* at *4.

Penny appealed, and the Iowa Court of Appeals framed the issue presented as "whether the district court erred in concluding as a matter of law that a police officer who was responding to an emergency vehicle was not reckless in driving through a stop sign at a highway intersection and crashing into a vehicle. *See* Iowa Code § 321.231 (2020)." *Penny v. Winterset*, 2023 WL 3862312 (Iowa Ct. App. June 7, 2023). The court's analysis began with Iowa Code § 321.231, which "'provides liability protections to drivers of emergency vehicles in certain situations,' including where, as here, the driver of an authorized emergency vehicle is 'responding

to an emergency call.'" *Id.* at *4 (internal citations omitted). Next, the court observed that "[a] plaintiff seeking recovery based on actions of a driver of an authorized emergency vehicle must show the protected actions were performed in a reckless manner."[10] *Id.* (internal citations omitted). The court ultimately reversed the district court's ruling and remanded for further proceedings. *Id.* at *7. Relevant to the court's decision was its conclusion that it was not safe for Dekker to assume the path in front of him was clear or would be clear because of motorists' duty to yield to him. *Id.* at *6.

Upon further review to the Iowa Supreme Court, the defendants challenged the court of appeals' conclusion that a genuine issue of material fact existed as to whether Dekker's actions leading up to the collision were reckless. *Penny*, 999 N.W.2d at 652. In holding so, the court of appeals relied on *Bell v. Community Ambulance Service Agency*, 579 N.W.2d 330 (Iowa 1998), and *Estate of Fritz v. Henningar*, 19 F.4th 1067 (8th Cir. 2021), which the defendants' maintained articulated a recklessness standard that conflicts with the court of appeals' decision. *Id.* Instead, the defendants argued that *Bell* and *Fritz* require a determination that no reasonable jury could have found Dekker's actions reckless. *Id.*

The Court previously determined what constitutes recklessness under Iowa Code § 321.231 in the context of high-speed chases, but its decisions regarding the issue of recklessness in emergency response scenarios were limited. *Id.* at 653. Penny argued that *Bell* and *Fritz* were not analogous to the present case. *Id.* at 654. The Court disagreed, and explained:

> "Like *Bell*, Officer Dekker was responding to an emergency with his lights and siren activated, and he had a clear lane through which he could proceed through the intersection. While he had been speeding, which he was permitted to do under Iowa Code section 321.231(3)(b), Officer Dekker slowed down considerably as he approached the intersection . . . Just as in *Bell*, given the circumstances, Officer Dekker's speed was not excessive. Further, his decision to slow down evidences his intent to proceed through the intersection with caution, which is supported by his deposition testimony that said, 'had I seen him, I would have braked. I'm not in the line of hurting myself or other people.'"

Id. at 654-55. Penny argued that *Bell* and *Fritz* were distinguishable from this case because they involved an intersection controlled in all four directions, whereas here, Penny was not subject to a traffic control device, but Dekker was. *Id.* at 655. The Court disagreed, and reasoned that while "Officer Dekker did not come to a complete stop at the stop sign, he was not required to do so under Iowa Code section 321.231(3)(a) if he slowed down to a speed 'necessary for safe operation.'" *Id.* Finally, Penny argued that two expert reports[11] supported a finding of recklessness. *Id.* The Court disagreed, and stated there must still be evidence Dekker intentionally committed an unreasonable act "in disregard of a risk known to or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Id.* The Court then vacated the court of appeals decision, affirmed the district court ruling and concluded: "[i]t cannot be said that Officer Dekker intentionally disregarded a risk known to him or a risk so obvious that he must have been aware of it. (internal citations omitted). At most, Officer Dekker's conduct created an unreasonable risk of harm, but recklessness requires more. (internal citations omitted). Therefore, Officer Dekker's conduct does not meet the high bar for recklessness under Iowa law." *Id.* at 656.

MARK VAGTS, ET AL. V. NORTHERN NATURAL GAS COMPANY,—N.W.3D—, 2024 WL 3075432 (IOWA JUNE 21, 2024)

Case No. 23-0537
Submitted: January 23, 2024
Filed: June 21, 2024

This Iowa Supreme Court Opinion concerns an appeal from the Iowa District Court of Fayette County. Justice Christopher McDonald delivered the opinion of the court, in which Justices Oxley, McDermott and May joined, and in which Chief Justice Christensen and Justices Waterman and Mansfield joined as to part III. While not discussed within this article, Justice Mansfield filed a special concurrence, in which Chief Justice Christensen and Justice Waterman joined.

The Vagts family owned and operated a dairy farm in West Union, Iowa. *Vagts*, 2024 3075432, at *1. Northern Natural Gas Company ("NNG") operated a natural gas pipeline that ran under the Vagts' property. *Id.* The parties' relationship began in 1960 when the Vagts granted NNG an easement to lay its pipeline through their property. *Id.* The following year, the Vagts granted NNG a second easement to install a cathodic protection system on their property. *Id.* In 1964, NNG installed both its pipeline and an anode bed on the Vagts' property. In 2013, NNG replaced the existing, depleted anode bed with new anodes, which remained in the same location. *Id.* In 2017, the Vagts substantially increased the size of their dairy operation, which included an increase in the size of their free-stall barn (extending it westward closer to NNG's pipeline and cathodic protection system), and increased in the size of their herd to approximately 500 cows. *Id.*

After 2013, the Vagts began to experience difficulties in their dairy operation and their cows displaying "bizarre, abnormal behavior," such as increased sickness and somatic cell count, decreased milk quality and production, and an increase in the cows' rate of death to approximately 17% of the herd in 2022.

Id. at *2. These difficulties took a personal toll on the Vagts, and resulted in excess costs, decreased revenue and lost profits for their dairy operation. *Id.* Subsequently, the Vagts decided to test their farm for stray voltage, and they contacted the Allamakee-Clayton Electric Cooperative, Inc. ("ACEC") to do so. *Id.* ACEC tested the site, reported stray electrical current, and contacted NNG. *Id.* NNG visited the Vagts' dairy farm and also detected stray voltage, but believed the detected voltage fell below the level of concern established in the "Redbook"[12] and the Iowa Stray Voltage Guide. *Id.* Thereafter, in late-October 2020, NNG shut down the rectifier nearest to the Vagts' free-stall barn; however, NNG added anode beds to the cathodic protection system and increased the electrical energy applied to each of the anode beds. *Id.*

In March 2021, the Vagts filed a lawsuit against NNG and ACEC. *Id.* Counts I and II asserted claims of nuisance and negligence, respectively, against NNG. *Id.* Count III asserted a claim of negligence against ACEC. Count IV asserted a claim of abatement against NNG and ACEC. *Id.* The Vagts later dismissed their negligence actions against NNG and ACEC. *Id.* A dispute arose at trial regarding the jury instructions. The Vagts proposed marshaling instruction for their nuisance claim. *Id.* NNG objected to the marshaling instruction and argued, "Plaintiffs should be required to prove negligence in order to recover under a nuisance theory." *Id.* NNG's position was that negligence is an element of nuisance, and "comparative fault principles therefore apply" and proposed an alternative jury instruction. *Id.* The district court held that negligence was not an element of the nuisance claim, and instructed the jury in accord with the Vagts' proposed jury instructions and disallowed evidence relating to a comparative fault defense. *Id.* at *3. The district court submitted an instruction which provided a correct statement of law defining nuisance, and NNG did not object to this instruction. *Id.* at *3-4. Based on this instruction, the jury found (1) that normal persons in the community would regard the stray voltage from the cathodic protection system as definitely offensive, seriously annoying, or intolerable; (2) that the stray voltage was an unreasonable interference with the Vagts' comfortable enjoyment of their life and property; and (3) that the stray voltage was a nuisance. *Id.* at *4. The jury awarded the Vagts $3 million in economic damages; $1.25 million for personal inconvenience, annoyance and discomfort; and $500,000 for the loss of use and enjoyment of land. *Id.*

NNG filed a posttrial motion, which claimed the district court erred in submitting the nuisance claim to the jury without including negligence as an element of the claim as set forth in its proposed jury instruction. *Id.* The district court denied this motion, and concluded that "[i]t is clear that no breach of a standard of care is required to prove a common law nuisance claim." *Id.* NNG also moved for a new trial or, alternatively, remittitur regarding noneconomic damages. *Id.* NNG's position was that the noneconomic damages were not supported by the evidence and allowed for a double recovery. *Id.* The district court denied that motion as well. *Id.*

On appeal, the Iowa Supreme Court first addressed NNG's contention that the district court erred in instructing the jury that the Vagts could establish their nuisance claim without proof of negligence and that the district court erred in denying NNG's motion for judgment notwithstanding the verdict and motion for new trial. *Id.* The Court's analysis began with the recognition that "Iowa case law distinguishes between negligence and nuisance" and a discussion of the long-standing distinction between nuisance and negligence. *See id.* at *4-5. Then, the Court observed that, "[s]ince the time of Iowa's founding, this court's precedents are in accord with the common law and statute. Our cases hold that negligence is not an element of a nuisance claim, even when the defendant is acting lawfully and even when the defendant's activities are not inherently dangerous." *Id.* at *5. The Court provided a number of authorities that make clear that "negligence is not an element of nuisance under long-established Iowa law." *See id.* at *5-8. Conversely, NNG relied upon an inapposite line of cases regarding nuisance-by-negligence claims. *Id.* at *8. The Court disagreed and determined this case was not a nuisance-by-negligence action. *Id.* at *9. Rather, this case was a nuisance claim in which the plaintiffs contended that even though NNG exercised the highest possible degree of care, NNG nonetheless created a nuisance. *Id.* Therefore, the Court agreed with the district court that proof of negligence is not an element in a nuisance claim, and concluded the district court did not err in instructing the jury and in denying NNG's motion for judgment notwithstanding the verdict and motion for new trial. *Id.* ("The common law, the controlling statute, and 170 years of precedents establish that '[i]f the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance.'" (internal citations omitted)).

NNG further argued the district court erred in failing to instruct the jury on negligence, and relied on *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 658 (Iowa 2002), to support this argument. *Id.* The Court articulated NNG's *Martins* arguments as two-fold and "somewhat contradictory." *Id.* First, NNG argued that *Martins* was rightly decided, that *Martins* held that nuisance requires proof of negligence unless danger is inherent in the activity producing the nuisance, that use of the cathodic protection system is not inherently dangerous, and that proof of negligence was thus required in this case. *Id.* The Court disagreed, and determined that "[i]n the end, *Martins* does not support NNG's argument and the statement in *Martins* on which NNG relied was an incorrect statement of the law.[13] *Id.* at *10. Second, NNG argued that *Martins* was wrongly decided, should be overruled, the Court should instead adopt the dissenting position in *Martins* and the

Restatement (Second) of Torts § 822 (regarding nuisances), and that the Court should hold that nuisance claims always require proof of negligence. *Id.* at *9. The Court again disagreed and declined NNG's request to overrule *Martins* and adopt the dissenting position in *Martins* and Restatement (Second) of Torts § 822, as neither "are in accord with our statutory nuisance scheme." *Id.* at *11.

The Court then addressed NNG's argument that the district court erred in denying its motion for remittitur or, in the alternative, motion for new trial. *Id.* at *13. Here, NNG argued that the jury's award of $1.25 million for personal inconvenience, annoyance and discomfort lacked evidentiary support, and NNG emphasized this case lacked the hallmarks of a true stand-alone nuisance case because the Vagts were never subjected to sensory offenses such as noxious odors that caused personal discomfort. *Id.* Here, the Court could not conclude the district court abused its considerable discretion in denying NNG's motion for new trial or remittitur. *Id.* at *13-14. Rather, the Court concluded there was reasonable foundation for the jury's verdict, such as testimony which showed the additional time and resources the Vagts' expended in treating their increasingly sick herd, and testimony which showed the Vagts experienced decreased enjoyment of their property due to the necessity of euthanizing an abnormally high percentage of their herd. *Id.* at *14.

Finally, the Court addressed NNG's argument that the damages award was excessive in this case because there was an omission in the instruction and the verdict form. *Id.* at *15. The verdict form did not contain an "end date" for calculating damages, and NNG contended that the parties agreed that the end date for calculating damages should have been January 30, 2023, and that end date should have been included in the instructions and the verdict form. *Id.* Here, the Court observed that NNG made this same argument in its posttrial motion, and the district court concluded that any alleged error was waived because the instruction and verdict form were submitted without objection. *Id.* The Court agreed with this analysis, and concluded "NNG's failure to timely object to the instruction also failed to preserve this issue for appeal." *Id.* For all of these reasons, the Court affirmed the judgment of the district court. *Id.*

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1 Per the district court's ruling, the incident occurred at approximately 2:00 a.m., while it was dark, and Singh was driving approximately 65-68 mph when he struck a black cow in the right lane, impacting the driver's side of the truck. *Singh v. McDermott*, 2022 WL 22685842, at *1 (July 28, 2022). Singh stated that the cost of repair to his truck was approximately $44,094.44, and that the time of the accident, the value of his truck exceeded the cost of repairs. *Id.*

2 McDermott's motion asserted that, due to the lack of evidence, Singh could not meet the elements for breach of duty of care, and that any finding of breach would be purely speculative. *Singh*, 2022 WL 22685842, at *2.

3 In resistance, Singh argued that the fact that the cow was in the road is the proof that McDermott breached the duty of care. *Singh*, 2022 WL 22685842, at *2. Singh's resistance additionally raised a claim based on *res ipsa loquitor*. *Id.* The district court, which noted Singh's *res ipsa* claim was not properly pled, nevertheless concluded that the facts as presented did not fit a *res ipsa* theory. *Id.*

4 In *Klobnack*, the Iowa Supreme Court acknowledged the absence of statutory or common-law duty to restrain livestock, (specifically, horses) but that, nevertheless, the Defendant still owed a duty of ordinary care. *Singh*, 2022 WL 22685842, at *2 (citing *Klobnack*, 668 N.W.2d at 800).

5 *Singh v. McDermott*, 2023 WL 4103449 (Iowa Ct. App. June 21, 2023).

6 "The common-law duty is a 'duty of ordinary care.'" *Id.* (citing *Klobnack*, 668 N.W.2d at 801).

7 *See, e.g.*, *Vanderwater v. Hatch*, 835 F.2d 239, 242 (10th Cir. 1987) (recognizing the split and collecting authorities).

8 North 10th Street has stop signs that control northbound and southbound traffic, while Highway 92 runs east-to-west and has no traffic control devices. *Id.* As Penny neared the intersection, he pulled off to the side of the road to yield to another emergency vehicle that was traveling westbound towards him on Highway 92 with its lights and siren on before Penny resumed driving on the highway at approximately 50-55 mph. *Id.*

9 Dekker observed a car to his left that had either stopped or was a reasonable distance away from the intersection. *Id.* When Dekker looked to his right, he noticed a light in the distance but perceived it to be coming from a nearby farmhouse. *Id.*

10 "To prove recklessness under the statute, a plaintiff must show that the officer 'has intentionally done an act of unreasonable character in disregard of a risk known to [the officer] or so obvious that [the officer] must be taken to have been aware of it.' And even then, the officer can only be liable if the dangerous act was "so great as to make it highly probable that harm would follow." *Id.* (internal citations omitted).

11 These two expert reports opined that "based on the dash camera footage from Officer Dekker's vehicle, Penny was fully visible from Officer Dekker's vantage point and that because of his speed, Officer Dekker failed to provide himself enough time to confirm where the lights were coming from or to react appropriately at the intersection." *Id.*

12 The Redbook is published by the United States Department of Agriculture and is cited by the Iowa Stray Voltage Guide. *Id.*

13 "Specifically, the *Martins* court confused whether something is an 'inherent danger' with 'ultrahazardous activity.' (internal citations omitted). In addition, despite that stray sentence, the holding in *Martins* was correct and consistent with the common law, the controlling statute, and our precedents. The *Martins* court held 'the district court correctly submitted the nuisance claim without an accompanying negligence claim.' 652 N.W.2d at 665. The court explained that 'our nuisance cases make clear that there can be a nuisance claim without an underlying actionable conduct, such as negligence, being proved. Additionally, such a claim can be established without a showing of intentional conduct.' *Id.* at 664. Given the holding in *Martins*, the single sentence on which NNG relies cannot be interpreted to deviate from the statutory text and overrule *sub silentio* more than a century's worth of precedents. (internal citations omitted)." *Id.*

New Member Profile

Nick Gral

Attorney Nick Gral practices at Whitfield & Eddy in the areas of civil, commercial, and personal injury litigation. Nick also specializes in construction disputes and dram shop defense work. In January 2024, Nick was named a member attorney.

Prior to becoming an attorney, Nick received his law and undergraduate degrees from Drake University. While a member of the Drake University football team, Nick played in the Global Kilimanjaro Bowl in Arusha, Tanzania, which was the first collegiate football game played on the continent of Africa. Aside from the game, the trip also included service work with local orphanages, hosting a football clinic for over 1,000 Tanzanian youths, and summiting Mt. Kilimanjaro—the world's tallest freestanding mountain.

Nick's wife, Katie Gral, is an associate attorney at Dentons Davis Brown. Together, they live in Urbandale with their daughter, Campbell.

A Litigator's Guide to Social Inflation

By Sean O'Brien
Dickinson, Bradshaw, Fowler & Hagen PC


Sean O'Brien

As litigators, we are often called upon to provide an evaluation of our client's exposure in a given case. This evaluation, no doubt, has been impacted by social inflation in recent years. This article aims to provide a helpful guide that defines social inflation, identifies the causes, and provides strategies for combating it.

Social inflation is a term that describes how insurers' claims costs are increasing above general economic inflation. The "social" aspect of the term represents shifting social and cultural attitudes about who is responsible for absorbing risk. The term can generally be associated with a trend towards larger jury verdicts, particularly nuclear verdicts.

A "nuclear verdict" has been defined as a verdict in excess of $10 million. According to a recent study by the U.S. Chamber of Commerce's Institute for Legal Reform - Nuclear Verdicts: Trends, Causes and Solutions (September 2022), for the time period from 2010 to 2019, there were 1,376 nuclear verdicts. These nuclear verdicts increased in frequency and amount. The median verdict increased 27.5% compared to a 17.2% rate of inflation over same period. The majority of nuclear verdicts arise from claims involving products liability (23.6%), auto accidents (22.8%) and medical liability (20.6%).

A number of factors have contributed to social inflation. First and foremost are new trial tactics by the Plaintiffs' Bar, discussed further below. Legal marketing and social media are another factor. Plaintiffs' lawyers have flooded the airwaves with lawsuit advertising hyping large settlements or verdicts that influence potential jurors' views of appropriate compensation. There has also been an increase in third-party litigation funding. These lenders expect a return on their investment that drives up damages demands and widens the gap for reasonable settlement negotiations.

Studies show an increasing public distrust of large corporations. We can all recall the McDonald's Coffee Case verdict in 1994 that served as an impetus for tort reform. A 2003 Survey by American Tort Reform Association reflected this sentiment and showed 85% of Americans believe the court system was clogged with frivolous lawsuits. Attitudes have changed, however, as evidenced by a 2014 Survey by K&B National Research which found 85% of jury-eligible people polled believed that corporations should be held to a higher standard of responsibility than individuals.

The Plaintiff's Bar has seized on this trend by deploying what is known as the Reptile Theory. The theory has its origins in a book: Reptile: The 2009 Manual of the Plaintiff's Revolution by Don Keenan, a Georgia personal injury lawyer and David Ball, a jury researcher, trial consultant, and former actor. Reptile theory attempts to avoid the "golden rule" by getting a defendant to create its own standards and instructions that may differ than the controlling legal standards. The "golden rule" refers to the prohibition on asking a juror to deliver a verdict he or she would desire if they were in the Plaintiff's shoes

So, how does Reptile Theory avoid the golden rule? It begins with some neuroscience research suggesting there are three parts of the brain: (1) the Rational Brain which controls intellectual tasks; (2) the Intermediate Brain which controls emotions; and (3) the Reptilian Brain which controls self-preservation. Based on this premise, Plaintiffs' Counsel seeks to establish the Defendant violated a safety rule. There are several prerequisites for a model safety rule:

- The rule must prevent danger.
- The rule must protect people in a variety of situations, not just the Plaintiff.
- The rule must be clearly state what a person must or must not do.
- The rule must be practical and easy to follow.
- The rule must be one that the Defendant will either agree or run the risk of looking stupid or dishonest by disagreeing.

Plaintiff's counsel works to establish general safety rules, and then relates those general principles to specific safety rules. Once a violation of a safety rule has been established, Reptile Theory holds jurors' Reptilian Brains will take over to protect the community from the violation. There are no accidents under the Reptile Theory; rather, the defendant made a decision to ignore a safety rule. The issue then becomes not what harm happened,

but what harm could have happened. Here is an example of how a Defendant might unwittingly concede to a higher standard of care in a dram shop case than that required by the law:

Q: The pub should do everything it can to reduce the chance of underage drinking?

A: We try to.

Q: One way to reduce the chance of selling to alcohol to a minor is to require two forms of ID?

A: Yes, that could be done.

Q: Another way to discourage underage persons from purchasing alcohol is to seize fake IDs?

A: True.

Q: Your pub does neither, correct?

A: It is not our policy to do so, correct.

This business about identification differs from the legal standard of liability found in Iowa Code Section 123.92, which establishes liability for licensees or permittees who sold and served any alcoholic beverage to an intoxicated person, provided that person was visibly intoxicated at the time of the sale or service.

The Defense Bar and our clients can combat Reptile Theory and Social Inflation several ways. It starts with preparation. A discussion of Reptile Theory should be a standard topic for deposition preparation sessions for defense witnesses. Social inflation should also be a consideration when insurance companies set claim reserves. We can also focus on eduction. Local corporate social responsibility (CSR) campaigns are an option to counteract anti-corporate bias and maintain a positive image in local communities. Raising awareness on how social inflation impacts consumers through skyrocketing insurance costs may also be an effective strategy to raise awareness. Finally, there are legislative solutions such as damages caps and requiring disclosures of third-party litigation funding. We have seen some recent progress in Iowa with caps on noneconomic damage awards against health care providers and truckers, but more could be done. If you are interested in joining the cause, contact a IDCA board member about joining the Legislative Committee or the Reptile Theory Task Force.

Iowa Defense Counsel Association

2024 Annual Meeting & Seminar

September 12-13, 2024 • Embassy Suites by Hilton Des Moines Downtown

Hotel/Venue

Embassy Suites by Hilton Des Moines Downtown
101 East Locust Street, Des Moines, IA 50309

ROOM RATES: $173/night + tax

DEADLINE: Monday, August 12, 2024

BOOK ONLINE: rb.gy/po92m4

You can also book by calling 1-800-EMBASSY and asking for the Iowa Defense Counsel Association (IDCA) Annual Meeting and Seminar room rate.

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Your attendance at the 2024 Annual Meeting & Seminar includes the Thursday night networking reception!

WHEN: Thursday, September 12 at 6:00 pm

WHERE: The Republic on Grand (401 E Grand Avenue, Des Moines, IA 50309)

Thank you to Minnesota Lawyers Mutual for sponsoring the networking reception.

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Agenda

Thursday, September 12

7:45 AM – 8:00 AM	**Welcome and Opening Remarks**
8:00 AM – 8:20 AM	**Case Law Update #1: Employment/Civil Procedure** — Zack Martin
8:20 AM – 9:00 AM	**Permission to Pay? Consent Issues During Settlement** Chris Wertzberger; Josh Strief
9:00 AM – 10:00 AM	**Fitness To Improve Your Practice** Kathryn Atkinson Koverberg; Gail Witte; James P. Craig; Judge Soorholtz Greer
10:00 AM – 10:15 AM	**Break**
10:15 AM – 10:35 AM	**Case Law Update #2: Contracts/Commercial** — Jaquilyn Waddell Boie
10:35 AM – 11:35 AM	**How Reinsurance Impacts Insurance Company Operations** — Brad Buchanan
11:35 AM – 12:00 PM	**Case Law Update #3: Torts/Negligence** — Brendan McGuire
12:00 PM – 1:00 PM	**Lunch Break**
1:00 PM – 2:00 PM	**Practical, Effective and Ethical Uses for AI in the Law Firm** — Todd C. Scott
2:00 PM – 2:45 PM	**Transform Your Writing in 45 Minutes** — Dawn Barker Anderson
2:45 PM – 3:00 PM	**Break**
3:00 PM – 4:00 PM	**Artificial Intelligence: A Brave New World** — John T. Sly
4:00 PM – 5:00 PM	**Building the Bar: Steps Toward Successful Mentorship from the Perspective of Young Attorneys** — Luke M. Zahari; Caleb Piersma; Nathan Kooker
6:00 PM – 8:00 PM	**Networking Reception at Republic on Grand**

Friday, September 13

8:00 AM – 8:30 AM	**Challenging Experts in Federal and State Court** — Mike C. Richards
8:30 AM – 9:00 AM	**Iowa Non-Economic Damage Caps** — Joseph F. Moser
9:00 AM – 10:00 AM	**Witness Prep** — Scot G. Doyen
10:00 AM – 10:15 AM	**Break**
10:15 AM – 11:00 AM	**Defending Employment Claims** — Terri C. Davis
11:00 AM – 11:30 AM	**Criminal Representation: A Sprint Lap** — Jeff Wright
11:30 AM – 12:00 PM	**The Basics of Insurance Coverage Opinions** — Ben Kenkel
12:00 PM – 1:00 PM	**Digital Forensics** — Robert Hartkemeyer

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