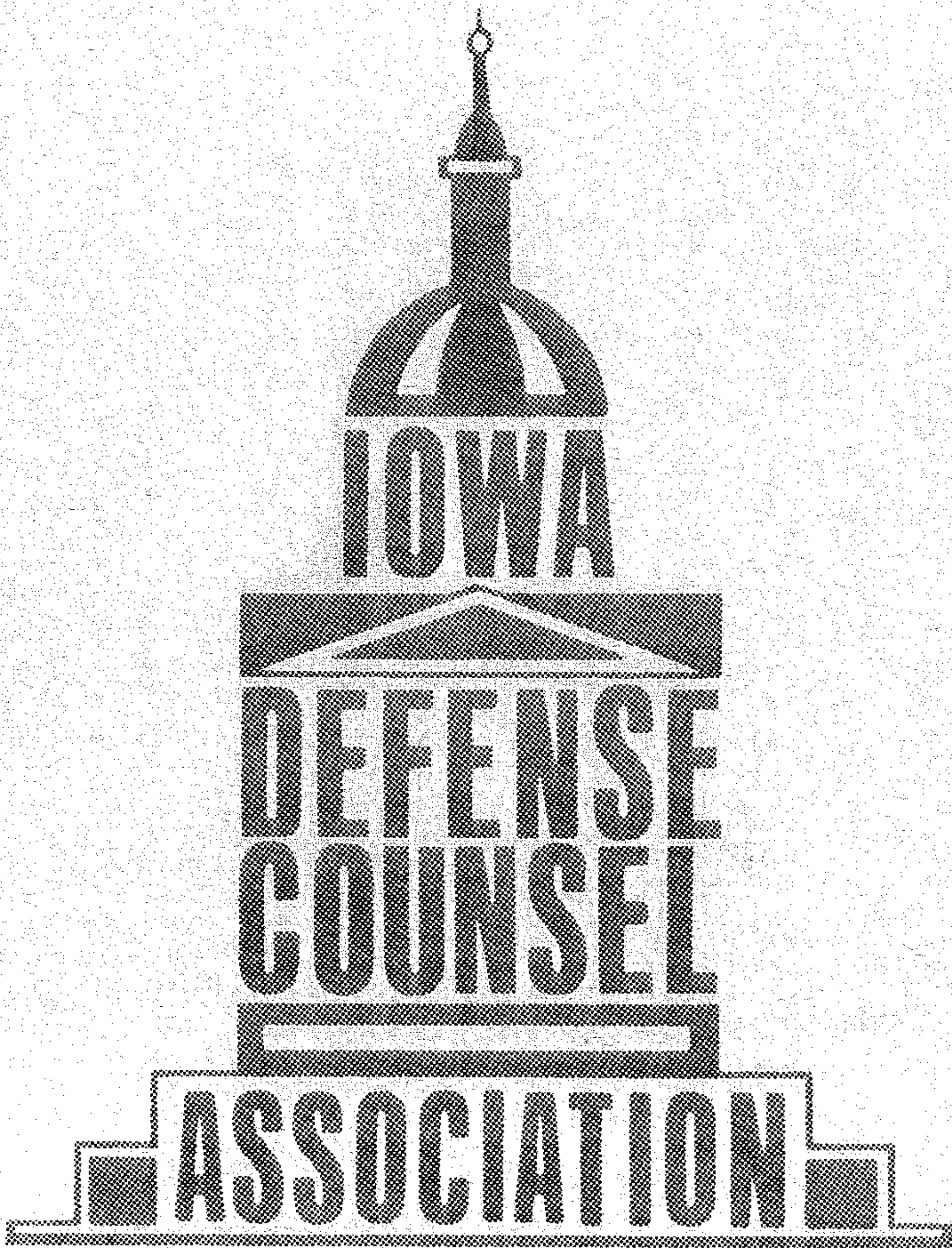

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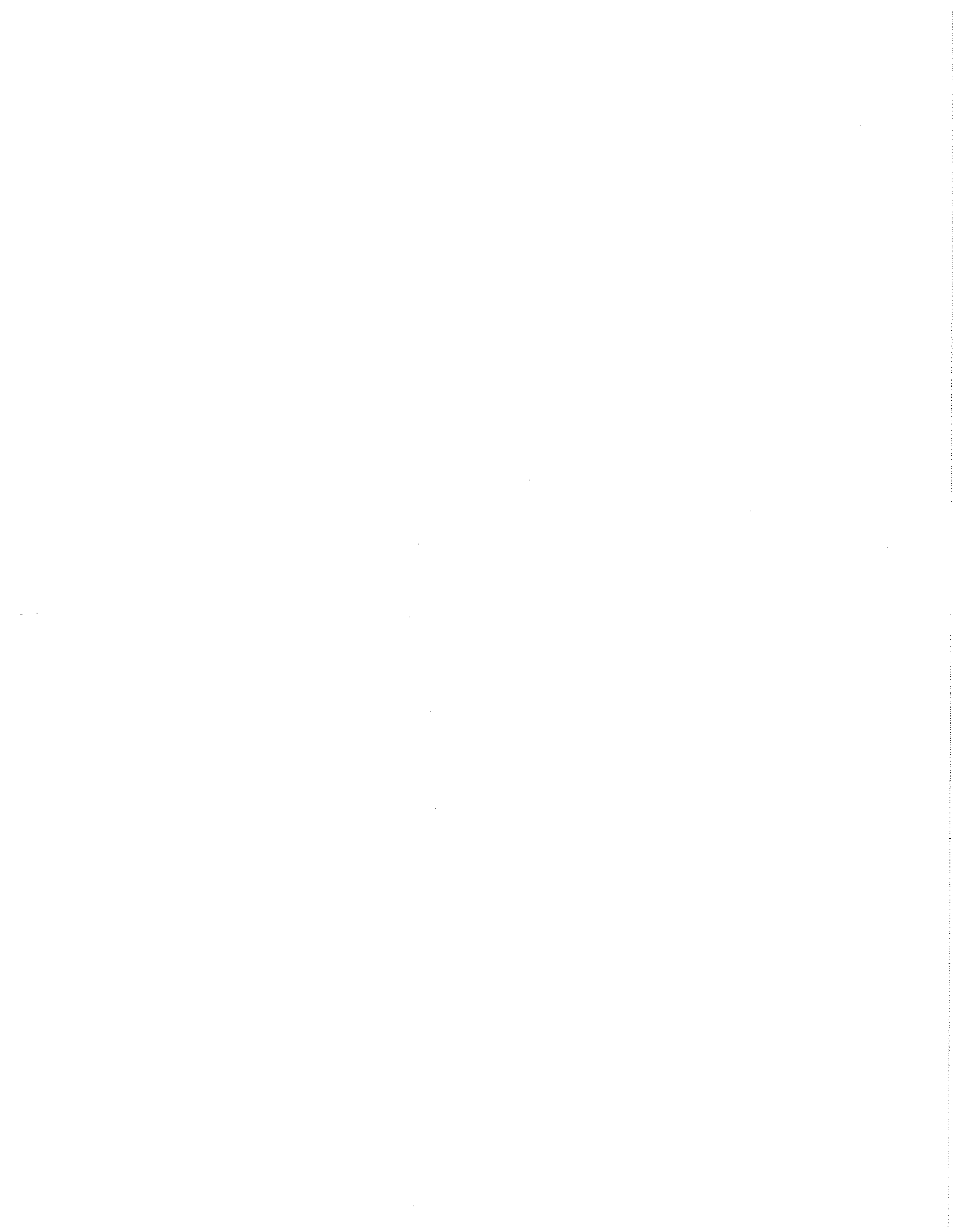

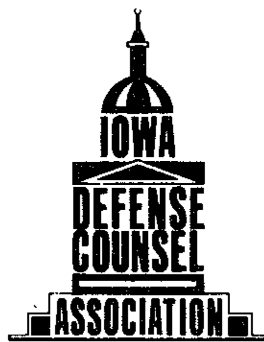

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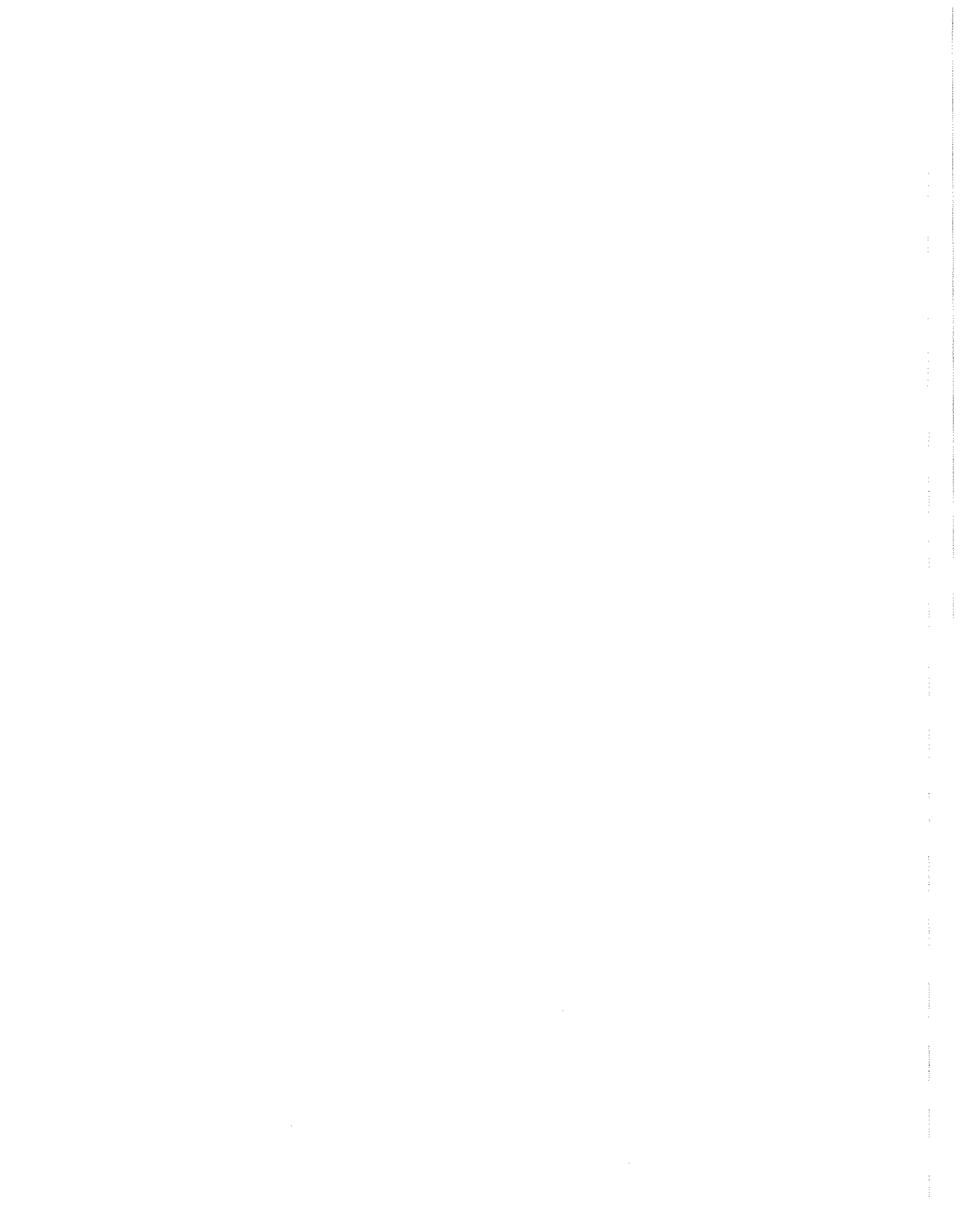

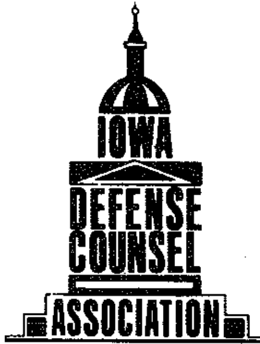

1979 Annual Meeting

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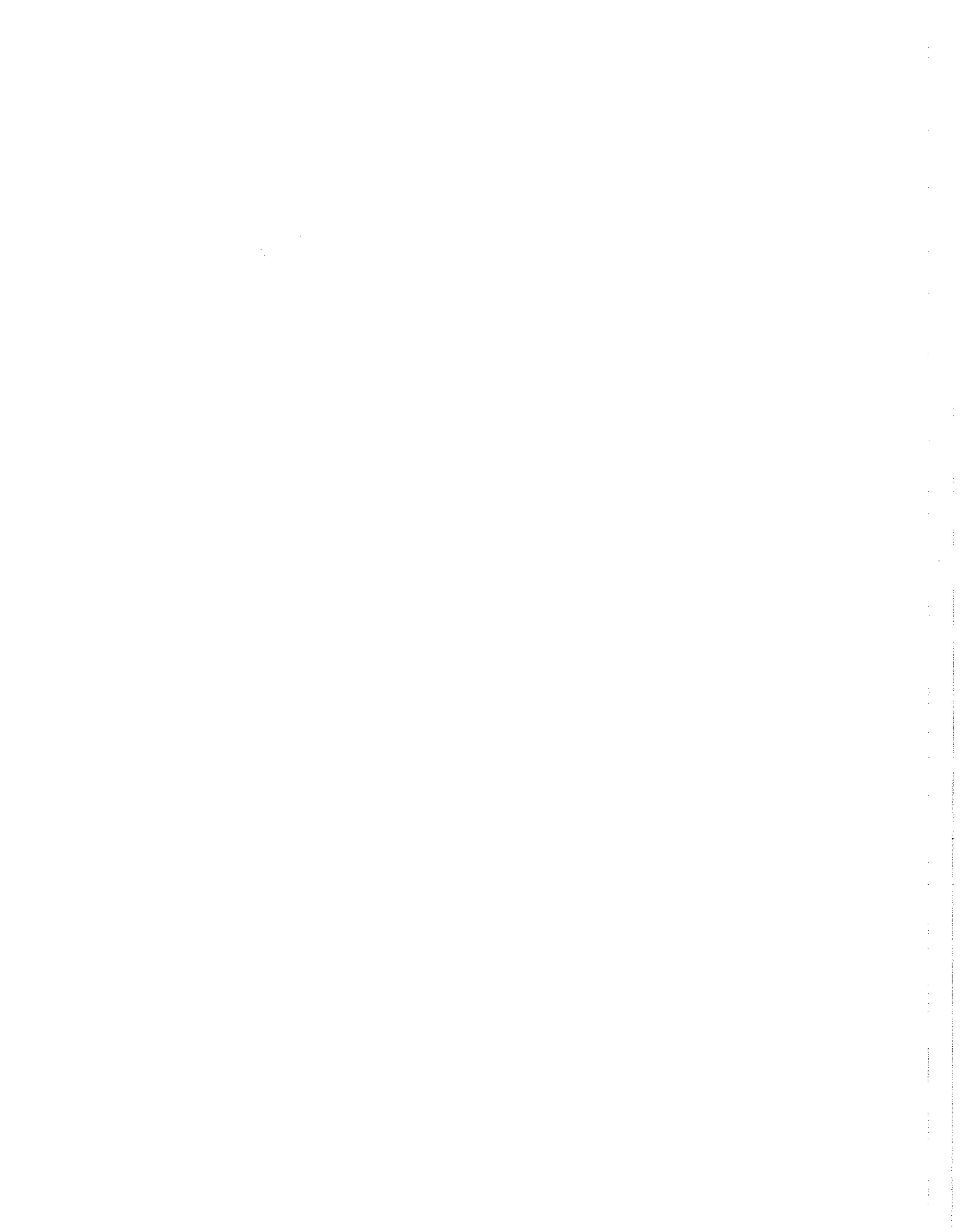


WHEN THE VIOLATION OF A STATUTE, ORDINANCE OR ADMINISTRATIVE RULE WILL NOT SUPPORT AN ACTION FOR DAMAGES - - PUBLIC VIS-A-VIS PRIVATE DUTIES

John B. Grier
Cartwright, Druker & Ryden
112 West Church Street
Marshalltown, Iowa 50158

I. Introduction

A. The common law rule, the reasonable man
See generally, Prosser, Handbook of the Law on Torts, §32, p. 149 (4th ed. 1971)

B. The scope of this topic is limited by the question of "When does a statute, ordinance, or administrative rule fix the standard of conduct of a 'reasonable man'"?

II. The General Rule

A. Duty can be created by legislation if the legislative body proposed or intended to protect a class of persons to which the Plaintiff belongs against a particular harm which the Plaintiff has suffered.

Wilson v. Nepstad, et al., ___ N.W.2d ___ (Iowa) (Opinion filed July 25, 1979)

Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780 (Iowa 1971)

Koll v. Manatt's Transportation Co., 253 N.W.2d 265 (Iowa 1977)

Crane v. Cedar Rapids & Iowa City Railway, 160 N.W.2d 838 (Iowa 1968)

Lattner v. Immaculate Conception Church, 255 Iowa 120, 121 N.W.2d 639 (1963)

III. Liability of a governmental unit for failure to comply with its laws

A. Police Departments

1. Riots

<u>Jahnke v. Incorporated City of Des Moines</u>, 191 N.W.2d 780 (Iowa 1971)

2. General Police Protection

(a) The general rule. A governmental unit cannot be held liable for failure to furnish adequate police protection, as its duties in that regard flow only to the general public and not to individual members of the community.

<u>Riss v. City of New York</u>, 293 N.Y.S.2d 897, 240 N.E.2d 860 (1968)

See also, Police Protection -- Governmental Liability, Annotation, 46 ALR3d 1084

(b) The Exceptions. Where a special relationship exists, it may be held liable.

<u>Florence v. Goldberg</u>, 44 N.Y.2d 189, 375 N.E.2d 763 (Ct. of App. N.Y. 1978) (Schoolguard crossing)

<u>Schuster v. City of New York</u>, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958) (Providing protection for a police informer)

<u>Moch Co. v. Rensselaer Water Co.</u>, 247 N.Y. 160, 159 N.E. 896 (Ct. of App. N.Y. 1928) (The negligent performance of a task directed towards a specific member of the public negligently performed will result in liability)

B. Fire Protection. The general rule is that legislation creating obligations in a governmental unit to provide fire protection is designed to protect members of the community at large, rather than the individual members of the community, and hence no private rights are created by said legislation.

Steitz v. City of Beacon, 64 N.E.2d 704 (Ct. of App. N.Y. 1945)

Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780 (Iowa 1971)

Motyka v. City of Amsterdam, 204 N.E.2d 635 (Ct. of App. N.Y. 1965)

Messineo v. City of Amsterdam, 215 N.E.2d 163 (1965)

C. Providing of Public Services Generally.

1. Other jurisdictions. "A municipality cannot be held liable solely for its failure to provide adequate public services. The extent of public services afforded by a municipality is, as a practical matter, limited by the resources of the community. Deployment of these resources remains, as it must, a legislative-executive decision which must be made without the benefit of hindsight."

   Florence v. Goldberg, 44 N.Y.2d 189, 375 N.E.2d 763, 767-8 (Ct. of App. N.Y. 1978)

2. The law in Iowa -- Analysis of the case of Wilson v. Nepstad, ____ N.W.2d ____ (Iowa) (Opinion filed July 25, 1979)

   See, Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979)

3. The Future Rule in Iowa

(a) The possibility of adopting the New York Court of Appeals standard. Analysis of the procedural aspects of _Wilson v. Nepstad_.

(b) The status of the law in other jurisdictions.

Duran v. City of Tucson, 20 Ariz.App. 22, 509 P.2d 1059 (1973)

Halvorson v. Dahl, 574 P.2d 1190 (Wash. 1978)

Georges v. Tudor, et al., 556 P.2d 564 (Wash. 1976)

Campbell v. City of Bellevue, 85 Wash.2d 1, 530 P.2d 234

Adams v. State, 555 P.2d 235 (Alaska 1976)

Department of Health v. McDougall, 359 So.2d 528 (Florida 1978)

Herring v. Railway Express Agency, Inc., 474 P.2d 35 (Ariz. 1970)

Welsh v. Metropolitan Dade County, 366 So.2d 518 (Florida 1979)

Haehl v. Village of Port Chester, 463 F.Supp. 845 (S. D. of N.Y. 1978)

D. Suggested Protections to Governmental Subdivisions

(1) Amendments to building, housing and fire codes

(2) Use of the notice defense

a. Discussion of Section 364.12, 1979 Code of Iowa

> <u>Abraham v. Sioux City</u>, 218 Iowa 1068, 250 N.W.2d 461 (1933)

b. The mere existence of a defect on public property which causes an injury is not alone sufficient to establish liability.

> <u>KRSKA v. Incorporated Town of Pocahontas</u>, 200 Iowa 594, 203 N.W. 39 (1925)

c. The Plaintiff must prove that the municipality had either actual knowledge of the defect or that the defect had existed for such time that in the exercise of reasonable care, it should have known of the defect in time to permit its repair and was capable of being discovered.

> <u>Edwards v. City of Cedar Rapids</u>, 138 Iowa 421, 116 N.W. 323
>
> <u>Abraham v. Sioux City</u>, supra
>
> <u>Cook v. City of Anamosa</u>, 66 Iowa 427, 23 N.W. 907 (1885)
>
> <u>Broberg v. City of Des Moines</u>, 63 Iowa 523, 19 N.W. 340 (1883)
>
> <u>Fetters v. City of Des Moines</u>, 260 Iowa 490, 149 N.W.2d 815 (1967)

IV. Suits Among Private Citizens

A. General Rule -- Legislation may be relied upon as defining the standard of conduct of a reasonable man under certain circumstances:

1. Restatement (Second) of Torts § 286 (1965) states:

> "The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
> (a) to protect a class of persons which includes the one whose interest is invaded, and
> (b) to protect the particular interest which is invaded, and
> (c) to protect that interest against the kind of harm which has resulted, and
> (d) to protect that interest against the particular hazard from which the harm results."

B. When such legislation will not set the standard

1. Restatement (Second) of Torts § 288 (1965) states:

> "The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively
> (a) to protect the interests of the state or any subdivision of it as such, or
> (b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or
> (c) to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public, or

(d) to protect a class of persons other than the one whose interests are invaded, or
(e) to protect another interest than the one invaded, or
(f) to protect against other harm than that which has resulted, or
(g) to protect against any other hazards than that from which the harm has resulted."

C. Negligence and Negligence Per Se

1. Restatement (Second) of Torts § 288 B (1965) states:

"(1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.
(2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct."

2. The Law in Iowa

(a) Violation of the law of the road established by statute or ordinance is negligence per se

Kisling v. Thierman, 214 Iowa 911, 243 N.W. 552 (1932)

But see,

Silvia v. Pennock, 253 Iowa 779, 113 N.W.2d 749 (1962)

McMaster v. Hutchins, 255 Iowa 39, 120 N.W.2d 509 (1963)

France v. Benter, 256 Iowa 534, 128 N.W.2d 268 (1964)

See also,

Annot., 22 A.L.R.3d 325 (1968)

§ 321.292, 1979 Code of Iowa

D. Violation of Vehicle Registration or License Laws

See generally,

Nichols v. McGraw, 152 So.2d 486 (Florida App.)

Annot., 99 A.L.R.2d 904

7 Am.Jur.2d Automobiles and Highway Traffic § 365, p. 912 (19)

E. Other Statutes

T.I.M.E. v. United States, 359 U.S. 464, 3 L.Ed.2d 952 (1959)

Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 18 L.Ed.2d 475 (1967)

Clairol, Inc. v. Suburban Cosmetics, Inc., 278 F.Supp. 859 (N. D. Ill. 1968)

Wells v. Wells, 240 F.Supp. 282 (W. D. Ky. 1965)

In Re Franklin National Bank Securities Litigation, 445 F.Supp. 723 (E. D. N.Y. 1978)

Landeros v. Flood, 551 P.2d 389 (Calif. 1976) (Malpractice based on failure to report child abuse)

Kronzer v. First National Bank of Minneapolis, 235 N.W.2d 187 (Minn. 1975) (Unauthorized practice of law statute)

V. Conclusion. The law in the State of Iowa in this particular area is unsettled.

"INTENTIONAL ACTS" vs. "ACCIDENTS"

*By David L. Phipps

(Whitfield, Musgrave, Selvy, Kelly & Eddy)

Des Moines, Iowa

I. Introduction

A. Liability insurance policies often describe situations for which coverage applies by use of the term "occurrence."

(1) Occurrence has been defined as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

(2) It is language such as "expected nor intended from the standpoint of the insured" which presents a problem with regard to coverage issues. See generally, Brittain, Jack O. and Pennington, James F. When Is an Intentional Tort an Intentional Tort? 26-4 Federation of Insurance Counsel Quarterly 315 (1976).

B. Often liability insurance policies contain exclusion clauses with regard to the infliction of intentional injury caused by or at the direction of the insured.

C. Examples of language contained in a typical clause:

(1) "This policy does not apply: (c) to injury, sickness, disease, death, or destruction caused intentionally by or at the direction of the insured." See Aetna Casualty and Surety Company v. Hanna, 224 F.2d 499, 504 (5th Cir. 1955).

(2) "Injury intentionally inflicted shall be deemed an accident unless committed by or at the direction of the insured." See Employers Mutual Liability Insurance Company v. Hendrix, 199 F.2d 53, 55 (4th Cir. 1952).

D. There are few, if any, Iowa cases dealing with the operation of "intentional injury" exclusion clauses in liability policies. Therefore, the reader must rely on the authority of other jurisdictions for guidance in this area.

* This Speaker wishes to acknowledge the research assistance of Kenneth W. Biermacher, a third-year law student at Drake University School of Law.

II. Construction of "Intentional Injury" Exclusion Clauses

A. Some jurisdictions have declared that "intentional injury" exclusion clauses are ambiguous, and therefore, the meaning of such clauses should be resolved in favor of the insured and against the insuror who drafted the policies. See Caspersen v. Webber, 213 N.W.2d 327, 330 (Minn. 1973).

B. However, courts in such jurisdictions may find the language of "intentional injury" exclusion clauses to be clear and unambiguous where it is clear that both the act and the injury resulting therefrom were intended. See Hartford Fire Insurance Company v. Wagner, 207 N.W.2d 354, 355 (Minn. 1973).

C. Other jurisdictions have taken the position that "intentional Injury" clauses are clear and unambiguous. See Wiggintun v. Lumbermens Mutual Casualty Company, 169 So.2d 170 (La. Ct. App. 1964).

D. Iowa follows the rule that policy exclusions are strictly construed against the insuror. State Farm Auto Insurance Company v. Malcolm, 259 N.W.2d 833 (Iowa 1977). Where an ambiguity exists, it will be resolved against the insuror. Jackson v. Continental Casualty Company, 266 F.Supp. 782 (N.D. Iowa 1967).

E. Iowa law provides that the construction of the terms of an insurance policy is a question of law. Iowa-Des Moines National Bank v. Insurance Company of North America, 459 F.2d 650, 653 (8th Cir. 1972). The rules of construction are applied in a situation where the terms of the insurance policy are ambiguous. Iowa-Des Moines National Bank, supra, at 653.

F. Extrinsic evidence may be used to ascertain the parties' meaning with regard to the construction and interpretation of the policy. However, if the evidence is conflicting, the question is for the jury as to the meaning to be given the policy. Iowa-Des Moines National Bank, supra, at 654.

G. Many jurisdictions that have been presented with the issue have indicated that when determining whether the damages sustained are the result of an "accident" or "intentional act", one must look from the viewpoint of the victim. Jennigan v. Allstate Insurance Company, 269 F.2d 353 (5th Cir. 1959); New Amsterdam Casualty v. Jones, 135 F.2d 191 (6th Cir. 1943); Wisconsin Transport Company v. Great Lakes Casualty Company, 6 N.W.2d 708 (Wisconsin 1942).

H. Other courts look from the standpoint of the acting party (insured) when making the determination of "accident" or "intentional act." Farm Bureau Mutual Auto Insurance Company v. Hammer, 177 F.2d 793 (4th Cir. 1949); Cordon v. Indemnity Insurance Company, 123 F.2d 363 (6th Cir. 1941).

III. Definition of "Injury Caused Intentionally"

A. Many courts have required a showing of specific intent to cause harm before the "intentional injury" exclusion clause is enforced. One federal court has held that an insured is not protected from the consequences of his own wilful and intentional acts when committed with the intent to inflict injury, although the actual bodily injury sustained may have been accidental. Pendergraft v. Commercial Standard Fire and Marine Company, 342 F.2d 427, 429 (10th Cir. 1965).

B. Another court has stated that an injury is either expected or intended if the insured acts with the specific intent to cause harm to another individual. The court found it immaterial whether the injury which resulted was specifically intended. State Farm Fire and Casualty Company v. Muth, 205 N.E.2d 364, 366 (Neb. 1973).

C. A Michigan court looked to not only the insured's intent to take the action which led to the result, but also it attempted to determine whether or not the actor intended the result. See Putman v. Zeluff, 127 N.W.2d 374 (Mich. 1964). See also, Morrill v. Gallagher, 122 N.W.2d 687 (Mich. 1963).

D. At least one court which also required a showing of specific intent stated that grossly negligent conduct of an insured is not the same as injury intentionally caused. Therefore, the exclusion was not enforceable. Peterson v. Western Casualty and Surety Company, 93 N.W.2d 433, 437 (Wis. 1958).

E. Courts have also distinguished between the terms "intentional" and "wanton and reckless," concluding that the latter terms mean an act intentionally done without regard for the results. The court held that the evidence presented an issue for the jury to determine whether the insured's acts were intentional or were merely wanton and reckless. Crull v. Gleb, 282 S.W. 2d 17 (Mo. Ct. App. 1964).

F. Other courts have inferred intent as a matter of law. See Pendergraft v. Commercial Standard Fire and Marine Company, 342 F.2d 427 (10th Cir. 1965); Continental Western Insurance Company v. Toal, 244 N.W.2d 121 (Minn. 1976); Hartford Fire Insurance Company v. Wagner, 207 N.W.2d 354 (Minn. 1973).

G. Examples of specific activities in which the courts attempted to define specific intent:

(1) In an action by a liability insuror for a declaratory judgment, the federal court held that the policy excluded coverage for injuries due to an assault and battery committed by the insured, even though the insured did not intend to inflict the specific injuries sustained by the victim. Pendergraft v. Commercial Standard Fire and Marine Company, 342 F.2d 427 (10th Cir. 1965).

(2) Where an insured automobile operator repeatedly rammed another's motor vehicle from the rear, another federal court held that the damages sustained by the victim were due to the insured's intentional wrongdoing. Therefore, the insured's activities were within the "intentional injury" exclusion clause. Great American Insurance Company v. Ratliff, 242 F.Supp. 983 (E.D. Ark. 1965).

(3) In another declaratory judgment action brought by the insuror in regards to a homeowner's policy, a court held that the action of a 13-year old boy who intentionally threw a soft drink bottle into a swimming pool, striking a small child, would not be excluded from the policy's coverage, since the court concluded that the boy did not intend to cause injury. American Insurance Company v. Saulnier, 242 F.Supp. 257 (Conn. 1965).

(4) In a declaratory judgment action by the insuror under an automobile policy, the court held that the evidence established that the insured intentionally caused a collision that resulted in the death of another. As a result, coverage was properly excluded, as provided by the policy. United Services Automobile Association v. Wharton, 237 F.Supp. 255 (W.D. N.C. 1965).

(5) Upon a declaratory judgment action by the insuror as a result of its involvement under an automobile insurance policy, a jury found that a killing which occurred during the course of an armed robbery by the insureds was expected or intended. The trial court entered a declaratory judgment in favor of the insurance company. The appellate court affirmed. Continental Western Insurance Company v. Toal, 244 N.W.2d 121 (Minn. 1976).

(6) With regard to a homeowner's policy, a court has held that the actions of the insured's son throwing a pumpkin at a motorist was intentional. However, since there was an absence of proof of an intent to injure the motorist, the activity of the juvenile was not exclused under the policy. Vermont Mutual Insurance v. Dalzell, 218 N.W.2d 52 (Mich. Ct. App. 1974).

(7) In an action by a hat check girl against a patron who allegedly pushed her, causing her to strike a metal object, the court held that where bodily injury was not intended, the assault did not come within the exclusionary clause. Caspersen v. Webber, 213 N.W.2d 327 (Minn. 1973).

(8) Where the insured's son fired a B-B gun from an automobile striking another in the eye causing a loss of sight, the court held that it was immaterial whether the injury which resulted was specifically intended so long as the insured acted with the specific intent to cause harm to another. State Farm and Casualty Company v. Muth, 207 N.W.2d 364 (Neb. 1973).

(9) In a case where it was clearly established that the insured intentionally shot another with a gun, causing death, the court held that the activity was clearly within the exclusionary clause, since both the act and the injury were intended. Hartford Fire and Insurance Company v. Wagner, 207 N.W.2d 354 (Minn. 1973).

(10) In an action where insured's eight-year old son started a fire in order to frighten the residents of a house because the boy was angry at them, the court sustained the finding that the house was not burned intentionally within the meaning of the policy's intentional injury exclusion clause. The court's finding of a lack of intent was due to the "tender age" of the boy. Connecticut Indemnity Company v. Nestor, 145 N.W.2d 399 (Mich. Ct. App. 1966).

(11) In an action against an insured arising from an assault and battery inflicted by insured's son and two of his friends upon another party where one of his friends kicked the individual causing damage, it was stipulated that the insured's son did not direct his friend to take such action and did not actually see the contact causing the injury. The insurance carrier attempted to deny coverage based upon the "intentional injury" exclusion clause in a homeowner's policy. However, the court ruled that where the facts were stipulated to with regard to the intent of the insured's son coverage could not be denied where his specific intent was not established. Hawkeye-Security Insurance Company v. Shields, 197 N.W.2d 894 (Mich. Ct. App. 1971).

(12) In an action wherein the plaintiff's prize dog was shot and killed by insured's son, the court sustained the jury's finding that the boy did not intend to destroy the dog within the provision of a comprehensive liability policy, which excluded coverage for intentional injury. In this case, the boy had been camping out and when he heard the approach of the dog he believed it to be wild. He tried to scare it away, but when the dog would not retreat he shot his rifle from his hip. The court stated that the issue was the boy's "total intent." Putman v. Zeluff, 127 N.W.2d 374 (Mich. 1964).

IV. Special Circumstances Which May Affect Coverage Under An Intentional Injury Exclusion Clause

A. At least one court has held that an "intentional injury" exclusion does not apply to lawful intentional acts of the insured. See Runyan v. Continental Casualty Company, 233 F.Supp. 214 (D. Ore. 1964).

B. Another court held that where the activities of an insured causing injury to another party are due exclusively to "the impairment of his judgment and rational capacity by the influence of schizophrenia...[which] deprived him of the ability to govern his conduct in accordance with reason and intent, to judge the nature, character and consequences of his act and to resist the impules to do other than what he did," the carrier could not deny coverage under an "intentional injury" exclusion clause. Rosa v. Liberty Mutual Insurance Company, 243 F.Supp. 407 (D. Conn. 1965).

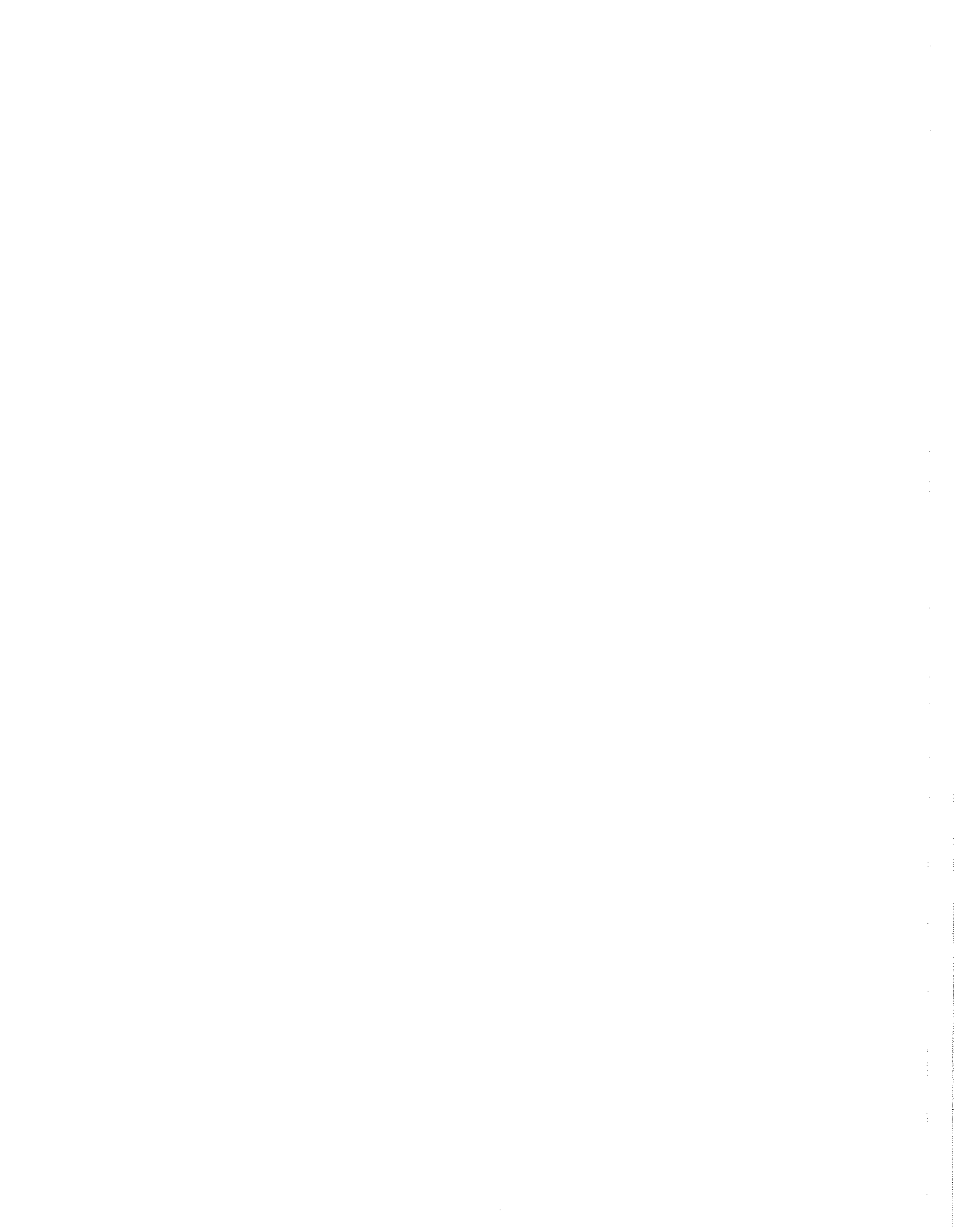
C. Some courts have held that in spite of the doctrine of vicarious liability, where an agent or employee inflicts intentional injury the "intentional injury" exclusion clause is inapplicable to the principal or employee so long as the actions were of the actor's own initiative and not at the direction of the principal or employer (insured). See Employers Mutual Insurance Company v. Hendrix, 199 F.2d 53 (4th Cir. 1952); Travelors Insurance Company v. Reed Company, 135 S.W.2d 611 (Tex. Civ. App. 1939); Georgia Casualty Company v. Alden Mills, 127 So. 555 (Miss. 1930); 44 Am.Jur.2d Insurance §1411 (1969).

V. Burden of Proof

A. The general rule is that if there is proof of a loss which appears to be covered by an insurance policy, the carrier has the burden to prove that the loss arose from a cause which is excluded under the policy. Wilson v. State Farm Mutual Auto Insurance Company, 256 Iowa 844, 128 N.W.2d 218 (1964); See 44 Am.Jur.2d Insurance §1967 (1969).

B. At least one court, however, has placed the burden

on the insured to negative any exclusions provided in a policy where the insuror plead certain exclusions as defenses. Sherman v. Provident American Insurance Company, 421 S.W.2d 652 (Tex. 1967).



AN ANATOMY OF A NUISANCE

I. Introduction: Nature of Nuisance Actions.

A. Defined as that which unlawfully annoys or does damage to another or that which annoys or disturbs one in the free use of his property or makes his physical condition uncomfortable. See 58 Am. Jur.2d, Nuisance, Section 1.

B. Operates to restrict the right of the owner of property to make such use as he pleases. See 58 Am. Jur.2d, Nuisance, Section 1.

C. Is like a trespass action but broader.

1. Trespass is usually physical in nature and the signs of which are objective.

2. A nuisance can be intangible, such as an invasion by odor, sound or light; in lieu of or in addition to a physical trespass.

D. Nuisance is a distinguished negligence.

1. Liability for negligence is based on want of proper care.

2. Liability for nuisance occurs regardless of care to avoid the injury. See Claude v. Weaver Construction Co., 261 Iowa 1225, 158 N.W.2d 139 (1968); Schlotfelt v. Vinton Farmers' Supply Company, 252 Iowa 1102, 109 N.W.2d 695, 699 (1961).

3. Nuisance is a condition and not an act or a failure to act. Sparks v. City of Pella, 258 Iowa 187, 137 N.W.2d 909 (1965).

II. Classification and Kinds of Nuisances.

A. Public and private nuisances.

1. "Public nuisance" affects the safety, health, or morals of or annoys or inconveniences the public at large or a substantial part thereof.

2. "Private nuisance" affects only private rights of a few individuals.

B. Nuisance per se and nuisance per accidens.

1. Nuisance per se is an act, occupation, or structure which because of its inherent qualities is harmful to health, morals or tranquility of persons or the community.

2. Nuisance per accidens is an act, occupation or structure which is not a nuisance per se, but which may become such by reason of the circumstances, location or surroundings. <u>Stockdale v. Agrico Chemical Co.</u> 340 F. Supp. 244 (USDC ND Iowa 1972).

C. Temporary or permanent nuisances.

1. Permanent nuisance is one of such a character that it is literally not abatable and is reasonably certain to continue.

a. Causes permanent harm as opposed to mere interference with use or enjoyment. <u>Harvey v. Mason City & Ft. D.R. Co.</u>, 129 Iowa 465, 105 N.W. 958 (1906).

b. Damages recovered are those for the permanent injury to the property. <u>Ryan v. City of Emmetsburg</u>, 232 Iowa 600, 4 N.W. 2d 435 (1942).

2. Temporary nuisance is one which is remediable, removable or abatable at reasonable cost. <u>City of Ottumwa v. Nicholson</u>, 161 Iowa 473, 143 N.W. 439 (1913).

III. Codification of Nuisance Law in Iowa.

A. Section 657.1 Code of Iowa 1977 states as follows:

"Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof."

1. Tests of nuisance under this section are:

a. Injurious to health <u>or</u>

b. Indecent or

c. Offensive to the senses, or

d. Obstructs free use of property.

2. In addition to one of the above, the act must essentially interfere with enjoyment of property or life.

3. It is a question of fact whether nuisance exists. State ex rel v. Clemens v. ToNeCa, Inc., 265 N.W.2d 909 (Iowa 1978).

4. Where Section 657.1 is involved, must cause tangible injury, not just annoyance. State ex rel v. Clemens v. ToNeCa, Inc., supra.

B. Section 657.2 enumerates specific acts of nuisances.

1. Acts enumerated in Section 657.2 could be private or public nuisance.

2. Section 657.3 provides persons committing public nuisance may be guilty of aggravated misdemeanor.

3. Statutory enumerations do not exclude other instances. Wymer v. Dagnillo, 162 N.W.2d 514 (Iowa 1968).

4. Statute does not abrogate common law. Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126 (Iowa 1974).

5. An act within the categories of the statute is conclusive as to the unreasonableness of the interference (Restatement of Torts 2d, Section 821B, Comment e).

IV. Elements of a Cause of Action for Nuisance.

A. An act or failure to act which causes an invasion of another's property rights.

1. An act (Restatement of Torts 2d, Section 824) must set in motion a chain of events resulting in invasion of another's property rights.

2. Failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the invasion or interference.

a. Possessors of real estate may have certain duties to prevent or abate nuisances on their land (See Division VI of outline).

b. Sellers of land may have continuing responsibility for nuisances on land at time of sale (See Division VI of outline).

B. An invasion of another's use and enjoyment which is intentional (Restatement of Torts 2d, Section 825):

1. Need not be malicious (Comment c).

2. Is deemed "intentional" if defendant knows or should know that his conduct involves serious risk of invasion or that invasion is substantially certain to result.

3. Where conduct continues after actor knows invasion is resulting, further invasions are intentional even if the first one is not.

4. Unintentional conduct may be a nuisance where it is actionable under the rules of negligence, is reckless, or is an extra hazardous condition or activity. (Restatement of Torts 2d, Section 822).

C. An invasion which is unreasonable.

1. Restatement of Torts 2d, Section 826 says an intentional invasion of another's interest is unreasonable if the gravity of the harm outweighs the utility of the actor's possessive conduct.

2. "Gravity" of harm is determined by considering the following factors (Restatement of Torts 2d, Section 826):

a. The degree and duration of the invasion.

b. The character of the harm involved.

i. Objective standard is applied (Comment c. Restatement of Torts 2d, Section 826).

ii. Physical damage to tangible property ordinarily regarded as of greater gravity than minor and temporary personal discomfort.

iii. Sensitivities of a normal, reasonable person considered, rather than the harm to one abnormally sensitive (Restatement of Torts 2d, Section 826, Comment e).

c. The social value that the law attaches to the type of use or enjoyment involved.

d. Suitability of particular use invaded to the character of the locality.

e. The burden on the person harmed of avoiding the harm.

i. Persons living in society must make reasonable efforts to adjust to uses of land by fellow men.

ii. Likewise person causing harm may have to adjust to reduce harm.

iii. Utility of conduct causing the invasion is based upon the following considerations (Restatement of Torts 2d, Section 828):

a. The social value that the law attaches to the primary purpose of the conduct.

b. The suitability of the conduct to the character of the locality.

c. The impracticality of preventing or avoiding the invasion.

D. The invasion must cause significant or substantial harm (Restatement of Torts 2d, Section 821F):

1. More than slight inconvenience or petty annoyance must be involved.

2. The standard is that of a normal person in the particular locality; not a hypersensitive person.

3. Normal mental reactions common to community may be considered.

V. Persons Who May Recover for Nuisance.

A. Public nuisance (Restatement of Torts 2d, Section 821C):

1. To recover damages for public nuisance, individual must have suffered harm of a type different from that suffered by other members of the public.

2. To enjoin a public nuisance, a private party must:

a. Have the right to recover damages, <u>or</u>

b. Have authority as a public officer <u>or</u>

c. Have standing for class action (probably not available in Iowa unless seeking injunction, only due to Iowa class action law) <u>Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 82 N.W.2d 151 (1957).</u>

B. Private nuisance actionable by:

1. Possessors of land, including family members;

2. Owners of easments and profits in the land;

3. Owners of nonpossessory estates, detrimentally affected by interferences (landlord receiving rent).

VI. Persons Who May Be Liable for Creating Nuisance:

A. Persons carrying on an activity which is an actionable nuisance or who participate to a substantial extent in carrying on the activity (Restatement of Torts 2d, Section 834).

B. Employer of an independent contractor who has to do work which the employer has reason to know will involve an abnormally dangerous actitivty or which the employer knows or has reason to know is likely to involve a trespass or create a public or private nuisance is subject to liability or harm resulting to others from the acts of the independent contractor.

C. Possessor or lessor of land may be liable for activities caused on his land if:

1. Possessor knows or has reason to know the activity will cause or will involve unreasonable risk of nuisance <u>and</u>;

2. Possessor consents to activity or fails to exercise reasonable care to prevent the nuisance (Restatement of Torts 2d, Section 838 and Section 837).

D. Possessor of land may be subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on his land if:

1. He knows or should know of the condition.

2. Failed after reasonable opportunity to take reasonable steps to abate (Restatement of Torts 2d, Section 839).

E. Possessor of land normally is not liable to persons outside the land where nuisance results solely from a natural condition of the land, except where nuisance is near a public highway (Restatement of Torts 2d, Section 840).

F. Vendor or lessor of land upon which there is an actionable nuisance remains subject to liability for continuation of the nuisance after he transfers the land (Restatement of Torts 2d, Section 840A).

1. If vendor conceals condition he is liable until vendee or lessee discovers it and has opportunity to abate.

2. If vendor doesn't conceal the conditions, liability continues until vendee or lessee has had reasonable opportunity to discover and abate.

VII. Defenses:

A. Contributory negligence (Restatement of Torts 2d, Section 840B).

1. When nuisance action is based on negligence action, contributory negligence is a defense.

2. When nuisance is based on intentional, reckless or abnormally dangerous conditions, contributory negligence is a defense only if plaintiff voluntarily subjects himself to the condition.

B. Assumption of risk (Restatement of Torts 2d, Section 840C) is a defense to the same extent as in other tort actions.

1. Under Iowa law, except where he expressly so agrees, plaintiff does not assume a risk of harm arising from defendant's conduct unless he knows of the existence of the risk and appreciates its unreasonable character.

2. Assumption of risk must be voluntary. Where plaintiff's acceptance of risk is not voluntary and defendant's tortious conduct has left plaintiff no reasonable alternative course of conduct to avert harm to himself or another, or to protect the right or privilege of which the defendant has no right to deprive him, there has been no assumption of risk.

C. Coming to the nuisance:

1. The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence, does not in itself bar the action, but is a significant factor in determining whether the nuisance is actionable. Kriener v. Turkey Valley Community School District, 212 N.W.2d 526 (Iowa 1973).

   a. Prescriptive rights to not run in favor of the defendant until actual interference has occurred.

   b. Comparable to assumption of risk doctrine.

2. Case of Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972) enjoined operation of a cattle feedlot which had existed for many years prior to the development by Del E. Webb of Sun City, Arizona. Sun City had "come to the nuisance" but still obtained relief. Relief was granted to the developer of Sun City because to deny the relief would have worked irreparable harm upon the thousands of persons who brought lots and built homes in Sun City. Although the feedlot operation was enjoined, Del Webb, because it "came to the nuisance", was required to indemnify the feeding operation for the amount of the damage that it sustained by virtue of the injunction.

D. Compliance with licensing requirements or meeting administrative standards is not a defense to a nuisance action.

1. Lawful businesses operated under some conditions and in some locations might still interfere with comfortable use and enjoyment of private property Patz v. Farmegg Products, Inc., 196 N.W.2d 557 Iowa (1972).

2. Test is whether the business is reasonable in the manner, place and circumstances in question. Patz v. Farmegg Products, Inc., 196 N.W.2d 557 (Iowa 1972), Pitensbarger v. Northern Natural Gas, 198 F. Supp. 665 (U.S.D.C. SD Iowa 1961).

3. Compliance with zoning, building codes, water quality codes air quality standards is pertinent evidence of community standards and nonexistence of nuisance, but is by no means conclusive. Dawson v. Laufersweiler, 850 43 N.W.2d 726, 241 Iowa (1950).

   a. Evidence of noncompliance appears to be more important as evidence of existence of a nuisance--i.e. that the invasion is unreasonable, intentional and substantial--than evidence of compliance is to avoid nuisance.

   b. Administrative or legislative standards may prescribe minimum requirements only and do not relieve defendant in all circumstances.

4. Use of latest and most modern technology is evidence of good faith, but is not conclusive in determining whether invasion is unreasonable. Claude v. Weaver Construction Company, 261 Iowa 1225, 158 N.W.2d 139 (1968).

5. Lack of negligence or absence of intention to injure does not bar recovery. Larsen v. McDonald, 212 N.W.2d 505 (Iowa 1978); Claude v. Weaver Construction Co., 261 Iowa 1225, 158 N.W.2d 139 (1968).

VIII. Remedies:

A. Money damages:

1. Permanent nuisance:

   a. Permanent nuisance is the type that is not readily abatable and will, therefore, continue indefinitely. Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942).

i. If it can be abated at reasonable expense, it is not permanent. Vogt v. City of Grinnell, 123 Iowa 332, 98 N.W. 782 (1904).

ii. Structure causing nuiance may be permanent but if problem arising from the structure can be abated, the nuisance is temporary and nonpermanent; i.e. odors from a sewer. Ryan v. City of Emmetsburg, supra.

b. Before damages may be awarded for a permanent nuisance there must be actual harm done to the property itself rather than just to the use and enjoyment of that property. Harvey v. Mason City & Ft. D.R. Co., 129 Iowa 465, 105 N.W. 958 (1906).

c. Cases say property injured must be realty and not personalty. City of Ottumwa v. Nicholson, 161 Iowa 473, 143 N.W. 439 (1913).

d. Damages are the difference in the value of the land immediately before and immediately after the creation of the nuisance. City of Ottumwa v. Nicholson, supra. Patz v. Farmegg Products, Inc., 196 N.W.2d 557 (Iowa 1972).

e. Proximate cause between the nuisance and the damages must be established. Kriener v. Turkey Valley Community School District 212 N.W.2d 526 (Iowa 1973).

2. Temporary Nuisance:

a. Damages are based on the diminution in rental value caused by the nuisance plus any special damages as may result. Stockdale v. Agrico Chemical Co., 340 F. Supp. 244 (U.S.D.C. N.D. Iowa 1972); Bates v. Quality Ready-Mix Co., 261 Iowa 696 154 N.W.2d 852, (1967).

b. Diminution of market value (except as that which may relate to rental value) has no relevance. Dawson v. Laufersweiler, 241 Iowa 850 43 N.W.2d 726 (1950).

c. In addition to diminution of rental value, plaintiffs may recover "special damages".

i. Consists of compensation for annoyance, discomfort and inconvenience. Randolf v. Town of Bloomfield, 77 Iowa 50, 41 N.W. 562 (1889); Kriener v. Turkey Valley Community School District, 212 N.W.2d 526 (Iowa 1973).

ii. Can recover incidental damages for possessor and his family. Randolf v. Town of Bloomfield, supra.

iii. May include cost of removal of offensive materials. Earl v. Clark, 219 N.W.2d 487 (Iowa 1974).

iv. Need not show impairment of health. Kriener v. Turkey Valley Community School District, 212 N.W.2d 506 (Iowa 1973).

v. Cannot recover for items of special damages which reflect themselves into the loss of rental value of land Stockdale v. Agrico Chemical Co., supra at 270.

d. Nuisance must be proximate cause of damages. Stockdale v. Agrico Chemical Co., 340 F. Supp. 244 (USDC ND Iowa 1972).

B. Injunctive relief:

1. Injunctive relief is an extraordinary remedy and will be granted "sparingly, with caution, and only in clear cases". Stockdale v. Agrico Chemical Co., 340 F. Supp. 244 (U.S.D.C. N.D. Iowa 1972).

a. Will not be granted where money damages will suffice.

b. Injury must be such as would cause physical discomfort or injury to a person of ordinary sensibilities, in addition to other factors. Helmkamp v. Clark Ready-Mix Co., 214 N.W.2d 126 (Iowa 1974).

c. Must be a showing of irreparable harm and be a difficult burden. Kaibob Industries v. Parker, 406 US 989 (1972) (cutting of trees); Helmkamp v. Clark Ready-Mix Co., 214 N.W.2d 126 (Iowa 1974) (dust and noise).

2. Factors considered (Restatement of Torts 2d, Section 936, and Helmkamp v. Clark Ready-Mix Co., 214 N.W.2d 126 (Iowa 1974):

   a. The character of the interest to be protected.

   b. The relative adequacy of the other remedies.

   c. Plaintiff's unreasonable delay in bringing suit.

   d. Plaintiff misconduct.

   e. The relative hardship likely to result to defendant if injunction is granted and to plaintiff if denied.

   f. Interest of third persons and of the public.

   g. The practicability of framing and enforcing the order or judgment (See also Newton v. City of Grundy Center, 246 Iowa 916, 70 N.W.2d 162 (1955).

3. Courts appear to pay particular attention to priority of occupation, the nature of the business, the character of the locality and the relative hardships. 57 Iowa Law Review 451, 475.

4. Parties should marshal evidence on following factors:

   a. Value to community for the jobs, money spent, creation of markets, prestige.

   b. Capital costs of facility.

   c. Taxes paid.

   d. Wages paid.

   e. Efforts to comply with laws and regulations.

   f. Use of modern technology.

g. Need for the services or products rendered.

5. Under proper circumstances money damages and injunction can be awarded for a temporary or abatable nuisance. Kriener v. Turkey Valley Community School District, 212 N.W.2d 526 (Iowa 1973).

6. Injunction may be added later even if not granted in original decree (Kriener v. Turkey Valley Community School District, supra) or may be modified or rescinded later. Helmkamp v. Clark Ready-Mix Co., 249 N.W.2d 655 (Iowa 1977).

C. Other remedies:

1. Exemplary damages:

a. Since object is to punish, ordinarily can only be awarded when substantial actual damages are shown. Golden Sun Feeds, Inc. v. Clark, 258 Iowa 678, 140 N.W.2d 158 (1966); Stockdale v. Agrico Chemical Co., supra.

b. Finding of legal or actual malice, fraud, gross negligence or oppression or an illegal act essential. Katko v. Birney, 183 N.W.2d 657 (Iowa 1971); Stockdale v. Agrico Chemical Co., supra. Malice does not necessarily mean spite or hatred but means acting with complete indifference without evidence of feeling towards the injured party. Rarely applied in nuisance cases until Claude v. Weaver Construction Co., 271 Iowa 1225, 158 N.W. 2d 139 (1968).

2. Consider buying out single or major complainer.

3. Consider consent decree limiting hours of operation, methods, or scope of operations.

D. Insurance Considerations:

1. Noxious gas discharged from manufacturing plant results in evacuation of nearby business building. Owner of building claims lost profits. Covered?

a. Under traditional general liability policy, issue would turn on whether the discharge was an "occurrence".

b. Most decisions were adverse to insurers. See Grand River Lime Co. v. Ohio Casualty Ins. Co., 32 Ohio App.2d 178, 289 N.E.2d 360 (1972).

2. In June of 1970 insurance industry adopted pollution exclusion endorsement which excludes liability due to discharge or escape of pollutants onto land, into atmosphere or into water.

a. Exclusion does not apply if discharge or escape is sudden and accidental.

b. Exclusion designed to prevent loss to insurance industry but also to encourage responsibility on the part of insureds not to pollute.

c. Now have coverage where discharge was not expected or intended, such as due to breakdown of equipment.

d. Will be ripe source of coverage litigation. See "Role of Insurance in Environmental Litigation", The Forum Vol. XI, Spring 1976, page 762.

IX. Nuisance Law Applied to Livestock Confinement Facilities.

A. Reasons for Growth of Problem.

1. Rising land prices and competition from other areas of country caused increase in livestock confinement facilities.

a. Began with poultry, then hogs, then cattle.

b. Advantages in confining cattle in small area: lower labor costs and somewhat sheltered from elements.

2. Odor problems arise from:

a. Intensive concentration of animals in pen.

b. Intensive accumulation of waste in lagoon.

c. Use of waste disposal implements such as irrigators and spreaders.

3. Typical confinement facility consists of confinement building with slotted floor which allows waste to drop below building into storage basin. Waste is then transferred to holding tanks or lagoons and later removed and used as soil nutrient. See "Odor Neighbors and Livestock Farmers" by Iowa Development Commission/Agricultural Division.

B. Nuisance actions increasingly directed at livestock confinement operations.

1. Usual common law nuisance principles apply.

2. Nuisances from livestock confinement odors will normally be considered temporary abatable nuisances. See "Ill Wind That Profits Nobody", 57 Iowa Law Review 451.

a. Odors, even though from permanent structures, are abatable. Ryan v. City of Emmetsburg. 343 Iowa 600, 4 N.W.2d 435 (1942); Stockdale v. Agrico Chemical Co., 340 F.Supp. 244 (USDC ND Iowa 1972).

b. Money damages will be the normal type of recovery and will be for temporary damages.

c. Patz v. Farmegg Products, Inc., 196 N.W.2d 577 (Iowa 1972) awarded permanent damages, but appears to be limited to its facts. (See 57 Iowa Law Review at page 462).

3. No Supreme Court cases in Iowa where permanent injunction issued closing down livestock confinement facilities.

a. Have been permanent injunctions by Iowa District Courts:

i. Hardin County v. Gifford Feed Lots, Civil No. 62-160 (D. Iowa, Hardin County filed 1968);

ii. Trottman v. Kullmer, Civil No. 23482 (D. Iowa, Benton County filed Dec. 1968).

b. Injunctive relief is a distinct possibility, however, if plaintiffs have priority of location and no substantial investment involved.

c. Courts have great flexibility in fashioning remedy. Spur Industries, Inc. v. Del E. Webb Development Co., 494 P2d 700 (Ariz. 1972); Kriener v. Turkey Valley Community School District, 212 N.W.2d 526 (Iowa 1973).

4. Punitive damages should also be considered a distinct possibility where:

a. Defendant acts with heedless disregard of interest of neighbors in siting of facility or its operation;

b. Abundant expert testimony available that feedlots can be operated with a minimum of odor.

C. Factors peculiar to livestock feeding operations.

1. Section 657.8, Code of Iowa provides that Chapter 657 (relating to nuisances) shall apply to livestock feedlot operations only as provided by Chapter 172D, Code of Iowa.

a. Chapter 172D effective November 1, 1976.

b. Provides, in essence, that if livestock operator stays in compliance with rules of Iowa Department of Environmental Quality it is protected from nuisance suits brought by new landowners whose date of ownership is subsequent to the date of operation of the feedlot.

c. Proof of compliance with rules of IDEQ is absolute defense to nuisance action.

d. Does not protect livestock operator from nuisance actions resulting from expansion of facilities after the new owner arrives.

e. Strengthens the "coming to the nuisance" defense.

f. This chapter also grants livestock operators additional time before new state or local pollution regulations or zoning laws can apply to an existing facility.

2. Livestock feed operations intensely regulated on state and federal levels by environmental laws in addition to nuisance laws:

   a. Water quality legislation and regulation;

      i. Federal Water Pollution Prevention and Central Act, 33 USC § 251, et seq.

      ii. Chapter 455B, Code of Iowa and regulations promulgated thereunder.

         A. Permits required for operation of feedlots of various sizes and within specified distances from water courses.

         B. Permits required for construction and operation of waste holding and treatment facilities.

         C. Different rules apply to open feedlots than apply to confinement facilities.

         D. Permits will specify detailed rules as to operation of facility.

         E. Chapter 20 of Departmental Rules of Iowa Department of Environmental Quality relate specifically to animal feeding operations. Guidelines of Iowa Water Quality Commission on land disposal of animal wastes immediately follow Chapter 20.

         F. Section 400-5.4, Section 400-1.2 (35)-(37) Iowa Administrative Code, attempts to define the emission of an odorous substance, effective January 1, 1980. Section 400-1.2 (35) attempts to define "objectionable odor" until January 1, 1980.

b. Clean Air Act (as amended in 1977), 42 USC § 7401-7642 and State Implementation Plan (SIP).

c. Various local zoning and health laws.

d. Violations of these acts can be an unlawful act subject to injunctive relief by public officials or private persons, or independently form the basis for a nuisance action and attorney fees.

   i. See 33 USC § 1365.

   ii. See 42 USC § 7604.

   iii. See § 455A.25 and § 455B.43.

e. Properly locating the livestock facility is the key to avoidance of problems. 57 Iowa Law Review at pages 460-466.

EMERGING APPROACH TO PRODUCTS LIABILITY OF SUCCESSOR CORPORATIONS

I. Introduction

We are here concerned with the situation where a person is injured by an allegedly defective product after the product manufacturer has ceased operations and gone out of business. Meanwhile, product units similar or identical to the offending product are still being manufactured at the same location with a similar trade name but by a second corporation. The second corporation will have purchased the assets of the manufacturer of the offending product before the injury occurred and will have had nothing to do with manufacturing the offending product or placing it into the stream of commerce.

A. In this analysis, it will be presumed that the injured party cannot use existing statutory procedures to identify and reach assets of the product manufacturer and is therefore turning to the successor corporation in attempt to establish vicarious liability for defective products manufactured by its predecessor.

1. If statutory merger or consolidation has taken place, it may be assumed that the new or surviving corporation will have succeeded to the product's liabilities of the predecessor.

2. In the situation we are concerned with, it may be assumed that sufficient time has passed so that the injured party has no remedy under the bulk transfer laws.

II. The Traditional Approach to Corporate Successor Liability

A. As a general rule, when one corporation acquires the assets of another corporation, the buyer does not impliedly assume or otherwise succeed to the liability for the tortious acts or defective products of the selling corporation solely as a result of such asset purchase. Arthur Elevator Company v. Burley Grove (Iowa 1975) 236 N.W. 2d 383.

B. Liability may be found to have been inherited or impliedly assumed by a corporation if one of the four recognized exceptions to the general rule is present.

The exceptions are as follows:

1. The acquiring corporation has expressly or impliedly agreed to accept liability.

2. The asset sale transaction amounts to a de facto merger or a de facto consolidation of the two transacting corporations.

3. The successor corporation is a mere continuation of the selling corporation.

4. The parties to the asset sale had fraudulent motives.

C. Discussion of four exceptions

III. Recent Developments in the Law of Successor Products Liability

A. Tradition corporate rules of successor liability versus a merging "tort" rule of liability.

B. Tort doctrine is adopted by the California Supreme Court in Ray v. Alad Corporation (copy of opinion attached) 560 P 2d 3 (CA 1977).

C. Approach adopted by the Michigan Supreme Court in Turner v. Bituminous Casualty Company (MI 1976) 244 N.W. 2d 873.

D. Interpretation of successor liability by First Circuit Court of Appeals in Cyr v. B. Offen & Company, Inc. 501 F 2d 1145 (CCA1, 1974).

E. Interpretation of successor liability by Third Circuit Court of Appeals in Knapp v. North American Rockwell Corporation 506 F 2d 361 (CCA3 1974)

F. Two recent Seventh Circuit Court of Appeals cases interpretating Wisconsin and Indiana law have refused to adopt the rule of Ray v. Alad Corporation. Leannis v. Cincinnati, Inc. 565 F 2d 437 (CCA7 1977); Travis v. Harris Corp. 565 F 2d 443 (CCA7 1977).

IV Conclusion

The law with respect to a purchasing corporation's liability for injuries caused by products manufactured and sold by the selling corporation in an assets acquisition is changing. A purchaser must be prepared to face the risk that the law of a jurisdiction with the Alad rule may be applied to its case. Additional courts may follow the Alad decision as happened when California was the first state to impose strict liability on manufacturers for defective products.

Respectfully submitted,

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quest, Andrade signed a document in which he agreed to pay Urbano 33 percent apparently of any recovery. Andrade subsequently received a letter from Urbano's office thanking him for having selected that office to represent him.

Urbano denied knowing how Mrs. Barcelo and Andrade came to his office. He also denied having ever employed Covar but acknowledged having known him since about 1970.

[1] The board found that Urbano wilfully solicited professional employment. Urbano does not attack that finding. Moreover, as above appears, although the evidence is conflicting, there is sufficient evidence to support the finding.

[2] Urbano argues that his acts charged in the instant proceeding and those charged in the prior proceeding arose out of a single course of conduct, namely the management of his law office in 1972, and that it violated due process to "prosecute" him a second time for that conduct. The argument lacks merit. The two proceedings involve different acts of misconduct, different clients and different dates. Nothing in the record shows that bringing the instant proceeding violated due process.

[3] Urbano also seeks to invoke the rule in *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827, 48 Cal.Rptr. 366, 409 P.2d 206; relating to multiple prosecutions. The instant proceeding, however, is not a criminal one (*Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447, 113 Cal.Rptr. 602, 521 P.2d 858; *Black v. State Bar* (1972) 7 Cal.3d 676, 688, 103 Cal.Rptr. 288, 499 P.2d 968; *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916, 101 Cal.Rptr. 369, 495 P.2d 1289), and the rule in *Kellett* does not apply.

[4] Urbano further contends that the board's recommendation of six months' suspension is too severe and that we should instead follow the local committee's recommendation of sixty days' suspension. It is the board's recommendation that is accorded greater weight, and Urbano has not sustained his burden of showing that the recommendation is erroneous or unlawful (*Toll v. State Bar* (1974) 12 Cal.3d 824, 831, 117 Cal.Rptr. 427, 528 P.2d 35.)

[5] In *Geffen v. State Bar* (1975) 14 Cal.3d 843, 122 Cal.Rptr. 865, 537 P.2d 1225, we suspended an attorney with no prior record for six months for wilfully violating former rules 2 and 3, Rules of Professional Conduct. (See also *Younger v. State Bar* (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5; *Higgins v. State Bar* (1956) 46 Cal.2d 241, 293 P.2d 455). Each case must, of course, be decided on its own facts.

[6] On the facts of this case six months' suspension appears amply warranted. It is therefore ordered that Gino Urbano be suspended from the practice of law for six months; that he comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of this order; and that he pass the Professional Responsibility Examination within one year after the effective date of this order. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8, 126 Cal.Rptr. 793, 544 P.2d 929.) This order is effective 30 days after the filing of the opinion.

136 Cal.Rptr. 574

Herbert C. RAY, Plaintiff and Appellant,

v.

ALAD CORPORATION, Defendant and Respondent.

L.A. 30613.

Supreme Court of California

Feb. 24, 1977.

Rehearing Denied March 31, 1977

Plaintiff claiming injury from defective ladder brought action against company which neither manufactured nor sold the

ladder but prior to plaintiff's injury succeeded to the business of the ladder's manufacturer through a purchase of manufacturer's assets The Superior Court, Los Angeles County, Robert M. Olson, J., granted company's motion for summary judgment and plaintiff appealed. The Supreme Court, Wright, J, held that a party which acquires a manufacturing business and continues the output of its line of products under the circumstances presented in the instant case assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired.

Reversed.

Opinion, Cal.App., 127 Cal.Rptr. 817, vacated.

1. Corporations ⟹445

Generally, purchaser of business does not assume the seller's liabilities unless there is an express or implied agreement of assumption, the transaction amounts to a consolidation or merger of the two corporations, the purchasing corporation is a mere continuation of the seller, or the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. Civil Code, § 2466, St.1955, p. 1477.

2. Products Liability ⟹54

Even though transaction by which defendant purchased assets of manufacturer of allegedly defective ladder which caused plaintiff's injuries contained no agreement to assume liability for injury from defective product, there was no indication or contention that transaction was prompted by any fraudulent purpose of escaping liability for ladder manufacturer's debts, the purchase did not amount to a consolidation or merger, under circumstances that plaintiff's right of recovery against original manufacturer was vitiated by purchase of its assets, trade name and goodwill and dissolution of original manufacturer, plaintiff would probably face insuperable obstacles in attempting to obtain satisfaction of judgment from former stockholders or directors and defendant continued to manufacture the same product line previously manufactured by original manufacturer, defendant assumed strict liability for defect in the ladder. West's Ann.Corp.Code, §§ 4608, 5000, 5200, 5400.

3. Products Liability ⟹24

Party which acquired manufacturing business and continued the output of its line of products assumed strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired; disapproving decisions to the contrary. Civil Code, § 2466, St 1955, p. 1477

Silver & McWilliams, Thomas G, Stolpman, Wilmington, for plaintiff and appellant.

Robert E. Cartwright, San Francisco, Edward I. Pollock, Los Angeles, Leroy Hersh, David B. Baum, San Francisco, Stephen I. Zetterberg, Claremont, Robert G. Beloud, Upland, Ned Good, Los Angeles, Arne Werchick, San Francisco, Sanford M. Gage, Beverly Hills, Roger H. Hedrick, Daly City, Leonard Sacks, Encino, and Joseph Posner, Los Angeles, as amici curiae on behalf of plaintiff and appellant

Yusim, Cassidy, Stein, Hanger & Olson and Robert E. Levine, Beverly Hills, for defendant and respondent.

Bell, Dunlavey & Rosenberg and James Dunlavey, Oakland, as amici curiae on behalf of defendant and respondent

WRIGHT, Associate Justice.*

Claiming damages for injury from a defective ladder, plaintiff asserts strict tort liability against defendant Alad Corporation (Alad II) which neither manufactured nor sold the ladder but prior to plaintiff's injury succeeded to the business of the lad-

* Retired Chief Justice of the Supreme Court Sitting under assignment by the Chairman of the Judicial Council

der's manufacturer, the now dissolved "Alad Corporation" (Alad I), through a purchase of Alad I's assets for an adequate cash consideration. Upon acquiring Alad I's plant, equipment, inventory, trade name, and good will, Alad II continued to manufacture the same line of ladders under the "Alad" name, using the same equipment, designs, and personnel, and soliciting Alad I's customers through the same sales representatives with no outward indication of any change in the ownership of the business. The trial court entered summary judgment for Alad II and plaintiff appeals

Apart from tort liability for defective products, the hereinafter discussed rules of law applicable to Alad II's acquisition of this manufacturing business imposed no liability upon it for Alad I's obligations other than certain contractual liabilities that were expressly assumed. This insulation from its predecessor's liabilities of a corporation acquiring business assets has the undoubted advantage of promoting the free availability and transferability of capital. However, this advantage is outweighed under the narrow circumstances here presented by considerations favoring continued protection for injured users of defective products. As will be explained, these considerations include (1) the nonavailability to plaintiff of any adequate remedy against Alad I as a result of Alad I's liquidation prior to plaintiff's injury, (2) the availability to Alad II of the knowledge necessary for gauging the risks of injury from previously manufactured ladders together with the opportunity to provide for meeting the cost arising from those risks by spreading it among current purchasers of the product line and (3) the fact that the good will transferred to and enjoyed by Alad II could not have been enjoyed by Alad I without the burden of liability for defects in ladders sold under its aegis. Accordingly we have concluded that the instant claim of strict tort liability presents an exception to the general rule against imposition upon a successor corporation of its predecessor's liabilities and that the summary judgment should be reversed.

Plaintiff alleges in his complaint that on March 24, 1969, he fell from a defective ladder in the laundry room of the University of California at Los Angeles while working for the contracting company by which he was employed. The complaint was served on Alad II as a "Doe" defendant alleged to have manufactured the ladder. (See Code Civ Proc., § 474.)[1] The Regents of the University of California (Regents) were named and served as a defendant on the basis of their ownership and control not only of the laundry room but of the ladder itself.

In granting summary judgment to Alad II,[2] the trial court considered not only the supporting and opposing declarations of witnesses with attached exhibits but also excerpts from depositions and answers to interrogatories. (See Code Civ.Proc., § 437c.) It is undisputed that the ladder involved in the accident was not made by Alad II and there was testimony that the ladder was an "old" model manufactured by Alad I. Hence the principal issue addressed by the parties' submissions on the motion for summary judgment was the presence or absence of any factual basis for imposing any liability of Alad I as manufacturer of the ladder upon Alad II as successor to Alad I's manufacturing business.

Prior to the sale of its principal business assets, Alad I was in "the specialty ladder business" and was known among commercial and industrial users of ladders as a "top quality manufacturer" of that product. On July 1, 1968, Alad I sold to Lighting Maintenance Corporation (Lighting) its "stock in trade, fixtures, equipment, trade name, in-

1. The complaint also named Howard Manufacturing Company as manufacturer of the ladder, but plaintiff apparently had that company dismissed as a defendant before serving Alad II

2. Alad II was granted separate summary judgments against plaintiff and against the Regents on their cross-complaint. Although only plaintiff has appealed Alad II and the Regents have stipulated that the summary judgment against the Regents will stand or fall in accordance with the disposition of the summary judgment against plaintiff.

ventory and goodwill" and its interest in the real property used for its manufacturing activities. The sale did not include Alad I's cash, receivables, unexpired insurance, or prepaid expenses. As part of the sale transaction Alad I agreed "to dissolve its corporate existence as soon as practical and [to] assist and cooperate with Lighting in the organization of a new corporation to be formed by Lighting under the name 'ALAD CORPORATION'" Concurrently with the sale the principal stockholders of Alad I, Mr. and Mrs. William S. Hambly, agreed for a separate consideration not to compete with the purchased business for 42 months and to render nonexclusive consulting services during that period. By separate agreement Mr. Hambly was employed as a salaried consultant for the initial five months. There was ultimately paid to Alad I and the Hamblys "total cash consideration in excess of $207,000.00 plus interest for the assets and goodwill of ALAD [I]."

The only provisions in the sale agreement for any assumption of Alad I's liabilities by Lighting were that Lighting would (1) accept and pay for materials previously ordered by Alad I in the regular course of its business and (2) fill uncompleted orders taken by Alad I in the regular course of its business and hold Alad I harmless from any damages or liability resulting from failure to do so. The possibility of Lighting's or Alad II's being held liable for defects in products manufactured or sold by Alad I was not specifically discussed nor was any provision expressly made therefor.

On July 2, 1968, the day after acquiring Alad I's assets, Lighting filed and thereafter published a certificate of transacting business under the fictitious name of "Alad Co." (See former Civ.Code, § 2466.) Meanwhile Lighting's representatives had formed a new corporation under the name of "Stern Ladder Company". On August 30, 1968, there was filed with the Secretary of State (1) a certificate of winding up and dissolution of "Alad Corporation" (Alad I) and (2) a certificate of amendment to the articles of Stern Ladder Company changing its name to "Alad Corporation" (Alad II). The dissolution certificate declared that Alad I "has been completely wound up . . . [its] known debts and liabilities have been actually paid . . . [and its] known assets have been distributed to the shareholders." (See Corp.Code, former § 5200, now § 1905, subd. (a).) In due course Lighting transferred all the assets it had purchased from Alad I to Alad II in exchange for all of Alad II's outstanding stock.[3]

The tangible assets acquired by Lighting included Alad I's manufacturing plant, machinery, offices, office fixtures and equipment, and inventory of raw materials, semifinished goods, and finished goods. These assets were used to continue the manufacturing operations without interruption except for the closing of the plant for about a week "for inventory." The factory personnel remained the same, and identical "extrusion plans" were used for producing the aluminum components of the ladders. The employee of Lighting designated as the enterprise's general manager as well as the other previous employees of Lighting were all without experience in the manufacture of ladders. The former general manager of Alad I, Mr. Hambly, remained with the business as a paid consultant for about six months after the takeover.

The "Alad" name was used for all ladders produced after the change of management. Besides the name, Lighting and Alad II acquired Alad I's lists of customers, whom they solicited, and continued to employ the salesman and manufacturer's representatives who had sold ladders for Alad I. Aside from a redesign of the logo, or corporate emblem, on the letterheads and labels, there was no indication on any of the printed materials to indicate that a new company was manufacturing Alad ladders, and the manufacturer's representatives were

3. No contention is made that this transfer of the purchased assets to Alad II, contemplated as part of the overall purchase transaction, did not burden Alad II with whatever liabilities for Alad I's defective products Lighting had assumed by acquiring and operating the "Alad" business. (Cf. *Gordon v. Aztec Brewing Co.* (1949) 33 Cal.2d 514, 521-523.)

not instructed to notify customers of the change.

[1] Our discussion of the law starts with the rule ordinarily applied to the determination of whether a corporation purchasing the principal assets of another corporation assumes the other's liabilities. As typically formulated the rule states that the purchaser does not assume the seller's liabilities unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. (See *Ortiz v. South Bend Lathe* (1975) 46 Cal.App.3d 842, 846, 120 Cal.Rptr. 556; *Schwartz v. McGraw-Edison Co.* (1971) 14 Cal.App.3d 767, 780–781, 92 Cal.Rptr. 776; *Pierce v. Riverside Mtg. Securities Co.* (1938) 25 Cal.App.2d 248, 255, 77 P.2d 226; *Golden State Bottling Co. v. NLRB* (1973) 414 U.S. 168, 182 fn.5, 94 S.Ct. 414, 38 L.Ed.2d 388; *Kloberdanz v. Joy Mfg. Co.* (D.Colo.1968) 288 F.Supp. 817, 820 (applying California law); 15 Fletcher, Cyclopedia Corporations, § 7122.)

[2] If this rule were determinative of Alad II's liability to plaintiff it would require us to affirm the summary judgment. None of the rule's four stated grounds for imposing liability on the purchasing corporation is present here. There was no express or implied agreement to assume liability for injury from defective products previously manufactured by Alad I. Nor is there any indication or contention that the transaction was prompted by any fraudulent purpose of escaping liability for Alad I's debts.

With respect to the second stated ground for liability, the purchase of Alad I's assets did not amount to a consolidation or merger. This exception has been invoked where one corporation takes all of another's assets without providing any consideration that could be made available to meet claims of the other's creditors (*Malone v. Red Top Cab Co.* (1936) 16 Cal.App.2d 268, 272–274, 60 P.2d 543) or where the consideration consists wholly of shares of the purchaser's stock which are promptly distributed to the seller's shareholders in conjunction with the seller's liquidation (*Shannon v. Samuel Langston Company* (W.D.Mich.1974) 379 F.Supp. 797, 801). In the present case the sole consideration given for Alad I's assets was cash in excess of $207,000. Of this amount Alad I was paid $70,000 when the assets were transferred and at the same time a promissory note was given to Alad I for almost $114,000. Shortly before the dissolution of Alad I the note was assigned to the Hamblys, Alad I's principal stockholders, and thereafter the note was paid in full. The remainder of the consideration went for closing expenses or was paid to the Hamblys for consulting services and their agreement not to compete. There is no contention that this consideration was inadequate or that the cash and promissory note given to Alad I were not included in the assets available to meet claims of Alad I's creditors at the time of dissolution. Hence the acquisition of Alad I's assets was not in the nature of a merger or consolidation for purposes of the aforesaid rule.

Plaintiff contends that the rule's third stated ground for liability makes Alad II liable as a mere continuation of Alad I in view of Alad II's acquisition of all Alad I's operating assets, its use of those assets and of Alad I's former employees to manufacture the same line of products, and its holding itself out to customers and the public as a continuation of the same enterprise. However, California decisions holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts have imposed such liability only upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations. (See *Stanford Hotel Co. v. M. Schwind Co.* (1919) 180 Cal. 348, 354, 181 P. 780; *Higgins v.*

Cal. Petroleum etc. Co. (1898) 122 Cal. 373, 55 P. 155; *Economy Refining & Service Co. v. Royal Nat. Bank of New York* (1971) 20 Cal.App.3d 434, 97 Cal.Rptr. 706; *Blank v. Olcovich Shoe Corp.* (1937) 20 Cal.App.2d 456, 67 P.2d 376; cf. *Malone v. Red Top Cab Co.*, supra, 16 Cal.App.2d 268, 60 P.2d 543). There is no showing of either of these elements in the present case.

Plaintiff relies on *Cyr v. B. Offen & Co., Inc.* (1st Cir. 1974) 501 F.2d 1145, 1152, where tort liability for injury from a defective product manufactured by an enterprise whose assets a corporation had acquired for adequate consideration in an arm's-length transaction was imposed on the corporation as a mere continuation of the enterprise.[4] We hereafter refer to the *Cyr* case as helpful authority on the separate issue of what if any *special* rule should be applicable to a successor corporation's *tort* liability for its predecessor's *defective products*. We disagree, however, with any implication in *Cyr* or contention by plaintiff that the settled rule governing a corporation's succession to its predecessor's liabilities *generally* should be modified so as to require such succession merely because of the factors of continuity present in *Cyr* and in the instant case.

We therefore conclude that the general rule governing succession to liabilities does not require Alad II to respond to plaintiff's claim. In considering whether a special departure from that rule is called for by the policies underlying strict tort liability for defective products, we note the approach taken by the United States Supreme Court in determining whether an employer acquiring and continuing to operate a going business succeeds to the prior operator's obligations to employees and their bargaining representatives imposed by federal labor law. Although giving substantial weight to the general rules of state law making succession to the liabilities of an acquired going business dependent on the form and circumstances of the acquisition, the court refuses to be bound by these rules where their application would unduly thwart the public policies underlying the applicable labor law. (See *Howard Johnson Co. v. Hotel Employees* (1974) 417 U.S. 249, 257, 94 S.Ct. 2236, 41 L.Ed.2d 46; *Golden State Bottling Co. v. NLRB*, supra, 414 U.S. 168, 182 fn. 5, 94 S.Ct. 414, 38 L.Ed.2d 388.) Similarly we must decide whether the policies underlying strict tort liability for defective products call for a special exception to the rule that would otherwise insulate the present defendant from plaintiff's claim. (See *Turner v. Bituminous Cas. Co.* (1976) 397 Mich. 406, 244 N.W.2d 873, 877–878; Note, *Assumption of Products Liability in Corporate Acquisitions* (1975) 55 B.U.L.Rev. 86, 107.)

The purpose of the rule of strict tort liability "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63, 27 Cal.Rptr. 697, 701, 377 P.2d 897, 901.) However, the rule "does not rest on the analysis of the financial strength or bargaining power of the parties to the particular action. It rests, rather, on the proposition that '[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.' (*Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436 [concurring opinion].)" (*Seeley v. White Motor Co.* (1965) 63 Cal.2d 9, 18–19, 45 Cal.Rptr. 17, 23, 403 P.2d 145, 151.) Thus, "the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the *spreading throughout society* of the cost of compensating them." (Italics added.) *Price v. Shell Oil Co.* (1970) 2 Cal.3d 245, 251, 85 Cal.Rptr. 178, 181, 466 P.2d 722, 725.) Justification for imposing strict liability upon a *successor* to a manufacturer under the circumstances

4. The assets were acquired not from a corporation but from the estate of a decedent who had operated the business as a sole proprietorship. (See 501 F.2d at p. 1151.)

here presented rests upon (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business. We turn to a consideration of each of these aspects in the context of the present case.

We must assume for purposes of the present proceeding that plaintiff was injured as a result of defects in a ladder manufactured by Alad I and therefore could assert strict tort liability against Alad I under the rule of *Greenman v. Yuba Power Products, Inc.*, supra, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897. However, the practical value of this right of recovery against the original manufacturer was vitiated by the purchase of Alad I's tangible assets, trade name and good will on behalf of Alad II (see fn. 3, *ante*) and the dissolution of Alad I within two months thereafter in accordance with the purchase agreement. The injury giving rise to plaintiff's claim against Alad I did not occur until more than six months after the filing of the dissolution certificate declaring that Alad I's "known debts and liabilities have been actually paid" and its "known assets have been distributed to its shareholders." This distribution of assets was perfectly proper as there was no requirement that provision be made for claims such as plaintiff's that had not yet come into existence.[5] Thus, even if plaintiff could obtain a judgment on his claim against the dissolved and assetless Alad I (see Corp Code, former § 5400, now § 2010, subd. (a)) he would face formidable and probably insuperable obstacles in attempting to obtain satisfaction of the judgment from former stockholders or directors. (See *Hoover v. Galbraith* (1972) 7 Cal.3d 519, 102 Cal.Rptr. 733, 498 P.2d 981; *Trubowitch v. Riverbank Canning Co.* (1947) 30 Cal.2d 335, 345, 182 P.2d 182; *Zinn v. Bright* (1970) 9 Cal.App.3d 188, 87 Cal.Rptr. 736; Henn & Alexander, *Effect of Corporate Dissolution on Products Liability Claims* (1971) 56 Cornell L.Rev. 865; Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims* (1976) 41 Mo.L.Rev. 321; cf. Corp.Code, § 2009 (eff. Jan. 1, 1977.)

The record does not disclose whether Alad I had insurance against liability on plaintiff's claim. Although such coverage is not inconceivable (see *Kelley v. Indemnity Ins. Co. of North America* (1937) 252 App.Div. 58, 297 N.Y.S. 228, affd., 276 N.Y. 606, 12 N.E.3d 599 (coverage afforded by policy rider)) products liability insurance is usually limited to accidents or occurrences taking place while the policy is in effect. (See *Protex-A-Kar Co. v. Hartford Acc. etc. Co.* (1951) 102 Cal.App.2d 408, 227 P.2d 509; *Bouton v. Litton Industries, Inc.* (3rd Cir. 1970) 423 F.2d 643, 645-646; 11 Couch Cyclopedia of Insurance Law (2d ed. 1963) § 44:385 (including cases cited in 1975-1976

5. Former section 5000 of the Corporations Code, which was then in effect and has since been replaced by section 2004 provided:
"After determining that all the *known debts and liabilities* of a corporation in the process of winding up have been paid or adequately provided for, the board shall distribute all the remaining corporate assets among the shareholders and owners of shares according to their respective rights and preferences. If the winding up is by court proceeding or subject to court supervision, the distribution shall not be made until after the expiration of any period for the presentation of claims which has been prescribed by order of court." (Italics added)
In a liquidation proceeding subject to court supervision "the amount of any unmatured contingent or disputed claim against the corporation which has been presented and has not been disallowed" must be "paid into court" and suit on rejected claims must be commenced within 30 days after notice of rejection. (Corp Code, former § 4608, now § 1807.) No provision need be made for the satisfaction of claims that may arise in the future on account of defective products the corporation has manufactured in the past.

cumulative supplement).) Thus the products liability insurance of a company that has gone out of business is not a likely source of compensation for injury from a product the company previously manufactured.

These barriers to plaintiff's obtaining redress from the dissolved Alad I set him and similarly situated victims of defective products apart from persons entitled to recovery against a dissolved corporation on claims that were capable of being known at the time of its dissolution. Application to such victims of the general rule that immunizes Alad I's successor from the general run of its debts would create a far greater likelihood of complete denial of redress for a legitimate claim than would the rule's application to most other types of claimants. Although the resulting hardship would be alleviated for those injured plaintiffs in a position to assert their claims against an active and solvent retail dealer who sold the defective product by which they were injured, the retailer would in turn be cut off from the benefit of rights against the manufacturer. (See *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262–263, 37 Cal. Rptr. 896, 391 P.2d 168; *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, 464, 150 P.2d 436 (conc. opn.).)[6]

While depriving plaintiff of redress against the ladder's manufacturer, Alad I, the transaction by which Alad II acquired Alad I's name and operating assets had the further effect of transferring to Alad II the resources that had previously been available to Alad I for meeting its responsibilities to persons injured by defects in ladders it had produced. These resources included not only the physical plant, the manufacturing equipment, and the inventories of raw material, work in process, and finished goods, but also the know-how available through the records of manufacturing designs, the continued employment of the factory personnel, and the consulting services of Alad I's general manager. With these facilities and sources of information, Alad II had virtually the same capacity as Alad I to estimate the risks of claims for injuries from defects in previously manufactured ladders for purposes of obtaining insurance coverage or planning self-insurance. (See *Cyr v. B. Offen & Co., Inc.*, supra, 501 F.2d 1145, 1154.) Moreover, the acquisition of the Alad enterprise gave Alad II the opportunity formerly enjoyed by Alad I of passing on to purchasers of new "Alad" products the costs of meeting these risks. Immediately after the takeover it was Alad II, not Alad I, which was in a position to promote the "paramount policy" of the strict products liability rule by "spreading throughout society . . . the cost of compensating [otherwise defenseless victims of manufacturing defects]" (*Price v. Shell Oil Co.*, supra, 2 Cal.3d 245, 251, 85 Cal.Rptr. 178, 182, 466 P.2d 722, 726). (See *Knapp v. North American Rockwell Corp.* (3d Cir. 1974) 506 F.2d 361, 372–373 (conc. opn.).)

Finally, the imposition upon Alad II of liability for injuries from Alad I's defective products is fair and equitable in view of Alad II's acquisition of Alad I's trade name, good will, and customer lists, its continuing to produce the same line of ladders, and its holding itself out to potential customers as the same enterprise. This deliberate albeit legitimate exploitation of Alad I's established reputation as a going concern manufacturing a specific product line gave Alad II a substantial benefit which its predeces-

6. In contrast to the present case in which the injury occurred after the liquidation and dissolution of the manufacturer is, the situation found in *Schwartz v. McGraw-Edison Co.*, supra, 14 Cal.App.3d 767, 92 Cal.Rptr. 776. There the minor plaintiff's injuries occurred two years and ten months *before* the manufacturer's sale of its trade name and operating assets for cash. In connection with the sale the manufacturer gave its successor a 10-year lease of the real property on which the manufacturing business was conducted. Thus the *Schwartz* plaintiff's claim could have been asserted against the original manufacturer as a going concern for a substantial period following the injury, and even after the manufacturer had sold its operating assets the possibility of recovery against it was given practical value by its continued corporate existence and its retention of substantial assets. (See 14 Cal.App.3d at pp. 776–781, 92 Cal.Rptr. 776.)

sor could not have enjoyed without the burden of potential liability for injuries from previously manufactured units. Imposing this liability upon successor manufacturers in the position of Alad II not only causes the one "who takes the benefit [to] bear the burden" (Civ Code, § 3521) but precludes any windfall to the predecessor that might otherwise result from (1) the reflection of an absence of such successor liability in an enhanced price paid by the successor for the business assets and (2) the liquidation of the predecessor resulting in avoidance of its responsibility for subsequent injuries from its defective products. (See *Turner v. Bituminous Cas Co.*, supra, 397 Mich. 406, 244 N.W.2d 873, 882; *Cyr v. B. Offen & Co., Inc.*, supra, 501 F.2d 1145, 1154; *Shannon v Samuel Langston Company*, supra, 379 F.Supp. 797, 802; Note, *Expanding the Products Liability of Successor Corporations* (1976) 27 Hastings L.J. 1305.) By taking over and continuing the established business of producing and distributing Alad ladders, Alad II became "an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products" (*Vandermark v. Ford Motor Co.*, supra, 61 Cal.2d 256, 262, 37 Cal.Rptr. 896, 899, 391 P.2d 168, 171).

[3] We therefore conclude that a party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired. Anything to the contrary in *Ortiz v. South Bend Lathe*, supra, 46 Cal.App.3d 842, 120 Cal.Rptr. 556, or *Schwartz v. McGraw-Edison Co.*, supra, 14 Cal.App.3d 767, 92 Cal. Rptr. 776 (see fn. 6, *ante*) is disapproved.

The judgment is reversed.

TOBRINER, Acting C. J., and MOSK, CLARK, RICHARDSON and SULLIVAN,** JJ., concur.

** Retired Associate Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council.

RESOURCES

Charles W. Brooke
Lane & Waterman
Davenport, Iowa

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ATLA Law Reporter: published monthly by the Association of Trial Lawyers of America

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III. TECHNICAL ASSISTANCE

The following general sources can provide technical assistance

ATLA Products Liability-Medical Malpractice Exchange:

Description: product information and medical procedure information, including governmental acts relating to them, cases litigated over them and attorneys who have handled such cases; in addition, list of expert witnesses - see attached

Address: The Exchange
1050 31st Street N.W.
Washington, D.C. 20007
(202) 785-1327

Cost: $25 per inquiry

LAWYER'S DESK REFERENCE 6th ed:

Description: 2 volume treatise by Philo listing experts, technical societies, statutes, regulations, standards, rules, sources of demonstrative aids, bureaus et al. - see attached portion of table of contents

Publisher: The Lawyers Co-Operative Publishing Co.
Rochester, N.Y. 14694

U.S. DEPARTMENT OF TRANSPORTATION/NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Description: computer information available on traffic safety tests of particular safety devices

Address: NHTSA
Office of Defects Investigation
400 7th Street, S.W.
Washington, D.C. 20590

AMA Division of Library Services:

Description: computer assisted searches of medical literature

Address: 535 N. Dearborn St.
Chicago, IL 60610
(312) 751-6000

Cost: $20 per search, 20¢ per page for copies, $3 handling charge (no cost to members)

IV. TRIAL AIDS

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The following are general sources of referral to experts

D.R.I.

Description: names and resumes of sundry experts used previously by defense counsel - also have transcripts of economists' testimony

Address: - see above

L.D.R.: - see above

ATLA Product Liability Exchange: - see above

Description: names and resumes of sundry experts used previously by plaintiffs' counsel on particular products - see attached example of ATLA response

IOWA STATE U. CIRAS:

Description: ISU Center for Industrial Research and Service providing technical references and references to experts

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Room 201 Building E
Iowa State University
Ames, Iowa 50011
(515) 294-3420

Cost: free

TASA (Technical Advisory Service for Attorneys)

Description: referral service which claims to match up your issue(s) with several experts in the technical area, nationwide

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Fort Washington, PA 19034
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Cost: referral fee

CLIENT:

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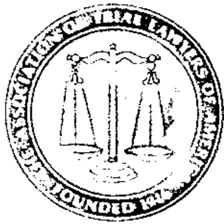

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No July issue of the *ATLA Law Reporter* is published.
The next issue will be Vol. 22, No. 6, August.

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TO: Charles W. Brooke, Esquire

FROM: The Research Group, Inc. September 14, 1976

RE: Iowa/Evidence/Constitutional Law

LOG: A-7604-A

STATEMENT OF FACTS:

Section 321.445 of the Iowa Code provides that the fact of use or non-use of seat belts by a person shall not be admissible or material as evidence in civil actions brought for damages.

QUESTION PRESENTED:

Is there any constitutional objection to this statute?

CONCLUSION:

A total of five states have similar or identical statutory provisions, and none of them has apparently ever been challenged on constitutional grounds. Various cases have applied these statutes, without questioning their validity, and the courts of other jurisdictions, in the absence of such a statute, have reached the same conclusion on the admissibility of evidence of seat belt use.

In addition, considering the similarities between the type of statute at issue here and a statutory presumption,

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it appears quite certain that a provision of this kind will withstand any challenge based on the arbitrariness or unreasonableness of the classification involved. Due process challenges would almost certainly not succeed, and there appear to be no other valid constitutional objections to this statute. (The right to jury trial under the seventh amendment would not be applicable since the amendment only applies to proceedings in federal court).

DISCUSSION OF AUTHORITY:

Five states have statutes which provide that evidence of use or non-use of seat belts is inadmissible in civil actions brought for damages. Iowa Code Ann. § 321.445 (1966); Me. Rev. Stat. Ann. tit. 29 § 1368-A (1973); Minn. Stat. Ann. § 169.685 (1976); Tenn Code Ann. § 59-930 (1968); Va. Code Ann. § 46.1-309.1(b) (1972). None of these statutes have ever been challenged on constitutional grounds, and in fact some of them have been applied by courts, without any question being raised as to their validity. See , e.g., Stallcup v. Taylor, 62 Tenn. App. 407, 463 S.W.2d 416 (1970).

In fact, even in the absence of such a statute, many courts have reached the conclusion that evidence of use or non-use of seat belts should not be admissible on the issue of due care, because there is no statutory or common law duty to wear them, and hence their non-use cannot, as a matter of law, constitute contributory negligence or a failure to exer-

cise ordinary care. An Oregon case, Robinson v. Lewis, 254 Ore. 52, 457 P.2d 483 (1969), explained why non-use is not negligence per se under the typical installation statutes, and many courts have considered the issue of a common law duty to exercise ordinary care, and concluded that there is no duty to use available seat belts. See, e.g., Robinson, supra; Petersen v. Klos, 426 F.2d 199 (5th Cir. 1970); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super Ct. 1967); Roberts v. Bohn, 26 Ohio App. 2d 50, 269 N.E.2d 53 (1971), rev'd on other grounds, 29 Ohio St. 2d 99, 279 N.E.2d 878 (1972); Paschal v. Pinkard, 228 So.2d 633 (Fla App. 1969). In an Illinois case, Deaver v. Hickox, 121 Ill. App. 465, 256 N.E. 2d 866 (1970), the court would not even admit evidence of use of a seat belt in order to prove that due care had been exercised.

There appear to be only three instances in which a court has held that evidence of use or non-use of seat belts is admissible in an action for damages. The court in Bentzler v. Brown, 34 Wis. 2d 362, 149 N.W.2d 626 (1967), found that there was a duty, based on the common law standard of ordinary care, to use available seat belts, because any occupant of an automobile should know of the additional safety factor they provide. Therefore, evidence of their non-use was admitted; however, Wisconsin is a comparative negligence jurisdiction, and the strong policy reasons for not allowing a failure to

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use a seat belt to constitute contributory negligence were therefore not present.

A California case, Truman v. Vargas, 275 Cal. App. 976, 80 Cal. Rptr. 373 (1969), found it to be a question of fact for the jury to decide, whether, in the exercise of ordinary care, the plaintiff should have been using available restraint at the time of the accident. Expert testimony, as well as the plaintiff's expected knowledge regarding the efficacy of the safety feature, were to be taken into account.

Finally, one federal court, in Mays v. Dealers Transit, Inc., 441 F.2d 1344 (7th Cir. 1971) (applying Indiana law), held that the wearing of a seat belt was sufficiently involved in the question of reasonable care to create an issue of common law negligence under "proper circumstances." The "proper circumstances" in that case, however, were very unusual, involving as they did a case of severe impact without material damage to the interior of the vehicle (a truck cab, the right side of which was ripped off on impact, but not crushed inward).

There is one other decision which purports to admit evidence of non-use of seat belts, Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968), but that language is really by way of dictum, since in that case the car was not even equipped with seat belts. In addition, that decision came when Illinois was a comparative negligence state, which it no longer is, and so the policy considerations involved

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have changed radically.

Thus, there appears to be a great similarity in the results reached in the majority of jurisdictions, whether by statute or by judicial decision. The only remaining question would then be whether this difference in form is of any substantive import, or to put it differently, whether there is any reason why the legislature cannot, by statute, achieve the same goal that a court can, by judicial decision?

To answer this question, one can start with the long-established principle that every statute is entitled to the presumption of constitutionality, in the absence of clear and convincing proof to the contrary. (See cases collected at 7 S. Ct. Digest "Evidence" § 99 (1949 and 1975 supp.). In this case, it might be argued that the statute denies a persons who wishes to put on evidence of use or non-use of seat belts either his full right to a jury trial or due process of law. The most closely analogous situation in which such a claim appears to have been litigated is that involving statutory presumptions.

The Iowa statute at issue provides that certain evidence will not be admissible or material, thereby removing from the trier of fact one potential area of conflict. This is quite similar to other statutory presumptions which provide that a certain conclusion must inevitably follow from a given set of facts, thereby removing any possibility of debate on the significance to be given such facts. In the case of such

presumptions, the Supreme Court has said that "[i]t was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions is . . . an illustration of the power to classify." Hawker v. New York, 170 U.S. 189, 197-98 (1898). This power to classify is clearly established, and state legislatures are given wide latitude in exercising the power, as long as its classifications are not completely arbitrary or capricious. Weinberger v. Salfi, ____ U.S. ____, 95 S. Ct. 2457 (1975). (See cases collected at 5 S. Ct. Digest "Constitutional Law" § 317 (1971 and 1975 supp.)

The Supreme Court has said that every legislature has the power to prescribe the evidence that shall be received in the courts of its jurisdiction, and where a legislature has provided that one fact shall constitute a presumption of another fact, and the inference is not purely arbitrary, and there is a rational relation between the two facts, then such a statute does not violate the requirements of due process of law or the equal protection of the laws. Bailey v. Alabama, 219 U.S. 219 (1911).

It would seem, therefore, that the state legislature has a good deal of discretion in the enactment of such provisions. McCormick shares this viewpoint, saying that burdens of proof are fixed in civil cases not for constitutional reasons, but for reasons of probability, social policy, and

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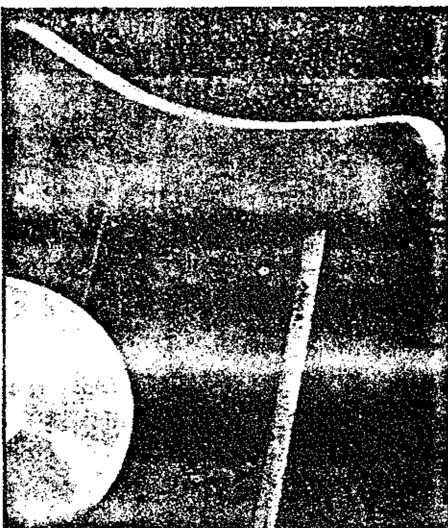
convenience, and that because of this, it is "extremely unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases." McCormick, Evidence § 344 at 819 (2nd ed. 1972). It is true, of course, that the Iowa statute is not exactly the same as a presumption, being rather an exclusionary rule of evidence, and yet many of the same policy considerations are applicable. In the absence of any legislatively-proclaimed social policy mandating the use of seat belts, and particularly in the absence of their widespread use, it seems unlikely that their non-use would be considered to be evidence of contributory negligence. Indeed, as demonstrated, the courts of most jurisdictions have laid down that rule without any statutory guidance. In this case it would not seem to make any difference that the Iowa legislature reached this conclusion and made it a statutory mandate. It is clearly not an arbitrary or capricious rule, but rather one founded in social policy, and as such does not appear to be subject to any valid constitutional challenge.

Volume 15, No. 6

THE NATIONAL LEGAL NEWSMAGAZINE

Published by the Association of Trial Lawyers of America



COVER: Photographer Ira Wexler depicts this month's theme of construction and the law.

A PARTIAL REVOCATION OF THE LEGAL LICENSE TO KILL CONSTRUCTION WORKERS Attorneys Harry M. Philo and Richard L. Steinberg recount the hazards of the construction workers' occupation. Although there have been improvements in safety precautions, and in the law, there is still a long way to go. 24

THE INJURED CONSTRUCTION WORKER: LEGAL TRENDS AND TACTICAL CONSIDERATIONS Attorney Aaron J. Broder explores legal trends and tactical considerations in representing the injured construction worker. 30

CONSTRUCTION CLAIMS New York attorney Michael S. Simon emphasizes the need for documentation as the key to pretrial resolution of the typical construction contract claim from bidding and negotiation to actual performance. 34

A PRACTICAL APPROACH TO CONSTRUCTION LITIGATION Attorney Marvin Schecter considers effective preparation for trial in private construction litigation: review of existing contract documentation, interviewing of office and field personnel, chronological memorandum of events, pretrial discovery and inspection, and more. 39

SECURITIES LAW (PART I): RECOGNIZING FRAUDULENT BROKER-DEALER PRACTICES Stuart Goldberg begins a two-part series on securities fraud with his initial focus on churning as one of the more frequent abuses. 42

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MARCH 1979
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for the Defense

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For Defense Attorneys, Insurance And Corporate Executives, And The Judiciary

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JURY REPORTS

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VOL. 5 July 15, 1979 No. 13

LINN DISTRICT COURT May 31, 1979 William R. Eads, Judge.
Darryl W. Cheney vs Walter W. Benson
Plaintiff's Attys. Timothy White & James Piersall, Cedar Rapids, Ia.
Defendant's Atty. Tom Riley, Cedar Rapids, Ia.
AUTO Plaintiff sues for $25,000 for leg and shoulder contusions, 2 weeks of income and partial disability. Defendant filed offer to confess judgement for $2,000 as a result of making a left turn at intersection into path of plaintiff's oncoming motorcycle. Suit alleged failure to yield, defense of improper lookout.
VERDICT FOR Defendant.

DUBUQUE DISTRICT COURT June 7, 1979 Carroll Engelkes, C. J.
The Great Atlantic & Pacific Tea Co. vs Ed Turquist and Homer V. Butt.
Plaintiff's Atty. Michael J. Melloy, Dubuque, Ia.
Defendant's Atty. Hal F. Reynolds, Dubuque, Ia.
LANDLORD - TENANT A & P sues for $20,861 repair costs of parking lot which it alleged was the obligation of the landlord under terms of its lease. Defendant counterclaims for $15,000 for damages to the lot beyond normal wear and tear, caused by Plaintiff.
VERDICT FOR PLAINTIFF $2,800.
VERDICT FOR DEFENDANT $2,250

ARBITRATION Mar. 27, 1979 David E. Linquist, Dep. Ind. Comm.
Jack Gearhart vs Gra-Iron Foundry Corp. & Kemper Ins. Cos.
Claimant's Atty. Pat W. Brooks, Marshalltown, Ia.
Employer's Atty. Mike Moon, Marshalltown, Ia.
Claimant, age 59, molder, worked spreading sand in a box on a jolting table for 20 yrs. 2 years ago claimant first noticed difficulty using his arm which gradually became worse. Now asks for disability and medical expenses from surgery.

ASSIGNMENT TRANSMITTAL PROCEDURES

1. People to Contact: All research assignments and information inquiries should be directed to one of the following:

   Mr. David H. Nelson — Mr. Alvin B.H. Mirmelstein
   Mr. W. Andrew McCaughey

   The Research Group, Inc.
   Post Office Box 88
   Ann Arbor, Michigan 48107

   Telephone: (313) 769-8273

2. Transmittal by Mail: A statement of the facts and the issues to be researched may be submitted by mail. Upon receipt of the assignment, The Research Group will telephone the assigning attorney to discuss the case, estimate the cost, and set the deadline for delivery. The assignment receipt will also be confirmed by mail.

3. Transmittal by Telephone: The Research Group is prepared to receive assignments by telephone at the number listed above. With the permission of the transmitting attorney, The Research Group will tape record the conversation in order to preserve a full record of the assignment. Cost estimates and deadlines are normally established during the discussion. The receipt of the assignment will be confirmed by mail.

4. In-person Transmittal in the Attorney's Offices or Other Designated Location: Special arrangements may be made to appoint a Research Group senior staff member to receive personally an assignment within the attorney's offices or other designated location.

5. Deadline for Delivery of the Completed Assignment: Normally, the assignment will be completed and returned to the attorney within two (2) weeks of receipt. Upon the request of the attorney, The Research Group is prepared to respond to extremely short due dates.

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THE RESEARCH GROUP

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Insurer's Duty To Defend

Edited by

Donald J. Hirsch and Anthony K. Karpowitz

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THE CASE FOR ATLA'S PRODUCTS LIABILITY — MEDICAL MALPRACTICE EXCHANGE

A service available exclusively to ATLA members

- The Exchange is a professional information and research service maintained by ATLA for Association members covering the areas of products liability and medical malpractice
- A library with a master index system containing information on thousands of consumer and commercial products, hundreds of drugs and many medical procedures is maintained and constantly updated by the Exchange.
- The Exchange provides references to case law and settlements dealing with a particular product or medical procedure.
- A list of ATLA members who have handled or are handling similar cases is available through the Exchange.
- The minimum fee for this service is only $25.00 per inquiry.

The following is a sample of just some of the topics included in the Exchange's index system:

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Airplanes
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Auto Design Liability
Auto Door Latches
Auto Fan Blades
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Auto Seats
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& Windows
Batteries
Bicycles
Blindspots — Vehicle
Boats
Bottles
Brakes
Butazolidin
Catheters
Clairol
Cleocin
Coffee Makers
Compazine
Conveyor Belts
Corn Pickers & Choppers
Corvair
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Cranes
Deodorants
DES
Detergents
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Golf Carts
Grinding Wheels
Hair Rinses & Dyes
Hair Sprays
Hair Waves
Halothane
Hand Tools
Helicopters
Helmets
Hot Water Heaters
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or Blankets
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Prednisone
Rubella Vaccine
Sansert
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Snowmobiles
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Vaporizers
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Xylocaine

MEDICAL MALPRACTICE

Abandonment
Abortion
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Appendectomy
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Blood Transfusions — Mismatched
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Foreign Objects Left in Body
After Surgery
Heart Attack — Treatment & Diagnosis
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Hospital Liability — Refusal of
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Hospital Liability — Sucide of
Patient
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In reply refer to: 60.41

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September 12, 1978

Charles W. Brooke, Esq.
LANE & WATERMAN
700 Davenport Bank Building
Davenport, IA 52801

Dear Mr. Brooke:

In response to your inquiry of August 22, 1978, I am enclosing a copy of the materials which the Products Liability - Medical Malpractice Exchange has researched and collected on IUD: MALPRACTICE and IUD: CONTRACEPTIVES.

These materials include whatever cases, settlements and other relevant information The Exchange has gathered on this subject to date. The materials also list the names of attorneys who have contacted The Exchange while preparing cases similar to yours or involving similar issues. You may be interested in contacting some of the attorneys listed in order to determine the specifics of their cases and to make mutually beneficial arrangements for the exchange of information. In addition, you may find it useful to contact the attorneys who handled the concluded cases and settlements listed in the materials, whose names can often be obtained through published case reports and some of whom are ATLA members. In the future, should The Exchange receive inquiries from other member attorneys handling similar cases, your name and a brief description of your case will be included in the materials they receive.

In response to your inquiry concerning Enovid as a teratogenic agent, our file on Oral Contraceptives does not make reference to birth defect injuries. However, you may be interested in the discussion found in Heinonen, Slone, Shapiro, Birth Defects and Drugs in Pregnancy, 1977, Publishing Sciences Group, Inc., Littleton, MA, at Chapter 31, of findings suggesting "an association between female hormones and cardiovascular malformations". For your convenience, I have enclosed a copy of the relevant chapter of the study, along with the applicable footnotes.

In this regard, it would be greatly appreciated if you would provide this office with any relevant precedents or materials you may discover in the course of your investigation of this case. Such information would aid us in assisting other members who contact The Exchange regarding this topic in the future.

1050 31ST STREET, N.W., WASHINGTON, D.C. 20007 202/965-3500

As I am sure you are aware, the best way to obtain referral to seasoned expert witnesses is to contact attorneys who have handled similar cases. While The Exchange has been unable to compile a listing of individual physicians willing to testify for plaintiffs in medical negligence cases, you may be able to obtain referral to the appropriate expert by contacting one or more of the medical expert services on the enclosed list.

The Exchange is always interested in receiving the names of physicians and competent medical expert witnesses willing to testify on behalf of plaintiffs. At present, The Exchange is in the process of compiling an index of medical expert witnesses by speciality, but this cannot be accomplished without the participation of all ATLA members handling medical malpractice and drug product liability cases. Therefore, if you are able to locate and utilize the services of a medical expert whom you would recommend for consideration by other ATLA members handling similar cases, it would be greatly appreciated if you would complete the enclosed Medical Expert Evaluation Form for our records. Please enclose a copy of the expert's resume or qualifications and be specific in your responses to the questions on the form. Recommendations and evaluations by ATLA members will be kept on file for future reference and will greatly aid The Exchange in better assisting all ATLA members in the future.

I hope this information proves to be of some assistance and that you will inform this office of the progress and resolution of your case.

Sincerely,

JONATHAN T. ZACKEY, Executive Counsel
Products Liability - Medical Malpractice Exchange
The Association of Trial Lawyers of America

JTZ/tar

enclosures

Medical Expert Evaluation Form (2)

Issues on which the Medical Expert was utilized in your case: ______________________

____

____

____

Was the case settled or tried? ______________________________

Resolution of case? ______________________________________

Comments on Medical Expert's performance in evaluation, discovery, preparation, depositions, testimony, etc.: ____

____

____

____

____

Would you recommend this expert for use by other ATLA members handling similar cases?

____

(If yes, please enclose a resume or a brief description of the expert's qualifications.)

This form should be returned to:

The ATLA Exchange
The Association of Trial Lawyers of America
1050 31st Street, N.W.
Washington, DC 20007

Your assistance in our efforts to improve and expand the lists of possible expert witnesses maintained by The Exchange is an important element in our continuing efforts to make The Exchange a more effective resource for all ATLA members. Your cooperation in this regard is greatly appreciated.

Jonathan T. Zackey
Executive Counsel

Medical Expert Evaluation Form (2)

Issues on which the Medical Expert was utilized in your case: ______________________________

____

____

____

Was the case settled or tried? ____

Resolution of case? ____

Comments on Medical Expert's performance in evaluation, discovery, preparation, depositions,

testimony, etc.: ____

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Jonathan T. Zackey
Executive Counsel

AMERICAN ASSOCIATION OF MEDICO-LEGAL CONSULTANTS, Park Towne Place North, 2200 Benjamin Franklin Parkway, Philadelphia, PA 19130 (215) 561-2121 (evaluation by doctors-lawyers for approximately $400; ATLA member recommended)

NATIONAL MEDICAL ADVISORY SERVICE, Washington Office: 7315 Wisconsin Avenue, Washington, D.C. 20014 (301) 656-8030; Pennsylvania Office: Robinson Building, 42 South 15th Street, Philadelphia, PA 19102 (215) 563-2875 (ATLA member recommended)

INTER-CITY TESTING & CONSULTING CORPORATION, Executive Offices: Post Office Box 1180, 3 Baker Hill Road, Great Neck, NY 11023 (516) 829-8762; Southeastern Office: Post Office Box 9203, Fort Lauderdale, FL 33310 (305) 565-0324

MALPRACTICE ASSISTANCE BUREAU, 413 Ninth Street, Palisades Park, NJ 07650 (201) 947-5217 (evaluation and expert referrals; $300-$500 evaluation fee; $100 referral fee; limited to New Jersey, New York, Delaware, Pennsylvania, and Connecticut)

MEDICAL-LEGAL CONSULTING SERVICE, INC., Suite 710 - Chevy Chase Lake Building, 8401 Connecticut Avenue, Chevy Chase, MD 20015 (301) 652-7664

MEDI-LEGAL SERVICES, 2550 Fifth Avenue - Suite 310, San Diego, CA 92101 (714) 239-1472

MEDICAL RESOURCES, Six Fayette Street, Boston, MA 02116 (617) 426-7722 (initial evaluation fee $350; New England area)

MEDICAL EVALUATION, INC., David Z. Kitkay, M.D. and Douglas R. Shanklin, M.D., Post Office Box 1267, Gainesville, FL 32602 (904) 375-0821 (specializing in obstetrics and gynecology)

Godard v. Ridgway, 445 P.2d 757 (Wy. 1968), 18 The Citation 49 (1968) (physician failed to promptly discover and then promptly disclose to patient that "Bow" IUD he inserted moved into abdominal cavity...summary judgment for physician reversed...question of fact on issue of physician's negligence)

Livingstone v. Varga, No. NEC9801 (Super. Ct., Los Angeles Cty., Cal. Dec. 8, 1971), 25 The Citation 113 (1972) (defendant physician unable to locate IUD and failed to remove it...subsequent normal pregnancy and then second pregnancy ended in abortion...surgical removal required...jury verdict for defendant-physician)

Johnson v. Fuller, No. 174871 (Super. Ct., Orange Cty., Cal. Sept. 7, 1972), 27 The Citation 65 (1973) (uterine perforation caused by IUD migration...evidence that migration did not occur during placement but later...jury verdict for defendant physician)

Hines v. Kaiser Foundation Hosp., No. 395620 (Super. Ct., Alameda Cty., Cal. Oct. 4, 1973), 28 The Citation 113 (1974) (hospital and medical group failed to inform patient of IUD risks...device migrated to peritoneal cavity... colpotomy and exploratory laparotomy required...jury verdict for defendants after $5,000 settlement rejected by plaintiff)

Nivison v. County of Los Angeles, No. 994586 (Super. Ct., Los Angeles Cty., Cal. July 19, 1974), 30 The Citation 38 (1974) (perforation of uterus from insertion of wrong size IUD...laparotomy necessary for removal...Caesarean Section required for future childbirth...$3,411.15 jury verdict)

Sherman v. Cupps, No. C-27973 (Dist. Ct., Denver, Colo. 1974), 18 ATLA News L. 69 (1975) (osteopathic surgeon inserted IUD causing infection and necessitating total hysterectomy...informed consent...substantial verdict for plaintiff)

Roberts v. Ortho Pharmaceutical Corp., et al., No. 4878 (Dist. Ct., Trego Cty., Kan., 1976) (improper insertion of Lippes Loop which perforated uterine wall and lodged in peritoneal cavity...physician believed patient passed device and failed to X-ray as directed by mfr....Loop remained in cavity for four years until caused stomach cramps...removed in conjunction with hysterectomy...$15,000 SETTLEMENT against inserting physician only...counsel for plaintiff ATLA member Thomas C. Boone of Hays, KS)

Shields v. Planned Parenthood, No. 4185/73 (N.Y. Sup. Ct., Kings Cty., May 2, 1977), 20 ATLA L. Rep. 480 (Dec. 1977) (plaintiff 31-year-old woman had IUD fitted by defendant in 1968 . . . the next year she was unable to find the string attached and returned to clinic where, rather than x-raying, doctor assumed IUD expelled and inserted another . . . next year she decided to have a child and had second device removed . . . but after two years of unsuccessful attempts at conceiving, returned to clinic, x-ray revealed first IUD, implanted in uterine wall . . . removed, but scarring severe in uterus and fallopian tubes . . . sterile . . . $200,000 JURY VERDICT . . . counsel for plaintiff ATLA member, Abraham Fuchsberg, New York, NY)

Vareltzis, et al. v. Gianis, No. L-1931-76 (Morris Cty. Super. Ct., N.J., July 19, 1977), 20 ATLA L. Rep. 480 (Dec. 1977) (Defendant doctor performed tubal ligation on plaintiff wife without removing a Maczlin Spring IUD . . . she returned for two post-op checkups and doctor told her she was healthy and did not notice IUD . . . plaintiff husband suffered lacerations and punctures of his penis when couple attempted intercourse . . . she returned to defendant after seven months of severe cramps and told him she thought her IUD still in place . . . doctor unable to remove IUD without consulting specialists . . . left on vacation and offered no help to plaintiff . . . she consulted another obstetrician who removed IUD . . . defendant admitted not removing IUD was oversight in deposition . . . plaintiff's motion for summary judgment granted on "common knowledge" doctrine since

I.U.D.

Godard v. Ridgeway, 445 P.2d 751 (Wyo. 1968), 12 ATL News L. 40 (Feb. 1969) - medical malpractice case

6 Medical Letter 63 (July 31, 1964) (Drug and Therapeutic Information, Inc., N.Y.)

1 Lancet 1391 (June 26, 1965)

Clin-Alert, No. 196 (July 27, 1965)(Science Editors, Louisville, Ky.)

Medical Tribune, Vol. 6, No. 78 (June 30, 1965), p. 11 (Medical Tribune, Inc., NY.)

Today's Health, Vol. 43, No. 6, (June 1965), p. 28

94 Am. J. Obst. & Gynecol. 1073 (April 19, 1966)

Clin-Alert 122 (May 14, 1966)

27 Obst. & Gynec. 814 (June 1966)

Clin-Alert 177 (July 7, 1966)

8 Med. Letter, No. 20 (Oct. 7, 1966), p. 81

Obst. & Gynec. 731 (Nov. 1966), Clin-Alert 333 (Dec. 9, 1966)

Med. World News, Feb 9, 1968, p. 31

4 British M. J. 708 (Dec. 23, 1967), Clin-Alert 52 (Feb. 22, 1968)

100 Am. J. Obst. & Gynecol. 649 (March 1, 1968), Clin-Alert 82 (March 30, 1968)

31 Obst. & Gynecol. 322 (March 1968), Clin-Alert 84 (April 12, 1968)

1 British M. J. 612 (March 9, 1968), Clin-Alert 101 (April 30, 1968)

31 Obst. & Gynecol. 845 (June 1968), Clin-Alert 159 (July 26, 1968)

207 JAMA 121, Jan. 6, 1968

2 British M.J. 381 (May 10, 1969), Clin-Alert 96 (June 9, 1969)

10 Medical World News 4 (Nov. 21, 1969)

210 JAMA 728 (Oct. 27, 1969) summarized in Clin-Alert 222 (Dec. 1969)

105 Am J. Obst. & Gynecol. 620 (Oct. 15, 1969)

211 JAMA 959 (Feb. 9, 1970) CA #168 Aug 10'71

Medical World News, Obs. & Gyn Special Issue (Feb. 1970), p. 22

Clin-Alert#75 (March 20, 1970)

Medical World News April 24, 1970 p. 12I (how IUD works)

212 JAMA 765 #5 May 4, 1970 ; #7 May 18, 1970 p. 1136

Medical Trial Technique Quarterly June 1970 p. 1

213 JAMA 1693 #10 Sept 7, 1970

215 JAMA 674 #4 Jan 25'71 , 827 #5 Feb 1, 1971 (Majzlin spring)-CA#85 May 12'7

215 JAMA 1156 #7 Feb 15'71 (injury)

Med Wor News OBS & GYN Feb 71 p. 23 MED WOR NEWS Mar 26'71 p. 15 (improved models)

216 JAMA 229 #2 Ap 12'71 (T-shaped)

med wor news Ap23'71 p.5 (CU-7, Tatum T with copper must file NDA)

CA#93 May 14'71 (Singapore goes off IUD)

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PROPOSED UNIFORM PRODUCT LIABILITY LAW [1]

M. Gene Blackburn
Murray & Blackburn, P.C.
Fort Dodge, IA 50501

I. BACKGROUND

A. Intent of the proposal:

"The model law is intended to balance the interests of product users and sellers and to provide uniformity in the major areas of tort law that may affect product liability insurance rate making."

B. Criteria for the Law:

1. [To] ensure the availability of 'affordable' product liability insurance with adequate coverage to product sellers that engage in reasonably safe design and quality control practices.

2. [To] ensure that a person injured by an unreasonably safe product receives reasonable compensation for his or her injury.

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1. NOTE: The "Draft Uniform Product Liability Law" which is the subject matter of this outline is a project of the United States Department of Commerce. It is not a product of the Commission on Uniform State Laws. The text of the Draft is reported in 44 Federal Register, No. 9, January 12, 1979. For the purpose of saving space, considerable editing has been done by omitting parts of the act. Omissions are designated by * * * In addition, certain liberties have been taken by abstracting the Draft author's "analysis". A short abstract of the Draft author's "analysis" follows the selected section. My interpretation of the effect of current Iowa law follows that. Occasional comments are dropped to footnotes in this outline. As an additional caveat, it is virtually impossible to do a complete analysis of this act and its possible effect on existing law within the scope of this outline. MGB

3. [To] place the incentive for risk prevention on the party or parties who are best able to accomplish that goal.

4. [To] expedite the reparations process from the time of injury to the time the claim is paid.

5. [To] minimize the sum of accident costs, prevention costs and trasaction costs.

6. The remedy is comparatively specific and concrete in nature and format.

II. THE UNIFORM PRODUCT LIABILITY ACT[2]

A. Section 101: Findings.

Section 101 defines certain grounds in support of the claimed need for uniformity. These include findings relating to the burden upon interstate commerce which affect increased consumer prices, discincentives for manufacturers to develop high risk but beneficial products. Other findings relate to the observation that the law is fraught with uncertainty; there have been "panic reforms" which would curtail the rights of product users; insurers have cited uncertainty in the law as justification for rates that do not reflect actual risk; uncertainty in law and the added litigation costs put an additional strain on the judicial system and recently enacted state legislation has widened already existing disparities in the law.

B. Section 102: Definitions.

(1) "Product Seller"

"Product seller" means any person or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling such products, whether

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2. Some of the language of the proposed act is paraphrased in order to conserve space. For the complete text see 44 Federal Register, No. 9, pp. 2997-3000. This writers comments follow.

the sale is resale, or for use or consumption. The term "product seller" also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products.

Analysis: The definition of "product seller" encompasses all parties in the regular commercial distribution chain. It does not include the occasional private seller, nor does it include the potential product liability problems of the seller of real property. See Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). Neither does it indicate whether a commercial seller of used property is subject to liability under the act.

Iowa Law: The definition of "product seller" in Section 102 appears to be in compliance with Iowa law. See dictum statement in Miller v. International Harvester Co., 246 N.W.2d 298, 303 (Iowa, 1976) ". . . defendant must be shown to have been within the distributive chain of a product."

(2) "Product Liability Claim"

"Product liability claim" includes all claims or actions brought for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing packaging, or labeling of any product. It includes, but is not limited to, all actions based on the following theories: strict liability in tort; negligence; breach of warranty, express of implied; breach or failure to discharge a duty to warn or instruct, whether negligence or innocent, misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any substantive legal theory in tort or contract.

Analysis: This section purports to consolidate all theories, e.g., negligence, express warranty, implied warranty and strict liability in tort into one unitary action.

Iowa Law: This, of course, would drastically change Iowa law which recognizes several theories of product liability recovery. See, e.g., Calkins v. Sandven, 256 Iowa 68, 129 N.W.2d 1 (1964) and Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312

(1965); (negligent design); Breitenkamp v. Community Co-op, 253 Iowa 839, 114 N.W.2d 323 (express and implied warranty) and Kleve v. General Motors Corporation, 210 N.W.2d 568 (Iowa, 1973)(strict liability).

(3) "Claimant"

> "Claimant" means a person asserting a legal cause of action or claim and, if the claim is asserted on behalf of an estate, claimant includes claimant's decedent. Claimants include product users, consumers, and bystanders who are harmed by defective products.

Iowa Law: This conforms with Iowa law. See Haumerson v. Ford Motor Co., 257 N.W.2d 7 (Iowa, 1977) but see Eikelberg v. Deere & Co., 276 N.W.2d 442, 445 (Iowa, 1978) which declines to extend liability to bystanders beyond that to users.

(4) "Harm"

> "Harm includes damage to property and personal physical injuries including emotional harm. It includes damage to the product itself. Damage caused by loss of use of a product is not included, but a claim may be allowed if the seller expressly warranted this protection and this warranty was intended to extend to claimant.[3]

Analysis: This section does not approach the question of whether there may be recovery for emotional harm without physical contact. It does include damage to the product itself. It excludes economic loss. Justification is found in the difficult underwriting problems of extending economic loss through product liability insurance.

Iowa Law: It is likely the Iowa Court would sustain a claim for recovery, upon proper proof, of emotional harm without trauma. See Meyer v. Nottger, 241 N.W.2d 911 (Iowa, 1976)(permitting damages for emotional distress for breach of

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3. It is interesting to note that the definition of "harm" does not include damages for death. Surely this is an oversigh on the part of the drafters.

contract); Mentzer v. Western Union, 93 Iowa 752, 62 N.W. 1. As to the question of economic loss resulting from product failure see Iowa Electric Light & Power Co. v. Allis Chalmers Mfg. Co., 360 F. Supp. 25 (S.D., Iowa,)(denying economic loss, opinion by Hanson, applying Iowa law).

(5) "Manufacturer"

"Manufacturer" includes product sellers who design, assemble, fabricate, construct, process, package, or otherwise prepare a product or component part of a product prior to its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

(6) "Reasonably Anticipated Conduct"

"Reasonably anticipated conduct" means conduct which would be expected of an ordinary prudent person who is likely to use the product.

Analysis: Based on Arizona Statute §12 681(4) 1978. Intended to change conduct from foreseeable, e.g., "foreseeable misuse" and to eliminate hindsight by the trier of fact.

Iowa Law: The Iowa Court may have adopted the concept of foreseeable misuse of a product. See, e.g., Cooley v. Quick Supply Company, 221 N.W.2d 763, 772 (Iowa, 1974).

C. Section 103: Scope of this Act.

"(a) A product liability claim provided by this Act shall be in lieu of all existing claims against product sellers (including actions in negligence, strict liability, and warranty) for harms caused by a product.

(b) A claim may be asserted successfully under this Act even though the claimant did not buy the product from or enter into any contractual relationship with the product seller * * *"

Analysis:

(a) This section is intended to consolidate all theories of product liability into one unitary action.

(b) Subsection (b) does away with the contractual privity concept.

Iowa Law:

(a) Would obviously change current Iowa law which permits several theories of recovery. See Comment to §101 above. The Iowa Court has indicated that although strict liability in tort and breach of implied warranty may be submitted in some factual situations, it might be a rare case where it is properly done. Hawkeye Security Insurance Co. v. Fort Motor Company, 174 N.W.2d 672 (Iowa, 1970).

(b) The Iowa Court abandoned the privity requirement in products cases in State Farm Mutual Auto Insurance Co. v. Anderson Webber Ford, 252 Iowa 1289, 110 N.W.2d 449 (1962).

D. Section 104: The Basic Standards of Responsibility.4

"A product seller may be subject to liability for harm caused to a claimant who proves by a preponderance of the evidence that one or more of the following conditions apply: the product was defective in construction (Subdivision 104A); the product was defective in design (Subdivision 104B); or the product was defective in that adequate warnings or instructions were nto provided (Subdivision 104C).

Analysis: This section is intended to distinguish products cases based upon defects in construction, design or failure to warn. It "takes an approach which avoids terminological difficulties by focusing on practical considerations that courts and juries have looked to in deciding product liability cases."

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4. The product was defective construction. This section seems to permit the trier of fact to determine whether liability based upon the manufacturers standards, rather than industry standards. The "may" of course, seems to be permissive, rather than mandatory.

It is also significant that the section seems to eliminate any necessity to prove negligence in construction or design. The standard seems to require proof of a defect. If this is the intent, it would be a departure from some of the traditional methods of proof in products cases, particularly the questions relating to standard of care.

Subdivision A purports to impose strict liability in keeping with §402A of the Restatement of Torts 2nd.

Iowa Law: The "basic standard of responsibility" under current Iowa law insofar as the lawyer is concerned, depends for the most part upon the theory under which plaintiff seeks to recover. If the theory is negligence, the standard of responsibility rests upon whether the seller or manufacturer exercised reasonable care in the sale or manufacture of the product. See, e.g., Mayers v. Sears Roebuck Co., 242 Iowa 1038, 48 N.W.2d 881; Calkins v. Sandven, 256 Iowa 682, 129 N.W.2d 1; Wagner v. Larson, 2157 Iowa 1202, 136 N.W.2d 312; Bengford v. Carlem Corporation, 156 N.W.2d 855 (Iowa, 1978). See also §395, Restatement of Torts 2d.

The question of responsibility for breach of an implied warranty depends upon proof that the seller or manufacturer breaches an implied warranty of fitness or merchantability. See, e.g., State Farm Mutual Auto Insurance Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449; § 554.2314, 554.2315, The Code.

Likewise, the proof which imposes "responsibility for breach of warranty of an express warranty" depends upon proof of the express warranty and the breach thereof. It has been held that an express warranty imposes a contractual duty upon the seller which is even broader than the duty imposed by strict liability. See Hawkeye Security Insurance Co. v. Ford Motor Company, 199 N.W.2d 373 (Iowa, 1972).

Likewise, proof of responsibility under the theory of strict liability in tort requires several other essential elements. See Kleve v. General Motors, 210 N.W.2d 568 (Iowa, 1973); Iowa Uniform Corut Instruction 24.1.

Iowa law, under strict liability theories, whether the claim is based upon defective design, construction or failure to warn, proof of a defect is required and that the defect was unreasonably dangerous. Kleve, supra.

The proposed §104 does not specifically spell out or require the "unreasonably dangerous" element which is required by the Iowa Court. See Aller v. Rodgers Machinery Supply Co., 268 N.W.2d 830 (Iowa, 1978) and Eickelberg v. Deere & Co., 276 N.W.2d 442 (Iowa, 1979). The Iowa Court has interpreted the element of "unreasonably dangerous" to be viewed from the aspect of the consumer's reasonable expectations. See Eickelberg, supra and Aller, supra. Because of this perspective, the proof differs from negligence actions, which are based upon the manufacture

action in failing to exercise care. Thus, the proposed act creates a wide disparity with existing Iowa law. [5]

D. Section 105: Unavoidably Unsafe Aspects of Products

"(a). An unavoidably unsafe aspect of a product is that aspect incapable of being made safe in light of the state of scientific and technological knowledge at the time of manufacture.

(b) A product seller may be subject to liability for failing to provide an adequate warning or instruction about an unavoidably unsafe aspect of the seller's product, if the factors set forth in Section 104, subdivision (C) indicate that such warnings or instructions should have been given. This obligation to warn or instruct may arise after the time the product is manufactured.

(c) If Section 104(C) is not applicable, the product seller shall not be subject to liability for harm caused by an unavoidably unsafe aspect of a product unless the seller has expressly warranted by words or actions that the product is free of such unsafe aspects.

Analysis: This section is intended to comply with Restatement of Torts 2d, Section 402A, Comment K. There may be liability to warn about the unavoidably unsafe aspects of the product. However, Section 105 goes further because §(b) requires a duty to warn even after the product is manufactured.

Iowa Law: This rule seems to comport with Iowa law. In Iowa, a product, even though faultlessly made, may be deemed defective and subject the seller to liability for harm in the absence of a warning. See Cooley v. Quick Supply Co., 221 N.W.2d 763 (Iowa, 1974).

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[5] Quaere. By essentially fusing all theories of recovery into "proof of defect", the question may arise whether, by eliminating or diminishing the importance of negligence implied and express warranties, the costs of litigation will be increased by the increased use of experts. Have you observed that the expert witness is becoming a separate profession - or is it occupation? For a disdainful judicial discussion of expert testimony, see Dougherty v. Boyken, 261 Iowa 602, 155 N.W.2d 488.

The Iowa Court has not addressed the question of the antecedent duty to warn, but it seems logical that that would at least follow negligence principles if the danger was known. See Cooley, supra.

E. Section 106. Relevance of the "State of the Art" and Industry Custom

"(a) For the purposes of this section, "state of the art" means the safety, technical, mechanical, and scientific knowledge in existence and reasonably feasible for use at the time of manufacture.

(b) Evidence of changes in a product design, in the "state of the art" or in the custom of the product seller's industry occurring after the product was manufactured is not admissible for the purpose of proving that the product was defective in design under Section 104(B), or that a warning or instruction should have accompanied the product at the time of manufacture under Sectin 104(C). The evidence may be admitted for other purposes if its probative value outweighs its prejudical effect.

(c) Evidence of custom in the product seller's industry is generally admissible. The product seller's compliance or non-compliance with custom may be considered by the trier of fact in determining whether a product was defective in design under Section 104(C), or whether there was a failure to warn or instruct adequately under Section 104(C).

(d) Evidence that a product conformed to the "state of the art" at the time of manufacture, raises a presumption that the product was not defective within the meaning of Sections 104(B) and (C). This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104(B) and (C), the product was defective. * * *"

Analysis: Subsection (a) is an attempt to codify a fundamental principle of evidence law. See Federal Rule of Evidence 407. It excludes post-accident changes in design, post-accident "state of the art" or post-accident custom of the industry. Subsections (b)(c) and (c) permit the introduction of industry, custom and the "state of the art" as it existed at the time of manufacture. 6

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6. It is to be noted that introduction of the "state of the art" creates a rebuttable presumption rather than an inference.

Iowa Law: The Iowa Court has probably adopted the "state of the art" defense. See Aller v. Rodgers Machinery Supply Co., 268 N.W.2d 830 (Iowa, 1978). See also, Raney v. Honeywell Co., 540 F.2d 932 (8th Cir., 1976).

F. Section 107. Relevance of Compliance with Legislative or Administrative Standards (Paraphrased)

Section 107 provides that a product seller may make application to the Court to determine that the product conformed to an administrative or legislative standard in that (a) the standard was developed through thoughtful, careful product testing and formal evaluation (b) consumer as well as manufacturer interests were considered in formulating the standard (c) the agency responible considered it to be more than a minimum standard and (d) the standard as up to date in light of current technology. If the Court finds that the product meets the standard, it instructs the trier of fact to presume that the product was not defective. This presumption is rebuttable.[6]

Analysis: The analysis accompanying the section implies that this section presents a compromise between manufacturers who claim unfairness in calling a product defective when

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6. This section appears to make the question of the effect of standard itself a question of fact in that the Court makes a factual determination as to whether the standard itself complies with certain guidelines in its formulation. In this respect it differs from the usual application of the negligence per se concept. In the negligence per se application, the question of whether the statute or ordinance was passed for the purpose of establishing a standard of acre is a question of law for the Court. Whether the statute was violated is a question of fact. See Kisling v. Thierman, 214 Iowa 911, 243 N.W. 552. The question of whether the violation of a statute or ordinance is to be considered in the light of the legislative intent. See Porter v. Iowa Power & Light Co., 217 N.W.2d 221 (Iowa, 1974).

This reaction seems to have a kind of reverse negligence per se application in that it permits the manufacturer to show that it met certain legislative or administrative standards, thereby creating a presumption of no-defect which may be rebutted. The creation of the "rebuttable presumption" has a similarity to the negligence per se doctrine in that in the latter, proof of a violation throws upon the adverse party the duty to show a legal excuse.

it conforms to an administrative of legislative standard and consumer groups who claim that the promulgation of the standards are generally formulated by the industry.

Iowa Law: If this section is intended to aid in the proof or disproof of a defect by showing the violation of or the compliance with an industry standard is a defect, iti may have an effect on existing Iowa law. The violation of a statute is not always negligence per se. The legislative intent must be considered. Porter v. Iowa Power & Light Company, 217 N.W.2d 221; Lattimer v. Immaculate Conception Church, 255 Iowa 120, 121 N.W.2d 639 (1963). Violation of an administrative rule is not negligence per se, but only prima facie evidence of negligence. See Porter supra.

F. Section 108. Notice of Possible Claim Required (Paraphrased)

This section requires notice by the claimant within six months of entering into an attorney-client relationship. upon receipt of notice of the claim, the product seller must, if requested in the notice, furnish claimant's attorney with the names and addresses of all persons whom the seller known to be in the chain of manufacture and distribution. The section provides sanctions against a claimant who delays entering into an attorney-client relationship in order to unreasonably delay the notice. It also provides damages to any person who is damaged because of the failure of the claimant or his attorney to give timely notice.

Analysis: (paraphrased) The Department assumes that early claim notice will have a deterrent effect on product injuries by inducing a manufacturer to correct defects of which it receives notice. The section does not provide that a claim will be barred for failure to comply with its provisions. That would be a "booby trap for the unwary". See Greenman v. Yuba Products Co., 59 Cal.2d 57, 377 P.2d 897 (Cal., 1962).

Iowa Law: With the exception of warranty claims, current Iowa products liability law requries no pre-suit notice. See §554.2607, The Code.

G. Section 109. Length of Time Product Sellers are Subject to Liability for Harm Caused by Their Products

(A) Usefule Safe Life.

(1) A product seller may be liable to a claimant for harm caused by the seller's product during the useful safe life of that product. "Useful sale life" refers to the time during which the product reasonably can be expected to perform in a safe manner. In determining whether a product's useful safe life has expired, the trier of fact may consider:

(a) The effect on the product of wear and tear or deterioration from natural causes;

(b) The effect of climatic and other local conditions in which the product was used;

(c) The policy of the user of similar users as to repairs, renewals and replacements;

(d) Representations, instructions and warnings made by the product seller about the product's useful safe life; and

(e) Any modification or alteration or the product by a user or third party.

(2) A product seller shall not be liable for injuries or damage caused by a product beyond its useful safe life unless the seller has so expressly warranted.

(B) Statues of Repose.

(1) Workplace Injuries.

(a) A claimant entitled to compensation under a state worker compensation statute may bring a product liability claim under this Act for harm that occurs within en (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of seeling products of that type.

Where this Act precludes a worker from bringing a claim because of division (1)(a), but the worker can prove, by the preponderance of evidence, that the product causing the injury was unsafe, the worker may bring a claim against the workplace employer. If possible, the claim should be brought in a worker compensation proceeding, and shall include all loss of wages that otherwise would not be compensated under the applicable worker compensation statute.

(c) Where this Act precludes a worker's beneficiaries under an applicable wrongful death statute from bringing a wrongful death claim because of subdivision (1)(a), but they can prove, by a preponderance of evidence, that the product that caused the worker's claim against the workplace employer. If possible, the claim must be brought in a Worker Compensation proceeding, and shall include pecuniary losses that would not have otherwise been compensated under the applicable worker compensation statute.

(d) An employer who is subject to liability under either subsection (1)(b) or (c) shall have the right to seek contribution from the product seller in an arbitration proceeding under Section 116 of this Act. Contribution shall be limited to the extent that the product seller is responsible for the harm incurred under the principles of Section 104 of this Act. The final judgment in that proceeding shall not be subject to a trial de novo, but shall be treated as a final judgment of a trial Court.

(2) Non-Workplace Injuries.

For Product Liability claims not included in subdivision (B) that involve harms occurring more than ten (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type, the presumptionis that the product has been utilized beyond its useful safe life as established by subdivision (A). This presumption may be rebutted by clear and convincing evidence.

(3) Limitations on Statutes of Repose.

(a) Where a product seller expressly warrants or promises that the seller's product can be utilized safely for a period longer than ten (10) years, the period of repose shall be extended according to these warranties or promises.

(b) The ten (10) year period of repose established in Section 109(B) does not apply if the product seller intentionally misrepresents a product, or fraudulently conceals information about it, where the conduct was a substantial cause of the claimant's harm.

(c) Nothing contained in Section 109(B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.

(d) The ten (10) year period of repose established in Sectin 109(B) does not apply if the harm was caused by prolonged exposure to a defective product, or if an injury-causing aspect of the product existing at the time it was sold did not manifest itself until ten years after the time of its first use.

(C) Statute of Limitations.

All claims under this Act shall be brought within three years of the time the claimant discovered, or in the exercise of due diligence should have discovered, the facts giving rise to the claim.

Analysis: (Paraphrased) This section is intended to alleviate the problems associated with open ended liability situations in product cases. Many states have enacted statutes of repose, the advantages of which are (1) establish an actuarily certain date after which no liability can be assessed; (2) eliminate tenuous claims involving older products for which evidence of defective conditions may be difficult to product. It attempts to provide product sellers with some security against state claim.

Iowa Law. Insofar as statutes of limitations are concerned, the 2 year statute applies, §614.1, The Code. However, the statute has been interpreted to mean that a plaintiff's cause of action does not accrue until he or she discovered or in the exercise of reasonable care should have discovered the injury. Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967).

The Iowa Court did in Hahn v. Ford Motor Co., 256 Iowa 27, 126 N.W.2d 350, a warranty case, indicate that warranties do not last forever. In Hawkeye Security Insurance Co. v. Ford Motor Company, 174 N.W.2d 672, 679 (Iowa, 1970) it held that time, length and severity of use and state of repair are all relevant factors in determing [liability].

H. Section 110. Relevance of a Third-Party Alteration of Modification of a Product

(a) A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a third party unless:

(1) The alteration or modification was in accordance with the product seller's instructions or specifications;

(2) The alteration or modification was made with the express consent of the product seller; or

(3) The alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that original designed, tested or intended by the product seller. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

Analysis: This section is intended to codify §402A of the Restatement of Torts 2nd, comment g, which imposes liability upon the seller only when the product reaches "the user or consumer without substantial change in condition in which it was sold". In this context, the burden is upon the claimant to show that the product was not altered.

Iowa Law: Although the Iowa Court has not directly adopted the concept of foreseeable misuse of the product, it said in Cooley v. Quick Supply Co., 221 N.W.2d 763, 772 "defendant cannot relieve itself of a duty to warn by assuming every user of its product will act with judgment". It follows that if the Iowa Court should adopt the idea of foreseeable misuse, it would, by the same logic, adopt the concept of foreseeable alteration. See, e.g., Haumerson v. Ford Motor Company, 257 N.W.2d 7 (Iowa, 1978).

The question may really be one of causation. It is not necessary for plaintiff to prove the proximate cause where there may be more than one cause. See Iowa Uniform Court Instruction 2.7B and 2.7C. The question is, was the product seller's act (defect, negligence or breach of warranty) a "substantial factor in bringing about the harm". See Schnebly v. Baker, 217 N.W.2d 708, 729 (Iowa, 1974). "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." See Haumerson v. Ford Motor Company, 257 N.W.2d 7 (Iowa, 1977).

H. Section 111. Relevance of Conduct on the Part of Product Liability Claimants

(a) General Rule.

In any claim under this Act, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

(b) Apportionment of Damages.

In any claim involving comparative responsibility, the Court, unless otherwise requested by all parties, shall instruct the jury to give answers to special interrogatories, or the court shall make its own findings if there is no jury, indicating --

(1) The amount of damages each claimant would have received if comparative responsibility were disregarded, and

(2) The percentage of responsibility allocated to each party, including the claimant, as compared with the combined responsibility of all parties to the action. For this purpose, the Court may decide that it is appropriate to treat two or more persons as a single party.

(3) In determining the percentage of responsibility, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party.

(4) The court shall determine the award for each claimant according to these findings and shall enter judgment against parties liable on the basis of the common law joint and several liability of joint tortfeasors. The judgment shall also specify the proportionate amount of damages allocated against each party liable, according to the percentage of responsibility established for that party.

(5) Upon a motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's share of the obligationis uncollectible from that party, and shall reallocate from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is still to be subject to contribution and to any continuint liabiligy to the claimant on the judgment.

(c) Conduct Affecting Claimant's Responsibility.

(1) Failure to Discover a Defective Condition.

(i) A claimant is not required to have inspected the product for defective condition. Failure to have done so does not render the claimant responsible for the harm caused.

(ii) Where a claimant using a product is injured by a defective condition that would have been apparent to an ordinary prudent person, the claimant's damages are subject to reduction according to the principles of subsections (a) and (b).

(2) Using a Product With a Known Defective Condition.

(i) A claimant who knew about a product's defective condition, but who voluntarily and unreasonably used the product, shall be held solely responsible for injuries caused by that defective condition.

(ii) In circumstances where a claimant knew about a product's defective condition and voluntarily used the product, but where the reasonableness of doing so was uncertain, claimant's damages shall be subject to reduction according to the princples of subsections (a) and (b).

(3) Misuse of a Product.

(i) Where a claimant has misused a product by using it in a manner that the product seller could not have reasonably anticipated, the claimant's damages shall be reduced according to the princples of subsections (a) and (b).

(ii) Where the injury would not have occurred but for the misuse defined in subsection (3)(i)), the product is not defective for purposes of liability under this Act.

Analysis: This section is an attempt to "resolve uncertainty in the law about the relevance of a product liability claimants' conduct." It applies principles of comparative responsibility to situations where claimant's conduct suggests that he or she has some responsibility for the product-related incident. It also characterizes three basic kinds of conduct and provides rules for them, e.g., failure to inspect, use of a product with a known defect and misuse of a product.

Iowa Law: Contributory neglgience is a defense to an action based upon negligence, but in its ordinary sense, not

to an action based upon strict liability in tort. Hawkeye Security Insurance Company v. Ford Motor Company, 199 N.W.2d 373 (Iowa, 1972). Assumption of risk and abuse or misuse of the product are appropriate defenses. Hakweye, supra.

Although the Court has not directly passed upon the question of foresseable misuse, dictum appearing in Cooley v. Quick Supply Company, 221 N.W.2d 763, 772 (Iowa, 1974) indicates that it would. See also Haumerson v. Ford Motor Company, 257 N.W.2d 7 (Iowa, 1978).

Because Iowa is not a comparative negligence state, this section would change existing Iowa law.

I. Section 115. Sanctions Against the Bringing of Frivolous Claims and Defenses

(a) After final judgment has been entered under this Act, either party, by motion, may seek reimbursement for reasonably attorneys' fees and other costs that would not have been expended but for the fact that the opposing party pursued a claim or defense that was frivolous.

(b) For the purposes of this Act, a claim or defense is considered frivolous if the court determines that it was without any reasonable legal or factual basis.

(c) If the court decides in favor of a party seeking redress under this section, it shall do so on the basis of clear and convincing evidence. In all motions under this section, the court shall make and publish its findings of fact.

(d) The motion provided for in subsection (a) may be filed and the claim assessed against the person who was responsible for the frivolous nature of the claim or defense.

(e) In situations where a claimant has been represented on a contingent fee basis and no legal costs have been or will be incurred by that claimant, the attorney for claimant may recover reasonable attorneys' fees based on the amount of time expended in opposing a frivolous defense.

(f) Claims for damages under this section shall not include expenses of persons not parties to the action.

Analysis: This section is intended to discourage the commencement of frivolous suits. It is a compromise to pressures requesting abolition of the contingent fee agreement.

Iowa Law: There is no similar provision in the Iowa rules except that frivolous appeals may be dismissed upon motion of appellee. See Iowa Rule of Appellate Procedure 23.

J. Section 116. Arbitration.

(a) Applicability.

In any claim brought under this Act where the amount in dispute is less than $30,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial, either party may by a motion institute a pre-trial arbitration proceeding.

(b) Rules Governing.

(1) The substantive rules of a Section 116 arbitration proceeding shall be those contained in this Act as well as those in applicable state law.

(2) The procedural rules of a Section 116 arbitration proceeding shall be those contained in this section. If this section does not address a particular issue, guidance may be obtained from the Uniform Arbitration Act.

(3) A legislatively designated state agency may formulate additional procedural rules under this Act.

(c) Arbitrators.

(1) Unless the parties agree otherwise, the arbitration shall be conducted by three persons, one of whom shall be either an active member of the state bar or a retired judge of a court of record in the state, one shall be an individual who possesses expertise in the subject matter area that is in dispute, and one shall be a lay person.

(2) Arbitrators shall be selected in accordance with applicable state law in a manner which will assure fairness and lack of bias.

(d) Arbitrators' Powers.

(1) Arbitrators to whom claims are referred pursuant to Section 116 shall have the power within the territorial jurisdiction of the court, to conduct arbitration hearings and make awards consistent with the provisions of this Act.

(2) State laws applicable to subpoenas for attendance of witnesses and the production of documentary evidence shall apply in procedures conducted under this chapter. Arbitrators shall have the power to adminsiter oaths and affirmations.

(e) Commencement.

The arbitration hearing shall commence not later than 30 days after the claim is referred to arbitration, unless for good cause shown the court shall extend the period. Hearings shall be concluded promptly. The court may order the time and places of the arbitration.

(f) Evidence.

(1) The Federal Rules of Evidence [or designated state evidence code] may be used as guides to the admissibility of evidence in an arbitration hearing.

(2) Strict adherence to the rules of evidence, apart from relevant state rules of privileges, is not required.

(g) Transcript of Proceeding.

A party may have a recording an transcript made of the arbitration hearing at its own expense. A party that has had a transcript or tape recording made shall furnish a copy of the transcript or tape recording at cost to any other party upon request.

(h) Arbitration Award and Judgment.

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial *de novo* has expired, unless a party demands a trial *de novo* before the court pursuant to subsection (i). The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be subject to appeal.

(i) Trial *De Novo*.

(1) Within 20 days after the filing of an arbitration award with the court, any party may demannd a trial *de novo* in that court.

(2) Upon demand for a trial de novo, the action shall be placed on the calender of the court and treated for all purposes as if it had not been referred to arbitration. Any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) At the trial de novo, the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any matter concerning the conduct of the arbitration proceeding, except of the testimony given at the arbitration hearing may be used for impeachment purposes at a trial de novo.

(4) A party who has demanded a trial de novo but fails to obtain a judgment in the trial court, exclusive of interest and cost, more favorable than the arbitration award, shall be assessed the cost of the arbitration proceeding, including the amount of the arbitration fees, and --

(i) If this party is a claimant and the arbitration award is in its favor, the party shall pay to the court an amount equivalent to interest on the arbitration award from the time it was filed; or

(ii) If this party is a product seller, it shall pay interest to the claimant on the arbitration award from the time it was filed.

Analysis: The rationale for the compulsory non binding arbitration section is (1) cases would be decided more accurately because a small group, with a member who is an expert should be better able to comprehend the facts; (2) a group of relatively neutral experts would be less easily misled; (3) Arbitrators should be less affected by the emotional aspects of the case; (4) the privacy of arbitration procedures should prompt more complete revelation of trade (manufacturing and processing) secrets.

Iowa Law: There is a little used provision for voluntary arbitration. See Chapter 679.2, The Code. Unlike the proposed act, there is no provision for compulsory arbitration.

K. Section 117. Expert Testimony. (Explained)

This section permits the Court to appoint an expert witness, either sua sponte or upon application. A court

appointed expert witness must advise the parties of his or her findings, be available for deposition and be available to testify. The witness may be cross examined by either party. The court fixes the reasonable compensation and may assess the compenstaion to one party or apportion it.

The section does not prevent the parties from calling their own expert.

Analysis: This section is intended to give the Court discretion to balance the problem relating to biased experts on the one hand and unqualified experts on the other. It is stated "where arbitration is not used . . . this section should promote the goal of presenting objective and sound expert testimony to the jury."

L. Section 118. Non-Pecuniary Damages.

(a) Non-pecuniary damages, including "pain and suffering" shall be determined by the trier of fact. The court shall have the power to review such damage awards.

(b) In cases where the claimant has not suffered permanent serious disfigurement, permanent impairment of bodily function, or permanent mental illness as a result of the product-related harm, non-pecuniary damages shall be limited to $25,000.

Analysis: Ths salutory effect of this section is to limit the possible award for pain and suffering. The commissions justification for the proposal centers around the history of damage awards. It is said the non-pecuniary award at common law was a substitute for seeking "vengeful retaliation". In those cases, the defendant usually committed an intentional wrong. The Commission feels that this historical basis has little relevance to product litigation.

In addition, it was felt that some non-pecuniary has had some deterrent effect on industry, therefore some limited features are retained. Thus, when the claimant has not suffered permanent disfigurement or permanent mental illness as a result of product producing injury, damages are limited to $25,000 for pain and suffering.

Iowa Law: This section would have a marshall effect on existing Iowa law. See Iowa Uniform Court Instruction 3.9.

M. Section 119. The Collateral Source Rule.

In any claim brought under this Act, the claimant's recovery shall be diminished by any amount he or she has received or will receive in compensation for the same damages from a public source. This provision shall also apply to parties who may be subrogated to the claimant's rights under this Act.

Analysis: The argument is that an injured party should be the one to benefit from a "windfall", if anyone should. This argument is rebutted by the argument that a manufacturer's liability is "without fault" and therefore, since the desideratum of products litigation is to reocver the loss in the pricing, any offset will have beneficial economic effect.

Another argument is that a product manufacturer should not be permitted to "externalize" the costs of an injury caused by its product, particularly where an injured party has been prudent through his own economic planning. Thus, the section applies only to collateral source amounts the claimant has gained from "public sources".

Iowa Law: This section would abrogate existing Iowa law which precludes the introduction of evidence of amounts received from a collateral source. See Stewart v. Madison, 278 N.W.2d 284 (Iowa, 1979) where the Iowa Court re-affirmed its holding in Clark v. Berry Seed Co., 225 Iowa 262, 280 N.W. 505 (1938).

N. Section 120. Punitive Damages. (Omitted)

For your consideration.

(1) Does the Act do what it is intended?

(2) Is the field of products liability, taking into account its relatively short existence, so confused that it needs codification?

(3) Assuming the truth of (2) above, does the proposed Act eliminate or exacerbate the confusion.

(4) If adopted, how will it effect the cost of litigation?

(5) Does it create too many fact issues to be decided on questions that are now law questions -- or mixed questions of law and fact?

(6) Will it assist the underwriting functions of the insurance industry?

(7) Will manufacturers be able to place product insurance any better under the act than without it?

DAMAGES FROM THE DEFENDANT'S POINT OF VIEW

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A. SHOULD PUNITIVE DAMAGES BE RECOVERABLE FROM A MASTER OR OTHER PRINCIPAL?

1. Section 909 of the Restatement of Torts 2d and Section 217C of Restatement of Agency 2d contain identical provisions as follows:

   > "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
   >
   > (a) the principal or a managerial agent authorized the doing and the manner of the act, or
   >
   > (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
   >
   > (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
   >
   > (d) the principal or a managerial agent of the principal ratified or approved the act."

2. There is dictum that a corporation can be held liable for exemplary damages on the basis of wrongful acts of employees if it was shown that the employees were acting within the course of, or in connection with, their duties or employment. See Northrup v. Miles Holmes, Inc. of Iowa, 204 N.W.2d 850, 858, 859 (Iowa 1973). (In Young v. City of Des Moines, 262 N.W.2d 612, 620-622 (Iowa 1978) an award of punitive damages against a muncipality was upheld on the ground that the same rules apply as those applicable to private corporations as set forth in the Northrup case.)

a. In White v. Citizens Nat. Bank of Boone, 262 N.W.2d 812, 817 (Iowa 1978) the Supreme Court upheld the action of the trial court in setting aside an award of punitive damages for the reason that even though there was an act of trespass which was illegal there were insufficient circumstances shown to supply the necessary animus.

b. The earlier Iowa law upon which the court relied in the Northrup case held a corporation liable only if the acts were authorized or directed; were within the scope, or apparent scope of their authorities; or were subsequently ratified and confirmed with full knowledge of the facts. Ashland v. Lapiner Motor Co., 247 Iowa 596, 75 N.W.2d 357, 360 (1956).

c. The Court of Appeals for the 2d Circuit has held that under New York law a corporation can only be held liable for punitive damages when superior officers either order, participate in, or ratify outrageous conduct. Roginsky v. Richardson-Merrell, Inc., (CA2d, 1967) 378 F.2d 832, 842. No rigid rule is used to define who is a "superior officer" or a "person in authority". See Doralee Estates, Inc. v. Cities Service Oil Co. (CA2d, 1977) 569 F.2d 716, 722.

d. California permits recovery of punitive damages against a corporation only where an act is done with the knowledge or under the direction of corporate officials having power to bind the corporation. Toole v. Richardson-Merrell, 251 Cal. App.2d 689, 60 Cal. Rptr. 398, 29 ALR3d 988, 1013 (California Court of Appeals 1967).

e. Punitive damages have been allowed in products liability cases even though the theory of strict liability does not require any showing of fault. Annot: Allowance of puntive damages in products liability case, 29 ALR3d 1021.

f. Section 908 of Restatement of Torts 2d provides:

> "(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his

outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant."

B. THE REQUIREMENT OF CERTAINTY.

1. Section 912 of Restatement of Torts 2d provides:

"One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit."

a. Comment a states that usually a plaintiff can recover damages for harm only by proof with the same degree of certainty as that required in proving the existence of the cause of action.

1. Kissling v. Thierman, 214 Iowa 911, 243 N.W. 552 (1932) holds that an injured person is entitled to recover for pain and suffering without any testimony estimating the dollar amount thereof.

2. Where the plaintiff's claimed injuries and proof was uncertain as to the exact amount of the earnings at the time of the injury, evidence as to former earnings, as bearing upon earning capacity was held proper and sufficient to support an instruction thereon in Miller v. McCoy Truck Lines, 243 Iowa 483, 52 N.W.2d 62 (1952). The case further holds that any error would be harmless if an instruction as to a non-pleaded element of damages carries the limitation "if any".

3. Iowa Uniform Jury Instruction 3.1 provides:

"If, after a careful and impartial consideration of all the evidence in the case, you find plaintiff

entitled to recover, it will then be your duty to determine the amount of his recovery for damages, if any, sustained by him for loss and injury."

4. Comment c to Section 924 Restatement of Torts 2d states that as to loss of earning capacity or impairment at the time of trial "this amount is the difference between what he probably could have earned but for the harm and any lesser sum that he actually earned in any employment or, if he failed to avail himself of opportunities, the amount that he probably could have earned in work for which he was fitted up to the time of trial." The comment further states: "when the injured person was not receiving a salary, but owned and was operating a business that was deprived of his services by the injury, his damages are the value of his services in the business during the period. If his services, rather than the capital invested or the services of others, were the predominate factor in producing the profits, evidence of the diminution of profits from the business will be received as bearing on his loss of earning capacity."

5. In Trushcheff v. Abell-Howe Co., 239 N.W.2d 116 (Iowa 1976), the court held there was no error in excluding evidence of profits derived from a roofing business following the accident where the injured workman in his new business venture did not substantially engage in physical labor and was no longer an employee of a contractor but rather engaged employees of his own and where his profits were largely dependent upon his skill in estimating time and expenses in bidding.

6. In Kalinov v. Darland, 252 N.W.2d 732 (Iowa 1977), the plaintiff in attempting to prove diminution of earning capacity as a jazz pianist by reason of the injury was permitted to show the success and popularity of a singer with whom plaintiff had performed in the past and with whom plaintiff planned to perform in the future but for the accident and to offer evidence of income of trios of the kind to which plaintiff previously belonged and to demonstrate that plaintiff

and the singer had entertained at places where artists of national renown performed.

7. Mere difficulty in assertaining the amount of damages does not alone constitute a cause for denial of recovery. Dealers Hobby, Inc. v. Marie Ann Lynn Rlty. Co., 255 N.W.2d 131, 134 (Iowa 1977).

8. A plaintiff is required to establish a claim of damages with some reasonable certainty, showing rational basis for assertaining their amount; on the other hand, a plaintiff is not required to show the amount with the same degree of certainty required for a showing of fact that they were sustained. Conley v. Warne, 236 N.W.2d 682 (Iowa 1975). The same principles are stated differently in Northrup v. Miles Holmes, Inc. of Iowa, 204 N.W.2d 850 (Iowa 1973) by stating that if after proof it is speculative and uncertain whether damages have been sustained, recovery is denied, but if uncertainty lies only in the amount of damages, recovery may be had if there is proof of reasonable basis from which the amount can be inferred or approximated.

9. Where a farmer claimed back injuries it was held proper to instruct as to damages for value of the farmer's loss of time and earnings, past and future, despite the fact that the farmer's labor replacement cost, if any, or the fair value thereof, were not shown. DeWall v. Prentice, 224 N.W.2d 428 (Iowa 1974).

10. In a personal injury action by tenant farmer, who was also a part-time livestock scalper, evidence of impairment of earning capacity was insufficient to permit jury to place a value thereon and trial court erred in submitting this item of damage to the jury. Harms v. Ridgeway, 64 N.W.2d 286, 245 Iowa 810.

11. In an action by a person engaged in general trucking business for personal injury, evidence that such person employed others to carry out work for him and as to reasonableness of amount paid those so employed was admissable as tending to show extent of such person's disability or impairment in carrying on his

business, but such evidence would be restricted to work that such person would have done had injury not occurred. Sexton v. Lauman, 57 N.W.2d 200, 244 Iowa 670, 37 ALR2d 353.

12. Where an injured person's earnings are not measured by fixed wage, the business in which he was engaged may be shown, together with capital and assistance employed, the particular part of the business transacted by him, and the profits, not as a distinct element of damage, but as showing value of injured person's time and services. Amelsburg v. Lunning, 14 N.W.2d 680, 234 Iowa 852.

13. "Earnings" are fruit or award for labor, while "profits" are gain from investment or business after payment of all expenses. Generally, plaintiff is entitled to recover for loss of time or earnings as result of injuries but not for loss of profits; loss of profits is too speculative. Plaintiff was not to be denied recovery for loss of time from business due to injuries merely because he did not work for wages and proof of fair value of time lost might therefore be more difficult. Shewry v. Heuer, 121 N.W.2d 529, 255 Iowa 147.

14. In a wrongful death action recovery for pain and suffering is permitted only where the item has "substantial evidentiary support". Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 727, 728 (Iowa 1978).

15. Evidence that pain has been suffered up to the time of trial and evidence that plaintiff has not fully recovered is sufficient to submit future pain and suffering without medical testimony. Mabrier v. A. M. Servicing Corporation of Raytown, 161 N.W.2d 180, 183 (Iowa 1968).

16. The case of Carradus v. Lange, 203 N.W.2d 565, 570 (Iowa 1973) suggests that with reference to instructions as to future pain and suffering and permanent disability the matter should be "left to the judgment of the jury on appropriate 'reasonable probability' instructions . . ."

17. It has been held that estimates of monetary value of the services of a wife or mother are not necessary. Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 656-657 (Iowa 1969).

18. Uniform Jury Instruction 3.9 relating to damages for pain and suffering-past-future-disability includes the requirement that such items be shown "with reasonable certainty".

19. In appropriate cases portions of the Restatement and portions of the above cases may be used to withdraw from the consideration of the jury items as to which there is no substantial proof and if the matters are submitted to the jury perhaps the uniform instructions should be supplemented to explain the requirement of certainty.

C. FUTURE PECUNIARY LOSSES MUST BE DISCOUNTED TO THEIR WORTH.

1. Section 913A of the Restatement of Torts 2d provides:

> "The measure of a lump-sum award for future pecuniary losses arising from a tort is the present worth of the full amount of the loss of what would have been received at the later time."

a. Comment a indicates that the requirement of reduction to present worth applies to future losses and earnings and future medical expenses but not to awards for future pain and suffering or for emotional distress. Comment b indicates that the reduction process should be followed separately for each separate item of future loss, and that the complicated process may appropriately be explained by the utilization of present-worth tables, indicating that present worth of a dollar, paid at regular intervals over a designated period of time and calculated at a particular interest rate.

b. Iowa Uniform Jury Instruction 3.8A covering "loss of future earning capacity" does not make any reference to discounting any such award to its present worth.

c. Iowa Uniform Jury Instruction 3.9 "pain and suffering-past-future-future disability" includes a provision that as to injuries that "are permanent or will to some extent disable him in the future (or require further medical or hospital expense), or hereafter cause pain and suffering, you should determine and allow such further sum as paid now in advance will fairly and reasonably compensate for any such items as the evidence shows, with reasonable certainty, will result in the future from such injuries."

d. Iowa Uniform Jury Instruction 3.10 "death of a spouse and parent" and 3.10a "death of a minor" contain provisions referring to "present worth or value of the estate".

e. Iowa Uniform Jury Instruction 3.10b "death-minor-damages to parent-loss of services" states that "the measure of damages for future loss of services of said child is that sum which paid now, in advance, will fairly and reasonably compensate plaintiff for the loss of earnings of said child (or the economic or monetary value of his services where he is not employed) and for the value of the loss of companionship and society of said child . . .".

f. Iowa Uniform Jury Instruction 3.17 "damages--consortium" states that future loss of society and consortium is computed by allowing "any further sum, as paid now in advance, will fairly and reasonably compensate for such item as the evidence shows, with reasonable certainty, will result in the future from such injuries."

g. The Iowa Uniform Jury Instructions do not give the jury any guidance in determing present worth. An instruction from Book of Approved Jury Instructions in California (California Jury Instructions-Civil-6th Edition) is set out in the Appendix hereto.

h. Under Iowa law the estimated accumulations in a death case should be discounted by the application of the discount rate of a "good sound investment." Stein v. Sharpe, 229 Iowa 812, 817, 295 N.W. 155, 157 (1940). See also Mallinger v. Brussow, 252 Iowa 54, 105 N.W.2d 626, 628-629 (1960).

i. In Schnebly v. Baker, 217 N.W.2d 708, 727 tried to the court without a jury, the court as the trier of facts was permitted to consider future inflation and to offset the discount rate by an assumed inflation rate.

j. Judicial notice may be taken of interest rates. Stein v. Sharpe, supra; In re Kees' Estate, 31 N.W.2d 380, 383 (Iowa 1948). See also VanWie v. United States, (N.D. IA 1948) 77 F.Supp. 22, 48-49.

k. In a death case or in a case involving claims for large amounts of future losses consideration should be given to asking the court at the pre-trial conference to take judicial notice of discount tables for the purpose of laying a foundation for requesting a jury instruction similar to the California form. Consideration should also be given to either asking the court to take judicial notice at the pre-trial conference of the interest rate for a good sound investment or consideration should be given to calling a banker to testify to the then current yields available on the longest term government secured obligations then on the market. This will give the jury more assistance in computing damages and may reduce the amount of the award. It will also be possible to take figures placed before the jury in the argument of the plaintiff and use the discount tables to show what sort of accumulation plaintiff is assuming in a death case or what sort of earnings are being assumed in a personal injury case.

l. A form of instruction relating to the computation of present worth set forth in 3 Devittt & Blackmar - Federal Jury Practice and Instructions, 3d Edition, §8513 is included in the Appendix hereto.

D. RECOVERY OF EXPENSES OF LITIGATION.

1. Section 914, Restatement of Torts 2d, provides:

> "(1) The damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation.

(2) One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action."

a. The Restatement seems to be the general rule. This subject is not covered in the Book of Approved Jury Instructions - Civil - for California and is not referred to in Devitt & Blackmar. The Iowa Court has held that it is improper in jury argument to advise the jury that the plaintiff's recovery will be reduced by attorney's fees. White v. Chicago & N. W. Ry Co., 145 Iowa 408, 124 N.W. 309 (1910).

E. EFFECT OF INCOME TAXATION.

1. Section 914A of Restatement of Torts 2d, provides:

"(1) The amount of an award of tort damages is not augmented or diminished because of the fact that the award is or is not subject to taxation.

(2) The amount of an award of tort damages is ordinarily not diminished because of the fact that although the award is not itself taxed, all or a part of it is to compensate for the loss of future benefits that would have been subject to taxation."

a. A caveat points out that the institute takes no position as to whether an award of tort damages should be diminished due to the fact that even though it is not itself taxed, either (1) all or part of it is to compensate for the loss of benefits that, but for the injury, would have been acquired by the time the award was made and have been subjected to taxation, or (2) all or part of it is to compensate for the loss of future benefits that would have been subject to an unusually large tax rate.

b. In Adams v. Deur, 173 N.W.2d 100, 105 (Iowa 1969), a death case, the Iowa Court rejected the argument that prospective taxes are too

speculative and conjectural. The Court adheres to the rule that an injured party should not receive more than what has been lost as the result of some tortious act. The Court, therefore, held that a defendant would be permitted in a wrongful death action, to cross-examine plaintiff's witnesses, present evidence, and comment in argument to the jury or trier of the facts, with regard to the incidence of taxes, federal and state, upon a decedent's past and probable future earnings or income as they relate to the present value of a decedent's estate. The court added that the foregoing rationale applies with equal force to the future loss of support and maintenance. The court directed that jury instructions must, of course, be patterned in accord with the principles set forth, relative to loss of estate value. The court further added that services of a parent to children or one spouse to another have no income tax consequences.

F. MITIGATION OF DAMAGES.

1. Section 918 of the Restatement of the Law of Torts 2d provides:

> "(1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.
>
> (2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests."

A. Necessity of Pleadings.

1. Federal Rule 8(c) requires that "a party shall set forth . . . any other matter constituting an avoidance or affirmative defense." Wright and Miller, Federal Pleading of Practice, Section 1273, suggests that a partial defense such as mitigation of damages or partial defenses should be indicated in the pleadings.

2. Iowa Rule 97 provides that in an action by an employee against an employer, or by a passenger against a common carrier, defendant may plead and prove contributory negligence in mitigation of damages. Rule 101 providing for defenses to be specially pleaded does not seem to require that mitigation of damages be specially pleaded. However, Section 619.7, The Code provides:

> "In any action brought to recover damages for an injury to person, character, or property, the defendant may set forth, in a distinct division of his answer, any facts, of which evidence is legally admissible, to mitigate or otherwise reduce the damages, whether a complete defense or justification be pleaded or not, and he may give in evidence the mitigating circumstances, whether he proves the defense or justification or not."

Section 619.8, The Code provides:

> "No mitigating circumstances shall be proved unless pleaded, except such as are shown by or grow out of the testimony introduced by the adverse party."

Therefore, under Iowa law it is clear that matters in mitigation of damages must be pleaded as affirmative defenses except as to the extent that they are shown by or grow out of testimony introduced by the adverse party.

3. There are two types of situations covered by concepts of mitigation of damages.

   (a) One type of situation involves a claim that all or part of the consequences could have been avoided by reasonable efforts or expenditures by the plaintiff. This is the type discussed in Section 918 of the Restatement. The reason for the rule is not that the plaintiff has the duty to minimize his damages but that recovery is denied because it is in part the result of the injured person's lack of care and

also because public policy requires that persons should be discouraged from wasting their resources, both physical and economic. Section 6.77, of Loth, Iowa Rules of Civil Procedure Forms, sets out a form for such an allegation and comments that it is not believed that pleading this defense necessarily admits libility. Section 37.5, Loth, Iowa Rules of Civil Procedures Forms, sets out a form of affirmative defense where an employee is suing an employer and contributory negligence is alleged in mitigation of damages.

(b) The other type of situation involving mitigation of damages arises where matters other than a failure to act on the part of the plaintiff are being alleged in mitigation of damages. Section 6.76, Loth, Iowa Rules of Civil Procedure Forms, points out in a comment that sometimes these allegations necessarily admit liability and would therefore limit the trial to the amount of damages. Samples of this type of defense cited by Loth include an allegation that claimed libelous matter was published without malice and was believed true upon creditable information and that furthermore, a retraction was published; in a case of alleged criminal conversation that the plaintiff's wife had been so promiscuous that no more than nominal damages could be recovered; or that in a personal injury action plaintiff had recovered from another party for the same injuries.

4. Included in the Appendix is a copy of Iowa Uniform Jury Instruction 3.22 relating to mitigation of damages in personal injury cases. Shewry v. Heuer, 143 Iowa 567, 121 N.W.2d 529, 533 (1963), holds that the jury should have been told that the burden to prove that the plaintiff failed to minimize damages rested on the defendant.

5. Shortened life expectency caused by the injury may be used to reduce damages when determining loss of earning capacity, future pain, suffering and medical expenses. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

6. Section 619.8, The Code, states that where the defendant does not affirmatively allege mitigating circumstances, the defendant is limited to those matters shown by or growing out of the testimony of the adverse party. It is not clear as to what is meant by "shown by or growing out of" testimony of the adverse party. See Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1971).

7. However, it seems to be a rule of substantive law that where a tenant wrongfully abandons leased premises, the landlord has an affirmative duty to show that reasonable diligence has been used to relet the property and thereby obviate or reduce the resulting damages. Under these circumstances, apparently such evidence of lack of diligence is admissable under a general denial. Vawter v. McKissick, 159 N.W.2d 538, 541 (Iowa 1968). Likewise, any condemnation case where plaintiff claimed damages because of alleged reduction in the value of gravel on the premises, the defendant was permitted, without having specially pleaded the defense of mitigation, to show in mitigation of damages that the removal of the gravel would be subject to the jurisdiction of the Iowa Natural Resource Council. Contra: Schoonover v. Fleming, 239 Iowa 539, 32 N.W.2d 99 (1948).

8. Annot: Duty of injured person to submit to non-surgical, medical treatment to minimize tort damages, 62 ALR3d 70; Annot: Duty of injured person to submit to surgery to minimize tort damages, 62 ALR3d 9.

G. EFFECT OF PAYMENTS MADE TO INJURED PARTY.

1. Section 920A, Restatment of Torts 2d, provides:

"§920A. Effect of Payments Made to Injured Party. (1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability. (2) Payments

made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."

a. Comment a states that if a tort defendant makes a payment toward his tort liability, the liability is reduced to that extent and this is also true of payments made under an insurance policy that is maintained by the defendant. The comment states that the rule is the same whether insurance payments are made under a liability provision or without regard to liability, as under a medical-payments clause.

b. Ferris v. Anderson, 255 N.W.2d 135 (Iowa 1977), involved a situation where advanced payments had been made on behalf of defendant to the plaintiff. After a jury verdict was returned in favor of the plaintiff, the defendant filed a motion for "summary judgment for credit or offset" to the extent of the advanced payments. The Court granted the motion and the Supreme Court affirmed and indicated that the advanced payment concept should be encouraged and sum paid credited against any final judgment. Lewis v. Kennison, 278 N.W.2d 12 (Iowa 1977), holds that the Court should have excluded advanced payments and testimony of plaintiff concerning promises made by defendant's representative to pay medical bills and wage loss, even if the statements were made before any controversy arose for the reason that policy considerations require the exclusion of offers to compromise disputed claims and on the further ground that they are irrevalent.

c. There is a possibility of offering evidence of receipts from collateral sources for the limited purpose of showing a motive independent of injuries for malingering or exaggerating the extent or duration of such disabilty or for impeachment. However, such evidence is usually rejected on grounds of prejudice or other reasons. Annot.: Admissability of evidence that injured plaintiff received benefits from a collateral source on issue of malingering or motivation to extent period of disability, 47 ALR3d 234.

H. APPORTIONMENT OF HARM TO CAUSES.

"§433A. Apportionment of Harm to Causes.
(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or
(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

§433B. Burden of Proof.

(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

§434. Functions of Court and Jury.

(1) It is the function of the court to determine

(a) whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff;

(b) whether the harm to the plaintiff is capable of apportionment among two or more causes; and

(c) the questions of causation and apportionment, in any case in which the jury may not reasonably differ.

(2) It is the function of the jury to determine, in any case in which it may reasonably differ on the issue,

(a) whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff, and

(b) the apportionment of the harm to two or more causes."

1. Mere difficulty in assertaining the amount of damages does not in and of itself constitute a cause for denial of recovery if there is evidence in the record which would enable a jury to form a reasonable estimate as to the damage resulting from the allegations against a defendant. Oakleaf Country Club, Inc., v. Wilson, 257 N.W.2d 739, 747 (Iowa 1977).

2. Where a medical laboratory had intended that its report be relied upon, where there were several incorrect reports, where its role in the pediatrician's diagnosis was vital, and where the reports were not just erroneous as to a degree but were completely wrong, the negligence of the pediatrician and that of the laboratory were concurring legal causes entitling the pediatrician to contribution. Schnebly v. Baker, 217 N.W.2d 708, 729, later appeal 221 N.W.2d 739 (1974).

3. Where two independent tortfeasors are guilty of consective acts of negligence, causing damage under circumstances where the damage is indivisable, the negligent actors are jointly and severally liable. Treanor v. B. P. E. Leasing, Inc., 158 N.W.2d 4, 6 (Iowa 1968).

I. FUNCTIONS OF COURT AND JURY.

"§328B. Functions of Court

In an action for negligence the court determines

(a) whether the evidence as to the facts makes an issue upon which the jury may reasonably find the existence or non-existence of such facts;

(b) whether such facts give rise to any legal duty on the part of the defendant;

(c) the standard of conduct required of the defendant by his legal duty;

(d) whether the defendant has conformed to that standard, in any case in which the jury may not reasonably come to a different conclusion;

(e) the applicability of any rules of law determining whether the defendant's conduct is a legal cause of harm to the plaintiff; and

(f) whether the harm claimed to be suffered by the plaintiff is legally compensable.

§328C. Functions of Jury.

In an action for negligence the jury determines, in any case in which different conclusions may be reached on the issue:

(a) the facts,

(b) whether the defendant has conformed to the standard of conduct required by the law,

(c) whether the defendant's conduct is a legal cause of the harm to the plaintiff, and

(d) the amount of compensation for legally compensable harm.

J. DUPLICATE DAMAGES CANNOT BE RECOVERD.

1. The underlying principal in the allowance of damages is that of compensation with the ultimate purpose of placing the injured party in as a favorable position as though no wrong had been committed. Adams v. Deuer, 173 N.W.2d 100, 105 (Iowa 1969).

2. In a death action an allowance for both lost earnings and for loss of support of a parent or spouse would permit the plaintiff duplicate damages to the extent such lost earnings would be the source of any loss of support. DeWall v. Prentice, 224 N.W.2d 428, 434 (Iowa 1974).

3. If a jury has awarded damages for tortious interference with business on grounds which include wrongful attachment, trespass and conversion, there would be duplicate damages if the jury were also permitted to make separate awards for wrongful attachment, trespass, and conversion. Team Cent., Inc. v. Team Co. Inc., 271 N.W.2d 914, 925 (Iowa 1978).

4. Where a court submits to the jury both impairment of earning capacity and an allowance for injuries

to the person and total disability it may be necessary to give the jury an instruction to avoid duplication of damages. Schnebly v. Baker, 217 N.W.2d 708, 726 (Iowa 1974).

BAJI 14.70 (1977 Revision)

PRESENT CASH VALUE—MEANING OF

Any [award for] [finding of] future pecuniary loss must be only for its present cash value.

Present cash value is the present sum of money which, together with the investment return thereon when invested so as to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts, and for the period that you find such future benefits would have been received.

The present cash value will, of course, be less than the amount you find to be the loss of such future benefits.

USE NOTE

This instruction should be used in every instance where a future pecuniary loss is involved.

This instruction should not be given in the absence of evidence of present cash value or giving the jury a present cash value table of which the court has taken judicial notice. Wilson v. Gilbert, 25 Cal.App.3d 607, 102 Cal.Rptr. 31.

If the court determines that a present cash value table is to be given to the jury, it is suggested that counsel be advised of the intention of the court to take judicial notice thereof and there be added to this instruction a paragraph as follows:

"In the event you have occasion to determine the present cash value of future constant annual pecuniary losses, there is handed to you a table the correctness of which the court takes judicial notice and from which you can determine the present cash value of such losses by following the instructions printed thereon."

See Appendix B for a Present Cash Value table.

COMMENT

Witkin, Calif.Evid. (2d ed.), § 626(b); 4 Witkin, Summary of Calif.Law (8th ed.), Torts, § 884.

Library References:

West's Key No. Digests, Damages 🔑209 et seq., 226.

APPENDIX B

PRESENT VALUE TABLE

The following Table of the Present Value of $1 per year for a Specified Number of Years is offered for use to reduce a constant annual amount for a determined number of years at a determined rate of investment return to its present cash value.

To use this table, (1) determine the constant annual amount, (2) determine the number of years it will continue, (3) determine the rate of investment return, (4) using the number of years and the rate of investment return so determined, ascertain the factor from the table, and (5) multiply the annual amount by the factor so ascertained. The result will be the present amount which, invested at the determined rate of investment return, will pay at the end of each year the determined annual amount for the number of years it is determined that such amount will continue.

1. Present Value of $1 per Year (Payable at End of Each Year) for Specified Number of Years *

(Compound Discount Table)

YEARS	RATE 3%	3¼%	3½%	3¾%	4%	4¼%	4½%	4¾%	5%	5¼%	5½%	5¾%	6%	6¼%	6½%	6¾%	7%	YEARS
1	.97	.97	.97	.96	.96	.96	.96	.95	.95	.95	.95	.95	.94	.94	.94	.94	.93	1
2	1.91	1.91	1.90	1.89	1.89	1.88	1.87	1.87	1.86	1.85	1.85	1.84	1.83	1.83	1.82	1.81	1.80	2
3	2.83	2.82	2.80	2.79	2.78	2.76	2.75	2.74	2.72	2.71	2.70	2.69	2.67	2.66	2.65	2.64	2.62	3
4	3.72	3.69	3.67	3.65	3.63	3.61	3.59	3.57	3.55	3.53	3.51	3.49	3.47	3.45	3.43	3.41	3.39	4
5	4.58	4.55	4.52	4.48	4.45	4.42	4.39	4.36	4.33	4.30	4.27	4.24	4.21	4.18	4.16	4.13	4.10	5
6	5.42	5.37	5.33	5.29	5.24	5.20	5.16	5.12	5.08	5.04	5.00	4.96	4.92	4.88	4.84	4.80	4.77	6
7	6.23	6.17	6.11	6.06	6.00	5.95	5.89	5.84	5.79	5.73	5.68	5.63	5.58	5.53	5.48	5.44	5.39	7
8	7.02	6.95	6.87	6.80	6.73	6.66	6.60	6.53	6.46	6.40	6.33	6.27	6.21	6.15	6.09	6.03	5.97	8
9	7.79	7.70	7.61	7.52	7.44	7.35	7.27	7.19	7.11	7.03	6.95	6.88	6.80	6.73	6.66	6.59	6.52	9
10	8.53	8.42	8.32	8.21	8.11	8.01	7.91	7.82	7.72	7.63	7.54	7.45	7.36	7.27	7.19	7.11	7.02	10
11	9.25	9.13	9.00	8.88	8.76	8.64	8.53	8.42	8.31	8.20	8.09	7.99	7.89	7.79	7.69	7.59	7.50	11
12	9.95	9.81	9.66	9.52	9.39	9.25	9.12	8.99	8.86	8.74	8.62	8.50	8.38	8.27	8.16	8.05	7.94	12
13	10.63	10.47	10.30	10.14	9.99	9.83	9.68	9.54	9.39	9.25	9.12	8.98	8.85	8.72	8.60	8.48	8.36	13
14	11.30	11.11	10.92	10.74	10.56	10.39	10.22	10.06	9.90	9.74	9.59	9.44	9.29	9.15	9.01	8.88	8.75	14
15	11.94	11.72	11.52	11.32	11.12	10.93	10.74	10.58	10.38	10.21	10.04	9.87	9.71	9.56	9.40	9.25	9.11	15
16	12.56	12.32	12.09	11.87	11.65	11.44	11.23	11.03	10.84	10.65	10.46	10.28	10.11	9.93	9.77	9.61	9.45	16
17	13.17	12.90	12.65	12.40	12.17	11.93	11.71	11.49	11.27	11.07	10.86	10.67	10.48	10.29	10.11	9.93	9.76	17
18	13.75	13.47	13.19	12.92	12.66	12.41	12.16	11.92	11.69	11.46	11.25	11.03	10.83	10.63	10.43	10.24	10.06	18
19	14.32	14.01	13.71	13.42	13.13	12.86	12.59	12.34	12.09	11.84	11.61	11.38	11.16	10.94	10.73	10.53	10.34	19
20	14.89	14.54	14.21	13.90	13.59	13.29	13.01	12.73	12.46	12.20	11.95	11.71	11.47	11.24	11.02	10.80	10.59	20
21	15.42	15.05	14.70	14.36	14.03	13.71	13.40	13.11	12.82	12.54	12.28	12.02	11.76	11.52	11.28	11.06	10.84	21
22	15.94	15.55	15.17	14.80	14.45	14.11	13.78	13.47	13.16	12.87	12.58	12.31	12.04	11.78	11.54	11.29	11.06	22
23	16.44	16.02	15.62	15.23	14.86	14.50	14.15	13.81	13.49	13.18	12.88	12.58	12.30	12.03	11.77	11.52	11.27	23
24	16.94	16.49	16.06	15.64	15.25	14.86	14.50	14.14	13.80	13.47	13.15	12.85	12.55	12.27	11.99	11.73	11.47	24
25	17.41	16.94	16.48	16.04	15.62	15.22	14.83	14.45	14.09	13.75	13.41	13.09	12.78	12.49	12.20	11.92	11.65	25
26	17.88	17.37	16.89	16.43	15.98	15.56	15.15	14.75	14.38	14.01	13.66	13.33	13.00	12.69	12.39	12.10	11.83	26
27	18.33	17.79	17.29	16.80	16.33	15.88	15.45	15.04	14.64	14.26	13.90	13.55	13.21	12.89	12.57	12.28	11.99	27
28	18.76	18.20	17.67	17.15	16.66	16.19	15.74	15.31	14.90	14.50	14.12	13.76	13.41	13.07	12.75	12.44	12.14	28
29	19.19	18.60	18.04	17.50	16.98	16.49	16.02	15.57	15.14	14.73	14.33	13.95	13.59	13.24	12.91	12.59	12.28	29
30	19.60	18.98	18.39	17.83	17.29	16.78	16.29	15.82	15.37	14.94	14.53	14.14	13.76	13.40	13.06	12.73	12.41	30

APPENDIX B

YEARS	RATE 3%	3¼%	3½%	3¾%	4%	4¼%	4½%	4¾%	5%	5¼%	5½%	5¾%	6%	6¼%	6½%	6¾%	7%	YEARS
31	20.00	19.35	18.74	18.15	17.59	17.05	16.54	16.06	15.59	15.15	14.72	14.32	13.93	13.56	13.20	12.86	12.53	31
32	20.39	19.71	19.07	18.46	17.87	17.32	16.79	16.28	15.80	15.34	14.90	14.48	14.08	13.70	13.33	12.98	12.65	32
33	20.77	20.06	19.39	18.75	18.15	17.57	17.02	16.50	16.00	15.53	15.08	14.64	14.23	13.84	13.46	13.10	12.75	33
34	21.13	20.40	19.70	19.04	18.41	17.81	17.25	16.71	16.19	15.70	15.24	14.79	14.37	13.96	13.58	13.21	12.85	34
35	21.49	20.72	20.00	19.32	18.66	18.05	17.46	16.90	16.37	15.87	15.39	14.93	14.50	14.08	13.69	13.31	12.95	35
36	21.83	21.04	20.29	19.58	18.91	18.27	17.67	17.09	16.55	16.03	15.54	15.07	14.62	14.20	13.70	13.40	13.04	36
37	22.17	21.35	20.57	19.84	19.14	18.49	17.86	17.27	16.71	16.18	15.67	15.19	14.74	14.30	13.89	13.49	13.12	37
38	22.49	21.64	20.84	20.08	19.37	18.69	18.05	17.44	16.87	16.32	15.80	15.31	14.85	14.40	13.98	13.58	13.19	38
39	22.81	21.93	21.10	20.32	19.58	18.89	18.23	17.61	17.02	16.46	15.93	15.43	14.95	14.50	14.06	13.66	13.26	39
40	23.11	22.21	21.36	20.55	19.79	19.08	18.40	17.76	17.16	16.59	16.05	15.53	15.05	14.58	14.15	13.73	13.33	40
41	23.41	22.48	21.60	20.77	19.99	19.26	18.57	17.91	17.29	16.71	16.16	15.63	15.14	14.67	14.22	13.80	13.39	41
42	23.70	22.74	21.83	20.99	20.19	19.43	18.72	18.05	17.42	16.83	16.26	15.73	15.22	14.75	14.29	13.86	13.45	42
43	23.98	22.99	22.06	21.19	20.37	19.60	18.87	18.19	17.55	16.94	16.36	15.82	15.31	14.82	14.36	13.92	13.50	43
44	24.25	23.24	22.28	21.39	20.55	19.76	19.02	18.32	17.66	17.04	16.46	15.91	15.38	14.89	14.42	13.98	13.56	44
45	24.52	23.47	22.50	21.58	20.72	19.91	19.16	18.44	17.77	17.14	16.55	15.99	15.46	14.95	14.48	14.03	13.61	45
46	24.78	23.70	22.70	21.76	20.88	20.06	19.29	18.56	17.88	17.24	16.63	16.06	15.52	15.02	14.54	14.08	13.65	46
47	25.02	23.93	22.90	21.94	21.04	20.20	19.41	18.68	17.98	17.33	16.71	16.13	15.59	15.07	14.59	14.13	13.69	47
48	25.27	24.14	23.09	22.11	21.20	20.34	19.54	18.79	18.08	17.41	16.79	16.20	15.65	15.13	14.64	14.17	13.73	48
49	25.50	24.35	23.28	22.28	21.34	20.47	19.65	18.89	18.17	17.50	16.86	16.27	15.71	15.18	14.68	14.21	13.77	49
50	25.73	24.56	23.46	22.43	21.48	20.59	19.76	18.98	18.26	17.57	16.93	16.33	15.76	15.23	14.72	14.25	13.80	50
51	25.95	24.75	23.63	22.59	21.62	20.71	19.87	19.08	18.34	17.65	17.00	16.39	15.81	15.27	14.76	14.29	13.83	51
52	26.17	24.94	23.80	22.73	21.75	20.83	19.97	19.17	18.42	17.72	17.06	16.44	15.86	15.32	14.80	14.32	13.86	52
53	26.37	25.12	23.96	22.88	21.87	20.94	20.07	19.25	18.49	17.78	17.12	16.49	15.91	15.36	14.84	14.35	13.89	53
54	26.58	25.30	24.11	23.01	21.99	21.04	20.16	19.33	18.57	17.85	17.17	16.54	15.95	15.39	14.87	14.38	13.91	54
55	26.77	25.47	24.26	23.15	22.11	21.14	20.25	19.41	18.63	17.91	17.23	16.59	15.99	15.43	14.90	14.41	13.94	55
56	26.97	25.64	24.41	23.27	22.22	21.24	20.33	19.49	18.70	17.96	17.28	16.63	16.03	15.46	14.93	14.44	13.96	56
57	27.15	25.80	24.55	23.40	22.33	21.34	20.41	19.56	18.76	18.02	17.32	16.67	16.06	15.49	14.96	14.46	13.98	57
58	27.33	25.96	24.69	23.51	22.43	21.42	20.49	19.63	18.82	18.07	17.37	16.71	16.10	15.52	14.99	14.48	14.00	58
59	27.51	26.11	24.82	23.63	22.53	21.51	20.57	19.69	18.88	18.12	17.41	16.75	16.13	15.55	15.01	14.50	14.02	59
60	27.68	26.25	24.94	23.74	22.62	21.59	20.64	19.75	18.93	18.16	17.45	16.78	16.16	15.58	15.03	14.52	14.04	60

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§ 85.13 Damages—Present Worth of Future Loss

If the jury should find that the plaintiff is entitled to a verdict, and further find that the evidence in the case establishes either: (1) a reasonable likelihood of future medical expense, or (2) a reasonable likelihood of loss of future earnings, then it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money which he would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump-sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump-sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time; and include in the verdict an award for only the present-worth—the reduced amount—of the total anticipated future loss.

As already explained to you, this computation is readily made by using the so-called "present-worth" tables, which the Court has judicially noticed and received in evidence in this case

No. 3.22 MITIGATION OF DAMAGES IN PERSONAL INJURY CASES

If under the evidence and these instructions you find that the plaintiff is entitled to recover damages herein, you are instructed that it was the duty of the plaintiff to make use of reasonable means to effect as speedy and complete a cure of his injuries as could be reasonably accomplished under all the circumstances. If you find from the evidence that plaintiff failed to act as a reasonable prudent person to make use of reasonable means to effect as speedy and complete a cure of his injuries as could be reasonably accomplished under all the circumstances, he cannot recover for any injuries, suffering, or disability caused or induced by such failure.

You are further instructed that evidence has been introduced in this case that plaintiff's disability or suffering would have been relieved to some degree or extent by plaintiff submitting to a surgical operation. You are instructed that plaintiff has no duty to undergo a serious or speculative surgical operation; however, if by slight expense and by slight inconvenience, plaintiff acting as a reasonable prudent person might have avoided the consequences of his injury, if any, it was the duty of plaintiff to alleviate his injury, and if you find from the evidence that he failed and neglected to do so, he cannot recover for suffering, inconvenience or disability that might thus have been avoided.

Updegraff v. City of Ottumwa, 210 Iowa 382, 226 N.W. 928 (1929).

Bailey v. City of Centerville, 108 Iowa 20, 78 N.W. 831 (1899).

White v. Chicago NW Ry Co., 145 Iowa 408, 124 N.W. 309 (1910).

Honorable Hubert L. Will, United States District Judge, Northern District of Illinois

Now, when you get into discussions, if you do so on invitation of counsel, I think you should make yourself available. I think your role should be "I'm ready to talk settlement of this case if you want me to," and this is both at the preliminary pretrial conference, if counsel are ready, as well as at the final pretrial conference.

Let's assume that you've got a case in which counsel say, "Yes, we'd like to have your participation. We think with a little help we might be able to obviate the necessity for further discovery or for any discovery or a trial. We've already had our investigations, we've already looked at documents, and so we're ready to talk at this point."

My approach is to say, "All right. Let's attempt to ascertain the present value of this case." And that's when I say "Let's assume that we are the underwriters at Lloyds in London." And the defendant comes in. You can do it either way but if you do it with the plaintiff you've got to convert the calculations. The direct calculation is easier.

So, let's assume that the defendant comes in and wants to purchase a policy to insure against possible loss in the case in question. We, the underwriters, say, "All right, the first thing we have to determine is, what is the insurance premium? What's the risk premium in this case? We can add on the administrative and overhead costs, and the commission for the agent and so forth afterwards. But the base figure we have to get initially is how much do we have to have to protect us against our risk of loss in this case."

Well we have to know two things. We have to know how likely are we to have to pay. How likely is the defendant to lose? What are the risks of liability? What are the chances it's going to rain on the second day of the Bing Crosby Open? Or, what's the chance that Ringling Brothers tent is going to collapse—whatever we're insuring against?

I say to the plaintiff, "What do you think the chances of the defendant losing are, or what do you think the chances of your winning are?" I'll usually get a pretty high probability in favor of the plaintiff—75, 80, 90%. Then I'll say to the defense counsel, "What do you think the chances of the defendant losing are?" And I'll get a figure—normally it runs anywhere from 30 to 50 or 60%.

Interestingly enough, I find counsel are comparatively objective. If they're not, it's not difficult for you to ask the kind of questions that will inject some objectivity. For example, you get a plaintiff who says he's got a 90% case. My reaction is

that's got to be a very, very good case, and what about this possibility of contributory negligence, or what about that possibility, etc

Over a relatively short discussion, in my experience, you can get to a rough consensus. In the kind of situation which I've just been discussing, my guess is that you'll end up with a probability somewhere in the range of 65-35, 60-40, 70-30—somewhere in that range

You've now established the first element that you need in the evaluation of the risk premium in the case. Now, we have to talk about how much are we going to have to pay if we do have to pay, because that's the second thing we at Lloyds want to know before we figure out how much to charge you for the policy that you want.

And I will attempt to ascertain from plaintiff's counsel, first of all what they think the special damages are if its a tort case or a contract case. If it's a tort case, I'll ask for their estimate as to the maximum judgment which they think a jury might reasonably return, or which I might stand still for in the event that a jury did return it.

Let's assume that the plaintiff says, "I think I can get $100,000.00 out of this case." And I say, "Well, that's pretty steep for $8,000.00 in specials, but okay Let's assume for the purposes of discussion that you might get as much as $100,000.00 and I wouldn't order a remittitur or a new trial."

Then you ask defense counsel, "What do you think the least the defendant might have to pay is, assuming now, of course, the defendant has lost the issue of liability?" We're now talking about how much is the defendant going to have to pay, assuming the defendant has to pay at all.

You get the figure of, say $20,000.00, with $8,000.00 in specials You say, "All right." So, you're talking about a range of verdicts which a jury might return of $20-100,000.00. That means that the most probable verdict, the median verdict, is $60,000.00; 20 from 100 is 80—cut it in half, add the 20—$60,000.00.

The most probable verdict in the case is $60,000.00, and the likelihood of our having to pay is let's say two-thirds, one-third. Then in this case at this time—if you want an insurance policy you ought to pay us $40,000.00 for the insurance policy. Or put another way, the present value of this case is $40,000.00, because that's the synthesis of the probabilities of liability and the possibilities of damages

You'd be surprised at the reactions you get to that kind of an analysis. Some counsel say, "Well, you know, there's nothing wrong with your mathematics except that my client won't pay that kind of money," or, "My client won't accept it." And I say, "Oh, well, then, there is nothing I can do. One of the things which this system permits is gambling in court. It may be illegal on the street, but it's okay in court if the defendant or the plaintiff wants to do it

"The question, of course is whether it is good business judgment or good legal advice for you or your client to participate in that kind of a gamble But I'm not going to tell you you have to settle this case. You're entitled to a trial I'm here to serve as the croupier if necessary, if you want to gamble in court."

That's the kind of analysis, however, that claims adjusters and insurance men do all the time. They understand the valuation of a case, so defense counsel can talk to them on that basis. It's the kind of analysis which a plaintiff's counsel can take back to his client, and most plaintiff's lawyers don't want to try the case if they can avoid it

If you don't believe that, go look at the class actions; the massive cases in which every effort is made to settle them so that counsel can get their fees without trying the case, because the trial of a case is not usually profitable to a trial lawyer. Settlement of a case is likely to be much more profitable because he can settle a lot more cases over a shorter period of time than he can try

And so the plaintiff's lawyer is happy to have an analysis he can take back to his client as an evaluation of the case with the judge's imprimatur on it. This is what the judge has valued the case at.

I give you a couple of interesting examples of the way it works I had a case several years ago in which Bordens was suing a small milk producer in Illinois. We did the Lloyds of London analysis one night at a final pretrial conference, and it came out to a 50–50 chance of getting a median judgment of $125,000.00 or $62,500.00.

There was dead silence. I said, "What's the matter? Somebody's got to have a reaction. What's right with it? What's wrong with it? Why don't you say something?" Finally, Borden's counsel said, "Well, we're speechless because we've been demanding 75 and they've been offering 50." I said, "Okay, that's the end of that, isn't it?" And they said, "That's the end of it The case is settled."

WORKERS' COMPENSATION UPDATE

Robert C. Landess
Industrial Commissioner

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      3. Wetzel v. Wilson, 276 N.W.2d 410 (Iowa 1979) - Coverage of agricultural workers

      4. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979) - Assault by co-employee

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3. Fuering v. Fuering, No. 16150, filed April 26, 1979 - Exclusion from coverage - Agricultural

4. Hammes v. Rustlers Rendezvous, No. 15539, filed August 16, 1978 - Arising out of - Tornado

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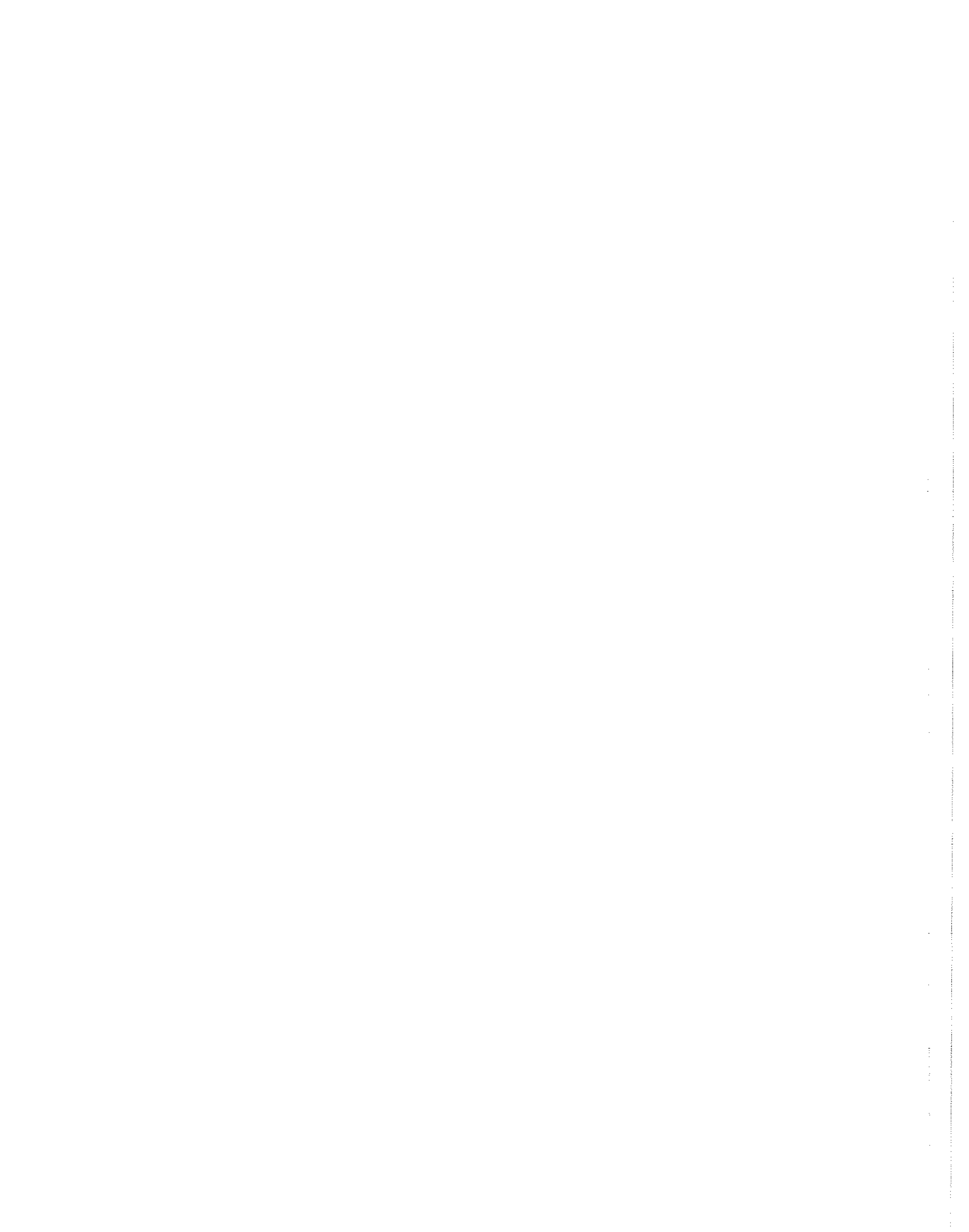
13. Garner v. Armstrong Rubber Co., No. 16306, filed July 27, 1979 - Medical examination - Reimbursement

14. Prusia v. Armstrong Rubber Co., No. 16511, filed September 4, 1979 - Injury to two members - Code section 85.34(2)(s) - Functional impairment v. industrial disability



"BACK TO BASICS"

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*Judge, Third Judicial District of Iowa. Outline prepared by Judge David R. Hansen and Law Clerk Gary Poetting, Second Judicial District of Iowa, for the CLE workshop at the Judicial Conference, June 14-15, 1979, Ironmen Inn, Iowa City, Iowa. For further reading, see BLAIR, "Attacking the Caseload Dilemma," 27 Drake L. Rev. 319 (1978); BLAIR, "The New Local Rules for Federal Practice in Iowa," 23 Drake L. Rev. 517 (1974); BLAIR, "A Guide to the New Federal Discovery Practice," 21 Drake L. Rev. 58 (1971).

I. Motions Attacking the Pleadings.

A. Rule 111. Motions Combined.

Motions to dismiss, to strike, and for more specific statement must be combined.

1. Purpose. A party should not be allowed to have a series of motions attacking the same pleading, consuming time and involving successive hearings, so he should be required to make all his motions attacking a pleading at the same time. Comment, 2 IRCP Anno 225.

2. Only one such motion - amendment. Only one such motion assailing the same pleading shall be permitted, unless the pleading is amended thereafter. Rule 111.

   a. Amendment to Motion. Although only one such motion is allowed, the rules do not forbid the allowance of an amendment to a filed motion before its submission. Larson v. Baker, 235 Iowa 200, 16 N.W. 2d 262, 264 (1944).

3. References.

   a. Comparable Federal Rule: 12(g).
   b. Key Nos.: Pleading 341 et seq.; Fed. Civ. P. 925.
   c. 35A CJS Fed. Civ. P §372.

B. Rule 104(b) Motion To Dismiss.

1. Purpose. The purpose of a motion to dismiss for failure to state a claim is to expedite a hearing on the merits of an action, not to outfit a party with tactical armaments for delay and harassment of his adversary. FRA S. P. A. v. SURG-O-FLEX of America, Inc. 415 F. Supp. 421, 424 (USDC SD New York 1976).

2. Specificity. Motions to dismiss for failure to state a cause of action must clearly specify wherein the pleading attached is insufficient. Turner v. Thorp Credit, Inc., 228 N.W. 2d 85, 88 (Iowa, 1975); Rule 104(d). A motion not disclosing wherein the pleading is claimed to be insufficient should be overruled. Newton v. City of Grundy Center, 246 Iowa 916; 70 N.W. 2d 162, 164 (1955).

3. No Discretion. Overruling or sustaining a motion to dismiss does not depend upon the trial court's discretion. The Court must grant or deny the motion according to law.

Logan v. McMillen, 244 Iowa 1328; 60 N.W. 2d 498, 502 (1953); Berger v. General United Group, Inc., 268 N.W. 2d 630, 633 (Iowa, 1978).

4. Almost Unnecessary. A motion to dismiss is limited to the failure to state any claim on which any relief can be granted. Such a motion is now almost as unnecessary as the similar obsolete pleading of demurer. Burd v. Board of Education of Audubon County, 260 Iowa 846; 151 N.W. 2d 457, 463 (1967). But not entirely obsolete see 268 N.W. 2d 630.

5. When sustainable. A motion to dismiss grounded on failure to state a cause of action is sustainable only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts which would be proved in support of the claim asserted. Berger v. General United Group, Inc. 268 N.W. 2d 630, 633 (Iowa, 1978).

6. Law action brought in equity. Filing a claim for damages recoverable in a court of law as an equity action is not grounds for dismissal. §611.7, The Code. Newton v. City of Grundy Center, 246 Iowa 916; 70 N.W. 2d 162, 164. (1955). Motion to transfer is appropriate motion. Id.

7. Construction of Pleading. A motion to dismiss is a waiver of any ambiguity or uncertainty in the pleadings. The pleading should be construed in the light most favorable to the pleader with doubts resolved in his favor and the challenged allegations accepted as true. Berger v. General United Group, Inc., 268 N.W. 2d 630, 633 (Iowa, 1978). Compare 197 N.W. 2d 552.

8. Facts admitted. Like the old demurer, a motion to dismiss admits the well-pleaded facts in the pleading assailed for the purpose of testing their legal sufficiency. Berger v. General United Group, Inc., 268 N.W. 2d 630, 634. (Iowa, 1978). Even the most extravagant factual averment is dignified into a verity when exposed to a motion to dismiss. Bailey v. Iowa Beef Processors, Inc., 213 N.W. 2d 642, 647 (Iowa, 1973).

a. Unsupported conclusions.
Although well-pleaded allegations are to be taken as admitted, mere unsupported conclusions of fact or mixed fact and law are not admitted. Tamari v. Bache & Co. (Lebanon) S.A.C., 565 F. 2d 1194, 1199 (7th Cir. 1977), cert. denied, 48 S. Ct. 1450; Homan Manufacturing Co. v. Russo, 233 F. 2d 547, 550 (7th Cir. 1956).

b. Allegations of Law. While allegations of fact are to be regarded as true, allegations of law are not. United States v. Tulare Lake Canal Co., 535

F. 2d 1093, 1097 (9th Cir. 1976).

c. Judicial Notice. The Court should not accept as true allegations that are in conflict with facts judicially known to the Court. Blackburn v. Fisk University, 443 F. 2d 121, 123 (6th Cir. 1971).

9. Speaking Motions. The motion may not sustain itself by its own allegations of fact not appearing in the challenged pleading. Such averments are no proper part of the motion and must be ignored. The motion to dismiss can neither rely on facts not alleged in the petition, except those of which judicial notice may be taken, nor be decided by an evidentiary hearing. Berger v. General United Group, Inc., 268 N.W. 2d 630, 634 (Iowa, 1978). The Iowa practice in this regard is different from the Federal practices. Id.

10. Right to plead over. Plaintiff has the right to plead over after the trial Court sustains a motion to dismiss. Nesper Sign & Neon Co. v. Nugent, 168 N.W. 2d 805 (Iowa, 1969).

11. References.

a. Comparable Federal Rule: Rule 104(b) is much like Federal Rule 12(b). Bervid v. Iowa State Tax Commission, 247 Iowa 1333; 78 N.W. 2d 812. (1956).

b. Key Nos.: Pleading 350 et seq.; Pre-trial Procedure 621 et seq.; Federal Civil Procedure 1721 et seq.

C. Motion To Strike - Rules 104(c), 113.

Rule 104(c) permits a motion to strike any insufficient defense. Rule 113 authorizes the striking of improper or unnecessary matter in a pleading.

1. Like Motion To Dismiss. A motion to strike an insufficient defense under Rule 104(c) is essentially the same as a motion to dismiss directed at the petition. 1 Vestal and Wilson, Iowa Practice 318 (1974).

2. Specificity. A motion to strike must specify wherein the pleading attacked is insufficient. Rule 104(d).

(a) "Not any proper reply" is not sufficiently specific. Johnson v. Cedar Park Association, 229 Iowa 749, 752; 295 N.W. 136 (1940).

(b) "Not authorized under Section _______" is indefinite and uncertain. Carr v. McCauley, 215 Iowa 298, 301, 245 N.W. 290 (1932).

(c) "Immaterial, irrelevant, surplusage and redundant" appears to be sufficient. Johnson v. Cedar Park Association, 229 Iowa 749, 752; 295 N.W. 136 (1940).

3. Discretion. The trial Court has some discretion in ruling on a motion to strike under Rule 113. In re Primary Road No. 141, 253 Iowa 1130; 114 N.W. 2d 290, 292 (1962). Since a motion to strike an insufficient defense under Rule 104(c) is like a motion to dismiss a petition, it would appear there is no discretion under Rule 104(c). See also 177 N.W. 2d 1,4.

4. Matters Admitted. A motion to strike admits well-pleaded facts. In re Primary Road No. Iowa 141, 253 Iowa 1130; 114 N.W. 2d 290, 293 (1962)(Rule 113); In re Estate of Carpenter, 210 Iowa 553, 561; 231 N.W. 376 (1930). (Motion to strike defense).

5. Construction of pleading. When a pleading is attacked before issue is joined by a motion to strike out a specified portion of the pleading asserted to contain improper or unnecessary matters as permitted by Rule 113, R.C.P., the pleading will be resolved against the pleader. Murphy v. First National Bank of Chicago, 228 N.W. 2d 372, 375 (Iowa, 1975) (dicta). Compare 6. below.

6. Cautiously granted. A motion to strike under Rule 113 must be cautiously granted and will be denied if there is any question as to the validity of the pleading. A motion to strike certain paragraphs in a petition should be granted only when the allegations thereof have no possible relation to the controversy, and in case of doubt as to whether under any contingency the matter may raise a material issue, the trial Court should deny the motion. In re Primary Road No. Iowa 141, 253 Iowa 1130; 114 N.W. 2d 290, 292 (1962).

7. Entire division of petition. A motion to strike is unavailable for purposes of challenging an entire division of a petition. Rule 113. Bourjailey v. Johnson County, 167 N.W. 2d 630, 632 (Iowa, 1969). However, such a motion may be treated as a motion to dismiss. Id.

8. Extrinsic Evidence (speaking motion). Motions to strike improper and immaterial matter are directed to the pleadings as they stand. They cannot be aided by evidence. Kester v. Travelers Indemnity Co. of Hartford, Conn., 257 Iowa 1146; 136 N.W. 2d 261, 264 (1965).

9. Grounds.

(a) Repetitious allegations. Fosselman v. Waterloo Community School District, 229 N.W. 2d 280, 284 (Iowa, 1975).

(b) Conclusions, where no pertinent, relevant nor material facts are alleged to support the conclusion. Hutchinson v. Des Moines Housing Corp., 248 Iowa 1121; 84 N.W. 2d 10, 13 (1957). This may be changed by amendments to Rule 69.

(c) Immaterial allegations. Johnstone v. Johnstone, 226 Iowa 503, 512; 284 N.W. 379 (1939).

(d) Evidentiary matters. Roddy v. Gazette Co., 163 Iowa 416; 144 N.W. 1009 (1914). This may also have been changed by amendments to Rule 69.

(e) Late pleading. Striking of reply which was not filed until nearly 17 months after answer was justified on ground of delay. Brown v. Schmitz, 237 Iowa 418; 22 N.W. 2d 340, 342 (1946).

(1) Acquiescence in delay may result in waiver. City of Des Moines v. Barnes, 237 Iowa 6; 20 N.W. 2d 895 (1945).

10. References.

(a) Comparable Federal rule: 12(f).

(b) Key Nos. Pleading 361 et seq.

(c) 71 C.J.S. Pleading §463 et seq.

D. Motion For More Specific Statement - Rule 112. A party may move for a more specific statement of any matter not pleaded with sufficient definiteness to enable him to plead to it and for no other purpose.

1. Purpose. A motion for more definite statement is designed to strike at unintelligibility rather than want of detail. It is inappropriate if the notice requirements of the pleading rules are met and the pleading fairly notifies the opposing party of the nature of the claim. Evidentiary details can more appropriately be obtained through pre-trial discovery procedures. Fairmont Foods Company v. Manganello, 301 F. Supp. 832, 839 (USDC SD N.Y. 1969); United States v. Georgia Power Company, 301 F. Supp. 538, 543-544 (USDC N D Georgia 1969).

2. Not Favored. The notice pleading concept is used to secure the just, speedy and inexpensive determination of every action. Because of this, motions for a more definite statement are not favored. United States v. Georgia Power Company, 301 F. Supp. 538, 543-544 (USDC N D Georgia 1969).

3. Specificity. The motion shall point out the insufficiency claimed and the particulars desired. Rule 112.

4. Discretion. A motion for more definite statement is addressed to the sound discretion of the Court. Kroungold v. Triester, 407 F. Supp. 414, 420 (USDC E. D. Penn. 1975).

5. Not a substitute for discovery. This motion will no longer lie to obtain evidence or information necessary to prepare for trial as distinct from preparation to plead. Hagenson v. United Telephone Company, 164 N.W. 2d 853, 857 (Iowa 1969). Also 241 N.W. 2d 893, 896.

6. Purpose. By adopting the current rule it was hoped to avoid the indiscriminate practice of moving for, and ordering, amendments not actually needed but which cause delay and expense. Id.

7. When sustained. An order sustaining a motion for more specific statement should be entered only if the movant shows the pleading to which the motion is addressed is so indefinite he is unable to respond to it. Wunschel v. Hoefer, 241 N.W. 2d 893, 896 (Iowa, 1976).

8. May not seek grounds for dismissal. A motion for more specific statement may not be used to compel a plaintiff to lay the groundwork for a defendant's motion to dismiss. Goldstein v. Brandmeyer, 243 Iowa 679; 53 N.W. 2d 268, 271 (1952).

9. Error waived. When a party attempts to comply with an order for more specific statement, error in the order is waived. Wunschel v. Hoefer, 241 N.W. 2d 893, 895 (Iowa, 1976).

10. Good faith effort. A plaintiff who is ordered to make his petition more specific in certain particulars which he is actually or reasonably unable to state, and so demonstrates in a good faith effort to comply with the order, must be deemed to have complied with the order, and must not be disciplined by a dismissal of his action. Id.

11. References.

a. Comparable Federal Rule: Rule 12(e).

b. Key Nos. Pleading 367.

c. 71 C.J.S. Pleading §475.

E. Time To Move - Rules 85(a), 104(b).
Motions attacking a pleading must be served before responding to a pleading, or, if no responsive pleading is required by the rules, upon motion made by a party within 20 days after the service of the pleading on the party.

1. Motion by party in default. Even though the Federal rule, like the Iowa rule, gives no specific time limit for the filing of motions, the Federal Courts consider a Rule 12(b) motion by a party in default as untimely and, therefore, as having been waived. 5 Wright and Miller, Federal Practice and Procedure §1391, pg. 855 (1969); 2A Moore's Federal Practice paragraph 12.06 (1. - 2b) (1978). This does not necessarily waive the right to raise the point by other means. 20 N.W. 2d 895; 229 N.W. 2d 280.

2. Service of Motion - Rule 82.

a. Service on a party represented by an attorney shall be made upon the attorney unless service upon the party himself is ordered by the Court. Rule 82(b).

b. Service may be by delivery or by mail. Service by mail is complete upon mailing. Rule 82(b).

c. Whenever rules require a filing within a certain time said filing shall be deemed timely if service is made within said time and filing is completed within a reasonable time thereafter. Rule 82(d).

d. Time limits are extended three days when service of notice or other paper is by mail. Rule 83(b).

3. Motion to dismiss filed after answer. A motion to dismiss filed after answer without first securing permission to withdraw answer is not timely. Riediger v. Manlord Development Corporation, 253 N.W. 2d 915, 916 (Iowa, 1977).

4. Purpose. The purpose of the rule is not to enable a party to profit by a long delay during which it was being violated with his acquiescence, but to give him and the Court a weapon by which he could have prompt trial and disposition of his case. The rule was designed for the

benefit of the Court in the prompt administration of justice and litigants who are interested in cooperating to that end; not for parties who acquiesce and then seek to profit from its violation. Bomber v. Schafer, 242 Iowa 619, 47 N.W. 2d 842, 846 (1951).

5. Shortening time. The Court may order any motion or pleading to be filed within a shorter time than required by the rules, but cannot require a defendant to answer sooner than seven days after the appearance date. Rule 85(e).

   a. Violation of this rule is not reversible error unless prejudice is shown. In re Marriage of Reed, 226 N.W. 2d 795, 796 (Iowa, 1975).

6. Extending time. For good cause but not ex parte, and upon such terms as the Court prescribes, the Court may grant a party the right to file a motion, answer or reply where the time to file same has expired. Rule 85(f).

   a. Does extending time to answer also extend time to file motion attacking a pleading? Compare District Tp of Newton v. White, 42 Iowa 608 (1876) with 35A C.J.S. Federal Civil Procedure §369, n. 58. See also Gray v. Myers, 45 Iowa 158 (1876).

7. References.

   a. Comparable Federal Rule: 6, 12(b).

   b. Key Nos. Pleading 360(2), 367(b), 365(3); Pretrial Procedure 673.

   c. 71 C.J.S. Pleading §§ 497 et seq.

II Motion for Continuance, Rules 182 - 184.

A. Must be filed without delay. Motions for Continuance shall be filed without delay after the grounds therefor become known to the party or his counsel. Rule 182(a). Failure to observe this rule can in itself afford sufficient basis for the denial of a continuance. State v. One Certain Automobile, 237 Iowa 1024, 23 N.W. 2d 847, 849 (1946).

B. Substance cannot be amended. A Motion for Continuance may be amended only to correct a clerical error. Rule 182(a).

C. When granted. A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained. Rule 183(a).

D. Discretion. Trial courts are accorded broad discretion in granting or denying a Motion for Continuance. The trial court's ruling will not be disturbed unless clear abuse of discretion is shown. Madison Silos, Division of Martin Marietta Corp. v. Wassom, 215 N.W. 2d 494, 498 (Iowa, 1974).

E. Agreement of Parties. A continuance shall be allowed if all parties so agree and the court approves. Rule 183(a).

1. "and the court approves" was added in 1961. 2 I.R.C.P. Anno. 543.

F After amendment. The filing of an amendment is not a matter of surprise warranting a continuance where it merely sets forth in more detail the matters alleged in the original pleading, or states such matters in a different manner, or where the matter set up in the amended pleading is disclosed by answers to applicant's interrogatories. Madison Silos, Division of Martin Marietta Corp. v. Wassom, 215 N.W. 2d 494, 499 (Iowa, 1974).

G. Effect. A "continuance" generally means only that the date of hearing or trial is postponed. It does not affect the merits of the case; it does not change any rulings that have been made; it leaves all matters as they were before, except that the time is extended. McKinney v. Hirstine, 257 Iowa 395, 131 N.W. 2d 823 (1964).

H. Partial continuance. Where the defenses are distinct, the cause may be continued as to any one or more defendants Rule 184.

I. Absence of Evidence

1. Requirements Motions for continuance based on absence of evidence must be supported by affidavit of the party, his agent or attorney. The affidavit must show:

a. Name and residence of the absent witness, or, if unknown, that affiant has used diligence to ascertain them.

b. What efforts, constituting due diligence, have been made to obtain such witness or his testimony, and facts showing reasonable grounds to believe the testimony will be procured by the next term.

c. What particular facts, distinct from legal conclusions, affiant believes the witness will prove, and that he believes them to be true and knows of no other witness by whom they can be fully proved. Rule 183(b).

2. Requirements must be met. Failure to comply with 182(a) and 183(b) can itself afford sufficient basis for the denial of a continuance. In re Estate of Tomin, 260 Iowa 1129, 152 N.W. 2d 286 (1967).

3 Cumulative testimony. The general rule is that where the testimony of the absent witness is merely cumulative, a refusal to grant the continuance will be upheld. State v. Sipe, 240 Iowa 872, 37 N.W. 2d 914, 915 (1949).

a. But the fact that testimony of the absent witness would be cumulative does not in all instances require refusal of a continuance, especially where direct evidence of the transaction is in conflict, since the issue may often be determined by the number of witnesses. Id.

4. Admissions to prevent continuance. Rule 183(b).

J. Discovery. Where Plaintiff's physician unreasonably refused to answer questions pertaining to Plaintiff's injuries at deposition five days before trial, it was the Court's duty to expedite the trial and the Court properly overruled motions to require answers and for continuance of trial to allow completion of deposition. Bernard v. Cedar Rapids City Cab Co., 257 Iowa 734, 133 N.W. 2d 884, 895 (1965).

K. Conditions of Granting. A Court has power to impose reasonable terms as a condition to granting a continuance. 17 CJS Continuance §104. But see 2 below.

1. Costs. Every continuance shall be at the cost of the movant unless otherwise ordered by the Court. Rule 184, see also Rule 182(b)

a. The costs which may be imposed are only taxable costs. Attorney's fees and expenses of travel of a party, save on a subpoena, may not be included. Keller v. Harrison, 151 Iowa 320, 330 - 333, 131 N.W. 53 (1911).

2. Erroneous to impose conditions other than taxable costs. Our statute, in designating the terms on which continuances may be ordered, by fair implication excludes authority to impose others. Keller v. Harrison, 151 Iowa 320, 331, 131 N.W. 53 (1911); Moore v. Chicago, R.I. & P. Ry. Co., 151 Iowa 353, 361, 131 N.W. 30 (1911). Compare 3 below.

3. Condition that witness not testify. The Court did not abuse its discretion when it granted a motion for continuance provided that the testimony of a certain witness would not be admissible either in person or by deposition. Daniels v. Bloomquist, 258 Iowa 301, 138 N.W. 2d 868, 875 (1965).

4. Condition that party waive jury trial is error. Grant of a continuance on condition that action be tried to the Court rather than to a jury would be reversible error. In re Estate of Tomin, 200 Iowa 1129, 152 N.W. 2d 286, 291 (1967).

L. References.

1. Comparable Federal Rule: None
2. Key Nos.: Continuance 1 et seq.; Federal Civil Procedure 1851 et. seq.; Pretrial Procedure 711 et. seq.
3. 17 CJS Continuances §1 et. seq.; 35B CJS Federal Civ. P. §789 et. seq.

III. Motion in Limine. Definition. 220 N.W. 2d 919, 922.

A. Purpose. The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel declaring a mistrial. State v. Johnson, 183 N.W. 2d 194, 197 (Iowa, 1971). It also serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the Court may be called upon to make during the course of the trial. Twyford v. Weber, 220 N.W. 2d 919, 923 (Iowa, 1974). The Trial Judge is thereby alerted to an evidentiary problem which may develop in the trial State v. Johnson, supra, at 197.

B. Removes possibility of inadvertence. The motion has the effect of advising the Court and opposing counsel of the party's position on a particular matter and should effectively remove the problem when the argument is advanced by the offending party that the prejudicial evidence came in by sheer inadvertence. Twyford v. Weber, 220 N.W. 2d 919, 923 (Iowa, 1974).

C. Not a ruling on evidence. A motion in limine is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence. Twyford v. Weber, 220 N.W. 2d 919, 923 (1974).

D. Drastic Motion - use should be exceptional The motion is a drastic one. Preventing a party from presenting his evidence in the usual way. Its use should be exceptional rather than general. Lewis v. Buena Vista Mutual Insurance Association, 183 N.W. 2d 198, 201 (Iowa 1971). Care must be exercised to avoid indiscriminate application of it lest parties be prevented from even trying to prove their contentions. Id. at 200.

E. Case should not be tried twice. A party should not be required to try a case or defense twice - once outside the jury's presence to satisfy the trial court of its sufficiency and then again before the jury. Id. at 201.

F. Rifle - not a shotgun. The motion should be used, if used at all, as a rifle and not as a shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial. Id. 201.

G. Procedure.

1. Evidentiary hearing. Since no one knows exactly how the trial will proceed, trial courts would ordinarily be well advised to require an evidentiary hearing on the motion when its validity or invalidity is not manifest from the face of the motion. Id. at 201.

2. Ruling. When the motion is sustained the order must be so worded as not to preclude the right of the parties affected thereby to make their record in the absence of the jury, on any material evidentiary matters which they feel entitled to produce in support of their case in view of the trial record made at that point. Twyford v. Weber, 220 N.W. 2d 919, 923 (Iowa 1974).

a. At the same time the court recognizes there may be situations presented where the evidence or statements are so prejudicial that there can be no situation developed during the course of the trial in which such evidence could be logically claimed to be admissible. No further record is then necessary. Id. at 923-924.

H. Preservation of error. Ordinarily the granting or rejecting of a motion in limine is not reversible error; the error comes, if at all, when the matter is presented at trial and the evidence is then admitted or refused, as the case may be. State v. Langley, 265 N.W. 2d 718, 720 (Iowa, 1978).

1. Exception - motion granted. An exception exists where such a motion is granted on a hearing which is evidentiary in nature, the court is completely advised of the factual situation, and nothing occurs at trial to change the status. Id.

2. Where motion denied. Where the motion is denied and opposing counsel attempts to ask the questions challenged in the motion or offer the prejudicial evidence covered therein, a proper objection at that time is necessary to preserve the right to complain on appeal that such questions asked or such evidence tendered were so prejudicial the mere asking or tendering would require a reversal. Stated otherwise, where the motion is denied the movant must base

his complaint on the trial record. Twyford v. Weber, 220 N.W. 2d 919, 924 (Iowa, 1974).

I. References.

1. Key Nos.: Trial 9(1); Pretrial Procedure 3.

IV. Amendments to Pleadings - Rules 88, 89.

A. Right to amend.

1. Before responsive pleading is served. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. Rule 88.

a. A motion is not a pleading. Rule 109; 223 N.W. 2d 246.

2. Where no responsive pleading is required. If the pleading is one to which no responsive pleading is required and the action has not been placed on the trial calendar the party may so amend it at any time within 20 days after it is served. Rule 88.

3. All other cases. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Rule 88.

a. The purpose of the leave of court requirement is to give defendants who have answered a right to object to amendments made which might affect their preparation for trial. West v. Hawker, 237 N.W. 2d 802, 807 (Iowa, 1976); Johnston v. Percy Const., Inc., 258 N.W. 2d 366, 370 (Iowa, 1977).

b. When a petition is sought to be amended to add new parties after issue has been joined by original defendants permission of the court is necessary. West v. Hawker, 237 N.W. 2d 802, 807 (Iowa, 1976).

B. Leave freely given. Leave to amend, including leave to amend to conform to proof, shall be freely given when justice so requires. Rule 88.

1. Amendments the rule. Amendments are the rule and denials the exception. Ackerman v. Lauver, 242 N.W. 2d 342, 345 (Iowa 1976).

C. Discretion. The trial court has considerable discretion in allowing amendments. Ackerman v. Lauver, 242 N.W. 2d 342, 345 (Iowa, 1976); Johnston v. Percy Const., Inc., 258 N.W. 2d 366, 371 (Iowa, 1977).

D. When allowed. Amendments may be allowed at any time before the case is finally decided, even after completion of the evidence. Ackerman v. Lauver, 242 N.W. 2d 342, 345 (Iowa, 1976).

E. Conditions. In allowing an amendment under Rule 88, the trial court may impose terms as a condition of the allowance. Ackerman v. Lauver, 242 N.W. 2d 342, 345 (Iowa, 1976).

F. Change of issues. Under the rule as it appeared before amendment by order of January 28, 1977, leave to amend could not be granted if the amendment substantially changed the issues. Parker v. Tuttle, 260 N.W. 2d 843, 846 (Iowa, 1977). The new rule does not contain this language. Under the similar Federal Rule 15(a) it is irrelevant that a proposed amendment changes the cause of action or theory of the case or that it states a claim arising out of a transaction different from that originally sued on. 2 I.R.C.P. Anno. 23.

G. Relation Back. 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. Rule 89.

1. Purpose. The rule is based upon a concept that once litigation involving particular conduct or given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction or occurrence as set forth in the original pleading. 2 I.R.C.P. Anno. 1978-1979 pocket part pg. 16.

2. Amendment changing party. An amendment changing

the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the time allowed by the statute of limitations the party to be brought in by amendment (1) has received such notice that he will not be prejudicial and (2) knew or should have known that there was a mistake in identity of the proper party. Rule 89.

H. Effect. Pleadings that have been superseded remain a part of the record in the case, even though withdrawn, and may be introduced in evidence against the party filing them. Admissions in a pleading that have been superseded are not conclusive upon the party making them. He may show they were made inadvertently or by mistake. Bigelow v. Williams, 193 N.W. 2d 521, 524 (Iowa, 1972).

I. Delay grounds for denial. A long delay in filing an amendment is sufficient ground for the trial court, in its discretion, not to permit it. Russell v. Chicago, Rock Island & Pacific Railroad Co., 251 Iowa 839; 102 N.W. 2d 881, 885 (1960).

J. Increase demand. Allowing amendment of petition on first day of trial to increase demand for damages is within trial court's discretion. Moser v. Brown, 249 N.W. 2d 612, 615 (Iowa, 1977).

K. Related Rules.

1. Pleading over. Plaintiff has a right to plead over after the trial court sustains a motion to dismiss. Rule 86; Nesper Sign and Neon Co. v. Nugent, 168 N.W. 2d 805, 806 (Iowa, 1969).

2. Supplemental Pleading. 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. Rule 90.

a. Purpose. The purpose of the rule is to permit the pleading to be brought up to date as to new developments since the prior pleading was filed. 2 I.R.C.P. Anno., 1978-1979 pocket part pg. 18.

3. Special action. In any case of mandamus, certiorari, appeal to the District Court, or for specific equitable relief, where the facts pleaded and proved do not entitle the petitioner to the specific remedy asked, but do show him entitled to another remedy, the court shall permit him on such terms, if any, as it may prescribe, to amend by asking for such latter remedy, which may be awarded. Rule 107.

4. Pretrial Conference. The necessity or desirability of amending pleadings by formal agreement or pretrial order may be considered at pretrial conference. Rule 136(a).

5. Issues tried by consent. Either party may amend his pleadings to conform to issues actually tried by express or implied consent of the parties, but failure to so amend shall not affect the result of the trial. Rule 249.

a. When tried by consent. Where parties proceed without objection to try an issue, even though not presented by the pleadings, it amounts to consent to try such issue and it is then rightfully in the case. Rouse v. Rouse, 174 N.W. 2d 660, 666 (Iowa, 1970).

L. References.

1. Comparable Federal Rule: 15(a), (c).

2. Key Nos.: Pleading 229 et. seq. Fed. Civ. Procedure 821 et. seq.

3. 71 C.J.S. Pleading Section 275 et. seq.; 35A C.J.S. Federal Civil Procedure Section 322.

V. Setting Aside Defaults. Rule 236

A. Setting Aside Default - Rule 236.

1. Within 60 days after judgment. Rule 236 is used to set aside a default within 60 days after entry of judgment. Rule 236. Thereafter Rule 252 must be used.

2. Purpose. The purpose of Rule 236 is to allow a determination of litigation on the merits, where appropriate, as opposed to an ex parte adjudication when the absence of opposing litigant is due to his non-prejudicial inadvertence or excusable mistake. Hansman v. Gute, 215 N.W. 2d 339, 342 (Iowa, 1974).

3. Discretion. Trial courts are vested with broad discretion in ruling on motions to set aside a default. Such rulings will be reversed on appeal only for an abuse of discretion. Generally, abuse will be found only where there is a lack of substantial evidence to support the trial court's ruling. Gateway Transportation Co. v. Phillips & Phillips Co., 261 N.W. 2d 175, 177 (Iowa 1978). The Supreme Court is more reluctant to interfere with the grant of such a motion than with its denial. Flexsteel Industries, Inc. v. Morbern Industries, Ltd., 239 N.W. 2d 593, 596 (Iowa 1976).

4. Determined at law. A proceeding to set aside a default judgment under Rule 236 is a proceeding at law and not in equity. Gateway Transportation Co. v. Phillips & Phillips Co., 261 N.W. 2d 175, 177 (Iowa, 1978).

5. Trials favored. Courts look with favor upon trials and the rights of a litigant should not be denied proper hearing by strict application of legal formalities. Hannan v. Bowles Watch Bank Co., 180 N.W. 2d 221, 222 (Iowa 1970). In general, a liberal approach is taken in appeals from rulings overturning default under Rule 236. Wharff v. Iowa Methodist Hospital, 219 N.W. 2d 18, 21 (Iowa 1974)

6. "Good cause." "Good cause" for setting aside a default judgment is a sound, effective, truthful reason, something more than an excuse, a plea, an apology, an extenuation or some justification for the resulting effect. Paige v. City of Chariton, 252 N.W. 2d 433, 437 (Iowa, 1977).

a. Burden of proof. The burden is upon the movant to show good cause as to one of the grounds stated in Rule 236. Paige v. City of Chariton, 252 N.W. 2d 433, 437 (Iowa, 1977).

1. Hansman v. Gute, 215 N.W. 2d 339, 342 (Iowa 1974), holds the burden is upon the movant to plead and prove such good cause as will not only permit but require a finding of mistake, inadvertence, surprise, excusable neglect or unavoidable casualty.

b. Must be based on one of the grounds in Rule 236. Good cause must be based on one of the grounds listed in Rule 236: mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty. Paige v. City of Chariton, 252 N.W. 2d 433, 437 (Iowa, 1977).

c. Good faith defense. Since "good cause" does not exist without a defense, a movant to set aside a default under Rule 236 is required at least to assert in good faith a claimed defense to plaintiff's action or as some courts state at least a prima facie showing of a meritorious defense. Flexsteel Industries, Inc. v. Morbern Industries Ltd. 239 N.W. 2d 593, 599 (Iowa, 1976).

1. The court's duty is to ascertain from the evidence whether facts exist which, if established on a trial on the merits, would prima facie constitute a defense. This principle does not require the allegations of a defense which can be guaranteed to prevail at trial. Id.

2. Whether a meritorious defense has been shown must be determined on a case by case basis and with an awareness of the policies behind default judgments and the circumstances under which they should be set aside. Id.

3. A general denial in a pleading may constitute a prima facie showing of a meritorious defense. Id. at 599-601.

d. Intent to defend. Intent to defend is a circumstance which tends to show good cause. Paige v. City of Chariton, 252 N.W. 2d 433, 437 (Iowa 1977).

e. Promptness. The fact that defendant moved promptly to set aside the default is of significance in determining whether good cause has been shown. Id.

7. Negligence. The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. Dealers Warehouse Co. v. Wahl & Associates, 216 N.W. 2d 391, 394-395 (Iowa 1974).

a. But see Hannan v. Bowles Watch Bank Company, 180 N. W. 2d 221, 223 (Iowa 1970), in which the Court affirmed the setting aside of a default judgment where the evidence supported a finding of negligence, but did not support a finding of inexcusable neglect.

8. Ignoring rules. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them. Dealers Warehouse Co. v. Wahl & Associates, 216 N.W. 2d 391, 395 (Iowa 1974).

9. Court may impose terms. The setting aside of a default may be on such terms as the court prescribes, Rule 236.

10. References.

a. Comparable Federal rule: 55(c).

b. Key Nos.: Judgment 135 et. seq.

c. 49 CJS Judgments Sections 286, 333 et. seq.

VI. Dismissal for Want of Prosecution and Reinstatement - Rule 215.1

A. Dismissal and Continuance

1. Policy. It is the declared policy that in the

exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed, and docketed and in most instances within a shorter time. Rule 215.1.

2. Purpose. The purpose of Rule 215.1 is to clear the docket of dead cases and to assure the timely and diligent prosecution of those cases which should be brought to a conclusion. Its application is perhaps at times harsh as indeed it must be if it is to accomplish what it is designed to do. Brown v. Iowa District Court for Polk County, 272 N.W. 2d 457, 458 (Iowa 1978).

3. Strictly construed. The provisions of Rule 215.1 are mandatory as to trial courts and strictly construed in their application to litigants. Schmidt v. Abbott, 156 N.W. 2d 649, 650 (Iowa 1968).

4. Shield, not a sword. Rule 215.1 was intended to be a shield, not a sword. It was not designed as a technicality to trap a diligent party and prevent him from having a day in court. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W. 2d 204, 210 (1966).

5. Dismissal automatic without continuance. Without a proper continuance, the dismissal of a cause noted for trial or dismissal is mandatory and automatic. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W. 2d 204, 208 (1966). When the time for dismissal arrives, the case is dismissed automatically without formal action by either the court or the clerk. Failure to note the dismissal of record does not save the case. Brown v. Iowa District Court for Polk County, 272 N.W. 2d 457, 459 (1978).

6. Motion pending. The fact that other matters, such as motions, are pending and undisposed of does not operate as an automatic continuance. Even then the obligation to obtain a continuance persists if dismissal is to be avoided. Brown v. Iowa District Court for Polk County, 272 N.W. 2d 457, 458 (Iowa, 1978).

7. Continuances does not remove case from rule. When a case is continued, it is not removed from the operation of the rule except that the date of trial is changed. In all other respects the rule remains operative. If the order continuing the case is not complied with, the case stands dismissed. Brown v. Iowa District Court for Polk County, 272 N.W. 2d 457, 458 (Iowa, 1978).

8. No continuance without Application and Notice. A case may not be continued after a 215.1 notice has been given without an order of court upon application and notice. Brown v. Iowa District Court for Polk County, 272 N.W. 2d 457, 458 (Iowa, 1978).

9. Jurisdiction retained. Where a motion for continuance is filed and submitted on notice before the Rule 215.1 deadline for trial, continuance or dismissal, jurisdiction is retained by the trial court while it has such motion under advisement. Of course, if under such circumstances the motion is overruled, the result to plaintiff's cause may be fatal. Schimerowski v. Iowa Beef Packers, Inc. 196 N.W. 2d 551, 554 (Iowa, 1972).

10. Assignment not duty of court. It is not the duty of either the clerk or the trial court to assign the case for trial or see that it is tried. Parties who receive the notice are charged with protecting their rights. They must see that the case is assigned and tried or suffer the consequences of dismissal. Windus v. Great Plains Gas, 255 Iowa 587; 122 N.W. 2d 901, 904 (1963).

11. Notice mandatory. Rule 215.1 imposes a mandatory duty upon clerks of trial courts to give notice by mail or delivery in accordance with Rule 82 prior to August 15. Kiertzner v. Ehrp, 218 N.W. 2d 587, 590 (Iowa 1974). An untimely notice does not result in dismissal. Id., at 588.

B. Reinstatement.

1. Purpose. The reinstatement provisions of Rule 215.1 were designed to mitigate the harsh results mandated by the inflexible language of the rule's

dismissal provisions. They reflect a policy favoring trials on the merits. Rath v. Sholtz, 199 N.W. 2d 333, 335 (Iowa, 1972).

2. Reinstatement only as provided by rule. Once a case is dismissed under Rule 215.1, it can be reinstated only by timely application and order as provided for in the rule itself. Brown v. Iowa District Court for Polk County, 272 N.W. 2d 457, 459 (Iowa, 1978).

3. Application must be within six months. An application to reinstate under Rule 215.1 must be filed within six months from the date of dismissal, otherwise the dismissal is final. Brown v. Iowa District Court for Polk County, 272 N.W. 2d 457, 459 (Iowa 1978).

4. Mandatory reinstatement. Reinstatement is mandatory and not discretionary for the trial court if the dismissal is shown to be the result of "oversight, mistake or other reasonable cause." Rath v. Sholtz, 199 N.W. 2d 333, 335-336 (Iowa, 1972); Wharff v. Iowa Methodist Hospital, 219 N.W. 2d 18, 21 (Iowa, 1974).

a. Oversight. "Oversight" has been defined as "something overlooked"; an "omission or error due to inadvertence." "Inadvertence" in turn is defined as "lack of care or attentiveness." Oversight is similar to excusable neglect. Negatively, it is not gross neglect or willful procrastination. Rath v. Sholtz, 199 N.W. 2d 333, 336 (Iowa, 1972).

b. Same interpretation as Rule 236 (Setting aside Default). The court has stated the mandatory reinstatement provisions of Rule 215.1 are to be afforded the same interpretation as Rule 236. Wharff v. Iowa Methodist Hospital, 219 N.W. 2d 18, 21-22 (Iowa, 1974).

1. The basic policy in regard to Rule 236 and thus to reinstatement situations under Rule 215.1 has been stated to be to use a liberal approach in order to allow trial on the merits. Id., at 22.

2. Certain considerations relevant to Rule 236

determinations have been applied to Rule 215.1 mandatory reinstatement proceedings. These include burden of proof, the effect of ignoring a notice, and good faith intent to defend. Id. at 22.

3. The same liberal approach taken in Rule 236 appeals is followed with respect to reinstatement under Rule 215.1. Id. at 21.

c. Whose conduct must provide cause. The rule makes no limitation as to whose conduct must provide the cause. Grounds for reinstatement could arise from conduct of the attorney or the client, as well as court personnel, which amounted to mistake, oversight or other reasonable cause. Id. at 24.

1. The clerk's failure to comply with the notice provisions of Rule 215.1 may be grounds for reinstatement. Kiertzner v. Ehrp, 218 N.W. 2d 587 (Iowa, 1974).

d. Review. The determination whether there has been a showing of oversight, mistake or other reasonable cause first involves a factual finding which is reviewed not de novo, but as in a law proceeding. The trial court's findings of fact and inferences inherent therein are binding on appeal if supported by substantial evidence. Whether the facts and inferences found constitute "inadvertence," "mistake" or "other reasonable cause" is not a factual but a legal question on review. Rath v. Sholtz, 199 N.W. 2d 333, 336 (Iowa 1972).

1. The court has been liberal in affirming determinations of default-voiding mistakes, inadvertence, and excusable neglect in Rule 236 appeals. The same policy is followed with respect to reinstatement under Rule 215.1. Rath v. Sholtz, 199 N.W. 2d 333, 337 (Iowa, 1972).

5. Discretionary reinstatement. In addition to the mandatory reinstatement provisions, Rule 215.1

provides for discretionary reinstatement. Rath v. Sholtz, 199 N.W. 2d 333, 335-336 (Iowa, 1972); Wharff v. Iowa Methodist Hospital, 219 N.W. 2d 18, 25 (Iowa, 1974).

a. Discretion. Apparently the legislature intended to grant the trial court discretion comparable to that extended by Rule 236 (setting aside default and judgment thereon) and Rule 252 (vacating final judgment or order). The clause, "may, in its discretion" permit no other meaning. Wharff v. Iowa Methodist Hospital, 219 N.W. 2d 18, 25 (Iowa, 1974). In Johnson v. Linquist, 184 N.W. 2d 681 (Iowa, 1971), the court not only held trial court had discretion, but was in error in failing to exercise it.

b. Review. Review in those areas in which trial court's discretion is invoked under Rule 215.1 will be that employed in reviewing rulings under Rule 236. The exercise of a lower court's discretion is not reviewable; it is only the alleged abuse of that power which is reviewable on appeal. Generally, abuse of discretion will be found only where there is no support for the decision in the evidence. The reviewing court will interfere more reluctantly where the motion has been sustained than where it has been denied. Rath v. Sholtz, 199 N.W. 2d 333, 336 (Iowa, 1972).

c. Abuse of discretion. "Abuse of discretion" does not necessarily imply a dishonest motive or act; it is not ordinarily a term of reproach. It arises from action beyond the bounds of fair discretion, exceeding the bounds of reason. It has been defined as "an erroneous conclusion and judgment, one clearly against the logic and effect of the facts and circumstances before the court, or reasonable, probable, and actual deductions to be drawn therefrom." Best v. Yerkes, 247 Iowa 800, 77 N.W. 2d 23, 32, 60 A.L.R. 2d 1354 (1956).

VII Summary Judgments

A. Purpose. The purpose of summary judgment is to enable a judgment to be obtained promptly and without the expense of a trial when there is no genuine and material fact issue present. Drainage District No. 119 v. Incorporated City of Spencer, 268 N.W. 2d 493, 499 (Iowa, 1978)

B. When proper The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law Rule 237(c).

1. Legal consequences of undisputed facts Entry of summary judgment is proper where the only conflict in the record concerns legal consequences flowing from undisputed facts. Jacobs v. Stover, 243 N.W. 2d 642, 643 (Iowa 1976).

C. Movant has burden. The movant is assigned the burden of demonstrating both the absence of any genuine issue of material fact and that he is entitled to judgment as a matter of law. Drainage District No. 119 v. Incorporated City of Spencer, 268 N.W. 2d 493, 499 (Iowa, 1978).

D. Entire record. The court is required to examine the entire record to determine for itself whether any genuine issue of a material fact is generated thereby. Drainage District No. 119 v. Incorporated City of Spencer, 268 N.W. 2d 493, 499 (Iowa, 1978).

E. View of record. All material properly before the court must be viewed in the light most favorable to the opposing party. Daboll v. Hoden, 222 N.W. 2d 727, 731 (Iowa, 1974).

F. When denied.

1. Different conclusions from undisputed facts. If reasonable minds could draw different inferences and reach different conclusions from the facts, even though undisputed, the issue must be reserved for trial. Daboll v. Hoden, 222 N.W. 2d 727, 733 (Iowa, 1974).

2. Good defense. If an examination of the record discloses any allegations of ultimate fact which if found true would constitute a good defense to the action, a summary judgment motion must be overruled. Schulte v. Mauer, 219 N.W. 2d 496, 500 (Iowa, 1974).

3. Negligence. The general rule is that issues of negligence, contributory negligence and proximate cause, the resolution of which requires determination of the reasonableness of the acts and conduct of the parties under all the facts and circumstances of the case, are ordinarily not susceptible of summary adjudication either for or against the claimant but should be resolved by trial in the ordinary manner. Daboll v. Hoden, 222 N.W. 2d 727, 734 (Iowa, 1974).

a. But since certain affirmative defenses are often susceptible of categorical proof, particularly such defenses as release, res judicata, and statute of limitations, a summary adjudication of a claim based on negligence may appropriately be rendered for the defendant when such is the case and the defense is legally sufficient. Id.

G. Support of Motion, Affidavits. When a motion for summary judgment is made and supported as provided by Rule 237, an adverse party may not rest upon the mere allegations and denials of his pleading, but his response, by affidavits or as otherwise provided in Rule 237, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 237(e).

1. Support. A motion for summary judgment is not supported as required by the rule unless the movant meets his burden to show there is no genuine fact issue. Mead v. Lane, 203 N.W. 2d 305, 306-307 (Iowa, 1972).

2. Affidavits. The parties are not mandated by the rule to file opposing affidavits but are authorized to do so. Brody v. Ruby, 267 N.W. 2d 902, 904 (Iowa, 1978).

3. Opposing affidavit unneeded where motion not properly supported. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. Mead v. Lane, 203 N.W. 2d 305, 307 (Iowa, 1972).

a. Even complete failure to resist is fatal only if the movant has met the burden imposed by Rule 237. Ferris v. Anderson, 255 N.W 2d 135, 137 (Iowa, 1977).

4. Do not try credibility of affidavits. Questions of credibility of affidavits or evidence do not concern the trial court. If the affidavit of defense shows a substantial issue of fact, summary judgment should not be ordered even though the affidavit be disbelieved. 3 Iowa. R. Civ. P Anno. 496.

H. Similar to Motion For Directed Verdict. The motion for summary judgment is similar in theory to the motion for directed verdict. If, upon the basis of such material before the court as would be competent proof at trial, the court would be compelled to direct a verdict for the movant, then it is proper to render summary judgment. Meyer v. Nottger, 241 N.W 2d 911, 917 (Iowa, 1976).

I. Party Resisting Motion May Have Discovery. A party against whom a summary judgment motion is made should first be allowed to discover the facts if he desires. Rule 237(e),(f); Carter v. Jernigan, 227 N.W 2d 131, 135 (Iowa, 1975).

J. Available Only to Moving Party. Summary judgment is available to either party on motion, but it is to be granted only to the party who has moved for it and only after notice and hearing on motion. Estate of Campbell, 253 N.W 2d 906, 907-908 (Iowa, 1977).

K. Not Proper in Administrative Review Proceeding. Summary judgment is inappropriate in a judicial proceeding to review a contested case pursuant to Section 17A.19. Young Plumbing and Heating Co. v. Iowa Natural Resources Council, 276 N.W. 2d 377, 381 (Iowa, 1979).

I. References.

1. Comparable Federal Rule: 56.

a. Federal decisions are persuasive in interpreting the Iowa rule, but not binding. Estate of Campbell, 253 N.W. 2d 906 (Iowa, 1977).

2. Key Nos.: Judgment 178 et. seq.

3. 49 C.J.S. Judgments §219 et. seq.

VIII. Discovery - Abuse and Judicial Control

A. Broad Scope, Parties in Control

1. Scope. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Rule 122(1).

a. Not limited to matters admissible at trial. Rule 122(1).

b. Existence and contents of insurance agreements is discoverable. Rule 122(2)

c Trial preparation materials are discoverable on proper showing. Rule 122(3).

d. Facts known and opinions held by experts may be discovered as provided by Rules 122(4), 133.

e. "Fishing expeditions" are permitted. Hickman v. Taylor, 239 U.S. 495, 507, 67 S. Ct. 385, 91 L. Ed. 451, 460 (1947)

2. Parties in control. Presently the timing and extent of discovery is left up to the parties. Judicial intervention in the discovery process has been limited to settling disputes about the scope of discovery and enforcing legitimate requests for discovery which are not complied with voluntarily.

B. <u>Abuse</u>.

1. <u>Interrogatories</u>. Many lawyers ask numerous unneeded, irrelevant, inappropriate questions often regurgitated from an automated typewriter. Six good arguments against the use of form interrogatories are:

a. They tend to be used as instruments of harassment.

b. They result in a carefully framed answer prepared by counsel rather than a spontaneous answer from his client.

c. They are inflexible.

d. They are time consuming.

e. They serve to educate opposing counsel concerning his own case.

f. Interrogatories designed for general use in all types of cases are ill-adapted for use in any one of them. Smith, The Concern Over Discovery. 28 Drake L. Rev. 51 (1978).

2. Depositions.

a. <u>Time abuses</u>. The time of the deposition is set by the party taking it. Reasonable notice of the time and place of the deposition must be served on all other parties not in default. Rule 147(b). Since "reasonable notice" is not defined, a party can give notice as short as he thinks he can get away with.

b. <u>Travel abuses</u>. The party taking the deposition may deliberately choose a place inconvenient to the other parties. A party may be required to submit to examination in the county where the action is pending, even where he lives a great distance from that county. Rule 147(a),(d).

c. <u>Techniques of taking</u>. Protracted, saturation techniques in taking of depositions add unnecessary time and expense to litigation and are potentially detrimental to the client's case.

Kennelly, Pretrial Discovery - The Courts and Trial Lawyers are Finally Discovering That Too Much of It Can Be Counterproductive, 21 Trial Lawyer's Guide 458 (1978); Smith, The Concern Over Discovery. 28 Drake L. Rev. 51, 59 (1978).

3. Production of documents.

a. Overbroad requests.

b. Producing the requested documents in an unorganized manner.

C. Judicial Control. "Once a case is filed, it is public business as well as private... [S]trong control of the pretrial processes has a marked effect on early dispositions, either by trial or settlement... We can no longer indulge in the old notion that it is 'up to the lawyers to push cases.' It is up to the judges to see to it that dilatory tactics by neither party can frustrate speedy justice." Chief Justice Warren Burger, quoted in 65 A.B.A. Journal 175 (1979).

1. Protective orders. Upon motion and for good cause shown the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense..." Rule 123.

a. Expenses. The court may require either party or his attorney to pay the expenses due to the motion, including attorney fees. Rule 123, 134(4).

2. Motion for order compelling discovery. Rule 134.

a. Expenses. The court may require either party or his attorney to pay the expenses due to the motion, including attorney fees. Rule 123, 134(4).

b. Sanctions. If a party fails to obey an order to provide discovery, the court "may make such orders in regard to the failure as are just." Rule 134(b). These include:

1 Establishing facts. Rule 134(b)(2)(A)

2. Excluding evidence. Haumersen v. Ford Motor Co., 257 N.W. 2d 7 (Iowa, 1977); White v. Citizens National Bank of Boone, 262 N.W. 2d 812 (Iowa, 1978).

3. Striking pleadings and entering default judgment. Smiley v. Twin City Beef Co., 236 N.W. 2d 356 (Iowa, 1975).

4. Contempt of Court. Rule 134(b)(2)(D).

5. Expenses. Rule 134(c).

3. Privilege. Privileged matters are not subject to discovery. Rule 122.

4. Trial Preparation Materials. A party may obtain discovery materials prepared for trial only upon a showing that the party seeking discovery has substantial need of the materials and that equivalent materials are unavailable to him without undue hardship. Rule 122(3).

a. Work Product. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Rule 122(3).

b. Witness Lists. Except as provided in Rule 122 (expert witnesses), a party shall not be required to list the witnesses expected to be called at trial. Rule 143.

5. Pretrial conference. New amendments to Rule 136 give the court additional control over the discovery process. After issues are joined the court may direct all attorneys to appear for pretrial conference. The matters which may be considered at the pretrial conference include:

a. Setting dates for closing of pleadings and discovery. (new)

b. Assigning a date for trial. (new)

c. All other matters for consideration at pretrial conference are retained including "Any other matter which may aid, expedite or simplify the trial of any issue."

D. New Amendments: Readiness Schedule, Trial Certificate.

1. Readiness schedule. Under the new amendment to Rule 136, either party may move, after issues are joined, for an order setting dates for closing of pleadings and completion of discovery. The dates fixed by the court may not be extended except upon a showing of good cause.

2. Trial certificate. Under the new amendments to Rule 181, the Certificate of Readiness for Trial is replaced by a "Trial Certificate." The required form includes the following:

a. The above party believes the issues are joined and states that such party (a) is ready for trial or (b) will be ready for trial by_______.

b. Discovery has been completed except as follows:

c. Pretrial conference (a) is, or (b) is not requested.

d. Assignment for trial (a) by jury, or (b) by the court, is requested.

e. Names, addresses and telephone numbers of other attorneys and parties appearing pro se.

ACCESS TO MEDICAL RECORDS

By John M. Dinse
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I. BY PATIENT TO HIS OWN RECORDS.

Report of the Secretary's Commission on Medical Malpractice (1973), U.S. Department of Health, Education and Welfare.

Gotkin v. Miller, 514 F. 2d 125 (2nd Cir. 1975).

Bishop Clarkson Memorial Hospital v. Reserve Life Insurance Co., 350 F. 2d 1006 (8th Cir. 1965).

Wallace v. University Hospital of Cleveland, 172 N.E. 2d 459, (Ohio, 1961).

Pyramid Life Insurance Co. v. Masonic Hospital Association, 191 F. Sup. 51 (W.D., Okla., 1961).

Connell v. Medical & Surgical Clinic, 315 N.E. 2d 278 (Ill. App. 1974).

In re: Culbertson's Will, 292 N.Y.S. 2d 806 (1968).

II. ACCESS TO THOSE CLAIMING IN THE RIGHT OF THE PATIENT, BUT WITHOUT WRITTEN AUTHORIZATION.

Guardian:

Garertner v. State, 187 N.W. 2d 429 (Mich. 1971).

Surviving son:

Emmett v. Eastern Dispensary & Casualty Hospital, 396 F. 2d 931 (D.C. Cir. 1967).

Fure v. Sherman Hospital et al, 380 N.E. 2d 1376 (Ill. 1978).

Hospital Director:

Hyman v. Jewish Chronic Disease Hospital, 206 N.E. 2d 338 (N.Y. 1965).

I.R.S.:

U.S. v. Kansas City Lutheran Home & Hospital Ass'n, 297 F. Sup. 239, (W.D., Mo. 1969).

III. DISCOVERY IN LITIGATION.

A. Discovery of records of others:

Wilson v. Brown, 273 P.2d 896 (Ore. 1962)

Prior Medical Records:

Caeser v. Mountanos, 542 F.2d 1064 (9th Cir. 1976).

B. Discovery of records of other patients:

Marcus v. Superior Court, 18 Cal. App.3rd 22, (1971).

Blue Cross v. Superior Court, 61 Cal.App.3rd 798.

State Ex Rel Benoit v. Randall, 431 S.W.2d 107 (Mo. 1968).

Community Hospital Association v. District Court, 570 P.2d 243, (Col. 1977).

Argonaut v. Peralta, 358 So.2d 232 (Fla. App. 1977).

Hood v. Phillips, 554 S.W.2d 160 (Tex. 1977).

IV. DISCOVERY OF OTHER HOSPITAL GENERATED DOCUMENTS.

Slegar v. Tucker, 267 So.2d 54 (1972).

Bernardi v. Community Hospital Association, 443 P.2d 708, (Colo. 1968).

Judd v. Park Avenue Hospital, 235 N.Y.S.2d 843 (1962).

Staff or Committee Meetings:

Bredice v. Doctors' Hospital, Inc., 50 F.R.D. 49 (D.C. 1970) Aff'd 479 F.2d 920 (D.C. Cir. 1973).

City of Edmond v. Parr, 587 P.2d 56 (Okla. 1978).

Young v. Gersten, 381 N.E.2d 353 (Ohio, 1978).

Gilman v. U.S., 53 F.R.D. 316 (S.D.N.Y. 1971)

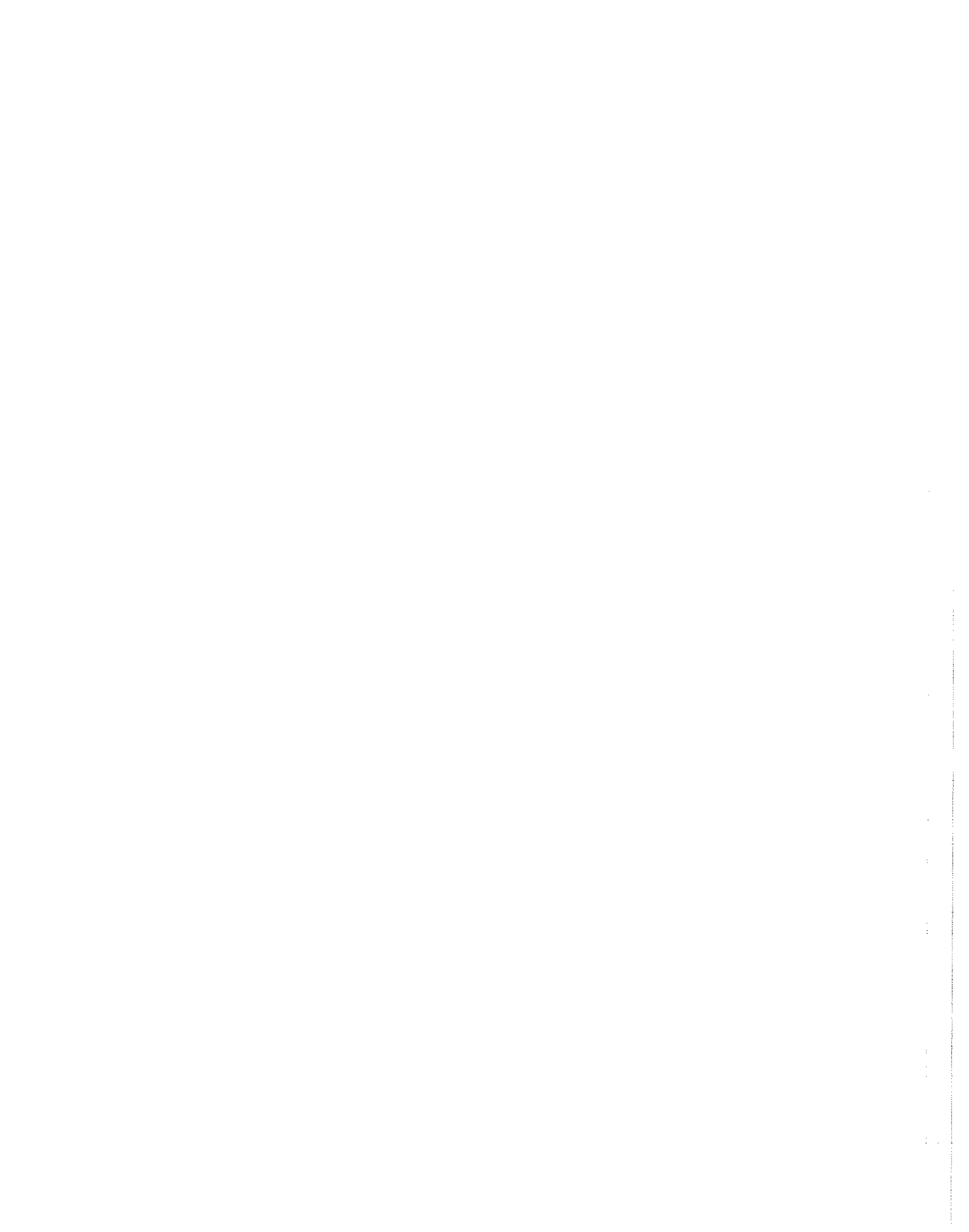
Oviatt v. Archbishop Bergan Mercy Hospital, 214 N.W.2d 490 (Neb. 1974).

Nazareth Literary & Benevolent Institution v. Stephenson, 253 So.2d 920 (Ky. 1971).

Matchett v. Superior Court, 115 Cal. Rptr. 317 (1974).

Shibilski, Admr. v. St. Joseph Hospital et al, 266 N.W.2d 264, (Wisc. 1978).

Tucson Medical Center, Inc. v. Misevch, 545 P.2d 958 (Ariz. 1976).



1978 LEGISLATIVE CHANGES
OR
HOW WE GOT OFF LUCKY

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Des Moines, Iowa 50316

I. Bills having a specific impact from I.D.C.A. viewpoint

A. H.F. 10 -- Furnishing prosthetic devices for injured workmen

B. H.F. 198 -- Eligibility of municipal fire and police personnel for worker's compensation

C. S.F. 294 -- Provide uniform procedures for certifying questions of law from Federal Court

D. H.F. 730 -- Inspections by inspectors inspecting for self-insurance of group self-insurancepurposes of the place of employment.

II. Bills having a minor impact from I.D.C.A. viewpoint

A. H.F. 97 -- Reduction of time period for maintaining proof of motor vehicle financial

responsibility to two years

B. S.F. 463 -- Amendments to the Code relating to the regulation of security transactions

1. Redefining "Agent" to allow new exemptions from Agent licensing requirement
2. Establish interest at legal rate as used in sec. 535.3
3. Exemptions from registration 496B Corporation
4. Exemptions from registration at securities sold to a limited number of persons
5. Fractional shares in certain cases will be exempt from registration
6. Allows securities that are sold in excess of the quantity registered to be amended retroactively
7. Harmonize the civil liability provisions of our securities law with the Federal Civil liability provision
8. Repeal of Chapter 501 relating to rule of stock on installment plan, enacted in 1904, it is little used and considered obsolete

C. S.F. 29 -- Uniform enforcement of foreign judgements

D. H.F. 470 -- Places foster children and foster parents in the same position as natural parents for purposes of tort law

III. New laws of General impact

A. S.F. 70 -- Establishing a Senior Judge System

B. Rules and Regulations submitted by the Supreme Court will take effect on the July 1st their submission

C. S.F. 93 -- Use of Diagnostic pharmaceutical agents by optometrists

IV. Next year

A. Products Liability

1. Several proposals last year

a. S.B. 23 (House Commerce Committee)

b. H.F. 560 (House Judiciary Committee)

c. IMA proposed draft

d. S.B.-7, S.B.-26, H.F. 66 by Bina; H.F. 388 by Danker; H.F. 260 by Clark; H.F. 279 Poffenberger

e. S.F. 338 -- Senate Commerce Committee

1. History
2. Definitions
3. Work comp carries loss subrogation right
4. Annual reporting of insurance carriers
5. No dollar amount in Ad Damnum clause
6. State of Art defense
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12. Use of collateral benefits evidence
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1. Statute of limitation
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3. Alteration, modification, deterioration, or misuse
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5. Duty to warn
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7. Protection for wholesalers and retailers

B. No fault auto insurance

C. H.F. 597 -- Requirement for rehabilitation evaluations for persons sustaining permanent disabilities under workman's compensation

D. H.F. 565 and H.F. 124 -- Permitting employees to choose medical care under workman's compensation

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F. H.F. 431 -- Limitation on dram shop liability

G. H.F. 654 -- Prohibition against operating motor vehicle with more than .10 of 1% of alcohol in the blood

H. S.F. 188 and H.F. 315 -- A 10-year statute of limitation for engineers, architects and contractors

ANNUAL CASE REVIEW - IOWA SUPREME COURT

OCTOBER 1978 - OCTOBER 1979

By Tim Estlund
Conway, Casey & Doll
Osage, Iowa

APPEAL: finality

Plaintiffs brought action for personal injuries to wife and loss of consortium of husband against driver of vehicle and city. City moved to dismiss for untimely notice under tort claims act. Court overruled motion with respect to wife's claim on grounds of incapacity but sustained a motion against husband. Husband appealed from the ruling.

Although neither appellant nor appellee discussed the issue in their briefs, the Court dismissed the appeal on the jurisdictional ground the ruling was not a final order. The husband's consortium claim was "dependent upon or intertwined with" his wife's claim, and consequently, determination of issues remaining in the case could affect the final resolution of the issues between the husband and the city.

Stockburger v. Robinson, 270 N.W. 2d 453, 454 (Iowa 1978)

APPEAL: finality

Following verdict for plaintiffs, defendants moved for judgment notwithstanding the verdict and, in the alternative, for new trial. Trial court overruled a motion for judgment n.o.v. and sustained a motion for new trial. Plaintiffs appealed and defendants cross-appealed. Plaintiffs' appeal was dismissed for failure to comply with various appellate rules. The Court held that defendants' cross-appeal should likewise be dismissed since it was dependent upon plaintiffs' appeal - standing alone, it amounted to an interlocutory appeal from an order denying judgment n.o.v. without the necessary application for permission to appeal.

Archie's Steak House v. Joe Rosenthal & Sons, 270 N.W. 2d 591 (Iowa 1978)

APPEAL: finality - motion to enlarge

"***When a rule 179 (b) application is pending prior to the taking of an appeal, the decree to which it is addressed becomes in effect interlocutory until the trial court rules upon the application. ***

"We should point out that a dismissal is required only when an appeal is attempted by the nonmoving party. We deem application for post-trial relief, such as applications under rule 179 (b), to be waived and abandoned when the moving party files a notice of appeal. *** (Citing authorities)."

Recker v. Gustafson, 271 N.W. 2d 738, 739 (Iowa 1978)

APPEAL: residual trial court jurisdiction

Following notice of appeal from a probate order establishing spousal allowance, the court proceeded with other aspects of the estate. The Supreme Court, apparently sua sponte, raised the issue of the probate court's jurisdiction following the notice of appeal and concluded the collateral matter exception to appellate jurisdiction should be adopted. The Court stated:

"***We hold a trial court retains jurisdiction to proceed as to issues collateral to and not affecting the subject matter of the appeal. While not foreclosing its operation in other appropriate settings, allowing the retention of jurisdiction over collateral matters by a trial court would be of greatest value in the probate and domestic relations settings."

Matter of Estate of Tollefsrud, 275 N.W. 2d 412, 417-418 (Iowa 1979)

APPEAL: timeliness - summary judgment - motion to enlarge

Defendants' motion for summary judgment was sustained and plaintiff timely filed a motion to enlarge or amend the findings and conclusions. The motion was overruled by the trial court and plaintiff appealed. The appeal was taken within thirty days of the order overruling the motion, but was not within thirty days of the order granting summary judgment.

The Supreme Court held the appeal was untimely because the motion to enlarge was improper, and consequently, did not toll the running of the thirty-day appeal period from the date of the order granting summary judgment. The motion to enlarge is only available where a court tries an issue of fact. A motion for summary judgment results in no factual determinations, and consequently, a motion to enlarge is improper.

City of Eldridge v. Caterpillar Tractor Co., 270 N.W. 2d 637 (Iowa 1978)

APPEAL: timeliness

Defendant's summary judgment motion was granted by the trial court and plaintiff filed a motion for re-hearing and new trial which was overruled. Plaintiff's appeal was taken within thirty days of the ruling on his motion but was more than thirty days after ruling on the summary judgment.

The Supreme Court dismissed the appeal as untimely, concluding plaintiff's motion was not an appropriate method for attacking summary judgment. The Court stated a summary judgment is not a trial, and consequently, the motion was ineffective.

Orr v. Iowa Public Service Co., 277 N.W. 2d 899 (Iowa 1979)

APPEAL: timeliness - agreement extending time

Plaintiff's motion for new trial was filed more than two weeks after the thirty-day period. Defendant did not object to the motion's untimeliness, apparently due to an unfiled agreement of counsel.

Trial Court overruled the motion on its merits and plaintiff appealed.
The Supreme Court, on its own motion, dismissed the appeal as untimely since the late-filed motion did not toll the thirty-day period for appeal. The Court held that the agreement of counsel could not confer appellate jurisdiction where it had been lost due to untimeliness.
Hogan v. Chesterman, 279 N.W. 2d 12 (Iowa 1979)

APPEAL: waiver by payment of judgment
Where plaintiff subjected defendant to debtor's examination, levied upon defendant's personal property and defendant was unable to secure supersedeas bond, defendant's payment of the judgment was not voluntary, and consequently, defendant's right to appeal was not waived.
Yeager v. Durflinger, 280 N.W. 2d 1, 4 (Iowa 1979)

AUTOMOBILES: guest statute - definite and tangible benefits
Conversation and company are not definite and tangible benefits, and consequently, a passenger whose sole purpose was to provide those items for the driver was still a guest.
Beitz v. Horak, 271 N.W. 2d 755, 757-758 (Iowa 1978)

AUTOMOBILES: guest statute - equal protection challenge
Plaintiff unsuccessfully asserted in the trial court that Iowa's guest statute denies equal protection under the United States Constitution. On appeal, the Supreme Court affirmed relying upon (1) two previous decisions of the Court, (2) a 1929 decision of the United States Supreme Court, and (3) the United States Supreme Court's dismissal without opinion for lack of substantial federal question of three recent appeals from state courts wherein equal protection challenges were asserted against guest statutes.
Notwithstanding the foreclosure of a federal constitutional issue, the Court went on to state:
"Of course, if the issue is properly raised we are free to reach a different interpretation and application of the comparable clause in the Iowa Constitution***.
"Other jurisdictions recently have struck down guest statutes as unconstitutional under the provisions of their state constitutions. *** (Citing authorities)."
Beitz v. Horak, 271 N.W. 2d 755, 759 (Iowa 1978)

AUTOMOBILES: guest statute - void for vagueness challenge
In response to an assertion that Iowa's guest statute was void for vagueness under federal constitutional principles, the Court stated:
"A noncriminal statute must convey its meaning in sufficient, definite terms so that men of common intelligence need not guess at its meaning. *** (Citing authority). Beitz argues the word 'guest' does not meet the standard. He points to our statement in *** (other

cases) that each case involving a guest statute question must be decided on its own facts. *** Because 'guest' is not susceptible to a tidy definition, easily resolving each factual situation, Beitz reasons Section 321.494 is so vague it deprives persons of due process.

"Vagueness challenges usually are directed to statutes which regulate conduct. ***

"But the guest statute is not conduct-regulating in the traditional sense. We doubt that it significantly affects the daily decisions of drivers and passengers. To whatever extent Section 321.494 affects those choices, it is minimally sufficient to put persons on notice. ***"

Beitz v. _Horak_, 271 N.W. 2d 755, 759-760 (Iowa 1978)

AUTOMOBILES: owner's liability - noncompliance with inspection laws

Defendant, an automobile dealership, sold a used car which did not have an approved inspection certificate, although it was agreed the vehicle would be returned in a few days for the necessary repairs. However, in the meantime, the "purchaser" negligently caused an accident. The plaintiff brought an action against the dealership under the owner's liability statute, Section 321.493.

Defendant maintained violation of the inspection laws did not prevent the passing of ownership. The Court held that violation of the inspection laws results in retained ownership responsibility under Section 321.493 on the part of the seller.

Sullivan v. _Skeie Pontiac, Inc._, 270 N.W. 2d 814 (Iowa 1978)

CONTRACTS: breach - punitive damages

The issue concerned the availability of punitive damages in a breach of contract case involving construction of a house in violation of contract specifications. Following a lengthy case law analysis, the Supreme Court stated the following principles:

"(1) Punitive damages cannot be recovered for breach of contract;

"(2) Punitive damages may be recovered when the breach also constitutes an intentional tort, or other illegal or wrongful act, if committed maliciously;

"(3) It is sufficient if the malice is only legal malice, that is, committed or continued with a willful or reckless disregard of another's rights;

"(4) The intentional tort or other illegal or wrongful act may occur at the time of and in connection with the breach; but

"(5) A wrongful act in this context is not committed merely by breaching a contract, even if such act is intentional."

Pogge v. _Fullerton Lumber Co._, 277 N.W. 2d 916, 920 (Iowa 1979)

CONTRACTS: modification v. rescission and new contract

After a lengthy review of the confusing case law, the Court reaffirms its prior holdings requiring new consideration for the modification of a contract and requiring no new consideration for rescission of a contract with the adoption of a new agreement.

Recker v. _Gustafson_, 279 N.W. 2d 744, 753-759 (Iowa 1979)

CONTRACTS: real property - forfeiture

"The amount of default in this case is trifling when compared with the value of the real estate. On the other hand the default was flagrant and, we must assume, stubbornly deliberate. If we were to hold this trifling amount will not trigger a forfeiture we would in effect be repealing the statute. Under such a rule trifling amounts could never be recovered. We think that where the amount of a default is only trifling, that is only one factor to be considered as a part of equity's abhorrence of forfeiture. The fact that the amount in default here was trifling must be balanced against the showing that the default was deliberate and that an opportunity was given to make payment.

"Under these circumstances equity will indeed order a forfeiture of a $30,000 real estate contract by reason of a $10.48 default."
Miller v. American Woodlands, Inc., 275 N.W. 2d 399, 403 (Iowa 1979)

CONTRACTS: statute of frauds v. promissory estoppel

In a case involving an oral agreement to sell corn and beans to an elevator with delivery at a future date, the Court held that promissory estoppel bars a statute of frauds defense based upon the provisions of the Uniform Commercial Code. The Court saw no reason to distinguish a UCC case from a non-UCC case where promissory estoppel has long been recognized as a means to defeat a statute of frauds defense.
Warder & Lee Elevator, Inc. b. Britten, 274 N.W. 2d 339 (Iowa 1979)

CORPORATIONS: piercing the veil - sham entity

"We agree with Team Central that mere identity of stock ownership and corporate management is not alone sufficient to permit a piercing of the corporate veil. *** (Citing authorities).

"***The main thrust of Team Central's argument is that fraud is an essential element for application of this doctrine. ***

"It is true that the corporate veil doctrine is more frequently applied to avoid fraud. However, it is equally appropriate under other circumstances when one corporation is used as a mere sham for the other. *** (Citing authorities)."
Team Cent., Inc. v. Teamco, Inc., 271 N.W. 2d 914, 923 (Iowa 1978).

DAMAGES: duplicative awards

In a five-count counter-claim, defendant listed separate actions for (1) tortious interference with business, (2) breach of contract, (3) wrongful attachment, (4) trespass, and (5) conversion. A verdict was returned for counter-claimant on each of the five theories. The trial court held that the verdict on the breach of contract claim was duplicative of the verdict for tortious interference. The Supreme Court further modified the verdicts stating:

"***it is clear Teamco considered the acts of trespass and conversion and the wrongful attachment as an integral part of the tortious interference with its business. The case was both pled and tried on that theory.

"We believe the jury verdict in the amount of $500,000 for tortious interference***of necessity included any damage resulting from the specific acts of wrongful attachment, from trespass, and from conversion. Perhaps this would not be the inevitable result in all cases, but as this case was pled, tried and submitted, it was the result here."
Team Cent., Inc. v. Teamco, Inc., 271 N.W. 2d 914, 924 (Iowa 1978)

DAMAGES: "loss of earnings" allegation
Plaintiff's petition asserted a "loss of earnings" without specifying whether he was referring to past and/or future earnings. The trial court excluded evidence on the issue of lost future earnings citing plaintiff's failure to specifically pray for such an item of damages.
The Supreme Court reversed relying upon (1) lack of surprise to defendant, (2) liberalization of pleading requirements and (3) a similar case involving pain and suffering.
Franken v. City of Sioux Center, 272 N.W. 2d 422, 428-429 (Iowa 1978)

DAMAGES: punitive - duplicative
Plaintiff sought to pierce the corporate veil between two corporate defendants and, in addition, sought a punitive damage award against each. The Supreme Court refused a double punitive damage award stating as follows:
"Under such circumstances, there should be only one punitive damage award. We recognize the corporate veil doctrine is simply an expedient for allowing one to reach the party who should really answer for a wrong. For all other purposes the two corporations remain separate; but Teamco should not have it both ways. Since it has been established that Team Central and Dayton Hudson are one and the same for the purpose of holding Dayton Hudson liable, that finding should hold for fixing damages as well."
Team Cent., Inc. v. Teamco, Inc., 271 N.W. 2d 914, 925-926 (Iowa 1978)

DAMAGES: remarriage of plaintiff in spouse-death action
"***We conclude that the existing case law in this state on the collateral source rule and the results reached by the overwhelming majority of jurisdictions in addressing the precise issue mandate a holding that evidence of a plaintiff's remarriage should not be admissible in a wrongful death action for the death of a spouse.
"***
"An examination of the cases subscribing to the majority position leads to the conclusion that there are two basic reasons for such an application of the rule: (1) the cause of action arises at the time of the decedent's death, and the damages are to be determined as of that time, *** (Citing authorities); and (2) the rule providing for mitigation of damages on account of the remarriage***

is highly speculative, involving a comparison of the prospective earnings and services of the new spouse with those of the deceased spouse, *** (Citing authorities). ***

"Although remarriage has not itself been termed a collateral source, several courts have found the rationale underlying the collateral source rule to support, if not directly then by analogy, the exclusion of evidence of the remarriage *** (Citing authorities). ***"

The Court also concludes that the jury can be asked in voir dire if they are acquainted with plaintiff's spouse, but an instruction directing the jury to disregard the fact of remarriage when assessing damages should be given.
Groesbeck v. Napier, 275 N.W. 2d 388, 391-393 (Iowa 1979)

DAMAGES: statutory treble damages v. punitive damages

The Supreme Court held that the award of statutory treble damages and common law punitive damages violated the basic prohibition against double recovery. The court concluded that a statute providing for treble damages constitutes a statutory allowance of punitive damages, and consequently, forecloses an award of common law punitive damages.
Johnson v. Tyler, 277 N.W. 2d 617, 618-619 (Iowa 1979)

DISSOLUTION: child support based upon percentage of income

Following trial, trial court ordered husband to pay child support of not less than 15% of his gross annual self-employment income, with fixed minimum and maximum yearly amounts.

The Supreme Court modified the trial court's award to a fixed weekly amount stating that percentage-based awards of this type (1) create uncertainty, (2) breed disputes, and (3) ignore other important factors such as the needs of the children.
In re Marriage of Meeker, 272 N.W. 2d 455 (Iowa 1978)

DRAM SHOP ACTIONS: causation

Plaintiff brought dram shop action based upon injuries sustained when intoxicated patron of defendant's establishment shot plaintiff. Trial court held there is no requirement that plaintiff show the serving of intoxicants was a proximate cause of his injuries. The Supreme Court, in affirming the trial court, stated:

"A certain amount of uncertainty on the question flows from the differing types of dram shop acts. In comparing our statute with those of other states it is important to remember the underlying purpose of such acts. We have many times noted the purpose is to obviate the difficulty, amounting oftentimes to an absolute impossibility, of connecting the act of the dram shop operator and the injury. *** (Citing authority).

"***

"For a holding which properly expresses our rule see Lee v. Hederman, 158 Iowa 719, 722, 138 N.W. 893, 894 (1913): '***It is

enough that the injury was by an intoxicated person, regardless of whether it would have been committed by him if sober. In other words, if by an intoxicated person, it is not necessary to prove that the injury was in consequence of intoxication. ***.' (emphasis added) ***"
Walton v. Stokes, 270 N.W. 2d 627, 628 (Iowa 1978)

ELECTION OF REMEDIES: workers' compensation v. common law damages
Plaintiffs brought wrongful death action against employer of minor child. Employer raised defense of election of remedies based upon Plaintiff's acceptance of $1,000 in workers' compensation benefits. Employer's motion for summary judgment was sustained by the trial court. The Supreme Court reversed stating:

"Election of remedies is an equitable defense. Because it is not favored, it is applied narrowly. ***Its purpose is to protect a person from the vexation of contradictory claims by a single party.

"***

"Three elements must be established by a party relying on the doctrine: (1) existence of two or more remedies, (2) inconsistency between them, and (3) a choice of one of them. *** (Citing authority).

"***

"However, we agree with Plaintiffs that defendant did not establish the third element***. It was his burden to do so.

"In seeking to meet this burden, Defendant contends the (Plaintiffs) cannot rely on their ignorance of the law or mistake as to their remedy. We disagree. Ignorance of the law and mistake are excuses for avoiding the election of remedies defense. The doctrine 'is not intended either as a trap or as a penalty for a mere mistake.'*** (Citing authority).

"Election presupposes the knowledge of alternatives with an opportunity for choice. *** (Citing authorities). The choice must be intelligent and intentional. *** (Citing authority).

"When the first remedy is pursued in ignorance of the other, whether the ignorance is of fact or law, equity will provide relief in the absence of estoppel or injury to third persons. *** (Citing authorities)."
Bolinger v. Kiburz, 270 N.W. 2d 603, 605-607 (Iowa 1978)

EQUITY: "clean hands" required of State
The Court held that the "clean hands" doctrine is applicable when the State, or any sovreignty, invokes equity jurisdiction. In addition, the Court intimates that it may reverse itself and hold equitable estoppel is also applicable to the State.
Iowa Dept. of Transp. v. Neb.-Iowa Supply, 272 N.W. 2d 6, 14-15 (Iowa 1978)

ESTATES: surviving spouse allowance
Refusing to overrule prior decisions, the Court held an allowance of $200 per month to a surviving spouse during estate proceedings

was appropriate notwithstanding the fact that the decedent and the survivor had been separated for five months prior to the death and that the surviving spouse was self-supportive during the separation. Matter of Estate of Tollefsrud, 275 N.W. 2d 412, 415-417 (Iowa 1979)

EVIDENCE: blood test - admissibility in civil actions

The issue on appeal concerned the appropriate foundational requirements for admission of blood test results in civil actions. Recognizing "ambiguities" in its past decisions, the Court held that the foundational requirements of the implied consent law are inapplicable in civil actions and clearly adopted the following foundational standard:

"'Before any result of a blood test analysis can be admitted ***, the party seeking to introduce such evidence must first lay a proper foundation***. Unless waived, this foundation must show that the specimen was taken by a duly-authorized person using proper sterile equipment, that it was properly labeled and preserved, that its care and transportation were proper, and also the identity of persons processing it so as to give the opposing party the opportunity to cross-examine as to the care and procedure used in the test.'"

Henkel v. Heri, 274 N.W. 2d 317, 320 (Iowa 1979)

EVIDENCE: value of leasehold interest

In condemnation proceeding involving leasehold interest in agricultural property, trial court overruled Highway Commission's motion in limine and admitted evidence of the intrinsic value of the leasehold to plaintiff.

On appeal, the Supreme Court affirmed concluding that the willing-buyer willing-seller method of valuation would ordinarily not be an effective method for valuing leasehold interests. Fritz v. Iowa State Highway Commission, 270 N.W. 2d 835, 841 (Iowa 1978)

EVIDENCE: offers of compromise

Defendant, in a breach of construction contract case, attempted to introduce into evidence its offer to refund a portion of the contract price to plaintiff and to partially rectify the problems caused by its breach. Plaintiff objected to the evidence on the ground it related to offers of compromise and the trial court sustained the objection. The Supreme Court disagreed with the trial court stating:

"The offer of settlement or compromise exclusionary rule is designed to exclude this evidence only when it is tendered as an admission of weakness of the other party's claim or defense, not when it is tendered to prove a fact other than liability. *** (Citing authorities). The exclusionary rule protected *** (defendant) and could be waived by it. *** (Citing authority).

"In this case*** (defendant) was entitled to present evidence in mitigation of*** (plaintiff's) claim for punitive damages. *** (Citing authorities). ***"
Pogge v. Fullerton Lumber Co., 277 N.W. 2d 916, 921 (Iowa 1979)

EVIDENCE: opinion testimony - passage of time v. reliability
In a special concurrence joined in by six other justices, Chief Justice Reynoldson concluded expert testimony relating to passage of time and diminishing recollection and reliability was not a proper subject for expert testimony since such evidence is within the knowledge and experience of jurors.
State v. Galloway, 275 N.W. 2d 736, 740-742 (Iowa 1979)

EVIDENCE: opinion - "scientific viability"
Defendant's expert introduced evidence relating to the speed of the vehicles involved in a collision based upon a "conservation of momentum-vector analysis." Plaintiff maintains such an analysis ignores a number of factors relevant to a determination of speed. In reversing the trial court and the Court of Appeals, both of which permitted the testimony, the Court stated:

"***This contention basically raises a question of the scientific reliability of the conservation of momentum-vector analysis***. If it can be shown that the analytical process***is generally accepted by the scientific community, then the testimony should be admitted. Absent such a foundational showing, the evidence must be excluded. *** (Citing authorities). ***In light of the tension between the factors comprising the conservation of momentum-vector analysis and the factors which this court has considered important in the past, a showing of the scientific viability of the momentum-vector analysis in the vehicle collision context is a necessary precondition to the admission of such testimony."
Henkel v. Heri, 274 N.W. 2d 317, 323-324 (Iowa 1979)

EVIDENCE: prior injuries and recoveries therefor
In personal injury action, defendant, over plaintiff's objection, cross-examined plaintiff on his previous injuries and recoveries therefor. In holding such evidence inadmissible, the Court, following a lengthy review of the conflicting case law, stated:

"We conclude that the better-reasoned authorities hold that evidence of the amount of prior settlements is inadmissible in the context of this case. There was no denial by plaintiff of any prior injuries. It is likely that the prior settlements included such items as loss of earnings and medical expense; and***pain and suffering. None of these would have a direct bearing on what injuries plaintiff had suffered which were still in existence at the time of his last injury.

"The size of any verdict or settlement may vary according to factors having no bearing on the extent of residual injuries. For example, close issues of liability might diminish the recovery;

shocking acts of recklessness or negligence might increase them. Disputed legal issues and other obvious factors, such as the ability of the claimant's attorney, could affect them.

"The settlement figures brought out***were aggregations of all these factors without any guidance for the jury to determine how much, if any, represented the residual injuries which defendants sought to establish. In addition to the lack of probative value of this evidence, it could cause a jury to consider plaintiff to be accident prone, or litigious, or both. ***"
Nepple v. Weifenbach, 274 N.W. 728, 733 (Iowa 1978)

INSURANCE: arbitration provisions

Plaintiff-insured sought to recover under uninsured motorist coverage. Insurer sought and obtained dismissal based upon plaintiff's alleged failure to comply with arbitration provisions of the policy.

In holding that the trial court erred in concluding arbitration was a condition precedent to suit, the Court stated:

"The first provision purports to require the insured and insurer to submit the issue of the uninsured motorist's liability for damages and their amount to arbitration when the insured and insurer are unable to agree. Under the second provision, arbitration may then be invoked 'upon written demand of either.***' The insured and insurer also purport 'to be bound by any award made by the arbitrators.***'

"These provisions do not make arbitration a condition precedent to suit***. Instead, when arbitration is utilized it becomes the sole method of resolving the dispute. It is a substitute for litigation rather than an essential prelude to it.

"Moreover, the provisions do not make arbitration a substitute for litigation in all cases. The clause purports to make arbitration mandatory only upon written demand of either party to the dispute. Otherwise the case may proceed to suit."
Johnson v. Fireman's Fund Ins. Co., 272 N.W. 2d 870, 873 (Iowa 1978)

INSURANCE: coverage limitations

Corporate owner of airplane involved in fatal accident wherein officer was killed brought action against insurer for property damage to aircraft. Insurer denied coverage on the ground the pilot did not hold an instrument flight rating and the conditions at the time of the crash required such a rating. The policy provisions required ratings "appropriate for the flight." The policy itself was not delivered to plaintiff until after the crash.

The Court reversed the trial court and held there was no coverage. The Court simply stated there was coverage when the pilot flew within his ratings and there was no coverage when the pilot flew beyond his ratings.

Plaintiff argued (1) it was unaware of the coverage limitation, (2) the restriction was unreasonable, and (3) the policy was a contract of adhesion and under C & J Fertilizer such a provision should be read out of the policy. In that case, the Court refused to

enforce the policy's definition of burglary as being unreasonable. The Court distinguished C & J Fertilizer on the grounds that (1) the pilot rating was not unreasonable and (2) the provision did not infringe the objectively reasonable expectations of plaintiff.
Jim Hawk Chevrolet-Buick v. Insurance Co., Etc., 270 N.W. 2d 466 (Iowa 1978)

INSURANCE: partial subrogation - real party in interest

Wife's car was damaged by husband and wife's insurer paid for damage, except $100 deductible. Apparently to avoid problems of spousal immunity, insurer brought action against husband in insurer's name. Trial court rejected husband's assertion that insurer was not the real party in interest and husband appealed.

The Supreme Court found the general rule to be as follows: (1) where insurer pays entire loss, insurer becomes real party in interest and, ordinarily, must proceed in its own name; (2) where insurer pays only a portion of the loss, the right of action remains with the insured; and (3) the right of action for the entire loss is single and can not be split between the insured and insurer.

In concluding, the Court stated:

"Finally, we observe that if this court were to hold that a subrogated insurer which has not paid the full loss is a rule 2 real party in interest, then it is difficult to conceive how such insurers could avoid being brought into these cases as necessary or indispensable parties on motion of the alleged tortfeasors. *** (Citing authorities).
United Sec. Ins. Co. v. Johnson, 278 N.W. 2d 29 (Iowa 1979)

INSURANCE: uninsured motorist coverage

Plaintiff brought an action against her insurer seeking to recover under her uninsured motorist coverage for damages sustained when she left the road to allegedly avoid a collision with an oncoming car. There was no impact between the vehicles and the other vehicle did not stop. Relying upon statutory language requiring physical contact in a hit-and-run situation, the trial court granted insurer judgment on the pleadings.

After reviewing the various types of uninsured motorist statutes, the Supreme Court concluded Iowa's statute only requires coverage in two situations: (1) damage sustained from uninsured motor vehicle or (2) damage sustained from actual contact of hit-and-run motor vehicle. The Court refused to adopt plaintiff's theory that in her situation there should be a presumption that the other vehicle was uninsured.
Rohret v. State Farm Mut. Auto. Ins. Co., 276 N.W. 2d 418 (Iowa 1979)

INSURANCE: builder's warranty v. policy coverage

Plaintiffs' purchased three steel buildings from Morton Buildings, Inc., which were subsequently destroyed by a tornado. Morton Buildings, Inc., gave a five-year express warranty on the

buildings which stated the buildings would be repaired or replaced free of charge if damaged by snow or wind during that time. Plaintiffs' also purchased insurance covering the buildings for various losses, including wind. Following the tornado, the buildings were replaced by Morton and defendants refused payments under the policies. Trial court held in favor of the insureds on their breach of contract actions.

In response to defendants' contention that plaintiffs' sustained no loss, the Supreme Court, following a review of case law in the area, concluded as follows:

"We believe, as did the district court, that the essential question in resolving these cases is who shall receive the benefit of the ***warranty. Because we agree with the rationale of the New York Rule, that an insurance company accepting and retaining premiums for the coverage of loss that occurred should not be relieved of liability on the basis of the contractual relations between the claimant and third parties, and we decline to alter our stance***, that determination of loss should not be postponed to some future unspecified date, we decide*** (plaintiffs) are entitled to claim the benefits of both the Morton warranty and the***insurance proceeds."

The Court also held the warranty did not constitute "other insurance" within the meaning of the policy language relying upon the principle of strict construction of policy provisions against the insurer.

Gustafson v. Central Iowa Mut. Ins. Ass'n., 277 N.W. 2d 609, 613 (Iowa 1979)

JURISDICTION: sufficiency of original notice

Original notice served upon defendants did not advise defendants to "appear and defend"as required by Rule 49 (a), but only required defendants to appear. More than a year after default was entered, defendants brought an action to vacate the judgment based upon the defective original notice. The trial court found the defect was not fatal and defendants appealed.

The Supreme Court affirmed concluding that the defect was a "mere irregularity" and not a "substantial defect" and, in any event, defendants could not complain of the failure to advise them to defend since they did not even bother to appear notwithstanding that they were so advised, and consequently, they were not prejudiced by the defective notice.

Holmes v. Polk City Sav. Bank, 278 N.W. 2d 32 (Iowa 1979)

MECHANIC'S LIEN: foreclosure - joinder of actions

Although the mechanic's lien statute prohibits joinder of another cause of action in a foreclosure action, a plaintiff may join an additional, independent action for amounts due not covered by the mechanic's lien in response to a defendant's pleading of set-off or counterclaim.

Capitol City Dry Wall v. C. G. Smith Const. Co., 270 N.W. 2d 608 (Iowa 1978)

MUNICIPALITIES: tort claims - discovery rule

Plaintiff posted bail for a criminal defendant which was subsequently paid to the wrong person upon the criminal defendant's release. Plaintiff did not learn of the improper payment until four months later and commenced her action against the city and county four months after discovering the loss. The issue presented was whether the discovery rule applied in municipal tort claims actions and saved plaintiff's cause of action from the limitation provision of Section 613A.5. The Supreme Court affirmed the trial court's dismissal of plaintiff's action concluding as follows:

"The present case is to be distinguished from those in which negligence occurred at one time but the injury, the breach, did not occur until later. ***

"***

"Under our decisions Section 613A.5 is part of a statute of creation. Time to sue or to give the sixty-day notice runs from the wrongful death, loss, or injury unless the sixty-day notice is timely given, and then from the notice. When the legislature abolished sovereign immunity***, numerous statutes existed throughout the country, some of them containing ameliorative clauses***. The legislature saw fit to include an exception in Section 613A.5 for the person who is incapacitated by injury from giving notice, but it did not see fit to insert other ameliorative language***."
Montgomery v. Polk County, 278 N.W. 2d 911 (Iowa 1979)

MUNICIPALITIES: tort liability - special charter city

Plaintiff's notice of claim against defendant-city was timely with respect to Section 613A.5, but was not within the thirty-day notice requirement of Section 420.25, applying to special charter cities. Plaintiff received a favorable verdict and defendant-city appealed relying upon the special notice provision applicable to special charter cities.

The Supreme Court reversed and remanded holding that (1) a constitutional challenge on equal protection grounds was not preserved, (2) defendant's admission that it was a "municipality" did not amount to a waiver of its special charter status, (3) it must assume the legislature deliberately exempted special charter cities from the notice provisions of the municipal tort claims act, and (4) there is a strong presumption against implied repeal of a statute. The court concluded the city's affirmative defense constituted a valid bar of plaintiff's claim.
Lemon v. City of Muscatine, 272 N.W. 2d 429 (Iowa 1978)

MUNICIPALITIES: tort liability - special charter city

As in Lemon v. Muscatine, plaintiff's claim was timely under the municipal tort claims act but was not timely under the provisions of the special charter statutes. The city's motion for summary judgment was granted based upon the notice of claim provisions of the special charter statutes.

Plaintiff properly preserved her constitutional challenge in the trial court and the Supreme Court held that Section 420.25 (thirty-day notice requirement) was violative of equal protection in that it applies a different time limitation to claims against municipalities than does the municipal tort claims act.
Gleason v. City of Davenport, 275 N.W. 2d 431 (Iowa 1979)

NEGLIGENCE: assumption of risk v. contributory negligence

Relying upon Rosenau v. City of Estherville, the trial court concluded contributory negligence was not available in a tort action brought by a spectator struck by a hockey puck, and consequently, assumption of risk defense was appropriate. The Supreme Court, in a lengthy and complex analysis, stated in part as follows:

"We do not agree with this conclusion. The defense of contributory negligence was and remains available to defendants in this action. Parsons' cause of action was based on common-law tort and allegations of defendants' negligence. There is no statutory or case-law restraint on defendants' right to plead and attempt to prove that Parsons was negligent and contributed to her own injury. *** (Citing authority).

"This does not mean that defendants may rely only on contributory negligence. Rosenau holds only that in a negligence action the defense of assumption of risk, as used in its secondary sense, is indistinguishable from contributory negligence and is better treated as a component of the latter. In determining whether a plaintiff acted reasonably, one factor the jury will consider is any appreciated risk. Rosenau did not affect assumption of risk in its primary meaning: 'an alternative expression for the proposition that defendant was not negligent, i. e., either owed no duty or did not breach the duty owed.'***

"Since the burden of pleading and proving defendants' negligence is on Parsons, primary assumption of risk is not an affirmative defense."

The Court held defendants owed a duty to plaintiff to exercise reasonable care under all the circumstances, defendants did not show as a matter of law they did not breach that duty, and consequently, trial court erred in granting defendants' motion for summary judgment.
Parsons v. Nat. Dairy Cattle Congress, 277 N.W. 2d 620, 621-622 (Iowa 1979)

NEGLIGENCE: last clear chance abolished

Stating that the doctrine of last clear chance adds nothing to the basic concept of proximate cause, could unduly emphasize the elements common to both doctrines, and is almost certain to confuse a jury, the Court abolished last clear chance as a separate doctrine in all cases commenced after the Court's decision. The elements of last clear chance shall be included as issues within proximate cause.
Stewart v. Madison, 278 N.W. 2d 284, 293 (Iowa, April 25, 1979)

NEGLIGENCE: third-party proximate cause - burden of proof

"***When a defendant pleads that third-party negligence was the sole proximate cause of a plaintiff's damages, we have consistently held he has the burden to prove his allegation by a preponderance of the evidence.*** (Citing authorities). However, we have not had occasion to decide whether a different rule applies when the defense is not pled in the defendant's answer.

"We see no reason for a different rule to apply when the defense is not alleged in the answer. The reason for not requiring the defense to be pled is that it seeks to negate an element in the claimant's case instead of asserting new facts in avoidance of the claim. *** Citing authorities). There is no magic in failing to plead the theory; it is the same doctrine whether pled or not."
Adam v. T. I. P. Rural Elec. Co-op., 271 N.W. 2d 896, 902 (Iowa 1978)

NEW TRIAL: late amendment to timely filed motion

Plaintiff's original motion for new trial was filed within the prescribed time period, but did not include a ground which was subsequently asserted in an amendment to the motion. The amendment was filed thirty-three days after the verdict. The untimely amendment could not be considered unless the ground asserted was germane to a ground in the original, timely motion.
Julian v. City of Cedar Rapids, 271 N.W. 2d 707, 708 (Iowa 1978)

NEW TRIAL: previously denied change of venue

Prior to medical malpractice trial, plaintiff sought change of venue essentially based upon the fact defendant and his three associates were the only physicians in the county. Trial court overruled the motion, but following verdict for defendant, the court granted plaintiff's motion for new trial based upon the denial of the change of venue request.

The Supreme Court affirmed stating that it would reverse only if an abuse of discretion was established and there could be no such abuse if there was a basis in the record for the granting of the new trial. The court found such a basis in the fact that eleven of the twelve jurors indicated they or members of their families had been treated by the defendant.
Thompson v. Rozeboom, 272 N.W. 2d 444 (Iowa 1978)

PLEADINGS: combined answer-motion to dismiss

Where motion to dismiss and answer were filed as one "pleading" the motion was not filed before the answer as required by Rule 85 (a) and Rule 104 (b), and consequently, the motion could not be considered.
Poole v. Putensen, 274 N.W. 2d 277 (Iowa 1979)

PRODUCTS LIABILITY: similar accidents

In products liability action based upon strict liability in tort against manufacturer of combine, plaintiff attempted to offer evidence of four similar accidents. Trial court sustained defendant's relevancy

and materiality objection. In affirming the trial court, the Supreme Court stated:

"Such evidence is allowed in negligence cases to show a hazard and defendant's knowledge thereof. *** (Citing authorities). In negligence cases, there must be a showing that conditions were substantially similar and the occurrence was not too remote in time.

"Relying upon analogies to negligence cases, several courts have held that evidence of similar accidents is admissible in actions based on strict liability. *** (Citing authorities). While substantial similarity is required, the temporal element does not apply to strict liability cases. *** (Citing authorities). This is because knowledge or notice of a dangerous condition is not an issue in such actions.

"The rule gleaned from these decisions is a salutary one, and we now recognize it as the law of this state.***"
Eickelberg v. Deere & Co., 276 N.W. 2d 442, 445 (Iowa 1979)

SECURED TRANSACTIONS: notice of repossession sale

In an action by a secured party for deficiency judgment following sale of repossessed collateral, debtor asserted he did not receive notice of sale as required by Section 554.9504 (3). In reversing the trial court and denying the deficiency, the Supreme Court stated that while proof of actual receipt is not necessary, it was necessary to establish that the notice was in fact properly mailed. The fact of mailing may be shown by the testimony of the "mailing clerk" as to the customary office practice or by direct proof of actual mailing. In this case, the bank's only evidence with respect to mailing was a notation on a ledger card which contained a date and the words "ten-day notice." The court concluded the bank's evidence did not establish the fact of mailing.
Northwest Bank & Trust Co. v. Gutshall, 274 N.W. 2d 713, 717-718 (Iowa 1979)

SECURED TRANSACTIONS: notice of right to cure - pre-ICCC credit

Secured parties are required to give notices of right to cure to debtors notwithstanding the fact that the credit transaction occurred prior to the effective date of the Iowa Consumer Credit Code.
Northwest Bank & Trust Co. v. Gutshall, 274 N.W. 2d 713, 721-723 (Iowa 1979)

STATUTE OF LIMITATIONS: intentional delay in service

Plaintiff filed petition against city just prior to tolling of six-month limitation established by tort claims act, but, by ex parte order, sealed the file and did nothing further. Three months later the sealing order was vacated and service was made. By motion to adjudicate law points and in answer, defendants asserted prejudicial delay and challenged the commencement method is contrary to the policy behind the limitation provision. The trial court sustained defendants' motion and the Supreme Court affirmed stating

that plaintiff's method of commencement would frustrate the basic purpose of limitations statutes - prompt notification to defendants of pending litigation. The court went on to state that it had no intention to retreat from the principle that filing constitutes commencement, but this was an unusual case - an intentional bypass by the plaintiff of some of the steps required for starting an action (the requirements for contemporaneously placing in the clerk's hands the petition and the notice papers for prompt delivery to the serving officer). Under these unusual circumstances, the court held that the filing of the petition was not enough alone to toll the statute of limitation.
Scieszinski v. City of Wilton, 270 N.W. 2d 450, 452-453 (Iowa 1978)

UNIFORM CHILD CUSTODY JURISDICTION ACT: analysis
In a case of first impression, the Supreme Court analyzed and applied the provisions of the uniform child custody jurisdiction act, Chapter 598A, The Code. The act is applicable in any proceeding involving child custody and dictates when jurisdiction should and should not be exercised.
Barcus v. Barcus, 278 N.W. 2d 646 (Iowa 1979)

VENUE: legal malpractice
Plaintiff's personal injury action was dismissed under Rule 215.1 and could not be brought again due to the expiration of the statute of limitations. Plaintiff commenced a malpractice action against his attorney in Polk County, the county where the personal injury action was commenced. Plaintiff and defendant were residents of Clay County.

Defendant's motion for change of venue to Clay County based upon Section 616.17, establishing venue as within the county where defendant resides, was overruled and defendant appealed.

The Supreme Court held that plaintiff's personal injury action was "property" within the meaning of Section 616.18 and that "property" was damaged in Polk County, and consequently, venue was appropriate there.
Johnson v. Nelson, 275 N.W. 2d 427 (Iowa 1979)

WITNESSES: impeachment - prior perjury conviction
Prior to trial, defendant asserted a motion in limine seeking to prohibit State from using his eight-year old perjury conviction for impeachment purposes. Trial court ruled the State could inquire into the nature of the conviction. On direct-examination, defendant acknowledged the perjury conviction which was also brought out during cross-examination. Defendant asserted on appeal that the court's ruling was an abuse of discretion.

In response to the state's argument that defendant waived error by disclosing the conviction on direct, the Court, following an extensive discussion of applicable case law, held:

"***Where the issue is fully argued and trial court, carefully

apprised of defendant's objection, rules evidence of prior convictions admissible, we are not convinced defendant must abandon all trial tactics to preserve error. We hold defendant has not waived his right to assert error in this instance."

With respect to the admissibility of the perjury conviction in light of its relative remoteness in time, the Court stated:

"''The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness.'***

"***

"In the case before us defendant's perjury conviction occurred eight years prior to trial. It would be admissible for impeachment purposes in federal court. Moreover, the record made at the in-chambers trial court hearing revealed that in 1975 defendant was convicted of malicious injury to a motor vehicle. His perjury conviction has not been 'followed by a legally blameless life.'***"

State v. Jones, 271 N.W. 2d 761, 765-766 (Iowa 1978)

WORKERS' COMPENSATION: on-the-job assault by co-employee

Employee's widow sought workers' compensation death benefits for fatal assault upon husband by deranged co-employee. The Supreme Court held (1) the death arose out of the employment, and (2) the attack was not motivated by personal reasons, and consequently, the willful injury defense was inapplicable.

Cedar Rapids Community Sch. v. Cady, 278 N.W. 2d 298 (Iowa 1979)

WORKERS' COMPENSATION: review reopening

Three years after initial arbitration hearing, claimant commenced a review reopening proceeding relying upon the orthopedic surgeon's testimony that his initial finding of 12% permanent disability was in error and that claimant actually had suffered 23% disability. The error stemmed from the physician's assumption that there would be an improvement, but such was not the case. In ruling for the claimant, the Court of Appeals stated:

"We believe the situation before us falls within the concept of 'substantive omission due to mistake'***. It makes little difference from the standpoint of the injured claimant whether a physical condition resulting from an injury progressively worsens beyond what was anticipated or fails to improve to the extent anticipated. Either situation results in the industrial commissioner being unable to fairly evaluate the claimant's condition at the time of the arbitration hearing.

"***When passage of time and subsequent events show the true extent of industrial disability there should be some vehicle for adjusting an award.***"

Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W. 2d 24 (Iowa App. 1978)