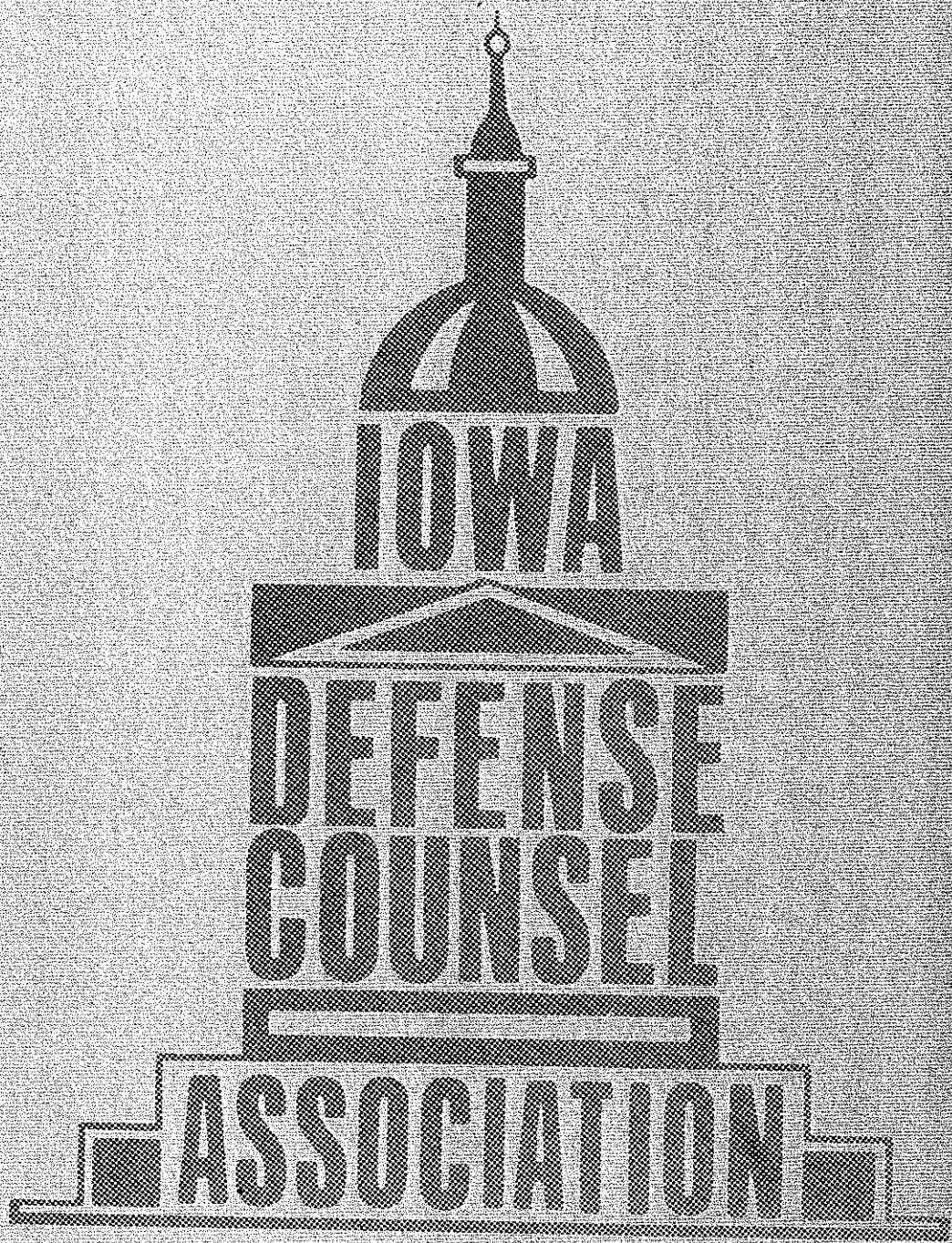

ANNUAL MEETING

October 1, 2, & 3, 1981

DES MOINES HYATT HOUSE
Des Moines, Iowa

IOWA DEFENSE COUNSEL ASSOCIATION

1980 — 1981
OFFICERS AND DIRECTORS

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Frank W. Davis	1965-1966	Craig H. Mosier	1973-1974
D.J. Goode	1966-1967	Ralph W. Gearhart	1974-1975
Harry Drucker	1967-1968	Robert Waterman	1975-1976
Philip H Cless	1968-1969	Stewart H M. Lund	1976-1977
Philip J. Willson	1969-1970	Edward J. Kelly	1977-1978
Dudley Weible	1970-1971	Don N. Kersten	1978-1979
Kenneth L Keith	1971-1972	Marvin F. Heidman	1979-1980
Herbert S. Selby	1980-1981		

1981 Annual Meeting

HANDLING THE EXPERT WITNESS

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

I. General Rules Regarding Experts Opinion Testimony.

A. Iowa is committed to a liberal rule which allows opinion testimony if it is of a nature to aid the jury and is based on special training, experience, or knowledge with respect to the issue in question.

State ex. rel. Leas in Interest of O'Neal, 303 N.W.2d 414 (Iowa 1981)

Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa 1977)

Haumersen v. Ford Motor Company, 257 N.W.2d 7 (Iowa 1977)

See also Rule 702, Federal Rules of Evidence

B. The receipt of opinion testimony rests largely in the discretion of the trial court and its ruling will not be disturbed absent manifest abuse of that discretion.

Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280 (Iowa 1979)

Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 830 (Iowa 1978)

Duke v. Clark, 267 N.W.2d 63 (Iowa 1978)

Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa 1977)

Haumersen v. Ford Motor Company, 257 N.W.2d 7 (Iowa 1977)

Hayes Bros. Inc. v. Economy Fire & Cas. Co., 634 F.2d 1119 (1980)

1. Discretion must be legal one based on sound judicial reasons.

Osborn v. Massey-Ferguson Inc., 290 N.W.2d 893 (Iowa 1980)

II. Proper Subject Matter of Expert Testimony.

A. The subject of the evidence must be so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman.

Bernal v. Bernhardt, 180 N.W.2d 437 (Iowa 1970)

B. Questions of law are not proper subject of opinion testimony.

Aller v. Rodgers Machinery Mfg. Co., Inc., 269 N.W.2d 830 (Iowa 1978)

Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646

Hegtvedt v. Prybil, 223 N.W.2d 186 (Iowa 1974)

C. The requirement of unreasonable danger in products liability is a legal standard upon which no witness, expert or non-expert, may express an opinion.

Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 830 (Iowa 1978)

III. Foundation Necessary to Show Qualifications.

A. Test is whether witness possesses sufficient expertise regarding the topic in question to qualify as an expert. If this test is not met, the opinion is incompetent.

State ex. rel. Leas in Interest of O'Neal, 303 N.W.2d 414 (Iowa 1981)

Schmitt v. Clayton County, 284 N.W.2d 186 (Iowa 1979)

Karr v. Samuelson, Inc., 176 N.W.2d 204 (Iowa 1970)

B. Qualifications held sufficient.

State ex. rel. Leas in Interest of O'Neal, 303 N.W.2d 414 (Iowa 1981)

Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980)

Heth v. Iowa City, 206 N.W.2d 299 (Iowa 1973)

Schmitt v. Clayton County, 284 N.W.2d 186 (Iowa 1979)

C. Qualifications held insufficient.

Bernal v. Bernhardt, 180 N.W.2d 437 (Iowa 1970)

IV. Foundation Sufficient to Show Basis for Opinion.

A. Sufficient data must appear upon which an expert judgment can be made and, if absent, the opinion is incompetent.

State ex. rel. Leas in Interest of O'Neal, 303 N.W.2d 414 (Iowa 1981)

Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280 (Iowa 1979)

Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa 1977)

Lessenhop v. Norton, 261 Iowa 44, 153 N.W.2d 107 (Iowa 1967)

See also Rules 703 and 705, Federal Rules of Evidence

B. Expert must not only be qualified generally, but must also possess sufficient information to permit him to express his opinion on the particular issue involved.

Henkel v. Heri, 274 N.W.2d 317 (Iowa 1979)

Duke v. Clark, 267 N.W.2d 63 (Iowa 1978)

C. Basis of experts opinion must have general acceptance in the scientific community.

Henkel v. Heri, 264 N.W.2d 317 (Iowa 1979)

D. Foundational data must be sufficient so that opinion is more the speculation and conjecture.

Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980)

E. First-hand knowledge not essential.

Henkel v. Heri, 264 N.W.2d 317 (Iowa 1979)

F. Testimony allowed because factual data sufficient.

Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280 (Iowa 1979)

Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980)

Henkel v. Heri, 264 N.W.2d 317 (Iowa 1979)

Team Central, Inc. v. Team Co., Inc., 271 N.W.2d 914 (Iowa 1978)

Duke v. Clark, 267 N.W.2d 63 (Iowa 1978)

G. Testimony denied because factual basis insufficient.

Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa 1977)

Bernal v. Bernhardt, 180 N.W.2d 437 (Iowa 1970)

V. Form of Question and Opinion.

A. If hypothetical question is used, it must include material facts essential to formation of a rational opinion and sufficient facts so it does not mislead jury.

Schmitt v. Clayton County, 284 N.W.2d 186 (Iowa 1979)

Iconco v. Jensen Construction Co., 622 F.2d 1291 (1980)

B. Opinion couched in terms like "possible" and "probable" is admissible, although such an opinion, standing alone, may not be enough to make out a case for the jury.

Becker v. D & E Distributing Co., 247 N.W.2d 727

Dickinson v. Mailliard, 175 N.W.2d 588 (Iowa 1970)

Duke v. Clark, 267 N.W.2d 63 (Iowa 1978)

VI. Objections.

A. Objections must be sufficiently specific to advise court of basis therefor.

Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280 (Iowa 1979)

VII. Necessity of Expert Testimony.

A. Even though proper subject of expert testimony is in issue, it does not necessarily follow that expert testimony is necessary to submit issue to jury.

Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa 1977)

VIII. Expert Testimony Not Conclusive.

A. The fact finder is not obliged to accept expert testimony, even if it is uncontradicted, although testimony should not be arbitrarily and capriciously rejected.

Parrish v. Denato, 262 N.W.2d 281 (Iowa 1981)

Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29 (Iowa 1978)

IX. Discovery of Experts.

A. Failure to identify expert may preclude use at trial.

Rule 125, Iowa R. Civ. P.

B. Discovery deposition of adverse party's expert may be used by adverse party at trial but objections are not waived.

Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980)

X. Decision to Use Expert.

A. Is it necessary?

1. Is plaintiff going to use one?

2. Is plaintiff's expert's theory contrary to a lay person's common experience?

3. Should trial be focused on subject matter of expert testimony?

B. Is persuasive qualified expert available?

C. Is there sufficient foundational data to support desired opinion?

XI. Preparation of Expert.

A. Provide expert with all evidence, favorable and unfavorable.

B. Have expert inspect, test and analyze, to extent possible.

C. Determine what published materials, if any, are essential foundationally for expert's opinion.

1. Study these for unfavorable statements.

D. Determine unfavorable opinions, if any, expert would render.

E. Be sure expert understands nature of proceedings, matters in issue, evidentiary problems and scope of legitimate cross examination.

REPORTED CASES

Richards v. Iowa State Commerce Comm'n, 270 N.W.2d 616 (1978)

Petition filed for judicial review of intermediate agency action of the Iowa Commerce Commission involving a petition for an electric transmission line franchise. The supreme court held that the district court was without jurisdiction to review intermediate agency action of the Iowa Commerce Commission. The court held that a party seeking judicial review of intermediate agency action must show that adequate administrative remedies have been exhausted and review of final action would not provide an adequate remedy. Both requirements must be satisfied before intermediate judicial review is available. Expenses incident to completion of litigation and inconvenience due to delay do not justify intermediate judicial review. The court noted that in order to demonstrate inadequacy of remedy the party must show existence of reasons, peculiar to party's own case, which makes final review an inadequate remedy. "[T]hat each issue raised in the intermediate proceeding could be heard in the final review is telling proof that final review is an adequate remedy."

Hawk v. Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84 (Iowa 1979)

Appeal from district court decision reversing the industrial commissioner's denial of workers' compensation death benefits. The supreme court affirmed the district court. The primary issue presented was whether commission of "an unusual and rash act" by an employee causes the resultant injury not to arise out of and in the course of his employment. Claimant's decedent was killed in an airplane crash while on a business trip. Decedent had piloted the plane into bad weather at a time when he was not officially licensed to fly. The court specifically overruled the "unusual and rash act" doctrine and held that the doctrine cannot bar recovery of workers' compensation benefits. The court held that claimant's decedent's death arose out of and in the course of his employment.

Bahr v. Christianson, 282 N.W.2d 768 (Iowa Court of Appeals 1979)

Appeal from district court decision affirming an award of workers' compensation benefits to claimant. The court of appeals, in a per curiam decision, affirmed. The sole issue is whether claimant was a casual employee at the time of his injury. On the day of the injury claimant finished his regular duties early and was requested by his employer to paint the exterior trim of the employer's wife's house at the same hourly rate he received for his regular job. The court noted that the term "purely casual" is strictly construed against the employer and liberally construed in favor of the employee. The court found that claimant did not enter into a separate and distinct employment, purely casual in nature, when he agreed to paint the employer's private residence.

Temple v. Vermeer Mfg. Co., 285 N.W.2d 157 (Iowa 1979)

Appeal from district court judgment affirming industrial commissioner's denial of workers' compensation benefits. The supreme court affirmed. The court held that Industrial Commissioner Rule 4.28 was consistent with legislative intent indicated by the statutory authorization for such a limitation contained in section 86.24(3). Rule 4.28 requires the commissioner to decide an appeal on the record established before the deputy commissioner unless the commissioner is satisfied that additional evidence is material and that there was good reason for failure to present additional evidence to the deputy. The court found that the commissioner did not abuse his discretion in limiting evidence on appeal in this case. The excluded evidence could have been obtained prior to the original hearing.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174 (Iowa 1979)

Appeal from district court judgment affirming industrial commissioner's award of workers' compensation benefits in an arbitration proceeding. The supreme court affirmed. The primary issue was whether claimant's injuries arose out of and in the course of his employment. Claimant was injured while on his way home from a dinner which was attended by fellow employees and customers. The court stated that the test is "whether the act is 'in any manner dictated by the course of employment to further the employer's business.'" The court found that the record contained sufficient evidence to support a finding that the claimant's participation in the customer appreciation dinner was both beneficial to and authorized by defendant employer. The court stated that "when an injury occurs while an employee is traveling to or from a social function which occurs somewhere other than the workplace, compensability depends on the extent to which the function is employment-related." The court found that the commissioner could find that compensation was appropriate in this case. The court also found substantial evidence in the record to support the conclusion that intoxication was not a promimate cause of claimant's injury. The court rejected defendants' contention that section 85.23 requires claimants to give their employers written notice within the ninety-day time limit of their intention to file a claim. The court held that "section 85.30 expresses legislative intent that interest on unpaid compensation be computed from the date each payment comes due, starting with the eleventh day after injury."

Iowa Industrial Commissioner v. Davis, 286 N.W.2d 658 (Iowa 1979)

Certiorari to challenge defendant district court's order granting the petition of Iowa Beef Processors for writ of certiorari to review intermediate agency action. The supreme court upheld the industrial commissioner's contention that the IAPA, chapter 17A, as interpreted in Salsbury Laboratories v. Iowa DEQ, 276 N.W.2d 830 (Iowa 1979), provides the exclusive means of challenging agency action and precludes a collateral certiorari attack in district court. The controversy involved

overruling defendants' special appearances challenging the commissioner's in personam jurisdiction. The court ruled that decisions of commissioner and his deputies are agency actions subject to review exclusively under chapter 17A even though those administrative officers may be performing a quasi-judicial function. The court observed that the exhaustion of administrative remedies rule does not control unless: (1) there is an administrative remedy for the claimed wrong, and (2) the statute must expressly or impliedly require that remedy to be exhausted before resort to the courts. The court noted that an inadequate administration remedy still must be exhausted if judical review from the final agency action is adequate. Only a clear showing of irreparable injury from anticipated agency action justifies judicial intervention prior to exhaustion of administrative remedies and monetary losses caused by litigation expenses are insufficient.

McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980)

Appeal from district court decision affirming industrial commissioner's denial of workers' compensation benefits in an arbitration proceeding. The supreme court affirmed in part, reversed in part and remanded. Claimant filed his petition for arbitration, claiming to have suffered deleterious effects from inhaling coal dust and toxic gases while working underground in coal mines and seeking permanent and total disability benefits. The court upheld the commission's finding that claimant did not have pneumoconiosis. The court noted that the statute fails to delineate the characteristics indicative of pneumoconiosis. The court thereby concluded that "it is left to the deputy industrial commissioner or industrial commissioner reviewing the medical evidence presented to determine the particular characteristics of pneumoconiosis which must be present to justify a finding of the disease." The court wrote that the purpose of the presumption in section 85A.13(2) is to establish a causal link between the disease and the employment, not to establish the disease in the first place. The court further wrote that this particular presumption can only serve to aid defendants' cases, not claimants' cases. The court believed that chapter 85A does not require that the claimant prove that his disease was actually caused by exposure, but rather it is "sufficient that he show that the hazardous employment condition which at some time caused his disease existed to the extent necessary to possibly cause the disease at his employer's place of employment." The effect of this is to raise a narrow presumption of causation by a particular period of employment. The court concluded "that both the existence of pneumoconiosis and diability resulting from it must be proved in accordance with the statutory criteria before the presumption in section 85A.10 and the exception to the presumption in section 85A.13(2) apply. The supreme court remanded so the deputy could state his reasons for rejecting the conclusion that chronic bronchitis and asthma constituted occupational diseases under chapter 85A. The court indicated that such diseases were

occupational diseases under chapter 85A. The court ordered that claimant be allowed to present further evidence concerning the existence of quantities of coal dust in defendant employer's mine which could have caused his disease.

In addressing the issue of disability, the supreme court stated "the fact that the normal aging process may produce the ailment from which claimant suffers an actual result from his employment experience does not operate to bar a finding of disability." The court further stated that "[d]isability from injuries covered by chapter 85 has been defined by case law as 'industrial disability,' or a reduction in earning capacity. The court noted that reasons for disability may not always be directly related to functional impairment and gave as an example "a defendant-employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability." Another example given was "a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted." The court remanded for determination of claimant's industrial disability.

On additional matters, the supreme court ruled that the burden of persuasion regarding causation never shifts from claimant to defendant, and even if defendants failed to prove an affirmative defense, that would not mandate a finding against them. The court rejected claimant's allegation of inadequate findings in deputy's order overruling claimant's motion for an order compelling discovery. The court also rejected claimant's contention that section 85.39 should be construed to permit a medical examination furnished by employer at any point after the defendant has denied liability. Concerning the timeliness of requesting a deposition, the court remarked that "[i]t is the statement of dates of taking future depositions which must be filed at the hearing; the statement of reasons for the request for a delayed examination or evaluation presumably could be filed either before or during the hearing."

Firestone Tire & Rubber Co. v. Williams, (Iowa Court of Appeals 1979)

Appeal from district court ruling affirming industrial commissioner's denial of defendants' motion for summary judgment. The court of appeals affirmed. The issue presented was whether the action was barred by the applicable statute of limitation. The court stated that "[w]ith the proper filing of a written memorandum of agreement for compensation, the two year limitation set by section 85.26 is tolled." The court held that a memorandum of agreement is legally sufficient to toll the limitation provisions of section 85.26 even if the memorandum of agreement does not provide for weekly compensation. Once a memorandum of agreement is filed, it settles the issues of: (1) the employer-employee relationship at the time of the injury, and (2) an

injury arising out of and in the course of employment. The court specifically rejected the contention that payment of medical expenses constitutes "compensation."

Blacksmith v. All-American, Inc, 290 N.W.2d 348 (Iowa 1980)

Appeal from district court decision affirming industrial commissioner's denial of relief in a review-reopening proceeding. The supreme court reversed and remanded. The issue was whether the industrial commissioner erred in denying additional workers' compensation to an employee who was transferred by his employer to a lower-paying job following a work-related phlebitis attack. The court stated: "An increase in industrial disability may occur without a change in physical condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under section 85.26(2) and 86.14(2)." The court further stated that "[t]he fact that a similar diability occurred previously does not alone constitute substantial evidence that either incident resulted from a preexisting injury or disease. To be a preexisting condition under our cases, an actual health impairment must exist, even if it is dormant." The court held that the commissioner erred in attributing Blacksmith's job transfer to a preexisting condition in reliance on a medical report from Dr. Torruella. The court relied on McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980), in holding that Blacksmith did incur an increased industrial functional disability of his leg.

In order denying rehearing filed by the supreme court on April 16, 1980, the court stated:

> Blacksmith's injury and resulting industrial disability were to his vascular system; it was only his functional disability which was temporary and limited to the left leg. As the opinion discloses, the court found from the record as a matter of law that the compensable injury was a propensity to traumatic phlebitis of which the 1977 work-connected truck-driving injury was a proximate cause, that the injury affected the body as a whole because it involved the vascular system, that it motivated the job transfer, and that it resulted in some reduction in earning capacity, the duration and extent of which are issues of fact to be decided by the commissioner.

Orr vs. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980)

Appeal from district court judgment affirming industrial commissioner's dismissal of claimant's application for workers' compensation benefits. The supreme court on a 5 - 4 decision reversed and remanded. The primary issue is whether the "discovery

rule" applies to the two-year period of limitations for original workers' compensation actions under Iowa Code section 85.26 (1975). Claimant filed a petition for arbitration in June 1978, seeking benefits for headaches he allegedly suffered as the result of a work-related incident which occurred in May 1975. Claimant contended that, despite reasonable diligence, he was unable to determine the headaches were caused by the May 1975 incident until September 1977. After a discussion of the court's prior interpretation of Code sections 85.23 and 85.26 and the legislature's enactment of an amended section 85.26 in 1977, the court held that, under Iowa Code section 85.26, the limitation period begins to run when the employee discovers or in the exercise of reasonable diligence should have discovered the nature, seriousness and probable compensable character of the "injury causing. . .death or disability for which benefits [were] claimed." The court next addressed the issues of whether the amended statute was intended to apply to all injuries discovered after the amendment's effective date or only to those injuries caused by events occurring after that date. Only four of nine justices concurred on each of the divisions of the opinion which established two different theories which would allow a claim for an injury which occurred before July 1, 1977, the effective date of the amendment to Iowa Code section 85.26, to be commenced within two years of the time when a claimant "discovered" the possible compensable nature of the injury. Since the 1977 amendment to Iowa Code section 85.26, the "discovery rule" is applicable; but it does not give retroactive effect for those injured before July 1, 1977 as only four justices agreed on each of the two theories propounded to allow retrospectivity. The claim was allowed in this case, however, as five justices concurred in the result which reversed the district court's affirmation of the commissioner's determination that it was barred by the two year statute of limitations.

Frost v. S.S. Kresge Co., 299 N.W.2d (Iowa 1980)

Appeal from a district court judgment reversing industrial commissioner's denial of workers' compensation benefits to claimant. The supreme court affirmed. The primary issue was whether claimant was precluded from recovery by the "going and coming" rule. Claimant was on her way to a birthday breakfast and store meeting when she slipped and fell on an accumulation of ice on a public sidewalk to the employer's store entrance. The court found that the claimant was entitled to recovery here because (1) the site of the injury was so closely related in time, location, and employee usage to the work premises to bring the claimant within the "zone of protection" of Workers' Compensation Law (6 concur 2 dissent) and (2) the employee had exercised such control over the abutting sidewalk to make it part of the premises. (8 concur) Kresge argued that the sidewalk in question was also used by the general public and that any hazards encountered by employees were not "unique" or "special" to employees. The court stated that it is not necessary to show that a risk is

unique to employees, but rather on the areas used by the employer and its employees. The court pointed to evidence that all employees used the sidewalk in question when entering and leaving the premises, that the employer performed snow removal on the sidewalk, and even occasionally used the sidewalk for display and sales of merchandise. The court concluded that this constituted control of the sidewalk by the employer so as to constitute an extension of the premises and that the nexus of the work relationship here is so strong that protection under chapter 85 is appropriate without regard to any formalistic exception to the going and coming rule.

The court also ruled that appeal was appropriate from the final determination in a bifurcated case.

Robinson v. Department of Transportation, 296 N.W.2d 809 (Iowa 1980)

Appeal from district court judgment affirming industrial commissioner's denial of workers' compensation benefits. The supreme court affirmed. The issue on appeal is whether the notice to employer of claim requirements of section 85.23 was satisfied. Claimant suffered a heart attack at his home on February 14, 1976 (a Saturday) after an allegedly stressful week on the job. Although he was hospitalized for the heart attack and disabled from working, the claimant did not notify his employer of his claim to workers' compensation until he filed a petition on February 13, 1978. Nonetheless, claimant contends that his employer had actual knowledge of his injury within 90 days of its occurrence, and that he filed his petition for arbitration within 90 days of discovering the compensable nature of the injury. The court stated that while section 85.23 does not expressly require any information in addition to knowledge of the injury to satisfy actual knowledge, that section could not be construed in isolation from the alternative requirement of notice. The court pointed to section 85.24 which provides a form of notice which includes a comment that compensation will be claimed. It further states that "[n]o variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employee, by name, received an injury in the course of his employment on or about a specified time, at or near a certain place." (Emphasis added.) The court ruled that this provision required information not only about the injury, but that compensation would be claimed. The court pointed to the same principles recited in Larson, Workmen's Compensation section 78.31(a) at 15-39 to 15-44 (1976) that actual knowledge must include indication to a reasonably conscientious manager of a potential compensation claim. The court held that this principle applies to the actual knowledge provision of section 85.23. The court stated that although reasonable persons could draw different conclusions from the evidence does not negate the fact that the commissioner's decision as to notice was supported by substantial evidence when the record is

viewed as a whole. As to claimant's contention of notice being properly given on February 13, 1978, because it was the first he learned of possible compensability the court found substantial evidence for the commissioner to conclude that claimant had knowledge of the work relatedness of his injury when he entered the hospital. The court pointed to 3A. Larson, supra, section 78.41 at 15-65 to 15-66 which states: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness, and probable compensable nature of his injury or disease." The reasonableness of the claimant's conduct is to be judged in the light of his own education and intelligence.

Ward v. Iowa Department of Transportation, 304 N.W.2d 236 (Iowa 1981)

Appeal from a district court affirmance of industrial commissioner's denial of death benefits. Claimant's decedent sought benefits based upon a heart attack allegedly related to stress, anxiety, depression, weakness because of pain, lack of mobility, physical problems and lack of income related to a back injury and cessation of workers' compensation benefits.

The opinion holds that the scope of judicial review is not de novo and the findings of the commissioner have the effect of a jury verdict. Although the form of the decision of the agency was imperfect it was possible to work backward from the summary statement and deduce the legal conclusions and findings of fact. The evidence was sufficient to support the decision that claimant's spouse's fatal heart attack was not caused by a work injury. Because the commissioner's decision did not set forth findings of fact and conclusions of law, separately stated costs of the appeal were taxed to appellees.

Ross v. Ross, 308 N.W.2d 50 (Iowa 1981)

Appeal from district court decision affirming denial of workers' compensation benefits. The supreme court affirmed the district court. Claimant's decedent was a farmer whose farming operation was conducted in a close family association with his father and brother. There was extensive exchange labor among the three farms. On the day of his death, decedent spent the morning working on his father's farm. He then drove to the farm his brother operated to see if he could be of some assistance. After speaking to the brother, decedent decided to return to his father's farm and on his way, was involved in the fatal collision.

One issue in this case is whether claimant's decedent was an employee of his parents. The court held that the industrial commissioner clearly found that no employer-employee relationship existed and further observed that, even had such employment existed, decedent would have been excluded as a child under section 85.1(3), The Code. The court further found that there is a rational basis for treating farm employees: Section 85.1(3),

The Code, does not deny equal protection by excluding both groups from compulsory workers' compensation coverage; it was not a denial of equal protection to grant an employer the right to elect coverage without granting a similar right to the employee.

Cowell v. All-American, Inc., 308 N.W.2d 92 (Iowa 1981)

Appeal from district court decision modifying an award of workers' compensation. The supreme court reversed the district court. The court held that mailing the petition for judicial review to the attorney's address rather than the employer's address was not fatal to jurisdiction. The court citing Delman v. Commissioner, 384 F.2d 929 (3d Cir.), cert. denied, 390 U.S. 952, 88 S. Ct. 1044, 19 L. Ed. 2d 1144 (1967) found that the petitioner could reasonably conclude that the employer wished all communications in the proceeding to be sent to its attorney's address. At the time of mailing the copy of the petition for judicial review, the petitioner's selection of the attorney's address was not unreasonable. The court further found that there was no basis for the district court finding that the commissioner's decision on the claimant's industrial disability was unsupported by substantial evidence, arbitrary and capricious, or induced by an error of law.

UNPUBLISHED CASES

Riekes Equipment Co. v. Jones (Iowa Court of Appeals 1981)

Appeal from the district court judgment affirming industrial commissioner's adoption of the deputy's decision as the final agency decision awarding death benefits in an arbitration decision. The court of appeals affirmed. The primary issue was whether the deputy commissioner's decision was supported by substantial evidence. Decedent was fatally injured when the truck he was driving overturned. Claimant denied defendants' allegation that claimant was intoxicated at the time of the accident and that his death was proximately caused by intoxication. The evidence with respect to decedent's alleged intoxication was in conflict. The court noted that the fact finder, the deputy commissioner, had the duty to weigh and determine the credibility of conflicting evidence. The court noted that the deputy relied on evidence which was presented with respect to nothing unusual about the decedent's conduct after he reported to work to rebut the issue of intoxication raised by the blood alcohol test of .216. The court concluded that substantial evidence existed to support the determination. The court next addressed the question of the chain of custody over a beer can allegedly found in the cab of the overturned truck. The court noted that to establish a chain of custody adequate to justify admission of physical evidence, the party seeking admission need only show circumstances making it reasonably probable that tampering, substitution or alteration of evidence did not occur. According to the court, even assuming the deputy erred in his

refusal to admit the beer can, the refusal contributed harmless error.

Eittreim v. Iowa Industrial Commissioner (Iowa Court of Appeals 1980)

Appeal from a district court judgment affirming as modified a review-reopening decision on a claim for workers' compensation benefits. The court of appeals reversed and remanded. Claimant sustained injuries as the result of a fall and pursuant to a memorandum of agreement received healing period and permanent partial disability benefits. Claimant later initiated review-reopening proceedings alleging his total and permanent disability warranted additional benefits. The industrial commissioner found that claimant's refusal to submit to surgery was unreasonable and warranted a reduction of compensation under Stufflebean v. City of Fort Dodge, 9 N.W.2d 281, 283-84 (Iowa 1943). Claimant asserted that the agency's decision was "unsupported by substantial evidence in the record" and resulted in prejudice to his rights warranting judicial reversal under section 17A.19(8). The court stated that evidence is substantial for purposes of section 17A.19(8) when a reasonable mind would accept it as adequate to reach a conclusion. The court stated that under the Stufflebean case, there must be substantial evidence that the claimant was offered the opportunity to undergo this operation and refused. The court ruled that there was no evidence whatsoever that the claimant was ever offered the opportunity of surgery. The court therefore held that the deputy's decision was not supported by substantial evidence in the record and that claimant's rights were prejudiced as a result.

Iowa Beef Processors, Inc. v. Burmeister (Iowa Court of Appeals 1980)

Appeal from a district court decision affirming an award of workers' compensation to claimant. The court of appeals, in a per curiam decision, affirmed. The commissioner found that claimant had contracted acute tracheobronchitis resulting from the inhalation of caustic vapors emanating from a cleansing solution at his place of employment. The issue was whether the commissioner's finding of a permanent partial injury arose out of and in the course of employment are supported by substantial evidence. The court of appeals stated that its review was not de novo and that the findings of the commissioner are binding if supported by substantial evidence. The court repeated that evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. City of Davenport v. Pub. Emp. Rel. Bd, 264 N.W.2d 307, 311 (Iowa 1978). The court found that "while expert testimony that a condition could be caused by a given injury is in itself insufficient to support a finding as to cause or connection, such testimony coupled with additional nonexpert testimony that claimant was not afflicted with the same condition prior to the accident or injury in question is sufficient." Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065,

1072, 146 N.W.2d 911, 915 (1966). The court held that although defendants had considerable evidence to disprove causal connection, claimant's testimony when coupled with the testimony of expert witnesses as to the caustic nature of chemicals used in his work area, and the testimony of his physician and other employees as to the effect of inhalation of the chemicals did constitute substantial evidence of an injury. The court further held because they need only find substantial evidence to support the award, the commissioner's decision must be affirmed.

Armstrong Rubber Co. v. Bennett (Iowa Court of Appeals 1980)

Appeal from a district court decision vacating claimant's writ of general execution to collect interest allegedly due on a workers' compensation award. The court of appeals reversed. The sole issue is whether under section 85.30, interest on a workers' compensation award should be computed from the date each payment comes due rather than from the date of the agency decision establishing the right to such an award. The court pointed to section 85.30 which provides that "[c]ompensation payments shall be made each week beginning on the eleventh day after the injury, and each week thereafter during the period for which compensation is payable, and if not paid when due, there shall be added to such weekly compensation payments, interest at six percent from the date of maturity." The court held for claimant on the basis of Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979), in which the court stated that section 85.30 reflects a legislative intent that injured employees be provided compensation at the earliest time possible.

Johnson v. Brown Construction Co., (Iowa Court of Appeals 1981)

Appeal from a district court order in claimant executor's action to recover for death of his decedent. The court of appeals, in a per curiam decision, reversed and remanded. The court held that under Iowa workers' compensation law, an employee may pursue a common law negligence action only if the injury was caused by the gross negligence of a fellow employee. Here, the defendant was decedent's employer. The court found the fact that defendant individual was working with decedent at the time of the accident has no consequence because Iowa does not recognize the "dual capacity" doctrine wherein an employer can also be a co-employee for the purpose of avoiding the exclusivity of the workers' compensation remedy.

Furay v. Flavorland Industries, Inc., (Iowa Court of Appeals 1980)

Claimant appeals district court affirmance of denial of death benefits by industrial commissioner. Per curiam decision affirms. Claimant's decedent died as a result of ruptured cerebral aneurysms. Alleged causally related to emotional stress on the job. Agency decision supported by substantial evidence.

Carr v. John Deere Waterloo Tractor Works, (Iowa Court of

Appeals 1980)

Claimant in workers' compensation benefit proceeding appeals district court order upholding agency determination that his claim is barred by section 85.26, The Code. OPINION HOLDS: The district court order is vacated and remanded for reconsideration in light of the decision in Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980). This court will not retain jurisdiction since either party may seek review of the agency action upon remand in the district court under section 86.26, The Code.

SELECTED INDUSTRIAL COMMISSIONER APPEAL DECISIONS

AGGRAVATION -- PREEXISTING EMOTIONAL PROBLEMS

Barnhill v. Delavan Mfg. Co. (April 3, 1980)

Claimant suffered from preexisting emotional problems which were not disabling, but a work-related injury caused an aggravation or worsening of claimant's preexisting emotional problems which rendered claimant totally and permanently disabled. Defendants argued that claimant suffered from a preexisting patent condition and that the law allows recovery only for an aggravation of a preexisting latent condition. The distinction between latent and patent is not particularly clear nor helpful. A better approach is to focus on the extent of aggravation caused by the industrial injury. If claimant's condition is more than slightly aggravated because of his employment, the resultant condition is considered a personal injury within the Iowa law. The physical pain caused by the work-related injury revived the entire neurosis and the industrial injury amounted to an aggravation of a preexisting condition. (Appealed to District Court: Dismissed)

APPEAL WITHIN AGENCY

McCoy v. Dept. of Transportation (March 26, 1980)

Industrial Commissioner Rule 500-4.27 states that the appealing party has 20 days in which to file a notice of appeal with the commissioner following the date on which the deputy commissioner's decision, order or ruling is filed. When the time prescribed for filing an appeal has passed, the commissioner no longer has jurisdiction to hear an appeal. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday.

The purpose of a nunc pro tunc order is to correct an obvious mistake or to make the record conform to an adjudication actually or inferentially made but which by oversight or evidence mistake was omitted from the record. A nunc pro tunc order is only done to show now what was actually done then, and its function is not to change but to show what took place. A nunc pro tunc order cannot furnish the basis of extending the time in which to file an appeal. (No appeal)

Barrera v. Heinz, USA (August 6, 1981)

Defendants' notice of appeal was filed twenty-three days after the review-reopening decision was filed and according to claimant's certificate of service stamp, mailed twenty-one days after the decision was filed. Industrial Commissioner Rule 500-4.27 states that the appealing party has twenty days following

the day in which the deputy commissioner's decision, order or ruling is filed in which to file a notice of appeal with the commissioner. If "service" were "filing," then the notice of appeal would have been timely as the twentieth day was on a Sunday. Service, however, does not constitute filing. "A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file." Mills v. Board of Supervisors, 227 Iowa 1141, 1143; 290 N.W. 50, 51 (1940); Bedford v. Supervisors, 162 Iowa 588, 591; 144 N.W. 301, 302 (1913).

Section 17A.15(3) states that a proposed decision "becomes the final decision of the agency without further proceedings" unless there is an appeal within the time provided by rule. Thus, the commissioner has no jurisdiction to hear an appeal when the time prescribed for filing the appeal has passed. The commissioner is limited to the exercise of those powers prescribed in the workers' compensation law and Iowa Administrative Procedure Act. He cannot extend his jurisdiction to include matters expressly excluded by these laws.

ARISING OUT OF -- ENTERTAINING

Sun v. K.S. Sun, M.D., P.C. (October 16, 1980)

The issue on appeal was whether claimant's decedent, an employee of his own corporation, was in the course of his employment at the time of death. Claimant's decedent was returning home after entertaining three people when he died in an automobile accident. Two of the individuals claimant's decedent was entertaining were patients of claimant's decedent's professional corporation and close personal friends. A week prior to the accident in which claimant's decedent was killed, claimant's decedent went on a trip to Wisconsin with these friends. While in Wisconsin, he was entertained by an aunt of one of these friends. When they all returned to Iowa, claimant's decedent wished to show his gratitude for the hospitality shown to him in Wisconsin by making the three his guests at a country club. Claimant contended that decedent's activities were for the benefit of his professional corporation since two of the individuals were patients of decedent and decedent's country club membership was maintained primarily for the futherance of the corporation's business. An employee's injury which is connected with a social occasion is compensable if the employee's participation is both beneficial to the employer and is authorized by the employer. When the activity consists of entertaining customers, the benefit lies in the ultimate business gain. Because there was no showing that the professional corporation actually received any real benefit by claimant's decedent's club membership and because decedent's motivations at the time of his death were personal and not business oriented, claimant's decedent was not in the course of his employment. (No appeal)

ARISING OUT OF -- HEART CONDITION

Deaver v. City of Des Moines, Iowa (September 6, 1979)

The issues presented in the arbitration portion of the proceeding were whether defendant received the requisite notice of symptoms of a heart condition as required by Iowa Code section 85.23 and whether the symptoms of a heart condition arose out of claimant's employment. Requisite notice was given because claimant had called her supervisor and told her that the pain had started at work. The medical reports and testimony failed to adequately establish a causal connection. Although claimant experienced some symptoms of a heart injury at work, there was no showing of a direct connection between claimant's heart condition and an exertion in her employment. (Appealed to District Court: Pending)

ASSAULTS

Mai v. Olan Mills, Inc. (August 12, 1980)

Claimant, along with other fellow employees, was sent by defendant employer to a motel in Cedar Rapids to conduct employer's business of selling photographs. After the end of an unsuccessful day, a business dispute arose between claimant and a fellow employee as to who was to be docked by their employer for lack of success that day. After a lengthy period of drinking and bickering, claimant demanded that her supervisor arbitrate the issue. Upon being refused, claimant became verbally abusive towards her supervisor. After repeatedly warning claimant to leave, the supervisor struck her, causing the injuries complained of.

Injuries as the result of a physical assault on an employee by an employer's supervisor may be considered to have arisen out of and in the course of employment if the assault happened at a place where it was the employee's duty to be, at a time when he was properly doing his work, and while in the performance of employment duties. If the assault by a supervisor or fellow employee grew out of an argument over the performance of the work or payment for the work, it is recognized to be compensable under workers' compensation law. The argument here had its origins in job performance. The fact that personalities may have clashed or personal disputes were drawn in does not detract from those employment origins which made claimant's injuries compensable. (No appeal)

ATTORNEY'S FEES

Litton v. Wean Chevrolet-Olds, Inc. (March 4, 1980)

Iowa Code section 85.38, which deals with credit for benefits paid under group plans, does not contemplate awards of attorney's fees for recovery of monies paid out under a nonoccupational plan. (No appeal)

BURDEN OF PROOF -- EQUIPOISE

Winey v. International Harvester Co. (January 7, 1980)
Claimant's burden of proof was not discharged because, at best, the testimony was in equipoise, and therefore claimant should not prevail because her evidence did not preponderate. The burden is not discharged by creating an equipoise; it requires a preponderance. (No appeal)

CAUSATION -- MEDICAL

Klinker v. Wilson Foods Corp. (July 27, 1979)
An expert witness may testify to the possiblity, the probability or the actuality of the causal connection between claimant's employment and his injury. If the testimony shows a probability or actuality of causal connection, this will suffice to raise the question of fact of connection for the trier of fact and, if accepted, will support an award. If the testimony shows a possibility of causal connection, it must be buttressed with other evidence such as lay testimony as to observations of objective symptoms before and after the incident claimed to have resulted in injury. See Becker v. D & E Distributing, 247 N.W.2d 727 (Iowa 1976). (No appeal)

CREDIT -- OVERPAYMENTS

Mysch v. Shirley, d/b/a Shirley Agricultural Service (September 14, 1979)
Defendants were not entitled to credit or restitution for overpayment of healing period benefits and medical payments. Since the legislature specifically provided for such a credit when a permanent total disability is involved, it must be assumed that such a credit was not intended for permanent partial disability. Also, the agency is not a court empowered to order restitution of medical payments. (Appealed to District Court: Reversed. Appealed to Supreme Court: Pending)

CREDIT -- OVERPAYMENTS

Caputo v. United Concern for Children (August 29, 1980)
The insurance carrier sought a credit against a permanent partial disability award for the overpayment of temporary total disability payments under a memorandum of agreement. Iowa Code section 85.34 reads as of July 21, 1976 that in the event weekly compensation for temporary total disability had been paid to a person for the same injury producing a permanent partial disability, said amounts paid shall be deducted from the amount of compensation payable for the healing period.

The law allows a credit only against the healing period for temporary total disability payments because the law does not specifically provide a credit for overpayment of healing period

benefits against permanent partial disability benefits, it must be assumed that such a credit was not intended by the legislature. (Appeal to District Court: Pending)

EMPLOYER-EMPLOYEE RELATIONSHIP

Strode v. Metro Athletic Assoc. (October 9, 1979)

Claimant was an employee of Metro Athletic. Claimant was a player and team member of a semi-pro football team, which was run by Metro Athletic. The following circumstances established the employer-employee relationship: Claimant received a two hundred dollar certificate of membership in the team without cost, and was to receive a share of any net proceeds realized by the team from any play-off games. The defendant employer supplied claimant with all the necessary equipment needed for his work and gave expenses for meals and mileage. The coaching staff of the defendant employer directed claimant in his work. Claimant did not have the right to employ assistants and had no right to control the progress of his work. The coaching staff of the defendant employer had the right to determine how and when claimant would get playing time, and could terminate claimant's work and exclude him from the team were he to miss a couple of practices or a game. Based upon the conduct of the defendant employer and claimant, it is clear that they intended claimant to be a member of the team. Claimant viewed his relationship with the team as one of being a team member and an employee of the team. (No appeal)

EVIDENCE - AFFIDAVITS

Rittgers v. United Parcel Service (August 22, 1980)

Claimant, a resident of Boise, Idaho at the time of rehearing, submitted an affidavit in lieu of testimony. Iowa Code section 622.90 gives the commissioner discretion as to the admission and restrictions of affidavits, but the commissioner should require the affidavit to be produced for cross-examination where a demand is made by a party against whom the affidavit is offered. (Appeal to District Court: Pending)

HEALING PERIOD

Castle v. Mercy Hospital (August 26, 1980)

Claimant, while acting in her employment sustained a fractured left hip and left wrist. Despite the surgical repair of these fractures, claimant experienced increasing pain in her hips. Claimant worked again briefly, but had to quit because of pain she was experiencing. After considerable treatment, claimant did receive some relief from her pain, but her complaints persisted. Claimant has received therapy ever since and has never been totally relieved of her pain.

Healing period compensation is paid until the employee has

returned to work or competent medical evidence indicates that recuperation from the injury has been accomplished, whichever comes first. Recuperation occurs when it is medically indicated that either no further improvement is anticipated or the employee is capable of returning to substantially similar employment. The fact that one continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond the point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition. Because medical evidence concluded that further improvement in claimant's condition could not be anticipated, healing period benefits would terminate at the last point of improvement. (Appeal to District Court: Pending)

Wardenburg v. Amana Refrigeration (May 21, 1980)

Iowa Code section 85.34(1), which deals with the requirements for healing period benefits, states that if an employee has suffered a personal injury causing permanent partial disability for which compensation is payable, the employer shall pay to the employee compensation for healing period beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from the injury has been accomplished, whichever comes first. As stated in Iowa Industrial Commissioner Rule 500-8.3(85), recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever comes first. Healing period was terminated when the doctor indicated claimant's condition had stabilized and no further improvement was anticipated. (No appeal)

Lopez v. Carter Construction Co., (July 24, 1981)

Claimant, while still in a leg cast, returned to high school. Defendants argue that claimant removed himself from the labor force by returning to high school and therefore terminated his healing period.

Industrial Commissioner Rule 500-8.3 states, in part, that healing period is to be terminated when the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury.

To say that one who enrolls in an activity designed to improve their job marketability while they have still not reached maximum recuperation intentionally removes themselves from the job market is to work against the intent and rationale behind Iowa Workers' Compensation Law. Such a statement would serve to reward the malingerer and penalize the ambitious.

Moreover, by not financially penalizing those who seek to increase their job marketability, eases the burden upon employers and insurance carriers by reducing the degree of permanency of an industrial disability.

The mere fact that a claimant enrolls in or returns to an education program does not in and of itself constitute a voluntary removal from the labor market such as to terminate healing period benefits.

INDUSTRIAL DISABILITY

Maulorico v. Wilson Foods Corp. (October 3, 1979)

Factors of industrial disability include the employee's medical condition prior to the injury, after the injury and present condition; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; and age, education, motivation, and functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

When considering a loss of earning capacity for employments for which a person is fitted, it is not considered initially that a person before an injury is fitted for every line of employment. Consideration must be given only to those employments which the employee, taking into account his age, education, qualifications and experience, had the ability to engage in prior to his injury. This would include employments for which, based upon the employee's characteristics, it can reasonably be anticipated that the employee would be trainable without undue inconvenience. Next is considered the earning capacity within the fields of endeavor for which the employee was fitted which has been lost as a result of the injury to determine the degree of industrial disability. (No appeal)

INDUSTRIAL DISABILITY

Birmingham v. Firestone Tire & Rubber Company, (July 10, 1981)

There is a common misconception that a finding of industrial disability to the body as a whole must necessarily be in excess of a rating of permanent impairment fund by a medical evaluator. Such is not the case as impairment and disability are not identical terms. Disability can in fact be less than the degree of impairment because in the first instance we are referring to loss of earning capacity and the latter reference is to anatomical or functional abnormality or loss. Although loss of function is

to be considered and disability can rarely be found without it, is is not so that a loss of function per se will result in an industrial disability.

Factors considered in determining industrial disability include the employee's medical condition prior to the injury, after the injury and present condition; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; and age, education, motivation, and functional impairment as a result of the injury and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. (No appeal)

INTERLOCUTORY APPEAL -- SPECIAL APPEARANCE

White v. Missouri Beef Packers (October 9, 1979)

Defendants' appeal of a ruling overruling their special appearance was interlocutory in nature and thereby the appeal was dismissed. Great harm would result to litigants under a system which tolerated indiscriminate appeals from each and every adverse ruling. The regulation of interlocutory appeals contributes to the orderly lititgation and to the peace of mind of the parties in that they have at least the comfort of knowing they will not be put to the expense, or threat of the expense, of repeated, permissive appeals. (No appeal)

IN THE COURSE OF - DEVIATION

Boettcher v. Garst Co. (May 22, 1980)

While driving his employer's truck back to the point of

origin, claimant overshot an intersection at which he intended to turn because of darkness. Rather than turn around, claimant proceeded to the next country road and took a course which although generally in the direction of his employer's premises with a deviation took him to his residence where he relaxed until his wife returned home. Claimant intended to drive the truck to a restaurant and then on to his employer's business to effect return of the truck. In doing so, he was involved in an accident resulting in injury immediately prior to returning to the direct line which would have ended the course of the deviation.

To recover workers' compensation benefits, a claimant must show that the injury arose out of and in the course of the employment. "In the course of employment" refers to time, place, and circumstance of the injury. Whenever an employee leaves his line of duty, coverage by virtue of the employment relationship ceases. The departure from the orders or usual practice of the employment must amount to abandonment of the employment or by an act wholly foreign to his usual work. After a deviation from an employment, if the employee returns to the usual course of employment, and is then injured, such injury is compensable. Because the claimant deviated from his prescribed path of return in order to return home early, he abandoned his employment to serve his personal purposes and his injury resulting thereof was not compensable. (Appeal to District Court: Pending)

IN THE COURSE OF -- EMPLOYER'S CONVEYANCE

Kindle v. Mapco, Inc. (January 23, 1980)

Claimant's decedent was killed while driving to work in an automobile owned by his employer and the car was being operated by the decedent with his employer's permission. Decedent was provided with a company vehicle to insure that he has reliable transportation at all times and to transport the company tools for which he was responsible and which he used in his duties. Decedent was required to perform services for his employer at places other than on the employer's premises and was required to use the company vehicle in the performance of these services. Decedent was found to be in the course of his employment because the journey to and from work was made in the employer conveyance. The risk of employment continues through the journey because the vehicle is under the control of the employer and the employee's ride in the vehicle at the direction of the employer. The transportation duties are incidental to but outside the regular duties. (Appealed to District Court: Dismissed)

IN THE COURSE OF -- EMPLOYER'S PARKING LOT

Atkinson v. Willow Gardens Care Center (August 23, 1979)

Claimant's injury arose out of and in the course of her employment when claimant injured her knee when she slipped on

some ice in defendant employer's parking lot while helping a co-employee start her car. The incident occurred before claimant finished her regular shift. It was a custom of the employees both to park their cars in the lot and to start their cars periodically throughout their shift during cold weather. Claimant always notified her immediate supervisor when she was going to start her car early. (No appeal)

IN THE COURSE OF -- LIVING ON EMPLOYER'S PREMISES

Phipps v. Mahaska County (January 31, 1980)
Claimant was in the course of his employment when he was injured in a fire while sleeping in a trailer which was located on defendant employer's premises. Defendant employer derived a substantial benefit from having claimant live on the premises. The evidence indicated that although claimant was not specifically "on call," claimant did work some overtime and was expected to do "whatever [came] natural on a farm." Claimant was told that the living quarters would help subsidize his wages. (No appeal)

JURISDICTION -- EXTRATERRITORIAL EMPLOYMENT

Vangi v. Trend/Roxbury Indus., Inc. (October 31, 1979)
The agency lacked jurisdiction under Iowa Code section 85.71(3), which allows jurisdiction if claimant "is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to his employer." Claimant worked under a contract of hire made in Iowa in employment principally localized in Nebraska. Claimant was domiciled in Nebraska and Nebraska's Workmen's Compensation Law was applicable to the defendant employer in this case.

A contract of employment is made at the time and place where the last act necessary to a complete meeting of the minds of the parties is performed. The place of completion of a contract determines the place of the contract. Where the offeror and acceptor of a contract speak by telephone from different states and do consummate a contract of employment, the contract is made at the place from which the accepting party speaks. (No appeal)

JURISDICTION -- EXTRATERRITORIAL

Johnson v. All-American, Inc. (May 15, 1980)
Claimant's decedent died in Minnesota while employed by defendant employer, a South Dakota firm. Decedent was also domiciled in Iowa at the time of his death. If an employee dies while working outside the territorial limits of the state, and their dependents would have been entitled to compensation had such death occurred within this state, those dependents shall be entitled to benefits provided that at the time of the injury the decedent employee was domiciled in this state. Iowa Code

section 85.71 is interpreted here to mean that the employee's domicile, without more is sufficient to establish the commissioner's jurisdictional authority. (Appeal to District Court: Pending)

Whitmore v. Custodis Construction Co. (June 3, 1980)

The issue presented was whether the claimant was a domiciliary of Iowa at the time of his injury and therefore within the jurisdiction of the commissioner. Claimant had previously received compensation pursuant to Nebraska Workmen's Compensation Laws for an injury which ocurred in Nebraska while claimant was employed by a Nebraska employer. Claimant was a long time resident of Iowa. Most of claimant's recent employments had been in Nebraska, to which claimant had been commuting from Iowa. Approximately eighteen months before this injury, claimant began residing in a small trailer near his employment in Nebraska but retained close ties with his former residence in Iowa. Iowa Code section 85.71 confers jurisdiction on the commissioner if the employee "is domiciled in this state." While Iowa Workers' Compensation Laws do not specifically define "domicile," basic Iowa law defines "domicile" much differently than "resident." Under Iowa law, in order to change one's domicile there must be the concurrence of these essential elements: (1) a definite abandonment of the former domicle; (2) the actual removal to, and physical presence in the domicile; (3) a bona fide intention to change and to remain in the new domicile permanently or indefinitely. "Resident" and "domicile" are terms of fixed and familiar meaning. Resident may be temporary, transient or permanent. Domicile is a broader term. Resident coupled with the required intent is necessary to acquire domicile, but actual residence is not necessary to preserve an established domicile. The requisite element of intent to change one's domicile necessarily, includes an intention to abandon the former domicile, and to do so permanently. There must be both an absence of an intent to return and an intent to remain in the place chosen as the new domicile. If a person establishes a new dwelling place, but never abandons the intention of returning to the old dwelling place as his new home, the domicile remains as the old dwelling place. Because claimant never abandoned his old home, his domicile remained in Iowa. (Appealed to District Court: Affirmed. Appeal to Supreme Court: Pending)

JURISDICTION -- FINAL JUDGMENT

Hirtes v. Ideal Truck Lines (June 14, 1979)

A decision on jurisdiction is not a final judgment as contemplated by the Iowa Supreme Court. The supreme court has held that a final judgment is one "that finally adjudicates the rights of the parties, and it must put it beyond the power of the court which made it to place the parties in their original positions." Crowe v. DeSoto Consolidated School District, 246 Iowa 38, 66 N.W.2d 859 (1954) (No appeal)

JURISDICTION -- FULL FAITH AND CREDIT

Johnson v. All-American, Inc. (May 15, 1980)

A settlement agreement entered into in another state does not terminate a claimant's rights or bar recovery under the Iowa Workers' Compensation Law by virtue of the Full Faith and Credit clause of Article IV, section 1 of the United States Constitution. The only limits are that credit be given for amounts previously paid and that there is no specific legislative preclusion in the sister state. Because Iowa Workers' Compensation Law allows credit for amounts previously paid and the sister state's workers' compensation law does not preclude filing a claim in another state, constitutional requirements of full faith and credit are satisfied. This conclusion is supported by legislative intent to prevent waiver of any rights under Iowa Workers' Compensation Law. (Appeal to District Court: Pending)

JURISDICTION -- SERVICE OF NOTICE

Breitbach v. Bertch Cabinet (January 23, 1981)

A petition for workers' compensation benefits was served by registered mail upon the employer. Shortly thereafter, the employer filed with the commissioner an "Employers First Report of Injury" as required by Iowa Code section 86.11, some nine months after the injury. The employer's and insurance carrier's assertion was that there was no showing that either had received the petition in proper service. Iowa Workers' Compensation Law contains nothing which requires the claimant to prove that proper service is actually received. Nor is it fatal to claimant's rights that the insurance carrier was not separately served. Iowa Code section 87.10 requires a policy provision in a workers' compensation policy which provides that jurisdiction over the employer is jurisdiction over the insurance carrier which places the insurance carrier under the jurisdiction of the commissioner. Iowa Workers' Compensation Law refers to the employer as the party responsible for workers' compensation benefits. To overly scrutinize the receipt of service would only serve to defeat the purpose and intent of the Iowa Workers' Compensation Law. (No appeal)

ISSUE PRECLUSION

Fridolfson v. Roseway Trucking, Inc. (April 14, 1981)

Claimant's decedent, employed as a truck driver, was killed, and a fellow-employee injured as the result of a road accident. In the fellow-employee's action for workers' compensation benefits, the insurance carrier was granted summary judgment upon a showing that its policy with the employer had expired at the time of the accident. The insurance carrier was then granted summary judgment in this action. The most important factors in determining the availability of the doctrine of issue preclusion (collateral estoppel) notwithstanding a lack of

mutually or privity are whether the doctrine is used offensively or defensively, and whether the party adversely affected by issue preclusion had a full and fair opportunity to litigate the relevant issue effectively in the prior action to bar litigation on a specific issue. Four requirements must be established: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Indentity of parties is not necessary to give validity to a claim of issue preclusion. Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981) adopts the position of the Restatement (second) of Judgments, section 88. The defensive or offensive use of issue preclusion is permissable where nonmutual parties are present if there has been a full opportunity to litigate the issues sought to be precluded. Where parties could have easily affected joinder, such opportunity is said to have existed. Because joinder was an open option which the claimant chose not to exercise and the evidence in the first action was found to have been thoroughly presented, that evidence should suffice to preclude the issue from being presented again. (Appeal to District court: Pending)

MEDICAL BENEFITS

Romani v. Ebasco Services (March 26, 1981)

Claimant, a native of New York, injured his back while working for an employer in Iowa. After the injury, claimant returned to New York for recuperation. Iowa Workers' Compensation Law provides that the employer is liable for healing period benefits until the employer has returned to work or has recuperated, plus reasonable medical expenses incurred by the claimant as a result of the injury. Where requiring the employer and insurance carrier to furnish out-of-state treatment does not impose hardship, such treatment must be deemed reasonable. To forbid out-of-state treatment would defeat the humanitarian purposes of the workers' compensation law. (Appeal to District Court: Pending)

MEDICAL CAUSATION -- HEART ATTACK

Glover v. Isaacson Roofing Co. (September 26, 1980)

Claimant, with preexisting arteriosclerosis condition, suffered a heart attack in the course of his employment as a roofer. A heart attack, to be a compensable injury, requires that one of two circumstances be present. One is that the work ordinarily requires heavy exertion which, superimposed on an already-defective heart, aggravates or accelerates the condition. Another circumstance is where medical testimony has shown an instance of unusually strenuous employment exertion is imposed upon a preexisting condition resulting in a heart injury. In

either case, however, the employment's contribution to the heart attack must take the form of a greater exertion then that which the claimant normally encountered in non-employment. Because the evidence failed to establish any such exertion during employment, there could not be found a causal relationship existing between the work and the claimed disability. (No appeal)

MEDICAL EXAMINATION

Garner v. Armstrong Rubber Co. (July 27, 1979)

Claimant was examined by a physician pursuant to the terms of a labor agreement providing for resolution of disputes regarding work status. It was held that this examination was not covered by Iowa Code section 85.27, which deals with the medical care or treatment of an injured employee. Treatment and care of an injured employee was not the objective of the medical examination in this case. Therefore, the cost of the examination is not allowed under Iowa Code section 85.27. (No appeal)

MEDICAL EXAMINATION -- OUT OF STATE

Hoegh v. Embassy Club (June 12, 1981)

Defendants appealed an order authorizing claimant to obtain a medical examination out of state and for defendants to pay the reasonable cost of said examination under the provisions of section 85.39, The Code.

Defendants assert that the language of section 85.39 in the first unnumbered paragraph which restricts examinations by employers geographically but not in frequency should be carried over to the second unnumbered paragraph of section 85.39 which allows the employee one examination by a self-chosen physician without any mention of geographical restraint.

This issue has been previously discussed in Shannon v. Department of Job Service, 33rd Biennial Report of the Industrial Commissioner, p. 98.

> Iowa Code §85.39 expressly reveals the legislature's intent to distinguish between the obligation to submit to examination imposed upon employees and those imposed upon employers when it is the employee who is requesting the evaluation. The statute clearly limits the employer-requested employee exam to 'some reasonable time and place within the state' and 'to a physician or physicians authorized to practice under the laws of this state.' This restriction has been seen as a protective shield for the employees who are submitting to an examination by physicians who are not chosen by them. When the employee is choosing the physician,

> as in the case in an employee-requested evaluation, the safeguard provided by requiring an examination within the state by an Iowa doctor is unnecessary. It is to be noted that the element of reasonableness pervades the employee-requested examination section and operates as a protective device for the employer. . . .

The statute is not interpreted as directing all costs to be paid by the employer for an examination requested to be conducted at some remote and exotic place merely on whim. Nevertheless, it is concluded that section 85.39 does not restrict evaluations to be made by a physician of the employee's choice, when the prerequisite conditions have been met, to a physician authorized to practice under the laws of this state and located in this state.

MEDICAL GUIDES

Worshek v. Sporleder, Inc. (September 28, 1979)

Use of the AMA guides is not intended to be the preferred method of determining permanent partial disability but merely a method which is suggested for use when ratings of percentage of disability are not obtainable from qualified experts. Industrial Commissioner Rule 500-2.4, which speaks about medical guides, is not intended to be an evidentiary rule. Its use in determining the quality of expert medical evidence is inappropriate. (No appeal)

NOTICE --- HEART ATTACK

Robinson v. Dept. of Transportation (June 4, 1979)

Defendants did not have actual knowledge or receive the requisite notice that claimant's heart attack arose out of and in the course of his employment within the ninety-day statutory period as required by section 85.23. Claimant started experiencing chest pains at work but did not tell anyone about the pains. Over the weekend claimant was hospitalized for angina and acute myocardial infarction. The employer defendant was notified on the following Monday that claimant had suffered a heart attack, but was not told that the condition was work-related. Claimant testified that he believed the heart attack was work-related when he entered the hospital; however, he did not think it was compensable because it did not occur while he was working for his employer. Professor Larson stated in his treatise that:

> It is not enough, however, that the employer, through his representatives, be aware that claimant. . . has suffered a heart attack. There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment,

and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. 3 Larson's Workmen's Compensation Law, section 78.31 (1976).

The purposes of the notice statute are to provide prompt medical care for the claimant and to provide an opportunity for the defendants to immediately investigate the circumstances of the accident. If these purposes are satisfied, then under some circumstances, the employer cannot claim prejudice if the time limitation under the notice statute is not met. However, in Iowa if notice is not given within 90 days under section 85.23, then the injured employee is forever cut off from any right to compensation under the act and the "no prejudice" and "ignorance of fact or law" arguments are not applicable. There must be an express "no prejudice to defendant" argument provided in the workers' compensation act in order that it may be invoked. In other states, in facts similar to this case, the courts have reached the same result whether or not a "no prejudice to defendant" argument was available to claimant.

The 90-day period in Iowa Code section 85.23 does not begin to run until the nature of the disease is made known to the claimant. Claimant must be aware of the seriousness and probable compensable nature of the injury before a notice statute may commence to run. However, claimant must exercise ordinary and reasonable care in discovering the nature of the trouble. (Appealed to District Court: Affirmed. Appealed to Supreme Court: Affirmed)

NOTICE -- TERMINATION OF BENEFITS

Armstrong v. Buildings & Grounds (July 15, 1981)

Claimant returned to work for one or two days and then stopped working, he testified, because of the injury. Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978) states that a claimant is entitled to a notice prior to termination of workers' compensation except when he has demonstrated recovery by returning to work. There appears to be no question that claimant would not be entitled to an Auxier notice under the circumstances. Claimant returned to work, and the employer took him back in apparent good faith. The Auxier case does not go so far as to state that notice is due under such circumstance. (Appeal to District Court: Pending)

OCCUPATIONAL DISEASE

Apling v. John Deere (March 19, 1981)

Claimant was diagnosed as suffering from obstructive lung disease which, it was determined, was aggravated by his work environment. The primary issue was whether compensation for the disability resulting from the obstructive lung disease should be

awarded under chapter 85 or 85A. It was concluded that claimant suffered from a preexisting obstructive lung disease which was aggravated by exposure to the airborne initiants in his work environment and, as such, compensation must be computed under chapter 85A, the occupational disease chapter. The concept of injury and occupational disease cannot be used interchangeably since Iowa Code section 85.61(5)(b) specifically excludes occupational diseases from the definition of injury. Under section 85A.7(4) compensation must be reduced and limited to such proportion that would be payable if the occupational disease was the sole cause of the disability. In addition, industrial disability criteria can be used to evaluate a claimant's capacity to perform work or to earn equal wages in other suitable employment when the claimant proves that he or she has been unable to continue working for reasons related to his disease. (No appeal)

PROOF OF EMPLOYMENT RELATIONSHIP

Funk v. Bekins Van Lines Co. (December 12, 1980)

Claimant had founded a small, interstate moving firm and later entered into a contract with defendant for the lease of trucks owned by claimant's firm. Under the lease contract, claimant's firm was to supply drivers and workers' compensation insurance coverage accordingly. Claimant was the only driver in the firm. Defendant sought to deny any employment relationship by asserting the claimant was instead an independent contractor.

Under Iowa Workers' Compensation Law, a claimant must establish that he/she was the employee of the defendant at the time of the injury in order to be eligible for benefits. Iowa Code section 85.61(3) defines an employee as one who has entered into the employment of, or works under a contract of service, express or implied. One who is not deemed an employee is then an independent contractor to whom the Iowa Workers' Compensation Law does not apply. The tests commonly applied in Iowa to find an independent contractor relationship are, although not necessarily concurrent or each in itself controlling; (1) the existence of a contract for the performance by an individual of a certain piece or a kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to the final results; (6) the time for which each worker is employed; (7) the method of payment, whether by time or by job; and (8) whether the work is part of the regular business of the alleged employer. Although the element of control has traditionally been accorded greater weight than the other elements, it is not the controlling element. Nor is it necessary that evidence preponderate on each of the elements to establish an employment relationship, or even

a majority of the elements where present. In the construction of a contract involving the contractor's relationships, the contract must be construed as a whole and not from isolated passages. No contract, employment rule, or device can operate to transform the employment relationship into one of an independent contractor as to relieve an employer of liability under Iowa Workers' Compensation Law. The law looks to the substance and not the form of the contract. While the claimant's contract was for a specific type of work at a fixed price, the method of performance was specifically and definitely spelled out as to establish the employment relationship. Because defendant was found to have exerted a great deal of control over claimant's operations, and because moving activities performed were a regular part of defendant's business, an employment relationship was found to exist at the time of claimant's injury. (Appeal to District Court: Pending)

RATE COMPUTATION

Winters v. TeSlaa (February 12, 1981)

Claimant appealed from a proposed arbitration decision in which she was awarded compensation for the death of her spouse. The primary issue was the method used to calculate decedent's gross weekly wages. Decedent received fatal injuries which arose out of and in the course of his employment. Claimant contended that decedent's gross weekly earnings included not only income decedent received as a truck driver, but also income decedent received from various other activities primarily related to decedent's farm operation. It was determined that decedent's weekly wage should be computed pursuant to Iowa Code section 85.36(10) since decedent earned less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which he was injured. Section 85.36(10) states that the weekly wage is based upon earnings from "employment." All income producing activities of decedent which failed to meet the "employee," "employment" requirements of the workers' compensation statute were disallowed in computing decedent's weekly wage. "Employee" is defined in Iowa Code section 85.61(2) as "a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for any employer...." The term "employment" implies that a contract is required on the part of the employer to hire and on the part of the employee to perform service. Only income earned as an "employee" can be used to compute gross weekly earnings. (Appeal to District Court: Pending)

RATE COMPUTATION -- EARNINGS REDUCTION

Parr v. Nash Finch Co. (October 31, 1980)

Although the court in Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) indicated the test of industrial disability was loss of earning capacity it is obvious that a "loss of

earnings" caused by job transfer for reasons related to the injury justifies a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction of earnings, it would appear this would justify an award of industrial disability. This would appear to be so even if the workers' "capacity" to earn has not been diminished. Here, claimant made several bona fide attempts to gain employment after his injury. Although it was not clear whether claimant's attempts were unsuccessful because of his injury, lack of qualifications, or general economic conditions, attempts were in fact made. Because the employment areas which were available to the claimant because of his injury reduced his earning capacity, claimant is entitled to benefits for that reduced capacity. (Appeal to District Court: Pending)

RATES -- INCREASE

Grebner v. Roberts Cooperative Elevator (October 24, 1979)

Claimant sought an increase in the rate of healing period benefits. It was held that such an increase is not allowed and the rate is restricted to the rate applicable at the time of the employee's injury. It was noted that adjustments in rates also are not allowed for death benefits and permanent partial and permanent total disability compensation. (Appealed to District Court: Affirmed)

REVIEW-REOPENING -- CAUSATION

Barker v. City Wide Cartage (September 25, 1980)

When an employer sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicted on the first injury, he must prove one of two things: (1) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (2) that the second injury (and ensuing disability) was proximately caused by the first injury. A causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a preexisting latent condition which becomes a direct and immediate cause of his disability or death. Claimant was able to establish by a preponderance of the evidence that he suffered an injury as the result of a road accident. (Appeal to District Court: Pending)

SCHEDULED INJURY -- TWO MEMBERS

Prusia v. Armstrong Rubber Co. (September 4, 1979)

If an injury to two members is anything less than a permanent total disability, under Iowa Code section 85.34(2)(s) the disability is compensated as a scheduled disability using the 500 week schedule. For example, an injury to both hands caused by the same accident does not fall under the "other" category of

permanent partial disability entitling the employee to a body as a whole disability pursuant to Iowa Code section 685.34(2)(u). Under section 85.34(2)(s), prior to 1974, an injury to both hands "shall equal a permanent total disability." If the actual disability was less that total, the disability award could be proportionately diminished. In 1973 the Iowa General Assembly removed the 500 week limitation of permanent total disability and changed section 85.34(2)(s) to read: "The loss of both arms. . . shall be compensated as such, however, if said employee is permanently and totally disabled he may be entitled to benefits under subsection three (3) of this section." This change in statutory language is interpreted as meaning that anything less than a permanent total disability, under Iowa Code section 85.34(2)(s), is compensated as a scheduled disability using the 500 week schedule. (Appealed to District Court: Reversed and remanded)

SECOND INJURY FUND

Lewis v. Mich. Coal Company (June 3, 1980)

Claimant suffered an industrial injury to his left leg for which he received workers' compensation benefits. He was able to return to work doing essentially the same work as prior to the injury. Claimant later suffered an industrial injury to his right leg.

Second Injury Fund liability arises when the total combined effect of a prior and subsequent injury to separate specified members is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for the parts. Although the Second Injury Compensation Act provides that the employer shall not be liable for the combined effect of a prior loss or loss of use of a specified member and a compensable subsequent loss or loss of use of another such member, Iowa Code section 85.64 does contemplate that the employer is liable for the full amount of disability attributable to the subsequent compensable injury.

An employer is liable for second injury fund benefits only to the degree of disability which would have resulted from the later injury if there had been no preexisting injury. Although a second injury may involve a scheduled member if the effects of the injury extend beyond the schedule the second employer shall be liable for the entire disability and the second injury fund will not be involved. Because claimant was able to return to his prior employment duties after his first injury, it was found not to have contributed to claimant's final industrial disability. (Appeal to District Court: Pending)

SETTLEMENTS -- COMMUTATIONS

Hawk v. Hawk Chevrolet-Buick, Inc. (June 18, 1980)

Future payments of workers' compensation benefits may be commuted to a present worth lump sum payment if the period

during which compensation is payable can be definitely determined and it can be shown to the satisfaction of the commissioner that commutation will be in the best interests of the person or persons entitled to the compensation. While the indiscriminate granting of lump sum payments would serve to defeat the purpose of workers' compensation by the unwise spending of beneficiaries, there are exceptional circumstances where a lump sum commutation would serve the beneficiaries' best interest. The commissioner must look to the circumstances in each case to determine if such exceptional circumstances are present. Because claimants had proposed a trust agreement for the financial benefit of minor beneficiaries without detracting from the needs of the minors, a lump sum commutation would properly serve the interests of those entitled to benefits. (Appealed to District Court: Affirmed, appealed to Supreme Court: Dismissed)

SUCCESSIVE INSURERS

Duree v. Firestone Tire and Rubber Co. (April 21, 1981)

Claimant was awarded thirty percent permanent partial industrial disability for a 1973 injury and an additional thirty percent industrial disability as a result of a 1977 injury. The employer's workers' compensation policy with its carrier expired in 1975 and workers' compensation insurance coverage was assumed by another carrier. Because medical reports established that the 1973 injury resulted in a twenty percent functional disability of the body as a whole, with an ultimate forty percent functional disability rating as the result of all injuries, claimant asserted that the insurance carrier during 1973 should assume half of the liability for the permanent total industrial disability award. Industrial disability is based upon a number of factors in addition to any finding of functional disability, such as age, education, prior work experience, and inability to return to substantially similar work. An employer is responsible for the degree of disability as a result of an injury. After each injury the employer takes the employee as is. It is the employer who is legally responsible for compensation under the Iowa Workers' Compensation Act. It is the employer who must accept the employee as is. Insurance carriers are normally only responsible for the extent of the disability caused by injuries while they were contractually liable to the employer. (Appealed to District Court: Pending)

STATUTE OF LIMITATIONS

Whitmer v. International Paper Co. (October 11, 1979)

Although it is recognized that reopening proceedings can be maintained on a proper showing that facts relative to an employment-connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, it is not shown that such action may be maintained after the expiration of three years from the last payment of weekly compensation.

However, medical benefits which are causally related to the injury are not barred by either section 86.34 or section 85.26(2) when an award for payments or agreement for settlement has been made. Section 85.27 pertains to the ongoing duty of the employer to provide medical care to an employee determined to have received an injury arising out of and in the course of employment. That section indicated that no statutory period of limitations shall be applicable to the obligation to continue to provide reasonable and necessary medical care related to the injury. (Appealed to District Court: Pending)

TEMPORARY TOTAL DISABILITY

Kline v. K-Mart Division (October 19, 1979)

Temporary total disability does not necessarily contemplate that all residuals from an injury must be completely healed and returned to normal. It is only when the evidence shows that because of the effects of the injury gainful employment cannot be pursued. For example, bruises and lacerations quite often result in no "temporary disability," although they may take some time to "heal." (No appeal)

TESTICLES

Nissen v. Latus Construction Co. (January 31, 1980)

The Iowa Code makes no provision for loss of testicles in its schedule of permanent partial disabilities. Thus, under the Iowa Workers' Compensation Act no award for scheduled permanent partial disability can be supported soley on the basis of an injury to the testicles. However, a finding of industrial disability might be possible if it is shown that a permanent injury has occurred to the body as a whole. (No appeal)

STRUCTURED SETTLEMENTS

R. TUCKER FITZ-HUGH
International Sureties, Ltd.
New Orleans, Louisiana

I would like to thank you for asking me to participate in this claims seminar, and to have the opportunity to visit with you.

Over the past several years the concept of structured settlements has grown from infancy to maturity. During this maturational process much has been written and spoken about the subject ranging from uncompromising advocacy from some on Defense and Insruance side to irrational rejection by some on the Plaintiff's side. The concept has been enshrouded with a mystick that it does not deserve, and the truth lies somewhere in between.

Structured settlements are not now, nor will they ever be the panacea for the claims mans delima in settling liability cases. At best it will provide you with a reasonable alternative to all cash discussions wherein demand is one million dollars, and the offer is one hundred thousand dollars since in that very brief exchange, you have exhaused your total topic of discussion.

Simply stated, structured settlements represent a realistic solution to the socio-economic dilema of placing large sums of money in the hands of financially inexperienced people when such monies are intended for medical maintenance or support of families.

When correctly used as a forum for settlement discussions, it will permit both Palintiff and Defendant to reduce to understandable

terms a settlement which reflects the amount and long term needs of a Claimant. The general breakdown of a structured settlement includes Cash or Front Money coupled with an Annuity, and Plaintiff Attorney's Fees. In every settlement each category should be considered separately, and one must be prepared to negotiate each aspect individually before an agreement is likely to be reached.

An informed understanding of annuities is imperative for anyone considering settlement along structured lines. Basically, an annuity is nothing more than a contractually guaranteed form of periodic payment by a life insurance company. There are five forms within the family of annuities which may be used to fund a settlement. They are No Refund Annuities, Period Certain Annuities, and Annuity Certain Agreements.

There are several outstanding advantages to the parties at interest; these being the Plaintiff, the Plaintiff's Attorney, and the Insured /Defendant. To the Plaintiff, annuity payments are income tax free; and, annuities are a self-contained spendthrift trust which automatically reduces the possiblity of any well intentioned party misapplying the settlement proceeds.

The Plaintiff's attorney may benefit as well, first by being able to secure a settlement which will produce for his client long term economic benefits which are guaranteed in both amount and duration and secondly by spreading his fees over a number of years into the future.

For the Insurer/Defendant the advantages rest in the fact that cases will generally be settled for lesser sums than the traditional cash only method, and secondly settlements will be achieved more quickly, thus reducing legal fees and court costs.

Insofar as I am aware there are no disadvantages to any of the foregoing.

Often the question is asked as to when structured settlements become practicable. Obviously, there is no specific answer except that perhaps at the $250,000 out-of-pocket range the concept and application become more viable. This is due principally to the contingency fee system in which 33-1/3 - 40% of the gross sums are taken by the Plaintiff's Attorney which leaves very little for the Claimant. Otherwise, Workmen's Compensation cases involving indemnity, death cases with minor children, and disability cases involving parapelegics, quadrapelegics and comatose victims will generally be the most susceptible.

It should be remembered that first and foremost this is a settlement tool, and may be tried in any case regardless of the type of injury or quantum. There is nothing sacrosanct about permanent and total disability cases only if long term financial security is an important consideration.

Starting with the premise that we are dealing with a pretrial settlement tool, the application of structured settlements to bodily

injury cases must be approached with a realistic appraisal of how much money one is prepared to spend. The reason for this is that your offer must be logical, realistic, intelligent, and responsive to the real or imagined needs of the Claimant.

Generally speaking, there are three aspects which must be negotiated separately. They are 1) Cash or Front Money, 2) the amount and type of annuity, and 3) Plaintiff's Attorney Fees.

Assuming that a realistic out-of-pocket figure has been determined one should commence by dividing your cash pot into the aforementioned segments. Obviously, one will have to ask an insurance agent or company for the cost of the annuity as this will be the unknown. Once the three pieces have been ascertained, then they can be split up any way you want so that the end result represents a logical distribution based on the agreed needs of the Claimant.

From this point one should concentrate on two items: First, are you sufficiently well versed in insurance, comparative economics, tax and probate law to be able to answer intelligently the questions which are likely to be raised by a conscientious Plaintiff's Attorney. Secondly, if your confidence level is fairly low on these points, then perhaps you should consider seeking the help of an outside party who may be more familiar with these points so as to be able to answer questions intelligently during the course of a settlement conference, and thus assure continuity of the discussions.

It is not just a matter of presenting a structured settlement proposal and having it instantly understood by the Plaintiff's Attorney and expecting him to understand as much as you do, because he most likely will not unless he has been through a structured settlement previously. More over, it is your job to relay to him your proposal so that he in turn may explain it to his client in terms everyone will understand.

I will not presume to tell anyone in this room how to negotiate a claim as this is personal and developed over many years from experience. I might only point out that settlement psychology dictates a certain amount of histronics and dramatics which can be used most effectively in structured settlements because of the socio-economic appeal to the Claimant and Attorney. Do not hesitate to use this peripheral aspect to your advantage.

In the presentation of a structured settlement, perhaps the most important pitfall to avoid is to make an all cash offer at the same time you are negotiating a structured settlement. If pressed to do so by Plaintiff's Attorney, as you will be, either decline to do so, or be prepared to offer a cash sum at least 20-25% less than what you expect the structured settlement to cost.

Under no circumstances, however, should you disclose the purchase price of an annuity to the Plaintiff Attorney during any phase of the negotiations unless required to do so by judicial request.

The reason is that the IRS may be able to establish a case against the tax free status of the annuity payments if it can be shown that there was any knowledge on the part of the Plaintiff or his representative as the cost of the annuity. This being based on the premise that if the Plaintiff has knowledge of the purchase price, that he then authorized purchase with a portion of the settlement proceeds, which would be the same as having bought the annuity himself. And, if he bought the annuity himself, then the payments would be taxable at rates prescribed in the tax code.

At this point let us look briefly at IRC 104 (A) (2) which stipulates that the proceeds of settlements or awards are income tax free. Revenue Ruling 79-220 amplifying on 104(A) (2) sets out the IRS approved procedure for annuity ownership and tax free payments. It also points out one very important caveat, that being if the claimant, or presumptively his representative, has influence or control over the investment or funding medium used by the Defendant, then the tax free payments will be voided because the Cliamant has constructive receipt of the funds.

I wish to emphasize this caveat, not to plant the seed of doubt in your mind, but rather to suggest that out of an abundance of caution, and an absence of case law, a strict interpretation of Ruling 79-220 as to form & content should be observed.

Now that we have explored the structured settlement from the standpoint of advantage and application, let us touch upon the Plaintiff's Attorney for a moment. After all, it is his job to

understand the concept as well as you and also sell his client on the idea.

It is very helpful to know as much as you can about him, especially his skill as a negotiator because this is what his job is during a settlement discussion. Conversely, your skill will be equally as important to the end result. Never underestimate the oppositions,intellect, judgement, motives, or ability. Do not be fooled into thinking that the Plaintiff's Attorney will not be able to ascertain your costs because he can and will. As well, do not be deluded into thinking that his concern or interest in the benefits you are offering are anymore genuine than yours may be. At the end of the day, if a structured settlement is going to be successfully effectuated, then it will only be done so when he is satisfied that you have spent enough money, and that he has a credible package to present his client. The absence of either one of these aspects is what generally will percipitate in a case being tried.

Throughout this discussion, I have made reference to using annuities as the funding medium for a settlement. Obvously, this is not the only device available, and occassionally we will recommend such things as stocks, bonds, trusts, etc. if it is appropriate.

In as much as this discussion is intended to be general in nature, perhaps we can deal with specific questions in minute; in closing I would like to reiterate several important points for you

to think about:

1. When you are serious about settling a case, a structured settlement can accomplish favorable results if used properly.
2. You must be prepared to negotiate front money, amount and type of annuity, and attorney's fee.
3. If in doubt about your expertise in comparative economics, taxes, annuities, etc. get outside help.
4. Be certain your release sets out correctly the terms of the payments and is in compliance with Revenue Ruling 79-220.

Otherwise, best of luck and, who knows it might even work.

THE PAST VS. PRESENT VS. FUTURE FOR THE INSURANCE DEFENSE LAWYER

DAN A ROGERS
Rogers, Honn, Hill, Secrest, and McCormick
Tulsa, Oklahoma

SPEECH OUTLINE

IOWA DEFENSE ATTORNEYS ASSOCIATION

Des Moines, Iowa

October 1, 1981

TOPIC: THE PAST VS. PRESENT VS. FUTURE FOR THE INSURANCE DEFENSE LAWYER

I. THE PAST

A. Settlement activities, evaluation, negotiations, responsibilities.

B. Relationship with insurance company and the insurance client.

C. Trial Preparation.

D. Trial.

II. THE PRESENT

A. Correspondence.

B. Settlement responsibilities.

C. Client vs. Insuror and vice versa.

D. Trial Preparation.

E. Responsibilities of Trial.

F. Impact of the Excess Carrier.

G. Defense Counsel Liability.

III. THE FUTURE

A. The changing role of the Insuror and Defense Counsel.

B. Cost containment -- a new era.

C. Defense Counsel's role as an "employee" of the Insuror and Attorney for the Insured.

MUNICIPAL TORT LIABILITY IN IOWA

Terrence Hopkins
Hopkins & Huebner
Des Moines, Iowa

I. Statute of Limitations. Six months unless notice given within 60 days - then 2 years. 613A.5. Death cases 613A.6.

A. Constitutional.

The notice requirements of §613A.5 are constitutional. Shearer 236 N.W.2d 688; Franks 286 N.W.2d 663; Lunday 213 N.W.2d 904.

The words "not to exceed 90 days" have been stricken from §613A.5 as unconstitutional. Harryman 257 N.W.2d 631.

B. Applicability.

Requirements of 613A.5 have no application to claims for contribution or indemnity. Olsen 209 N.W.2d 64.

Notice requirements of 613A.5 are not applicable to actions based on acts of municipal employees outside the scope of employment. Lamantia 298 N.W.2d 245; Roberts v. Timmins, 281 N.W.2d 20.

Section 614.8 which provides that minority of claimant tolls statute of limitation does not apply to claims against a municipality. Shearer 236 N.W.2d 688.

C. Burden of Proof.

Plaintiff must plead and prove notice or incapacity excusing notice. Bennett 203 N.W.2d 228; Lattimer 246 N.W.2d 255.

D. Who Should Be Served.

Section 613A.5 does not identify the person to be served. Letter to member of the city council is sufficient. Cook 264 N.W.2d 784.

Proper service may be made on representative of insurance company authorized by municipality to accept claims. Mihalovich 217 N.W.2d 564.

E. Who Must Give Notice.

Notice may be given by next friend of minor or personal representative of anyone under civil disability. Sprung 180 N.W.2d 430.

A notice need not be signed by the plaintiff. Cook 264 N.W.2d 784.

F. Sufficiency of Notice.

The notice need not state that a claim is being made. Cook 264 N.W.2d 784.

A properly filed petition constitutes substantial compliance. Harryman 257 N.W.2d 631.

Where the same incident gives rise to two claims, notice of one cannot be used to supply deficiencies in notice of the second. American States Insurance Company 186 N.W.2d 601.

Furnishing information to employee of the insurance agency which issued the liability policy to the municipality may be sufficient. Vermeer 190 N.W.2d 389.

A deficient notice cannot be amended after expiration of 60 days. Norland 199 N.W.2d 316.

Accident investigation report prepared by a city policeman as a result of an accident involving a city vehicle does not eliminate the necessity for a 60 day notice. Rush 240 N.W.2d 431.

Actual notice on the part of municipality does not eliminate the necessity for a 60 day notice. Shearer 236 N.W.2d 688; Franks 286 N.W.2d 663.

G. How To Raise Question of Sufficiency.

A Motion to Dismiss, not Special Appearance, is the proper method of raising compliance with 613A.5. Bennett 203 N.W.2d 228.

Where sufficiency of notice denied, issue may be raised at the close of plaintiff's evidence on a Motion for Directed Verdict. Latimer 246 N.W.2d 255.

H. Incapacity extends time for giving notice. 613A.5.

The father and next friend is not obligated to give notice on behalf of incapacitated injured son. Sprung 180 N.W.2d 430.

Incapacity of injured minor does not relieve the parents of filing notice of parents claim. Harryman 257 N.W.2d 631.

The claimant is incapacitated when he is unable to have reasonable consultation with his attorney. Harryman 257 N.W.2d 631.

Incapacity is to be determined by the jury. Harryman 257 N.W.2d 631.

I. Miscellaneous.

The discovery rule is not applicable to §613A.5. Montgomery 278 N.W.2d 911.

Section 613A.6 provides that when claim is commenced for death by wrongful act, notice may be given within one year after injury. Section 613A.5 provides that actions for wrongful death must be commenced within 6 months unless written notice is given within 60 days "after the alleged wrongful death, loss or injury". These provisions appear to be inconsistent.

II. Statement of Liability. Section 613A.2 provides: Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.

A. A municipality means a city, county, township, school district and any other unit of local government except the soil conservation district as defined in §467A.3 subsection 1. Section 613A.1.

B. Tort means every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights and included but is not restricted to actions based on negligence; error or omission; nuisance; beach of duty, whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute, or rule of law. 613A.1.

The duty to provide fire and police protection is owed to the public in general and not to any individual and hence a failure to provide such protection is not a tort. This "public duty" doctrine is followed by a majority of jurisdictions even where governmental immunity has been eliminated. See Municipal Liability for Negligent Building Inspection 65 Iowa L. Rev. 1416 (1980). The doctrine is recognized in Iowa. See Jahnke 191 N.W.2d 780. However, the Iowa court in Wilson 282 N.W.2d 664 rejected the doctrine as a defense to claims for negligent building inspection.

C. Scope of employment is defined as follows: A tort shall be deemed to be within the scope of employment or duties if the act or omission reasonably relates to the business or affairs of the municipality and the officer, employee or agent acted in good faith and in a manner a reasonable person would have believed to be in and not opposed to the best interests of the municipality. Section 613A.2.

This definition of scope of employment was added by a 1974 amendment and on its face would seem to eliminate municiple liability for intentional torts. Such an interpretation would be consistent with §25A.14 of the State Tort Claims Act which exempts a wide range of intentional torts.

A municipality has no duty to defend or indemnify an employee for tortious conduct beyond the scope of his employment. Roberts 281 N.W.2d 20.

A municipal employee's preparation of a libelous memo maliciously, recklessly and in bad faith constitutes conduct outside the scope of employment. Lamantia 298 N.W.2d 245.

Malicious prosecution, abuse of process, conspiracy to obstruct justice are torts involving willful and wanton conduct under Chapter 25A (State Tort Claims). Gartin 281 N.W.2d 25. It is probable such conduct is outside the scope of employment under §613A.2.

The case of Strong 179 N.W.2d 365 in which the court held the municipality could be liable for assault and unlawful arrest by a police officer was decided before the definition of scope of employment was added in 1974.

III. Claims exempted are set out in 613A.4 as follows: (1) Any claim by an employee of the municipality which is covered by the Iowa Workers' Compensation Law. (2) Any claim in connection with the assessment or collection of taxes. (3) Any claim based upon an act or omission of an officer or employee exercising due care in the execution of a statute, ordinance or officially adopted resolution, rule or regulation of a governing body. (4) Any claim against the municipality as to which the municipality is immune from liability by the provisions of any other statute or worthy action based upon such claim has been barred or abated by operation of statute or rule of civil procedure.

Claims by firemen and policemen entitled to benefits under Chapter 411 are barred even though they are not covered by workers' compensation. Goebel 267 N.W.2d 388.

Nicholson 60 N.W.2d 240 (pit adjacent to street); Bliven 85 Iowa 346, 52 N.W. 246 (falling billboard); Hall 79 N.W.2d 784 (defective stop sign pole); Elledge 144 N.W.2d 283 (storm sewer); Platter 21 N.W.2d 787 (sanitary sewer); McGuire 189 N.W.2d 592 (sewage disposal plant); Lubin 131 N.W.2d 765 (water main); Rosenau 199 N.W.2d 125 (fireworks display in public park); Symmonds 242 N.W.2d 262 (failure to install stop sign).

B. Snow removal.

The rule under §364.12, Iowa Code, with regard to snow removal from sidewalks remains as it was - the city is liable for negligently failing to remove from the public sidewalk and the abutting owner is not liable unless it appears he caused the dangerous condition by such acts as discharging water or snow on the sidewalk. Peffers 299 N.W.2d 675.

Mere slipperiness caused by ice and snow in natural condition does not give rise to liability. However, if snow or ice are permitted to remain until it becomes rigid, rough and uneven, liability may be imposed provided the municipality has actual or constructive notice. Hovden 155 N.W.2d 534.

C. False arrest.

Petition alleging unlawful arrest and detention, assault and negligence in hiring an incompetent police officer stated a cause of action against the city. Strong 179 N.W.2d 365. See also Young 262 N.W.2d 612 and Nelson 262 N.W.2d 579.

D. Libel and slander.

Members of the city council have qualified privilege with regard to statements made during council proceedings and an injured party must prove actual malice to recover for slander. Mills 63 N.W.2d 222; Cowman 234 N.W.2d 114. In view of the statutory definition of scope of employment, can a municipality be held liable for malicious conduct?

E. Actions under 42 U.S. Code 1983.

A municipality can be sued directly under §1983 if the official policy or custom of the municipality causes the violation of constitutional rights but the municipality is not liable solely on the basis of an employer-employee relationship with the tort feasor. Monnell 436 U.S. 658; 98 S.Ct. 2018, 56 L.Ed. 611.

Section 613A.8 expressly provides that the municipality's duty to defend and indemnify employees extends to 1983 claims.

F. Failure to provide police protection.

A municipality is not liable for failing to protect a citizen against mob violence. Jahnke 191 N.W.2d 780.

G. Building inspection.

A municipality may be held liable for negligence in failing to enforce building and fire codes. Wilson 282 N.W.2d 664.

VI. Indemnity.

Section 364.14 provides that if proper notice is given to indemnitor, a judgment against a municipality is conclusive as to: (1) existence of defect or other cause of injury, (2) liability of the municipality to the injured party, (3) amount of damage.

Section 364.14 does not create the municipality's right to indemnity - it exists at common law. City of Des Moines 30 N.W.2d 170.

Notice sufficient even though the municipality asserts liability over on an erroneous theory. Franzen 101 N.W.2d 4.

Abutting property owner who creates a dangerous condition on a public way must indemnify a municipality compelled to pay damages as a result of the dangerous condition. Franzen 101 N.W.2d 4.

Where a municipality grants a public utility a franchise to use the public way, the utility impliedly agrees to perform in such a manner as to save the municipality from liability and as a consequence must indemnify. City of Des Moines 188 Iowa 24, 175 N.W. 821.

VII. Punitive damages.

Since §613A does not provide to the contrary, a municipality is liable for punitive damages. Young 262 N.W.2d 612. Caution: Does present definition of "scope of employment" limit municipality's exposure to punitive damages.

Liability insurance policy construed to provide coverage for municipal punitive damage liability. City of Cedar Rapids 304 N.W.2d 228.

A municipality is not liable for punitive damages under 42 U.S. Code §1983. City of Newport v. Fact Concerts decided by U.S. Supreme Court on June 26, 1981.

VIII. Miscellaneous.

The definition of employee in §613A.2 includes a person who performs services for a municipality whether or not the person is compensated. Is this definition broad enough to include police informers? Independent contractors?

Despite provision of 613A.4, exclusive remedy is not against municipality and employee may be sued. Nelson 262 N.W.2d 579.

HANDLING OF COMPLEX LITIGATION AS VIEWED FROM THE BENCH

* * * * * * *

HON. HARLAN W. BAINTER
DISTRICT COURT JUDGE
Eighth Judicial District
of Iowa
Mt. Pleasant, Iowa

I. Introduction. "When a protracted case is identified, the assigned judge should, at the earliest moment, take actual control of the case. The judge should make himself available at all reasonable times, holding frequent pre-trial conferences, offering suggestions, and maintaining a firm, but understanding attitude towards the parties, with the objective of organizing and simplifying the issues and obtaining the stipulation of all possible facts and an accurate statement of the material issues concerning which there is a genuine disgreement." (Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 FRD 351, 383.)

a. What is a complex case? A complex case is complex by reason of the number of parties, number of dollars involved, or nature of the issues.

II. One judge must be assigned as soon as the case is filed.

III. The assigned trial judge must maintain an indexed file to the case, including a file of interrogatories.

a. Daily copy of filings must be sent to the assigned judge wherever he is assigned.

IV. Monthly pre-trial conferences shall be scheduled at least six months in advance.

a. Fix deadlines early and review monthly.

b. The Court should prepare an agenda for all pre-trial conferences allowing ample time at the end to attend to matters requested by counsel.

c. All pre-trial conferences shall be attended by counsel with authority to make decisions on the case.

V. Techniques must be developed to expedite the case through the courts.

a. Trial judge must be prepared to dispose of objections during depositions by conference call as the depositions are being taken.

b. The question of bifurcation of issues must be addressed early in the case.

c. If there are multiple plaintiffs, it may be necessary to designate trial counsel.

d. It may be necessary for the parties to employ an expert for the Court in order to resolve technical scientific questions.

VI. Final pre-trial order covering facts, brief, and proposed instructions. (See attached order.)

VII. The settlement conference.

VIII. The trial court judge assigned to a complex case must act as a catalyst and a funnel in order to move the case through the courts.

IN THE DISTRICT COURT OF IOWA IN AND FOR HENRY COUNTY

UNITY BUYING SERVICE CO., INC.,

Plaintiff,

vs. Cause #7526

METROMEDIA, INC.; ITT WAKEFIELD CORPORATION and INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, and GENERAL ELECTRIC COMPANY,

Defendants.

AMREP CORPORATION, PARENTS' MAGAZINE ENTERPRISES, INC., and PARENTS' MAGAZINE'S MAIL ORDER SERVICES, INC., and TIME INCORPORATED,

Plaintiffs,

vs. Cause #7588

METROMEDIA, INC.; ITT WAKEFIELD CORPORATION and INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, and GENERAL ELECTRIC COMPANY,

Defendants.

SHELL OIL COMPANY,

Plaintiff,

vs. Cause #7745

METROMEDIA, INC.; ITT WAKEFIELD CORPORATION and INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, and GENERAL ELECTRIC COMPANY,

Defendants.

METROMEDIA, INC., a Corporation,

Third-Party Plaintiff,

vs. Cause #7526

ITT WAKEFIELD CORPORATION and INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Third-Party Defendants, and Fourth-Party Plaintiff,

vs.

GENERAL ELECTRIC COMPANY,

Fourth-Party Defendant.

A36 803

This order supersedes the order of February 25, 1981 setting out pre-trial brief and instruction requirements as to all parties.

All plaintiffs will be referred to as plaintiffs. All defendants will be referred to as defendants. All third- and fourth-party plaintiffs will be referred to as cross-petition plaintiffs, and all third- and fourth-party defendants will be referred to as cross-petition defendants.

Phase I of the trial of the above and foregoing cause is scheduled to commence on June 23, 1981 at 9:30 a.m. to a jury and will deal only with the issue of liability. Because the pleadings are voluminous, the Court deems the following order appropriate.

IT IS ORDERED:

PLAINTIFF'S PRE-TRIAL BRIEF

On or before May 1, 1981, all plaintiffs shall file a detailed written pre-trial brief consisting of, first, a narrative statement of all facts proposed to be proved, and, second, concise statements of the legal contentions and the authorities in support thereof.

The narrative statement of facts and the statement of legal conclusions shall be set forth in the manner hereinafter ordered in separate sections of the pre-trial brief and shall not be commingled.

a. The narrative statement of facts shall set forth in simple, declarative sentences, separately numbered, the narration of all facts relied upon by plaintiffs in support of their claim for relief herein.

The narrative statement of facts shall be complete in itself and shall contain no recitation of what any witness testified to, or what any other parties stated or admitted in these or other proceedings, and no reference to the pleadings or other documents or schedules as such, provided that at the option of plaintiffs, (or of defendants in responses to this order) a narrative statement of facts may contain

references in parentheses to the names of witnesses, depositions, pleadings, exhibits, or other documents, but no party shall be required to admit or deny the accuracy of such references.

The narrative statement of facts shall, so far as possible, contain no color words, labels, or legal conclusions; and in no event shall any such color words, labels, or legal conclusions be commingled with any statement of fact in any sentence or paragraph.

The narrative statement of facts shall be so constructed to the best of the ability of plaintiffs' counsel that the opposite party will be able to admit or deny each separate sentence of the statement. Each separate sentence shall be separately and consecutively numbered.

b. In the separate section of the pre-trial brief containing the statements of legal contentions and authorities in supp rt thereof, all legal contentions and authorities of plaintiffs, necessary to demonstrate the liability of defendants, shall be separately, clearly, and concisely stated in separately numbered paragraphs. Each paragraph shall be followed by citations of authorities in support thereof.

c. In a separate division of the pre-trial brief, plaintiffs shall set out a complete set of proposed instructions to be given the jury, including the specific interrogatories which are proposed to be submitted to the jury. Each instruction shall have designated thereon the authorities which support that proposition, excepting that authorities need not be listed where uniform instructions are requested.

DEFENDANTS' AND CROSS-PETITIONERS' PRE-TRIAL BRIEF

1. Within 20 days after service of plaintiffs' narrative statement of facts, defendants and cross-petitioners shall file a pre-trial brief containing factual statements admitting or denying each separate sentence contained in the narrative statement of fact of plaintiffs, except in instances where a portion of a sentence can

be admitted and a portion denied. In those instances, defendants shall state clearly the portion admitted and the portion denied.

Each separate sentence of defendants' response shall bear the same number as the corresponding sentence in plaintiffs' narrative statement of facts.

In a separate portion of defendants' narrative statement of facts, defendants shall set forth in a separate narrative statement all affirmative matters of a factual nature relied upon by it, and shall make a narrative statement of all facts proposed to be proved by their cross-petition if they are a cross-petition plaintiff. The narrative statement shall be prepared in precisely the same manner as that required of the plaintiffs.

Within 20 days after the service of plaintiffs' statements of legal contentions and authorities in support thereof, defendants shall file, in a separate division of their pre-trial brief, a statement of their legal contentions and authorities in support thereof, which shall directly respond to plaintiffs' separate legal contentions and contain such additional contentions of defendants necessary to demonstrate the nonliability or limited liability of defendants, or both, and additionally shall state their legal contentions and authorities in support of any cross-petitions. The statements of legal contentions and authorities of defendants and cross-petitioners shall be constructed in the same manner as provided herein for plaintiffs' statements of legal contentions and authorities.

3. Within 20 days after the service of plaintiffs' proposed instructions and interrogatories, defendants and cross-petitioners shall file, in a separate division of their pre-trial brief, their proposed instructions and interrogatories to be constructed in the same manner as provided herein for plaintiffs' proposed instructions and interrogatories.

PLAINTIFFS' REPLY PRE-TRIAL BRIEF and
CROSS-DEFENDANTS' ANSWERING BRIEF

Within 15 days after service of defendants' pre-trial briefs containing statements of affirmative matters and cross-petitioners' narrative statements, plaintiffs and cross-defendants shall file a reply brief containing factual statements admitting or denying each separate sentence of the separate narrative statement of affirmative matters or cross-petitioners' narrative statement. This portion of the reply brief shall be constructed in the same manner as provided herein for factual statements responding to the narrative statement of facts previously provided for.

Within 15 days after service of defendants' and cross-petitioners' statement of additional legal contentions and authorities in support thereof, plaintiffs and cross-defendants shall file in a separate part of their reply brief each separate statement of additional legal contentions and authorities in support thereof, which shall directly respond to the additional legal contentions and authorities of defendants and cross-petitioners. The statement of legal contentions and authorities in support thereof shall be constructed in the same manner provided for herein.

Within 15 days after service of defendants' and cross-petitioners' proposed instructions and interrogatories to be submitted to the jury, plaintiffs and cross-defendants shall file in a separate division of their reply brief any further proposed instructions which they believe are necessary in direct response to those proposed by defendants and cross-petitioners.

CROSS-PETITIONERS' REPLY BRIEF

Within 10 days after the filing of cross-defendants' narrative statement of facts, legal contentions and authorities and proposed instructions and interrogatories, cross-petitioners shall reply fully as provided herein.

Any factual contentions, any legal contentions, any claim for relief or defense (in whole or in part) or affirmative matter not set forth in detail as provided herein shall be deemed abandoned, uncontroverted or withdrawn (as may be appropriate) in future proceedings, notwithstanding the contents of any pleadings or other papers on file herein except for factual contentions, legal contentions, claims for relief or defense thereto and affirmative matters of which a party may not be aware and could not be aware in the exercise of reasonable diligence at the time of filing the briefs herein provided for. Any matters of which a party was not aware at the time of filing and which he could not have been aware in the exercise of diligence at the time of the filing of a brief may be supplied by a supplemental brief by leave of Court for good cause shown on timely motion therefor.

Dated and signed this 18 day of March, 1981.

District Court Judge, Eighth
Judicial District of Iowa

Copies: Sent 3/18/81

John E. Rogers
William Bauer
Raymond T. Walton
Gerald D. Goddard
Charles I. Traw
Charles Miller
Robert Iilden
Patrick M. Roby
William Rosebrook
Ralph Sauer
A. K. Elgar

INDIVIDUAL AND GROUP DEFENSE OF COMPLEX LITIGATION
(Some Practical Considerations and Suggestions)

by

Charles J. Cronan IV*
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Louisville, Kentucky

I. INTRODUCTION.

In the not too distant past, complex tort cases arose because of unanticipated or accidental circumstances such as airplane crashes, structure fires, etc. More recently, there has been a proliferation of tort cases, particularly in the field of product liability, which are "complex" by design of the filing attorneys. With plaintiffs proceeding under theories of "enterprise" or "industry liability" it is not uncommon for all manufacturers of a certain type of product to be named as defendants in a single action.

The Defense Research Institute recently reported that, as a result of the MGM fire in Las Vegas and the walkway collapse in Kansas City, plaintiffs have formed litigation committees, have established a computer information service and have rented offices to handle these and similar claims. Litigation groups have either been formed or are in the process of being formed by the plaintiffs in areas dealing with "Agent Orange," aluminum wire, asbestos, Bendectin,

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DES, formaldahyde, Ford transmissions, fuel systems, Jeeps, polyurethene foam, polyvinyl chloride wire insulation and building materials, toxic shock syndrome, etc.

Multiparty "complex" litigation presents a unique opportunity for "group defense". However, the concept of "group defense" is not without risk to an attorney's primary duty to represent his individual client. This paper undertakes to highlight some of the opportunities and potential problems which can arise in the group defense of a complex case.

II. WHAT CIRCUMSTANCES MAKE A CASE "COMPLEX?"

A. Any one or more of the following factors make a case "complex":

1. Potentially large number of fact witnesses [air crash, hotel fire, industrial accidents].
2. Large number of plaintiffs [large industrial exposure, widely-used product, disasters involving large groups of people].
3. Large number of defendants ["enterprise" or "industry" liability claims alleging conspiracy of entire industry to withhold information upon risks or adverse effects of product, e.g., DES, PVC, aluminum wire, etc.].
4. Large number of documents [engineering development and design, testing, etc.].

III. CHALLENGES PRESENTED BY "COMPLEX" CASES:

(Although these challenges exist to an extent in any case, they are magnified in complex litigation).

1. Acquisition of information about facts and details of plaintiff's case.

2. Assimilation and analysis of information.

3. Ability to recall and use information at a later date.

4. Acquisition, analysis and assimilation of information regarding your own client and other defendants.

5. Maintaining law practice and keeping other clients while handling the "complex" case.

IV. SOME COMMENTS AND SUGGESTIONS ON "GROUP DEFENSE" OF THE COMPLEX CASE.

Caveat: A "group defense" affords unique opportunities for cooperation among defense counsel, allocation of resources and cost efficiency; however, it goes without saying that each lawyer's primary duty is to his individual client. Group defense is no substitute for individual preparation of your client's case. Participation in any group should not be at the expense of your ability to "go it alone" if necessary. In that regard, the following comments are offered on intra-office management procedures:

A. Intra-Office Personnel:

1. Don't underestimate requirements for staffing the case. It will not be unusual to have simultaneous depositions at different locations. This is particularly true as the trial date approaches. It is most efficient in the long run to have others involved at an early stage in the case so they can "grow" with it and fill in for you when needed.

2. Consider the formation of your own office "team" with division of responsibility for research, discovery, organization and handling of files, documents and exhibits, defense preparation and overall coordination.

3. Paralegals can be indispensable in indexing and summarizing pleadings, files and depositions. If a paralegal or associate is assigned to the case in its early stages, their familiarity with the facts can be invaluable when recall of information is necessary.

B. Intra-office File and Document Handling:

1. Use of loose-leaf binders is recommended for handing all documents other than pleadings. Loose-leaf binders permit ease of review, removal and copying and make it easy to catagorize by date, subject matter, etc.

2. Anticipating eventual inclusion of materials in file notebooks, adopt a standard letter-sized paper for all research memoranda, deposition summaries,

etc., and keep these in loose-leaf binders. If necessary, irregular-sized papers can be reduced to letter-size for inclusion in the binder.

3. Don't be stingy with files. Recall of information is facilitated by having several files under descriptive titles (with a master list of titles). These might include: pleadings, court orders, interrogatories to plaintiffs, interrogatories to defendants, your own client's pleading and discovery file, plaintiff's experts, defendant's experts, fact witnesses, legal research (by issue), instructions, etc.

4. Summarize information as it is accumulated. Storage and recall of information by a computer is a subject unto itself; however, there are other alternatives in cases where computers are not feasible. Take detailed notes at depositions. When the deposition transcript is received, have a paralegal or associate annotate your deposition notes with page numbers, make other minor corrections, have the notes typed and add them to a binder which includes similar summaries with a table of contents including each witnesses name. On reviewing answers to interrogatories, document productions, etc., prepare short cover memoranda summarizing contents and attach them to the materials before filing.

5. Consider the use of a card index of witnesses. List the witness' name, address and telephone number, a brief description of his knowledge and where references are made to that witness.

V. GROUP DEFENSE.

A. Generally: Group defense involves cooperation among defense counsel on the entire case or on certain aspects of the case.

B. Benefits of Group Defense:

1. Efficiency: Permits allocation of resouces to tasks at hand, avoids duplication of effort and permits more thorough preparation of the case than might result from individual efforts.

2. Cost Reduction: Expenses of case preparation may be prorated among members of the group thereby reducing cost to individual client.

3. Avoids unnecessary conflict among defendants which usually inures to the plaintiff's benefit.

4. Promotes common basis of understanding and development of common theories and tactics.

C. Suggestions for Group Formation:

1. Select a few co-counsel with whom you are compatible and take the initiative in contacting others, suggesting a meeting to discuss group formation.

2. Emphasize temporary leadership roles with responsibility for calling meetings, moderating and then follow-up with recommendations. Leadership will naturally evolve as the group works together.

3. Discuss proposals and reach agreement at an early stage on cost-sharing and confidentiality agreements [see samples attached].

4. Particularly in "industry liability" cases where a conspiracy among defendants may be alleged, obtain an order from the court permitting defendants to work as a group, preserving individual representation, and prohibiting plaintiffs from commenting at trial on any group effort by attorneys for defendants. A motion for such an order can be couched in terms of seeking to accommodate the court and aiding the plaintiffs by a voluntary effort on the part of defendants to designate one or more of the group to act as a liason with the court and plaintiffs.

5. Define issues and defense theories. Identify, and if possible, eliminate conflicts. Determine areas of cooperation.

6. Obtain a facility to serve as a "group office" at an early stage. This affords a meeting place for defendants, a common space for the storage of documents, exhibits, etc., and avoids undue burden on any one member of the group.

D. Cost Sharing: The cost-sharing agreement mentioned above is a crucial factor. It is suggested that a member of the group be appointed "treasurer" with responsibility for collecting assessments, making disbursements and furnishing members with a periodic accounting. It is suggested that attorneys' fees not be included in the "cost-sharing" agreement since this may become an area of conflict. Each attorney should be expected to contribute time and effort to the group with his client bearing that cost on the theory that his client will also benefit from the services of other members of the group for which the client will not pay. Expenses, such as for group experts, original deposition costs, central office space staffing, group trial exhibits, etc. should be covered by the agreement. The group should arrive at a realistic initial assessment. Clients should be advised in advance that additional assessments will probably be necessary.

VI. SUGGESTED AREAS OF COOPERATION AND PREPARATION OF DEFENSE.

A. Research: Once issues are defined by the group, research can be assigned to individuals in anticipation of a shared work product. Early research furnishes a common understanding of the legal issues and serves as a framework for discovery.

B. Document Review: Service of documents among defendants can be eliminated by the filing of one copy of all documents in a group office or central location. Consider assignment

G. Question Outlines: Where individual members of the group are to have primary responsibility for particular depositions it is helpful to have a standard outline of questions or areas to be covered. This outline should be prepared by the group with the understanding that the questioner is not limited to it but will at least cover the areas mentioned.

H. Development of Technical Expertise: Individuals in the group may already have, or may develop, technical expertise in areas of importance such as factual details of the case, details of a product, building or industry, medical aspects, or technical aspects of the case.

I. Motions, Memoranda and Briefs: Although filed on behalf of individual clients, these may be the product of a group effort.

J. Identification and Development of Group Exhibits.

VII. GROUP PARTICIPATION AT TRIAL.

A. Generally: Only the most general comments can be made on this topic because of the number of variables in each case. However, as a result of a group preparation of the case, particular talents are usually identified and certain lawyers will have more familiarity than others with certain witnesses, issues or aspects of the case. Obviously, those attorneys demonstrating the most talent for a particular

of a committee to review all documents and to extract references to other defendants and identify "bad" documents.

C. Development of Experts: Particularly in "industry liability" cases, individual clients may have favorite experts or people held in high regard in that particular industry. Defendants should form teams to interview experts and to assess their value to the group.

D. Plaintiff's Experts: A separate team should be assigned to conduct background investigation on plaintiff's experts and to have primary responsibility for discovery relating to the opinions of those experts.

E. Discovery: A discovery committee can serve the valuable function of eliminating duplication of interrogatories and can avoid claims of "harassment" by the plaintiffs. Additionally, the discovery committee can be responsible for interviewing and obtaining statements from fact witnesses, scheduling depositions of common interest to the group, making deposition assignments and furnishing reports.

F. Depositions: Particularly where numerous depositions are anticipated, it is suggested that individual members of the group be assigned primary responsibility for covering particular depositions with another member assigned to attend and furnish all members of the group with a written summary. This may make attendance by every member of the group unnecessary.

theory and tactics of defense. A trial notebook or memorandum may also serve this purpose.

VIII. PROSPECT OF SETTLEMENT.

1. A well coordinated "group defense" is a formidable threat to plaintiffs where all members are equally resolved to "hang together." Individual settlements are the bane of "group defense" since they usually result in disruption of the group and necessity for reassignment of tasks.

2. The prospect of individual settlements makes it essential that each attorney is prepared "to go it alone" on behalf of his individual client. Group participation should never be seen as an alternative to individual preparation for trial and the possibility for settlement must be considered with each job assignment. Particularly as trial approaches, it is important to assign more than one attorney to most projects so that their completion will not be interrupted by last minute settlements to the detriment of those remaining in the case.

task should be assigned that task at trial. Such assignments could include:

1. Responsibility for voir dire and jury selection: Voir dire questions can be submitted by the entire group. A local lawyer would probably be best able to assist in jury selection.

2. Opening statements: Again, ideas can be submitted by each member of the group. To the extent that all interests are identical, one or several of the lawyers can be selected to make the opening statement. This can be done on the basis of "audition" or general consensus.

3. Responsibility for cross-examination of plaintiff's witnesses: In each instance, backups should be available to cover the possibility of settlement by members of the group.

4. Selection of defense witnesses, preparation of the witnesses, and responsibility for offering individual witnesses' testimony.

5. Preparation of trial motions, closing arguments, post-trial motions, etc.

6. Ideally all members of the group would be equally familiar with the strategy and tactics to be followed in the case. In this regard, the ideal is seldom achieved; therefore, it may be helpful to hold several

Additional commitments for additional expenses may be agreed upon and may be effected through an addendum to this agreement or by letter from each defendant without the necessity of entering into another cost sharing agreement.

3. Non-payment. In the event that one or more defendants fail to enter into this agreement or fail to contribute their share as provided in Paragraph 2, the common costs up to ($500.00) Five hundred and 00/100 Dollars per signing defendant that are not paid will be apportioned among the signators.

4. Sanction. If a defendant fails to agree to this cost sharing agreement or fails to contribute its share of the costs, then the Steering Committee may decide that the defendant may not take advantage of the work performed in the common defense. The Steering Committee may, at its option, refuse to grant such a defendant access to any documents or other work product resulting from the work performed pursuant to this agreement, and/or refuse to permit such a defendant to sign joint pleadings or other documents.

5. Method of Billing. Each defendant which incurs common costs under this agreement will periodically submit a bill for them to the Steering Committee. If the Steering Committee believes the expenses incurred were reasonably necessary under Paragraph 1 of this Agreement it will include them in the common costs to be apportioned under Paragraph 2. From time to time, the Steering Committee will prepare bills showing the total amount of common costs incurred, the nature of each item of cost, the "duty" with which it is related and

COST SHARING AGREEMENT

Several lawsuits have been filed in both the U.S. District Court for the Eastern District of Kentucky and the Campbell Circuit Court for Campbell County, Kentucky. The lawsuits have been brought in an attempt to recover damages as a result of a fire at the Beverly Hills Supper Club. Many persons and corporations have been named as defendants. The defendants have been put into tiers or categories by the Judges involved for the purpose of trial. The defendants in each category supposedly have a common interest. In order to provide for as much of a common defense as is practical and feasible, and in order that that defense may be prepared with a minimum of duplication of effort and expense, the undersigned counsel for certain of the defendants in the suits enter into this cost sharing agreement on behalf of their respective clients.

1. Costs to be shared. The costs to be shared ("common costs") under this agreement are the out-of-pocket disbursements incurred by a participating defendant in the execution of those assigned duties for the common defense of the suits. The duties must have been assigned or approved by the Steering Committee to be eligible for reimbursement. This agreement does not apply to attorneys' fees or paralegal fees incurred by any defendant.

2. Apportionment of Common Costs. The common costs will be shared on an equal basis by all defendants.

The maximum cost to any one defendant under this agreement will be ($500.00) Five hundred and 00/100 Dollars.

"Steering Committee" as used in this document is a committee for the following purposes:

1. To coordinate discovery and arrange for the convenient dissemination of discovery schedules.

2. Coordination of physical arrangements for depositions.

3. Preparation of any appropriate discovery requests from our group to plaintiffs.

4. Preparation of memoranda necessary for any discovery request filed by our group or filed by plaintiffs.

5. Note that the existence of this committee and the work done by this committee does not preclude any efforts by any defendant in this group to ask questions in a deposition or file any appropriate memoranda. The primary purpose of this group is to make the discovery phase of our case as uncomplicated as possible and to arrange for the even flow of information, schedules and taking of depositions without prejudicing the rights of any member of this group.

each defendant's share of the total costs. When presented with its bill, each defendant will with reasonable promptness forward the appropriate amount to the person or company specified by the Steering Committee.

6. Work Product Depository. All memoranda, analyses, affidavits, test reports, etc. which constitute the work product of parties to this Agreement, the cost of which is to be shared as provided in Paragraph 1 herein-above, will be maintained in a "Document Depository", the location of which will be established by the Steering Committee. The work product produced under this agreement is to be used only by the participating defendants unless prior approval is given by a majority of the Steering Committee. Upon request directed to any member of the Steering Committee, access to the "Document Depository" shall, subject to Paragraph 3, be made available to any part to this Agreement, as soon after such request as is practicable.

We agree to the terms of this Cost Sharing Agree-ment on behalf of our respective clients:

_____on behalf of_____.

Date_____

_____on behalf of_____.

Date_____

_____on behalf of_____.

Date_____

_____on behalf of_____.

Date_____

DRAFT

CONFIDENTIALITY AGREEMENT

In the interest of pursuing discovery, attempting settlement, preparing for trial, and trying the cases known as the Beverly Hills Fire Litigation, counsel for certain co-defendants have agreed that it is to their mutual benefit to share information.

It is therefore agreed among counsel for co-defendants who have signed below:

1. The following definitions shall apply to this agreement

(a) "Defendant" shall mean and refer to those parties named as defendants in the Beverly Hills Fire Litigation which are assigned to the group "Manufacturers of Aluminum Wire and Devices" in Pre-trial Order 74 of Judge Carl Rubin;

(b) "Confidential Information" shall mean and refer to any information ~~prominently labeled "confidential"~~ at the time of its disclosure by the defendant disclosing such information ("disclosing party"), and not already known to the recipient or received from a third party without any breach of a confidentiality obligation. Information which was confidential at the time of its disclosure but which is

7. This agreement is made in an effort to comply with the directions of the Courts in these actions and to expedite the discovery procedures. The agreement is for the purposes of discovery only and is not to be construed as evidence. Further, this document is not to be construed as the undertaking of a joint defense by those signing the document, nor that those defendants entering into this agreement have a common interest as is alleged.

disclosing party retains all rights to object to its introduction into evidence.

3. The substance and content of confidential information, as well as all notes and memoranda relating thereto, shall not be disclosed to anyone other than a qualified person.

4. The exchange among defendants of privileged and confidential information and documents (including those protected by the attorney-client privilege and/or work product doctrine) shall not effect a waiver of privilege or confidentiality.

5. Upon termination of the Beverly Hills Fire Litigation by settlement or final judgment as to all defendants as defined in paragraph 1.(a) above, counsel for each defendant receiving confidential information shall assemble and return to the disclosing party all documents containing confidential information, except that all materials constituting the work product of such counsel of record, or any other qualified person, shall, to the extent such work product describes or quotes from confidential material in a manner that would compromise the confidentiality of the returned materials, be forthwith destroyed, unless specific authorization not to destroy said work product is granted by the disclosing party.

thereafter made public in a manner other than by breach of this agreement shall no longer be confidential information.

(c) "Qualified Person" shall mean and refer to:

i. Counsel for any defendant, and attorneys, law clerks, paralegal assistants, stenographic and clerical employees operating under the direct supervision of such counsel;

ii. Persons who are retained or employed by counsel or a defendant to assist counsel in discovery, settlement negotiations, preparation for trial, and trial of the Beverly Hills Fire Litigation. Any such person shall be given a copy of this Agreement and shall acknowledge in writing that he or she has read and understands the provisions of this Agreement, and agrees to abide by its terms.

2. Confidential information shall be used only in pursuing discovery, preparing for settlement negotiations, preparing for trial, or trying the case (including introduction into evidence) known as the Beverly Hills Fire Litigation, and shall not be used for any other purpose whatsoever; provided, however, that the

ACKNOWLEDGEMENT

I hereby acknowledge that I have read the CONFIDENTIALITY AGREEMENT, dated _____, which was signed by counsel for certain defendants in the Beverly Hills Fire Litigation, that I understand the provisions set forth therein, and that I agree to abide by the terms of the Agreement.

_____
Name

_____
Position

USING COMPUTERIZED LITIGATION SUPPORT—FRIEND OR FOLLY?

A discussion outline by:

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Legal Support Services
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I. Introduction

II. The lawyers factual information needs and concerns in litigation.

III. Alternatives to consider to meet these information requirements.

IV. To computerize or not? Some factors to consider.

V. Types of cases which have been computerized.

VI. Getting at the meaning of the information you have -

Indexed vs. Full Text

VII. Service vs. minicomputer vs. large computers

VIII. Dealing with a service vendor

A. Factors you may consider

B. Information the vendor needs

IX. Summary

DEFENDING THE CO-EMPLOYEE CASE
SOME UNANSWERED QUESTIONS

Patrick M. Roby
Shuttleworth & Ingersoll
Cedar Rapids, Iowa

INTRODUCTION

It has now been seven years since the Iowa Legislature amended §85.20 of the Code to require proof of gross negligence in co-employee actions. As of mid-August 1981, the Iowa Supreme Court had not yet decided a case arising under the amended statute. As of that time, there still had not been a decision as to exactly what is gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another. At least one case, Thompson v. Long, No. 2-64595 has been argued and is awaiting decision.

While many Defense Counsel have spent a great deal of time attempting to predict how the Supreme Court will define co-employee gross negligence, there are many other questions that confront Defense Counsel in defending cases brought under §85.20. Some of them will be discussed here.

I. WHAT MUST THE PLAINTIFF PROVE TO RECOVER?

Although there has not been a definition of gross negligence under §85.20, the Supreme Court has set forth the

criteria for imposing individual liability on a co-employee. That criteria, with the addition of the gross negligence requirement, can be stated as follows:

a. The employer owed a duty of care to the plaintiff, breach of which has caused the damage for which recovery is sought.

b. The duty was delegated by the employer to the defendant.

c. The defendant officer, agent, or employee breached the delegated duty through personal fault rising to the level of gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.

d. The co-employee defendant must have a personal duty towards the plaintiff, breach of which specifically caused his damages.

Kerrigan v. Errett, 256 N.W.2d 394, 397, (Iowa 1977) and §85.20 Code of Iowa.

II. IS CONTRIBUTORY NEGLIGENCE AVAILABLE AS A DEFENSE?

In Sanburn v. Rollins Hosiery Mills, Inc., 217 Iowa 218, 251 N.W. 144 (Iowa 1933) the Iowa Supreme Court said the following:

> "So, whatever wantonness means, it is something more than recklessness under the definition of this Court; because under the definition in Siesseger v. Puth, 213 Iowa 164, 239 N.W. 46, supra, there may be recklessness without willfulness or wantonness." (emphasis added) 251 N.W. at 147

In Siesseger v. Puth, 213 Iowa 164, 239 N.W. 46 (Iowa 1931), the Supreme Court stated:

> "To be 'reckless', one must be more than 'negligent'. Recklessness may include 'willfullness' or 'wantonness', but if the conduct is more than negligent, it may be 'reckless' without being 'willfull' or 'wanton', but to be reckless in contemplation of the statute under consideration, one must be more than negligent ....
>
> . . . .
>
> "...As recklessness is more than negligence, it follows that contributory negligence is not an element to be considered or dealt with, either by pleading, proof, or instruction of the court, in cases brought under this statute." (id. at 54)

While it could be argued that the Siesseger case and subsequent cases affirming it such as Edwards v. Kirk, 227 Iowa 684, 288 N.W. 875 (Iowa 1939); and Bohnsack v. Driftmier, 52 N.W.2d 79, 84 (Iowa 1952) are cases brought under the guest statute and therefore not analogous to cases under §85.20, it should be remembered that Sanburn v. Rollin Hosiery Mills Co., supra, was a business guest case and the court quoted Siesseger with approval without making any distinction between the forms of action.

The Restatement of Torts (Second) states as follows:

> "§503. Plaintiff's Conduct
>
> (1) A plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety."

If contributory negligence is not a defense to recklessness and if wanton conduct is more than reckless conduct, then it appears that contributory negligence should not be a defense to an action brought under §85.20.

III. IS COMPARATIVE NEGLIGENCE AVAILABLE AS A DEFENSE?

If the Iowa Supreme Court keeps the promise it made in Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980) and abolishes the doctrine of contributory negligence and replaces it with comparative negligence, we will no longer need to worry about whether or not contributory negligence can be a defense in co-employee cases. The question would then be whether the simple negligence of the plaintiff can be compared to the gross negligence of the defendant with the award thereby reduced.

In Fuller, the majority not only cited cases pointing out the "substantial injustice" of the contributory negligence rule but also cases which pointed out the harshness and perceived unfairness of that rule. If comparative negligence is less harsh towards the plaintiff and more fair for everyone, can a grossly negligent defendant rely upon the plaintiff's simple negligence to defeat his recovery? The majority in Fuller quoted the following from Hoffman v. Jones, 280 So.2d 431, 437 (Fla. 1973):

> "The rule of contributory negligence is a harsh one which either places the burden of the loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party." (Fuller at 674)

IV. IS ASSUMPTION OF THE RISK AVAILABLE AS A DEFENSE?

If contributory negligence is not a defense in a co-employee case, it would appear that assumption of the risk should be. Since Rosenau v. City of Estherville, 199 N.W.2d 125 (Iowa 1972), the assumption of risk by the plaintiff may not be submited as a separate defense in an ordinary negligence case. Assumption of the risk is available as a defense in various other situations including products liability cases.

> "The assumption of risk doctrine has to do with the user's culpability; he bars himself from recovering if he voluntarily proceeds in the face of known danger." Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 545 (Iowa 1980).

The assumption of the risk defense requires the defendant to show not only that the plaintiff assumed a known risk but that he did so unreasonably. Hughes, supra., at p. 548. It would appear that assumption of the risk is an appropriate defense in a co-employee case. Certainly the defendant should be permitted to show that a plaintiff, confronted with a situation caused by the gross negligence of a co-employee, who knows of the existence of that situation and knows of the risk and then proceeds unreasonably to assume that risk, should be barred from recovery.

V. IS EVIDENCE OF OSHA VIOLATIONS ADMISSABLE IN A CO-EMPLOYEE ACTION?

In Koll v. Manatt's Transportation Co. 253 N.W.2d 265 (Iowa 1977), the Supreme Court held:

> "(W)e hold violation by an employer of an OSHA or IOSHA standard is negligence per se as to his employee. Such a violation is evidence of

negligence as to all persons who are likely to be exposed to injury as a result of a violation." (id. at 270)

In Pease v. Zazza, 295 N.W.2d 43 (Iowa 1980), the Supreme Court affirmed the trial court's decision to receive into evidence certain OSHA standards for trench safety. The defendant was a co-employee of the plaintiffs.

The Supreme Court has not yet considered the question of whether evidence of violation of OSHA standards, assuming a proper showing of delegation of responsibility by the employer to the co-employee to comply with those standards, can be evidence of gross negligence.

VI. MAY THE CO-EMPLOYEE DEFENDANT OBTAIN CONTRIBUTION?

A. FROM OTHER CO-EMPLOYEES.

Contribution is never available in cases involving intentional wrongs or moral turpitude. Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (Iowa 1956). The question of whether contribution can be available at all in co-employee cases must await the Supreme Court's definition of what is gross negligence under §85.20. Assuming however that the Court does not define gross negligence as requiring a showing of intentional wrong or moral turpitude, then contribution should be available to the co-employee defendant from other co-employees under proper circumstances.

Contribution is premised on common liability of the person seeking contribution and the person from

whom contribution is sought. The common liability must be to the injured party. In Shonka v. Campbell, 152 N.W.2d 242 (Iowa 1967) the Supreme Court said:

> "This common liability may be joint or several, but under our prior holdings in order that a right of contribution exists, the injured party must have a legally recognized remedy against both the party seeking contribution and the party from whom contribution is sought." (id. at 245)

In order for one co-employee to obtain contribution from another co-employee, the party seeking contribution will have to prove that the party from whom contribution is sought was himself liable to the plaintiff and met the criteria set out in Kerrigan v. Errett, supra. and §85.20.

B. FROM PERSON OTHER THAN CO-EMPLOYEES.

Again, assuming that the Supreme Court's definition and interpretation of gross negligence in the context of §85.20 does not rise to the level of an intentional wrong or of moral turpitude, there does not appear to be any reason why the co-employee/defendant cannot seek contribution from others. The Supreme Court in Federated Mutual Implement and Hardware Insurance Company v. Dunkelberger, 172 N.W.2d 137 (Iowa 1969) quoted the following from Farmers Insurance Exchange v. Village of Hewitt, 274 Minn. 246, 143 N.W.2d 230, 233-234:

> "We approve this from decided opinion: 'Contribution rests on common liability,

> not on joint negligence or joint tort. Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds." (id. at 142)

As indicated above however the party seeking contribution will have to show that the original plaintiff had a cause of action against the party from whom contribution is sought.

VII. MAY THE CO-EMPLOYEE DEFENDANT OBTAIN INDEMNITY?

The four recognized grounds for indemnity in Iowa are: 1. express contract 2. vicarious liability 3. breach of independent duty of indemnitor to indemnitee 4. secondary as opposed to primary liability. Iowa Power and Light Company v. Abild Construction Comapny, 259 Iowa 314, 322-323, 144 N.W.2d 303, 308 (Iowa 1966).

It is difficult to imagine the existence of an express contract whereby a third-party would agree to indemnify an employee for any judgment returned against him in favor of a co-employee. Of course if such a contract did exist, it would be a basis for indemnity. Kerrigan v. Errett, supra, specifically states that liability may not be imposed on a co-employee for technical or vicarious fault. The breach of independent duty theory has been used in the context of claims for indemnity from an employer of an injured workman by the first party defendant. As stated in Hysell v. Iowa Public Service Company, 534 F.2d 775 (C.A. 8 1976):

> "In order for an independent duty to establish a basis for indemnity against an employer providing benefits under the Iowa Workmen's Compensation Act,

however, the duty must be of a specific, definite nature." (id. at 782)

The remaining ground for indemnity is secondary as opposed to primary liability. This is also known as active-passive liability.

In Sweeny v. Pease, 294 N.W.2d 918 (Iowa 1980) the Supreme Court declined to decide whether §85.20 would always preclude recovery for indemnity by a co-employee defendant under the primary-secondary liability doctrine. The Court limited its decision to Sweeny's claim that he was entitled for indemnity for attorneys fees and expenses because he was defending against his passive negligence when in fact the active negligence of the employer Pexa was involved. The following portions of the Court's decision are significant in evaluating whether or not the active-passive doctrine can be used as a basis for indemnity in a co-employee suit:

> Active negligence is the negligent conduct of active operations. It involves some positive act or some breach of duty to act which is the equivalent of a positive act. It exists when the person seeking indemnity has personally participated in an affirmative act of negligence, was connected with the negligent act or omission by knowledge or acquiescence, or has failed to perform a precise duty in breach of an agreement. The crucial issue is whether the person seeking indemnity has participated in some manner in the conduct or omission which caused the injury beyond a mere failure to perform a duty imposed by law. In contrast, passive negligence is nonfeasance or inaction, such as the failure to discover a dangerous condition or to perform a duty imposed by law. However, a negligent failure to act when one is charged with a duty to do so is active rather than passive negligence....
>
> ....
>
> ...Even assuming that accusations of gross negligence could conceivably be charges of passive negligence, no doubt

exists that Pease defended charges of active negligence in the Sweeny action. His liability would not have been predicated on mere imputed or constructive fault or simple failure to perform a duty imposed by law. Rather, he plainly defended charges of active negligence in which his personal participation was inherent and essential. His assertion of secondary liability rests on a theory that he did not know any better than to act as he did and was just following Pexa's orders. This is a claim that Pexa's fault was greater in degree, but it is not a basis for converting all the charges against Pease into allegations of primary negligence against Pexa and merely charges of passive negligence against Pease." (p. 823) (emphasis added)

Indemnity from the consequences of one's gross negligence under §85.20 will be difficult to obtain.

CONCLUSION

Although there are still many unanswered questions in the defense of co-employee cases, there is at least one comforting thought about the 1974 amendment.

> "It is obvious the amendment serves to limit the right of an employee to receive compensation from a co-employee. This limitation is substantive, not procedural. Furthermore, it is not remedial, in that it does not provide for redress of wrongs, but rather makes a policy decision to limit the redress available." Moose v. Rich, 253 N.W.2d 565, 572 (Iowa 1977). [emphasis added].

PRIMARY/EXCESS CARRIERS — WHAT ARE THEIR RIGHTS AND DUTIES?

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Whitfield, Musgrave, Selvy, Kelly, & Eddy
Des Moines, Iowa

I. DUTY OF PRIMARY TO EXCESS.

A. GENERAL DUTY.

The "majority rule" in the courts of this country describes the general duty of the primary insurance carrier toward the excess insurance carrier as being the same as that owed by the primary carrier to its insured, i.e. to exercise good faith and fair dealing in its actions. Penn's Estate v. Amalgamated General Agencies, 372 A.2d 1124 (N.J. 1977); Valentine v. Aetna Ins. Co., 564 F.2d (9th Cir. 1977); Peter v. The Travelers, 375 F.Supp. 1347 (D.C. Cal. 1974); Appleman, Insurance Law and Practice, Vol. 7, Sec. 4711 at note 99.45; Lanzone, Insured/ Primary/ Excess - The Duties Owed to the Excess Insurer, 20 For The Defense (1979).

No Iowa reported decision has been found which deals directly with the duty of the primary to the excess (or vice versa). However, it is submitted that the reasoning and trend of decisions in other jurisdictions make it reasonable to believe that the "majority rule" described above is likely to be adopted should the issue come before the Iowa Supreme Court.

B. RATIONALE OF IMPOSITION OF GENERAL DUTY.

The rationale of the "majority rule" seems to be rooted in both legal theory and public policy considerations. The duty owed by the primary to the excess is most often held to arise out of one or more of these theories: (1) equitable subrogation, i.e. the excess insurer stands in the shoes of the insured and may

exercise the same rights toward the primary carrier as the insured; (2) actual assignment of the insured's rights; (3) third party beneficiary. The expressed public policy considerations include: (1) the premium charged by the primary carrier to the insured takes into account the fact that the primary insurer will be undertaking the duty of investigation of the claim, the legal defense of the claim and the expenses connected therewith; (2) in recognition of the foregoing, the premiums of the excess carrier are based on what the liability exposure for loss payment would be and in reliance on the investigation and defense being provided by the primary; (3) the failure by a primary carrier to perform its duties toward the insured should not be deemed justified or minimized by the insured's purchase of excess coverage; (4) the availability of the remedy against the primary insurer has the effect of encouraging rather than discouraging settlements, to the benefit of a specific insured and the public in general.

C. SPECIFIC DUTIES.

The specific duties owed by the primary insurer to the excess may, of course, vary somewhat from jurisdiction to jurisdiction, according to the duties recognized by a particular jurisdiction as owing the insured by the primary carrier. Also, whether these specific duties are held to arise out of bad faith or mere negligence will depend upon the pronouncements of a given jurisdiction's courts with reference to the primary insurer's

duty to its insured. In each instance, the "majority rule" would make the duties owed by the primary insurer to its insured and to the excess carrier the same. The specific duties recognized by the courts include: (1) investigate promptly and properly; (2) evaluate the claim in good faith; (3) incur those expenses necessary to properly defend; (4) discover the existence of and notify the excess carrier of the results of its investigation and evaluation; (5) make available its claim files, investigative memos, attorneys' reports and all other data affecting issues of settlement and liability to the excess carrier; (6) affirmatively and aggressively seek to negotiate settlements with claimants where its good faith evaluation determines the necessity to do so; (7) refrain from seeking a contribution from an excess insurer to a settlement within the primary limits; (8) consider the recommendation and settlement advice of its counsel.

The law of Iowa requires bad faith, not mere negligence, on the part of an insurer to subject it to liability in excess of the policy limits. Kooyman v. Farm Bureau Mutual Insurance Company267 NW2d 403 (Iowa 1978). If the primary insurer's duty to the excess is recognized as being coextensive to the primary's duty to the insured, the primary carrier in Iowa must refrain from bad faith toward the excess. Depending upon the pattern of circumstances, the primary's failure to meet any one of the specific duties just enumerated could be held to be evidence of bad faith. This is evident in light of decisions in other

jurisdictions, which include:

> North River Ins. Co. v. St. Paul Fire and Marine Ins. Co., 600 F.2d 721 (8th Cir. 1979). (Duty to evaluate fairly and in good faith; duty to make information available.)
>
> Penn's Estate v. Amalgamated General Agencies, 372 A.2d 1124 (N.J. 1977); Continental Casualty Company v. Reserve Insurance Company, 238 NW2d 862 (Minn. 1976); Peter v. The Travelers, 375 F.Supp. 1347 (D.C. Cal. 1974); Valentine v. Aetna Ins. Co.564 F.2d 292 (9th Cir. 1977). (Duty to initiate and attempt settlement - in good faith; duty to evaluate claim fairly and in good faith.)
>
> Home Insurance Company vs. Royal Indemnity Company, 327 N.Y.S.2d 745 (N.Y. Sup. Ct. 1962). (Duty to refrain from seeking a contribution from an excess carrier to a settlement within primary limits.)
>
> Portland General Electric Company v. Pacific Indemnity Company, 574 F.2d 469 (9th Cir. 1978); Hawkeye-Security Insurance Company v. Indemnity Ins. Co. of North America, 260 F.2d 361 (10th Cir. 1958). (Duty to consider recommendations and settlement advice of its counsel.)
>
> Fireman's Fund Insurance Company v. Security Ins. Co. of Hartford, 367 A.2d 864 (N.J. 1976). (Duty to investigate promptly and properly.)
>
> Western World Ins. Co. v. Allstate Ins. Co., 356 A.2d 83 (N.Y. App. Div. 1976). (Duty to determine existence of excess coverage and to notify the excess carrier.)

The Iowa decisions discussing the insurer's duty of good faith to the insured also are indicative of what specific obligations could be imposed on the primary carrier in Iowa with respect to the excess. Some of these decisions are:

> Henke v. Iowa Home Mutual Casualty Co., 97 NW2d 168 (Iowa 1959).
>
> Ferris v. Employers Mutual Cas. Co., 122 NW2d 263 (Iowa 1963).

Hayes Brothers Inc. v. Ecomony Fire and Casualty Co., 634 F.2d 1119 (8th Cir. 1980).

Kooyman v. Farm Bureau Mutual Ins. Co., 267 NW2d 403 (Iowa 1978).

Dairyland Ins. Co. v. Hawkins, 202 F.Supp. 947 (D.Ct. 1968).

Kohlstedt v. Farm Bureau Mutual Ins. Co., 139 NW2d 184 (Iowa 1965).

Although the "majority rule" imposes the aforementioned duties on the primary insurer toward the excess, it also recognizes that the excess cannot force the primary into accepting the settlement which the primary's duty to its insured would not require. Valentine v. Aetna Ins. Co., supra.; North River Ins. Co. v. St. Paul Fire and Marine Ins. Co., supra; Appleman, Insurance Law and Practice, Vol. 7, Sec. 4711 at note 99.55.

II. DUTY OF EXCESS TO PRIMARY.

In describing the basis for a carrier's duty of good faith to its insured, most courts have spoken in terms of an implied contractual or policy provision, i.e. the implied covenant of good faith and fair dealing. Certainly a covenant is a mutual undertaking and the insured also owes the good faith-fair dealing duty to the carrier. Since the primary carrier's duty to the excess is based on the same principle, it is only reasonable that the excess carrier has a general duty to the primary of good faith and fair dealing as well. The case of Transit Casualty Company vs. Spink Corp., 144 Cal.Rptr. 488 (Cal. App. 1978) has

recognized the reciprocity of these relationships. In that case, the primary carrier argued that the only basis upon which the excess carrier could recover was equitable subrogation, and in view of the bad faith of the insured, who refused to settle within the limits of the primary policy, the excess carrier, standing in the shoes of the insured, could have no greater rights than those the insured possessed, should be denied recovery. The court rejected the argument, saying:

> ...The buyer of separate primary and excess coverage occupies relationships with two carriers. Usually, these carriers have no contractual privity. Yet when an accident occur they are made aware of each other. When a settlement value of the injury hovers over the upper limits of primary coverage, the two carriers face interreacting problems of claim adjustment, settlement and defense. Each has a choice of mutual support or naked self-interest. The law, then, is unrealistic when it demands that either carrier use the policyholder as its stepping stone to mutual obligation. Triangular reciprocity is more rational...
>
> ...The parties occupy a three-way relationship which, regardless of privity gap, may engender reciprocal duties of care in the conduct of settlement negotiations; when a damage claim threatens to exceed the primary coverage, the reasonable foreseeability of impingement on the excess policy creates a three-way duty of care; if the plaintiff in an ensuing failure-to-settle suit has been contributorily negligent, its damage recovery from the other parties will be proportionately reduced; if all three parties have been negligent, their individual shares of the total loss may be fixed in a single lawsuit...
>
> ...The three-way duty concept harmonizes with settlement realities. The policyholder pays for two kinds of liability coverage, each at a different rate. The premium charged by the primary insurer supports more localized claims adjustment facilities than those of the excess carrier. The latter is less frequently confronted with loss possibilities and, when it is, may employ local

> adjusters. The primary insurer is assisted, not impeded, by the active participation of another carrier with a stake in the negotiations. Self-interest will impel the primary carrier to take the lead when settlement value is well within its policy limits. When settlement value hovers over the fringes of both policies, both carriers may collaborate. Each may disagree with the settlement sentiments of the other; agreement is more likely when each knows that a jury may ultimately pass upon reasonableness of its conduct. The primary carrier's conflict of interest with the excess carrier is no more acute than its conflict with a policyholder without excess coverage. Either may sue it for refusal to settle. Neither carrier is likely to be intransigent if both know that intransigence will defeat or diminish a refusal-to-settle verdict. Triangular reciprocity advances the public interest in extrajudicial settlement.

III.WHAT ABOUT THE "SELF-INSURED" WHO HAS AN "EXCESS POLICY"?

In the case of Commercial Union Assurance Cos. v. Safeway Stores, Inc., 610 P.2d 1038 (Calif. 1980), the California Supreme Court examined the rights of an excess insurer vis-a-vis a self-insured. The court specifically held that a self-insured does not owe a duty to its excess liability carrier which would require it to accept a settlement offer below the threshold figure of the excess carrier's exposure where there is a substantial probability of liability in excess of that figure. Stated another way, the court held that an insured does not have an independent duty to his excess carrier to accept a reasonable settlement offer so as to avoid exposing the latter to pecuniary harm.

In affirming the trial court's dismissal after Safeway demurred to the complaint on the basis that it failed to state a cause of action, the California Supreme Court adopted a good

portion of the Court of Appeal opinion as its own. The court stated:

> We have no quarrel with the proposition that a duty of good faith and fair dealing in an insurance policy is a two-way street, running from the insured to his insurer as well as vice-versa (citations). However, what that duty embraces is dependent upon the nature of the bargain struck between the insurer and the insured and the legitimate expectations of the parties which arise from the contract.
>
> * * * *
>
> No such expectations (of settlement within the policy limits to protect the excess carrier from liability) can be said to reasonably flow from an excess insurer to its insured. The object of the excess insurance policy is to provide additional resources should the insured's liability surpass a specified sum. The insured owes no duty to defend or indemnify the excess carrier; hence, the carrier can possess no reasonable expectation that the insured will accept a settlement offer as a means of "protecting" the carrier from exposure. The protection of the insurer's pecuniary interests is simply not the object of the bargin.

The Court also pointed out that Commercial could not expect that when Safeway purchased the excess coverage, it impliedly promised that it would take all reasonable steps to settle a claim below the excess coverage, nor could Commercial or Mission expect any favorable treatment in this regard from its insured. The court held that the fact that excess coverage was provided did not result in this duty being implied in the bargain, nor could it be implied from the mutual covenant of good faith and fair dealing. In conclusion, the court stated:

> If an excess carrier wishes to insure itself from liability for an insured's failure to accept what it deems to be a reasonable settlement offer, it may do so by

appropriate language in the policy. We hesitate, however, to read into the policy obligations which are neither sought after nor contemplated by the parties.

IV. SOME SPECIAL CONSIDERATIONS.

A. SHOULD THE EXCESS CARRIER CONDUCT ITS OWN INVESTIGATION OF THE CLAIM OR LOSS?

1. What if the primary insurer's investigation appears to be inadequate?

2. What affirmative acts should the excess carrier take with respect to the investigation of the claim?

B. BEFORE SUIT CLAIM EVALUATION.

1. What should the primary carrier do?

2. How should the excess carrier respond?

C. HANDLING OF THE FILE.

1. Consultation re tactics?

2. Acquiescence and waiver risks versus risks of inaction of excess carrier.

D. SETTLEMENT AND NEGOTIATIONS.

1. Should primary carrier seek settlement review by counsel other than that engaged to represent insured?

2. What is excess carrier's role reference settlement?

CONCLUSION

In analyzing the relationships, rights and duties of the insured, primary insurer and excess insurer, the insurance contracts themselves should be closely examined for relevant terms and provisions.

Although there are "minority view" decisions on various specific duties, it is believed to be the substantial "weight of authority" in American jurisdictions that the primary insurer owes the same duties to the excess carrier as it owes to its insured. It is likely that future development of the law in this area will include recognition that the duty of good faith is reciprocal and that the excess carrier and the insured have a good faith obligation toward the primary carrier. However, the heavier burdens undoubtedly will continue to fall upon the primary insurer in view of the legal theories and public policy considerations discussed in the first two pages of this paper.

ENTERPRISE LIABILITY

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I. Introduction

A. Can be summarized as a theory of industry-wide liability which is based on the philosophy that the costs of an activity or enterprise ought to be borne by the entire industry.

B. Was first suggested in Hall v. E.I. DuPont de Nemours & Co., Inc., 345 F.Supp. 353 (E.D.N.Y. 1972) and refined in DES and a Proposed Theory of Enterprise Liability (1978), 46 Fordham L. Rev. 963.

C. Has not been expressly adopted by any court to date, although the concept itself has been espoused by several courts under the name of alternative liability, concerted action, and market-share liability.

D. Has been rejected by an equal number of courts which feel the theory is not applicable to the facts at hand or that the theory is too radical a deviation from traditional tort law to be adopted by any tribunal less than a supreme court or state legislature.

II. Background

A. Hall v. E.I. DuPont, supra.

1. Was a suit brought by multiple plaintiffs against the six major domestic manufacturers of blasting caps and their trade association.

a. Actual manufacturer(s) could not be identified due to nature of product.

b. Plaintiffs alleged that defendants had actual knowledge of product's danger to children since trade association kept statistics on such accidents.

c. Court found that defendants independently adhered to an industry-wide safety standard and had delegated some functions with respect to safety features and design to trade association.

2. Held, defendants' motions to dismiss would be denied since there are circumstances in which an entire industry may be liable for harm caused by its operations.

3. Shifted burden of proof as to causation to defendants once plaintiffs proved by a preponderance of evidence that caps were manufactured by one of the defendants.

4. Cautioned against applying this theory to a decentralized industry composed of thousands of small producers.

5. Limited application of theory to cases in which plaintiffs were unable to identify actual causative agent.

B. Fordham Law Review Comment.

1. Was written in response to the large number of DES cases which had been brought since the Hall decision.

2. Proposed applying the hybrid theory of enterprise liability to the causation problems of DES and analogous cases rather than distorting the existing theories of concerted action and alternative liability.

a. Criticism of concerted action theory being used in DES cases.

i. Defined as a legal theory which evolved in order to deter hazardous group activity and typically exemplified by the illegal drag race situation.

ii. Necessary elements are (a) the commission of a tortious act done in concert with another or pursuant to a common plan; or (b) substantial assistance or encouragement given to another with the knowledge that the other's conduct constitutes a breach of duty; or (c) substantial assistance given to another in

accomplishing a tortious result and own conduct, considered separately, constitutes breach of duty to third person. Restatement (Second) of Torts, section 876.

iii. Requires a tacit agreement or understanding.

iv. Problems with application of concerted action to DES cases.

(a) Must prove tacit agreement among defendants.

(b) Extends theory beyond a simple tort situation to complex situation involving cooperation among modern industrial organizations with numerous defendants whose activities take place over decades and on a nationwide basis.

(c) Is subject to charge of arbitrary or inequitable selection of responsible parties when less than all possible defendants are joined.

b. Criticism of alternative liablity theory being used in DES cases.

i. Defined as a legal theory which evolved in order to relieve plaintiff of burden of proving causation where inequitable to so require.

ii. Exemplified by Summers case wherein plaintiff was shot by one of two hunting companions who had fired their guns negligently and simultaneously in plaintiff's direction.

iii. Problems with application of alternative liability to DES cases.

(a) All possible defendants are rarely joined in DES case so if actual tortfeasor is not joined, Summers policy of fairness is frustrated.

(b) Where there is less than 100% certainty that one of the defendants is actually liable, Summers modification of standard

of preponderance of evidence may not be justified.

(c) DES defendants are not necessarily in a better position to identify cause of injury than is plaintiff.

(d) Large number of DES defendants makes it less probable that any one defendant is liable; hence, application may be unfair to defendants.

c. Proposition of hybrid theory of enterprise liability to solve causation problems presented in DES cases.

i. Elements of theory of enterprise liability.

(a) Inability to identify causative agent is not plaintiff's fault but is due to nature of defendants' conduct.

(b) A generically similar, defective product was manufactured by all defendants.

(c) Plaintiff's injury was caused by this product defect.

(d) Defendants owed duty to class in which plaintiff is a member.

(e) There is clear and convincing evidence that plaintiff's injury was caused by some one of the defendants.

(f) There existed an insufficient, industrywide standard of safety as to the manufacture of the product.

(g) All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed.

ii. Burden of causation shifts to defendants once plaintiff proves elements.

iii. Defendants may exculpate selves.

iv. Damages are apportioned among those defendants found liable in proportion to their market shares.

v. Underlying policy is equitable: a between the innocent plaintiff and tortfeasors, the tortfeasors should bear the cost of injury.

III. Present Status of Enterprise Liability.

A. Has not been expressly adopted by any court but concept has been embraced by several courts allowing claimants to maintain actions against multiple defendants where claimant cannot prove which, if any, defendant actually produced the injury-causing product.

1. Claimant allowed to maintain suit under extended theory of concert of action.

a. Allegations that drug companies acted in concert to produce and market an ineffective and dangerous prescription drug without adequately testing or warning held sufficient to state cause of action under theory of concerted action where multiple plaintiffs brought suit against all of the known manufacturers of DES whose products were distributed in Michigan during the relevant time period. Abel v. Eli Lilly and Co., 94 Mich.App. 59, 289 N.W.2d 20 (1980).

b. Original cooperation of drug companies in gathering clinical data to apply to FDA to manufacture DES and later parallel activity in the manufacture and marketing of DES held to sufficiently evidence agreement so as to maintain an action under the theory of concerted action where plaintiff brought suit against single defendant whom she failed to sufficiently prove was the actual manufacturer of the injury-causing drug taken. Bichler v. Eli Lilly & Co., 436 N.Y.S.2d 625 (1981).

2. Claimant allowed to maintain suit under new theory of market-share liability.

a. Claimant may maintain suit where all manufacturers who had produced a substantial percentage of the DES in the appropriate market were joined, and each defendant will be held liable for the proportion of the judgment represented by its share of the market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924 (1980).

b. Differs from enterprise liability primarily in its requirement that only a "substantial percentage" be joined rather than the Fordham Comment's suggested joinder of 75-80% of the market.

3. Claimants allowed to maintain suit under extended theory of alternative liability.

a. Theory of alternative liablity in New Jersey does not require that all possible tortfeasors be joined. Ferrigno v. Eli Lilly and Co., 175 N.J. Super.551, 420 A.2d 1305 (1980).

b. Once plaintiff proves (1) that the DES caused her injury, (2) that each defendant manufactured and marketed DES at the relevant time and place and for pregnancy-related purpose, and (3) that such manufacture was unreasonable, burden shifts to defendants who may then attempt to exculpate themselves. If defendants cannot do so, they are liable in proportion to their market share at the time of injury. Ferrigno, supra.

B. Other courts have rejected the concept of enterprise liability and refused to allow plaintiffs to maintain suits where it is not shown that plaintiff's injuries were caused by the act of a specific defendant and no traditional or recognized exception to this general rule of tort law applies.

1. Theories of enterprise liability and alternative liability held to be unavailable to plaintiffs who could identify the actual manufacturer of the DES taken by their mothers. Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J.Super.183, 406 A.2d 185 (1979).

2. Theory of enterprise liability held to be a deviation from traditional tort law of such a degree that its adoption would be proper only if by supreme court or legislature. Namm v. Charles E. Frosst, 178 N.J.Super.19, 427 A.2d 1121 at 1129 (1981); Ryan v. Eli Lilly & Co., Civil Action 77-246 (U.S.D.C.S.C. May 13, 1981); Payton v. Abbott Labs, 512 F. Supp. 1031 at 1040 (U.S.D.C. Mass. 1981).

COMPARATIVE NEGLIGENCE UPDATE

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To date, some 38 states have adopted some form of "comparative fault" either by statute or by judicial decision. Following is a list of those states indicating the source of the "comparative fault" rule and the form of the rule adopted:

(1) Alaska - Kaatz v. State (Alaska 1975), 540 P.2d 1037 (pure).

(2) Arkansas - Ark. Stat. Ann. secs. 27-1763 to 27-1765 (1979) (modified).

(3) California - Li v. Yellow Cab Co. (1975), 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (pure).

(4) Colorado - Colo. Rev. Stat. sec. 13-21-111 (1973 & Supp. 1978) (modified).

(5) Connecticut - Conn. Gen. Stat. Ann. sec. 52-572n (West Supp. 1980) (modified).

(6) Florida - Hoffman v. Jones (Fla. 1973), 280 So.2d 431 (pure).

(7) Georgia - Ga. Code Ann. sec. 105-603 (1968) (unique).

(8) Hawaii - Haw. Rev. Stat. sec. 663-31 (1976) (modified).

(9) Idaho - Idaho Code secs. 6-801, 6-802 (1979) (modified).

(10) Kansas - Kan. Stat. sec. 60-258a (1976) (modified).

(11) Louisiana - La. Civ. Code Ann. art. 2323 (eff. Aug. 1, 1980) (West 1981 Supp.) (pure).

(12) Maine - Me. Rev. Stat. tit. 14, sec. 156 (1980) (modified).

(13) Massachusetts - Mass. Gen. Laws Ann. ch. 231, sec. 85 (Supp. 1978) (modified).

(14) Michigan - Placek v. City of Sterling Heights (1979), 405 Mich. 638, 275 N W.2d 511 (pure).

(15) Minnesota - Minn. Stat. Ann. sec. 604.01 (Supp. 1981) (modified).

(16) Mississippi - Miss. Code Ann. sec. 11-7-15 (1972) (pure).

(17) Montana - Mont. Rev. Codes Ann. sec. 58-607.1 (Supp. 1977) (modified).

(18) Nebraska - Neb. Rev. Stat. sec. 25-1151 (1979) (slight/gross).

(19) Nevada - Nev. Rev. Stat. sec. 41.141 (1979) (modified).

(20) New Hampshire - N.H. Rev. Stat. Ann. sec. 507:7-a (Supp. 1979) (modified).

(21) New Jersey - N.J. Stat. Ann. secs. 2A: 15-5.1 to 2A: 15-5.3 (Supp. 1980-81) (modified).

(22) New Mexico - Claymore v. City of Albuquerque (N.M. App. Dec. 8, 1980), Nos. 4804, 4805 (pure).

(23) New York - N.Y. Civ. Prac. Law secs. 1411 to 1413 (1976) (pure).

(24) North Dakota - N.D. Cent. Code sec. 9-10-07 (1975) (modified).

(25) Oklahoma - Okla. Stat. Ann. tit. 23, secs. 13 to 14 (West Supp. 1980-81) (modified).

(26) Oregon - Or. Rev. Stat. secs. 18.470, 18.475, 18.480, 18.485, 18.490 (1979) (modified).

(27) Pennsylvania - Pa. Stat. Ann. tit. 42, sec. 7102a (Purdon Supp. 1980) (modified).

(28) Rhode Island - R.I. Gen. Laws sec. 9-20--4 (Supp. 1980) (pure).

(29) South Dakota - S.D. Compiled Laws Ann. sec. 20-9-2 (1979) (slight/gross).

(30) Texas - Tex. Rev. Civ. Stat. Ann. art. 2212(a) (Vernon's Supp. 1979) (modified).

(31) Utah - Utah Code Ann. secs. 78-27-37, 78-27-38, 78-27-41 (1977) (modified).

(32) Vermont - Vt. Stat. Ann. tit. 12, sec. 1036 (1973) (modified).

(33) Washington - Wash. Rev. Code Ann. sec. 4.22.010 (Supp. 1980) (pure).

(34) West Virginia - Bradley v. Appalachian Power Co. (W. Va. 1979), 256 S.E.2d 879 (modified).

(35) Wisconsin - Wis. Stat. Ann. sec. 895.045 (West Supp. 1980) (modified).

(36) Wyoming - Wyo. Stat. sec. 1-1-109 (1977) (modified).

(37) Illinois - Alvis v. Ribar Nos. 52875, 53788 (Illinois Supreme Court January, 1981).

(38) Ohio - Ohio Rev. Code sec. 2315.19 (1980) (modified).

The states which have, as yet, not adopted "comparative fault" include the following:

Alabama
Arizona
Delaware
Indiana
Iowa
Kentucky

Maryland
Missouri
North Carolina
South Carolina
Tennessee
Virginia

Iowa Update

1. Uniform Comparative Fault Act introduced in Iowa Legislature by Senator Art Small.

2. Bill assigned to subcommittee of the Judiciary Committee and not reported out -- pending arrival at "Lawyer's Position" by various lawyers' groups.

3. Iowa Defense Counsel Association appeared before the Legislative, Reparations and Litigation Committee of the Iowa Bar Association and took the following position:

A. The Iowa Defense Counsel believes that a comparative negligence rule will be law in the State of Iowa in the not-too-distant future, and that reasoned comprehensive legislation (with appropriate input from the legal profession) is probably the most acceptable way for such a rule to come about.

B. The Iowa Defense Counsel favors a form of "modified" comparative negligence in which the claimant would be allowed to recover, so long as the claimant's fault was "not as great as" the fault of the defendant's. This is sometimes referred to, of course, as the "49 percent rule".

C. The Iowa Defense Counsel favors a comparative "fault" rule rather than a strictly comparative "negligence" rule. That is, we believe that the legislation should bring about a consideration of all forms of fault in the tort context, including negligence, gross negligence, recklessness and strict liability.

D. The Iowa Defense Counsel believes that the claimant's fault should be compared to the collective fault of all of the defendants as a total, but that, in order for such a comparison to be made

properly and for the effect to be equitable, the rule of joint liability of defendants would have to be eliminated. That is, the fault of any individual claimant should be compared to the collective fault of all persons potentially responsible for the claimant's injury or damages. This would include persons who were, at one time, parties to the litigation, but who have settled, as well as possibly persons who were never parties to the lawsuit. After a determination has been made, however, as to the percentage of fault attributable to each defendant, that defendant should be responsible only for his proportionate share of the claimant's total damages.

E. The Iowa Defense Counsel takes the position that a settling defendant should be immune from indemnity or contribution, but that such a settlement with the claimant should extinguish the claimant's right of recovery for that percentage of his total damages which the court or jury apportions to the settling party.

F. The Iowa Defense Counsel has concluded that the better rule is not to inform the jury of the effect of their answers to special interrogatories. While we are not unanimous on this issue, it is the consensus of a majority of our Board of Directors that it is better to have the jury serve only fact-finding functions, and that that purpose is better served if they make specific fact findings in response to the special interrogatories and let the court apply the applicable law to reach a dollar judgment.

G. With respect to the issue of the interface between worker's compensation benefits and comparative negligence, the Iowa Defense Counsel believes that an employer on whose behalf worker's compensation benefits have been paid to the claimant should be treated as a settling party. In conjunction with that rule, we believe that the employer's (or worker's compensation carriers) subrogation interest should be extinguished if the worker's compensation benefits paid

amount to less than the amount of damages apportioned to the employer, or if the amount of damages apportioned to that employer by the court or jury is less than the amount of the worker's compensation benefits paid to the claimant than the subrogation interest of the employer, or his worker's compensation carrier shall be reduced by the amount of damages apportioned to the employer by the court or jury.

H. The Iowa Defense Counsel believes that any statutory enactment of comparative negligence should be prospective only, applying to incidents occurring after the effective date of the act.

4. Iowa Insurance Institute supported our position.

5. Iowa Trial Lawyers Association took the following position (as noted by Mr. Phipps -- no formal position paper):

a) Only bill supported for "pure" form of comparative negligence.

b) Apply only to negligence -- not other forms of "fault".

c) Joint and several liability should be retained.

d) Fault of parties only compared.

e) Prefer for Court to adopt rather than Legislature.

6. Iowa Academy of Trial Lawyers basically the same position as ITLA.

LEGISLATIVE REVIEW

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I. Bills of interest to defense attorneys

A. S.F. 255 -- Comparative Negligence

B. Study Bill -- Products Liability

C. H.F. 779 -- Establishing Federal Rules of Evidence

II. Bills of interest to attorneys in general

A. H.F. 775 -- Providing for successors to the interest of a franchise upon death of the franchisee under franchises relating to the distribution of retail sales of motor fuel.

B. H.F. 503 -- Provides that parties to a judicial review of an administrative agency action may be provided copies of the petition for judicial review by personal service instead of mailing.

C. H.F. 739 -- Relating to the intestate succession rights of adopted persons, their natural parents, and adoptive parents.

D. H.F. 767 -- Provides some changes and modifications of the mechanics lien law.

E. H.F. 794 -- Providing for several changes in probate law relating to minors, sale of property, hearings, and representation of attorneys.

F. H.F. 222 -- Providing for technical changes in small estates.

G. S.F. 307 -- Permitting a separate writing to identify bequests of certain tangible personal property in wills.

H. S.F. 480 -- Rewrite of state exemption statute.

I. S.F. 571 -- Increase in District Court Judges and increase in filing fees.

J. S.F. 555 -- Providing for substantial changes in state inheritance law.

K. S.F. 394 -- Increasing the corporate and uniform commercial code filing fees.

L. S.F. 514 -- Making changes in O.M.V.U.I. law and reporting provisions in an accident.

M. H.F. 778 -- Rewriting the disclaimer provisions in probate.

III. Bills of general interest

A. S.F. 130 -- Implementation of county home rule.

B. H.F. 386 -- Providing for implementation of standards of using arbitration to settle disputes.

C. S.F. 235 -- Outlawing radar jamming devices.

ANNUAL APPELLATE DECISIONS REVIEW

October 1980 - September 1981

By James E. Gritzner
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APPEAL

The appeal was dismissed for failure to comply with appellate rules wherein counsel had ignored time requirements regarding the completion of the transcript, initial docketing and contents of the appendix. Counsel argued pressures of other legal work had caused the violations, but the Court regarded the explanation as a demonstration that his disregard of the rules was willful. McKINNEY V. WILSON, 300 N.W.2d 87 (Iowa 1981).

APPEAL

A post-trial motion was untimely and the movant had not obtained an extension of time in which to file the post-trial motion. Since an untimely post-trial motion is defective, it will not toll running of the 30-day period for the taking of an appeal. LUTZ V. IOWA SWINE EXPORTS CORP., 300 N.W.2d 109 (Iowa 1981).

APPEAL

A notice of appeal from judgment on a jury verdict filed six months after judgment was entered was timely. The action for damages arose from the dissolution of a business together with an equitable claim for reformation of a contract. The Court held the rights of the parties had not been fully determined until after the later decision on the equitable claim. Thus, the judgment entered on the jury verdict was not a final judgment. POULSON V. RUSSELL, 300 N.W.2d 289 (Iowa 1981).

APPEARANCE

A special appearance was filed solely for the purpose of preventing entry of a default judgment. The Court found the pleading to be, in effect, a motion for time to plead. Thus, the pleading constituted a general appearance placing the party before the court and waiving defects in the original notice. MATTER OF ESTATE OF DULL, 303 N.W.2d 402 (Iowa 1981).

ATTORNEY AND CLIENT

Pursuant to new §815.7 of the Code, the Court placed compensation for court-appointed counsel on a par with like services in the community. "In changing the law, we believe the legislature intended that reasonable compensation for court-appointed lawyers be set under the criteria which govern reasonable compensation for other litigation services. . . . "No discount is now required based on an attorney's duty to represent the poor." HULSE V. WIFVAT, 306 N.W.2d 707 (Iowa 1981.)

COURTS

This action for balance due on a promissory note was brought in small claims court as the balance due was within the amount in controversy as required by §631.1 of the Code. However, interest due on the note, when added to the balance due, exceeded $1,000.00. The Court held the additional amount of interest sought was for incidental interest on an amount in controversy, within the interest exclusion of the Code. The amount in controversy is the unpaid balance. PEOPLES TRUST & SAV. BANK V. ARMSTRONG, 297 N.W.2d 372 (Iowa 1980).

DAMAGES

The Court refused to adopt a proposed change in the measure of damages to automobiles originally adopted in

Langham v. Chicago, R. I. & P. R. Co., 201 Iowa 897, 901, 208 N.W. 356, 358 (1926). The proposal would have added as another limitation the diminution in value of the car caused by the accident unless and until a repair is actually undertaken. This would have required the car owner to invest personal funds for repair in excess of the diminution of value with reimbursement after repairs were completed. AETNA CAS. & SUR. CO. V. INSURANCE DEPT. OF IOWA, 299 N.W.2d 484 (Iowa 1981).

EVIDENCE

In this action for wrongful termination, the plaintiff, a former city employee, sought to introduce into evidence an affidavit signed by a city official for the limited purpose of showing she performed work for the mayor which the mayor did not remember. The plaintiff's testimony identifying the exhibit and that she had typed it was found to be sufficient authentication to admit the document into evidence. ANDERSON V. LOW RENT HOUSING COMM. ETC., 304 N.W.2d 239 (Iowa 1981).

EVIDENCE

The trial court judge was found to have exceeded the bounds of judicial notice in this child custody dispute involving a law student mother. Statements of the trial court regarding the demands of law school were found to be matters of personal knowledge rather than facts commonly known in his judicial capacity. The Court noted that demands of a specific law school are not commonly or professionally known. The trial court could only properly consider the demands of law school as shown by the evidence. IN RE MARRIAGE OF TRESNAK, 297 N.W.2d 109 (Iowa 1980).

FRAUD

Plaintiff, who was misinformed as to the true identity of the manufacturer of a slide on which plaintiff was injured, which misinformation caused him to lose his cause of action against the true manufacturer as a result of the statute of limitations, was not required to bring action against the true manufacturer and fail before proceeding in an action for misrepresentation.

The tort of negligent misrepresentation does not apply to statements made during litigation. To hold contrary would create inefficiency and discourage cooperation in civil actions. BEECK V. KAPALIS, 302 N.W.2d 90 (Iowa 1981).

HUSBAND AND WIFE

The cause of action for alienation of affections was abolished by a sharply divided Court. The five member majority saw the right of action as contrary to notions of family preservation and personal dignity as well as being an issue imcompatible with our fact-finding system. The strong dissent by Chief Justice Reynoldson and joined by three others should be noted. FUNDERMANN V. MICKELSON, 304 N.W.2d 790 (Iowa 1981).

INSURANCE

Minnesota law, rather than Iowa law, governed the uninsured hit-and-run motorist provision, in that even though the policy by its terms was made binding when accepted by the insurer in Iowa, the insured and his agent plainly intended that the policy be governed by Minnesota law, and the policy was sold in a Minnesota transaction to a Minnesota resident by a Minnesota agent in order to establish an insurer-insured relationship in Minnesota. The Court followed the test from Restatement (Second) of Conflict of Laws, §188, looking to the intent of the parties or the most significant relationship

finding no difference between those two factors in this case. COLE V. STATE AUTO. & CAS. UNDERWRITERS, 296 N.W.2d 779 (Iowa 1980).

INSURANCE

Provision of a farm liability policy covering motor vehicles only on "ways immediately adjoining" the insured premises were found to require that the way touch or abut the insured premises at the point of the occurrence, and claims arising from a motor vehicle accident on a way not actually touching the insured premises would be excluded from coverage. It was insufficient that the vehicle was traveling between two separate tracts of the same insured premises. FARM BUREAU MUT. INS. CO. V. SANDBULTE, 302 N.W.2d 104 (Iowa 1981).

INSURANCE

A general liability policy for a municipality was found to include coverage for punitive damages awarded against the city as a result of unlawful arrest, detention and imprisonment. The specific policy allowed coverage for damages sustained by any person arising out of false arrest, detention or imprisonment. Exclusions in the policy made no mention of punitive damages. The Court found the insurer fully intended to provide coverage for willful, intentional and malicious acts committed by law enforcement officers, and thus the punitive damages awarded against the city were recoverable from the general liability insurer. Recovery of punitive damages from the insurer rather than the wrongdoer was found not to be contrary to public policy. CITY OF CEDAR RAPIDS V. NORTHWESTERN NAT. INS., 304 N.W.2d 228 (Iowa 1981).

INSURANCE

A father had attempted to assign title to an automobile to his son but the assignment was ineffective because the vehicle was not inspected first and did not have a valid official certi-

ficate of inspection. Thus, the vehicle remained an "owned automobile" under the terms of the father's policy after the attempted assignment and the insurer had the duty to defend the father in a later third-party action arising out of an accident. IOWA KEMPER INS. CO. V. CUNNINGHAM, 305 N.W.2d 467 (Iowa 1981).

INTEREST

The Court refused to allow interest on a plaintiff's judgment in a personal injury case from the date of the injury. However, the Court suggested a different rule might be followed as to some fixed elements of damages if separate awards on the various damage elements are fixed by the fact-finder. The jury had not been directed in this case by the damages instruction, special interrogatories, or verdict forms to make the various specific findings. MROWKA V. CROUSE CARTAGE CO., 296 N.W.2d 782 (Iowa 1980).

JUDGMENT

Adopting the principles set out in Restatement (Second) of Judgments, §88 (Tent. Draft No. 2, 1975), the Court concluded offensive use of the doctrine of issue preclusion should not invariably be precluded where mutuality of parties is lacking. It must then be determined, however, that the party who would be precluded was afforded a full and fair opportunity to litigate the issue in the prior action now being relied upon, and that there are no other circumstances which would justify an opportunity to litigate the issue again. HUNTER V. CITY OF DES MOINES, 300 N.W.2d 121 (Iowa 1981).

JURISDICTION

A district court judge is without jurisdiction to hear and decide an appeal from a judgment rendered by a district associate judge in a civil case which was transferred to the attention of the district associate judge and trial by regular proceedings when a counterclaim exceeded small claims juris-

diction. The judgment of the district associate judge was a judgment of the district court. WILSON V. IOWA DIST. COURT, 297 N.W.2d 223 (Iowa 1980).

JURY

Denial of a litigant's right to a jury trial may not be used as a sanction for failure to obey a discovery order. The case was remanded for imposition of some other appropriate sanction. R. E. MORRIS INVESTMENTS, INC. V. LIND, 304 N.W.2d 189 (Iowa 1981).

JURY

The statute denying trial by jury in small claims proceedings does not violate constitutional guarantees of trial by jury and due process. Settled common law withholds the right of jury trial in small claims, and the current economic conditions justify the category of $1,000.00 or less for small claims. IOWA NAT. MUT. INS. CO. V. MITCHELL, 305 N.W.2d 724 (Iowa 1981).

LIBEL

In an action alleging libel against a public figure, the Court held the standard of New York Times Co. V. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), requiring malice to be established by clear and convincing evidence will apply to both news media and non-media defendants. Apparently accepting that news media defendants in the New York Times case were granted greater protection due to the First Amendment, the trial court herein instructed that libel on the part of non-media defendants need only be shown by a preponderance of the evidence.

This case was also instructive on defining a "public figure" for purposes of this analysis. ANDERSON V. LOW RENT

HOUSING COM'N ETC., 304 N.W.2d 239 (Iowa 1981).

LIMITATION OF ACTIONS

An action against the State commences for the purpose of tolling the time limitations in §25A.13 of the Code when the petition is filed and not when service is obtained upon the Attorney General. The Court could not find a clear intent on the part of the legislature to repeal the applicability of Rule 55 (formerly Rule 49) in adopting §25A.13. Rule 55 controls for purposes of determining the time of beginning an action for tolling purposes. HANSEN V. STATE, 298 N.W.2d 263 (Iowa 1980).

MUNICIPAL CORPORATIONS

Section 364.12(2) of the Code maintains legal responsibility on municipalities for injury to pedestrians caused by negligent failure to remove snow and ice from public sidewalks, but the statute does not impose such liability on abutting property owners. PEFFERS V. CITY OF DES MOINES, 299 N.W.2d 675 (Iowa 1980).

NEGLIGENCE

The injured plaintiff, an employee of an independent contractor, sought to bring an action against the owner of the premises who had relinquished possession of the premises to the independent contractor during construction. Since the owner was not a possessor of land under the circumstances, the Court held an owner must exercise substantial involvement in overseeing the construction in order to be liable under a safe premises theory. No such involvement could be found in this case in which the work of the independent contractor was specialized and matters of safety were by contract the responsibility of the independent contractor. LUNDE V. WINNEBAGO INDUSTRIES, INC., 299 N.W. 2d 473 (Iowa 1980).

NEGLIGENCE

A bystander who is not in any physical danger may recover in Iowa for emotional distress which results from fear for the safety of another person caused by the defendant's negligence. In establishing the claim for such negligent infliction of emotional distress, the Court set out specific elements: "(1) The bystander was located near the scene of the accident. (2) The emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) The bystander and the victim were husband and wife or related within the second degree of consanguinity or affinity. (4) A reasonable person in the position of the bystander would believe, and the bystander did believe, that the direct victim of the accident would be seriously injured or killed. (5) The emotional distress to the bystander must be serious." BARNHILL V. DAVIS, 300 N.W.2d 104 (Iowa 1981).

NEGLIGENCE

Plaintiffs brought action alleging the defendant financial institution was negligent in making an appraisal of a home which plaintiffs purchased in reliance upon the appraisal. The Court held there is a duty to exercise due care in making such an appraisal and that duty is owed to the purchaser of the home which was appraised. LARSEN V. UNITED FED. SAV. & LOAN ASS'N, 300 N.W.2d 281 (Iowa 1981).

NEGLIGENCE

Based upon considerations of public policy, the Court refused to allow the patient to recover from her psychiatrist on a claim that in his professional capacity, he negligently failed to prevent her from committing murder. On the same grounds

the Court refused to recognize the husband's claim for loss of consortium, while noting the claim is not derivative. COLE V. TAYLOR, 301 N.W.2d 766 (Iowa 1981).

PLEADING

Under the rule of "notice", pleading the petition is not required to identify a specific legal theory upon which the action has been commenced. SOIKE V. EVAN MATTHEWS AND CO., 302 N.W.2d 841 (Iowa 1981).

PLEADING

Rule 78, requiring that every pleading shall bear the signature and address of the party or attorney filing it, is merely directory and an insufficiency of signatures on a petition does not deprive the trial court of subject matter jurisdiction. MATTER OF ESTATE OF DULL, 303 N.W.2d 402 (Iowa 1981).

PRETRIAL PROCEDURE

This case had been dismissed pursuant to the provisions of Rule 215.1 and the plaintiff had not moved to reinstate the case within six months as required by the Rule. Plaintiff had sought interlocutory appeal and received permission to appeal within the six-month period. The Court held the "order granting permission to appeal did not 'toll' the period for reinstatement; there is nothing in the rule to imply that the period could be tolled by any such means and, in fact, to read such a provision into it would frustrate the purpose of assuring the timely and diligent prosecution of cases." KOSS V. CITY OF CEDAR RAPIDS, 300 N.W.2d 153 (Iowa 1981).

PRIVACY

The fact that a plaintiff has, by her actions, become newsworthy, will not give rise to the defense of waiver in an action for invasion of privacy by publishing false information

about the plaintiff. "Such falsity cannot be insulated from liability by the defense of waiver without some evidence of conduct clearly indicating that the plaintiff voluntarily and intentionally acquiesced in the falsity." Likewise, the Court held the defense of consent will not be available to a defendant without a showing the plaintiff consented to the "particular conduct at issue or to substantial similar conduct." ANDERSON V. LOW RENT HOUSING COM'N ETC., 304 N.W.2d 239 (Iowa 1981).

REQUEST FOR ADMISSION

"A request for admission, once admitted, only binds the party making the admission. The party requesting the admission is free to prove facts in addition to, or contrary to, the admission." POULSEN V. RUSSELL, 300 N.W.2d 289 (Iowa 1981).

TRIAL

The Court refused to grant a new trial due to argument by defense counsel which permitted the jury to infer the defendant was uninsured. Such an inference could arise, the Court wrote, from the argument the plaintiff was asking for money "out of the pocket" of the defendant. At a recess during arguments, a single juror asked the trial judge what part insurance should play in the jury's decision. With agreement of counsel, the judge informed the entire jury of the conversation and that insurance should play no part in their decision. LAGUNA V. PROUTY, 300 N.W.2d 98 (Iowa 1981).

TORTS

The Court refused to recognize a cause of action by children for alienation of affections of a parent. The Court noted it has recently abrogated the right of recovery in regard to husband and wife. WHEELER V. LUHMAN, 305 N.W.2d 466 (Iowa 1981).

WORKERS' COMPENSATION

An employer's "actual knowledge" under §85.23 of the Code must include some information that the injury is work-connected. Although Department of Transportation representatives were aware of the claimant's heart attack within two days of the occurrence, that knowledge alone was insufficient to satisfy the statute. The Court followed the principle stated in 3 A. Larson, Workmen's Compensation, §78.31(a), at 15-39 to 15-44 (1976), that requires a showing of "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." ROBINSON V. DEPARTMENT OF TRANSP., 296 N.W.2d 809 (Iowa 1980).

WORKERS' COMPENSATION

Effective July 1, 1977, the Iowa legislature amended §85.26 of the Code to make the "discovery rule" applicable to the worker's compensation limitations statute. The Court held that amendment was intended to apply to injuries which were caused by events occurring before the effective date of the amendment but which were not discovered until after that date. Under the discovery rule, the period begins to run only after the claimant knows of his injury and that it is probably compensable. ORR V. LEWIS CENT. SCH. DIST., 298 N.W.2d 256 (Iowa 1980).

WORKERS' COMPENSATION

The claimant was entitled to compensation for injuries received in a fall on a public sidewalk a few feet from the entrance to the employer's store where she intended to enter to attend a birthday breakfast before a store meeting. The fall was sufficiently connected in time, location, and employee usage to the work premises. The Court also held the employer

had extended its work premises for workers' compensation purposes by assuming responsibility for cleaning ice and snow from adjacent sidewalks. FROST V. S. S. KRESGE CO., 299 N.W.2d 646 (Iowa 1980).

WORKERS' COMPENSATION

While affirming the decision of the district court which in turn had adopted the finding of the Industrial Commissioner, the Supreme Court ordered the costs on appeal taxed to appellees. The decision of the Deputy Commissioner had failed to separately state findings of fact and conclusions of law as required by §17A.16(1) of the Code. The Court sharply criticized the Deputy Commissioner's decision as to form, but declined at this time to strictly enforce the procedural requirement. The Court was content with the taxing of costs. WARD V. IOWA DEPARTMENT OF TRANSP., 304 N.W.2d 236 (Iowa 1981).

WORKERS' COMPENSATION

Section 85.1(3) of the Code which excludes children and relatives of a farm employer from coverage does not deny equal protection because work habits on a family farm are significantly different from those in the general labor market. The Court applied a rational basis test. Under the same test, the Court rejected an equal protection argument on the basis of the employer's right to elect coverage while the employee has no such right. ROSS V. ROSS, 308 N.W.2d 50 (Iowa 1981).

This review extends through 308 N.W.2d 92.