Annual Meeting '76

September 30, October 1 & 2
JOHNNY AND KAY'S HYATT HOUSE
DES MOINES, IOWA

IOWA DEFENSE COUNSEL ASSOCIATION

1976 Annual Meeting

INDEX

USE OF EXPERTS

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I. INTRODUCTORY REMARKS

The avowed purpose of the ensuing discussion is not to comprehensively cover the entire abody of law evolving from professional negligence cases arising out of the practice of the healing arts; rather, however, it will be to touch on some of the high points and most significant developments of recent origin. Further, to alert the practitioner to available resources which he can utilize in the defense of a healing art practitioner who is "accused of an act of malpractice".

II. SIGNIFICANT ENACTMENTS OF THE GENERAL ASSEMBLY--PAST AND FUTURE

A. Significant legislative enactments of the 66th General Assembly

Absent reference to the creation of professional liability insurance carriers and peer review, the General Assembly made five significant changes in the body of law in this State with respect to malpractice by members of the healing arts professions during its first session in 1975. (See "Medical Malpractice," Acts of the 1975 Regular Session, 66th General Assembly, Chapter 239, 1975).

1. Exclusion of actual losses to the extent that those loses are replaced or indemnified from private or public sources.

In seeking to reduce damage awards in malpractice litigation, due to pressure from the organized lobby of the healing arts professions, the General Assembly attempted to eliminate the concept of "double recovery" by the enactment of Section 16. Specifically, in personal injury actions against enumerated professions, or organizations, based upon professional negligence, damages awarded as a result thereof shall not include "actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury to the extent that those losses are replaced or indemnified by insurance, or by other governmental, employment or service benefit programs, or from any other source except the assets of Claimant or members of Claimant's immediate family." For example, such exclusion would include the costs of reasonable and necessary medical care, rehabilitation services and custodial care, and the loss of services and loss of earned income, etc.

2. Informed consent

Informed consent, a battle ground in medical malpractice litigation under the common law, achieved statutory recognition from the 66th General Assembly. In Section 17, the General Assembly set forth the requirements for the drafting of a valid written consent, and

included a presumption of informed consent, in the event that such a properly drafted consent is executed by the patient, or a person who has legal authority to consent on behalf of the patient.

3. Judicial supervision of contingent fee arrangements between patient and counsel

Yielding to the supposition that personal gain of a patient's attorney, rather than injury to the patient, was a primary motivation for the commencement of actions against members of the healing arts professions, the General Assembly, in Section 25, enacted the requirement that in all actions commenced against the enumerated professions or organizations, based upon professional negligence, the Court shall determine the reasonableness of the contingent fee agreement or arrangement between the patient and the patient's attorney.

4. Statute of limitations

In an attempt to allievate the problems derivative from a virtual absence of an effective statute of limitations in the area of medical malpractice, the legislature enacted Section 25. Therefore, in all actions for personal injury or death, other than those involving the unintentional leaving of a foreign object within the body, against the enumerated professions and organizations, such actions shall be commenced within two years after the date upon which the patient knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever date first occurs, and in no event shall any action be brought more than 6 years after the date upon which the alleged act, omission or occurrence shall have occurred. Presumably, in those cases involving the leaving of a foreign object within the body, the statute of limitations remains two years from the date of the discovery of the foreign object.

5. Prayer for damages

Based upon the theory that the sums demanded in the prayers of Petitions seeking compensation from members of the healing arts in professional negligence actions, inflamed juries and higher verdicts resulted therefrom, the General Assembly, in Section 27, protected the enumerated professions and organizations from any note in the public record with respect to the amount sought by the Plaintiff in the malpractice action.

B. Prospective enactments

Additional subjects which are currently under consideration by the General Assembly, through its interim study committees, about which there will be potential discussion and debate in the future, and potentially further enactment follow. (Report, Malpractice Insurance Study Committee, 2nd Session of 66th General Assembly, 1976)

1. Additional supervision of contingency arrangements between patient and counsel

   It was the mood of the committee to recommend that findings of the trial court with respect to the reasonableness of the contingent fee arrangement between patient and his counsel be reduced to written form and that additional support and strength be given to the roll of the trial court in the making of the determination of reasonableness.

2. Arbitration

   While unclear as to the exact recommendation of the committee, the committee did recommend that the legislature adopt some mechanism whereby agreements between the patient and professional with respect to future disputes may be submitted to arbitration.

3. Reversionary Trust/Annual Payment Judgments

   The committee, without making a firm recommendation, gave favorable consideration to the concept of a reversionary trust and/or annual payment in satisfaction of judgments awarded in professional negligence cases, as opposed to the lump sum concept; however, the problems involved in the adoption of mechanics whereby such a program could be implemented, prevented a definitive recommendation by the committee.

4. Miscellaneous

   In addition, the study committee found the following subjects worthy of some legislative action, but refrained from making any recommendation in regard thereto at this time:

   a. Providing for single defendant legal actions (for example, hospital only where alleged negligence took place within the territorial confines of the hospital);

   b. A statutory return to the locality rule for the use of expert witnesses; and

   c. The creation of additional statutory limitations with respect to use of the doctrine of res ipsa loquitur.

III. INITIAL PREPARATION OF THE MALPRACTICE DEFENSE

A. Investigation

1. Carefully scrutinize original file

Scrutiny of the original file is as important from the standpoint of what it does not contain, as it is from the standpoint of what it does contain. Because of an excessive time lapse, or lack of knowledge prior to the institution of suit, a file may contain little, other than copies of the Petition and Original Notice.

2. Building an investigative file

In order to properly evaluate the potential liability of your client, it is necessary to gain a good understanding and grasp of the facts surrounding and at the time of the incident complained of. A good investigative file should include the following:

a. A legible copy of the records of an institution, if the incident occurred within an institution;

b. A legible copy (preferably typewritten) of the client's personal records with respect to the care and treatment performed on the patient;

c. A resume log of the activities of the professional surrounding the relevant portions of time during which the incident occurred;

d. Duplicate copies of significant exhibits (xrays, lab reports, etc.) which are in danger of destruction, mutilation or disappearance.

3. On-sight investigation

Because of the trend in the healing arts profession toward delegation of responsibility to nursing or paramedical personnel, it is extremely important to interview all nursing or paramedical personnel who may have had conversations with, or have made observations regarding the patient during the relevant period of time. It is also important to review with nursing and paramedical personnel, their interpretation of the meanings of words used by them in describing a patient's condition, which may have become reduced to written form on the records regarding the care of the particular patient during the relevant period of time.

B. Self education in the field of medicine involved in the litigation

Rarely, if ever, is a file received where it is unnecessary for counsel to review and educate himself with respect to the specific field of medicine involved in the litigation. We have found the following to be most helpful in the self education process:

1. In-office resource material

   a. Dorland, "Medical Dictionary", (Illustrated), W. B. Saunders Co., 24 ed. (1965).

   b. Schmidt, "Attorneys' Dictionary of Medicine and Word Finder", 2 vols., (looseleaf), Matthew Bender, (1975).

   c. "Physicians' Desk Reference to Pharmaceutical Specialties and Biologicals", 26th ed. Charles E. Baker, Jr. by Litton Publications (1972).

   d. Gray, "Anatomy", ed. by Goss, Lea & Febiger, 26th ed. (1956).

   e. "Campbell's Orthopaedic Surgery", ed. by Creushaw, C. V. Mosley, 4th ed., (1963).

   f. Gordy - Gray, "Attorneys' Textbook of Medicine", 12 vols. (looseleaf), Matthew Bender, 3rd ed. (1975).

   g. "Lawyers Medical Cyclopedia", 8 vols. plus looseleaf, The Allen Smith Co., (1966).

   h. "Lawyers' Medical Journal", ed. by Schweitzer, 1st Series, 7 vol., Baker, Voorhes & Co., Inc. (1965-1972), 2nd Series, 4 vol. plus periodicals, Bancroft-Whitney (1973-1976).

   i. "Guides to the Evaluation of Permanent Impairment", American Med. Assn. (1971).

2. From outside sources

   a. Iowa State Medical Library

   b. Any national organization concerned with the particular disease involved

   c. Client resources

      x. Journals or articles of which your client is aware in his particular medical persuasion, which may bear upon the subject.

      y. Seminars, of which your client may be aware where the topic has been discussed and the discussion reprinted in seminar reprint form.

      z. Reference by your client to other professionals with whom he feels could be of assistance in the providing of general background information, as well as potential expert testimony at the time of trial.

C. Interview with client

The initial interview with your client-professional will often

leave an indelible mark on the relationship between you and your client during your remainder of the handling of his case; therefore, one should be fully reviewed and prepared for this conference in order that the relationship get off on the right foot. We have found the following techniques to be helpful in this regard:

1. Be a good listener;

2. Prepare a foundation with your client wherein the level of communication between the two of you will be one of candid objectivity in the analysis of the issues in the litigation, as well as your relationship with your client during the handling of the litigation;

3. Exhaustively review the record, asking probing questions and indicating weaknesses in your client's case where they candidly exist;

4. Develop a team approach to the handling of the litigation which requires effort and participation on your client's part, as well as yours, including study, research, and participation in the judgmental decisions which must be made during the litigation;

5. Candidly evaluate the litigation with your client with respect to its potential for involvement of time, effort and money, as well as your candid opinions with respect to the potential for successful defense;

6. Require that your client retain a professional attitude with respect to his conduct at all stages of the litigation and prepare your client for the antagonism that he might anticipate from the opposition;

7. Be prepared to discuss the filing of counterclaims against Plaintiff, patient and counsel for damages incurred by client flowing from the institution of legal proceedings against him(her).

IV. DISCOVERY

A. Interrogatories

For purposes of initial evaluation and review, it is most important that a comprehensive set of initial interrogatories be prepared, with the understanding that initial answers will be supplemented as the case progresses toward trial, including but not limited to the names of experts and the nature of the testimony sought to be elicited from them.

B. Depositions

1. Adverse Experts

Make sure, if possible, to depose all of Plaintiff's experts, including those which Plaintiff does not intend to call at trial. Obviously helpful opinions might be solicited from experts Plaintiff does not intend to call and the following guidelines we have found of assistance in examining adverse trial experts to be presented by Plaintiff's counsel:

a. Clarify exact extent of background of expert in the care and treatment of particular incident or ailment involved in the litigation;

b. Elicit from the expert what materials have been submitted to him for review in the preparation of his opinion;

c. Secure from the expert what factors, in his judgment, are crucial to his evaluation;

d. Allow him to fully and exhaustively explain his position without attempting to cross-examine him and thereby reveal the nature of your intended attack during trial.

2. Friendly experts

Our own client and other professional who may be involved in litigation are a source of favorable expert testimony if properly prepared for the taking of the deposition. Proper preparation of a client, or friendly expert, should be done cooperatively, if possible, by all defense counsel where several professionals may be involved. If possible, all professionals involved should be present at the time that the other party-professional's depositions are being taken. All party-professionals should be cautioned regarding the use of technical terminology which may have adverse layman implications or meanings. Avoid adverse interrogation of co-parties during discovery, thereby educating Plaintiff's counsel; rather, conduct such interviews in private in presence of counsel.

VI. TRIAL

A. Positive approach

We have found it helpful, in professional negligence litigation, to adopt a positive approach whereby we attempt to prove that the conduct of the professional involved was correct and measured up to the standard of care required of that client at all relevant times. In essence, we like to take the offensive, rather than the defensive, which will allow us to talk about what we have established by the evidence, rather than what Plaintiff has failed to establish.

B. Development of the theme

We have also found it helpful to develop a theme to our defense, which can be reduced to a catch phrase, which can be referred to during the course of the trial and which will attempt to succinctly state your position to the jury which can be reinforced by the evidence introduced.

C. Handling adverse expert

1. Be selective in the subjects to be discussed with the adverse expert based upon the deposition you have secured from him and the foundation which you intend to build with your own case.

2. If a hypothetical question is asked of the adverse expert, be prepared with additional facts, not included in Plaintiff's hypothetical, which, if established, would affect the expert's opinion. These facts, of course, are facts which can be established by your own testimony.

3. Emphasize the importance of the exercise of clinical judgment, especially in reaching a differential diagnosis, and the difference, if any, between the atmosphere in which the adverse expert practices and the resources available to and the atmosphere in which your client practices. (For example, a superior expert may be critical of your client's failure to diagnosis cancer, and it may be important to point out that he practices in a cancer clinic, were all patients referred to him have already been previously diagnosed as having cancer.)

D. Problems faced in the courtroom

1. Education, rather than persuasion

The presentation of a defense in a medical malpractice case should be primarily devoted to the education of the judge and jury with respect to the factual evidence being presented, including understanding the human body, the part of the body being referred to, the vocabulary being used, and the frame work or setting within which the determinations must be made between medical profession.

2. Medicine - an art not a science

It is important to acquaint and advise the jury or court that the practice of medicine is not referrable to the high school biology class. It involves the exercise of judgment, technic and differential diagnosis wherein there are no absolutes, but rather the idiosyncresies of each human body which may affect the outcome of any given case. In other words, it is important to avoid the atmosphere of sterility and certainty which tends to creep into the courtroom at the time of trial.

3. Translation of statistical information

Statistics, especially showing that the prognosis for recovery from an injury or disease, such as was suffered by Plaintiff, is bleak, maybe of assistance. However, statistics cannot be presented casually, and much consideration should be given to the manner in which statistics are used as a defensive technique.

E. Courtroom equipment

1. Evidentiary tools

Similar to other cases, where models or other demonstrative evidentiary tools will assist in education of the Judge and jury, they should be used. Care should be used to avoid offending the sensitivities of the jury in the use of demonstrative evidence.

2. Legal tools

a. Alexander, "Jury Instructions on Medical Issues", The Allen Smith Co., (1966), with annual supplement;

b. Tucker, "Summary of Iowa Law on Medical Malpractice", Iowa Academy of Trial Lawyers Spring Seminar (1973);

c. Supplemental Recent Decisions

SPEED V. STATE OF IOWA, 240 N.W. 2d 901 (1976).
This case involves an alleged failure in diagnosis due to failure to use or employ certain tests. The Court in reaching its decision discusses the standard of care required of the professional, the proximate causal relationship between the alleged negligence and the resulting injury which is required in the professional negligence cases, the use of expert testimony, and the permissible use of hypothetical questions to experts, including but not limited to, what must be included or may be excluded from the question posed to the expert.

BUCKROYD V. BUNTEN, 237 N.W. 2d 808 (1976).
This case involves alleged error in diagnosis and discusses the necessity for expert testimony to establish negligence in cases against professional practitioners, unless and accept the following applies:
(1) the negligence is so obvious as to be within the comprehension of laymen; or
(2) a part of the body which is not under treatment is injured.

BAINES V. BLENDERMAN, 223 N.W. 2d 199 (1974).
This case involves a defendant-physician's Motion for Summary Judgment based upon the defense of the statute of limitations,

which Motion was controverted by Plaintiff-patient's Affidavit regarding the patient's failure to discover and the Court found the existence of a genuine issue of fact and placed the burden of proof on the issue of the statute of limitations on the Defendant-physician.

DABOLL V. HODEN, 222 N.W. 2d 727 (1974).
This case involves Defendant-physician's Motion for Summary Judgment based upon the absence of negligence, which Motion was supported by the party-physician's expert affidavit. Plaintiff controverted the motion with layman's affidavit. The trial court sustained the Defendant's Motion due to the absence of expert countervailing affidavits. The Supreme Court found the granting of Defendant's Motion not to be "appropriate" within the meaning of Iowa Rule of Civil Procedure 237, but noted Plaintiff would be required to present more than lay testimony at trial to create a "genuine issue".

CRONIN V. HAGAN, 221 N.W. 2d 748 (1974).
This case involves a failure to discover pressure from first surgery which lead to necrosis and two subsequent surgical procedures. The Supreme Court affirmed the trial court's refusal to submit the case on the doctrine of res ipsa loquitur due to the absence of proof of necessary foundation facts as follows:
(1) exclusive control and management of instrumentality which caused injury and complained of by the person charged with negligent conduct;
(2) an occurrence causing injury was of such a type as in the ordinary course of events would not have happened if reasonable care had been used. The Supreme Court also affirmed the trial court's refusal to submit a specification of negligence not plead by Plaintiff.

WILES V. MYERLY, 210 N.W. 2d 619 (1973).
This case involved burns suffered by Plaintiff while in surgery for a vascular circulatory problem. The Supreme Court approved submission of the case on the basis of the doctrine of res ipsa loquitur, and further, its submission to the jury without detailed supportive expert testimony due to the fact that it is common knowledge that healthy tissue not involved in a surgical procedure is not normally burned or damaged during the surgery.

PERIN V. HAYNE, 210 N.W. 2d 609 (1973).
This case involved vocal chord paralysis following cervical fusion. The Supreme Court affirmed the trial court's refusal to submit the case to the jury on specific negligence, the doctrine of res ipsa loquitur, breach of express warranty

and battery or trespass based upon the absence of expert testimony to establish negligent conduct on the part of the Defendant-physician which resulted in Plaintiff's condition, under the facts of the instant case.

FREESE V. LEMMON, 210 N.W. 2d 576 (1973).
This case involved an action by a pedestrian, injured by a motorist while a motorist was suffering a seizure, against a physician who had treated the motorist for a seizure previously. The Supreme Court reversed the trial court's dismissal of the action against the physician on the basis that a question of substantive law was involved, and the Court could not conclude that Plaintiff's Petition failed to state a claim upon which any relief could be granted under any state of the facts which could be established at trial.

RUDEN V. HANSEN, 206 N.W. 2d 713 (1973).
This case involved an action against a veterinarian for alleged negligence in the vaccination of hogs. The Supreme Court, in discussing the standard of care required of professional practitioners, refused to place geographical or community-type limitations on the words "similar circumstances" as found in the statement of the standard of care for professional practitioners.

VII. DISCUSSION

NEW COURTROOM TECHNIQUE AND AIDS

Arthur Ryman, Associate Dean,
Drake Law School
Des Moines, Iowa

In General

The Courtroom in Cartwright Hall, Drake's new law building, is unique. It is designed for the purpose of teaching trial and appellate advocacy and negotiating skills and techniques. It implies a future in appellate processes when reviewing courts may see and hear trial events as well as read a transcript. Depositions taken with video record will truely preserve evidence as it was given. New ways of teaching advocates are apparent, and new advocacy techniques may be expected to develop.

Some Specifics - Description

1. Theater in the round to courtroom on the square; gallery and sight lines.

2. Electronic systems
   a. Sound
   b. Video

3. Courtroom atmosphere
   a. Light
   b. Decor, cameras, microphones

4. Increasing the audience
   a. Monitors

Some Possibilities

1. "To see ourselves as others see us."
   a. Lawyers
   b. Judges
   c. Other courtroom personnel
   d. Negotiators

2. To learn by repetition and comparison
   a. Chicago jury studies analogy

3. To escape the problems caused by written language differing from spoken language.

4. To preserve evidence, perhaps to try cases not now economically feasible by shipping tape (Reciprocal Enforcement of Support Act analogy).

EXPANDING LIABILITY

Thomas X. Wright
Vice President
Employers Mutual Companies
Des Moines, Iowa

A. Claims Executives Council

a. Excess Liability Guiding Principles (Exhibit 1)

b. Mary Carter Agreements

Agreements in which a plaintiff, in an action against several defendants, agrees with some of them that their liability to the plaintiff will be limited, that they will continue as defendants in the action in which the plaintiff will seek full recovery against the non-agreeing defendant or defendants.

c. Arbitration

Total Cases Filed		Total Closed		Total Pending		No. of Committees	
1974	1975	1974	1975	1974	1975	1974	1975
138,625	146,558	134,899	148,506	40,389	46,001	252	269
$71,118,891		$38,751,474		$28,247,707		$99,366,598	

B. Expanding Liability

a. Insurance Principles vs. Social Contributions

1. FAIR Plan - operating loss of $58.8 million in 1975 and $64.8 million in 1974

2. Beach and Windstorm Plan - loss of $2.8 million in 1975

3. Automobile Insurance Plans - $476,505,384 loss over a five-year period from 1968 through 1972

4. State Insurance Guaranty Fund - losses from 1969 to 1975, $148 million

5. Expenses in establishing Joint Underwriting Associations for Medical Malpractice, Assigned Claims Plans, Insurance Guaranty Associations, participation in various State Funds, etc.

b. Stare Decisis and Social Inflation

c. Financial Mechanism vs. Legal Mechanism

1. Financial Mechanism - Best's Insurance News Digest

Year	Premiums Written	Underwriting Gain or Loss
1971	35,302,450	847,758
1972	38,888,700	1,073,310
1973	42,018,993	- 7,403
1974	44,630,964	-2,648,952
1975*	49,725,000	-4,166,665
*Estimated	210,566,107	-4,901,952

2. Legal Mechanism

a) Chief Justice Burger

Arbitrary Reform
Rational Reform

EXHIBIT #1

GUIDING PRINCIPLES FOR PRIMARY AND EXCESS INSURANCE COMPANIES

PURPOSE

To provide standards of conduct which, if followed by insurers in the handling of claims, will reduce if not eliminate the incidence of controversy between primary and excess insurers.

To provide a forum for the resolution of problems involving the interaction of primary and excess insurance coverages and their applicable policy limits.

It is implicit in these guiding principles that the primary insurer in its dealings with an excess insurer voluntarily adopt those standards of conduct which the law imposes upon the primary insurer in its dealings with its insured and that the excess insurer voluntarily refrain from any conduct which might create additional difficulty for the primary insurer in the handling of a case or increase the danger of the primary insurer's being liable in excess of its policy limit.

Nothing in these principles shall in any way abridge the rights of or the duties owed to the insured, indeed it is believed that the insured's interests will be better served by adherence of insurers to these principles.

SCOPE

Applicable to all liability coverages written and claims and suits arising thereunder involving companies both foreign and domestic and whether or not members of any associations or other group of companies.

All insurers writing liability insurance are urged to indicate their concurrence by endorsing these guiding principles.

GUIDING PRINCIPLES FOR INSURERS OF PRIMARY AND EXCESS COVERAGES

1. The primary insurer must discharge its duty of investigating promptly and diligently even those cases in which it is apparent that its policy limit may be consumed.

2. Liability must be assessed on the basis of all the relevant facts which a diligent investigation can develop and in the light of applicable legal principles. The assessment of liability must be reviewed periodically throughout the life of the claim.

3. Evaluation must be realistic and without regard to the policy limit.

4. When from evaluation of all aspects of a claim, settlement is indicated, the primary insurer must proceed promptly to attempt a settlement, up to its policy limit if necessary, negotiating seriously and with an open mind.

5. If at any time, it should reasonably appear that the insured may be exposed beyond the primary limit, the primary insurer shall give prompt written notice to the excess insurer, when known, stating the results of investigation and negotiation, and giving any other information deemed relevant to a determination of the total exposure, and inviting the excess insurer to participate in a common effort to dispose of the claim.

6. Where the assessment of damages, considered alone, would reasonably support payment of a demand within the primary policy limit but the primary insurer is unwilling to pay the demand because of its opinion that liability either does not exist or is questionable and the primary insurer recognizes the possibility of a verdict in excess of its policy limit, it shall give notice of its position to the excess insurer, when known. It shall also make available its file to the excess insurer for examination, if requested.

7. The primary insurer shall never seek a contribution to a settlement within its policy limit from the excess insurer. It may, however, accept contribution to a settlement within its policy limit from the excess insurer when such contribution is voluntarily offered.

8. In the event of a judgment in excess of the primary policy limit the primary insurer shall consult the excess insurer as to further procedure. If the primary insurer undertakes an appeal with the concurrence of the excess insurer the expense shall be shared by the primary and the excess insurer in such manner as they may agree upon. In the absence of such an agreement, they shall share the expense in the same proportions that their respective shares of the outstanding judgment bear to the total amount of the judgment. If the primary insurer should elect not to appeal, taking appropriate steps to pay or to guarantee payment of its policy limit, it shall not be liable for the expense of the appeal or interest on the judgment from the time it gives notice to the excess insurer of its election not to appeal and tenders its policy limit. The excess insurer may then prosecute an appeal at its own expense being liable also for interest accruing on the entire judgment subsequent to the primary insurer's notice of its election not to appeal. If the excess insurer does not agree to an appeal it shall not be liable to share the cost of any appeal prosecuted by the primary insurer.

9. The excess insurer shall refrain from coercive or collusive conduct designed to force a settlement. It shall never make formal demand upon a primary insurer that the latter settle a claim within its policy limit. In any subsequent proceedings between excess insurer and primary insurer the failure of the excess insurer to make formal demand that the claim be settled shall not be considered as having any bearing on the excess insurer's claim against the primary insurer.

MEDIATION and ARBITRATION

1. Insurers are aware of the high expense and time involved in the resolution of factual and legal issues in the duly constituted courts of law, and are also aware that insurance matters require an expertise that is not always to be found in the courts. It is therefore strongly urged that controversies within the range of these guiding principles be submitted to mediation or arbitration processes.

2. When the primary insurer and the excess insurer are unable to reach an agreement under these guiding principles, the unresolved issues shall be submitted to mediation or arbitration, regardless of when the issues between the insurers may arise during the life of the claim or litigation.

3. If mediation is selected as a preliminary attempt to reach an agreement, the parties shall each nominate a mediator. The mediators thus selected shall nominate a third mediator. The issues shall be presented to the mediators on an agreed statement of facts and issues or the files of the insurers shall be submitted to the mediators. If the parties agree, they may be represented at an open mediation hearing and testimony and evidence may be presented.

4. The mediators shall make recommendations to the parties on the resolutions of issues and the determination of the controversy. The recommendations shall be advisory only, and the parties shall either reject or accept them.

5. The parties shall agree upon a plan of arbitration if arbitration is selected.

6. They may arbitrate under the Uniform Arbitration Act as passed by a particular state.

7. The parties may request the committee on Insurance Arbitration to draft a plan for the arbitration of matters under these guiding principles and arbitrate under such a plan.

8. The parties may agree to be bound by an arbitration decision; in the event the parties do not so choose, they would then have recourse to the judicial process.

NEW APPELLATE COURT AND BACKLOG

By Justice W. Ward Reynoldson

I. DIMENSIONS OF BACKLOG WHICH NECESSITATED RELIEF

A. Pending cases on August 1

1975: Civil 628, Criminal 296, Total 924
1976: Civil 757, Criminal 308, Total 1065

B. Ready cases pending on August 1*

1975: Civil 231, Criminal 7, Total 235
1976: Civil 358, Criminal 14, Total 372

C. Average delay from notice of appeal to decision in civil cases opinions filed in July**

1975: 24.8 months
1976: 33.6 months

D. Cumulative docketings in calendar year before August 1

1975: 619
1976: 688

E. Cumulative total of formal dispositions in calendar year before August 1

1975: 259
1976: 270

Note:

* Percentage increase in total number of cases ready from August 1, 1975 to July 1, 1976: 56.3%.

** Regular civil cases scheduled for September 1976 submission were ready in December 1974, a delay of 21 months.

II. THE ANATOMY OF THE "IOWA COURT OF APPEALS"

A. Personnel

(1) Court comprised of chief judge and four associate judges.
[SF 1092 §4(1), 66 G.A., ch. 1241 §4(1), §684.34, The Code 1977]

(2) Three nominees for each court of appeals vacancy shall be nominated by the state judicial nominating commission; the governor shall make the appointment.
[SF 1092 §38, 66 G.A., ch. 1241 §38, amending §46.15, The Code]

(3) Following staggered first terms, the judges shall serve six-year terms.
[SF 1092 §39, 66 G.A., ch. 1241 §39, amending §46.16, The Code]

(4) Judges of the Iowa Court of Appeals shall stand for retention as do Supreme Court Justices.
[SF 1092 §13, 66 G.A., ch. 1241 §13, §484.43, The Code 1977;
SF 1092 §41, amending §46.21, The Code]

(5) Each judge may employ one secretary.
[SF 1092 §20, 66 G.A., ch. 1241 §20, §684.50, The Code 1977]

(6) Each judge may employ one legal assistant.
[SF 1092 §21, 66 G.A., ch. 1241 §21, §684.51, The Code 1977]

B. Salary and physical facilities

(1) Chief judge to receive $37,000;
Each associate judge $36,000
[HF 1583 §13]

(2) Sessions shall be "at the seat of government".
[SF 1092 §3, 66 G.A., ch. 1241 §3, §684.33, The Code 1977]

(3) There is no reimbursement when a judge or employee resides elsewhere than at the seat of state government.
[SF 1092 §23, 66 G.A., ch. 1241 §23, §684.53, The Code 1977]

(4) State funds shall not be utilized for securing or maintaining facilities for any court personnel elsewhere than at the seat of state government.
[SF 1092 §24, 66 G.A., ch. 1241 §24, §684.54, The Code 1977]

(5) Court administrator shall "obtain" facilities for the court of appeals at the seat of government and shall utilize existing supreme court facilities to the extent practicable.
[SF 1092 §24, 66 G.A., ch. 1241 §24, §684.54, The Code 1977]

(6) Sessions shall be held in the courtroom of the supreme court at the statehouse.
[SF 1092 §3, 66 G.A., ch. 1241 §3, §684.33, The Code 1977]

C. Jurisdiction

(1) Territorial jurisdiction is coextensive with the State.
[SF 1092 §5, 66 G.A., ch. 1241 §5, §684.35, The Code 1977]

(2) Subject matter jurisdiction is generally coextensive with that of the supreme court.
[SF 1092 §5, 66 G.A., ch. 1241 §5, §684.35, The Code 1977]

(3) Court of appeals may issue writs or other process necessary for the exercise and enforcement of its jurisdiction.
[SF 1092 §5, 66 G.A., ch. 1241 §5, §684.35, The Code 1977]

(4) Court of appeals has no jurisdiction in any matter in absence of an order of transfer from the supreme court.
[SF 1092 §5, 66 G.A., ch. 1241 §5, §684.35, The Code 1977]

D. Procedure mandated by statute

(1) All appeals shall continue to be taken to the supreme court.
[SF 1092 §5, 66 G.A., ch. 1241 §5, §684.35, The Code 1977]

(2) The supreme court may move a matter to the court of appeals by an "order of transfer".
[SF 1092 §5, 66 G.A., ch. 1241 §5, §684.35, The Code 1977;
SF 1092 §77, 66 G.A., ch. 1241 §77, amending §684.1, The Code]

(3) Jurisdiction of the supreme court then ceases.
[SF 1092 §77, 66 G.A., ch. 1241 §77, amending §684.1, The Code]

(4) A decision of the court of appeals is final unless the supreme court grants an "application for further review".
[SF 1092 §6(2), 66 G.A., ch. 1241 §6(2), §684.36(2), The Code 1977]

(5) "Application for further review" must be filed in the supreme court within 20 days following the filing of the court of appeals decision.
[SF 1092 §77, 66 G.A., ch. 1241 §77, amending §684.1, The Code]

(6) An application for further review not acted upon by the supreme court within 30 days after filing shall be deemed denied, the supreme court shall lose jurisdiction and the court of appeals decision shall be conclusive.
[SF 1092 §77, 66 G.A., ch. 1241 §77, amending §684.1, The Code]

(7) CAVEAT: Note the anomolous use of the language, "upon certiorari to the supreme court of equity actions heard by the court of appeals * * *"
[SF 1092 §63, 66 G.A., ch. 1241 §63, amending §624.4, The Code]; compare with language in SF 1092 §6(2), 66 G.A., ch. 1241 §6(2), §684.36(2), The Code, 1977, and

SF 1092 §77, 66 G.A., ch. 1241 §77 (amending §684.1, The Code) providing right to review in supreme court only where there is filed an application for further review.

E. Administration

(1) The court of appeals and all of its officers and employees shall be subject to the supervisory and administrative control of the supreme court.
[SF 1092 §25, 66 G.A., ch. 1241 §25, §684.55, The Code 1977; see Iowa Constitution, Art. 5, §4, as amended, Amendment of 1962]

(2) The supreme court, and the court of appeals subject to the approval of the supreme court, may prescribe rules of appellate procedure and other rules for the conduct of the business of the court of appeals.
[SF 1092 §7, 66 G.A., ch. 1241 §7, §684.37, The Code 1977;
SF 1092 §79, 66 G.A., ch. 1241 §79, amending §684.18, The Code]

(3) All rules are subject to the provisions of §684.19, The Code (reported to general assembly and subject to change by it)
[SF 1092 §7, 66 G.A., ch. 1241 §7, §684.37, The Code 1977;
SF 1092 §77, 66 G.A., ch. 1241 §77, amending §684.1, The Code;
SF 1092 §79, 66 G.A., ch. 1241 §79, amending §684.18, The Code]

(4) The supreme court is empowered to prescribe temporary rules until July 1, 1977, §684.19 to the contrary notwithstanding.
[SF 1092 §7, 66 G.A., ch. 1241 §7, §684.37, The Code 1977]

(5) The supreme court shall promulgate rules for transfer of matters to the court of appeals (may provide for selective transfer of individual cases and may provide for the transfer of cases according to subject matter or other general criteria)
[SF 1092 §77, 66 G.A., ch. 1241 §77, amending §684.1, The Code]

(6) The supreme court shall promulgate rules of appellate procedure to govern further review by the supreme court of decisions of the court of appeals (such rules may require, but need not be limited to, a specification of grounds upon which further review may, in the discretion of the supreme court, be granted)
[SF 1092 §77, 66 G.A., ch. 1241 §77, amending §684.1, The Code]

(7) The court administrator shall cause the publication of opinions of the judges of the court of appeals in accordance with rules issued by the supreme court.
[SF 1092 §11, 66 G.A., ch. 1241 §11, §684.41, The Code 1977]

(8) Section 684.15 shall apply to decisions of the court of appeals.

["684.15 What cases reported. If the decision, in the judgment of the court, is not of sufficient general importance to be published, it shall be so designated, in which case it shall not be included in the reports, and no case shall be reported except by order of the full bench."]

[SF 1092 §11, 66 G.A., ch. 1241 §11, §684.41, The Code 1977]

UNINSURED MOTORISTS PROBLEMS

Kent M. Forney
Bradshaw, Fowler, Proctor and Fairgrave
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Des Moines, Iowa

I. Coverage

1. "To pay all sums. . . the insured is legally entitled to recover . . .

   A. The insured can't sue the tortfeasor because of an immunity such as parent-child. Markham v. State Farm 464 F.2d 703.

   B. What statute of limitations controls the insured's claim - tort or contract? Van Hoozer v. Farmers Ins. Ex., 219 Kansas 595 (1976).

2. ". . . As Damages. . ."

   A. The tort rules on conflict of laws govern the measure of damages. Hall v. Allied Mut. Ins. Co., 158 N.W.2d 107 (Iowa).

3. "from the owner or operator of an uninsured automobile. . ."

   A. A motorist with minimum limits is not an uninsured because the insured's damages exceed the $10,000 limits of the liability coverage. Detrick v. Aetna Cas. & S. Co., 158 N.W.2d 99 (Iowa).

   B. Even if the vehicle is insured for liability, if the driver is excluded from coverage, the vehicle is uninsured. Rodman v. State Farm, 208 N.W.2d 903 (Iowa).

   C. Chapter 516A converts the insolvency of the tortfeasors insurer to the tortfeasor being uninsured.

   D. The requirement of Chapter 516A that the insolvency occur within one year of the accident is a minimum requirement and insurers can provide U.M. insolvency coverage with no time limit. State Farm v. Iowa Insurance Guaranty Assoc., Polk County Dist. Ct., unpublished opinion, Dec. 1975.

II. Exclusions

1. Unauthorized settlements may void the coverage whether with the uninsured motorist or with another insured motorist.

   A. Cf: Michigan Mutual Liab. v. Karsten, 163 N.W.2d 670 (Mich.) (settlement with insured motorist doesn't violate the policy) with Jessie v. Security Mutual Cas. Co., 488 S.W. 2d 140 (Texas) (Does violate policy).

   B. See "Limits of Liability" clause which reduces benefits to the extent of recovery from either the uninsured or a jointly liable insured motorist.

      1. Reduction applies as a credit against insured's total damages. Michigan Mut. Liab. Co. v. Karsten, supra., (settlement with insured motorist).

      2. Reduction applies as a credit against the policy limits. Jobe v. International Ser. Ins. Co., 474 S.W.2d 11 (settlement with insured motorist).

2. No coverage if the insured is injured while occupying or hit by the named insured's automobile, if it is uninsured. Owens v. Allied Mut. Ins. Co., 487 P.2d 402 (Ariz); Contra: Vantine v. Aetna C. & S., 335 F. Supp. 1296 (Ind.) (Clause is in violation of statute and public policy).

   But a motorcycle is not an automobile. Westerhausen v. Allied Mut. Ins. Co., 140 N.W.2d 719 (Iowa). Cf: Howard v. Grain Dealers Mut. Ins. Co., 342 F. Supp. 1125 (Ark.) (a motorcycle is a highway vehicle and no coverage under 1966 form.)

III. Limits of Liability

1. U.M. benefits shall be reduced by the amount of W.C. benefits except in a death case where the widow and not the insured's estate receives the W.C. benefits. McClure v. Employers Mut. Cas. Co., 238 N.W.2d 321 (Iowa).

2. U.M. benefits shall be reduced by the amount of med. pay benefits. Dictum: McClure v. Employers Mut. Cas. Co., supra. (Note: Pay the insured med. pay benefits first because there is no companion set-off for U.M. benefits under the med. pay coverage.)

IV. Policy Period and Territory

1. While U.M. benefits are personal and follow the insured even when he is a pedestrian, they don't follow him world-wide but usually only in the U.S. and Canada. Kavelheim v. Farm Bureau Mut. Ins. Co., 195 N.W.2d 726 (Iowa).

V. Other Insurance

1. Riding in a car not owned by him, his own policy is (1) excess over other available coverage, and (2) he can't recover then unless his limits are in excess of the owners limits.

   A. The provision making his own policy excess is enforceable where he recovers his full damages under the owners policy. Burcham v. Farm. Ins. Ex., 121 N.W.2d 500 (Iowa).

   B. If the insured has not recovered his full damages under owners policy, he may recover the balance from his own policy, subject to the limits of his own policy. Benzer v. Ia. Mut. Tor. Ins. Co., 216 N.W.2d 385 (word available is ambiguous.)

   C. However, the insured may not recover double benefits since statute allows avoiding duplication of payments. Burcham, supra., Benzer, supra.

2. Except as provided above, the owners policy will (1) pro-rate with other coverage available to the insured, and (2) the claim is limited to the amount of the higher limits.

   A. This provision sets up a pro-rata vs. excess conflict and Iowa will make the pro-rata policy primary. McClure v. Emp. Mut. Cas. Co., supra.

   B. Limiting the amount of the claim is probably unenforceable. Benzer v. IMT, supra.

3. If insured has several cars all insured on the same policy, he can't multiply number of cars times limits to establish maximum benefits available, but is restricted to one policy limit. Holland v. Hawkeye Sec. Ins. Co., 230 N.W.2d 517, (Iowa)

VI. The Statute

1. Section 516A.1 requires every policy to have U.M. coverage unless the insured expressly rejects it in writing.

   A. The statute prohibits a policy definition of uninsured motor vehicle that would result in denying U.M. coverage because the car was insured but the policy was inapplicable to insured's claim. Rodman, supra.

2. Section 516A.2 provides:

   A. That the statute doesn't require the policy, in combination with similar coverage, to provide more than 10-20. Benzer, supra.

   B. That the policy may contain provisions designed to avoid duplication of insurance or other benefits. McClure, supra.

DEFENDING PRODUCTS LIABILITY CASES UNDER OSHA AND CPSA

H. Richard Smith
Ahlers, Cooney, Dorweiler, Haynie & Smith
Des Moines, Iowa

I. AVAILABILITY OF INFORMATION. Most information that is reduced to a report or decision is available. Trade secrets, privileged communications, work sheets, personal notes are not.

A. Iowa Occupational Safety & Health Act. Chap. 88 Iowa Code.

(1) Public Records Law, Chap. 68A Iowa Code.

(a) Trade Secrets protected Sec. 88.12 Iowa Code.

(2) Rule 610.1.105(88), Iowa Administrative Code, provides for inspecting and copying review commission records.

(3) Opinion Atty. Gen. Sept. 26, 1972.

(4) "What constitutes public records", Anno. 85 A.L.R.2d 1105.

(5) Don't contact field investigator. Contact:

Commissioner of Labor
East 7th & Court Ave.
Des Moines, Iowa 50319
Phone 515-281-3606
(For investigation documents)

Executive Secretary
Occupational Safety and
Health Review Commission
300 4th Street
Des Moines, Iowa 50319
Phone 515-281-5389
(For Review Commission documents)

B. Federal Occupational Safety & Health Act. Title 29 U.S.C.A. §§ 651 et.seq.

1. Probably won't be involved in incidents occurring after July 1, 1975.

2. Public Records Law, Title 5, U.S.C.A. §552.

(a) Trade secrets protected Title 29 USCA §664.

3. Regulations covering inspecting and copying OSHA documents 29 CFR §1906.7.

4. Names of parties and personal opinions will be deleted from documents.

5. Contact:

Area Office
Occupational Safety & Health Administration
210 Walnut Street
Des Moines, Iowa 50319
Phone 515-284-4794
(For procedure for obtaining documents)

C. Consumer Products Safety Act, 15 U.S.C.A. §2051 et seq.

1. Scope of Act. - Regulates any article, or component part thereof, distributed for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, excluding motor vehicles, aircraft, boats, drugs, food, tobacco, poisons and other products.

(a) Also now administers Hazardous Substances Act, Flammable Fabrics Act, and other acts. 15 USCA §2079.

2. Public Records Law, Title 5, U.S.C.A. §552.

(a) Restricted by Title 15, §2055. (See Relco, Inc., CPSC, 391 F. Supp. 841, S.D. Texas 1975).

3. Act provides for public disclosure Title 5 USCA §1074.

4. C.P.S.C. regulations 16 CFR 1001.60 et. seq.

5. Sources of information:

National Clearing House
U.S. Consumer Products
Safety Commission
Room 323
5401 West Bard Ave.
Bethesda, Maryland 20207
Phone 301-496-7038

National Electronic Surveillance System
(NEISS) information on injuries)

National Technical Information
Service (NTIS)
U.S. Dept. of Commerce
Springfield, Va. 22151
(National Commission on Product
Safety Publications)

6. No local office found.

II. USE OF INFORMATION. Very limited use may be made of results of investigation in civil action.

A. Iowa OSHA - General view that results of investigation cannot be used, or investigators called as witnesses, because of Sec. 88.6(7) Iowa Code.

B. Federal OSHA - Use of investigators in civil actions limited by Regulation, 29 CFR 1906 et. seq. Must be by subpoena. No opinions. Office of solicitor will probably resist.

1. Contact:

Office of Regional Solicitor
911 Walnut Street
Room 2106
Kansas City, Mo. 64106
Phone 816-374-2281

C. Consumer Product Safety Commission.

III. USE OF STANDARDS.

A. Negligence cases - Admissible as evidence to be consdered on issue of reasonable care. Some contend proof of violation is negligence per se.

1. See: Restatement of Torts, Second, §288, 288A, 288B, and 288C.

Porter v. Iowa Power and Light Company, 217 N.W.2d 221 (Iowa 1974)

McLinn v. Kodiak Electric Association, Inc. 546 P.2d. 1305 (Alaska 1976)

Anno: 58 A.L.R.3rd 148.

2. Scope of class to which standards apply.

(a) See: 29 CFR 1910.5, para. (d).

Limits OSHA standards to employees.

B. Strict Liability.

1. Manufactoring defect-should not be admissible since standard of care not in issue.

(a) See: Hoppe v. Midwest Conveyor Company, Inc. 485 F.2d 1196 (8th Cir. 1973).

2. Design and warning cases-probably admissible as bearing on reasonableness of conduct.

(a) See: Wagner v. Larsen, 136 N.W.2d 312 (Iowa 1965).

Garrison v. Rohm & Haas Company, 492 F.2d 346, (6th Cir. 1974)

But see:
Raney v. Honeywell,
8th Cir. Docket No. 75-1972,
Filed Aug. 16, 1976

C. CPSA - Provides for civil action for damages resulting from violation of act. Title 15 USCA §2072.

IV. CHARGES OF VIOLATIONS AS EVIDENCE IN CIVIL ACTION.

A. Fact of charges being filed or assessment of penalties not relevant or material to issues in civil action.

B. Plea of guilty or nole contendre should not be admissible.

(1) Usually only civil penalties.

(2) See: State Auto v. Farm Bureau, 257 Iowa 56, 131 N.W.2d 365.

Jones v. Krambeck, 228 Iowa 138, 290 N.W. 56.

(3) Rule 410, Federal Rules of Evidence.

(4) Include appropriate language in agreement setting out compromise settlement of charges.

ATTORNEY LIABILITY

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WHO IS MY CLIENT?

I. INTRODUCTION

A. The changing times.

B. The emergence of disciplinary enforcement in the several states.

C. The growth of disciplinary enforcement in Iowa.

D. The advent of The Iowa Code of Professional Responsibility For Lawyers.

E. The lawyer as the target defendant.

II. BODY

A. Specific duties of the lawyer to the client as set forth in The Iowa Code of Professional Responsibility for Lawyers.

1. Canon 5 - A lawyer should exercise independant professional judgment on behalf of a client.

a. EC 5-1 (soley for benefit of client and free of compromising influences)

b. EC 5-17 (typical cases of "potentially differing interests" includes "an insured and his insurer".)

1. American Employers Ins. Co. vs. Goble Aircraft Sp. 131 N.Y.S.2d 393 (1954) (owes policy holder an undeviating and single allegiance - produce all witnesses, fact and expert, who are available and necessary - cost to insurer beyond policy limits immaterial - duty to insured is paramount - duty to insurer and insured become diverse cannot represent both).

2. State Farm vs. Walker, 382 F.2d 548 (7th Circuit 1967) (void coverage because of noncooperation if insured who allegedly told a prefabricated story discovered by the defense lawyer. The lawyer revealed this to the insurer as well as continued in the representation of the insurer against the insured. (552) "This action appears to contravene an Indiana attorney's duty 'at every peril to himself to preserve the secrets of his client'").

3. Compare: Kirk vs. Home Indemnity Company 431 F.2d 554 (7th Circuit 1970) (analogous to State Farm vs. Walker except the lawyer attempted to withdraw and was refused permission to do so by the court. No issue of waiver was thus raised).

4. Storm Drilling Co. vs. Atlantic Richfield Co. 386 Fed Supp. 830 (E.D. La. 1974) (citing EC 5-1, EC 5-14 to EC 5-16 and EC 7-1, et. seq. as prohibiting a lawyer from representing both the insured and insurer if a reservation of rights has been taken).

c. EC 5-21 (must disregard desires of a third party).

d. EC 5-22 (guard against sense of responsibility to compensating third party).

e. DR 5-101(a) (no employment when professional judgment affect by own financial interests).

f. DR 5-107(A) (client must consent to another paying attorney fees).

g. DR 5-107(B) (one who pays the lawyer, other than the client, cannot regulate lawyers professional judgment).

1. Novella vs. Hartford Accident and Indemnity Co. 316A ed. 394, 405 (Conn. 1972) ("While he may have looked to the defendant for compensation and kept the defendant informed about the progress of the case, we do not find these facts conclusive. An attorney's allegiance is to his client not to the person who happens to be paying for his services").

2. Canon 6 - A lawyer should represent a client competently.

a. EC 6-4 - must safeguard interests of client - must be competent and must prepare adequately under the circumstances).

b. DR 6-101(A)(1) - must be competent

1. State vs. Bruno 196 N.W.2d 539 (Iowa 1972)

2. State vs. Thompson 208 N.W.2d 926 (Iowa 1973)

3. Florida Bar, In re Buckzinski 322 S.2d 511 (Fla. 1975)

4. Florida Bar vs. Alagis 318 S.2d 395 (Fla. 1975)

5. Iowa Bar vs. Wright 178 N.W.2d 749 (Iowa 1970)

c. DR 6-101(A)(2) - must prepare adequately

1. State ex rel Nebraska State Bar vs. Holscher,230 N.W.2d 75 (Neb. 1975) (must check amendments to statutory law.)

2. Baker vs. Beal 225 N.W.2d 106 (Iowa 1975) (filing of a law suit at the 11th hour.)

3. Smith vs. Lewis 530 P.2d 589 (Cal. 1975) (failure to claim husband's federal retirement as an asset in a divorce action).

4. Ramp vs. St. Paul Fire & Marine Ins. Co. 254 S.2d 79 (La. 1971) (must know statutes and published decisions of own state).

5. Williner vs. Elmer Fox & Co. 529 P.2d 806 (Utah 1974) (factual investigation).

6. Gregsly vs. Liles 147 So.2d 836 (Ala. 1961) (lawyer must see and talk with witnesses).

7. Bank of Ana Cortes vs. Cook 517 P. Ed. 633 (Washington, 1974) (lawyer required to inquiry of facts from client).

8. Meagher vs. Kavli 97 N.W.2d 370 (Minn. 1959) (lawyer's actions are to be appraised in light of facts and circumstances at time action was taken and not at the time the result turned out badly).

3. Canon 7 - A lawyer should represent a client zealously within the bounds of the law.

   a. EC 7-1 (must represent zealously).

   b. DR 7-101(A)(1) (cannot fail to seek the lawful objectives of the client).

   c. DR 7-101(A)(2) (cannot fail to carry out a contract of employment).

d. DR 7-101(A)(3) (cannot prejudice or damage the client during the course of professional relationship).

4. Canon 4 - A lawyer should preserve the confidences and secrets of a client.

a. EC 4-1 (client must reveal all - holding inviolate confidences and secrets facilitates full development of facts essential to proper representation. . .).

b. EC 4-4 (attorney-client privilege more limited than obligation to guard confidences and secrets -- applies to information received no matter what the source).

c. EC 4-5 (cannot use information acquired from any source to client's disadvantage).

d. EC 4-6 (obligation continues after employment).

e. DR 4-101(A) (confidence is information protected by attorney-client relationship - secret is any other information that would embarrass or be detrimental to the client).

f. DR 4-101(B)(1) and (2) (cannot reveal or use confidence or secret of client).

g. DR 4-101(B)(3) (cannot use confidence or secret <u>to advantage of third person</u>).

B. The Climate Today in Iowa

1. The position of the Iowa Supreme Court can only be described as strict adherance to the Code by lawyers.

2. Recent increases by the Supreme Court of discipline over that recommended by the Grievance Commission.

3. Number of cases subject to discipline is generally increasing.

4. Ethical considerations are, in Iowa, binding principals and a proper measure for a lawyer's conduct - Matter of Freicks, 238 N.W.2d 764 (Iowa, 1976).

5. Recent cases wherein the Supreme Court commented on a lawyer's ethics in appeals unrelated to discipline.

   a. State vs. Vickroy 205 N.W.2d 748 (Iowa, 1973) (Prosecutorial misconduct).

   b. Koppie vs. Allied Mutual 210 N.W.2d 844 (Iowa, 1973) (Defense lawyer's personal liability for failure to communicate with the insured).

   c. Rowen v. LeMars Mutual 230 N.W.2d 905 (Iowa, 1975) (Lawyers removed from representation by Supreme Court).

   d. Schulte vs. Mauer 219 N.W.2d 496 (Iowa, 1974) (Lawyer acting as both attorney and financier used poor professional judgment).

   e. Carmichael vs. Iowa State Highway Commission 219 N.W.2d 658 (Iowa 1974) (Fee dispute in condemnation case - lawyers chastised).

   f. Peterson vs. Farmers Casualty Co. 226 N.W.2d 226 (Iowa, 1975) (defense lawyer not the agent of the defendant - insured - what is the vicarious liability of the insurer to the insured for the lawyer's negligence?) (Court reserved ruling on this question)).

   g. Baker vs. Beal 225 N.W.2d 106 (Iowa, 1975) (Malpractice action for failure to properly plead - once case filed lawyer will not be heard to contend the cause had not merit).

   h. State vs. Hansen 215 N.W.2d 249 (Iowa, 1974)

(censuring defense counsel for profuse pleadings).

i. Cameron vs. Montgomery 225 N.W.2d 154 (Iowa 1975) (Malpractice action for failing to timely file federal estate tax return in order to take advantage of alternative valuations).

C. Particular Problems of the Insurance Defense Lawyer

1. Owes fiduciary to who - insured or insurer?

a. General duty of the insurer to insured

1. Peterson vs. Farmers Casualty Co. 226 N.W.2d 226 (Iowa 1975) (Duty of good faith).

2. Fulton vs. Woodford 545 P.2d 979 (Ariz. 1976) (Equality of consideration rule).

3. Rova Farms Resort, Inc. vs. Investors Ins. Co. 323 A.2d 495 (N.J. 1974) (Positive "fiduciary duty to initiate settlement within coverage and, if the settlement to exceed limits, offer the insured an opportunity to pay the excess).

4. Crisci vs. Security Insurance Co. of New Haven Conn. 426 P.2d 173 (Cal. 1967); Damas vs. State Farm Mutual 274 ATI2d 781 (N.H. 1971) (Doctrine of strict liability).

5. Smoot vs. State Farm 299 F.2d 525 (C.A. Ga. 1962) (insurer liable to insured for excess over limits if caused by bad faith of attorney supplied by insurer).

b. Duty only to insured (lawyer)

1. Lyseck vs. Walcom 258 Cal. App2d 136 (Cal. 1968) (Attorney liable, as a matter of law, when he believed his primary obligation was to insurer, did not notify the insurer of the first offer to settle or its rejection by insurer did not advise insurer to settle for policy limits where risk was great that recovery would be had beyond policy limits, and insurer was recalcitiant in offering settlement).

2. Lange vs. Fidility & Casualty Co. of New York 185 N.W.2d 881, 886 (Minn. 1971) ("This obligation of counsel retained by the insurer is not fulfilled merely by an explanation which amounts to no more than assurances to the insured that his interests are being zealously and faithfully protected by experienced counsel, but rather by laying bare the truth - not only of the potential consequences of a deficiency judgment but of the potential conflicts between the interests of the carrier and the insured - in the manner in which the insured would be advised if he consulted private counsel").

c. Duty only to the insurer (lawyer) (no cases)

d. Duty to both insured and insurer (lawyer)

1. American Mutual Liability Ins. Co. vs. Superior Court 113 Ca. Rpt. 561 (Cal. 1974) (Attorney may represent dual interest upon full disclosure - must disclose all facts to allow each client to make an informed decision - owes same duty to insured as if privately retained by insured - attorney owes primary duty to insured; however, owes obligation to insurer, also, of a fiduciary, but perhaps secondary to that duty owed

the insured - suit, thereafter, between insured and insurer, attorney can no longer represent insured in any pending actions).

2. Counsins vs. State Farm Mutual 258 So.2d 629 (La. App. 1972) (Attorney cannot withhold information or his opinions or expert opinions from insured-duty to disclose to either client all in his file even in communication to third party's attorney, insured, and insurer;parties displayed mutual trust so both deemed to have consented to mutual disclosures by attorney).

3. Lange vs. Fidelity & Casualty Co. of New York 185 N.W.2d 881 (Minn. 1971) (Insured, who had counter claim, insisted on trial - advised accordingly - no lawyer liability).

4. Fulton vs. Woodford 545 P.2d 979 (Ariz. 1976) (Citing Canon 6 as to the conflict which arises when representation is undertaken under a reservation of rights agreement and the waiver of such conflict if the insured thereafter consents to that representation - rule of equality of consideration).

e. The Iowa Rule

1. Koppie vs. Allied Mutual, supra.

2. Peterson vs. Farmers Casualty, supra.

f. Any rule should be pronounced in light of Canon 5 (Independent Professional Judgment) and Canon 7 (Zealous Advocacy).

2. Confidence and secrets of the client.

a. State Farm vs. Walker, supra.

b. Counsins vs. State Farm, supra.

c. American Mutual vs. Superior Court, supra.

3. Duty to Prepare

a. American Employers Ins. Co. vs. Goble Air Craft, supra.

b. EC 6-10(A)(1), (2) and (3).

4. Duty to Communicate

a. Central Cab Co. vs. Clarke 270 A2d 662 (Maryland 1970) (Failure to notify insured that fee arrangment with insurer was unsatisfactory in time to permit insured to retain other counsel and avoid a default judgment, imposed liability upon the attorney).

b. Fulton vs. Woodward 545 P.2d 979 (Ariz. 1976) (Duty to advise as to potential verdict - but must show that if proper advice given, insurer would have given authority to settle to establish malpractice.

c. Lange vs. Fidelity & Casualty Co. of New York, supra.

5. The problems to date have generally been generated by the insured but tomorrow it may be the insurer.

III. CONCLUSION

A. Insurance Defense Lawyer are on the "Horns of a Dilemma".

B. A lawyer cannot function unless he knows who is the client.

C. The legal resolution of this insurance defense lawyer's problem should not restrict or inhibit his or her professional independence or zealousness.

RECENT AMENDMENTS & CHANGES TO IOWA RULES OF CIVIL PROCEDURE

PHILIP WILLSON
SMITH, PETERSON, BECKMAN & WILLSON
301-12 PARK BUILDING
COUNCIL BLUFFS, IOWA, 51501

1. EFFECT OF APPEARANCE

   A. Gives jurisdiction over person, but not subject matter. Loth §4.1

   B. Has no effect on the due date of a pleading or motion. Rules 65, 85 (a)(b).

   C. Does not prevent a default. Rules 87, 230.

   D. Entitles the attorney to notice of pleadings and motions. Rule 82(b).

   E. A defendant can start discovery without advancing the answer date.

   F. Provisions for appearance by endorsement on the docket is abolished. Rule 65.

   G. The effect of abolishing the appearance is mitigated by Rule 85(c) (2) which grants at least ten days additional time on motion.

   H. The appearance must indicate the individual attorney or attorneys in charge of the case. Rule 65.

   I. There is a difference between an appearance by an attorney and an appearance by a party. Sawyer v. Sawyer (Iowa 1967) 152 NW 2d 605.

2. NOTICE PLEADING ADOPTED

   A. A petition need only state "a short and plain statement to the claim showing that the pleader is entitled to relief". Rules 69(a) (2).

      1. Continues trand of decreasing importance of pleadings in formulating issues.

         A. Issues are developed by:

            1. Pleadings
            2. Requests for admission
            3. Pre-trial conferences
            4. Amendments to conform to the proof
            5. Issues tried by express or implied consent, and
            6. Requested instructions.

2. Emphasizes that pleadings are not an end in themselves.

B. Plaintiff must still designate on the petition whether it is at law or in equity. Rule 70.

C. The Iowa Rules no longer use the term "cause of action" (except in Rule 22 relating to joinder). The term was previously eliminated in Rule 104 relating to "failure to state a claim on which any relief can be granted". Emphasis is shifted to specified conduct, occurrence or transaction instead of theories of law.

D. Reduces the use of the concept of election of remedies to substantive issues. Rule 69(b) (2) provides that consistency is not required. Loth 6.35, 9.52. Moore's Federal Practice 2nd Ed Para 2.06(4).

E. Motions to dismiss and the test applied for such motions will probably not be changed.

F. Specifications of negligence and contributory negligence will not be required but may be advisable.

1. The use of specification may avoid:

(a) Motion for more specific statement
(b) Interrogatory as contentions relating to facts or application of law to fact
(c) Being required to specify in pre-trial conference
(d) Need to file requested instructions

2. If specifications are not pleaded there is more flexibility, no need to amend if added grounds are developed, and discovery can be completed before the opposing party and witnesses are advised of the specific grounds claimed.

3. TIME FOR RESPONSE TO PLEADINGS HAVE BEEN REVISED AND CLARIFIED

A. Motions attacking a pleading must be served before responding to a pleading, or, if no responsive pleading is required, upon motion within twenty days after the service of the pleading. Rule 85(a).

B. Answer to a cross-claim must be served within twenty days. Rule 85(b).

C. Reply to a counter-claim shall be served within twenty days. Rule 85(b).

D. If a reply to an answer is ordered by the court, it must be served within twenty days after service of the order. Rule 85 (b).

E. Where the court denies a motion or delays ruling until trial, any responsive pleading required must be served within ten days after notice of the order. Rule 85(c)(1).

F. A response to a more specific statement filed pursuant to court order is due ten days after service of the more specific statement. Rule 85(c) (2).

G. A motion for additional time delays the responsive pleading only ten days, unless within that time, the parties stipulate in writing otherwise or if the court extends the time. Rule 85(c) (2).

4. TERMINOLOGY CLARIFIED

A. A claim against a co-party is called a "cross-claim". No separate caption is used. No separate designations are used for parties. Rule 33. See also Rules 34, 68 and 186. Federal official form 20.

B. The term "cross-petition" is reserved for a claim against a new party. Rules 34 and 74. A drop caption is used in identifying the claimant as "defendant and third-party plaintiff" and the new party is identified as "third party defendant". Rule 34. Federal official form 22. A pleading containing a cross-petition is called a third-party petition. Rule 68.

C. Query whether terms such as "fourth-party" and "fifth-party" should be used.

5. AMENDMENTS TO PLEADINGS

A. Clarifies rights to amend pleadings to which no response is required (such as an answer) and fixes the time period at twenty days. Rule 88.

B. Encourages the use of written consent of adverse party for amendments rather than involving the court. Rule 88.

C. Adopts Federal Rule on relation back of amendments and provides for relation back if the amended pleading arises out of the conduct, transaction or occurrence set forth in the original pleading. Rule 89.

1. No longer limits relation back to the "cause of action" pleaded originally.

D. Gives a limited right to amend by changing a party and provides for relation back. Rule 89.

6. ELIMINATES RIGID REQUIREMENTS FOR SEPARATELY NUMBERED PARAGRAPHS AND DIVISIONS

A. Provides that numbered paragraphs "shall be limited as far as practicable to a statement of a single set of circumstances". Rule 79.

B. Provides that each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth. Rule 79.

C. The Federal official form for the rule now adopted as Iowa Rule 79 suggest that in the answer, the defendant use the terms "First Defense, Second Defense, etc." instead of divisions or counts. Federal official form 20.

7. CLARIFIES THE RULE CONCERNING SUPPLEMENTAL PLEADINGS

A. A court order or written consent is needed in the same manner as late amendments. Rule 90.

B. Leave may be granted even though the original pleading was defective in stating a claim or defense. Rule 90.

C. No responsive pleading is required unless the court so orders and fixes the time. Rule 90.

8. STIPULATIONS FOR DISCOVERY CLARIFIED

A. Provides that if a stipulation for discovery is superseded by a court order, the time shall be extended to twenty days after notice of the court's action. Rule 124.1.

9. PROVISIONS MADE FOR OFFICIAL FORMS

A. Rule 381 was adopted which provides official forms for use under the rules.

CHECKLIST FOR PLEADINGS AND MOTIONS UNDER THE IOWA RULES AFTER JULY 1, 1976

TIME	CITATIONS*
A filing is timely if service made within the time and filing within reasonable time thereafter	82 (d)
Service by mail is complete on mailing	82 (b)
Three days added to allowed time where service by mail	83 (b)
On notice and good cause, not more than 30 extra days can be granted for answer or reply, or right to file may be allowed after time has expired	85 (f)
Otherwise (except for post-trial motions) for cause shown, time may be extended in discretion of court (1) with or without motion or notice if request made within time allowed, or (2) motion made after expiration where failure due to excusable neglect	85 (a)
Court may shorten time for motion or pleading except answer	85 (e)

PROPONENT	OPPONENT	
COMMENCEMENT OF ACTION:		
File petition		48
Contents		69,70
Original Notice		49
Directions for service		49
OPTIONAL:		
Serve Interrogatories		126
Serve Requests for Admissions		127
Serve Requests for Production		130
Jury Demand		177
	On or before Appearance date, one of the following:	
	1. Special Appearance Loth 4.2-4.25	66, 104
	2. Motion (See Motion Checklist)	
	3. Answer (See Answer Checklist)	72

OPTIONAL:

Start discovery
Jury Demand — 177

Optional: within 30 days after service, consider removal to Federal Court

ANSWER (On or before appearance date) Loth 43.17

Admit or deny, Loth Ch. 6 — 72

Allege failure to state claim, Loth Ch. 6 — 104

Counterclaim — 29-32

Affirmative defenses

contributory negligence Loth 43.18	VW §16.03 (2)
assumption of risk Loth 37.6, servant; 41.14, guest; 43.5, invitee	VW §16.03 (4)
statute of frauds, Loth 6.18	VW §16.02 (3)
statute of limitations Loth 6.43-6.54	VW §16.03 (1)
others, Loth Ch. 6	VW §16.03 (5)

Cross-claim against co-party — 33

Cross-petition against third party (no order needed if filed within 10 days after answer), Loth 7.38, 7.39 — 34

Motion

Jury Demand — 177

Reply to counterclaim — 68

(Reply to an answer is not required unless court orders) — 73

COUNTERCLAIM — 29-31

Motion

Reply (due 20 days after service of counterclaim or 20 days after service of order to reply to answer) — 68 — 85 (b)

	Third-party petition	34(b)
	Jury Demand	177
	Discovery	
	Separate trial, Loth 7.74, 7.75	186
CROSS-CLAIM		
	File motion	33
	Answer (due 20 days after service of cross-claim)	68 85(b)
	Jury Demand	177
	Start discovery	
	Move for separate trial Loth, 7.74, 7.75	186
	Move to sever	186
THIRD-PARTY PETITION (No order needed if filed within 10 days of answer)		34
	Motion to dismiss, strike or motion to vacate order granting leave to join third party (discretion involved re complications or prejudice Wright & Miller §1460)	34
	Other motion	34
	Third-party answer (on or before appearance date)	68
	Counterclaim v. third-party plaintiff	34
	Cross-claim v. other third-party defendants	34
	Assert defenses v. original plaintiff	34
	Assert claim v. plaintiff	34

File third-party petition v. new party	34
Jury Demand	177
Motion for separate trial, Loth 7.74, 7.75	176, 186
Motion to sever	186
Start discovery	

MOTIONS, Loth 7.1

(Motions attacking a pleading must be filed before responding and if no responsive pleading required, then within 20 days after service of pleading) (court may rule 10 days after filing)	85 (a) 117
Motion for added time (delays response only 10 days unless court orders otherwise), Loth 7.63	85(c) (f)
Cost bond, Loth 7.22, 7.23	I.C.A.Ch. 621
Dismiss, Loth 7.41-7.46	104(b), 111, §15.06
Strike, Loth 7.49-7.59	111, 113, §15.07
More specific statement, Loth 7.60	111, 112 §15.08
Combine motion to strike, make specific or dismiss, Loth 7.40	111
Change venue, Loth 7.12-7.15	175, §9.03
Recast, Loth 7.83	81
Change of docket or forum, Loth 7.16-7.21	§15.12
Default, Loth 9.4, 9.5	230-232, 86
Separate adjudication of law points (after issues joined. Technically, not a motion)l Loth 9.13.	105, 176
Optional: concise memo brief	117 (a)
Summary judgment, Loth 9.7-9.12	237
Supporting statement and memo required	237(h)

	Resistance required to summary judgment motion	237(e), §20.04
To add party		25
Leave to amend pleading, Loth 7.27, 7.28 See Amendment Check-list. (offer to accept continuance) Loth 7.29, 7.66		88
Leave to file third-party petition, Loth, 7.31, 7.32		34
Separate trial, Loth 7.74, 7.75		176,186
Sever		186
Consolidate, Loth 7.77-7.80		185
Judgment on pleadings		222
Belated jury demand, Loth 7.81 7.82		177
Offer of judgment, Loth 9.1-9.3	I.C.A.	§677.7
	Resistance, objections, motion to set aside or strike, if: local rules require, irregularity, prejudice would result, discretion involved, facts misstated, or not timely	§34.16 cf §3.05
	Amend pleading to remove grounds[2] set out in motion	

ORDERS

Court may order shortening or extending of time. But of 85(f) 124.1, 247		83, 85 (e,f)
Request for specific rulings [3]	Request for specific rulings [3]	118, §34.11 179b, §43.05 f.n. 125
	Appeal	331, 332
To file reply to answer	Reply due 20 days after service of order	85(b)

Order denying motion or postponing disposition until trial	Responsive pleading due 10 days after notice of order	85(c) (1), cf 86
Granting motion for more specific statement	Responsive pleading due 10 days after service of more specific statement	85 (c) (2)
Requiring or permitting further pleading	Further pleading due 7 days after mailing or delivery of order otherwise, constitutes election to stand, Loth 9.5	86(c,f), 85(c) (1)

AMENDMENTS

Amendments to pleading allowed without leave of court (1) before responsive pleading served or (2) within 20 days if no response required; thereafter leave of court or written consent of adverse party required. Loth 7.27	88
Rules do not cover amendments to motions. May be treated as motion to extend time under Rule 85(f) requiring good cause. Amendment of post-trial motion may be limited to enlargement of grounds in timely motion[4]	
Issues actually tried by express or implied consent shall be treated as though pleaded	294, VW §34.14
Resist granting amendment. Request continuance Loth 7.29, 7.66	
Responsive pleading due within time remaining or 10 days, whichever is longer	85(d)

SUPPLEMENTAL PLEADINGS

Leave of court and reasonable notice, upon terms as court	

deems just, or written consent of adverse party required. Pleadings may be brought up to date

90

No response required unless court on motion of court or party, so orders, and fixes time 90

*Citations are to Iowa Rules of Civil Procedure unless otherwise indicated. § references are to Vestal & Willson, Iowa Practice.

[1]Constitues a "final order". Rules 105; Loth 7.1, 7.28, Comment, Berger v. Amona Society, (1961), 253 Iowa 378, 111 NW2d 753; Bremmer v. Journal-Tribune Publishing Company, (1956), 247 Iowa 817, 76 NW2d 762.

[2]A motion is not a responsive pleading (Rule 69) therefore a pleading can be amended as of right when it is attacked by motion. Brecken v. County Board of Rev. for Story County, (Iowa, 1974), 223 NW2d 246.

[3]Failure to rule separately is reversible error. VW 34.11; Brecken v. County Board of Rev. for Story County, (Iowa, 1974), 223 NW2d 246.

[4]Wright and Miller, Federal Practice and Procedure §1194, Moore's Federal Practice, 2nd Ed., para. 7.05 pp. 1543, 1544.

IN THE IOWA DISTRICT COURT FOR _____ COUNTY

CAPTION

THIRD-PARTY PETITION FOR INDEMNITY OR CONTRIBUTION

DIVISION I.

INDEMNITY

Third-party plaintiff, _____, for cause of action against third-party defendant, _____, states:

1. Plaintiff has filed against this defendant and third-party plaintiff a (complaint) (petition) a copy of which is attached hereto as Exhibit "A".

2. The relationships among the parties are as follows:

3. (If the claim is based on express contract the allegations should show the making of the contract, the terms, performance, acts causing liability to be incurred, and breach.) (If the claim is based on implied contract the allegations should show acts resulting in liability for which the law by implication imposes an agreement to indemnify.) (If the claim is based on negligence the allegations must show a duty and negligence of third-party defendant constituting a proximate cause.)

4. By reason of the foregoing, if third-party plaintiff is held liable to any other party hereto, the third-party plaintiff would be entitled to indemnity from third-party defendant on the following grounds:

a. The liability of the third-party plaintiff for damage caused by third-party defendant would be only derivative or vicarious.

b. Third-party plaintiff's liability would

result from action at the direction, in the interest of, and in reliance upon third-party defendant. Restatement Restitution §90

c. Liability of third-party plaintiff would be incurred because of a breach of duty owed to third-party plaintiff by third-party defendant.

d. Third-party plaintiff would have incurred liability merely because of failure to discover or prevent the negligence of third-party defendant.

(Grounds a to d, inclusive, are set forth in Peters v. Lyons, 168 NW2d 759, 767, in which Restatement Restitution is cited for ground b. See also Iowa Power and Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 308.)

e. The terms of the express contract between third-party plaintiff and third-party defendant. (Iowa Power and Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 308.)

f. The negligence of third-party defendant would be active or primary as opposed to passive or secondary negligence of third-party plaintiff. (Iowa Power and Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 308.)

g. Intervening conduct of third-party defendant would be a superseding cause of the damages recovered against third-party plaintiff. (Schnebly v. Baker, (Iowa,), 217 NW2d 708, 728-731.)

h. I.C.A. §554.2607(5). (U.C.C.)

i. I.C.A. §364.14 (City claims)

5. Third-party plaintiff has denied all allegations and claims made against it. However, in the event judgments are rendered in favor of any party to this action against third-party plaintiff, then third-party defendant, would be fully liable to indemnify third-party plaintiff for any judgment obtained, together with interest thereon and costs of this action.

WHEREFORE, third-party plaintiff prays for judgment for all attorney fees and expenses of defense of the claims against the undersigned and further prays that in the event any judgments are rendered in favor of any party against it, in this action, that third-party plaintiff have judgment over and against third-party defendant for full indemnity for such judgments, interest and costs.

DIVISION II

CONTRIBUTION

Third-party plaintiff, _____, for cause of action against third-party defendant, _____, states:

1. Third-party plaintiff hereby incorporates by reference and makes a part hereof the allegations of paragraphs 1 and 2 of Division I hereof.

2. (Allege duty, negligence, and concurring proximate cause sufficient to show there would be common liability to plaintiff if plaintiff recovers against the defendant and third-party plaintiff.)

3. Third-party plaintiff has denied all allegations and claims made against it. However, in the event judgments

are rendered in favor of any party to this action against third-party plaintiff, then third-party plaintiff would be entitled to contribution from third-party defendant.

WHEREFORE, third-party plaintiff prays that in the event any judgments are rendered in favor of any party against it in this action, that third-party plaintiff then have judgment against third-party defendant for contribution thereto, including contribution for interest and costs of this action.

NOTE: The Original Notice should be addressed "TO THE ABOVE-NAMED THIRD-PARTY DEFENDANT(S)."

IN THE IOWA DISTRICT COURT FOR _____ COUNTY

CAPTION

CROSS-CLAIM OF DEFENDANT

AGAINST DEFENDANT _____

DIVISION I.

INDEMNITY

Defendant _____, hereinafter referred to as This Defendant, for cause of action against defendant, _____, hereinafter referred to as Defendant, states:

1. The relationships among the parties are as follows:

2. (If the claim is based on express contract the allegations should show the making of the contract, the terms, performance, acts causing liability to be incurred, and breach.) (If the claim is based on implied contract the allegations should show acts resulting in liability for which the law by implication imposes an agreement to indemnify.) (If the claim is based on negligence the allegations must show a duty and negligence of third-party defendant constituting a proximate cause.)

3. By reason of the foregoing, if This Defendant is held liable to any other party hereto, This Defendant would be entitled to indemnity from Defendant on the following grounds:

a. The liability of This Defendant for damage caused by Defendant would be only derivative or vicarious.

b. This Defendant's liability would result from action at the direction, in the interest of, and in reliance upon Defendant. Restatement Restitution §90.

c. Liability of This Defendant would be incurred be-

cause of a breach of duty owed to This Defendant by Defendant.

d. This Defendant would have incurred liability merely because of failure to discover or prevent the negligence of Defendant.

(Grounds a to d, inclusive, are set forth in Peters v. Lyons, 168 NW2d 759, 767, in which Restatement Restitution is cited for ground b. See also Iowa Power and Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 308.)

e. The terms of the express contract between This Defendant and Defendant. (Iowa Power and Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 308.)

f. The negligence of Defendant would be active or primary as opposed to passive or secondary negligence of This Defendant. (Iowa Power and Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 308.)

g. Intervening conduct of Defendant would be a superseding cause of the damages recovered against This Defendant. (Schnebly v. Baker, Iowa,), 217 NW2d 708, 728-731.)

h. I.C.A. §554.2607(5). (U.C.C.)

i. I.C.A. §364.14 (City Claims)

4. This Defendant has denied all allegations and claims made against it. However, in the event judgments are rendered in favor of any party to this action against This Defendant, then Defendant would be fully liable to indemnify This Defendant for any judgment obtained, together with interest thereon and costs of this action.

WHEREFORE, This Defendant prays for judgment for all attorney fees and expenses of defense of the claims against the undersigned

and further prays that in the event any judgments are rendered in favor of any party against it, in this action, that This Defendant have judgment over and against Defendant for full indemnity for such judgments, interest and costs.

DEFENDANT II.

CONTRIBUTION

Defendant, _____, hereinafter referred to as This Defendant, for cause of action against defendant, _____, hereinafter referred to as Defendant, states:

1. This Defendant hereby incorporates by reference and makes a part hereof the allegations of paragraphs 1 and 2 of Division I hereof.

2. (Allege that negligence claimed by plaintiff against Defendant, and any added grounds alleged by This Defendant, would be a concurring proximate cause.)

3. This Defendant has denied all allegations and claims made against it. However, in the event judgments are rendered in favor of any party to this action against This Defendant, then This Defendant would be entitled to contribution from Defendant.

WHEREFORE, This Defendant, _____, prays that in the event any judgments are rendered in favor of any party against it in this action, that This Defendant then have judgment against Defendant, _____, for contribution thereto, including contribution for interest and costs of this action.

1976 RULE CHANGES

RULE		FEDERAL SOURCE
33	Cross-Claim against a co-party	13 (g)
65	Appearances	11
66	Special Appearance	
69	General Rules of Pleading	8 (a,e)
70	Petition	
74	Cross-Claim, Cross-Petition - Judgment	
79	Paragraphs; separate statements	10 (b)
85 (a)	Motions	12 (f)
85 (b)	Pleading	12 (a)
85 (c)	Time after filing Motions	12 (a)
85 (d)	Response to Amendments	15 (a)
88	Amendments	15 (a)
89	Making and construing Amendments	15 (c)
90	Supplemental pleadings	15 (d)
124.1	Stipulations regarding discovery procedure	29
126 (a)	Interrogatories to parties	
336 (a)	How Taken	
381	Forms	84

1. That Rule 33 be stricken and the following substituted:

"33. CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or a counter-claim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

2. That Rule 65 be stricken and the following substituted:

"65. APPEARANCES. An attorney making an appearance shall, either by filing written appearance or by signature to the first pleading or motion filed by the attorney, clearly indicate the attorney or attorneys in charge of the case and shall not sign in the name of a firm only."

3. That Rule 66 be stricken and the following substituted:

"66. SPECIAL APPEARANCE. A defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only before taking any part in a hearing or trial of the case, personally or by attorney, or filing a motion, written appearance, or pleading. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error."

4. That Rule 69 be stricken and the following substituted:

"69. GENERAL RULES OF PLEADING. (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Pleading to be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required. (2) A party may set forth two or more statements

of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. 'Pleadings' as used in these rules do not include motions."

5. That Rule 70 be stricken and the following substituted:

"70. PETITION. The petition shall state whether it is at law or in equity."

6. That Rule 74 be stricken and the following substituted:

"74. CROSS-CLAIM, CROSS-PETITION - JUDGMENT. Any cross-claim under Rule 33 or cross-petition under Rule 34, and the answer and reply to it, shall be governed by these rules. Where judgment in the original case can be entered without prejudice to the rights in issue under a cross-petition, cross-claim or counterclaim, it shall not be delayed thereby."

7. That Rule 79 be stricken and the following substituted:

"79. PARAGRAPHS; SEPARATE STATEMENTS. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth."

8. That Rule 85 (a) be stricken and the following substituted:

"85(a). MOTIONS. Motions attacking a pleading must be served before responding to a pleading or, if no responsive pleading is required by these rules, upon motion made by a party within 20 days after the service of the pleading on such party."

9. That Rule 85 (b) be stricken and the following substituted:

"85(b). PLEADING. Answer to a petition must be served on or before the appearance date prescribed in accordance with Rule 53. A party served with a pleading stating a cross-claim against the party shall serve an answer thereto within 20 days after the service of the pleading upon the party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs."

10. That Rule 85 (c) be stricken and the following substituted:

"85(c). TIME AFTER FILING MOTIONS. The service of a motion permitted under these rules alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more specific statement, the responsive pleading shall be served within ten days after the service of the more specific statement; provided, however, unless the parties stipulate in writing otherwise, the filing of a motion for additional time shall delay the responsive pleading for a period of ten days after the service of the motion unless within such time the court orders otherwise."

11. That Rule 85 (d) be stricken and the following substituted:

"85(d). RESPONSE TO AMENDMENTS. A party shall plead in response to an amended pleading within the time remaining in response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

12. That Rule 88 be stricken and the following substituted:

"88. AMENDMENTS. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any

time within 20 days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

13. That the second sentence of Rule 89 be stricken and the following substituted:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

14. That Rule 90 be stricken and the following substituted:

"90. SUPPLEMENTAL PLEADINGS. By leave of court, upon reasonable notice and upon such terms as are just, or by written consent of the adverse party, a party may serve and file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Leave may be granted even though the original pleading is defective in its statement of a claim for relief or defense. No responsive pleading to the supplemental pleading is required unless the court, upon its own motion or the motion of a party, so orders, specifying the time therefor."

15. That the phrase "may be made only with the approval of the court" be stricken from the last portion of Rule 124.1 and the following substituted:

"must be filed with the court and may be superseded by court order, in which event the time shall be extended to 20 days after notice of the court's action ".

16. That the second paragraph of Rule 126(a) be stricken.

17. That the following words be stricken from Rule 336(c):

"; but no delay in so doing shall affect the validity of the appeal if the copy is filed before the abstract on such appeal is filed under rule 340(a)".

18. That the following Rule 381 be adopted:

"381. FORMS. The forms contained in the Appendix of Forms following this rule are for use and are sufficient under the Iowa Rules of Civil Procedure, excluding the rules appearing in division XVI. The Supreme Court shall have the power to prescribe forms for use under the rules appearing in division XVI."

1. FORM OF ORIGINAL NOTICE FOR PERSONAL SERVICE.

IN THE IOWA DISTRICT COURT FOR ______________________ COUNTY

* *

Plaintiff(s),	________ (Insert "LAW" or "EQUITY.")	No. ________
vs.		
Defendant(s).	ORIGINAL NOTICE	

* *

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified that there is now on file in the office of the clerk of the above court, a petition in the above-entitled action, a copy of which petition is attached hereto. The plaintiff's attorney is ______________________________, whose address is ____________________, Iowa ______________.

You are further notified that unless you appear thereto and defend in the Iowa District Court for ________________ County, at the county courthouse in ______________________, Iowa, within 20 days after the service of this original notice upon you, judgment by default will be rendered against you for the relief demanded in the petition.

(SEAL)

____
CLERK OF THE ABOVE COURT

__________ County Courthouse

______________, Iowa ________.

NOTE:

Persons named as defendants are told to "appear thereto and defend." These words are not always understood. The required appearance may be made either by the defendant or by defendant's attorney. IT IS NECESSARY TO SERVE AND FILE A SPECIAL APPEARANCE, MOTION OR PLEADING TO PREVENT A DEFAULT (RULE 87). The attorney who is expected to appear for the defendant should be promptly advised by defendant of the service of this notice.

2. FORM OF ORIGINAL NOTICE AGAINST A NONRESIDENT MOTOR VEHICLE OWNER OR OPERATOR UNDER § 321.500, THE CODE.

IN THE IOWA DISTRICT COURT FOR ________________________ COUNTY

Plaintiff(s),	________ No. ______ (Insert "LAW" or "EQUITY.")
vs.	
Defendant(s).	ORIGINAL NOTICE

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified that there is now on file in the office of the clerk of the above court, a petition in the above-entitled action, a copy of which petition is attached hereto. The plaintiff's attorney is ________________________, whose address is ____________________, Iowa __________.

You are further notified that unless you appear thereto and defend in the Iowa District Court for ______________ __________ County, at the courthouse in ____________________, Iowa, before noon of the sixtieth day following the filing of this notice with the director of transportation of this state, default will be entered and judgment rendered against you by the court.

(SEAL)

____
CLERK OF THE ABOVE COURT

____________ County Courthouse

____________, Iowa ________.

NOTE:

Persons named as defendants are told to "appear thereto and defend." These words are not always understood. The required appearance may be made either by the defendant or by defendant's attorney. IT IS NECESSARY TO SERVE AND FILE A SPECIAL APPEARANCE, MOTION OR PLEADING TO PREVENT A DEFAULT (RULE 87). The attorney who is expected to appear for the defendant should be promptly advised by defendant of the service of this notice.

3. FORM OF ORIGINAL NOTICE AGAINST FOREIGN CORPORATION OR NONRESIDENT UNDER §617.3, THE CODE.

IN THE IOWA DISTRICT COURT FOR ______________________________ COUNTY

Plaintiff(s),	________ (Insert "LAW" or "EQUITY.") No. __________
vs.	
Defendant(s),	ORIGINAL NOTICE

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified that there is now on file in the office of the clerk of the above court, a petition in the above-entitled action, a copy of which petition is attached hereto. The plaintiff's attorney is ________________________ ___________________, whose address is ________________________, Iowa ________________.

You are further notified that unless you appear thereto and defend in the Iowa District Court for ________________ ____________ County, at the courthouse in ____________________, Iowa, within 60 days following the filing of this notice with the secretary of state of the state of Iowa, default will be entered and judgment rendered against you by the court.

(SEAL)

____
CLERK OF THE ABOVE COURT

_____________ County Courthouse

_____________, Iowa ________.

NOTE:

Persons named as defendants are told to "appear thereto and defend." These words are not always understood. The required appearance may be made either by the defendant or by defendant's attorney. IT IS NECESSARY TO SERVE AND FILE A SPECIAL APPEARANCE, MOTION OR PLEADING TO PREVENT A DEFAULT (RULE 87). The attorney who is expected to appear for the defendant should be promptly advised by defendant of the service of this notice.

4. FORM OF ORIGINAL NOTICE FOR PUBLICATION.

IN THE IOWA DISTRICT COURT FOR ______________________________ COUNTY

Plaintiff(s),	____________ No. __________ (Insert "LAW" or "EQUITY.")
vs.	
Defendant(s).	ORIGINAL NOTICE

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified that there is now on file in the office of the clerk of the above court, a petition in the above-entitled action, which petition prays(1) ______________________. The plaintiff's attorney is ________________________________, whose address is __________________, Iowa ____________________.

You are further notified that unless you appear thereto and defend in the Iowa District Court for ____________________ County, at the courthouse in ______________________, Iowa, on or before the(2) ____ day of __________________, 19__, judgment by default will be rendered against you for the relief demanded in the petition.

(SEAL)

____
CLERK OF THE ABOVE COURT

__________ County Courthouse

______________, Iowa ______.

NOTE:

Persons named as defendants are told to "appear thereto and defend." These words are not always understood. The required appearance may be made either by the defendant or by defendant's attorney. IT IS NECESSARY TO SERVE AND FILE A SPECIAL APPEARANCE, MOTION OR PLEADING TO PREVENT A DEFAULT (RULE 87). The attorney who is expected to appear for the defendant should be promptly advised by defendant of the service of this notice.

[(1)Here make a general statement of the cause or causes of action and the relief demanded, and, if for money, the amount thereof (Rule 50).

(2)Date inserted here must not be less than 20 days after the day of the last publication of the original notice (Rule 53).]

5. DIRECTIONS FOR SERVICE OF ORIGINAL NOTICE

COMPLETE ONE OF THESE DIRECTIONS FOR EACH INDIVIDUAL, COMPANY, CORPORATION, ETC. TO BE SERVED.

DIRECTIONS FOR SERVICE OF ORIGINAL NOTICE

TO: Sheriff _____ County OR, TO: _____

_____Court House _____

_____, Iowa _____

Serve: _____

At: _____

ON COMPLETION OF SERVICE NOTIFY: _____

Special Instructions or Information Relating to Service: _____

_____

_____

NAME AND SIGNATURE OF ATTORNEY
OR OTHER ORIGINATOR: _____
BY: _____

DATE: _____ TELEPHONE No. _____

DEPOSIT FOR COST OF SERVICE

☐ Deposit Waived

☐ Deposit for $ _____ required and receipt thereof acknowledged.

_____
Clerk of Court

ROAD HAZARDS - TORT LIABILITY AND RESPONSIBILITIES

JOHN E. BEAMER
SPECIAL ASSISTANT ATTORNEY GENERAL
State Capitol
Des Moines, Iowa

I. OVERVIEW: PROCEDURES FOR INSTITUTING ACTIONS AGAINST STATE AND LOCAL GOVERNMENTAL BODIES FOR NEGLIGENT DESIGN, CONSTRUCTION AND MAINTENANCE OF ROADS AND HIGHWAY -

A. There are several basic procedures involved in initiating tort litigation against state, county and city highway departments for negligent design, construction and maintenance.

1. Types of Statutes Waiving Tort Immunity - Iowa

(a) State Claims Acts. The Iowa method of hearing tort claims is embodied in the State Tort Claims Act, Chapter 25A of the Code. The State Appeal Board is authorized to hear the claim prior to suit and has six months to consider it before suit may be instituted, Section 25A.5, The Code. The Act does provide for certain exceptions to suit, Section 25A.14. Every claim and suit against the State permitted under Chapter 25A shall be forever barred, unless within two years after such claim accrued. The claim is made in writing to the State Appeal Board, Section 25A.13. Accrual of a claim occurs when the plaintiff discovered or in the exercise of reasonable care should have discovered the wrongful act or ommission. Chrischilles vs. Griswold, 260 Iowa 453, 150 N.W.2d 94. The state act is modeled after the Federal Tort Claims Act. Federal cases are accepted authority for support in construing specific sections of the Iowa law. Hubbard v. State, 163 N.W.2d 904 at 907 (Iowa 1969).

(b) Municipal Tort Claims Act. Tort liability of governmental subdivisions is set forth in Chapter 613A of the Code. The statutory limitations of actions are set forth in Section 613A.5. Any common-law immunity in tort previously allowed governmental subdivision was eliminated except for the exceptions set forth in §613A.4. Symmonds v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 242 N.W.2d 262 (Iowa 1976).

2. Highway Defect Statutes

A second method of waiver of both suability and liability of state or municipal highway departments is represented by the highway defect statute. These generally authorize suits where the claimant sustains damage "by reason of any defective bridge or culvert on, or defect in a state highway, not within an incorporated city." Kan. Stat. Ann. §68-419(a), 68-419(b). Research Results Digest, National Cooperative Highway Research Program, No. 80, September, 1975.

These statutes are different inasmuch as the question is not whether a state officer or employee has been negligent, the criteria under the Iowa acts, but whether the claimant's injuries were caused by a "defect" within the meaning of the statute. Was the "defect" in the highway one which the legislature intended to be liability producing. The liability could be said to be statutory, as the cause of action is for the recovery of damages for breach of statutory duty. Kelley v. Broce Construction Co., Inc., 205 Kan. 133, 468 P.2d 160 (1970); Shirlock v. MacDonald, Highway Commissioner, 121 Conn. 611, 186 A. 562 (1936).

3. Iowa Statutory Law Imposing Duties on Governmental Bodies. The statutory provisions which impose duties on the various governmental levels of government are found in a number of Code sections. Apparently some of the jurisdictional areas overlap.

The Department of Transportation has the duty to maintain the primary roads of the State. Section

313.36, The Code. In addition, Section 319.1 provides that the Department and the county boards of supervisors shall cause all obstruction in highways under their respective jurisdictions to be removed. Chapter 306 states that the jurisdiction and control over the streets and roads shall in some instances be a concurrent responsibility of state and local governments. Sections 306.4(1) - 306.5(b).

Cities have specific responsibilities for the care, supervision and control of streets, alleys, bridges, culverts and the like as set forth in Section 364.12(2).

II. DEFENSES OF GOVERNMENTAL UNITS FOR ALLEGATIONS OF NEGLIGENT PLANNING OR DESIGNING OF HIGHWAYS.

A. Defenses of the State of Iowa.

In Iowa the State appears to have a defense for negligent acts which occur at the planning or design stage. Stanley v. State, 197 N.W.2d 599 (Iowa 1972); Seiber v. State, 211 N.W.2d 698 (Iowa 1973); Symmonds v. Chicago, Milwaukee, St. Paul and Pacific R. Co., supra.

B. Defenses of Governmental Subdivisions.

The exclusions for suits against governmental subdivisions are found in Section 613A.4. The discretionary function defense under Chapter 25A is not available to these governmental bodies. In Symmonds v. Chicago, Milwaukee, St. Paul and Pacific R. Co., supra, Scott County argued that the placing of a stop sign at a railroad crossing was discretionary. The Court held that the discretionary function exception contained in Chapter 25A does not exist in Chapter 613A. The abrogation of governmental immunity for governmental subdivisions resulted in the application of the ordinary care under the circumstances test of liability or statutory violation.

C. Allegations Based on Negligence In Warning of Construction Projects, Inadequate Maintenance.

These allegations are generally considered to be nondiscretionary, ministerial or routine functions, and "operational level" activities, not involving matters of policy, Ehlingher v. State, 237 N.W.2d

784 (Iowa 1976); Stanley v. State, 197 N.W.2d 599 (Iowa 1972); De Yarman v. State, 226 N.W.2d 26 (Iowa 1975).

III. THE DUTY OWED BY THE STATE AND ITS POLITICAL SUBDIVISIONS TO THE TRAVELING PUBLIC.

A. It is virtually impossible to summarize the law applicable to the design, construction and maintenance of highwayswhen actions are brought pursuant to statutes in various state and local jurisdictions.

Although it is difficult to summarize general rules on the duty owed by the governmental body to users of the highway, it is said: ". . . that persons using highways, streets, and sidewalks are entitled to have them maintained in a reasonably safe condition for travel . . . he is neither required nor expected to search for obstructions or dangers." 39 Am.Jur.2d, Highways, §337, p. 721; 39 Am.Jur.2d, Highways, Streets and Bridges, §506, p. 906. Koehler vs. State, Floyd County, Iowa, No. 21436-38, 3/16/76.

B. General Rules of Liability.

1. Even though the state is held to the same standard of care as a private citizen, the state is not an insurer of the safety of travellers using its highways. Stuart - Bullock v. State, 38 A.D.2d 626, 326 N.Y.S.2d 909, 912 (1971) Dodd v. State of New York, 223 N.Y.S.2d 32 (N.Y. 1961), Ritchie v. City of Des Moines, 223 N.W. 43 (Iowa 1930).

2. A governmental body must have actual or constructive notice of the condition or defect and reasonable opportunity to remedy this situation, (accumulation of ice and snow on roadway), Anderson v. Fort Dodge, 213 N.W.2d 527 (Iowa 1973).

3. The state is required to give adequate warning of existing conditions and hazards to the reasonably careful driver. Stuart - Bullock v. State, supra. A warning must be sufficient for the purpose intended. Hughes v. State 215 N.Y.S.2d 565 (N.Y. 1961).

4. It has been held that a plainly visible obstruction is sufficient in itself to provide warning to the traveling public approaching it; failure to give other warning of its presence

cannot be held to be the proximate cause of any collision involving said obstruction. Kolet v. State, 146 N.Y.S.2d 842 (N.Y. 1955).

C. Uniform Traffic Control Devices for Streets and Highways.

1. In Section 321.252 of the Code, the Department of Transportation adopted the manual and specifications for a uniform system of traffic control devices for use upon highways within the state.

2. Local authorities are directed to adhere to the specifications for these signs as established by the Department.

3. The adequacy of barriers or postal warnings is critical in resolving the question of the state's liability. Compliance with a standard manual on traffic signs following an evaluation of the exigencies of the roadway condition are relevant issues in considering whether the state has met its standard of care. See Meabon v. State, 1 Wash. App. 824, 463 P.2d 789 (1970).

IV. SUMMARY

The matter of tort liability of highway departments for design, construction, and maintenance negligence has received varying treatments by the courts. The cases are fairly uniform at the state level in holding that the design of a highway is discretionary because it involves high-level planning activity with the evaluation of policies and factors. Negligent construction is not likely to be immunized by reason of the discretionary function when the construction deviates from the approved plans. Negligent maintenance or inadequacy of warning are least likely to be immune from liability. There are exceptions to all these general rules and the answer to any given situation depends on the applied legal principle and often times more importantly the facts.

FEDERAL JURISDICTION

By

RONALD LONGSTAFF
UNITED STATES MAGISTRATE
FOR THE SOUTHERN DISTRICT OF IOWA

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FEDERAL JURISDICTION

I. SUBJECT MATTER JURISDICTION - GENERALLY

A. Defined.

1. Subject Matter Jurisdiction refers to the type of cases a court has the power to decide.
2. Jurisdiction over the person or property refers to a court having the right to adjudicate a matter with respect to a particular person (or property) involved in a case within its power.
3. If jurisdiction exists as to the subject matter and over the person or property, venue rules then become applicable.
4. Courts have jurisdiction to determine their jurisdiction and any order made prior to a jurisdictional determination must be obeyed.

B. Absence of Subject Matter Jurisdiction.

1. Absence of Subject Matter Jurisdiction can be raised at any time by any party or the court.
2. The validity of a final decision on the merits may stand despite absence of Subject Matter Jurisdiction when neither the parties nor the Court raised the jurisdictional defect until the decision is final and all appeals have been completed. At this junctur the relevant question becomes whether the decision can be collaterally attacked (set aside in a separate proceeding or disregarded in a later proceeding

Although there is a split of authority, some courts will allow a final judgment to be collaterally attacked if policy dictates. Factors to be considered in any such attack are listed in the Restatement of Judgments, §10(1) as follows: (a) lack of jurisdiction is clear; (b) jurisdiction depends on a question of law, not fact; (c) the court is of limited, not general jurisdiction; (d) the questions of jurisdiction were not litigated; (e) strong policy exists against the court acting beyond its jurisdiction.

II. GENERAL SUBJECT MATTER JURISDICTION OF FEDERAL COURTS

A. Limitation imposed by Article III of the Constitution which provides as follows:

"Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.....

"Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority;--to all cases affecting Ambassadors, other Public Ministers and Consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies between two or more states; --between a state and citizens of another state;--between citizens of different states;--between citizens

of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

"In all cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

1. Congressional power over Federal Jurisdiction. It is clear that Article III grants a limited original jurisdiction (i.e. Supreme Court acts as trial court) to the Supreme Court with the power to try cases so specified. However, subject to this exception, the jurisdiction of Federal courts is subject to Congressional control. If it so desired, Congress could refuse to establish lower Federal courts. Once established, lower Federal courts derive their jurisdiction exclusively from Congressional enactment. Moreover, under Article III, Congress also has the power to determine the nature and extent of the Supreme Court's appellate jurisdiction.

   The general power of Congress over Federal court jurisdiction is limited only to the extent that it

cannot be exercised so as to arbitrarily discriminate or otherwise deprive a citizen of due process. Therefore, jurisdiction based on a party's national origin or race would be invalid.

Examples of Congressional limitations on Federal court jurisdiction are as follows:

a. Amount in Controversy Requirement. Congress has prescribed that a minimum amount be in controversy before Federal courts can consider many types of cases otherwise within their jurisdiction. For instance, in general diversity cases, more than $10,000 must be involved; in special diversity interpleader actions, the amount must ~~exceed~~ be $500/ or more; and in some Federal questions cases, though not many, more than $10,000 is required. If the required amount is absent, such cases must be brought in a state court.

b. Concurrent Jurisdiction in State Courts Permitted. Congress rarely specifies that the jurisdiction it confers upon lower Federal courts shall be exclusive. Thus, most cases heard in Federal courts could also be tried in a state court if the parties so chose. In a few cases, notably those arising under the patent and copyright laws, Congress has established exclusive jurisdiction in Federal

courts. Although there may be some question as to Congressional power to grant Federal courts exclusive power over diversity cases if it ever so desired, it clearly may grant exclusive jurisdiction over Federal questions.

B. The "case or controversy" language of Article III places a twofold limitation on the judicial powers of Federal courts.

1. Questions must be presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.
2. Questions must be within the defined role assigned the judiciary in the tripartite allocation of power and must not intrude into areas committed to the other branches of Government.
3. The "term of art" which describes this dual limitation on the Federal courts is "Justiciability."

C. Instances of non-justiciability are as follows:

1. Moot Actions Barred: If a dispute between parties becomes moot, Federal courts do not have jurisdiction over the matter. Even if an action is proper when commenced, a Federal court must decline jurisdiction once it becomes moot. For example, an action attacking the constitutionality of a state statute becomes moot if the state legislature repeals the statute involved. Obviously, if a

plaintiff is seeking damages from past enforcement of the statute being attacked, the action will not be mooted by the statute's repeal.

2. Standing Required: A plaintiff may not maintain an action unless he has "standing" to do so. The standing aspect of justiciability focuses on the party seeking to get his complaint into a Federal court. To acquire standing, a plaintiff must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962).

3. Collusive Actions Barred: If parties to an action are merely attempting to obtain a determination of a point of law when no controversy actually exists, a Federal court will decline to exercise jurisdiction. In this respect, questions involving the financing and control of a lawsuit may become relevant.

4. Political Questions Barred: The inquiry with respect to this aspect of non-justicability is "whether there is a textually demonstrable Constitutional commitment of the issue to a coordinate political department of government and what is the scope of such commitment." Powell v. McCormack, 395 U.S. 486, 521 (1969).

5. Advisory Opinions Barred: Federal courts have no power to give advice, and may render decisions only as to actual disputes. For example, a Federal court would not render a decision on the constitutionality of a proposed statute.

a. Declaratory Judgments Permitted: Pursuant to 28 U.S.C. § 2201-02, Federal courts are authorized to grant judgment declaring the rights between parties even though such judgments may, in some instances, be considered advisory. The key depends on whether there is an actual controversy within the Court's jurisdiction. For instance, if parties disagree as to whether performance is required on a certain date under a purported agreement, the party claiming nonperformance is not required to risk a suit for breach by maintaining the status quo; instead he may bring an action for declaratory judgment and obtain a decision in advance of the critical date.

However, the Federal Declaratory Judgment statute does not confer jurisdiction. It can be invoked only when subject matter jurisdiction exists in the controversy.

D. Improper joiner or assignment cannot be used to invoke jurisdiction: Pursuant to 28 U.S.C. §1359, Federal courts cannot have jurisdiction over a civil action wherein any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the court's jurisdiction.

1. An assignment of a claim resulting in the "manu-

facture" of Federal jurisdiction will cause a court to decline the exercise of its jurisdiction. Kramer v. Caribbean Mills, Inc., 394 U.S. 823. (1969).

2. The appointment of an out-of-state guardian solely for the purpose of creating diversity jurisdiction is improper and collusive. The key to any such determination is the substance of the appointment. McSparran v. Weist, 402 F.2d 867 (3rd Cir, 1968).

E. Plaintiffs in Federal courts must plead jurisdiction: Federal courts are empowered to consider only those cases enumerated under Article III of the Constitution, supra, and for which there is a Federal statute authorizing jurisdiction. Federal courts are therefore referred to as having limited jurisdiction. In his complaint, a plaintiff must specifically plead the jurisdiction being asserted. If jurisdiction is challenged, the plaintiff bears the burden of proof.

1. Contrast to state courts: State courts are courts of general jurisdiction so that jurisdiction is presumed to exist in all cases. Generally, one of the state courts has jurisdiction over any case. However, in certain cases, such as patent litigation and bankruptcy, Congress has provided for exclusive jurisdiction in Federal courts.

III. FEDERAL QUESTION JURISDICTION: (28 U.S.C. 1331)

A. Cases "arising under" the Constitution, Laws and Treaties of the United States: Federal court jurisdiction over cases "arising under" Federal law is provided in Article III. The meaning of "arising under" has been a fertile ground for litigation which has not yet produced a clear definition. Nevertheless, there appears to be a developing standard that original Federal jurisdiction must be premised upon a substantial claim founded directly on Federal law.

1. Federal law creating action: When a law passed by Congress provides a plaintiff with a cause of action and a remedy, the action clearly falls within the purview of the "arising under" criterion. Examples of such actions would be a patent-holder's suit to obtain damages for infringement or an action under Federal anti-trust laws for damages sustained from price-fixing conspiracy of competitors designed to drive the plaintiff out of business.

2. Reference to Federal law: Although an action premised on state law may involve some reference to Federal law, Federal question jurisdiction cannot be established on that basis alone.

3. Federal law as essential element: The fact that Federal law furnishes an essential ingredient of an action does not necessarily establish Federal question jurisdiction unless:

a. The action presents an issue requiring construction of the Constitution or an Act of Congress (the doctrine of abstention, discussed infra, may become involved here), or

b. the action involves a distinctive policy of an Act of Congress or the Constitution which requires that its disposition be controlled by Federal principles. T. B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964); McFaddin Express Inc. v. Adley Corp., 346 F.2d 424 (2d Cir. 1965)

An example of when Federal Question Jurisdiction might exist under these guidelines is a claim for negligence and breach of contract in the rendition of interstate telephone service by carriers regulated under the Federal Communciations Act. Ivy Broadcasting Co. v. American Telephone and Telegraph, 391 F.2d 486 (2d Cir. 1968).

B. A case does not "arise under" a Federal law raised as a defense:

1. Jurisdiction determined by plaintiff's complaint: Federal question jurisdiction must appear on the face of a well-pleaded complaint. However, the jurisdiction question will ultimately be determined by the facts of the case, and not by the manner plaintiff pleads his case.

2. Defendant's answer not controlling: The assertion

by a defendant of a "federal question" defense does not give a Federal court a basis for asserting jurisdiction.

3. Plaintiff may not anticipate a defense: The plaintiff can not invoke Federal Question Jurisdiction by pleading an anticipated Federal defense.
   a. For example, if plaintiff sues defendant for breach of contract and plaintiff knows the defense will be premised on a Federal statute which purports to make the contract illegal, he cannot invoke Federal question jurisdiction by noting the defense in his complaint.
4. Delaratory actions based on Federal Question Jurisdiction: Declaratory judgment actions create serious jurisdiction problems when instituted by a party who normally would be a defendant in the lawsuit. In this situation, courts ordinarily will examine the underlying situation and determine jurisdiction as if the "real plaintiff" instituted the action. Jurisdiction is then proper only if the "real plaintiff's" action would have arisen under Federal law.
5. Requirement for minimum amount in controversy: The general Federal Question Jurisdiction statute, 28 U.S.C. 1331, requires that the amount in controversy must exceed $10,000, exclusive of interest and costs. However, virtually all cases covered by this general statute arise under statutes which

authorize Federal court jurisdiction without regard to the amount in controversy. Thus, cases arising under Federal laws such as those regulating patents, trademarks, copyrights, bankruptcy, admiralty, commerce and trade may be brought without regard to the amount in controversy.

Additionally, cases under 42 U.S.C. 1981, 1983 or 1985 (3), seeking to redress the deprivation, under color of state law, of any right, privilege or immunity secured by the Federal Constitution, or by any Federal civil rights statute may be brought in Federal court without regard to the amount in controversy, pursuant to 28 U.S.C. 1343.

There are, however, still a few Federal question cases requiring the jurisdictional amount. Suits seeking redress for invasion of Federally protected rights under color of Federal authority are not covered by the civil rights statutes cited above and must satisfy the amount in controversy requirement. An example of such a case would be Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

Also, a suit challenging the validity of Federal government action ordinarily would not fall within the purview of any special jurisdictional statute and therefore could only be maintained under the general Federal question statute requiring the jurisdictional amount.

On the other hand, Federal tort claims cases and tax refund cases do not require a jurisdictional amount. The calculation of the amount in controversy is discussed, infra.

IV. DIVERSITY OF CITIZENSHIP JURISDICTION: (28 U.S.C. 1332)

A. Diversity exists when plaintiff and defendant are citizens of different states.

B. Diversity also exists when either the plaintiff or defendant is a citizen of a state and the other is an alien.

C. An individual's citizenship is determined by domicile: The domicile of an individual is basically defined as the place of his true, fixed and permanent home where he is present or to which he intends to return whenever absent. Neither presence nor intention alone is sufficient.

1. A new domicile may be acquiried by an individual by moving to a new state with the intent to make it his home coupled with no present intention of going elsewhere.
2. If the prerequisites for a new domicile are established, the fact that the motive for the change was the creation of diversity to gain access to a Federal court is immaterial.
3. An American citizen domiciled abroad is not classified as an alien or a citizen of a state. Thus, the required diversity for a suit between such a citizen and a citizen domiciled in one of the states does not exist.

D. Corporate "Citizenship": A corporation is a citizen both of the state where it is incorporated and of the state where it has its principal place of business.

1. It has generally been held that a corporation incorporated in more than one state is deemed a citizen of each state of incorporation.

2. Principal place of business is a factual question. A corporation is deemed to have only one principal place of business. This determination is obviously simple when both the management and business activity of the corporation are located in the same state. However, when the management function is located in one state and manufacturing, sales outlets or other activities are located elsewhere, the principal place of business determination can become complex. There are conflicting views as to which factors should be focused upon.

   a. One view focuses on the "home office" location which is the "nerve center" from which all activities of a corporation are controlled. This test may be further refined by focusing upon the place of "general policy decisions" or the place of "decisions regarding the day-to-day control of business" if these are not in the same locale. Lurie Co. v. Loew's San Francisco Hotel Corp., 315 F. Supp. 405 (N.D. Calif., 1970).

b. The other view is that the locale of the "bulk of corporate activity" is the determinative factor. Anniston Soil Pipe Co. v. Central Foundry Co. 329 F.2d 313 (5th Cir. 1964).

E. Complete Diversity Required:

1. If multiple parties are involved as either plaintiffs or defendants or both, the concept of complete diversity requires that none of the plaintiffs can be of the same citizenship as any of the defendants. Since a corporate party may have a dual citizenship, diversity jurisdiction does not exist if any opposing party is a citizen of either of those states.

2. Complete diversity is required only under the general diversity statute, i.e. 28 U.S.C. 1332. The Federal Interpleader Act has been interpreted as not requiring complete diversity. So long as any two claimants are of diverse citizenship, Federal court jurisdiction may be invoked.

   For example, an Iowa plaintiff files an interpleader action involving two claimants from Iowa and a third from Kansas. Jurisdiction exists even though there is not complete diversity between the plaintiff and claimants or even among the claimants themselves.

3. Any attempt to name or align parties in bad faith for the purpose of creating or defeating diversity

jurisdiction will cause the court to dismiss or realign the parties as required. Diversity jurisdiction will then be determined.

F. Determination on diversity is made as of the time the action is filed:

1. Even though diversity of citizenship may not exist at the time the cause of action arises, jurisdiction exists if there is diversity at the time the lawsuit is commenced.
2. Parties may change domicile after the cause of action arises and prior to filing the lawsuit even though the purpose of the change is to destroy or establish diversity.
3. Diversity need not continue after commencement of the case.
4. Defective allegations of jurisdiction may be amended if jurisdiction actually existed from the facts at the time the complaint was filed.

G. Diversity Determinations in Specific Actions:

1. Class Actions: Only the citizenship of the named representatives of the class is considered in determining diversity.
2. Suits by Representatives: When a representative (a guardian, trustee or executor) is authorized to bring lawsuits in his own name, the representative's citizenship, not that of the

beneficiary, controls diversity.

a. When a representative is present merely for the purpose of protecting the interests of a person (such as a guardian ad litem in cases involving incompetents or minor children) and is not authorized to sue in his own name, the citizenship of the real party is controling for diversity purposes.

b. The effect of a representative's appointment being motivated solely by an intent to create diversity was discussed in paragraph II, D, 2, supra.

3. Assignments: The citizenship of an assignee of a claim determines diversity unless the assignment was for collection and intended to create diversity. In such a case, the citizenship of the assignor becomes controlling. See paragraph II, D, 1, supra.

4. Association or partnership as a party: When a partnership, union or other unincorporated association is a party, the citizenship of each owner or member is considered in determining diversity. If the Board rather than the organization is a party, the citizenship of each member of the Board is controlling for diversity purposes.

5. Direct Action Statutes: When statutes permit an action against the tortfeasor's insurer, the citizenship of the tortfeasor as well as that of the insurer controls the diversity determination. If

an action may be brought against an insurer without joining the insured, 28 U.S.C. §1332(c) requires that the insurer be deemed a citizen of the state where the insured is a citizen in addition to its own corporate citizenship.

H. Requirement of Minimum Amount in Controversy for all Diversity Cases: With one exception, all cases brought under the Federal courts diversity jurisdiction must involve more than $10,000, exclusive of interest and costs. The exception is the Federal Interpleader Act (28 U.S.C. 1335) which requires involvement of at least $500.

The calculation of the amount in controversy is discussed, infra.

V. CALCULATION OF AMOUNT IN CONTROVERSY

A. General Rule: The plaintiff's claim controls if made in good faith. To justify dismissal for lack of jurisdictional amount, it must appear to a legal certainty that the claim does not involve the amount. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938).

1. There appears to be no clear trend with respect to a liberal or strict application of the St. Paul test. The discretionary nature of the test has led courts to varying conclusions when such subjective elements as "pain and suffering" form a

substantial part of the claim.

2. In determining the existence of the jurisdictional amount, courts should consider that its purpose is to make Federal jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The $10,000 amount was designed not to be so high as to convert Federal courts into courts of big business or so low as to waste their time in the trial of petty controversies.

3. Examples of applications of the St. Paul rule are as follows:

   a. Action for nonpermanent injuries where one plaintiff had expenses of $742.60 and the other $412.00. Case dismissed. Orsini v. Spector Freight System, 334 F. Supp. 1396 (N.D. Ohio, 1971).

   b. Claim for eating unwholesome frozen chicken dinner sold by defendant. Medical expenses and loss of income totaled $43. Case dismissed. Borman v. Great Atlantic & Pacific Tea Co., 293 F. Supp. 120 (N.D. Ind., 1968).

   c. Claim for injury with allegation of pain and suffering. No time lost from work and medical expenses of $4. Motion for dismissal denied. Sicilia v. Tassell, 163 F. Supp, 371 (E.D. Pa., 1958).

d. Prisoner sought $25,000 from a sheriff for destroying his legal papers. Court found claim was not insubstantial or frivilous and refused to dismiss. Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969).

B. Plaintiff Must Seek Monetary Value: A plaintiff invoking Federal jurisdiction under one of the general jurisdictional statutes requiring a minimum amount in controversy must be able to place a monetary value on his lawsuit.

1. For example, if a plaintiff seeks to enjoin the operation of a plant on grounds that it emits pollutants damaging to his home, he must allege more than $10,000 is involved.

2. A plaintiff seeking relief incapable of pecuniary evaluation, such as a declaration of marital status, cannot bring the action under the general jurisdictional statues requiring a minimum amount in controversy even though the other elements of Federal jurisdiction are present.

C. Effect of Subsequent Developments: If the plaintiff finds through discovery after commencement of his action that he overestimated the amount in controversy and that his maximum recovery is less than the jurisdictional minimum, the case is subject to dismissal.

However, if the plaintiff's claim was over the juris-

dictional amount at the action's commencement but is reduced below it by subsequent developments, the case is not subject to dismissal.

For example, if an insurance company institutes an action for a declaration of nonliability on a $20,000 insurance policy and a judgment is subsequently returned against the insured for $5,000, the time the action was brought is controlling.

D. Aggregation of Claims by a Single Plaintiff: A single plaintiff may aggregate all claims he has against a single defendant.

For instance, in a diversity action, plaintiff may aggregate against a single defendant claims of $5,000 for injuries suffered in an auto accident, $3,000 for libel and $3,000 for malicious prosecution to satisfy the $10,000 monetary requirement.

E. Claim Aggregation in Multi-party Cases: Two or more plaintiffs with separate and distinct claims may not aggregate their claims to reach the jurisdictional amounts; but two or more plaintiffs uniting to enforce a single title or right in which they have a common and undivided interest may aggregate their claims to reach the jurisdictional amount. Pinel v. Pinel, 240 U.S. 594, 596 (1916).

A single plaintiff may not aggregate claims against

multiple defendants.

1. Example: Plaintiff X and plaintiff Y are involved in the same accident and each suffer injuries amounting to $6,000 apiece. X and Y cannot meet the $10,000 requirement by aggregating their claims.
2. Example: Plaintiffs X and Y have claims of $14,000 and $5,000 respectively agains Z. Y cannot join his claim with X's to satisfy the jurisdictional amount on Y's claim. (See pendent jurisdiction discussion infra.)
3. Example: Two equal partners may sue a defendant who breached a contract with the partnership resulting in $11,000 damages.

F. Class Actions: When a class action is brought under a jurisdictional statute containing a minimum amount in controversy requirement, each member of the class must satisfy the jurisdictional requirement. Zahn v. International Paper Co., 414 U.S. 291 (1973).

G. Collateral or Contingent Matters: The amount in controversy is ascertained by the matter directly in dispute and collateral or contingent matter which might result from a decision may not be considered.

H. Effect Of Interest and Costs.

1. The only problem with respect to costs appears to be the inclusion of attorney fees in cases where recovery therefore is allowable. In such cases

the amount claimed for attorney fees, if reasonable and within the limits permitted by the law involved, must be added to the principal sum sued for in determining the amount in controversy.

2. The interest charged as the agreed upon price for the hire of money is includible in computing the amount in controversy; the interest sought as a charge for delay in the payment of money is not includible.

I. Punitive or Exemplary Damages: Claims for punitive or exemplary damages are includible in computing the amount in controversy unless it appears to a legal certainty that such damages are not recoverable.

VI. JURISDICTION BY REMOVAL

Certain defendants have the right to remove a case from a state court to a Federal court if the case involved falls within the purview of Federal subject matter jurisdiction.

A. Removal of Federal Question Cases: Whenever a plaintiff properly files his case in state court but could have filed it in Federal court under Federal question jurisdiction, the defendant may remove the case to Federal court.

B. Removal of Diversity Cases: If diversity jurisdiction existed at the time an action was filed in state court, a defendant may remove the case to Federal court unless the action was instituted in a court of the state where the defendant resides. If more than one defend-

ant is involved, the case may not be removed if any of the defendants reside in the state where the action is pending.

C. All Defendants Must Join in Removal: All defendants who may properly join in a removal petition must timely join therein if the removal is to be perfected. The time for removal of 30 days as set forth in 28 U.S.C. § 1446(b) is strictly construed by the courts.

D. Case Becomes Removable After Filing in State Court: If a case is not removable when filed in state court, but later becomes removable through the plaintiff voluntarily dismissing a defendant whose removal was preventing diversity or through the plaintiff amending his pleadings by changing the nature of the claim, the case then may be removed and the time for removal (30 days) commences as of the time the action becomes removable.

E. Action to Defeat Removal: After a case has been properly removed, a plaintiff cannot take action to defeat Federal jurisdiction, i.e. reduce his claim below $10,000, and thereby force a remand to state court.

F. Removal of Separate and Independent Cause of Action: In some cases removal may take place even though only a portion of the action falls within the scope of Federal court jurisdiction. Such removals are authorized by 28 U.S.C. 1441(c) which provides:

"Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

1. This provision has been narrowly interpreted by the courts. If a plaintiff has suffered a single wrong, then any action seeking redress of that wrong may not be removed under this section even though the action may be against several defendants either jointly or severally and even though the claims against each may be premised on different legal theories. American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951).
2. If a plaintiff is seeking redress for separate wrongs or if multiple plaintiffs having separate injuries join in a single lawsuit, this section may permit removal of all or a portion of the case. (If a basis is found for removing the Federal claim under 1441(c), then any decision to remand the non-Federal claim is based on considerations similar to those involved in deciding whether to exercise pendent jurisdiction, discussed infra.)

a. Example: If two plaintiffs join together in their capacity as executors in an action against an airline for the death of their decedents in a plane crash, and only one plaintiff is of diverse citizenship from the defendant, the defendant may remove the action of that plaintiff pursuant to 1441(c). Hermann v. Braniff Airways, Inc., 308 F.Supp. 1094 (S.D.N.Y. 1969).

b. Example: If a movie producer sues two actors who had identical contracts to perform in the same movie and both refused to honor the contracts, the causes of action are independent and removal under 1441(c) would be possible.

3. Although a split of authority exists, the trend appears to be towards finding that third-party defendants cannot use 1441(c) to remove the case.

H. Removal Prohibited in Certain Cases: Cases brought under the Federal Employers' Liability Act or the Fair Labor Standards Act involving a Federal question and state Workmen's Compensation cases involving diverse parties are not removable under 28 U.S.C. § 1445.

I. Removal Jurisdiction is Derivitive: If a case is subject to a jurisdictional defect in state court, then jurisdiction cannot be conferred on a Federal court through removal.

J. Improper Removal: If a case is improperly removed to

Federal court, the result will not be dismissal of the case. The case will be remanded to the state court from which it was removed.

1. There is never a waiver of the right to remand. However, the validity of the removal procedure followed may not be raised for first time on appeal. On appeal, the issue is not whether the removal was proper, but whether the Federal District Court would have had original jurisdiction of the case had it been filed in that court.
2. If a case is removed by a defendant on grounds that a party was fraudulently joined to defeat jurisdiction, the case should be remanded if a reasonable possibility of recovery against that person exists under state law.
3. An order of remand is not appealable unless it involves a civil rights case removed pursuant to section 1443.
4. No provision exists for "removing" a case from Federal to state court. An action improperly filed in Federal court is subject to dismissal but may then be filed in state court if the statute of limitations has not run.

K. Effect of Counterclaim: Generally, counterclaims may not serve as the basis for removal to a Federal court by the original plaintiff. However, some courts have held that when the counterclaim is compulsory under state practice, it may serve as a basis for removal.

L. Waiver of Removal Rights: It now appears that a contract clause wherein one party gives up his right of removal is enforceable unless the clause is unreasonable or procured by duress.

VII. PENDENT JURISDICTION

The exercise of pendent jurisdiction refers to the joinder of state and Federal claims when the same parties are involved on both claims.

A. Pendent Jurisdiction is a doctrine of judicial discretion and it does not grant a plaintiff the right to invoke Federal court jurisdiction. The main factors in determining whether pendent jurisdiction should be exercised are judicial economy, convenience, and fairness to the parties.

B. A Federal court has the power to exercise pendent jurisdiction if all of the following factors are present with respect to the Federal and state claims involved:

1. The claims derive from a common nucleus of operative facts.
2. If, without regard to their Federal or state character, the plaintiff's claims would ordinarily all be tried in one judicial proceeding.
3. The Federal issues are substantial.

C. Pendent jurisdiction does not permit the joinder of an additional party to respond to a state claim on the

premise that that claim is closely related to a Federal claim being asserted against an existing party.

D. If pendent jurisdiction is properly exercised, a court will not dismiss the state claims on grounds that there is improper venue or lack of personal jurisdiction with respect to the state claim.

E. If there is a prior adjudication disposing of the Federal claims, the court is not automatically deprived of jurisdiction over the state claims.

F. Pendent jurisdiction may not be used as a basis for impleading a new party on a nonfederal claim when no independent grounds of federal jurisdiction exists for asserting a claim against that party even though the nonfederal claim derives from the "common nucleus of operative fact" giving rise to the dispute between the parties to the federal claim. Aldinger v. Howard, 44 U.S.L.W. 4988 (1976).

VIII. ANCILLARY JURISDICTION

Closely related to pendent jurisdiction is the concept of ancillary jurisdiction which permits Federal courts to assert jurisdiction over a non-Federal claim when it bears a logical relationship to the aggregate core of operative facts which constitute the main claim containing the independent grounds for Federal jurisdiction.

A. Claims under Rule 13 (counterclaims and cross-claims), Rule 14 (third-party practice), Rule 18 (a) (joinder of claims) and Rule 24 (a) (intervention as a right), may be maintained without independent grounds for Federal jurisdiction if they fall within the purview of the above test.

B. Claims under Rule 20 (permissive joinder of parties) must meet the above test and involve common questions of law or fact.

C. The purpose of ancillary jurisdiction is the avoidance of circuity of actions and the disposal of the entire matter in one litigation.

D. Instances of claims which may not be maintained under ancillary jurisdiction but require an independent grounds of Federal jurisdiction are as follows:

1. Permissive counter-claims under 13(b).
2. Original plaintiffs' claim against third-party defendant (majority view).

E. Some courts have permitted a third-party defendant to assert a counter-claim against the original plaintiff by using ancillary jurisdiction.

F. The Federal Rules of Civil Procedure do not expand ancillary jurisdiction, but merely provide opportunities for its application.

IX. LAW APPLIED IN FEDERAL COURTS

The dual nature of our court system, i.e. Federal and state, creates a number of problems regarding the rules and laws to be applied in Federal courts.

A. State Law in Federal Courts: In those instances, such as diversity cases, where no applicable Federal law or regulation clearly governs the case pending in Federal

court, a determination of which law to apply must be made. A 1789 Congressional enactment, commonly referred to as the Rules of Decisions Act, clearly required Federal courts to apply state statutes in absence of applicable Federal law. The Act was unclear, however, as to whether it required the application of state common law in the absence of Federal law. Prior to 1938, the Supreme Court had ruled that Federal courts were required to develop and apply Federal common law rules in such situation. However, in 1938 the Supreme Court reversed its position in the landmark decision of Erie Railroad v. Tompkins wherein it found that the 1789 enactment and the Constitution required application of state common law rules in the absence of Federal regulation.

B. Application of State Procedures in Non-Federal Cases: Difficult determinations must often be made concerning application of state procedures in Federal courts.

1. Although Erie did not involve procedural matters, the Supreme Court in 1945 held that their previous decision required application of state statutes of limitations in diversity cases. The Court was concerned that the outcome be substantially the same as if the case were tried in state court. The result was considerable confusion as to when state procedural law was applicable. Although there was some support for the proposition that no Federal

rule was applicable when a state practice conflicted because any procedure might affect the outcome of a case, most courts attempted to delineate between housekeeping rules and those, such as the statute of limitations, having a substantive content.

2. In its 1965 decision in Hanna v. Plummer, the Supreme Court clarified this area of the law by holding that the Constitution's "necessary and proper" clause permitted the Federal government to prescribe procedural rules for Federal courts, even when such rules might affect the outcome of litigation.

3. Some matters still fall within the purview of Erie and result in the application of state law. Examples include determinations of which party has the burden of proof on an issue or of when a statute of limitations is tolled. (However, at least one court has found that the latter may be controlled by Federal law. Atkins v. Schmutz Mfg. Co., 435 F.2d 527, [4th Cir. 1970]). When no Federal rule, statute or policy governs a procedural matter, state law will be applied in non-Federal cases.

4. The court in Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir., 1965), set forth a three-prong analysis to resolve the applicable law in a non-Federal case:

   a. If the state provision, whether legislatively

adopted or judicially declared, is the substantive right or obligation at issue, it is Constitutionally controlling.

b. If the state provision is a procedure intimately bound up with the state right or obligation, it is likewise Constitutionally controlling.

c. If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the Federal diversity court must still apply it unless there are affirmative counteravailing Federal considerations. This is not deemed a Constitutional requirement but one dictated by comity.

5. Cases interpreting Erie held that Federal courts in non-Federal cases must apply the conflict of laws doctrine of the state where the court is sitting. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

6. Once a Federal court has concluded that state law is to be applied, it must then ascertain what the pertinent state law is. Federal courts must use several methods to ascertain the applicable state law.

a. Basically, Federal courts follow the decisions of the state's highest court.

b. However, a state's high court decision need not be followed if there is a sound basis for believing the state court would change its

position, if given the opportunity. Factors considered in departing from a high court's decision are subsequent dictum, lower court decisions in the state, decisions by the highest courts of other states, the Restatement of Law and Law Review writings.

c. Although not bound by them, Federal courts should consider lower state court decisions.

d. If there are no applicable state decisions, the Federal court must apply the law it believes the state's highest court would apply.

C. Federal Common Law: This law has developed from decisions on the scope and meaning of the Federal Constitution or Federal statues and rules and seek to effectuate the general purpose of the provision involved.

1. Federal law applies no matter how the provision arises. For instance, if a Federal defense is raised in a diversity case, the Erie doctrine will not affect the interpretation of the Federal defense.

2. When the Federal provision fails to cover fully the problem involved, Courts then attempt to ascertain Congressional intent to bridge the gap.

D. Abstention: Abstention has been described as a judge-fashioned vehicle for according appropriate deference

to the respective competence of the state and Federal court systems. Louisiana P. & L. Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959). By invoking this doctrine, a Federal court is refusing to adjudicate, at the present time, a dispute which properly falls within the purview of its jurisdiction.

1. Abstention does not necessarily involve the abdication of Federal jurisdiction, but only a postponement in its exercise.
2. Abstention is invoked for one or any combination of the following:
   a. Avoidance of a Federal Constitutional question when a decision on state questions of law may dispose of the case.
   b. Avoidance of needless interference with a state's administration of its own affairs.
   c. Allow state courts to pass on unsettled questions of state law.
   d. Ease the overburdened dockets of Federal courts.
3. After a Federal court abstains and refers the parties to state court, if a party freely and without reservation submits his Federal claims for a decision by the state court, litigates them there, and has them decided there, then--whether or not he seeks direct review of the state decision in the Supreme Court--he has elected to forego his right to return to the Federal District Court. England v. Louisiana State Bd., 375 U.S. 411 (1964).

4. If abstention is invoked to avoid interference with state activities, dismissal of the action as opposed to retention of jurisdiction pending state court determination is normally appropriate.

X. THREE-JUDGE COURTS

The most widely used of the statutes requiring three-judge courts are 28 U.S.C. §2281 and §2282, involving attempts to enjoin enforcement of state or Federal statutes.

A. Composition: The three-judge court, which must be designated by the Chief Judge of the Court of Appeals, is comprised of the District Court Judge to whom the application for injunctive relief is presented and two other Federal judges, at least one of whom shall be a Circuit Judge.

B. Prerequisites: In order for a three-judge court to be convened under §2281 or §2282, the case must involve all of the following:

1. A challenge to a state or Federal statute or administrative order.
2. A state or Federal officer must be a party defendant.
3. Injunctive relief is being sought.
4. A claim that the challenged statute or order violates the United States Constitution.

C. Appeal: The appellate review procedures are somewhat complex.

1. If a three-judge court is properly convened and renders judgment on the merits of the Constitutional claim presented, appeal lies directly to the Supreme Court. If the three-judge court fails to reach the Constitutional claim and, instead, basis its decision on the impropriety of Federal intervention or the failure of the plaintiff to meet standing requirements, any appeal must be taken to the Court of Appeals. MTM Inc. v. Baxley, 420 U.S. 799 (1975); Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974).
2. If an improperly convened three-judge court renders judgment, appeal is to the Court of Appeals.
3. If a single judge incorrectly concludes that a three-judge court is not required and proceeds to decide the case on its merits, the appeal is to the Court of Appeals.

XI. VENUE

While rules of subject matter jurisdiction determine whether a Federal court may hear a certain type of case, venue rules dictate which of the courts having jurisdiction is the proper one in which to bring the action. If Federal venue requirements cannot be met, the action must be instituted in state court even though Federal subject matter jurisdiction exists.

A. Non-Diversity Cases: Except for those cases premised on Federal laws containing special venue provisions, cases not founded solely on

diversity of citizenship may be brought only in the judicial district where all defendants reside or in which the claim arose except as otherwise provided by law.

B. Diversity Cases: Cases founded on diversity may be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose. 28 U.S.C, §1391.

1. If defendants reside in different judicial districts within the same state, venue is proper in any of the districts. However, if plaintiffs reside in different districts within the same state, there is not proper venue in any of the districts as there is no similar exception for plaintiffs to the general venue rule.
2. It is generally recognized that for venue purposes, "residency" is equivalent to citizenship, i.e. domicile. A few courts, however, have concluded that a person with homes in different districts may be considered a resident of both.
3. A defendant corporation's residency for venue purposes is governed by 28 U.S.C. §1391(c) which provides as follows: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the

residence of such corporation for venue purposes."

a. It is now generally held that if a corporation is incorporated or licensed to do business by a state, it may be considered a citizen of each judicial district within the state.

b. When a suit joins a corporate defendant with an individual defendant in a state having more than one judicial district, it would seem that venue should only be proper in the district where the individual defendant resides and the rules discussed in XI B-1, supra, should be limited to cases involving defendants who are individually subject to suit in only one district.

c. While a corporate plaintiff is a resident for venue purposes of its state of incorporation, it is not clearly established whether it may also be considered a resident of states where it is licensed or is doing business.

4. If an unincorporated association has the capacity to sue or be sued as an entity, it is governed by the corporate venue rules discussed in XI B-3. Otherwise, the association is regarded as if all its individual members were parties to the action.

5. If all events involved in an action took place in a single Federal judicial district, there is no difficulty determining where the action "arose."

However, when the events involved several districts, a determination of where the action "arose" may be confusing and will be controlled by Federal, not state, law.

6. A rather complex judicial exception to general venue rules pertains to cases involving "local actions," i.e. realty. Such actions must be tried in a forum where the property is located.
   a. If the property is located in more than one district, 28 U.S.C. §1392 (b) provides that the action may be maintained in <u>any</u> of the districts involved.
   b. Some courts have held that a venue defect in "local actions" can not be waived and can be raised by the court for the parties at any time. Hence, venue in some instances can become a matter of subject matter jurisdiction.

C. <u>Improper Venue</u>

1. Unless raised by the defendant at the earliest practicable opportunity, defective venue is waived.
2. Pursuant to 28 U.S.C. §1406 (a), if venue is challenged in a case filed in a court with <u>improper</u> venue, the action may be dismissed or transferred to a proper court where it could have been brought under applicable jurisdictional and venue provisions.
3. If venue is challenged in a case filed in a court with <u>proper</u> venue, a Federal court is empowered

pursuant to 28 U.S.C. §1404 (a) to transfer the case to a more appropriate Federal court.

a. Any transfer under this provision must consider "the convenience of parties and witnesses, in the interest of justice."

b. The transfer power of a court is limited under this section to the extent that the transferee court must be one where the case could have been originally instituted.

XII. ANTI-INJUNCTION STATUTE

A. Congress has manifested its desire to permit state courts to try state cases free from interference from Federal courts in 28 U.S.C. §2283, which provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In Mitchum v. Foster, 407 U.S. 225 (1972), the Supreme Court held that the Civil Rights Act (42 U.S.C. §1983) falls within the "expressly authorized" exception of §2283.

B. Even if a case falls within one of the authorized exceptions to §2283, however, the principles of "equity, comity, and federalism" may prevent a Federal court from granting the requested relief.

1. Federal courts may not, save in extraordinary circumstances, enjoin state criminal prosecutions, Younger v. Harris, 401 U.S. 37 (1971).

2. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) the court extended the Younger principles of comity and federalism so as to preclude the Federal court intervention in a state civil proceeding that had characteristics similar to those of a criminal case.

3. In another case, Kugler v. Helfant, 421 U.S. 117 (1975), the court reaffirmed Younger's holding that, absent extraordinary circumstances such as bad faith and harassment by state officials, a Federal court should abstain from hearing a claim that a state criminal action was brought unfairly and in violation of the defendant's Constitutional rights.

4. A further extension of Younger came in Hicks v. Miranda, 422 U.S. 332 , 43 U.S.L.W. 4857 (1975), when the Court held that where state criminal proceedings are brought against Federal plaintiffs after the Federal complaint is filed but before any proceedings of substance on the merits of the claim have occurred in Federal court, the Federal court should dismiss the complaint unless extraordinary circumstances of irreparable harm are present.

5. The Younger doctrine is not, however, controlling

so as to necessitate abstention when a state prosecution is merely threatened but no state action is pending against a Federal plaintiff. Steffel v. Thompson, 415 U.S. 452 (1974); Ellis v. Dyson, 421 U.S. 426 (1975).

6. In a situation analogous to the above line of cases, the Supreme Court in Scheslinger v. Councilman, 420 U.S. 738 (1975), held that when court-martial charges have been made against a serviceman, Federal courts should refrain from interventions by injunction or otherwise in the military court system, unless the serviceman can show the possibility of irreparable harm. A Federal court could ascertain if the military court was acting within the scope of its jurisdiction and duty, but that, if that were so, it should not intrude upon the integrity of the military court system.

XIII. UNITED STATES MAGISTRATES

The powers and jurisdiction of United States Magistrates are set forth in 28 U.S.C. §636 and have been discussed by the Supreme Court in Wingo v. Wedding, 418 U.S. 461 (1974) and Matthews v. Weber, 44 U.S.L.W. 4065 (1976).

A. Duties: The duties assigned the United States Magistrate stationed at Des Moines and the procedure for review of his

decisions are as follows:

1. In criminal matters the Magistrate shall, unless otherwise ordered by the Judge to whom the case is assigned:

   a. Conduct arraignments on indictment or information, accept not-guilty pleas, set times of trial, and order preparation of presentence reports on defendants who signify at arraignment their desire to plead guilty.

   b. Conduct pretrial conferences, whether by means of omnibus hearings or by other appropriate proceedings; and, subject to provisions hereinafter made for review by a District Judge, conduct hearings on procedural and discovery motions, including motions for suppression of evidence.

2. In all civil proceedings, except prisoner post conviction proceedings and civil rights actions by prisoners in custody, the Magistrate shall, unless otherwise ordered by the Judge to who the case is assigned, and subject to provisions hereinafter made for review by a District Judge:

   a. Conduct pretrial and settlement conferences.

   b. Hear and determine prodedural and discovery motions.

   c. When referred to him by Order of the Judge assigned to the case, conduct hearings and make determinations on motions for summary judgment and for dismissal.

   d. Conduct trials by consent of all parties with stipula-

tion that the Magistrate may enter final judgment.

3. In Special Master references, when made by specific Order, the Magistrate shall hear testimony and submit a report of findings and recommendations to the District Judge to whom the case is assigned.

4. Other assignments: Reference to the Magistrate of matters other than those detailed in this Order shall be made by order of the District Court Judge specifying the conditions and extent of the reference.

5. Review by District Judge:

   a. In any matter upon which the Magistrate is empowered to rule, any party may obtain a review by the Judge to whom the action is assigned of any ruling of the Magistrate as follows:

      1. Rulings of the Magistrate which are dispositive of the action in civil or criminal cases, and rulings of the Magistrate upon motions to suppress evidence in criminal cases shall, upon application of any party aggrieved by the ruling of the Magistrate, be heard de novo by the Judge to whom the action is assigned. Any party desiring review of any such ruling by the Magistrate shall file an application for review with the Clerk of Court in which shall be specified the grounds upon which he believes the Magistrate's ruling to be erroneous.

The Judge shall thereafter hear and determine the matter de novo upon the issues raised in the application for review. If no application for review be filed and served within ten days of the filing of the Magistrate's ruling, the ruling of the Magistrate shall become the ruling of the court.

2. Any party aggrieved by a ruling of the Magistrate, other than a ruling described in (1) above, may obtain review of that ruling by the Judge to whom the action is assigned by serving and filing within ten days of the filing of the Magistrate's ruling an application for review in which shall be specified the grounds upon which he believes the ruling to be erroneous. The Judge to whom the action is assigned shall thereafter conduct such further proceedings as he deems appropriate, and may affirm or reverse, in whole or in part, the ruling of the Magistrate, or take such other action as he deems appropriate. If no application for review be served and filed within ten days of the filing of the Magistrate's ruling, the ruling of the Magistrate shall become the ruling of the court.

b. In all matters upon which the full-time Magistrate is required to submit a report and recommendations to a District Court Judge, he shall file the same with the

Clerk, who shall transmit a copy thereof to the Judge to whom the action is assigned and to each of the parties, or to their counsel if represented by counsel. Each party shall have ten days thereafter to serve and file with the clerk any objections to the recommendations of the Magistrate. After conducting such further proceedings as he deems appropriate, the Judge may adopt or reject, in whole or in part, the recommendations of the Magistrate, or take such other action as he deems appropriate, including, but not limited to, the remand of the matter to the Magistrate for further proceedings.

c. Nothing contained in this rule shall apply to any civil action in which the parties have consented to trial of the action and entry of judgment by the full-time Magistrate. Upon entry of judgment by the full-time Magistrate in any such case, he shall promptly report the entry of judgment to the District Judge, who shall then enter an order ratifying the Magistrate's judgment and adopting it as the judgment of the court.

CAVEAT: THE FOREGOING OUTLINE DEALT WITH SUBJECT MATTER JURISDICTION AND PROPER VENUE IN FEDERAL COURTS. PERSONAL JURISDICTION OVER THE DEFENDANT OR PROPERTY WHICH IS THE SUBJECT OF THE ACTION MUST ALSO BE PRESENT BEFORE A FEDERAL COURT MAY LITIGATE THE CASE.

WORKERS' COMPENSATION- THE LAW AND TRENDS

Robert C. Landess
Iowa Industrial Commissioner

I. Basic elements of a claim

A. Employer-employee relationship

B. Injury or occupational disease

C. Arising out of and in the course of employment

D. Disability
1. Temporary Total
2. Healing Period
3. Permanent Partial
   a. scheduled (functional)
   b. body of the whole (industrial)
4. Permanent Total
5. Death

E. Rate of compensation

F. Related physical care expenses

G. Notice

H. Statute of Limitations

II. Types of initial actions

A. Arbitration
1. Claimant must plead and prove I. A-F above. G & H affirmative defenses.
2. Other affirmative defenses.
   a. Willfull intent
   b. Intoxication
   c. Third person for personal reasons

B. Review-Reopening
1. I. A, B & C above admitted by filing of memo
2. Rate and nature and extent of disability (I. D, E & F)

III. Appeal and Review

A. Appeal to Commissioner

B. Judicial Review

IV. New Legislation

A. HF 863

1. Agricultural coverage changes effective January 1, 1977
   a. Lowers cash payroll threshhold from $2,500 to $1,000
   b. Eliminates 13 consecutive week provision
   c. Excludes certain family members and exchange labor
   d. Allows voluntary election of coverage for excluded members by separate classifications
   e. Eliminates requirement of filing with industrial commissioner notice of voluntary election
2. Notice of injury - 90 days
3. Professional health care services
   a. Dental services specifically included
   b. Reasonably necessary transportation expenses allowed
   c. Parties must exchange information regarding physical and mental condition relative to claim
   d. Releasing party protected
   e. Relief upon refusal
   f. Employer responsible for initial selection of care
   g. Employee may request change
   h. Relief in the event employer and employee cannot agree
4. Waiting period changes effective July 1, 1977
   a. Reduced from seven to three days
   b. First payment due on eleventh day
   c. Three days picked up after fourteen plus days of disability
5. Minimum weekly benefit raised to $36 or actual wage
6. Allows credit against healing period for temporary benefits paid
7. Raises number of weeks of certain scheduled disabilities
   a. Hand raised from 175 to 190 weeks
   b. Arm raised from 230 to 250 weeks
   c. Leg raised from 200 to 220 weeks
   d. Eye raised from 125 to 140 weeks
8. Transfers employee request for evaluation from 85.34 to 85.39
9. Clarifies right of dependent to enter into settlement of contested case
10. Minimum weekly wage raised to 35% of state average weekly wage
11. Provides for clerk of court to act as trustee for mentally incompetent dependent as well as minor and allows payments to be ordered paid to guardian, conservator or legal representative for those living out of state
12. Updates definitions of payroll taxes to tables in effect on July 1, 1976
13. Authorizes issuance of subpoenas duces tecum
14. Provides for issuance of order for refusal to submit books, records or payrolls for inspection
15. Requires employer to report all injuries *alleged* to have been sustained in course of employment
16. Extends reporting deadline from 48 hours to 4 days
17. First report not admissible for any purpose except notice
18. Failure to file report of alleged injury or submit to inspection subjects employer to $100 fine

19. If reported to insurance carrier and not filed, then insurance carrier subject to $100 fine
20. Fine paid to second injury fund
21. Order enforceable in district court
22. Party has twenty days to respond to petition for arbitration
23. Eliminates board of arbitration
24. Establishes venue for arbitration and review-reopening hearing in any county in the judicial district in which the injury occurred
25. Allows 20 days for appeal of an arbitration decision and requires appealing party to provide the transcript of proceedings within 30 days at their initial cost
26. Removes requirement for notifying nonresident employers by *restricted* certified mail
27. Review hearings (appeals) may be held at other than the seat of government as designated by the industrial commissioner
28. To encourage maintenance payments to a claimant during a period of investigation up to 90 days (extendable to 180 under proper conditions), voluntary payments can be made without an admission of liability upon filing of proper forms and later filing of either memorandum of agreement or denial
29. Changes "workmen's compensation" to "workers' compensation"

B. HF 1546 - Allows industrial commissioner to contract with other state agencies or political subdivisions for obtaining services, facilities and personnel and employ experts, consultants or organizations to effectuate the purposes of the workers' compensation law

C. SF 1303 - Allows service upon a foreign corporation authorized to do business in this state to be made upon the registered agent, rather than mailing to corporation

D. SF 1304 - Transfers handling of workers' compensation claims of state employees to comptroller who can contract outside services or insurance to handle

V. Iowa Administrative Procedure Act, Chapter 17A, Code, effective July 1, 1975

A. Rulemaking
1. Implement, interpret and prescribe law or policy
2. Describe organization of agency
3. Describe procedures and practice requirements of agency
4. Amend or repeal existing rules

B. Contested cases
1. Initial hearing before deputy (administrative hearing officer)
2. Appeal to industrial commissioner (agency)

3. Rehearing allowable
4. Judicial review (appellee and agency respondents)
5. Appeal to supreme court

VI. Industrial Commissioner Rules - Series 500, Iowa Administrative Code

A. Chapter 1 - purpose and function of industrial commissioner

B. Chapter 2 - general provisions including modification of time for compliance with a rule

C. Chapter 3 - forms

D. Chapter 4 - procedure for contested cases

E. Chapter 5 - declaratory rulings

F. Chapter 6 - settlements and commutations including tables

G. Chapter 7 - rulemaking

H. Chapter 8 - substantive and interpretive

VII. Recent Iowa cases

A. *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (August, 1974)
Appeal from the district court affirming industrial commissioner's denial of compensation. The supreme court affirmed in part, reversed in part and remanded to the industrial commissioner with instructions.

Claimant, who had a heart condition diagnosed as angina pectoris, felt chest pains while unloading washing machines for his employer but continued to work for a short period of time. Following hospitalization, a diagnosis of myocardial infarction was made. The commissioner found Claimant did not sustain his burden of proof that his injury was caused by the work incident. The supreme court concluded the commissioner either rejected the testimony of Claimant's expert medical witness through application of an erroneous rule of evidence or rejected it for reasons unassigned. Consequently, the supreme court remanded to the industrial commissioner for a decision showing evidence relied on, standards applied and reasoning issued in rejecting that testimony.

B. *Freeman v. Luppes Transport Co.*, 227 N.W.2d 143 (March, 1975)
Appeal from the district court reversing deputy industrial commissioner's dismissal of application of review-reopening. Supreme court reversed holding that the Memorandum of Agreement prohibits inquiry as to whether or not an employer-employee relationship existed when the injury occurred and as to whether the injury arose out of and in the course of the employment but does not foreclose inquiry into the question of whether the injury caused the claimed disability.

C. *Seeger v. Juncker*, 236 N.W.2d 372 (December, 1975)

Appeal from the district court affirming industrial commissioner's determination that compensation benefits should be measured in accordance with §85.36(5), Code of Iowa, 1971. The supreme court affirmed. Decedent was a part-time employee, who sustained fatal injuries while working on a television tower on November 12, 1971. The only issue of appeal concerned the proper statute under which death benefits due the dependents of a part-time employee were to be computed. The supreme court held that the death benefits were properly computed under §85.36(5), Code of Iowa, 1971, which specifically dealt with part-time employees, and not §85.31(1), Code of Iowa, 1971, a general statute relating to cases where death results from the employee's injury. The supreme court also noted that further inquiry was not required because §85.36 was amended by the 65th General Assembly in 1973, to clarify the manner in which employees like the decedent should be compensated.

D. *McClure v. Employers Mutual Casualty Co.*, 238 N.W.2d 321 (January, 1976)

Appeal from the district court judgment in favor of insurers, not a workmen's compensation case. The supreme court affirmed in part, reversed in part and remanded. Decedent sustained fatal injuries in a collision of a motor vehicle in which he was riding and a motor vehicle operated by a negligent uninsured motorist. Decedent's widow received workmen's compensation benefits of $10,094.17 [see *McClure v. Union, et al. Counties*, 188 N.W.2d 283 (June, 1971)]. The probate court appointed the widow as administrator of Decedent's estate. In a separate action by the administrator against the uninsured motorist, the district court adjudged the damages to McClure's estate resulting from his death to be $30,000. The administrator then brought this action to recover uninsured motorist insurance.

In this decision involving many issues, the supreme court interpreted the sentence, "Such forms of coverage may include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits", §516A.2, Code of Iowa. The supreme court of Iowa held that the phrase, "of insurance or other benefits", includes workmen's compensation. The supreme court further held that where workmen's compensation was payable to the dependent widow under Code §85.31 and the administrator is entitled to the uninsured motorist insurance by virtue of Code §611.20 (survival statute), even though the administrator and the widow happen to be the same individual, they are different legal entities and thus would not constitute "duplication" within Code §516A.2. The supreme court also held that a dependent's right to workmen's compensation is a distinct and separate claim from the right to compensation vested in such employee by reason of the injury.

E. *McDowell v. Town of Clarksville, Iowa,* 241 N.W.2d 904 (May, 1976)

Appeal from the district court reversing industrial commissioner's denial of compensation. The supreme court reversed and remanded the case to the industrial commissioner. Decedent had a cerebral aneurysm and high blood pressure. Decedent, a member of the volunteer fire department, collasped after performing various tasks at a flood scene. Decedent died the next morning suffering from massive bleeding (subarachnoid hemorrhage), following rupture of his cerebral aneurysm. The district court had indicated that once the claimant had established a prima facie case, this placed "the burden upon the Defendant-Employer to go forward with his burden of proof and meet the claimant's prima facie case". The district court also concluded that the commissioner did not consider the whole record on review, specifically, Claimant's written interrogatories to Dr. Caulkins and his answers. The supreme court distinguished the burden of producing evidence and the burden of persuasion and held that the claimant has the burden of persuasion on the issue of causation and that this burden does not shift. The supreme court further held that the district court's conclusion that the commissioner apparently failed to weigh and consider all the evidence, in accord with *Langford v. Kellar Excavating & Grading, Inc.*, 191 N.W.2d 667 (Iowa, 1971), was well founded but the district court erred in finding the facts in favor of Claimant and awarding compensation. It was held that the proper disposition was to remand the case to the commissioner to indicate whether or not he had weighed and considered specified answers to written interrogatories and if not, to consider the answers together with other evidence and then to render a supplemental decision, with judgment according to his findings.

VIII. The trend in the law is to give broad coverage to employees and work-related injuries and diseases; substantial protection against interruption of income; provisions of sufficient medical care and rehabilitation services; and an effective system for delivery of benefits and services.

PRECLUSION

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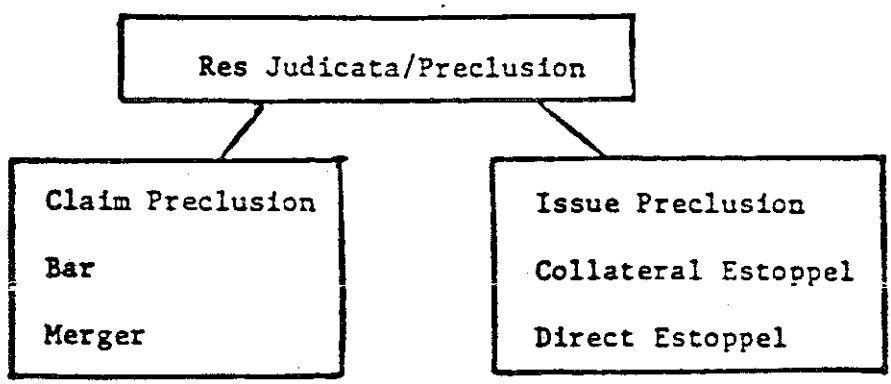
1. Terms Used



2. Principles underlying the concept

A. Establishing Rights of Individuals

B. Prevention of Harassment

C. Prestige of the Courts

D. Efficient Use of Courts

> "Undeniably, the court-produced doctrine of mutuality of estoppel is undergoing fundamental change in the common-law tradition. In its pristine formulation, an increasing number of courts have rejected the principle as unsound. Nor is it irrelevant that the abrogation of mutuality has been accompanied by other developments—such as expansion of the definition of 'claim' in bar and merger contexts and expansion of the preclusive effects afforded criminal judgments in civil litigation—which enhance the capabilities of the courts to deal with some issues swiftly but fairly."
>
> Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 91 S.Ct. 1434, 1442 (1971).

3. Definition of Claim

A.L.I., Restatement of Judgments 2d (Tentative Draft #1) § 61 *

> **(1)** When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 47, 48), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> **(2)** What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

4. General Principles of Claim Preclusion

A.L.I., Restatement of Judgments 2d (Tentative Draft #1) §§ 47 and 48*

> **§ 47. Judgment for Plaintiff—The General Rule of Merger**
>
> When a valid and final personal judgment is rendered in favor of the plaintiff:
>
> **(a)** The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, but he can maintain an action upon the judgment; and
>
> **(b)** In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

> **§ 48. Judgment for Defendant—The General Rule of Bar**
>
> A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

a. Judgment for Plaintiff

-Clarke v. Redeker, 406 F.2d 883 (8th Cir. 1969)

-Amerex Corp. v. Iowa City -
Iowa Dist. Ct. for Johnson Cty. Law # 42541 (1976)

Quasi-in-rem jurisdiction;

1. Effect on claim

2. Effect on Issues Tried

b. Judgment for Defendant

-B&B Asphalt v. T.S. McShane Co., 242 N.W.2d 279 (Iowa 1976).

c. Effect beyond Parties to Action

i. Derived Rights (Consortium)

-Kobmann v. Ross, 274 Mich. 678, 133 N.W.2d 195 (1965)

ii. Derivative Liability

-Bruszewski v. United States, 181 F.2d 419 (3rd Cir. 1950)

iii. Privity (Concurrent and Successive)

-Vestal, Claim Preclusion and Parties in Privity: Sea-Land Services v. Gaudet in Perspective, 60 Iowa L.Rev. 973 (1975)

5. Claim Preclusion by Rule

a. Two dismissal rule

-Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964).

i. Dismissals Under Rule
Voluntary Dismissal by Plaintiff
Same Claim
Different Capacities of Parties

ii. Effect of Second Dismissal
Final Adjudication
Multiple-Jurisdiction Two-Dismissal Situations

b. Compulsory counterclaim

i. Definition of Compulsory Counterclaim
Same Transaction or Occurrence
Different Capacities of Parties

ii. Exceptions in Compulsory Counterclaim Rule
Held at Time Pleading Served
Against Opposing Party
Absence of Parties Needed for Just Adjudication
Counterclaim Subject of Pending Action

iii. Effect of Compulsory Counterclaim Rules
In Litigation
Reactive Litigation
Judgment
Multiple-Jurisdiction Compulsory Counterclaim Situations

6. Claim Preclusion and Class Actions

-Hendler v. Wohlstetter, 411 F.Supp. 919 (S.D.N.Y. 1975)
-Robertson v. National Basketball Association, 413 F.Supp. 88 (S.D.N.Y. 1976)

MONTHLY INCOME SETTLEMENT OF PERSONAL INJURY CLAIMS

PAUL D. DONLON
Walker & Company Insurance
Post Office Box 55012
Los Angeles, California 90055

PROBLEM:
Current trends towards ever larger lump sum awards in Personal Injury cases have brought into sharp focus the problems inherent in such awards.

Premature death of the plaintiff results in unintended enrichment of heirs, particularly where awards have been determined on the basis of normal life expectancy

When normal or near normal life expectancy is realized, the long term risks of money management often result in premature exhaustion of funds

SOLUTION:
Settlement by means of a monthly income can be of advantage to both plaintiff and defendant. Centering discussion on present and future cash flow needs can more quickly bring about an equitable settlement, generally at a reasonable cost

FUNDING:
Thorough actuarial and medical evaluation of true life expectancy minimizes initial funding costs. Unexpected early death can result in a substantial refund to the defendant, reducing costs even further. Monthly income payments are fully *guaranteed* for the lifetime of the individual, however long that might be, a significant feature for the plaintiff and particularly appealing to the courts.

FLEXIBILITY:
A wide range of benefits is available. In addition to level monthly income, plans can be structured with future increases in payments to offset inflationary effects. Future death benefit provisions for parents or heirs can be built in, as can assurance of income for minor children.

PROCEDURES:
The initial step is to evaluate current and recent medical history. Normally all the information required can be obtained from hospital admission and discharge summaries contained in existing files. Often this can be supplemented by recent medical examination and evaluations prepared for defense and/or plaintiff's counsel.

Upon completing medical and actuarial evaluation of life expectancy, our office is available to work with defendant and defendant's counsel in developing possible offers for negotiation.

REFERENCES: Vol XLI Oct. 1974 Vol 4
Insurance Counsel Journal

Vol XLII July 1975 No. 3
Insurance Counsel Journal

SELECTED ASPECTS OF PUNITIVE DAMAGES

HONORABLE WILLIAM C. HANSON
judge-U.S. District Court
Southern District
Des Moines, Iowa 50309

I. INTRODUCTION

A. Definition

Punitive damages, or exemplary damages, are those damages awarded to a plaintiff over and above the amount needed to compensate him for his loss or injury. To recover a punitive damage award, a plaintiff must demonstrate that the defendant's conduct resulted from an evil state of mind, such as spite, ill-will, or recklessness. Mere negligence will not support an award of punitive damages.

B. Significance

Punitive damages are recoverable in many types of actions and against a variety of defendants. See Quick Index, ALR2d-3d 680 (1973). Perhaps because of this wide-ranging availability, a misunderstanding as to the nature and purpose of punitive damages is common among attorneys. Frequently such damage requests are tacked onto complaints as an afterthought, in an undiscerning effort to increase plaintiff's recovery. Many attorneys fail to recognize that this plea for punitive damages can critically affect the manner in which the case must be litigated and are unaware of how this plea can prejudice the principal claim.

Utilizing recent Iowa caselaw, the ensuing discussion attempts to outline a method for analyzing punitive damage claims. (For a discussion of punitive damage law in Iowa prior to 1953, see Amos v. Prom, 115 F.Supp. 127 (N.D. Iowa 1953)).

II. PURPOSE AND NEED FOR PUNITIVE DAMAGES

A. Debate

In recent years, commentators have disputed the need for punitive damage awards. This debate, while not examined, is mentioned because it does uncover the purported purposes for punitive damages. Those purposes provide the functional framework in which courts at least implicitly consider the merits of a punitive damage claim, and hence is the framework in which an attorney should present his argument for or against such recovery.

B. Purpose

1. When justifying a punitive damage award, the Iowa courts usually cite the need for punishment and deterrence. McCarthy v. J. P. Cullen & Son Corp., 199 N.W.2d 362, 368 (Iowa 1972). The argument that punishment of a defendant in both a civil and criminal court for the same offense constitutes double jeopardy has been rejected. Federal Prescription Service v. Amalgamated Meat Cutters, 527 F.2d 269, 278 (8th Cir. 1975).

2. Revenge and compensation offer further rationale for punitive damage awards. Though seldom cited by courts, revenge and compensation encourage principle-oriented lawsuits and justify making this largely windfall award to the plaintiff as opposed to the state.

C. Argument Against Punitive Damages

1. Opponents of punitive damages, among other arguments, contend that the concept is anachronistic and has been superseded by the expanding concept of what properly constitutes compensatory damages.

2. Only four states--Louisiana, Massachusetts, Nebraska and Washington--have by judicial decision completely rejected punitive damages. In Iowa the law of punitive damages is well-entrenched, and the question for the defense attorney is merely one of how to avoid its implementation.

III. PUNITIVE DAMAGES CLAIMS: PLEADING, PROVING AND REVIEW

A. An Approach to Punitive Damages

The following factors are fundamental to the determination of any punitive damage claim: (1) the nature of the defendant's conduct; (2) actions in which additional damage recovery is permitted; (3) defendant's wealth; and (4) the harm to the plaintiff caused or intended by the defendant.

B. Nature of Defendant's Conduct

1. Punitive damages are awarded only when the defendant's conduct resulted from a particular state of mind. The Iowa Uniform Jury Instruction on punitive damages speaks of "wanton, reckless and grossly negligent" acts; Devitt & Blackmar, Federal Jury Practice and Instructions, § 78.11 (1970) speaks of "malicious, wanton, and oppressive" acts. (See Appendix.)

2. The plaintiff has generally been required to prove "actual" or "legal" malice to recover punitive damages in Iowa. However, under Iowa law, punitive damages can be recovered where plaintiff shows defendant's conduct to be something less than "malicious." "Gross negligence," though no case has apparently made an award solely upon this ground, can support a punitive damage claim. Kirtley v. Bankers Life & Casualty Co., 198 F.Supp. 30, 33 (S.D. Iowa 1961).

C. Actions Permitting Punitive Damage Awards

1. A showing of "malice" has brought punitive damage awards in a variety of recent Iowa cases: from a trespass action in Hagenson v. United Telephone Co. of Iowa, 209 N.W.2d 76 (Iowa 1973), to criminal conversation and alienation of affection in Giltner v. Stark, 219 N.W.2d 700 (Iowa 1974), to wrongful death, which now clearly permits punitive damages under Koppinger v. Cullen-Schiltz & Associates, 513 F.2d 901 (8th Cir. 1975).

2. But defense attorneys should be alert to those actions that either do not permit or limit the recovery of punitive damages.

a. Contract Actions The general rule in Iowa, as elsewhere, is that punitive damages are not available in actions for breach of contract. Ranco Fertiservice v. Laursen, 456 F.2d 988, 991 (8th Cir. 1972).

Consequently, for purposes of maximizing damage recovery, a plaintiff with a contractual warranty claim may attempt to proceed in tort for fraud and deceit. Tortious interference with the right to contract would also permit a punitive damage award.

b. Products Liability A defense attorney should be aware of the inconsistency between strict liability and punitive damages. In strict liability, the character of the defendant's act is of no consequence and need not be proved; in a punitive damage action, the character of the act is determinative.

c. Vicarious Liability Iowa has adopted the majority rule that if a servant has committed a tort within the scope of his employment which renders the corporation liable for compensatory damages, then the corporation may likewise be liable for any punitive damages that could be asserted against the servant. Northrup v. Miles Holmes, Inc., 204 N.W.2d 850 (Iowa 1973).

d. Civil Rights Liability Punitive damages are clearly recoverable under 42 U.S.C. § 1983, which is an action sounding in tort. Guzman v. Western State Bank, No. 75-1970 (8th Cir. August 27, 1976). Courts outside the Eighth Circuit have found punitive damages to be available pursuant to 42 U.S.C §§ 1981, 1982, 1985 and 1988. See Devitt & Blackmar, § 87.19 (Appendix). However, it should be noted that recovery of punitive damages under § 1983, which is governed by federal rather than state law, may require more than a bare violation of that section's provisions. Adiches v. S. H. Kress & Co., 398 U.S. 144 (1970)(Brennan, J., concurring in part and dissenting in part).

Despite cases to the contrary, the pervailing view is that Title VII of the Civil Rights Act of 1964 does not provide for punitive damages. Equal Employment Op. Comm. v. Detroit Edison, 515 F.2d 301 (6th Cir. 1975).

e. Libel Actions Pursuant to Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974), punitive damages, regardless of the state standard for recovery, are available in defamation suits only where actual malice has been proven. See also Porterfield v. Burger King Corp., No. 75-1881 (8th Cir. August 19, 1976).

f. Federal Statutes Courts are split as to the availability of punitive damages under such federal statutes as FELA, LMRA, LMRDA, FAA, and the 1933 and 1934 Securities Acts. No precedent has been set by the Eighth Circuit as to whether punitive damages can be recovered under these statutes.

D. Defendant's Wealth

1. Evidence bearing on the defendant's wealth may be discovered and introduced by the plaintiff in a case where punitive damages are sought. Such evidence assists the jury in its determination of how large a judgment is necessary to deter and punish the defendant. Bankers Life Company v. Kirtley, 307 F.2d 418, 425 (8th Cir. 1962).

2. The scope of required financial disclosure is an open issue, and a plaintiff sometimes attempts to utilize broad discovery as a tactical device in accelerating settlement negotiations.

3. Owing to the danger of improper jury influence by disclosure of defendant's wealth, some courts require that the punitive damage issue be tried only after a verdict on liability and compensatory damages has been reached. Other courts permit the introduction of this financial information and then instruct the jury as to how and when the question of punitive damages must be determined. Defendant, in either situation, should consider a pre-trial motion in limine.

4. Some jurisdictions have addressed the question of whether punitive damages should be covered by a defendant's insurance policy. The majority of those courts have found public policy to compel a holding that insurance policies do not cover punitive damages. Northwestern National Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962). No Iowa court has confronted this issue.

E. Punitive Damage Awards

1. The rule in Iowa is that there can be no punitive damages without actual damages. Creme Lure Co. v. Schwartztrauber, 257 F.Supp. 53, 55 (S.D. Iowa 1966). Also, while no formula has been developed, the amount of the punitive damage award must generally be proportionate to the actual damages granted. Kirtley, supra, at 35. In Iowa, unlike other jurisdictions, courts cannot avoid the actual damage rule by finding actual damages to include nominal as well as purely compensatory damages. Amos, supra, at 132.

2. Iowa courts can review punitive damage awards.

a. Jury Discretion Although punitive damage awards are within the jury's discretion, such discretion is not unlimited and the trial judge has the duty of keeping damages within reasonable bounds. Federal Prescription, supra, at 277-79. Jury instructions can help keep punitive damages within reason. See West Virginia Jury Instruction on Punitive Damages (Appendix).

b. Preservation of Appeal Defendants must specifically raise the issue of punitive damages in the trial court if they want review of the award. Katko v. Birney, 183 N.W.2d 657, 662 (Iowa 1971). Unless they object to the instruction on punitive damages, defendants in federal court waive claim to any error. Fed.R.Civ.P. 51.

c. Remittitur No remittitur is permitted in this state when the review court finds the punitive damage award to be excessive. The only remedy is for the court to set aside the recovery. Claude v. Weaver Construction Co., 158 N.W.2d 139, 145 (Iowa 1968).

d. Review Standard The Iowa Supreme Court has stated that the jury's assessment of punitive damages would be disturbed only when the verdict is "(1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience of sense of justice; or (3) raises a presumption it is a result of passion, prejudice, or other ulterior motive; or (4) is lacking in evidential support." Giltner, supra, at 709.

In Bankers Life, supra, at 424-26, the Eighth Circuit Court reversed the district court and sustained a defendant's argument that a $650,000 punitive damage verdict was shocking and without evidentiary support. The Circuit recognized that a review court under Iowa law has no power of remittitur; however, it ordered that if plaintiff did not file a remittitur, the judgment would be reversed in its entirety and the case remanded for a new trial on all issues.

IV. CONCLUSION

A defense attorney should methodically approach any punitive damage claim: assess whether the plaintiff can establish defendant's conduct to have followed from the requisite state of mind; determine if such damages are available in the particular action; consider pre-trial motions in limine; submit prepared jury instructions; present the argument against punitive damages in a fundamental rather than constitutional framework; and preserve appeal.

APPENDIX

A. Iowa Uniform Jury Instructions

No. 3.21 EXEMPLARY DAMAGES

The plaintiff in (each Division of) his petition has asked to recover over and above his actual damages what is known in law as exemplary damages. You are instructed that the law of this State permits but does not require a jury to allow exemplary damages in certain cases if it is found by the jury that the act of the defendant causing the injury complained of is wanton, reckless and grossly negligent. By wanton and reckless, as these terms are used in this case, is meant something more than negligence, but is meant that an act is done in such a manner and under such circumstances as to show heedlessness and utter disregard and abandon as to what result may flow from the doing of an act or from the manner in which it is done.

Exemplary damages are not compensatory in the ordinary sense, but are allowed by way of punishment to restrain the defendant and others from the commission of like acts in the future.

So in this case, if you find from the evidence that the defendant drank intoxicating liquor and became intoxicated and then drove his car while so intoxicated as to make his conduct in driving upon a public highway wanton, reckless and grossly negligent as those terms are defined herein, you may allow to the plaintiff exemplary damages in addition to his actual damages as explained to you in the preceding paragraph.

In determining the amount of exemplary damages, if any, to be awarded the plaintiff, the Court can give you no exact rule, but you should be guided by your careful and well-considered judgment and allow, if any, such an amount and such only as you shall find the plaintiff entitled to receive in addition to his actual damages under all the facts and circumstances as shown by the evidence and under these instructions.

In no event may you allow the plaintiff as exemplary damages more than is asked in each Division of his petition, nor may you allow any exemplary damages unless you find by a preponderance of the evidence that the defendant's conduct was wanton, reckless and grossly negligent as those terms are herein defined.

Sebastian v. Wood, 246 Iowa 94, 66N.W.2d 841 (1954).

B. Devitt & Blackmar, Federal Jury Practice and Instructions (1970).

1. § 78.11 DAMAGES--PUNITIVE AND EXEMPLARY--WHEN CAUSED BY INTENTIONAL TORT--"MALICIOUSLY"--"WANTONLY"--"OPPRESSIVELY"--DEFINED

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the defendant, which proximately caused actual injury or damage to the plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendant's act or omission, which proximately caused actual damage to the plaintiff, was maliciously or wantonly or oppressivly done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of

(§ 78.11 continued)

such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

2. § 87.19 RACIAL DISCRIMINATION UNDER SECTIONS 1981 AND 1982--DAMAGES

If you find in favor of the plaintiff then you will award him such actual or compensatory damages as you find from a preponderance of the evidence were proximately caused by the acts of the defendants (in refusing to sell the house).

If you find for the plaintiff but do not find that he suffered any actual damages then you may award him some nominal sum such as one dollar as damages.

If you find for the plaintiff and find from a preponderance of the evidence that the acts of the defendant were maliciously or wantly or oppressively done, then you may award the plaintiff punitive damages in addition to actual damages, or in addition to nominal damages, such as you find. If you award punitive damages they must be separately stated in your verdict.

C. West Virginia Jury Instructions on Exemplary Damages.

If, after the jury has assessed damages to fully compensate the plaintiff for the injury, such damages are not sufficient in amount to punish the defendant . . . and . . . to prevent the repetition of the same or the commission of similar wrongs, they may add such further sum, as may in their judgment, be necessary for this purpose. But if the damages assessed as compensatory are sufficient in amount to operate at the same time as a punishment and a warning, the jury is not authorized to add still a further and greater sum, and thus subject the defendant to a double punishment in the same case for the same wrong.

REVIEW OF RECENT SUPREME COURT DECISIONS

(232 N. W. 2d to 243 N. W. 2d)

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ACKERMAN V. LAUVER V. IOWA MUIUAL INSURANCE COMPANY, 242 N.W.2d 342 (Iowa 1976).

FACIS

Plaintiff repairman was authorized by cross defendant insurer to repair defendant owner's windstorm-damaged building. After completion of the work undertaken by repairman, owner claimed the damage had not been completely repaired and that the work was faulty. Insurer tendered owner a draft for an amount alleged to be in full payment of owner's damages. For some time owner refused to accept the payment, but eventually did so. After the draft had been delivered to owner, he refused to pay repairman. Repairman then started this action against owner and owner filed a counterclaim against repairman. Repairman then brought in cross defendant insurer asking contribution or indemnity if repairman should be held liable on defendant's counterclaim. Another division of the cross petition asked judgment against insurer for the cost of repairs to owner's building.

On the second day of trial, owner asked permission to amend under Rule 88, I.R.C.P. by filing a cross petition to allege that insurer had assumed all responsibility for making repairs to his building and that it had not followed through on this duty. The court allowed the amendment.

Following trial, the court directed a verdict in favor of repairman and against owner on both the petition and counterclaim. Repairman then dismissed his cross petition against insurer.

As a result, the only remaining action was owner's claim against insurer for the amount of owner's actual damages. The jury returned a verdict in owner's favor for $7,500 and insurer appealed.

HOLDING:

Modified and affirmed. The Court did not err in allowing owner's amendment. Amendments may be allowed at any time before the case is finally decided, even after completion of the evidence. They should not be allowed under Rule 88 after a responsive pleading has been filed if they substantially change the issues. Owner's counterclaim against repairman was based on repairman's negligent performance of the repair work. Owner's cross petition against insurer was based upon insured's failure to "carry through" on its obligation to see that repairman faithfully did the repair work. Therefore, the issues of the counterclaim and cross petition were identical except for the parties against whom relief was sought. Although the amendment amounted to a new lawsuit, it did not present any substantially different issues. Insurer's claim of surprise is not credible, in view of the fact that insurer did not move for a continuance at the time the amendment was granted.

Ihe trial court did not err in denying insurer's request for an instruction on mitigation of damages. Since insurer did not plead mitigation of damages as a special defense, insurer is limited to showing failure to mitigate on the basis of circumstances growing out of owner's testimony. Owner's testimony showed only that he took no remedial steps to protect his property from additional damages. However, the record is utterly silent as to what measures could have been taken. For this reason, insurer was not entitled to any instruction on mitigation.

Ihe trial court did not err in denying insurer's motion for directed verdict. Insurer contends that a directed verdict should have been granted because its responsibility in this matter was fully discharged by payment to owner of the amount of his damages. Ihere is no merit to this claim. The proof of loss was not a release. It was nothing more than a receipt for payment of the work done by repairman. Insurer also argues that owner's claim could not be urged against the insurer because the contract was one between owner and repairman. However, owner had no part in the negotiations with repairman, he did not select repairman, he did not approve repairman's estimate and did not authorize the repairs. All these matters were handled by insurer.

B & B ASPHALI CO., INC. V. I. S. McSHANE CO., INC. B & B ASPHALT CO., INC. V. T. S. McSHANE CO., INC. AND AMERICAN HOIST & DERRICK CO., 242 N.W.2d 279.

FACIS

Iwo cases were consolidated on appeal. Both actions were based on the same transaction, plaintiff's lease-purchase of an allegedly defective asphalt plant from McShane. American was the manufacturer of the machine and McShane was American's dealer.

Ihe first action was based on allegations of fraud. After two days of evidence, just prior to resting, plaintiff moved for leave to amend the petition to conform to proof by adding allegations of breach of warranty. Ihe trial court reserved ruling on the motion, plaintiff rested, and the court later overruled the motion. Defendants then moved to dismiss and the motion was sustained.

Plaintiffs then filed the second action, seeking recovery on alternative theories of express warranty, implied warranty and negligence. Defendants answered alleging the defense of res judicata based on the first action and moved for summary judgment. Summary judgment was granted and plaintiff appealed.

HOLDING:

Affirmed on both appeals.

First appeal. Ihe trial court did not err in sustaining defendants' motions to dismiss. Plaintiff argues

that the allegations in the original petition were broad enough to sustain the action on theories of express and implied warranty as well as fraud. However, plaintiff did not urge this contention in the trial court and, moreover, stipulated as part of the record on the second appeal that its first action was based solely on fraud.

The trial court did not err in overruling plaintiff's motion for leave to amend. An amendment to conform to the proof should usually be allowed when it does not substantially change the issues. Allowance of such an amendment is the rule and denial the exception, but the trial court has considerable discretion in such matters. Here, the proposed amendment did not actually conform to the proof. The sole warranty alleged in the amendment was that the asphalt plant would meet highway commission specifications. However, no evidence as to damages caused by the breach of this alleged warranty was introduced.

The trial court did not err in sustaining defendant's motions for directed verdict. An essential element of a cause of action for fraud is scienter and intent to deceive. Scienter requires a showing that alleged false representations were made with knowledge they were false. The representations complained of were that the machine would meet highway commission specifications. Here, the evidence showed that defendant's agent actually believed that the machine would meet such specifications. This does not constitute reckless disregard of truth as required in establishing scienter and intent to deceive.

Second appeal. Claim preclusion under the doctrine of res judicata is based on the principle that a party may not split or try his claim peacemeal. An adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination. Therefore it is necessary to determine whether plaintiff's first and second actions were the same claim or cause of action within the meaning of the res judicata principle. Claims are identical under the res judicata doctrine when they involve the same operative facts or liability-creating conduct, and the invasion of the same legally protected interest of the plaintiff. Another way of viewing identity is that causes of action are identical when the same evidence will maintain both actions. Here both actions arise from the same transaction and depend on evidence of the same events. Res judicata is plainly applicable.

BERTRAN V. GLENS FALLS INSURANCE COMPANY, 232 N.W.2d 527 (Iowa 1975).

FACTS

Plaintiff Bertran was injured while operating a fertilizer conveyer. He sued Ritchie, who installed the conveyer. During trial, a factual determination was made

that Ritchie's wiring of the conveyer was not completed at the time of Bertran's injury. Bertran obtained judgment against Ritchie.

After execution against Ritchie's property was returned unsatisfied, Bertran and Ritchie separately sued Glens Falls, Ritchie's insurer. The policy provided general liability coverage for bodily injury arising out of Ritchie's "operations in progress." It specifically excluded bodily injuries arising out of "completed operations." Glens Falls defended on the ground that Ritchie's work on the conveyer was completed at the time Bertran was injured. Bertran filed a motion in limine claiming that Glens Falls was collaterally estopped from raising the policy defense because of the determination in the prior lawsuit that Ritchie's work was not completed at the time of Bertran's injury.

HOLDING:

A party who seeks to rely upon collateral estoppel must raise the issue in his pleadings. It was improper for the plaintiff to attempt to raise the issue by motion in limine.

In any event, the doctrine of res judicata was not applicable in plaintiff's favor here. Plaintiff was attempting to use the doctrine of collateral estoppel offensively against one who was not a party to the earlier judgment. The courts of Iowa will not allow collateral estoppel to be used offensively where, as here, mutuality is lacking. Furthermore, other prerequisites to application of the doctrine were lacking. The prerequisites to application of issue preclusion are: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action, and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

The issues in the two actions here were not identical. The former action did not involve any issue of contract construction. Nor was the issue of the policy exclusion presented in the former action. Finally, there was no evidence that the incompleteness of the project was in any way relevant to the first court's determination.

BOWEN V. KAPLAN, 237 N.W.2d 799 (Iowa 1976).

FACTS

Plaintiff was injured in an industrial accident while operating a forklift. It was alleged that an elevator shaft was improperly left open, and that plaintiff fell into it. Plaintiff sued his employer's workmen's compensation insurance carrier on the theory that it had negligently inspected and/or failed to inspect the premises. The

defendant moved to dismiss and the motion was sustained by the trial court without explanation.

HOLDING:

Affirmed. (The court discussed Fabricius v. Montgomery Elevator Co., which allowed recovery where a workmen's compensation insurance carrier was found liable when it reserved the right to inspect the work premises, undertook to do so, and did so negligently. The court noted that after the filing of the opinion in Fabricius, the legislature adopted §88A.14, since repealed.) That statute provides:

> "No inspection of any place of employment made by insurance company inspectors or other inspector shall be the basis for the imposition of civil liability upon the inspector or upon the insurance company or other person employing the inspector."

It is obvious that the Legislature enacted §88A.14 to overrule Fabricius. The terms of the statute are unambiguous.

Plaintiffs urge that the section only protects against civil liability for making a faulty inspection and not from failure to make inspection. However, there is no liability for a failure by a workmen's compensation carrier to make a gratuitous inspection. If there is no duty to act there can be no liability for failure to act. The difference between this case and Fabricius is that Fabricius was based on an inspection gratuitously undertaken, which constituted assumption of a duty to inspect with due care.

BUCHHOP V. GENERAL GROWTH PROPERTIES, ET AL., ETC., 235 N.W.2d 301 (Iowa 1975).

FACTS

Defendant General Growth Properties was sued for wrongful death, caused by freon gas which escaped from a defective air conditioning unit located in General Growth's Lindale Plaza Shopping Center at Cedar Rapids. General Growth obtained permission to bring in David B. Cheskin & Company as third party defendant. Its cross petition asserted that Cheskin designed and constructed the air conditioning in the shopping center under a contract with the first owner, Lindale Plaza, Inc. Cheskin had never attempted to obtain a certificate of authority to transact business in Iowa. General Growth sought to obtain jurisdiction of Cheskin by serving the notice and related papers on the Iowa Secretary of State pursuant to §§494.2(6) and 496A.112. Cheskin appeared specially, contending that the statutes employed to obtain jurisdiction were not applicable because Cheskin was not authorized to transact business in Iowa and had not transacted business in Iowa. The special appearance was sustained and General Growth appealed.

In the course of the appeal, Cheskin filed a

motion to dismiss on the ground that General Growth had settled the plaintiff's claim, and therefore that Cheskin would not be held liable to General Growth even if jurisdiction was upheld.

HOLDING:

Affirmed. General Growth's settlement of the underlying controversy did not defeat its right to seek indemnity or contribution from Cheskin for the amount paid to plaintiff, or at least a portion of it. Therefore the motion to dismiss is overruled.

Code of Iowa §617.3 was not available to General Growth because all the pertinent conduct of Cheskin occurred before 1961, when the statute was adopted. §617.3 does not apply retroactively.

General Growth relies upon the provisions of §494.2(6) and §496A.112 in asserting that Cheskin is subject to the jurisdiction of the Iowa courts. §494.1 requires a corporation desiring to transact business in the State of Iowa to file application for a permit with the Secretary of State. Subsection 6 of Section 494.2 requires the applying corporation to file a certified copy of its resolution giving the name and address of its registered agent for service and that if the corporation fails to do so, service of process may be made upon the corporation through the Secretary of State. In the present case, Cheskin never filed for a permit, and thus the foregoing provisions do not literally subject Cheskin to the jurisdiction of Iowa courts.

§496A.112 provides that whenever a corporation authorized to do business in Iowa fails to appoint a registered agent, then the Secretary of State shall be the agent for service of process. However, Cheskin never became authorized to transact business in Iowa.

Nevertheless, if Cheskin was in fact transacting business in Iowa within the meaning of Chapters 494 and 496A, it is conclusively presumed to have fulfilled statutory requirements, including appointment of the Secretary of State as its agent for service of process. The court must therefore examine the activity of Cheskin in Iowa, measuring it on the same terms the court would employ if the state were attempting to force Cheskin to secure a certificate of authority to transact business here. It is not enough that Cheskin's conduct rises only to the minimum contact standard of International Shoe Co. v. Washington.

The facts show that Cheskin had previously contracted to design the Merle Hay Mall in Des Moines. David Cheskin, the president of Cheskin, made six full-day trips to Des Moines to observe the progress of that project. Cheskin later orally contracted to design five buildings in the Lindale Plaza. Again Cheskin came to Iowa on six different days to observe the project construction. Cheskin

later issued certificates of satisfactory completion to eight Iowa tenants in the Plaza.

On these facts, it is apparent that Cheskin was not transacting business in Iowa. It was an Illinois corporation with a single place of business in Illinois. It made a contract with another Illinois corporation to draft plans in Illinois. It did not enter into any contract to perform services for any Iowa customer. It never commenced any legal action in Iowa, never participated in Iowa litigation, never paid taxes in Iowa, and never owned or leased property in Iowa. No person in Iowa has been indebted to Cheskin. It did not solicit business in this state. In view of the foregoing, Cheskin would not have been required to obtain a certificate of authority to transact business in this state. Therefore it cannot be conclusively presumed to have complied with the statutory requirements so as to be subject to §494.2(6) or §496A.112 jurisdiction.

BUCKROYD V. BUNIEN, EI AL., 237 N.W.2d 808 (Iowa 1976).

FACIS

Patient brought medical malpractice action against orthopedic surgeon. During trial, plaintiff introduced no expert testimony on the issue of whether the doctor was negligent in failing to diagnose patient's condition. At the conclusion of all the evidence, the trial court sustained a motion to dismiss as to the partner and found in doctor's favor. Plaintiff appealed.

HOLDING:

Affirmed. Iwo exceptions exist to the general rule that the negligence of a physician may not be established without expert medical testimony showing the applicable standard of care and its breach. One is the situation where a physician's lack of care is so obvious as to be within the comprehension of laymen and which requires only common knowledge and experience to understand. Ihe other arises when a physician injures a part of the body not being treated. This case falls within neither of the foregoing exceptions. There was no expert testimony that the defendant's diagnosis failed to conform with the applicable standard of care. In fact, one of plaintiff's own expert witnesses testified that he had never seen, read or heard of plaintiff's disease being caused by a non-penetrating injury of the kind plaintiff had. Iherefore, the trial court did not err in holding this to be a case where defendant's negligence could not be established without expert testimony. Under the record in this case a lay person unaided by expert medical testimony would have no basis to find that defendant breached the applicable standard of care in treating the plaintiff.

BURR V. APEX CONCREIE CO., 242 N.W.2d 272 (Iowa 1976).

FACIS

Plaintiff was an employee of Reed Construction Company (Reed) which had a subcontract to do certain work at an apartment complex. Defendant Apex delivered concrete to the jobsite in trucks. Reed's foreman told the drivers of the Apex trucks where to dump the concrete.

On one occasion, the foreman told one of Apex' drivers to dump his concrete through a window in a block wall. Since the driver could not see the chute in back of his truck, he enlisted the foreman's help in giving him directions. Another of Reed's employees stood at the window in the wall and attempted to guide the chute through it. A short piece of steel projecting from the chute struck the wall, tipping it. Approximately 15 minutes later, the wall fell completely over and injured the plaintiff. The plaintiff sued Apex, Apex' truck driver, Reed's foreman, and the other Reed employee who assisted in the unloading operation. Plaintiff's theory was that Apex was liable for the negligence of the other three defendants because they were acting as Apex' agents at the time of the incident. At the conclusion of all the evidence, the trial court directed verdicts for Apex on plaintiff's claims based on the negligence of Reed's employees. The jury awarded plaintiff damages from the Reed employees individually, but found that Apex and its driver were not liable. Plaintiff appealed.

HOLDING:

Affirmed. Plaintiff claims on appeal that in its answer Apex admitted plaintiff's allegation that Reed's employees were agents of Apex since Apex merely denied agency generally. Plaintiff's argument is based on I.R.C.P. 98, which requires a party denying "representative capacity" to set forth the facts relied upon in support of his denial. However, the term "representative capacity" in Rule 98 pertains to capacity to sue or be sued, not to agency. Plaintiff's argument is therefore without merit.

There was no evidence that Reed's employees were agents of Apex. The general rule is that a servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. However, in the absence of evidence to the contrary, the inference is that an employee remains in his original employment. In addition, a servant of one master will be held to have become the servant of another only insofar as the latter has the right to control and direct the servant's activities. Here, plaintiff introduced no evidence that Apex had the right to control the acts of Reed's employees. The evidence merely showed that Reed's employees cooperated with Apex' employees. The short time spent by

Reed's employees in helping Apex' employee suggests that they were not servants of Apex. Additionally, the custom in the construction industry appears to be that truckers are generally given assistance by contractor's employees in deliveries of material at construction sites. Thus part of Reed's employees' duties to their own employer Reed was to assist cement truck drivers. In so doing, they were engaged in Reed's business and remained Reed's servants.

The trial court was not obligated to predicate the liability of Apex for its driver's conduct on the owner's liability statute, where it gave another instruction which told the jury that Apex was responsible for its driver's conduct by virtue of the employer-employee relationship. It also held the trial court's instructions on joint and several liability to be correct.

MATTER OF ESTATE OF CHAPMAN, 239 N.W.2d 869 (Iowa 1976).

FACTS

Petition was brought to set aside a will which had been jointly executed by the testator and his wife, and to admit to probate a later will executed by the testator after the death of his wife. The trial court held that the earlier will was joint and mutual, that it was supported by consideration and that therefore the earlier will should be admitted to probate, since it was irrevocable after the wife's death. Petitioner appealed.

HOLDING:

Reversed. The earlier wills of the husband and wife were contained in a single document, each preceded by a paragraph stating that the testator and testatrix owned separate property, and that each, in consideration of the other's promise to make a certain disposition of that property, agreed to dispose of it in the manner thereinafter set forth. A will is "joint" if it is the will of two or more persons in one instrument; "reciprocal" if it contains reciprocal gifts or property among two or more makers; but it is mutual in Iowa only if it is executed pursuant to an agreement. There can be no doubt that the will in the present case was joint and reciprocal. The only question is whether it is mutual. Under Code of Iowa §633.270, no will should be construed as contractual or mutual unless the testator expressly states such intent in the will. Here the preamble to the two wills adequately expressed the intent of the testator and testatrix to make mutual wills.

The agreement of the testator and testatrix to make a certain distribution of their property was supported by adequate consideration. The mutual promises of a husband and wife to dispose of their jointly or separately owned property in a manner satisfactory to each of them is good consideration to support the contract.

However, the trial court erred in admitting the

prior will to probate. A will becomes effective only at testator's death. Until that time, it may always be revoked. This rule is not changed because, in revoking a will, the testator may violate a contract not to do so. This does not mean that the testator may escape his contractual obligations. We hold that where the testator violates a contract to make a particular distribution of property, the property is impressed with a trust for the benefit of those where the beneficiaries under the repudiated mutual will. The trial court should have admitted the later will and imposed a trust upon the estate in favor of the beneficiaries under the prior will.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION V. WILSON, 235 N.W.2d 117.

FACTS

Respondent appealed from a recommendation of the grievance commission that he be suspended from the practice of law for a period of three months on five separate charges of professional misconduct. All five of the charges involved litigation which respondent started, or should have started, for various clients. In three of them the actions were dismissed under I.R.C.P. 215.1. In each of these cases, respondent thereafter represented that the cause was still pending, giving ficticious and deceptive reasons for delay.

One client made a trip from his home in Texas to Cedar Rapids on the basis of respondent's assurance that trial date was set. Upon arriving in Cedar Rapids, he was falsely told that the judge's illness required a postponement. At that time, the case had long been stricken.

In the remaining two cases, the respondent failed to start actions which he had been hired to commence. He then repeatedly misrepresented the status of the matters, giving false reasons for the postponement of trial.

Respondent admitted most of the charges of misconduct, but attempted to excuse it by stating that he was under extreme pressure because of domestic trouble.

HOLDING:

Respondent has engaged in a studied and persistent course of conduct in deceiving his clients and misrepresenting the true state of their affairs long after his inexcusable neglect had prejudiced their rights. He violated §610.15 of the Code which prohibits an attorney from participating in deceit or collusion with intent to deceive a court or judge or party to an action. He also violated C.P.R.I. DR7-101(A)(1), (2) and (3) which deal with the zealous and faithful representation of a client in a matter committed to his care. He also violated DR6-101(A)(2) and (3) which deal with adequate preparation and exercise of diligence in

handling legal matters and §DR1-102(A)(1), (4), (5) and (6) which are a general provisions requiring ethical and diligent conduct on the part of an attorney. The suspension will be upheld.

CONLEY V. WARNE, 236 N.W.2d 682 (Iowa 1975).

FACTS

Owner of lakeside property sought injunction against adjoining landowners and building contractor on claim of zoning ordinance violation. The evidence showed that one of the adjoining landowners had made substantial improvements on his property without objection from the plaintiff that the improvements violated zoning ordinances The trial court held that plaintiff was estopped from complaining and for the most part denied injunctive relief and damages. Plaintiff appeals.

HOLDING:

Affirmed. A neighbor who observes in silence and without objection as an adjoining landowner expends large sums towards property improvement may become bound by his silence. However, there is no estoppel unless the one erecting the improvement does so in the good faith belief that he is within his rights in so doing. Ignorance of an ordinance will not excuse its violation.

Here plaintiffs waited until expensive construction was almost completed before complaining. There was no evidence of bad faith, since testimony during the trial showed that defendants relied upon their contractor to comply with all building requirements The contractor's request for a building permit did not fairly disclose that the improvements would be non-conforming. Since the defendants acted in innocence and good faith reliance on the contractor, the zoning violations will not prevent them from claiming estoppel.

However, plaintiffs are not estopped from complaining about a sun deck which was added onto defendants' home, since no building permit was ever sought for the sun deck. Since defendants could have applied to the issuing authority for permission to construct the sun deck and failed to do so, they cannot claim estoppel

Damages will not be awarded since plaintiff failed to introduce any evidence of diminution and rental value of the property Plaintiff was, however, entitled to recover special damages for expenditures made in an effort to remedy drainage problems caused by the construction.

COWMAN V. LaVINE, 234 N.W.2d 114 (Iowa 1975).

FACTS

Plaintiff was an assistant chief of the Des Moines Auxiliary Police Department. During a city council meeting, defendant councilman stated that plaintiff had been convicted of a felony, and had violated parole.

Plaintiff sued the defendant for slander. Following hearing on plaintiff's pre-trial motion for summary judgment, the trial court ruled that although the defendant's statements were slanderous per se, they were qualifiedly privileged, since they had been made in the course of official proceedings relating to a matter in the line of defendant's duty as a public officer. The trial court thus overruled the motion for summary judgment because a factual question as to the defendant's actual malice was presented

Subsequently, the defendant filed a motion for leave to bring in the City of Des Moines as a third party defendant He claimed the motion was that his statements were made in the course of his official duties for the City, and that the City was therefore liable to indemnify him under the provisions of Code of Iowa §613A.8. The motion was initially granted, but later the favorable ruling was set aside on plaintiff's motion

The trial court instructed the jury that it had made a ruling prior to trial that the plaintiff was not convicted of a felony and that the statements made by plaintiff at the city council meeting were false. It also instructed the jury that they were permitted to draw an inference of malice from evidence of republication. During deliberations, the jury submitted a written question to the trial judge in which it inquired whether the defendant's admission on cross examination that he still believed plaintiff was a felon could be considered a republication. In response to this question, the trial judge instructed the jury that all of the evidence which had not been stricken could be considered by the jury for all purposes in accordance with the instructions previously given them

The jury returned a verdict in favor of the plaintiff, and the defendant appealed on a number of grounds.

HOLDING:

Reversed The trial court should have instructed the jury that it could not regard the defendant's admission on cross examination as republication Statements made in open court which are reasonably pertinent to the issues involved in the litigation are absolutely privileged. Privileged communications may not be used to prove malice in making a qualifiedly privileged communication. The defendant's admission on cross examination was reasonably perti-

nent to the issues and therefore could not be considered a republication.

Ihe trial court erred in excluding from evidence the portion of plaintiff's criminal record which referred to a charge of attempted rape as the basis for his parole revocation. Although this information was prejudicial, it was highly probative as to the defendant's belief in the truth of his statements, and hence was relevant to the issue of malice. Since defendant claimed to have obtained the defamatory information concerning plaintiff from state criminal records, the records should have been introduced and defendant given the opportunity to explain how he interpreted them.

It was not error for the trial judge to set aside defendant's motion to bring in the City of Des Moines as a third party defendant. Chapter 613A of the Code of Iowa does not abolish the right of an injured party to sue a municipal employee for his own wrongful act. Iowa Rules of Civil Procedure 33b and 34a require the court to grant leave to bring in a third party only if the third party is indispensible or a real party in interest. In all other cases, the trial court is granted considerable discretion in deciding whether third parties can be brought in. In view of the defendant's nine-month delay in attempting to bring in the City of Des Moines, after discovery was well underway, the trial court did not abuse its discretion in overruling defendant's motion.

Ihe trial judge erred in instructing the jury that the falsity of the defendant's statements during the council meeting was established. The trial judge's instruction was based upon a prior finding by another judge that the statements were slanderous per se. However, such finding does not establish that the statements were actionable in and of themselves without proof of falsity or damage. Ihe defendant might still have escaped liability by proving the statements were true. Nevertheless, the instruction does not constitute reversible error because the defendant failed to put the defense of truth in issue.

DAN DUGAN IRANSPORI COMPANY V. WORIH COUNIY, EI AL., 243 N.W.2d 655 (Iowa 1976).

FACIS

While driving a truck on Highway S-28 in Worth County, plaintiff was detoured to bypass construction work. As he was crossing an unmarked bridge on the Worth County detour road, the bridge collapsed, resulting in injuries to him. Plaintiff complied with the notice of claim requirements of §613A.5 and subsequently filed suit against Worth County, the Worth County Board of Supervisors, and the State of Iowa. Worth County filed a motion to dismiss on the ground that plaintiffs had "failed to file a proper claim as

required by law". Ihis motion was sustained by the trial court, which held that compliance with §331.21, requiring the filing of a notice of claim with the county auditor, was a condition precedent to suit against the county. Plaintiff appealed.

HOLDING:

Reversed. Ancient decisions of this court held compliance with §331.21 a condition precedent to tort suit against the county. However, after these cases were decided, the tort liability of counties for personal injuries in connection with negligent maintenance of county facilities was abrogated. Thereafter, §331.21 had no further function in processing court claims. With the adoption of Chapter 613A in 1967, a new tort liability of counties was created. We hold that §331.21 was impliedly repealed by the enactment of Chapter 613A insofar as its application to tort claims is concerned. The functions of Chapter 613A and §331.21 are identical. Ihus there would be a complete duplication in purpose for the two statutes if both were applied to tort claims. Where, as here, subsequent legislation comprehensively and specifically treats a matter included in prior general legislation, and thereby results in ambiguity or redundancy, the prior legislation is deemed repealed.

EHLINGER V. SIAIE, 237 N.W.2d 784 (Iowa 1976).

FACIS

Automobile passenger was rendered quadriplegic when his vehicle encountered water which had accumulated on a state highway allegedly as a result of State's failure to repair a frost heave. Trial to the court resulted in a verdict for the plaintiff and both parties appealed. Defendant's most important assertion on appeal was that its duty to repair the frost heave was obviated by its placing a "bump" sign in the vicinity of the heave.

Plaintiffs' appeal was on the issue of inadequacy of damages. Plaintiff contended that the trial court's award of $638,000 was inadequate because the uncontradicted testimony of plaintiff's expert economists established that plaintiff was entitled to a greater award. In this connection, plaintiff complained because the trial court took into account testimony that plaintiff would not live out his normal life expectancy in computing loss of future earnings.

HOLDING:

Affirmed. Ihe posting of a bump sign in the vicinity of the frost heave did not excuse the State's duty to repair. It is the rule in Iowa that a mere warning is not ipso facto sufficient to eliminate a duty to repair.

Ihe court's award of damages was also supported by

the evidence. The evidence showed that plaintiff had just graduated from high school in the bottom quarter of his class, had never had regular employment, had no plans to go to college, and spent most of his weekends in drinking bouts with friends. There is nothing to indicate that, prior to his injury, plaintiff would ever achieve even median earnings at any point during his lifetime. The court was not bound to follow the economist's expert testimony in this regard.

Trial court could have properly concluded that because of his severe injuries, plaintiff would not live out his normal life expectancy. Iowa follows the minority rule that shortened life expectancy caused by injury may be used to reduce damages when determining loss of earning capacity Of course, a shortened life expectancy may also be considered while determining future pain, suffering, nursing and medical expense.

FARMERS COOPERATIVE ELEVATOR, INC. V. STATE BANK, 236 N.W.2d 674 (Iowa 1975).

FACTS

Bank held six of Elevator's notes with unpaid balances totalling $272,000. The greater amount of this debt was short term. The Bank's legal limit of lending to a customer was $300,000.

Representatives of Elevator met with Bank to attempt to convince Bank to convert some of Elevator's short-term debt to long-term debt. At this meeting it was revealed that Elevator had had a $22,000 operating loss the previous fiscal year, and was overdrawn in its account with the bank in the amount of $35,000. It was also short $50,000 in operating funds. Bank refused to increase the amount of long-term debt and advised Elevator to seek other financing. Bank was later advised that another lender had refused further financing of Elevator.

Bank subsequently determined that Elevator had substantially less company-owned grain on hand than Bank had previously believed This grain was the Bank's primary security.

Bank demanded and received warehouse receipts on all company-owned grain. Two days later, Elevator closed "for the holiday and finances". As a result of this closing, and previous occurrences, Bank decided to set off Elevator's checking account balances against its notes Consequently, checks for some $64,000 drawn on Elevator's account were returned to the payees marked "not sufficient funds".

In response to a request from Bank, the Commerce Commission inspected the Elevator. Small shortages of grain

were discovered. The Commission chairman requested Bank to return to the Elevator some of the warehouse receipts it had received so that Elevator would have sufficient grain to make up grain deficits on its books. Bank refused. As a result, the Commission suspended the Elevator's license to warehouse grain.

Elevator then sued the Bank for wrongful dishonor and tortious interference with its business. Following trial, the trial court entered judgment notwithstanding the verdict and Elevator appealed.

HOLDING:

Affirmed. The trial court did not err in granting judgment notwithstanding the verdict. A bank may set off a general deposit against a depositor's matured debt. Even though Elevator's notes had not matured when Bank made the setoff, the Elevator was in default under terms of the security agreement, and therefore Bank was entitled to accelerate and declare all of Elevator's debts to be due and payable. The record left no doubt that the Bank believed itself insecure. The only question was whether this belief was in good faith within the meaning of §554.1208 of the Uniform Commercial Code. The Elevator failed to produce substantial evidence that the Bank was not acting in good faith.

Interference with prospective business advantage is a recognized tort in Iowa. In cases of interference with existing contracts, a purpose to injure or destroy is not essential. The situation is different in cases such as the present one, involving interference with prospective advantage. In such cases, the plaintiff must prove that the defendant acted with a purpose to injure and destroy the plaintiff's business. Elevator did not introduce substantial evidence of a purpose on the part of the Bank to injure or destroy the Elevator. The evidence overwhelmingly shows that the Bank acted for its "own purposes" in protecting its security.

FLEXSIEEL INDUSIRIES, INC. V. MORBERN INDUSIRIES, LID., 239 N.W.2d 593 (Iowa 1976).

FACIS

Plaintiff furniture manufacturer brought a products liability action against its supplier of vinyl coated fabrics for damages. Defendant failed to appear and default was entered. Defendant moved to set aside the default.

By affidavit filed in conjunction with the motion to set aside default, defendant's president, Thompson, maintained that he received the original notice and petition two days after it was mailed to him following service on the Secretary of State of the State of Iowa, and that on the

same day he delivered copies to Carr, one of the company's local insurance representatives. Thompson also stated he notified Whittaker Corporation, a parent company of defendant. These actions were taken to enable defendant's insurer, Pacific Indemnity Group, to investigate the matter.

By affidavit, a claims supervisor for Pacific Indemnity disclosed that he notified the lawfirm which was to represent the insurance company's interests on February 11, 1974. He informed the attorneys that service on the defendant had been attained on December 18, 1973, on the understanding that the 60 day period for appearance was tolled on that date rather than on December 11, when the notice was filed with the Secretary of State. When counsel received suit papers, they realized the mistake. However, a default had been entered the day before. The trial court overruled the motion to set aside default, and defendant was granted leave to file an interlocutory appeal.

HOLDING:

Reversed. In view of Thompson's diligence, it is clear that the defendant corporation did not ignore the notice of suit or neglect to give attention to this suit. Any failure to timely appear and defend was not the defendant's but due to a mistake of defendant's liability insurance carrier as to the date the appearance was due.

However, plaintiff maintains that the negligence of the insurance carrier is imputable to the insured. Cases from other jurisdictions conflict on the imputability of the carrier's negligence. We believe that the better rule is that the insurer's mistake as to the appearance date cannot be imputed to the insured under the circumstances here. The record discloses that the insured acted with reasonable promptness, and we will not impute negligence on such facts.

The trial court also based its decision partially on the fact that no meritorious defense had been pleaded or proved. Under Rule 236, the defendant is required at least to assert a good faith defense to plaintiff's cause of action, which means defendant must make at least a prima facie showing of a meritorious defense. However, this principle does not require allegation of a defense which will prevail at trial. The specific question presented here is whether a general denial in a pleading constitutes a prima facie showing of a meritorious defense. Whether a meritorious defense has been shown should be determined on a case-by-case basis, with an awareness of the policies behind default judgment. (The court discussed a New Mexico case, Springer Corp. v. Herrera, where, on similar facts, default was set aside.)

> "At the forefront (here) are several factors rendering Springer particularly apposite to the case at hand. First, Springer involved a reversal of the trial court's findings. Second, both cases

involve mainly general denials, although in Springer there was one affirmative statement. Third, both cases involve tremendous amounts of money. Fourth, the defendants were diligent in attempting to remedy default-thus plaintiff was not substantially prejudiced by the delay. Fifth, and perhaps most momentous, Springer worked to set aside a default judgment. Ihus, that case necessarily applied tougher standards than are required of application by this court to set aside entry of default. There is no final judgment here and thus no interest in finality."

Under its general denial, defendant might refute proof of each essential of the plaintiff's cause of action. Defendant's general denial put in issue the existence of each and every element of plaintiff's recovery. This constituted a prima facie showing of a meritorious defense.

IN IHE MAIIER OF IHE CIIAIION OF AIIORNEY C. A. FRERICHS, 238 N.W.2d 764 (Iowa 1976).

FACIS

In a petition to the Iowa Supreme Court for rehearing of a criminal appeal, respondent expressed his belief that the Court had refused to address a constitutional question he urged was necessary to fully consider the appeal. He charged the Court with "willfully avoiding" certain constitutional questions raised in three consecutive cases, thus violating the constitutional rights of his clients. The Supreme Court commenced an original disciplinary proceeding against the respondent.

HOLDING:

Respondent's assertions amounted to allegations of the commission of public offenses, in violation of DR8-102b. It would be an indictable misdemeanor for any judge willfully and maliciously to oppress any person under pretense of judicial capacity. We find respondent's assertions unprofessional because they attribute to this Court sinister, deceitful and unlawful motives and purposes. (Ihe court rejected respondent's contention that his remarks were constitutionally protected speech, that the disciplinary rules were unconstitutionally vague, and that the proceedings themselves were unconstitutional because the court was sitting in judgment on its own cause. Ihe court admonished respondent, but accepted respondent's assurances that no disrespect was intended, and did not order reprimand, censure, suspension or other discipline.)

GOLDEN V. SPRINGER, 238 N.W.2d 314 (Iowa 1976).

FACTS

Motorist brought action against truck driver for damages arising out of a collision in the motorist's lane of travel on a city street. The evidence was in conflict, but it was clear that the accident occurred after plaintiff driver had begun a left turn across traffic. At some point after he had crossed the center line of the street, plaintiff observed the approach of the truck driver, and returned to his own lane. At the same time, however, the truck driver observed plaintiff's vehicle and attempted to avoid collision by moving into plaintiff's lane. Collission ensued.

Following the close of the evidence, plaintiff requested a jury instruction to the effect that if plaintiff's automobile was in a place where it had a lawful right to be at the time the accident occurred, then negligence on the part of plaintiff prior to reaching such place could not be a proximate cause of the collision and the negligence could not contribute to plaintiff's injuries or damages. The trial court refused to give this instruction. The trial court also refused to give an instruction making the doctrine of sudden emergency applicable to the plaintiffs. It did, however, give a sudden emergency instruction as to the defendants.

Following jury verdict for defendants, plaintiffs appealed.

HOLDING:

Affirmed. The trial court properly refused plaintiff's requested instruction on negligence in reaching the place of the collision. Persons operating motor vehicles on the highway must keep to the right of the center at all times when possible to do so. This rule is not limited to the exact point of collision, but embraces the entire course of departure from, and return to, the right hand side. If the rule urged by plaintiff was adopted, the jury would be required to disregard the fact that a plaintiff vehicle-driver had been proceding in his left or wrong lane of travel in the face of oncoming traffic, if at any prior point the offending vehicle returned to its proper lane of travel. Carried to its logical conclusion, this theory would require the trial court to give the requested instruction in utter disregard of the space separating the vehicles or the interval of time between the return maneuver and the impact. We are not persuaded that this is the correct rule of law.

The court was correct in refusing to give an instruction which made the doctrine of sudden emergency available to the plaintiffs. Plaintiffs at no point have stated in what manner the doctrine was applicable to them.

The trial court properly instructed the jury on

the applicability of the sudden emergency doctrine to the defendants. This court's definition of emergency has been variously stated as: 1) an unforeseen combination of circumstances which calls for immediate action; 2) a perplexing contingency or complication of circumstances; 3) a sudden or unexpected occasion for action; exigency; pressing necessity. The evidence is clear that plaintiff's car proceeded, to some extent, over the center line. Not feeling there was sufficient room for the truck to pass, the driver swerved left into the car's previous lane as the car did the same. The collision ensued. This constituted substantial evidence from which the jury could have found the driver's crossing of the center line was excused by the plaintiff's creation of an emergency not of the truck driver's own making.

KITCHEN V. TIME INSURANCE CO., 232 N.W.2d 863 (Iowa 1975).

FACTS

The defendant insurance company issued a group insurance policy to plaintiff. The policy insured against expense incurred as a result of "accidental bodily injury, sickness or pregnancy." After the policy became effective, plaintiff's wife, a chronic alcoholic, was hospitalized for treatment of alcoholism.

The defendant denied plaintiff's claim for the expense of his wife's treatment on the ground that alcoholism was not a sickness. Plaintiff sued and moved for adjudication of law points under I.R.C.P. 105.

HOLDING:

Plaintiff is entitled to insurance benefits. Although the courts have traditionally been divided, more and more recognize the view that chronic alcoholism is a disease. Since the term "sickness" is not defined in the policy, it should be given a broad and general connotation. Accordingly, the court will follow the general view that alcoholism is a sickness.

LAING V. STATE FARM FIRE & CASUALTY COMPANY, 236 N.W.2d 317 (Iowa 1975).

FACTS

Administrator of decedent's estate brought declaratory judgment action against defendant State Farm seeking a determination that decedent was insured by State Farm at his death. The evidence showed that the administrator had applied for auto insurance with State Farm in her husband's name. State Farm notified its local agent that insurance would issue from State Farm's high risk company. The agent notified administrator of the approval

but quoted the low-risk rate to administrator.

The policy was issued and sent to agent. He went to the Laing home with the policy and a premium statement for an additional $79.80 to cover the high risk premium.

During trial, State Farm sought to elicit from its agent a conversation between the agent and decedent. Plaintiff objected on the basis that such testimony was precluded by the Dead Man's Statute, §622.4. On offer of proof, agent testified that when decedent learned he had been insured in the high risk company he became very enraged, told the agent to send the policy back and that he wanted nothing more to do with it.

When agent returned to his office he wrote to the company advising them that the insured wanted it cancelled. The company sent an acknowledgement of cancellation to decedent, indicating the effective cancellation date as August 28, 1971. On September 3, 1971 decedent was killed in an auto accident. The trial court held for the administrator, and defendant insurance company appealed. The question before the court was whether agent's testimony was properly excluded under the Dead Man's Statute.

HOLDING:

Reversed. The testimony should have been admitted. The interest which disqualifies a witness under the Dead Man's Statute must be present, certain and vested, and not uncertain, remote or contingent. The test of interest is whether the witness will gain or lose by direct operation of the judgment or whether the record will be legal evidence for or against him in some other action. The general rule is that an agent of a party is not automatically disqualified from testifying to a communication with a person since deceased in an action against the administrator of the estate.

Here the agent had no interest beyond that of any other agent who could be expected to have a general desire to see his principal's cause advanced. This was insufficient to render the agent an incompetent witness.

LYNCH V. BOGENRIEF, 237 N.W.2d 793 (Iowa 1976).

FACTS AND HOLDING:

Administrator sued to require the Board of Fire Trustees to pay accumulated contributions to the deceased fireman's estate under Iowa statute providing for payment of such contributions in case of non-employment related death. The divorced wife of the fireman, who was receiving alimony at his death, and who was decedent's named beneficiary, was made a party. The Supreme Court held that under the statute, the Board of Trustees did not have discretion to pay to

fireman's estate rather than to designated beneficiary, that the divorced wife receiving alimony had an insurable interest in the deceased, and that she was entitled to receive the accumulated contributions.

McCLURE V. EMPLOYERS MUIUAL CASUALIY COMPANY, 238 N.W.2d 321 (Iowa 1976).

FACIS

Decedent was killed while riding in his employer's automobile, in a collision with an uninsured motorist's vehicle. His dependent widow, as such, received workman's compensation benefits of approximately $10,000. Ihe widow was appointed administrator of decedent's estate. In a separate action by her against the uninsured motorist, the district court adjudged damages to the decedent's estate to be $30,000.

Ihe automobile in which decedent was riding was insured by defendant Employers Mutual Casualty Company, which provided uninsured motorist coverage of up to $10,000. In addition, decedent was a named insured under a policy on his own car issued by Motor Club of Iowa Insurance Company.

Both of the policies contained "other insurance" clauses. Employers Mutual's other insurance clause was as follows:

> "With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under part iv (uninsured motorist coverage) shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.
>
> Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance."

Motor Club's other insurance clause was as follows:

"With respect to bodily injury to an insured while occupying an automobile not owned by the named insured the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this Part exceeds the sum of the applicable limits of liability of all such other insurance."

"With respect to bodily injury to an insured while occupying or through being struck by an uninsured automobile, if such insured is a named insured under other similar insurance available to him, then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable under this part for a greater proportion of the applicable limit of liability of this part then such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance."

"Subject to the foregoing paragraphs, if the insured has other similar insurance available to him against a loss covered by this Part, the company shall not be liable under this Part for a greater proportion of such loss than the applicable limit of liability hereunder bears to the total applicable limits of liability of all valid and collectible insurance against such loss."

In addition, both policies contained workmen's compensation clauses reducing payments under the clauses by any amounts paid under workmen's compensation law.

Plaintiff administrator sued both companies for $10,000, for a total of $20,000. The trial court dismissed on motion of defendants and plaintiff appealed.

HOLDING:

Code of Iowa §516A.1 provides:

"No automobile liability or motor vehicle liability insurance policy insuring against liability for bodily injury or death arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state ... unless coverage is provided in such policy ... for the protection of persons insured under such policy who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle .... Such coverage shall include limits for bodily injury or death at least equal to those stated in subsection 10 of Section 321A.1 of the Code ['$10,000-$20,000' coverage]. ..."

The majority of other jurisdictions holds that statutes similar to §516A.1 invalidate "other insurance" clauses like the ones involved here. The reason most frequently given is that since the statute requires every policy to contain uninsured motorist coverage, the legislature intended that the coverage could not be cut down or eliminated in any policy by a clause requiring reduction on account of other policies.

However, these decisions did not involve situations where the state had also adopted a provision similar to Code of Iowa (1975) §516A.2, which provides:

> "Nothing contained in this chapter shall be construed as requiring forms of coverage provided pursuant hereto, whether alone or in combination with similar coverage afforded under other automobile liability or motor vehicle liability policies, to afford limits in excess of those that would be afforded had the insured thereunder been involved in an accident with a motorist who was insured under a policy of liability insurance with the minimum limits for bodily injury or death prescribed in subsection 10 of section 321A.1 of the code [$10,000-$20,000]."
>
> "Such forms of coverage may include terms, exclusions, limitations, conditions and offsets which are designed to avoid duplication of insurance or other benefits."

Cases involving similar provisions have given effect to such statutes and have upheld anti-stacking clauses in policies.

Had the uninsured motorist here been insured in the minimum amount required by Iowa law, that is, $10,000, decedent's administrator would have been able to collect $10,000 from that motorist's insurance under Iowa's direct action statute. Therefore, Code of Iowa §516A.2 should be construed as allowing the uninsured motorist policy, in combination with similar policies, to provide the minimum limits of §321A.1(10), or $10,000-$20,000. The second sentence of §516A.2 buttresses this conclusion.

The second question presented is whether the pertinent paragraphs of one or both of the defendants' policies apply in the present circumstances so as to restrict the administrator's maximum recovery to $10,000. The first paragraph of Employers Mutual's policy does not apply, since it applies only where the insured is occupying an automobile not owned by the named insured. Under that policy decedent's employer was the named insured. Moreover, the paragraph applies only when the other insurance involved is "primary insurance." Decedent's policy on his own car, which was not involved in the accident, would not be "primary" insurance.

The second paragraph of Employers Mutual's other insurance clause is applicable only if there is "other

similar insurance available to [the insured] and applicable to the accident". Therefore, we must determine whether Motor Club's insurance is "available" and "applicable".

The first paragraph of Motor Club's other insurance clause requires that the injured person occupy an automobile not owned by the named insured (decedent). This requirement is met, and thus, under the remainder of that paragraph, Motor Club's insurance becomes excess insurance over any other similar insurance available to the decedent. To determine whether this paragraph comes into operation, therefore, we must know whether Employers Mutual's insurance is "available".

Thus the pro rata stipulation of Employers Mutual's policy collides with the excess stipulation of Motor Club's policy. The rule in Iowa is that the excess stipulation prevails in that the policy with such stipulation is not "other similar insurance" as to the pro rata stipulation. Accordingly, Motor Club's insurance is not available and applicable insurance as required by the second paragraph of Employers Mutual's other insurance clause. "That paragraph is therefore inapplicable. But Employers Mutual's insurance is available insurance within the first paragraph of Motor Club's other insurance clause. That paragraph is therefore applicable, and it restricts the administrator's maximum recovery to $10,000."

The workmen's compensation clause of the Employers Mutual policy would be invalid if it did not constitute "insurance or other benefits" under §516A.2. Cases from other jurisdictions are divided on this point. "We find the decisions more persuasive which hold that workmen's compensation cannot be deducted from uninsured motorist insurance in the absence of manifestation of legislative intent that it may." The legislative purpose of §516A.1 et seq. is to provide an uninsured motorist a right of recovery under the uninsured motorist provisions of his policy only up to the statutory required minimum. Accordingly, provisions in policies which operate to reduce uninsured motorist's coverage where workmen's compensation benefits are available are valid if they do not deny the statutory minimum payments to an insured. Therefore, the words "insurance or other benefits" in the second sentence of §516A.2 encompass workmen's compensation.

The next question is whether the facts of the present case bring it within the "duplication" phrase of the second sentence of §516A.2. Here, the workmen's compensation benefits were payable to the dependent widow. However, the uninsured motorist insurance was payable to the estate of the decedent. Although these persons are the same here, they are different legal entities. Accordingly, we hold that no "duplication" of insurance benefits exists, and that Employers Mutual's workmen's compensation clause cannot be applied. Uninsured motorist insurance of $10,000 remains payable to the administrator.

McDOWELL V. IOWN OF CLARKSVILLE, 241 N W.2d 904 (Iowa 1976).

FACTS

Plaintiff's decedent was a truck driver who died from hemorrhage following the rupture of a cerebral aneurysm when he was working as a member of the volunteer fire department of defendant Clarksville. Plaintiff instituted proceedings to recover workmen's compensation from Clarksville. During the compensation hearings, there was a substantial conflict in medical testimony on the question whether the rupture of the aneurysm was caused by the strain of the work which decedent was performing at the time. Following appeal to the Industrial Commission, the commissioner found that the rupture did not "arise out of" decedent's employment.

Plaintiff appealed to the district court, urging that the commissioner had applied an erroneous rule of law on the burden of proof. She also urged that the commissioner had failed to consider all of the evidence, based upon the fact that the commissioner's opinion mentioned testimony of a medical expert which disfavored plaintiff, but utterly failed to mention a subsequent favorable change in the expert's opinion.

Ihe district court found that the commissioner did apply an erroneous rule of law as to the burden of proof, and also found that the commissioner had ignored the medical expert's testimony. It disposed of the case by finding facts for claimant and awarding compensation. Employer appealed.

HOLDING:

Reversed. Ihe commissioner did not apply an improper rule of law as to burden of proof. It was the claimant's duty to prove by a preponderance of the evidence that her decedent's injury arose out of the employment. Once a prima facie case on this issue was established, the burden was then upon the employer to go forward with the evidence and overcome or rebut the case made by the claimant. However, the burden of persuasion remains with the claimant. Here, claimant erroneously confuses the burden of persuasion with the burden of going forward. Ihe Industrial Commissioner properly held that claimant had the burden of persuasion on the issue of causation, and that the burden did not shift. Ihe commissioner properly required the employer to go forward once claimant had established a prima facie case.

Ihe record indicates to us that the commissioner may well have been unaware of the medical expert's subsequent strong testimony in favor of plaintiff. Any reference to such testimony is conspicuously absent from the commissioner's opinion. Therefore, the trial court was well founded in concluding that the commissioner failed to consider the subsequent testimony.

However, it was improper for the district court to

make a disposition of the case by finding facts for the claimant and awarding compensation. The proper disposition was to return the case to the commissioner for decision on the record already made.

MAIER V. ILLINOIS CENIRAL RAILROAD COMPANY, 234 N.W.2d 388 (Iowa 1975).

FACIS

Plaintiff's decedent was the driver of a car which collided with a train at a railroad crossing. Plaintiff brought this damage action against the railroad. The evidence showed that the only control located at the crossing was a stop sign. Because of the presence of a grain elevator in the vicinity of the crossing, it was impossible for a motorist to see trains approaching from beyond the elevator when stopped on the north side of the tracks. Ihe case was submitted to the jury on the theory that the railroad was negligent in failing to place adequate warning devices at the railroad intersection. Following a jury verdict in favor of the plaintiff, the defendant appealed on a number of issues.

HOLDING:

Affirmed. Statutory requirements for warnings at railroad crossings are minimum only; conditions may exist which require more. Ihe general rule as to whether the condition of a crossing, with its surroundings, is such as to call for additional warning devices, or flagmen, is a question for the jury. Under §321.324, plaintiff's decedent was required to stop in obedience to the stop sign placed at the railroad tracks within 50 feet but not less than 10 feet from the nearest track. Ihe evidence showed that a motorist could fully comply with this statutory requirement and while stopped be unable to see trains approaching from the west. Therefore, the jury could have concluded that some additional warning was necessary.

Plaintiff was not contributorily negligent as a matter of law. Where there is substantial evidence that the view of the track is obstructed so as to render it impossible or difficult to learn of the approach of a train, the question of contributory negligence is generally for the jury. A motorist approaching a track has a continuing duty of lookout. Here, however, the jury could find that after looking to his left, plaintiff started to look to his right and was unable to complete his observation only because of the excessive speed of defendant's train. The jury could have been impressed by the evidence that no bell was sounded and that the whistle sounded too late to warn the plaintiff. Only in the rare and exceptional case does a party having the burden of proving an issue, such as contributory negligence, show it as a matter of law.

Defendant's objection that the effect of the stop sign on the relative rights of the railroad and the motorist at a railroad crossing was not adequately explained to the jury is not well taken. In one instruction, the court instructed on the relative rights and obligations of a railroad company and traveller, explaining that the rights are reciprocal and that the railroad company has the right of way. In another instruction the effect of the placement of the stop sign was explained. It was not error for the trial court to refuse to tailor each instruction so as to include all theories of negligence. The jury was directed to read and consider all instructions together.

The photographs offered into evidence were properly admitted. These photographs were pictures of three passengers who were occupying the automobile identical to the one involved in the accident and depicting the driver's view of the crossing in the direction from which the train had come. The foundation for these photographs was properly laid. The plaintiff testified the exhibits reasonably and accurately portrayed the view of the scene as he looked out of his car. Earlier testimony established that he was familiar with the crossing. The fact that the automobile used was one year newer and that the clothing of the parties may have been different goes to the weight of the photographs and not their admissibility.

During the jury's deliberations, a discussion was held between the trial judge and the jury foreman relating to whether the jury would be able to reach a verdict. The trial court took great pains to explain his neutrality as to the jury deliberations and stated that he was not to be told whether agreement was likely or even possible. There was nothing objectionable in the content of the communications between the trial court and the jury foreman. There was, however, something objectionable in the fact they took place. Generally speaking, the fact of such communications mandates reversal. It is no answer to show a record which discloses the judge's remarks to the foreman careful and innocent in their content. However, the defendant still has the burden to preserve the error by raising the matter in the district court. The defendant has wholly failed to make any record justifying or explaining its failure to complain of the communication at the time of trial. An affidavit by plaintiff's counsel recited that trial counsel for all parties were advised of the meeting between the judge and the foreman before it took place. According to this affidavit all counsel were invited to attend. Defendant does not dispute this. Defendant was required to complain of the communication in its motion for new trial or explain its failure to do so. Since it did not, the error has not been preserved and will not be considered on appeal.

MEYER V. NOLIGER, 241 N.W.2d 911 (Iowa 1976).

FACTS

Action was brought against a mortician to recover

damages for intentional infliction of mental distress allegedly suffered by plaintiff as a result of the manner in which the mortician dealt with the body of plaintiff's deceased father and conducted father's burial services. Plaintiff's petition was in two divisions. In Division I, defendant based his right to recovery on the facts that defendant advised plaintiff and his family that the deceased's wife had died subsequent to the deceased in an automobile accident, and that the statement was untrue; that the defendant advised plaintiff that a mere more expensive sealer casket had to be purchased due to the objectionable odor of the deceased; that the defendant advised plaintiff that he and his family could not view the body of the deceased because of the gruesome condition and noxious odor of the body when in fact the body was not in a gruesome condition and did not have a noxious odor; and, that plaintiff was delayed in joining the funeral procession to the cemetery and that he advised defendant to delay the procession but defendant did not do so, resulting in plaintiff's inability to view the interment of plaintiff's father. Division II of plaintiff's petition sought recovery on the basis of breach of contract, causing mental anguish, severe disturbance of mental and emotional tranquility and heart attack.

Following pre-trial discovery, defendant moved for summary judgment, and the motion was granted. Plaintiff appealed.

HOLDING:

Reversed. The following elements are necessary to the presentation of a prima facie case for the tort of intentional infliction of severe emotional distress: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Where a plaintiff demonstrates the existence of these elements, he may recover for physical injuries or illness resulting from the severe emotional distress, as well as for the distress itself. "Outrageous" conduct may broadly be defined as "conduct exceeding all bounds usually tolerated by decent society." The requirement that the conduct be "outrageous" can be understood by reference to the policies underlying the action. The second element of the action requires the defendant's intent to cause or reckless disregard of the probability of causing emotional distress. Intent may be found where the actor desires to inflict severe emotional distress, and also where he acts knowing that such distress is certain, or is substantially certain to result from his conduct. Recklessness may be found where plaintiff proves that defendant had reason to know that his conduct will create an unreasonable risk of emotional harm to another and that the risk of such harm was substantially greater than that which was necessary to make defendant's conduct negligent.

In view of the foregoing, we find that the allegations of the petition did generate genuine issues of material fact which were supported by matters disclosed during pre-trial discovery. The trial court was in error in overruling Division I of plaintiff's petition.

As to division II, the issue is whether to allow an action for recovery of damages for emotional distress which arises out of a breach of contract to perform funeral services. Damages resulting from breach of contract are recoverable only for those injuries which may reasonably be considered as arising naturally from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time of contracting. This court has previously declined to allow recovery of damages for mental anguish arising from breach of commercial contracts. However, the court has also noted that recovery could be allowed in cases growing out of contract rights and relations where the breach of contract also constitutes a tort. Here, the contract was not merely a contract concerned with trade or commerce, but with matters which if not properly performed would quite obviously and foreseeably result in mental distress. Accordingly, we hold that recovery of damages may be had in appropriate cases for mental distress, absent physical trauma, arising out of the breach of a contract to perform funeral services. It is obvious that the defendant funeral director impliedly agreed, by undertaking to perform funeral services, that his contract obligations would be performed in a workmanlike manner. There was a genuine issue of material fact as to defendant's breach of contract and therefore the trial court erred in entering summary judgment against plaintiff on Division II of plaintiff's petition.

The trial court was also in error in holding, as a basis for summary judgment, that exemplary damages could not be recovered in this action. Exemplary damages may be awarded where defendant acts maliciously, but malice may be inferred where defendant's act is illegal or improper; where the nature of the illegal act is such as to negative any inference of feeling toward the person injured, and is in fact consistent with the complete indifference on the part of defendant. We are unable to say as a matter of law that plaintiff raised no triable issue of fact with respect to exemplary damages.

MILLS V. LYON, 240 N.W.2d 189 (Iowa 1976).

FACTS

Plaintiff, a United States marshall, was a passenger in his own automobile, which was being driven by a deputy marshall. Plaintiff was injured in a collision with an automobile driven by defendants. At the time of the accident, plaintiff and the deputy marshall-driver were

engaged in the performance of their official duties.

Plaintiff filed suit against defendants for personal injury damages. The defendants filed counterclaims for personal injuries, alleging specific acts of negligence by the deputy marshall-driver for which plaintiff would be liable as vehicle owner. The United States attorney removed the counterclaims to the United States District Court as a matter of right. Defendants then filed an answer to plaintiff's petition, containing a general denial and raising no other issues or affirmative defenses. Subsequently, defendants filed an amendment to their answer alleging that plaintiff and the deputy marshall-driver were engaged in a joint venture and therefore the driver's negligent acts could be imputed to plaintiff. The amended answer also alleged that the deputy marshall-driver's acts of negligence were the sole proximate cause of the collision. Simultaneously, defendants filed a jury demand on the issues generated by the amendment, and a separate demand for jury trial on all issues in the litigation. Plaintiff resisted. After hearing, the trial court denied a jury trial on the ground that "the amendment to the answer does not raise such new issue as was not contemplated by the prior pleadings and that the demand for jury trial of all the issues or the issues on the amendment was not timely filed." Trial to the court resulted in a verdict in favor of the plaintiff. Defendants appealed the refusal of the trial court to grant a jury trial.

HOLDING:

Reversed. The decisions interpreting I.R.C.P. 177 make it plain that a timely jury demand limited to new issues raised by a proper amendment should be granted. The trial court was correct that the "sole proximate cause" defense alleged in the amended answer did not create new jury issues. The defendant could have raised the issue of sole proximate cause under the general denial initially pled.

The trial court was incorrect, however, as to the portion of the amended answer alleging joint venture. The defendants' counterclaims had been removed to Federal court, and the state court retained no jurisdiction over the issues raised therein. Therefore, any allegations of negligence imputable to plaintiff were no longer in issue in state court. Since the driver's negligence is not ordinarily imputable to the passenger, the defendant had no basis for the defense of contributory negligence until she asserted that the plaintiff and his driver were engaged in a joint venture. This added a new issue to the case, and a jury trial should have been granted as to all issues involved in the joint venture defense. While we need not reach the question in this case, a jury trial should be granted where a new legal theory has been added even though no new facts are alleged.

(The court remanded with instructions to the trial

court to submit the issues of joint venture, the driver's negligence, and proximate cause vis a vis deputy marshall-driver's negligence to the jury. The court instructed the trial court that if the jury found for the defendant on those issues, the trial court should set aside the previous judgment and enter judgment for defendant. If the jury found for plaintiff, the previous judgment was to stand.)

MYERS V. SELLERS, 234 N.W.2d 152 (Iowa 1975).

FACTS

The Department of Public Safety appealed from an order of the district court vacating a driver's license revocation. The appendix to the brief filed on behalf of the Department failed to comply with the requirements of I.R.C.P. 344.1(a)(1), which directs that the appendix must contain the relevant docket entries in the proceedings below and any relevant portions of the pleadings, transcript instructions, findings, conclusions and opinions. It also failed to comply with subparagraph d of I.R.C.P. 344.1 in that the docket entries were not set out following the list of contents, and also failed to comply in that the transcript page number was not placed in brackets before matters in the appendix taken from the transcript. The requirements for the contents of the appellant's brief did not contain a statement of the issues presented for review which included a complete list of all cases and statutes referred to in the argument covering the point.

HOLDING:

Because of the failures to comply with the rules of the court prescribing the form of the brief, the appeal is dismissed.

PIEPER V. HARMEYER, 235 N.W.2d 122 (Iowa 1975).

FACTS

Defendant Deputy Sheriff received a report of a motor vehicle accident and travelled to the scene. He observed a dented automobile parked on one side of the roadway. He parked his own car opposite the injured vehicle and left his red emergency lights on. Two other vehicles arrived at the scene and parked behind the patrol car and the injured vehicle. Subsequently an automobile driven by another defendant approached the accident scene, and slowed down to pass between the vehicles stationed on both sides of the road. At the same time, defendant Harmeyer, driving a car owned by his grandfather, came over the crest of a hill in the vicinity of the accident scene. Plaintiff Pieper was a guest in this automobile. Upon seeing the four vehicles on either side of the road and the other car passing between

them, Harmeyer applied his brakes, skidded 280 feet downhill and struck two of the parked vehicles Plaintiff was severely injured.

By next friend, plaintiff sued her host, alleging recklessness and driving under the influence of liquor. She also sued the deputy sheriff for negligence in parking the patrol car and in failing to warn other drivers of the dangerous condition on the road ahead.

At the close of plaintiff's case, the trial court granted a directed verdict for the Harmeyers. Irial continued against the deputy sheriff and the owner of the patrol car. Verdict was returned for the defendants and plaintiffs appealed, asserting that there was sufficient evidence of recklessness for submission to the jury and that trial court erroneously instructed the jury that if it found that the deputy sheriff was operating an authorized emergency vehicle in response to an emergency call at the time of the accident, it could take this into account in determining whether the deputy had a special parking privilege at the time of the accident.

HOLDING:

Reversed. (Plaintiffs claimed that the Iowa Guest Statute was unconstitutional. This was not considered on appeal because they had failed to raise the claim at trial.)

Recklessness means more than negligence or want of ordinary care. The elements of recklessness are: (1) No care coupled with disregard for consequences, (2) defendant's knowledge, actual or chargeable, of danger and his proceeding without any heed of or concern for consequences, and (3) the consequences of the actions of the driver are such that the occurrence of injury is a probability rather than a possibility. Viewed in the light most favorable to the plaintiffs, the evidence showed that the host's speed upon approaching the hilltop could have been anywhere from 45 to 75 m.p.h. It also showed that he had consumed a little more than one can of beer less than two hours before the accident. Finally, it showed he was an unexperienced driver. Speed alone is not sufficient evidence to engender a jury question on recklessness, and there was no evidence that the defendant appeared intoxicated. His inexperience could be taken into account. We are satisfied that nothing in the factual situation may be said to have been so established in plaintiff's favor as to require jury submission.

However, the court's instruction as to the special parking privilege of the deputy sheriff was erroneous. A special privilege is created only where the emergency driver is actually operating his vehicle or driving it to the scene. It does not apply once the vehicle arrives at the scene. Therefore, the deputy sheriff was not entitled to any special privilege at the time and place in question. In fact, his parking his vehicle in violation of §321.354 would constitute negligence unless he was legally excused from

compliance.

Since this case is being remanded, further consideration of legal excuse related to the factual situation here is appropriate. Where the driver of a car is confronted by an emergency not of his own making, and by reason thereof he fails to obey a statute, he is legally excused from doing so. An instruction on legal excuse may be warranted under the facts of this case. Adoption of a contrary view could unduly discourage, if not prevent, often essential prompt medical or lifesaving services by doctors, peace officers or ambulance personnel.

> "Since an emergency is characteristically transitory it may be said to have ceased when, under all the facts and circumstances a reasonable time has elapsed within which to dispositively resolve all elements of the exigency prompting the negligent conduct sought to be legally excused (illustratively, stopping or parking a vehicle on a public highway). Here again, such issue is ordinarily determinable by the trier of fact."

PIICHER V. LAKES AMUSEMENI COMPANY, 236 N.W.2d 333 (Iowa 1975).

FACIS

Plaintiff brought this action on behalf of his daughter, who was injured while visiting defendant amusement park on a tour conducted by defendant bus service. A jury trial resulted in a verdict for defendants. Although the court's opinion does not say so, it appears that the verdict was less than unanimous. Plaintiffs appealed, challenging the constitutionality of I.R.C.P. 203(a), which allows non-unanimous jury verdicts after six hours of deliberation.

HOLDING:

Affirmed. Article I §9 of the Iowa Constitution provides that the right of trial by jury shall remain inviolate. Plaintiff's challenge is based upon Article I, §9 of the Iowa Constitution and not upon any provision in the Federal Constitution. Iowa has held on five prior occasions that a verdict by a jury of less than 12 is unconstitutional under Article I, §9, on the theory that the jury required by that section is the one required at common law.

In Apodaca v. Oregon, 406 U.S. 404, the United States Supreme Court held that unanimous jury verdicts were not required under a similar provision in the Federal Constitution. It is for the Iowa court to decide whether it will choose a similar reinterpretation of the Iowa provision. As stated in Apodaca, the essential feature of a jury obviously lies in the interposition between the accused and his accusor of the common-sense judgment of a group of

laymen. The requirement that the verdict be unanimous, however, does not materially contribute to the exercise of common sense judgment. Requiring unanimous verdicts would obviously produce hung juries in some situations where non-unanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the state who prosecute and judge him is equally served. Accordingly, we reject and overrule our prior holdings that the jury under Article I, §9 of the Iowa Constitution is necessarily the jury recognized at common law. Article I, §9 protects the right to a jury trial and not any particular feature thereof.

SARVOLD V. DODSON, 237 N.W.2d 447 (Iowa 1976).

FACTS

Plaintiff filed suit against defendant police officer for abuse of process. Plaintiff's petition stated that plaintiff had conveyed to public officials information which he felt would be grounds for the discharge of defendant from his job as a police officer. The petition alleged that thereafter the defendant filed an information in the Clay County District Court which resulted in plaintiff's confinement at the state mental institute at Cherokee. The gravamen of plaintiff's petition was that the defendant signed the information not for the sole purpose of obtaining treatment for plaintiff but in order to prevent plaintiff from pursuing his efforts to have the defendant discharged or disciplined. The trial court sustained defendant's motion to dismiss on the ground that the plaintiff had failed to allege absence of probable cause and a termination of the commitment proceedings favorable to the plaintiff. Plaintiff appealed.

HOLDING:

Reversed. (The court discussed prior cases in which it had required absence of probable cause as an element of abuse of process. It decided, however, that it would henceforth follow the Restatement view, which does not require absence of probable cause or favorable termination. It overruled prior cases conflicting with the Restatement rule:

> "One who uses illegal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby. ... The gravamen of the misconduct for which ... liability .... is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any

purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was improperly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them. . . . The fundamental distinction between malicious use and malicious abuse of process is that the first is an employment of process for its ostensible purpose, although without probable cause, whereas the second is employment of process for a purpose not contemplated by law. Another distinction is that, in case of malicious use, it must be shown that the action in which the process was used has terminated favorably to plaintiff in the suit at bar, whereas this is unnecessary in an action for malicious abuse.")

SEEGER V. JUNCKER, 236 N W.2d 372 (Iowa 1975).

FACTS

Parttime employee was killed when he fell while working on a television tower. The dependents of the employee brought an action for workmen's compensation benefits for the employee's death.

It was agreed that the death arose out of and in the course of the employee's employment and that the dependents were entitled to payments under the Workmen's Compensation Act. The only disagreement was over the rate at which the payments were to be made. The defendants argued that §85.31(1) determined the extent of their liability That section provides:

> "1. When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of his injury, during their lifetime, compensation upon the basis of 66 2/3 per cent per week of the employee's average weekly earnings . . ."

The claimants argued that the award was to be made under the terms of §85.36(5) as follows:

> "In case of injured employees who earn either no wages or less than 300 times the usual daily wage or earnings of the adult day laborer in the same line of industry of that locality, the yearly wage shall be reckoned as 300 times the average daily local wages of the average wage earner in that particular kind or class of work . . ."

HOLDING:

Under prior decisions of the Court, §85.36(5) is the section under which benefits should be determined. The terms "injury" and "personal injury" as used in that section include death resulting from personal injury.

SHEARER V. PERRY COMMUNITY SCHOOL DISTRICT, 236 N.W.2d 688 (Iowa 1975).

FACTS

Plaintiff brought suit against Perry Community High School for injuries his minor received when a portion of the exercise machine minor was using struck him. The injury was immediately reported to the principal and assistant principal of the school. The following day, the incident was reported to the superintendent of the school district.

Two years later, suit was instituted. The defendant answered and filed a motion for summary judgment alleging that plaintiff had not complied with the notice requirements of §613A.5 of the 1971 Code of Iowa. In resisting the motion, plaintiff asserted that the school district had received actual notice of the injury through the school district. It was also argued that the time for bringing the action was extended by §614.8 of the Code, relating to injuries to minors, and alternatively argued that §613A.5 was unconstitutional. Summary judgment was granted in favor of the defendants and plaintiff appealed.

HOLDING:

Affirmed. §613A.5 is not arbitrary and capricious on its face. Rather it was enacted to protect the public interest in seeing prompt and thorough investigations of claims against the sovereign. Additionally, it was enacted to protect the public treasury from stale claims, permit prompt settlement of meritorious claims, avoid unnecessary litigation, facilitate planning of municipal budgets and insure that notice reaches the appropriate public officers, enabling such officers to remedy defects in municipal property before other persons are injured. The notice requirement is not so unreasonable as to render compliance almost impossible. Nor does §613A.5 violate the equal protection clause of Amendment 14 to the United States Constitution under this Court's prior holding in Lunday v. Vogelmann.

Importing actual knowledge to school officials cannot be construed as substantial compliance with the notice requirements of the statute. We are not prepared to say that verbal notification constitutes substantial compliance with a statute clearly and specifically requiring written notice.

Section 614.8, providing that minority of a claimant tolls the statute of limitations, is applicable by its very terms only to actions referred to in Chapter 614, Code of Iowa. There is nothing in §614.8 which provides for tolling of the notice of claim period because of the minority of a claimant seeking to maintain an action under Chapter 613A, and we must therefore hold the minority of plaintiff Kenneth L. Shearer, Jr. did not toll the operation of the statute.

SIMKINS V. CITY OF DAVENPORT, 232 N.W.2d 561 (Iowa 1975).

FACTS

Service station owner appealed from sheriff's jury's award of $49,000 for partial taking of service station property for highway construction. The service station was located on a major east-west thoroughfare in the City of Davenport. Davenport desired to acquire land abutting the street in order to widen it into a four-lane highway with median strips. Prior to trial the City filed a motion in limine to preclude introduction of evidence relating to the proposed construction of median strips, on the ground that construction of strips was a reasonable exercise of police power and not a basis for compensible damage. The trial court overruled the motion. During trial, plaintiff testified over objection as to the physical effect the medians would have upon the ingress and egress of vehicles at his station. This testimony was supported by testimony of other witnesses. The sheriff's jury awarded judgment of $105,000 and defendant appealed.

HOLDING:

Affirmed. Although installation of median strips for the purpose of regulating the flow of traffic is a valid exercise of police power, the action of a condemning authority in exercising that power must be proper and reasonable and must not amount to the taking of property without due process of law. Here, the evidence of the existence of the median strips was admissible, not as a substantive element of damages, but to show the effect of loss or impairment of access to the service station on the value of the service station after condemnation. This evidence was proper and relevant.

Assuming arguendo that prejudicial evidence concerning the property loss due to the construction of median strips was admitted, the court's instructions served to remove and thus render harmless any error in the admission of such evidence. The jury was told that the owner of property is not entitled to access to his property at any and all points between it and any highway; but that he is entitled only to reasonable and convenient access to his property; and, if there is substantial or material impairment or interference with the right of access, the abutting

owner is entitled to just compensation therefor. The court also told the jury that if it found by a preponderance of the evidence that a substantial or material impairment or interference would result to the rights of ingress and egress to plaintiffs' service station, this would be a factor in determining the value of the property after condemnation.

SMILEY V. IWIN CIIY BEEF COMPANY, 236 N.W.2d 356 (Iowa 1975).

FACIS

Landlord filed suit to recover back rent and defendant counterclaimed. Landlord served eight interrogatories on defendant. Under I.R.C.P. 123 in effect at the time, defendant had 14 days to file answers or object. Ihirteen days after the interrogatories were filed, defendant requested and was granted a 30-day extension of time. Defendant failed to meet the deadline set by the court and did not request a further extension. Four days after the time had expired, plaintiff moved for order striking defendant's pleadings, and for entry of default judgment against defendant under Rule 134. Before hearing on the motion was held, defendant filed answers to some of plaintiff's interrogatories. The trial court thereafter overruled plaintiff's motion on condition that defendant file answers to the remainder of plaintiff's interrogatories within 16 days. Defendant failed to comply with this order. On ex parte application of plaintiff, the trial court struck the defendant's counterclaim and entered default judgment in favor of the plaintiff. The defendant then moved to have the judgment set aside, alleging that the answers to interrogatories had been prepared and inadvertently mailed to counsel in another state. The trial court denied this motion and defendant appealed.

HOLDING:

Affirmed. Ihe court's ruling striking defendant's pleadings and entering default ex parte was not improper. The court had ruled that it would not enter default judgment on condition that defendant file timely answers to plaintiff's interrogatories. When defendant failed to file answers, the condition was not met and the court could have entered default without any action on the part of the plaintiff. The court's conditional order overruling the motion for default was ample notice to the defendant of the consequences of a failure to answer the interrogatories.

The drastic action of dismissal and default for failure to comply with Rule 134 should not be taken in the absence of willfulness, bad faith, or other fault. However, the facts in this case clearly indicate that from the beginning defendant was determined not to answer plaintiff's

interrogatories, acted in bad faith, and must be charged with flagrant disregard of the rules of discovery and the trial court's orders. Since the defendant was at fault, and the trial court did not abuse its discretion in dismissing the counterclaim and entering judgment for plaintiff.

The trial court did not err in refusing to set aside the default judgment. Under I.R.C.P. 236, the court is authorized to set aside defaults improperly granted due to mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Viewing the record in the light most favorable to the court's ruling it appears that the default was not due to mistake, inadvertence, surprise or neglect on the part of the defendant.

SPEED V. SIAIE, 240 N.W.2d 901 (Iowa 1976).

FACIS

Patient brought medical malpractice action against the state claiming that doctors at University Hospitals in Iowa City negligently cared for him and that their negligence resulted in his loss of sight. Plaintiff's theory of negligence was that the defendant doctor failed to employ recognized and appropriate tests or examinations to gather information necessary to prescribe the proper course of treatment for plaintiff's condition, an intracranial infection.

During trial, plaintiff's experts were asked a lengthy hypothetical question. On each occasion, the State objected on the ground that the experts were not qualified to render an opinion because they did not have sufficient knowledge of the standard of care applicable to physicians in the Iowa City community.

During cross examination of one of plaintiff's experts, Dr. Stutevill, defense counsel asked the doctor whether, in arriving at his answer to the hypothetical question, he had considered matters which were contained in certain depositions taken during pre-trial discovery. The doctor answered that he was not sure. On redirect examination, he stated that his answers to the hypothetical question were based on documents admitted in evidence and on the contents of the question itself. On re-cross examination, he stated that he was not sure whether the matters contained in the hypothetical questions were also contained in other depositions, but that his answer was based upon the contents of the hypothetical question and an exhibit already in evidence. Defendants moved to strike his answer to the hypothetical question and the trial court overruled the motion.

Defendants also objected to the hypothetical question asked of each of plaintiff's witnesses. One objection was that the hypothetical question invaded the province

of the trial court by asking whether the doctors who saw the plaintiff applied to his case the degree of knowledge, skill, care and attention ordinarily possessed and exercised by medical practitioners under like circumstances. The objection was overruled by the trial court.

A second objection to the hypothetical question was that it assumed facts not in evidence, since it assumed that during plaintiff's treatment, plaintiff's headache became more severe and that "it was like a man in his head beating with a hammer." Defendants asserted that there was no evidence that plaintiff told any of the doctors who treated him that his headache was throbbing or beating and that doctors cannot be held negligent for failure to act on the basis of a fact never revealed to them. The trial court overruled the objection.

A final objection raised to the hypothetical question was that it failed to note that the plaintiff was not feverish at one important point during the course of his treatment. This objection was overruled.

The court entered a verdict in favor of the plaintiff, and defendants appealed.

HOLDING:

Affirmed. (The Supreme Court discussed the sufficiency of the evidence at some length. It found that there was sufficient evidence to show that the defendant doctor negligently failed to employ recognized and appropriate tests or examinations to gather information necessary to prescribe treatment of plaintiff's condition; that proper examination and tests would probably have disclosed an intracranial infection, and that such disclosure would probably have led to prompt administration of large doses of antibiotics which would have prevented plaintiff's blindness.)

The issue which initially confronts the court is whether the "locality rule" applies in medical malpractice in Iowa. This court has incorporated the locality rule in a general statement of the legal standard of medical care in Sinkey v. Surgical Associates, where we said:

> "The patient is entitled to a thorough and careful examination such as his condition and attending circumstances will permit, with such diligence and methods of diagnosis as are usually approved and practiced by physicians of ordinary skill and learning under like circumstances and in like localities."

Commentators have severely criticized the locality rule in view of the modern conditions of medical eduction and practice. Our cases indicate disapproval of the rule. As far as the negligence of hospitals is concerned, the rule has been rejected. Dickinson v. Mailliard, 175 N.W.2d 588. A

number of our cases hold the locality rule inapplicable where the physician is a specialist. Perin v. Hayne, 210 N.W.2d 609; Grosjean v. Spenser, 140 N.W.2d 139. After noting Iowa's previous adherence to the locality rule, this court in McGulpin v. Bessmer, 43 N.W.2d 121 said:

> "There seems to be sound basis for holding a physician to such reasonable care and skill as is exercised by the ordinary physician of good standing under like circumstances. And the locality in question is merely one circumstance, not an absolute limit upon the skill required."

"We thus conclude that the statement of a physician's duty found in Sinkey v. Surgical Associates, insofar as it assumes the locality rule is a law in Iowa, is not in step with the trend of our decisions, while the statement from McGulpin reflects the view of the court. Under the record before us, however, we must still consider the locality rule." Here the records discloses that plaintiff's experts were sufficiently knowledgeable about medical standards in places like the University of Iowa Hospitals that they should be allowed to voice their views. All of the experts' backgrounds revealed extensive familiarity with teaching hospitals, and hospitals affiliated with universities.

We cannot say that the trial court abused its discretion by refusing to strike Dr. Stutevill's answer to plaintiff's hypothetical question. From the testimony, the trial court could reasonably conclude that Dr. Stutevill only considered the facts in the hypothetical question in formulating his answer.

The hypothetical question was not objectionable as invading the province of the jury. An opinion is not improper merely because it goes to the "ultimate question." Plaintiff's attorneys did not ask the experts what the decision in the case should be or whether the doctors who saw the plaintiff were negligent.

The hypothetical question was not objectionable as including facts outside of the record. The hypothetical question as framed did not assume that plaintiff told any doctor about throbbing headaches, it only assumed that his headache did throb. Plaintiff had testified that his headache was throbbing at the time referred to in the hypothetical question.

The hypothetical question was not objectionable for failing to state that plaintiff was not feverish. A hypothetical question need not contain all facts shown in evidence. The question set forth numerous detailed clinical symptoms at various relevant times, and we doubt the failure to state the lack of another symptom misled the experts to whom the question was addressed.

SIEINBACH V. CONIINENIAL WESIERN INSURANCE COMPANY, 237 N.W.2d 780.

FACIS

Plaintiff purchased a "blanket farm package" insurance policy from defendant. The policy covered "direct loss by theft, excluding mysterious disappearance, inventory shortage, wrongful conversion, embezzlement and escape." It did not define the term "theft".

During the term of the policy, plaintiff sold 50 head of his cattle in "consideration" of a forged check. Plaintiff sought to recover his loss under the terms of defendant's policy, but defendant refused payment asserting that the term "theft" was synonymous with "larceny" and did not encompass the offense of "false pretenses".

Plaintiff sued and defendant moved for summary judgment on two grounds: 1) that theft was not covered under the policy; 2) that plaintiff failed to sue within 12 months as required in the policy of insurance. The trial court entered summary judgment on the first ground and denied summary judgment on the second ground. Plaintiff appealed.

HOLDING:

Reversed. When construing ambiguous words in insurance contracts, the language should be interpreted from the viewpoint of an ordinary person, not a specialist or expert Where "theft" is not defined in a policy, it has its popular meaning as a word covering any wrongful appropriation of another's property to the use of the taker. (Here, the court distinguished prior authority holding that theft did not include taking by fraud, and concluded that the principles on which the prior decisions were based were no longer part of Iowa law. It held that it would no longer apply strict rules of construction which would defeat the "reasonable expectations" of one who purchased theft insurance from an insurance company.) An insurer, having affirmatively expressed coverage through broad promises, assumes the duty to define limitations or exclusions in clear and explicit terms. Defendant listed five kinds of losses not covered by the theft policy. Plaintiff's loss does not fall under any of the stated exceptions and therefore, under the commonly understood definition of theft, plaintiff's loss whether technically "larceny by trick" or "false pretenses" was covered by the "theft" policy.

Ihe trial court properly denied defendant's motion for summary judgment on the ground that plaintiff failed to file suit within the one year period of limitations set forth in the policy. After reviewing the record, this Court finds that there was a material factual dispute between

plaintiff and defendant concerning plaintiff's receipt of the policy jacket containing the one year limitation clause and the existence of the alleged estoppel defense.

SWISHER & COHRI V. YARDARM, INC., 236 N.W.2d 297 (Iowa 1975).

FACTS

Plaintiff lawfirm sued defendant Yardarm for payment allegedly due for legal services. Yardarm answered, alleging that any services performed by the lawfirm were not rendered at the request of Yardarm, but for its individual stockholders in their own behalf.

On lawfirm's motion the trial court rendered summary judgment for plaintiffs on a fractional part of the claim accruing before a certain date, and held that a fact issue existed as to the corporate liability for services performed thereafter.

Defendant subsequently paid the portion of the claim adjudicated to be owing. Lawfirm executed and sent a satisfaction of judgment to defendant, noting that the satisfaction was merely partial.

Thereafter, defendant filed a motion to dismiss the remainder of the claim pending in court, alleging that the plaintiff had split its cause of action and that the satisfaction of the "partial" summary judgment was res judicata. Trial court overruled the motion and Yardarm appealed.

HOLDING:

Affirmed. Iowa Rule 237, governing summary judgment, is patterned after Federal Rule 56. The Federal courts have uniformly held that F.R.C.P. 56 does not contemplate a summary judgment for a portion of a single claim in a suit, but authorizes only a pre-trial order that certain noncontroverted facts or issues shall be deemed established for trial of the case. However, in this case any error arising from the trial court's "partial" summary judgment was waived, for Yardarm did not object.

Res judicata is an affirmative defense which must be asserted by answer and cannot be raised by motion to dismiss. This rule will be followed even where the defense is not available when the answer is filed. It is necessary to amend the answer. However, since this rule was not raised by the plaintiff lawfirm, we will consider the claim of res judicata on appeal. The doctrine of res judicata is based upon the principle that a party may not split or try his cause of action piecemeal. The rationale of the rule is that where a person has a single cause of action, the interests of convenience and economy require him to try his cause

of action in one lawsuit. But res judicata has no application until plaintiff has attempted to bring two actions against the defendant. Therefore it does not apply here since only one action was filed.

SYMMONDS V. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY V. SCOTT COUNTY, IOWA, 242 N.W.2d 262 (Iowa 1976).

FACTS

Plaintiffs' decedents were killed when their automobile was struck by a train at a railroad crossing on a county road. They sued the railroad company which owned the track, and the railroad company which owned the train. The latter brought a cross petition against the County for contribution. The cross petition asserted that the County was negligent in failing to erect a stop sign at the crossing, basing its contention upon §321.342 Code of Iowa (1971). That statute provided:

> "The state highway commission with reference to primary highways and local authorities with reference to other highways under their jurisdiction are each hereby authorized to designate particular dangerous highway grade crossings of railroads and to erect stop signs thereat. ..."

The County moved to dismiss the cross petition on the ground that the statute did not create a mandatory duty to place a stop sign at this crossing, but merely gave the county discretion to do so. The trial court sustained the motion to dismiss and railroad appealed.

HOLDING:

Reversed. §613A.2 of the Iowa Code provides that every municipality is subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties. No "discretionary function" immunity is found in Chapter 613A. Accordingly, 613A's abrogation of governmental immunity for municipalities requires the application of the basic tort rule that negligence may be based upon acts of commission or omission.

Here, the County had jurisdiction of the secondary road where the crossing was located. This jurisdiction imposes an affirmative obligation to act where due care would require it for the protection of the travelling public. If the crossing was an extra- hazardous crossing as alleged in the cross petition, and if County knew or should have known of the hazard, County was under a duty to warn plaintiffs. Therefore, the trial court erred in dismissing the cross petition.

IRUSHCHEFF V. ABELL-HOWE COMPANY, 239 N.W.2d 116 (Iowa 1976).

FACTS

Abell-Howe Company (Abell-Howe) was a general contractor employed to construct a school building. It subcontracted erection of the metal roofing deck to Holman Erection Company (Holman). By a separate subcontract, R. I. Koder Company, Inc. (Koder) was employed to construct the built-up roof of the building on the metal decking erected by Holman. Each of the subcontracts contained the following provision:

> "It is understood and agreed that the Sub-Contractor will indemnify and save harmless the General Contractor and the Owner from and against any and all claims for injury or death to persons or damage to property (including cost of litigation and attorneys' fees) in any manner caused by, arising from, incident to, connected with or growing out of the work to be performed under this contract regardless of whether such claim is alleged to be caused, in whole or in part, by negligence or otherwise, on the part of the Sub-Contractor, its employees, agents or servants."

After the metal decking was installed, Koder began work on the built-up roof. Plaintiff Irushcheff, a roofer employed by Koder, was injured when the decking in the area of a hole cut for ventilating equipment tilted, causing Irushcheff to fall.

Because of injuries sustained in the fall, Irushcheff could no longer do the physical labor required of a roofer. However, he successfully entered into operation of a sole proprietorship roofing business. Eventually, his annual income doubled above what he had been making as a roofing laborer.

Irushcheff commenced action against Abell-Howe and Holman, alleging twelve specifications of negligence. Six of the specifications alleged that Abell-Howe neglected to supply adequate supporting "framing angles" for the deck, thus allowing the decking to tilt in the vicinity of holes cut for ventilation. Another specification alleged failure to provide a safe place to work.

After Irushcheff commenced the action, Abell-Howe cross petitioned against Holman and third party defendant Koder for common law (quasi-contractual) and contractual indemnity. Koder moved to dismiss the quasi-contractual indemnity allegations, and the motion was sustained. After joinder of issues, Abell-Howe moved for summary judgment against both Holman and Koder for contractual indemnity based upon the written indemnity provision. The trial court denied the motion.

Prior to trial, plaintiff Irushcheff filed a motion in limine, seeking to preclude defendants from introducing evidence concerning the profits derived from Trushcheff's new roofing business. The trial court sustained the motion.

At the close of all the evidence, the trial court directed verdicts on Abell-Howe's actions against Koder and Holman for contractual indemnity. Holman was granted a directed verdict against the plaintiff. The jury returned judgment against Abell-Howe in favor of the plaintiff. Abell-Howe appealed on several grounds.

HOLDING:

Affirmed. The trial court did not err in granting plaintiff's motion in limine. Irushcheff alleged he suffered impaired earning capacity as a result of the fall. By affidavit filed in support of the motion in limine, Trushcheff stated that the profits derived from his new business were completely unrelated to any work which he personally performed, but depended instead upon his skill in bidding for roofing jobs. There was compelling evidence in the record to support these allegations.

Profits are generally defined as the fluctuating income which is dependent on the employment of capital and labor. When the injured party is engaged in a business which involves the investment of capital and the labor of others, as well as that of the injured party, the return of which is received from the business must be distinguished from personal earnings. That return, called "profits", does not measure the earning ability of the plaintiff. It measures the earning power of the business involved. Therefore, as a general rule, loss of the profits of a business in which a plaintiff is employed, which depend upon the employment of capital and the labor of others, cannot be considered as the measure of the value of the plaintiff's impaired ability to earn. Accordingly, profits received by Irushcheff from his new business could not be used to measure his earning disability. (The court distinguished the case where the profits of a business were mainly dependent on plaintiff's personal exertions. It also held that Abell-Howe was not prevented from offering evidence concerning the value of Irushcheff's service to the new business, as opposed to its profits or income.)

The trial court did not err in instructing the jury regarding Abell-Howe's duty to provide Irushcheff a safe place to work. Abell-Howe argues that safe place theory was not pled. This ignores the fact that the "safe place to work" element of negligence was pled three times in plaintiff's amended and substituted petition. However, Abell-Howe further argues that the court's instruction was too general, since plaintiff pled twelve particular specifications of negligence, and the safe place to work instruction was worded broadly enough that it could include acts of negligence not otherwise pled. From this, Abell-Howe concludes

that the jury verdict may have been based on other acts of negligence which were not established. This argument fails for two reasons: (1) it completely ignores the fact that failure to provide a safe place for Irushcheff to work was a specification of negligence; (2) it ignores an abundance of evidence upon which the jury could find Abell-Howe breached such duty.

The trial court did not err in admitting evidence of a building construction industry custom as to the guarding of open roof holes with wooden curbs. Abell-Howe's primary objection to the admission of this evidence is based upon the fact that Abell-Howe's contract with the building owner did not require it to install such wooden curbs. However, a person cannot, by contract with a third party, lay down his own rules as to when he will be liable to those whom his negligence injures. Abell-Howe's duty to Irushcheff thus could not be limited by its contract with the building owner. Plaintiff's use of such evidence was not predicated upon the theory that Abell-Howe breached a contractual duty to provide such wooden curbs. It was instead based upon the common law duty of persons in control of premises to provide a safe place to work.

The trial court was correct in dismissing the portion of Abell-Howe's cross petition against Koder which sought common law or quasi-contractual indemnity. Abell-Howe's cross petition was based upon the theory of primary and secondary negligence (active-passive negligence). In the cross petition, Abell-Howe asserted that the plaintiff's petition alleged acts of negligence by Abell-Howe which constituted the breach of duties primarily owed by Koder under Koder's subcontract with Abell-Howe, and that Koder was therefore primarily liable to plaintiff. In short, Abell-Howe claims that it delegated to Koder the duties plaintiff claimed were breached.

There are three reasons why the trial court was correct in sustaining Koder's motion to dismiss. In the first place, Abell-Howe was charged, in twelve particulars, with failure to provide a safe place to work. However, the subcontract between Abell-Howe and Koder delegated nothing more to Koder than the duty to properly install the roofing and to provide safe facilities for inspection. These delegated duties have nothing whatsoever to do with Abell-Howe's duty to provide a safe place to work. Those cases which have held a subcontractor liable for an indemnity when he fails to perform his contract in a workmanlike manner have no application here. There was no showing on the part of Abell-Howe that any failure of Koder to perform in a workmanlike manner was connected to plaintiff's injuries.

Abell-Howe also seeks to justify its claim for indemnity on the basis of the Restatement, 2nd Torts §416. That section entitles employer of an independent contractor to indemnity from the contractor, where the contract provides that the contractor is to take special precautions to avoid injury to third persons, and injury results from the con-

tractor's failure to take the precautions. However, Koder was not employed to take any special precautions here. As previously noted, plaintiff's Petition charged Abell-Howe with violations of duties for which Koder had no responsibility under its subcontract with Abell-Howe. Abell-Howe incorporated these specifications in its cross petition against Koder. Therefore, Abell-Howe is in the awkward position of charging Koder with breach of contract regarding duties which Abell-Howe had agreed to perform. Obviously, since the contract did not provide that Koder had a duty to take precautions, §416 of the Restatement does not apply to give Abell-Howe any right to indemnity from Koder. Therefore, "Irushcheff has no fall related tort right which arose out of any separate or independent duty owing to him by Koder."

Finally, since there was no separate duty owing Irushcheff from Koder, and since Irushcheff's right of recovery from Koder was limited to workman's compensation benefits, there could be no common liability to Irushcheff as between Abell-Howe and Koder. Iherefore, under our previous opinion in Iowa P. & L. Co. v. Abelled Construction Co., Abell-Howe was precluded from recovering common law indemnification from Koder.

Irial court correctly directed a verdict in favor of Holman on Abell-Howe's cross petition against Holman. (Ihe court considered the evidence, and found it insufficient to support the jury submission of the cross petition. It then went on to consider Holman's second ground in support of the directed verdict.) Holman argues that even if there was sufficient evidence to support jury submission of Abell-Howe's cross petition, the cross petition is now barred by the doctrine of res judicata. Ihis contention is correct. Io bar further litigation on a specific issue, four requirements have to be met: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior acton; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Identity of parties is not necessary to give validity to a claim of issue preclusion. A stranger to the primary suit can assert the theory of issue preclusion as a defense in a subsequent suit if the other elements of the theory coincide. Here, Irushcheff did not appeal the directed verdict for Holman under cause of action against it, and the directed verdict therefore became a final judgment. Abell-Howe's cross petition against Holman made Abell-Howe and Holman adverse litigants. In its cross petition against Holman, Abell-Howe incorporated the acts of negligence alleged by plaintiff against Abell-Howe. Therefore, there was an identity of issues. Both Holman and Abell-Howe were defendants under plaintiff's petition, which means there was, as between these two defendants, an identity of interest Ihe jury verdict for Irushcheff against Abell-Howe established Abell-Howe's negligence. Ihe directed verdict for Holman on

Irushcheff's action against the former established that Holman was not negligent. The only difference between this case and the classic case involving issue preclusion is that it does not involve a "prior action". In fact, there was only one action. Nevertheless, the co-defendants Abell-Howe and Holman occupied adversary positions by reason of the cross petition. They fully litigated the matter of liability. For this reason, the directed verdict for Holman must stand.

Abell-Howe was not entitled to contractual indemnity from Holman or Koder based upon the hold harmless agreement in the subcontracts. Contractual indemnity would have been allowable had the hold harmless agreement expressly included coverage for Abell-Howe's negligence. In Iowa, an indemnity agreement generally will not be construed to cover losses to the indemnitee caused by his own negligence. General, broad and all inclusive language is insufficient. Since the agreement did not clearly state that Abell-Howe was to be indemnified for Abell-Howe's own negligence, Abell-Howe was clearly not entitled to indemnity from Koder or Holman on the contractual theory

VAN IREESE V. HOLLOWAY, 234 N.W.2d 876 (Iowa 1975)

FACTS

Pedestrian sued a motorist for injuries arising from a motor vehicle accident. At the conclusion of trial, the court refused to instruct the jury that a pedestrian crossing a street in a marked crosswalk is not required to maintain the same lookout as the motorist. Instead, the trial court instructed the jury that a pedestrian in a crosswalk must exercise ordinary care and caution to avoid collision with a motor vehicle when there is a danger of collision. The jury returned a verdict for defendant and plaintiff appealed

HOLDING:

Affirmed. Apart from the duty to maintain a proper lookout, and even in view of his right to rely upon the motorist performing his duty to yield the right of way, a pedestrian in a crosswalk must exercise ordinary care to avoid being struck by a motor vehicle he sees or should see. The court instructed the jury as follows:

> "Even though a pedestrian in a crosswalk has the right of way over an approaching motorist when there is danger of collision, the pedestrian still must exercise ordinary care and caution to avoid a collision with a motor vehicle when there is danger of a collision. The pedestrian's failure to exercise such ordinary care and caution constitutes negligence."

This instruction embodied a correct principle of law

(The court noted that defendant's brief failed to give the Iowa Reports citations to Iowa decisions. It ruled that under the holding of Sheridan v. Limbrecht, 205 Iowa at 577, 218 N.W. at 279-280, it would seek to discourage this practice by taxing the defendant with the costs of preparing his brief.)

WESI V. HAWKER, 237 N.W.2d 802 (Iowa 1976).

FACTS

Parachutist commenced a personal injury action in three counts against the City of Manchester and the Manchester Chamber of Commerce. Division I stated a claim against the City of Manchester, Division II stated a claim against the Chamber of Commerce and Division III stated a claim against both defendants. After the defendants appeared and answered, plaintiff filed an "Amended Petition" containing three divisions. Division IV stated a claim against defendant Hawker; Division V stated a claim against defendant Hanson and Division VI stated a claim against all four defendants alleging joint and several liability. Along with this document, plaintiff filed a "Motion for Leave to Amend Petition". In this motion, plaintiff asked leave of court to substitute Division VI of the Amended Petition for Division III of the original Petition. Plaintiff did not seek or obtain leave of court to file Divisions IV and V of the "Amended Petition".

Before the trial court ruled on the motion for leave to amend petition, plaintiff caused original notices to be served on the new defendants as follows:

> "You are hereby notified that a petition of the above named plaintiff and Amendments thereto in the above entitled action is now on file in the office of the Clerk of the above named Court, and a copy of which petition and Amendments thereto is hereto attached, and which petition and Amendments thereto prays for judgments against you in the amount of $75,000 with interest thereon as provided by law and for costs of this action. . . ."
>
> "You are hereby notifed to appear before said Court . . . within 20 days after service of this original notice upon you, and that unless you so appear, your default will be entered and judgement or decree will be rendered against you for the relief demanded in the amended petition." (Emphasis added)

The defendants specially appeared on the grounds that the original notices were fatally ambiguous and that Divisions IV and V of the "Amended Petition" were not actually "on file" because the court had not granted leave to file the

amendments. Trial court sustained the special appearances and plaintiff filed an interlocutory appeal.

HOLDING:

Reversed. The original notices were not fatally ambiguous. Rule 50 allowed the plaintiff to notify the defendant of the nature of the claim and the relief demanded by attaching a copy of the petition. In this case, plaintiff did exactly what Rule 50 permitted him to do, in that he attached the petition and all subsequent amendments thereto. The defendants acknowledged they understood that the only pleading purporting to state a claim for relief against them was the "Amended Petition". Moreover, the original notice was accurate in advising the defendants that the relief sought against them was in the "Amended Petition". Any defects in the descriptive language in the original notice were mere irregularities of form which did not prejudice defendants.

Defendants' second ground for their special appearance is based on (former) I.R.C.P. 88. Defendants urge that plaintiff was required to seek leave of court to add parties defendant when the persons already parties to the action have filed answers. Plaintiff contends that since Rule 24, governing joinder of defendants, does not require leave of court, no leave of court was required in this case. We believe that when Rules 24 and 88 are read together they require that when a petition is sought to be amended to add new parties after issues have been joined, permission of court is necessary. The purpose of the "leave of court" requirement in Rule 88 is to give defendants who have answered right to object to amendments made which might affect their preparation for trial. However, defendants Hawker and Hanson have no right to be heard on this issue. The rights protected under Rule 88 are those of parties already joined in the case, they are not the rights of nonparties whom the plaintiff seeks to add. Therefore, leave of court to file the "Amended Petition" was not a condition precedent to the District Court's acquisition of jurisdiction over defendants Hawker and Hanson, and the trial court improperly sustained defendants' special appearance on this ground.

WIII MECHANICAL CONIRACIORS, INC. V. UNIIED BROIHERHOOD OF CARPENIERS & JOINERS OF AMERICA, LOCAL 772, 237 N.W.2d 450 (Iowa 1976).

FACIS

Plaintiff commenced an action against the defendant unions for an injunction against defendants' picketing of plaintiff's construction site. A temporary injunction was granted. Defendants specially appeared, urging that exclusive jurisdiction was vested in the NLRB. They subse-

quently answered, asserting as a defense that the Federal government had pre-empted such controversies, and demanding equitable relief. For undisclosed reasons, plaintiff filed a dismissal of its action and obtained an ex parte order of court dismissing the action and vacating the injunction.

The unions then filed a "Motion to Vacate Dismissal and to Reinstate Action" alleging that they had been prejudiced by dismissal of plaintiff's action and that important issues presented by the case compelled the court to reinstate it, and to force plaintiff to litigate its claims. The trial court denied the motion and defendants appealed.

HOLDING:

Affirmed. Plaintiff had an absolute right to dismiss his cause of action any time before final submission of the case to the jury. The effect of such dismissal when defendant's pleadings are solely defensive is final and terminates the jurisdiction of the court.

A general denial and prayer for general equitable relief such as filed by defendant unions, furnishes no authority whatever for decreeing them affirmative relief after plaintiff dismissed its action.

WONG V. WATERLOO COMMUNITY SCHOOL DISTRICT, 232 N.W.2d 865 (Iowa 1975)

FACTS

Plaintiff sued the school district on behalf of his intestate, who died while participating in a swimming class conducted by the defendant. Plaintiff partially relied upon the doctrine of res ipsa loquitur. The trial court sustained defendant's motion to strike the res ipsa count before trial.

The jury returned a verdict in favor of the defendant, and plaintiff appealed.

HOLDING:

Affirmed. Under the doctrine of res ipsa loquitur, the happening of an injury permits, but does not compel, an inference of negligence if plaintiff produces substantial evidence that: (1) the injury is caused by an agent or instrumentality under the exclusive control and management of the defendant; and, (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used.

Ordinarily, res ipsa loquitur should not be stricken until the evidence is in, assuming the pleadings properly invoke that doctrine. Here, however, the trial court's

action was proper. There was no evidence that could be introduced under the pleadings which would bring the accident within the res ipsa loquitur rule.

The majority of courts have held the doctrine of res ipsa loquitur inapplicable to drowning accidents. There are numerous reasons for this, including the inherent dangers of swimming; the possibility of bodily malfunction on the part of the victims; the possibility of the victim's own negligence; and the lack of control over other swimmers who might cause or contribute to the misadventure. Thus, drowning is not such an occurrence as would, in the ordinary course of things, happen only if there is negligence.

WUNSCHEL V. HOEFER, 241 N.W.2d 893 (Iowa 1976).

FACTS

Plaintiff filed an action for damages caused by defendant's unauthorized connection with plaintiff's sewer line. Plaintiff's petition alleged that the sewer line was constructed at a time unknown to the plaintiff. Defendant filed a motion for more specific statement, requesting an order requiring plaintiff to set forth at least the month and year that the defendant was supposed to have constructed the sewer line. Trial court granted the motion.

In purported compliance with the order of the court, the defendant amended his petition to state that the sewer line was constructed sometime after February 23, 1960, and prior to the commencement of the action. Defendant moved to dismiss on the ground that plaintiff had failed to comply with the trial court's order. In resisting the motion, plaintiff alleged he was not a resident of the community, did not observe the unauthorized sewer connection, was not notified when it was made, and did not know the month and year in which the connection was made. The trial court sustained the defendant's motion to dismiss and plaintiff appealed.

HOLDING:

Reversed. When a party attempts to comply with an order for more specific statement, error in the order is waived. However, when a motion to dismiss is predicated on the insufficiency of the attempted compliance with the order, the question is whether good faith efforts at substantial compliance were made. If it is not reasonably possible to comply with the order, the party is excused from complying.

Here, plaintiff made his petition as specific as reasonably possible. He did not know when the connection was made, was not present when it was made, and was not notified when it was made. He learned it was made only after it had damaged his property. We hold plaintiff made a

good faith effort to comply substantially with the order for more specific statement and that the trial court abused its discretion in sustaining the motion to dismiss.

(The court also pointed out that although the question was not presented on appeal, the order for more specific statement imposed an unwarranted and unnecessary burden on plaintiff, not only requiring him to plead evidence, contrary to the purpose of the motion, but requiring him to plead evidence which he did not possess. The court noted that a motion for more specific statement should be entered only if the moveant shows the pleading to which the motion is addressed is so indefinite that he is unable to respond to it, and that that was not the case here.)

McCARNEY V. DES MOINES REGISTER AND TRIBUNE COMPANY, 239 N.W.2d 152 (Iowa 1976)

FACTS

The defendant newspaper published a story stating that plaintiff police captain had been indicted in a case involving the death of a prisoner. The story was not true. Plaintiff demanded and got a retraction from the newspaper, and then filed this libel action. After defendant had answered plaintiff's interrogatories, defendant moved for summary judgment, supported by affidavit. Plaintiff failed to file any countering affidavits. Nevertheless, the trial court denied the motion and defendant took interlocutory appeal. The decision was the first in Iowa involving libel of a public figure since New York Times v. Sullivan.

HOLDING

Reversed. Since plaintiff did not file any affidavits in resistance to motion for summary judgment, he has elected to stand on the record made by his opponent. Therefore, we will consider the defendant's right to summary judgment on the basis of the pleadings, answers to interrogatories and affidavits, which are unrefuted. The affidavits filed in support of the motion show that the original news story reached defendant's newsroom via a wire service, and contained the statement that plaintiff had been charged with assault involving a prisoner. Defendant's employee confused the story with another investigation in another Iowa city and changed the story to incorrectly state that the indictment involved the death of a prisoner. The error was not discovered until the next day.

The Court overruled its prior decisions and adopted the Sullivan standard in Iowa as follows:

> "The constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Here, plaintiff does not claim defendant knew the story was false. Thus, we must decide whether the statement was made with reckless disregard of its truth or falsity. "Reckless disregard" means a "high degree of awareness of probable falsity." Some suspicion as to the falsity of the statement must be shown to establish "reckless disregard." "Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Actual antagonism or contempt is insufficient to show malice. There is a complete absence of facts in the record showing that defendant published its statement in reckless disregard of its truth or falsity. Defendant's explanation of how the story came to be published is undisputed. It shows negligence, but nothing more. Defendant did not know the story was false or suspect that it was. It was not shown that defendant had "serious doubts" of the truth of the story.

GRAY V. LUKOWSKI, 241 N.W.2d 35 (Iowa 1976)

FACTS

Plaintiff started an action against the defendant by filing an original notice with the Commissioner of Public Safety and mailing a copy to the defendant in Nebraska. The remaining requirements of §321.498 et seq., the Iowa nonresident motorist statute, were met, except that plaintiff did not file a proof of service with the clerk of court. The defendant specially appeared and after the hearing thereon, plaintiff filed the proof of service in the clerk's office. The trial court sustained the special appearance and the plaintiff appealed.

HOLDING:

Affirmed. Full compliance with the nonresident motorist statute is necessary to grant jurisdiction. Plaintiff's failure to file a proof of service rendered service defective. The filing of the proof of service without leave of court was insufficient to comply with the statutory requirements