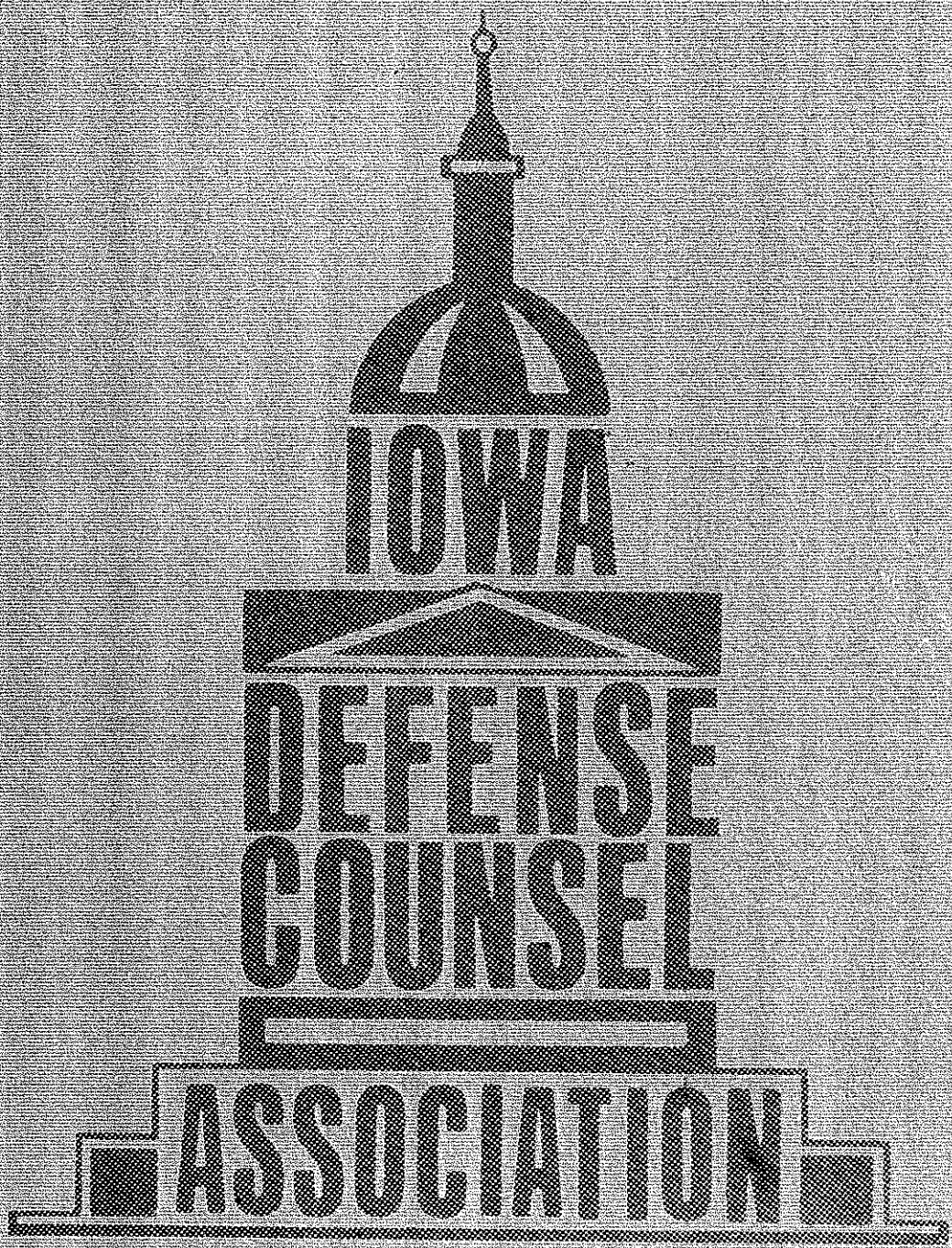

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SEPTEMBER 15, 16 & 17, 1983
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DES MOINES, IOWA

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1982-1983

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1983 Annual Meeting

INDEX

COMPARATIVE NEGLIGENCE UPDATE

PHIL WILLSON
SMITH, PETERSON, BECKMAN & WILLSON
COUNCIL BLUFFS, IOWA

I. THE ISSUES IN A CASE MUST BE ANALYZED.

Notice pleading does not require the pleading of issues. However, there are other reasons for preparing an analysis of the issues. In analyzing the issues, it is also necessary to determine whether each issue is an issue of law or fact.

A. On a motion to dismiss, the test is whether a pleading states a claim on which relief can be granted. Rule 104(B).

B. Whether an issue is appropriate for adjudication of law points under Rule 105.

C. Checklist for establishing a prima facie case or an affirmative defense.

D. Motion for judgment on the pleadings. Rule 222.

E. Motion for summary judgment or partial summary judgment. Rule 237.

F. Creating a discovery plan.

G. Formulation of issues during pretrial conference. "Stating and simplifying the factual and legal issues to be litigated." Rule 136(5).

H. Determining what evidence is relevant and requirements for prima facie case. Iowa Rule of Evidence 401.

I. Determining issues that must be instructed upon in jury instructions.

J. Motion for directed verdict and what is needed to avoid a directed verdict.

K. Scope of review on appeal.

L. A sample analysis of possible issues in a comparative negligence case is included in the appendix.

II. OPTIONAL STRATEGIES.

A. FACTORS MOTIVATING PLAINTIFF TO JOIN ALL POSSIBLE DEFENDANTS.

1. May increase size of verdict.

2. The more parties, the smaller plaintiff's percent of fault.

3. In-fighting among defendants may help prove liability.

4. More certainty that judgment will be collectible.

5. Protection against malpractice.

6. Benefits of being underdog.

7. Avoid empty chair argument.

8. All issues will be resolved in one action.

9. Increased probability of settlement by involvement of additional defendants who may be willing to contribute towards settlement.

10. Greater ease of discovery from a party as opposed to a nonparty.

11. Right to cross-examine the defendants.

B. FACTORS DISCOURAGING PLAINTIFF FROM JOINING ALL POSSIBLE DEFENDANTS.

1. Tendency of more discovery and more expensive discovery.

2. Longer and more expensive trial.

3. Difficulty settling because defendants may not agree on allocation.

4. More parties emphasizing contributory negligence of the plaintiff.

C. CONSIDERATIONS OF DEFENDANTS FAVORING ADDING THIRD PARTIES.

1. All issues will be resolved in one action.

2. Assistance from third party in establishing contributory fault of plaintiff.

3. An increased probability of settlement by involvement of additional defendants who may be willing to contribute toward settlement.

4. When the third party defendant has a "special relationship" with the plaintiff (e.g., relative, friend or business relation), pressure may be applied on the plaintiff to settle at a lower figure.

5. Third party may assert added defenses against claims of plaintiff.

6. Greater ease of discovery from a party as opposed to a nonparty.

7. Third party may implead other parties.

8. By bringing a third party action, the defendant will obtain right to cross-examine the third party defendant at trial.

9. Possibility of gaining additional jury strikes.

10. A third party action may force counterclaims from third parties who otherwise would hold back.

11. In a case where plaintiff's attorney also represents the third party defendant, a third party action normally would create an ethical conflict forcing him to either withdraw from representing one of the parties or avoiding the conflict through settlement.

12. Possible preclusion if third party not joined.

D. CONSIDERATIONS OF DEFENDANTS DISCOURAGING THIRD PARTY ACTIONS:

1. Possible increase of damage award due to the psychological impact of multiple defendants or causing evidence to be viewed in different light thereby reducing percentage of plaintiff's fault.

2. Plaintiff can assume position of underdog against several defendants.

3. Increased difficulty in settling due to inability to agree on percentages among defendants.

4. Cross-examination among defendants will help plaintiff's proof of liability.

5. Possible increase of damage award by "in-fighting" between defendants.

6. Practical disadvantages at trial of being sandwiched between plaintiff and third party defendants who both are attempting to blame the client.

7. Empty chair argument may be more beneficial than bringing third party in--especially if judgment proof.

8. Possibility that jury will allocate a greater percentage of negligence to plaintiff under comparative negligence in situations when there are only two parties involved as opposed to three or four.

9. Third party action may increase costs and attorney time.

10. Third party action may force counterclaims that otherwise would not have been asserted.

11. Third party may settle out for less than fair share.

E. A CHECKLIST RELATING TO THIRD PARTY PROCEDURE IS INCLUDED IN THE APPENDIX.

F. NEED FOR ADVANCE RULING AS TO WHETHER COURT WILL PERMIT JURY TO CONSIDER FAULT OF NONPARTIES.

1. By interrogatory, plaintiff should determine whether any defendant is contending that the fault of any other party or nonparty was a cause of the event or the damages.

2. If a defendant will claim fault of a nonparty, then plaintiff can decide whether to seek leave to amend to join such persons or firms as additional defendants.

3. If such persons are not joined as added parties, or if the Court refuses to permit the addition of parties because the request is not timely or there is immunity or lack of jurisdiction, all parties will want to know before the trial starts whether the Court will include in the special verdict for allocation of fault a line for nonparties. A ruling might be obtained under Rule 105 if the issue was raised in the pleadings or it

might be raised by motion for partial summary judgment or during the pre-trial conference.

G. VOUCHING IN OF A NONPARTY MAY BE CONSIDERED.

1. Vouching in is recognized where indemnity applies. Chicago Great Western Ry. Co. v. Farmers Produce Co. (N.D. Iowa 1958), 164 F.Supp. 532; Hoskins v. Hotel Randolph Co. (1926), 203 Iowa 1152, 211 N.W. 423.

2. If it is claimed a nonparty may be liable in contribution, vouching in may be attempted. A form of notice for that purpose is included in the appendix.

3. The procedure may be upheld on the grounds of res judicata or preclusion (see Hoskins, supra) or on the ground that a full and fair opportunity to litigate was afforded. See Hunter v. City of Des Moines (Iowa 1981), 300 N.W.2d 121, 126.

III. ISSUES RELATING TO PARTIAL SETTLEMENTS.

A. CAN THE NON-SETTLING PARTY KEEP THE SETTLING PARTY IN THE CASE FOR PURPOSES OF CONTRIBUTION? IF THE PIERRINGER FORM OF RELEASE IS USED AND IS UPHELD, THE SETTLING PARTY COULD NOT BE KEPT IN THE LAWSUIT.

B. IF NOT, WHETHER THE COURT WOULD ASK THE JURY TO ASSIGN A PERCENT OF FAULT TO THE SETTLING PARTY?

C. HOW THE SETTLEMENT AFFECTS THE AMOUNT OF PLAINTIFF'S RECOVERY.

1. Three alternative methods have been suggested:

a. Recovery by plaintiff would be reduced by both the percent of fault of the plaintiff and that of the settling party.

(1) Schantz v. Richview, 311 N.W.2d 155 (Minn. 1981). If jury says settling party not liable, then no offset for amount of settlement.

b. The total damages would be reduced by the amount of settlement before percentages of fault were applied.

c. The dollar amount of the settlement would be deducted after reducing plaintiff's damages by any fault allocated to plaintiff. This is called the pro tanto rule.

(1) Prior to comparative negligence, Iowa has followed the pro tanto rule. See Wadle v. Jones (Iowa 1981), 312 N.W.2d 510. The Michigan Supreme Court has taken the position that the pro tanto rule "is consistent with the ever-important policies of (1) encouraging settlements and (2) assuring that a plaintiff is fully compensated for injuries sustained." See Mayhew v. Berrien County Road Com'n. (Michigan 1982), 326 N.W.2d 366, 371.

D. AS TO CONTRIBUTION CLAIMS, WHETHER A NON-SETTLING DEFENDANT'S SHARE IS BASED ON A PER CAPITA CONTRIBUTION OR THE PERCENT FIXED BY THE JURY.

IV. UNSETTLED QUESTIONS.

A. IMPUTED NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

1. It can be argued that the concept of imputed negligence is not consistent with the philosophy of comparative negligence that damages should be allocated on the basis of fault. However, the adoption of comparative negligence does not seem to have caused any reconsideration of the principals of imputed negligence. Schwartz suggests that a more realistic basis for imputed negligence is that the person not at fault set in motion an enterprise which is profitable to the person and which involves negligent parties. Thus, the enterpriser, rather than an innocent party, should bear the cost of accidents which occur in the course of business. Schwartz, Comparative Negligence, §16.1, Page 247, citing 2 Harper & James, The Law of Torts, §26.5 (1956); Prosser, Torts, §69 (4th Ed., 1971).

2. Imputed Contributory Negligence. Ordinarily, contributory negligence of one person is not imputed to another unless there would be vicarious liability for injury to a third person caused by the negligent person. See Prosser, Torts, §74 at 488 (4th Ed., 1971). However, in Stuart v. Pilgrim, (1956) 247 Iowa 709, 74 N.W.2d 212, the Iowa Court abandoned the "both ways" test, in that case. See discussion in Houlahan v. Brockmeier (1966), 141 N.W.2d 545, at 548, 549, 258 Iowa 1197, supplemented 141 N.W.2d 924, 258 Iowa 1197. Before the adoption of comparative negligence, Minnesota refused to impute a servant's contributory negligence to bar his master's claim for vehicle damage. Weber v. Stokely-Van Camp, Inc.

(1966), 274 Minn. 482, 144 N.W.2d 540. After the adoption of comparative negligence, the Minnesota court held that negligence of the bailee of an automobile would not be imputed to the bailor. Smedsrud v. Brown (1975), 303 Minn. 330, 227 N.W.2d 572.

3. Schwartz points out that the reasons justifying vicarious liability do not always support the imputation of contributory negligence. He further contends that since comparative negligence is predicated on the general philosophy that damages should be allocated on the basis of fault, there is justification for arguing that the "both ways" test should not always be followed.

B. Whether assumption of risk is a complete defense or is applied on a comparative basis to a case based on strict liability. See Coney v. J.L.G. Industries, _____ Ill.2d _____, _____ N.E.2d _____ (1983).

C. Whether comparative negligence applies to cases based on strict liability and tort. Coney v. J.L.G. Industries, _____ Ill.2d _____, _____ N.E.2d _____ (1983), holds: (1) Plaintiff's injuries are to be apportioned on the basis of the relative degree to which the defective product and plaintiff's conduct proximately caused them; (2) misuse and assumption of risk will not bar recovery, but will be compared in the apportionment of damages; (3) a consumer's unobservant, inattentive, ignorant or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor.

D. Whether comparative negligence applies to intentional torts.

E. How mitigation of damages is to be submitted.

F. Whether negligence of a claimant's employer may be compared up to the extent of the worker's compensation subrogation. Cf. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033 (Mass. 1983).

G. Whether contribution will continue to be based on a per capita basis or on a comparative fault basis.

H. Whether comparative negligence applies to claims based on gross negligence or willful and wanton acts.

1. Thompson v. Bohlken, 312 N.W.2d 501, 504 (Iowa 1981) holds that gross negligence differs from ordinary negligence "only in degree, not kind", and that willful or reckless conduct lies somewhere between ordinary negligence and intent to harm.

2. Larson v. Massey-Ferguson, Inc., 328 N.W.2d 343 (Iowa 1982), holds that contributory negligence is not a defense to an action based on gross negligence.

I. Whether the concept of partial indemnity may be created, such as was done by California in American Motorcycle Ass'n v. Los Angeles County Superior Court (1978), 20 Cal.3d 578, 604, 146 Cal.Rptr. 182, 578 P.2d 899.

J. Whether the court will permit the jury to allocate fault to nonparties such as:

a. Parties who have settled,

b. A party with an immunity such as worker's compensation, (Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033 (Mass. 1983) points out that since worker's compensation is purely legislative in origin there is less basis for courts to interfere.)

c. A party over whom jurisdiction cannot be obtained, or

d. Other nonparties.

K. The extent to which comparative negligence will be applied to nuisance cases based on:

a. Intentional acts,

b. Negligence, or

c. Strict liability.

L. Whether joint and several liability will be retained. Coney v. J.L.G. Industries, _____ Ill.2d _____, _____ N.E.2d _____ (1983), summarizes the arguments and agrees with the "vast majority of jurisdictions" that have retained joint and several liability.

M. Unsettled questions relating to settlement were discussed in Division III of this outline.

V. INSTRUCTIONS

A. POSSIBLE REQUESTED INSTRUCTIONS.

1. Quotient verdict as to amount of damages or allocation of fault is prohibited. See appendix.

2. Guidelines in determining comparative negligence. See appendix.

3. It is not clear whether the same jurors must agree to each of the individual answers to the special verdicts. Intermediate appellate courts in California have reached different results. Borns v. Butts (1979), 98 Cal.3d 208, 159 C.R. 400 (1st App. Dist., Div. 2), and McCormick v. Octopus Fresh Fish Market

& Seafood Grotto (1981), 119 Cal.3d 150, 174 C.R. 11, held that the same jurors must agree to each of the special verdicts. In United Farm Workers of America v. Superior Court (1980), 111 Cal.3d 1009, 169 C.R. 94 (5th App. Dist.), it was held that a different group of jurors could then decide whether the plaintiff was also negligent and whether plaintiff's negligence contributed to causing his injuries. The Court did not consider to what extent the same jurors must concur in the allocation of fault. See Anno. 155 A.L.R. 586; Krueger v. Winters, 37 Wisc.2d 204, 155 N.W.2d 1. In order to preserve alleged error, it might be prudent to ask the trial court to poll the jury as to each special verdict.

4. Sole proximate cause instructions may still be given. See appendix. Sponsler v. Clarke Elec. Coop., Inc. (Iowa 1983), 329 N.W.2d 663, reaffirmed the doctrine of sole proximate cause. The Court points out that it is available even when it relates to a nonparty and is available whether or not pleaded. The court also points out that the doctrine of "act of God" is an additional example of the defense. See appendix. See also Woods, The Negligence Case, Comparative Fault, §5.3.

5. If it is contended that fault of a nonparty was a proximate cause, there should be a requested instruction asking the court to add special verdicts relating to the negligence or other fault of a nonparty, the proximate cause, and a line in the special verdict for allocation of fault.

6. If different parties are involved in causing the accident and causing the

damages, the court might be asked to instruct the jury to make separate determinations as to the cause of the accident and the cause of the injuries.

B. ISSUES RELATING TO SPECIAL VERDICTS.

1. There is considerable authority to the effect that it is reversible error for either the court or the attorneys to inform the jury of the effect of their answers. The argument is made that this destroys the purpose and the benefits of special verdicts. See Annot. 90, A.L.R.2d 1040. For criticism of the rule, see Wright, Federal Practice and Procedure, §2509, ¶2; and Schwartz, Comparative Negligence, §17.5.

2. Rule 223 does not authorize the clerk to enter judgment on a verdict when special verdicts are involved.

   a. Therefore, it is suggested that, either at the pretrial conference or some time during the trial proceedings, arrangements be made reserving the entry of the judgment on the verdicts for future argument or consideration. The issues which may be involved include:

      (1) Whether the special verdicts are consistent,

      (2) Whether joint and several judgment is to be entered,

      (3) Interest,

      (4) Possible setoff questions,

      (5) Possible apportionment of costs under §625.1, The Code, and

(6) Contribution.

VI. PROOF AND ARGUMENT RELATING TO FAULT.

In a comparative negligence trial, the attorneys on each side must concentrate on methods of reducing the percentage of fault of their client and increasing the percentage of fault of opposing parties. There is included in the appendix a checklist of points to consider in the development of proof and making jury arguments relating to the allocation of percentages of fault.

VII. WHETHER A JURY IS TOLD ABOUT A PARTIAL SETTLEMENT.

A. Greiner v. Hicks (1941), 231 Iowa 141, 300 N.W.2d 727, 730, 731. Plaintiff had received a payment in return for a covenant not to sue. The trial court instructed the jury that defendant was entitled to a credit for the amount received upon any amount they should allow plaintiff. The only issue on appeal was whether defendant was entitled to the credit -- not the procedure.

B. In Frideres v. Lowden (1945), 235 Iowa 640, 17 N.W.2d 396, 401. Plaintiff had received $2,000.00 in return for covenant not to sue. The jury was instructed that defendants were entitled to a credit of this amount, with interest from date of payment, upon any amount it should allow plaintiff. The only issue on appeal was whether the amount of the verdict was excessive.

C. In Bolton v. Ziegler (N.D. Iowa, 1953), 111 F.SUPP. 516, 531-533, Judge Graven reviewed the authorities and concluded that the preferable procedure would be to inform the jury of the amounts received, instruct the jury that those sums are to be credited

upon any recovery, and in the interest of clarity, the forms of verdict should provide that the jury first set out the total award of damages before the credit, and then apply the credit, and return a verdict for the balance, if any, remaining. See also Johnson v. Harnisch (Iowa 1966), 147 N.W.2d 11, 17.

D. In Wadle v. Jones (Iowa 1941), 312 N.W.2d 510, the jury was told that there had been a settlement but was not told the amount. The trial court had previously decided during pretrial conference that the amount received in settlement from one defendant would be credited against any recovery by the plaintiff. After the jury returned its verdict, the trial court deducted the dollar amount of the credit and entered judgment for the remainder of the vercit. THE PROCEDURE WAS NOT CHALLENGED ON APPEAL.

E. BREWER v. PAYLESS STATIONS, INC. (Mich.) 316 N.W.2d 702, held that where there is no genuine dispute regarding either the existence of a release or settlement or the amount to be deducted, the jury shall not be informed of the existence of a settlement or the amount paid unless the parties stipulate otherwise, and that following the jury verdict, upon motion of the defendant, the Court shall make the necessary calculation and find the amount by which the jury verdict will be reduced. The Court determined that there had been considerable movement in other states toward this result, which is sometimes called the "court rule." See also Anno: 94 A.L.R.2d 352, 360-373 (1964).

VIII. NEW LEGISLATION -- S. F. 531.

A. "The doctrine of joint and several liability shall not apply if a plaintiff is found to bear any comparative negligence with respect to any claim." (Emphasis added.)

Π negligent – jt & several does not apply
Π not negligent – jt & several does apply

B. The change applies to cases "tried or retried on or after July 1, 1984."

C. A study committee is created to study ". . . the matter of comparative negligence, comparative fault and contributory negligence as they apply to the broad spectrum of tort law in Iowa . . ." during the interim before the next session.

IX. THE EFFECTS OF NEW LEGISLATION.

A. Jockeying as to whether a case will be tried before or after July 1, 1984.

B. Increased importance to the question as to whether the Court will allow a jury to allocate fault to a nonparty. This decision will be critical in some cases, e.g., phantom vehicle causing accident, etc.

C. Additional argument in favor of comparative contribution.

D. The statute uses the term "comparative negligence." What about assumption of risk and mitigation of damages?

E. The statute refers to "any claim." What if plaintiff recovers on several claims and comparative negligence applies to only one of the claims?

F. There may be a constitutional attack on the new statute as to whether there is any rational relationship between the classifications drawn and the statute's conceivable purpose and whether it violates the equal protection clause of the Iowa Constitution. See Bierkamp v. Rogers (Iowa 1980), 293 N.W.2d 577.

X. PUNITIVE DAMAGES

A. Contribution is denied for punitive damages. For The Defense, July 1983. Courts are divided as to whether there should be apportionment. Annot., 20 A.L.R.3d 666 (1968). Individual assessment seems to be the rule. See Dickerson v. Young, 332 N.W.2d 93 (Iowa 1983); McFadden v. Sanchez (CA2, 1983) _____ F.2d _____.

COMPARATIVE NEGLIGENCE ISSUES

1.	Whether the facts give rise to any legal duty on the part of the defendant to a particular plaintiff.[1]	Law
2.	The standard of conduct required of the defendant by the legal duty.[2]	Law
3.	Whether the defendant has conformed to the standard of conduct required by the law.[3]	Fact
4.	Cause in fact.[4]	Fact
5.	Whether the cause in fact would be a legal cause.[5]	Law
6.	Whether recovery is barred by an affirmative defense (other than contributory negligence).	Law & Fact
7.	Whether fault of plaintiff would reduce plaintiff's recovery, and if so:	Law
	a. Do the facts give rise to any legal duty on the part of the plaintiff to a particular defendant.[1]	Law
	b. The standard of conduct required of the plaintiff by the legal duty.[2]	Law
	c. Has plaintiff conformed to the standard of conduct?[3]	Fact
	d. Is there cause in fact?[4]	Fact
	e. Would cause in fact be a legal cause?[5]	Law
8.	Whether fault of nonparties is to be considered and, if so, same issues regarding nonparties as set out in Issue 7.	Law

9.	Allocation of fault.[6]	Fact
10.	Whether the farm claimed to be suffered by the plaintiff is legally compensable.[7]	Law
11.	Whether the harm is capable of apportionment among two or more causes.[8]	Law
12.	The apportionment of harm to two or more causes.[9]	Fact
13.	The amount of compensation for legally compensable harm.	Fact
14.	Whether a jury question is presented on the fact questions.[8]	Law

[1]Restatement Torts 2nd §328B(b) Soike v. Evan Matthews and Co., 302 N.W.2d, 841(4). "When the violation of a statute, ordinance or administrative rule will not support an action for damages." 1979 Iowa Defense Counsel meeting, Page 1. A general duty of due care will not be sufficient (unless res ipsa applies). Hysell v. Iowa Public Service (8th Cir., 1976) 534 F.2d 775, 782 (12); Manley v. O'Brien Cty. Rural Elec. Co-op, 267 N.W.2d 39 (Iowa 1978) (2). The neglect of a duty imposed by contract is a tort. Duke v. Clark, 267 N.W.2d 63, 68 (9) (Iowa 1978). Palsgraf v. Long Island R. Co., 59 A.L.R. 125. Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979) (4), Wittrup v. Chicago and Northwestern Ry. Co., 226 N.W.2d 882, 823, 824 (Iowa 1975). Larsen v. United Fed. Sav. & Loan Ass'n., 300 N.W.2d 281, 285 (Iowa 1981). Roadway Exp., Inc. v. Piekenbrock, 306 N.W.2d 784 (Iowa 1981). Prosser, Law of Torts (4th Ed., 1971) p. 206. "Negligent conduct involves an unreasonable risk of: (1) Causing harm to a class of persons of which the other is a member, and (2) subjecting the other to the hazard from which the harm results." Restatement Torts §430, PP. 426, 427.

[2]Restatement Torts 2d §328B(c).

[3]Pacific Indemnity Co. v. Rathje, 188 N.W.2d 338, 341 (Iowa 1971); Restatement Torts 2nd §328B(d).

[4]State v. Marti (Iowa) 290 N.W.2d 570, 584, 585; W. Prosser, Handbook of the Law of Torts (4th Ed. 1971) §41.

[5]State v. Marti, supra, 290 N.W.2d at 585; W. Prosser, supra, §42; Restatement Torts 2nd §328B(e), §§430-462. Whether harm is capable of apportionment among two or more causes is also a question of law. Restatement Torts §434.

[6]State v. Kaatz (Alaska 1977) 572 P.2d 775, 781.

[7]Restatement Torts 2nd §328B(f).

[8]Restatement Torts 2nd §§433A, 434.

[9]Restatement Torts 2nd §434.

[10]Restatement Torts 2nd §434.

THIRD PARTY PROCEDURE UNDER RULE 34 (F.R.C.P. 14)

A. By the Third Party Defendant

1. After being served with an original notice, the third party defendant must:

   a. Make defenses to the third party plaintiff's claim as provided in Rule 85.

   b. File counterclaim against the third party plaintiff as provided in Rule 29.

2. The third party defendant also may:

   a. Assert against the original plaintiff any defenses which the third party plaintiff has to the original plaintiff's claim.

   b. Assert against the original plaintiff any claim arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim against the third party plaintiff.

   c. Implead another person not a party who is or may be liable to him/her for all or part of the third party claim.

   d. File cross claims against other third party defendants as provided in Rule 33.

   e. Move to strike third party claim.

   f. Move to sever third party claim.[1]

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[1]Creates independent actions which may result in different judgments. Lusk v. Pennzoil United, Inc. (D.C., Miss. 1972), F.R.D. 645.

g. Move for separate trial (See also Rule 186).[2]

h. File jury demand.[3]

i. Tender defense.

B. By any party

1. Any party may move to strike the third party claim.

2. Any party may move to sever the third party claim. F.R.C.P. 21, I.R.C.P. 27, 186.

3. Any party may move for separate trial. (See also Rule 186). F.R.C.P. 42(b), 14(a).

4. Motion to vacate order granting leave to bring in third party.[4]

---

[2]Results in a single judgment. Lusk v. Pennzoil United, Inc. (D.C., Miss. 1972), 56 F.R.D. 645. A second jury may be impaneled to try issue of third party defendant's liability. DeWald v. Minister Press Company (6th Cir. 1974), 494 F.2d 795, 798.

[3]A separate jury demand is needed for claims for indemnity or contribution. Brandt v. Olsen, N.D., Iowa 1961), 190 F. Supp. 683, 685 (interpreting Federal Rule 38 which is similar to Iowa Rule 177). If a plaintiff files a jury demand, it applies only to issues between plaintiff and defendant. If defendant files a jury demand, it applies to plaintiff and if the defendant thereafter brings in a third party, the jury demand of the defendant also applies to the third party claim. See Andrews v. Struble (Iowa 1970), 178 N.W.2d 391, 399.

[4]§1460, Wright and Miller, Federal Practice and Procedure; Cowman v. LaVine (Iowa 1975), 234 N.W.2d 114, 124.

C. The venue of a cross-petition remains in the county where the main action belongs, even though the issues on the cross-petition are tried separately. See Cooley v. Ensign-Beckford Co. (Iowa 1973) 209 N.W.2d 100.

NOTICE

TO:

You are hereby advised that on _____, 19___, (name of plaintiff) brought an action against the undersigned, claiming damages for:

> (Set out the claim and issues as specifically as possible; in case the action is in tort, specify the date and place of injury.)

A copy of the (petition, complaint) is attached hereto.

You are further notified that the undersigned claims that if the undersigned is liable to the plaintiff in said action, the undersigned is entitled to contribution from you for the following reasons: (Set out grounds, such as "your negligence would be a concurring cause", etc.)

You are, therefore, notified that the undersigned will claim of you contribution for your proportionate share of any recovery obtained by a plaintiff herein.

You are encouraged and invited to intervene herein if you wish to participate in the proceedings determining your liability and your proportionate share.

If you do not intervene, you are hereby notified that the undersigned will request that the jury fix your proportionate share, and the undersigned will contend that you are bound by said determination.

Dated this _____ day of _____, 19___.

_____

By_____

SMITH, PETERSON, BECKMAN & WILLSON
370 Midlands Mall
P. O. Box 249
Council Bluffs, Iowa 51502
Telephone: (712) 328-1833
ATTORNEYS FOR

BAJI 15.33 (1975 Revision)

CHANCE OR QUOTIENT VERDICT PROHIBITED

The law forbids you to determine any issue in this case by chance. Thus, if you determine that a party is entitled to recover, you must not arrive at the amount of damages to be awarded [or any percentage of negligence] by agreeing in advance to take the independent estimate of each juror of the amount to be awarded [or such percentage], then to total such estimates, divide such total by twelve and to make such resulting average the amount of your award [or percentage].

USE NOTE

For eminent domain proceedings, it is suggested that this instruction be revised as follows:

"The law forbids you to determine any award to be made in this case by chance. Thus, you must not agree in advance to take the independent award estimate of each juror, then to total such estimates, divide by twelve and to make the resulting average the amount of your award."

COMMENT

Code of Civ Proc., § 657(2); 4 Witkin, Calif Proc., Trial, § 299; Li v. Yellow Cab Co., 13 Cal 3d 804, 119 Cal Rptr. 858, 532 P 2d 1226.

Library References:
West's Key No Digests Trial ⇐217

BAJI 14.91 (1980 Revision)

GUIDELINES IN DETERMINING COMPARATIVE NEGLIGENCE

In order to determine the proportionate share of the negligence attributable to the plaintiff, you will of necessity be required to evaluate the combined negligence of the plaintiff and of the defendant[s] [and of all other persons] whose negligence proximately contributed to plaintiff's injury.

In comparing the negligence of such persons you should consider all the surrounding circumstances as shown by the evidence.

USE NOTE

Should the user desire to delineate guidelines as discussed in Li v. Yellow Cab Co., 13 Cal 3d 804, 119 Cal Rptr 858, 532 P 2d 1226, this instruction may be used by adding at the end "including but not limited to the following:"

Strike the bracketed reference to other persons if there is no claim that non-joined persons contributed to the injury.

If a special verdict is to be directed the following preface should be added to this instruction: "In the event that you find there was negligence on the part of the plaintiff which contributed as a proximate cause to his injuries, then".

Comparative negligence or comparative fault does not apply in a fraud action based on negligent misrepresentation. Carroll v. Gava, 98 Cal App 3d 892, 159 Cal Rptr 778.

COMMENT

Doctrine of comparative fault "applies where either party's conduct is anything less than intentional" even where one party's conduct constitutes willful misconduct. Zavala v. Regents of Univ. of California, 125 Cal App 3d 616, 178 Cal Rptr. 185.

of an assumption of risk defense separate from ordinary contributory negligence principles. Many states have merged assumption of risk into the general comparison of negligence. *E. g. Li v. Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 873, 532 P.2d 1226, 1241 (Cal.1975); Schwartz, *supra* §§ 9.4 & 9.5 at 165–75 (collecting citations).

[23, 24] We cannot offer specific guidelines on how to compare negligence. Every case must turn on its own facts. The trier of fact, whether judge or jury, must apply its ordinary human experience to the facts revealed by the evidence. The pattern jury instructions used in Wisconsin, perhaps the leading state in the development of comparative negligence law, and in California offer no real guidance.[8] *See also* Aiken, Proportioning Comparative Negligence-Problems of Theory and Special Verdict Formation, 53 *Marquette L.Rev.* 293, 294-97 (1970).

Professor Victor Schwartz, in his treatise on comparative negligence, offers four items which make the apportionment process somewhat more concrete for the trier of fact. He suggests that counsel might find them helpful in structuring the closing argument. They are: (1) the probability from each negligent party's point of view that the particular kind of harm that actually occurred, would indeed result; (2) the extent to which reasonable people in the positions of the parties could foresee that the particular harm might occur; (3) what, if anything, was to be gained by each party taking the risk it did; and (4) if something of significant value was to be gained, whether there were more reasonable alternatives open to the party. Schwartz, *supra* § 9.1 at 278.[9]

[25] If we were the triers of fact, we might well have apportioned the negligence more favorably to the state than did the trial court. But after examining the entire record, we are not left with the definite and firm conviction that the trial court was clearly mistaken.[10] Therefore, we affirm.

8. The Wisconsin instruction, as reprinted in C. R. Heft and C. J. Heft, *Comparative Negligence Manual* § 7.520 (Supp.1976) reads as follows:

> "If you answer Question _____ [or this question] you will determine how much or to what extent each person (party) named in the question is to blame for the (collision) (accident) (injury) and considering the conduct of the persons (parties) named in the question considered as a whole, you will determine whether one made a larger, equal or smaller contribution than the other (others). In making your apportionment of negligence you will fix the percentage attributable to each participant in proportion to how much the fault of each contributed to cause the (collision) (accident) (injury) and record those percentages."

The California instruction, *California Jury Instructions—Civil* [BAJI] 11.91 (Supp.1975), entitled "Guidelines in Determining Comparative Negligence" reads:

> "In order to determine the proportionate share of the negligence attributable to the plaintiff, you will of necessity be required to evaluate the combined negligence of the plaintiff and of the defendant[s] [and of all other persons] whose negligence proximately contributed to plaintiff's injury.
>
> In making this evaluation you are instructed that it is the negligence of such persons that you must measure and not the mere physical causation for the accident. In comparing the negligence of such persons you should consider all the surrounding circumstances as shown by the evidence."

9. In *Associated Engineers, Inc. v. Job*, 370 F.2d 633, 641 (8th Cir. 1966) (Blackmun, J.), the court suggested the following three factors are useful in assessing negligence: the precautions the parties took for their own safety; the extent to which they should have been aware of the risk "as the result of warnings, experience or other factors"; and the foreseeability of injury as a consequence of the conduct. The court was interpreting South Dakota's comparative negligence statute which bars the plaintiff's recovery unless his negligence is slight and the defendant's gross. But these factors may be useful in apportioning negligence under our system of pure comparative negligence as well.

10. We bear in mind the advice of the Supreme Court of Wisconsin in the first case to reach it after enactment of that state's comparative negligence statute:

> "When two persons are negligent and injury to one proximately results from the combined negligence of both, it must often be a very delicate and difficult question to decide whether the negligence of one was greater than that of the other, and contributed in a greater degree to produce the injury. There is no yardstick with which to measure the two acts of negligence, nor scales with which to weigh them."

BAJI 15.51

CONCLUDING INSTRUCTION—SPECIAL VERDICT

You shall now retire and select one of your number to act as foreman, who shall preside over your deliberations.

In this case it will be your duty, and you are directed, to return a special verdict in the form of written answers in the special verdict form you will be given. You shall answer according to the directions in that form and in accordance with all the instructions of the court.

As soon as 9 or more identical jurors have agreed upon each answer required by such directions on the special verdict form, so that each of those 9 or more may be able to state truthfully that every answer is his or hers, you shall have such verdict signed and dated by your foreman and you shall return with it to this room.

USE NOTE

This instruction is designed for use exclusively where the only jury verdict is a special verdict. Do not give Instruction 15.50 (1977 Revision) in case of a special verdict.

Library References:

West's Key No. Digests, Trial ⇨352.7

COMMENT

At least nine identical jurors must agree to each answer in a special verdict. Borns v. Butts, 98 Cal.App.3d 208, 159 Cal.Rptr. 400. But see United Farm Workers of America v. Superior Court, 111 Cal.App.3d 1009, 169 Cal.Rptr. 91, which holds that nine identical jurors need not agree to every answer in a special verdict.

No. 2.7 SOLE PROXIMATE CAUSE

Defendant contends that the sole proximate cause of the accident involved herein was the negligence of the driver of the car in which plaintiff was riding, and that if defendant was negligent, as alleged in plaintiff's petition, such negligence was not a proximate cause of the accident and resulting injuries to plaintiff. Defendant has the burden of proof to establish this contention.

Before the plantiff can recover he must establish by a preponderance of the evidence that the defendant was negligent in one or more of the particulars alleged by plaintiff and that such negligence was a proximate cause of the accident and resulting injuries to plaintiff.

However, if the defendant has proved by a preponderance of the evidence that the driver of the car in which plaintiff was riding was negligent and that such negligence was the sole proximate cause of the accident and injuries to the plaintiff, then the plaintiff cannot recover against the defendant.

NOTE: The defendant has the burden to prove the sole proximate cause defense whether it is raised by affirmative pleading or general denial.

Adam v. T.I.P. Rural Electric Cooperative, 271 N.W.2d 896 (1978).

December 1981

REVISED
No. 2.7A THIRD PERSON NEGLIGENCE PLEADED AS SOLE PROXIMATE CAUSE

The defendant has pleaded that the sole proximate cause of plaintiff's injury and damage was the negligence of (driver of car in which plaintiff was riding or driver of another car), and the defendant has the burden of proof to establish this contention.

Proximate cause has been heretofore defined. A particular result may have more than one proximate cause, and the negligence of two or more persons may combine so that the negligence of each is a proximate cause of an injury or damage.

Where the negligence of only one person is the proximate cause of an injury or damage, it is referred to as the "sole" proximate cause. Where the negligence of two or more persons combine to proximately cause an injury or damage, the negligence of each is referred to as a "concurring" proximate cause, or concurrent negligence.

Before the plaintiff can recover he must establish by a preponderance of the evidence that the defendant was negligent in one or more of the particulars alleged by plaintiff and that such negligence was either the sole proximate cause or a concurring proximate cause of any injury and damage to plaintiff.

However, if the defendant has proved by a preponderance of the evidence that (third person) was negligent and that such negligence was the sole proximate cause of the injury and damage to plaintiff, then the plaintiff cannot recover against the defendant.

NOTE: The defendant has the burden to prove the sole proximate cause defense whether it is raised by affirmative pleading or general denial.

Adam v. T.I.P. Rural Electric Cooperative, 271 N.W.2d 896 (1978).

December 1981

No. 1.22 DEFENSE OF ACT OF GOD

The defendant claims that the sole proximate cause of plaintiff's injuries was an Act of God. An Act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected. While the occurrence need not be unprecedented, it must be such that reasonable precautions could not have been taken to guard against it.

The defendant has the burden of proving by a preponderance of the evidence the following propositions in connection with the defense of Act of God: (1) That the Act of God in fact occurred; and (2) That said Act of God was the sole proximate cause of plaintiff's injuries and damages.

If you find from the evidence that the defendant has proved by a preponderance of the evidence that an Act of God was the sole proximate cause of plaintiff's injuries and damages, then the plaintiff cannot recover. If the defendant has failed to establish these propositions by a preponderance of the evidence, then you should disregard the defense of Act of God.

Dickman v. Truck Transport, Inc., 224 N.W. 2d 459 (1974)

Naxera v. Watham, 159 N.W. 2d 513 (Iowa 1968)

Oakes v. Peter Pan Bakeries, Inc., 258 Iowa 447, 138 N.W. 2d 93 (1966)

Wagaman v. Ryan, 258 Iowa 1352, 142 N.W. 2d 413 (1966)

Brown v. Coal Company, 143 Iowa 662, 120 N.W. 732 (1909)

> "Extreme weather conditions, though inevitable in the locality involved, which operate to foil human obligations of duty are usually deemed in law to be Acts of God." Oakes v. Peter Pan Bakeries, Inc., 258 Iowa 447, 138 N.W. 2d 93 (1966); Ritchie v. City of Des Moines, 211 Iowa 1026, 1035, 233 N.W. 43, 47 (1930).

Houghtaling v. Chicago Great Western Railway Company, 117 Iowa 540, 91 N.W. 811 (1902)

CRITERIA FOR ALLOCATING PERCENTAGES OF FAULT

Liability is usually based on objective tests. Comparative fault involves subjective criteria -- quality of the fault -- moral fault.

1. Probability of harm resulting from conduct.

2. Magnitude of risk. Number endangered. Potential seriousness of injury. Whether the fault endangers only the actor or others. Lookout of driver v. lookout of passenger.

3. Whether inadvertence or awareness of danger involved. Active or passive. Left turn in face of oncoming traffic v. look-out. Failing to look v. failing to see.

4. Would claimant or a reasonable person realize the risk or hazard, i.e. that there was a danger of risk lurking in this situation or place. Foreseeability.

5. Prior experience of actor or warnings that would help realization of risk. Some elements of assumption of risk.

6. Significance of what actor was seeking to attain by conduct. Products -- balance utility v. risk of use.

7. Were there more reasonable ways to accomplish. Alternate safe route, etc. Alternate designs.

8. Burden of adequate precautions. Product guards. Warnings.

9. Actor's superior or inferior capacities. Child. Elderly. Handicapped.

10. Particular circumstances. Emergency.

11. Elements contained in policy causing rule or law to be adopted in the first place.

12. Closeness of the cause to the event. Some elements of last clear chance.

13. The comparison is not determined by the kind or character or number of elements of negligence but by the degree of contribution.

14. Both fault and causation are compared. Query whether fault causing damages should be considered. See Wing v. Morse (Me.), 300 A.2d 491.

AUTHORITIES

Schwartz, Comparative Negligence, §17.1.

Comments to §1 of Uniform Comparative Fault Act.

State v. Kaatz (Ak. 1977) 572 P.2d 775.

way or road construction or reconstruction. The rule of statutory construction that the express mention of one thing implies the exclusion of the other does not apply to this Act.

Sec. 28. NEW SECTION. The doctrine of joint and several liability shall not apply if a plaintiff is found to bear any comparative negligence with respect to any claim.

Sec. 29. Sections 11, 24 and 26 of this Act shall apply to all cases tried or retried after July 1, 1983. Section 28 of this Act shall apply to cases tried or retried on or after July 1, 1984.

Sec. 30. The legislative council is directed to establish a joint subcommittee of the senate committee on judiciary, the house committee on judiciary and law enforcement, and the senate and house committees on commerce, to be composed of eight members of the house and eight members of the senate, to study the matter of comparative negligence, comparative fault and contributory negligence as they apply to the broad spectrum of tort law in Iowa, during the interim between the Seventieth General Assembly's first and second session. This joint subcommittee shall be authorized to meet for not less than five days.

Sec. 31. Notwithstanding the provisions of section 423.24, there is transferred from revenues collected under chapter 423 during the fiscal year beginning July 1, 1983 and ending June 30, 1984, from the use tax imposed on motor vehicles, trailers and motor vehicle accessories and equipment under section 423.7 the sum of one million (1,000,000) dollars which shall be transferred to the state department of transportation for public transit assistance for the fiscal year beginning July 1, 1983 and ending June 30, 1984. The funds transferred under this section to the state department of transportation for public transit assistance shall be considered an advance of funds to be received for public transit assistance under the Surface Transportation Assistance Act of 1982 and the road use tax fund shall receive reimbursement of the funds from receipts received by the state department of transportation for public transit assistance from the United States government pursuant to the Surface Transportation

TABLE OF CONTENTS

AFFIRMATIVE DEFENSES

GENERAL:

AFFIRMATIVE DEFENSES -- GENERAL

A-1. Negligence and fault of plaintiff(s) is a proximate cause of plaintiff('s/s') injuries or damages which is the sole cause, or contributes thereto, and the negligence and fault of the plaintiff(s) should either bar recovery or be apportioned to determine the amount of damages to which plaintiff(s) (is/are) entitled. (Comparative Negligence)

A-2. By the use of reasonable effort or expenditure, the plaintiff(s) could have completely or partially avoided the damages claimed in the pleadings. (Mitigation of Damages)

A-3. In no event should this answering defendant be liable for more than defendant's comparative share. (No joint and several. If this is used always add optional prayer.)

A-4. The alleged accident and damages, if any, were proximately caused or contributed to by the negligence or fault of others over whom this defendant has and had no control, or right of control, and for whom it is not responsible and said negligence and fault comparatively reduces the percentage of negligence and fault, if any, of this defendant. (Nonparties)

A-5. Defendant(s) allege(s) that payments have been made to plaintiff(s) in the amount of $_____ as compromise advance payments against any possible liability of the defendant(s) and by reason thereof in the event any judgment is entered against the defendant(s) herein, there should be a credit made for the amount of said payments. (Credit)

A-6. The alleged accident and damages, if any, were the result of intervening and/or superceding acts of third persons over whom this defendant has and had no control, or right of control, and for whom defendant is not responsible. (Intervening Acts)

A-7. This court lacks personal jurisdiction over defendant(s). (Personal Jurisdiction) (Federal Court Only)

A-8. This court lacks jurisdiction over the subject matter of this action. (Subject Jurisdiction)

A-9. This action was not commenced within two years from the time the plaintiff(s) knew or had reason to know or with the exercise of reasonable

care should have known the facts out of which the alleged claims were made. (Statute of Limitations)

A-10. In the event that plaintiff is entitled to any recovery herein, the damages incurred by plaintiff should also be reduced in the proportion that the conduct of plaintiff's employer bears to the total negligence or fault that proximately caused the plaintiff's damages; and plaintiff's employer's workers' compensation subrogation rights, if any, should be satisfied in full or in part to the extent of said reduction. (Workers' Compensation Subrogation)

A-11. The sole proximate cause of the accident involved herein was the negligence of _____. (Sole Proximate Cause)

A-12. Defendant driver was confronted with a sudden emergency, not brought about by his own fault, and because thereof is required to act upon the impulse of the moment without sufficient time to determine with certainty the best course to pursue by reason of _____. (Sudden Emergency)

A-13. Just prior to the collision, defendant was in a position of peril; plaintiff had knowledge of defendant's presence; plaintiff realized

or in the exercise of reasonable care should have realized that defendant was in a position of peril; and plaintiff had the time and ability to avoid the collision through the exercise of ordinary care and failed to do so. See Uniform 2.7D (Last Clear Chance)

A-14. The alleged injuries and damages complained of by plaintiff were proximately caused by a new, independent, and efficient intervening cause, namely, _____ (describe intervening cause), which constitutes a superseding cause.

OPTIONAL PRAYER

and that in any event, defendant(s) (is/are) only liable for the defendant('s/s') comparative share

PRODUCT CASES:

P-1. Economic Damages

P-2. Assumed Risk

P-3. Limited Express Warranty

P-4. Express Warranty

P-5. Implied Warranty - No Notice

P-6. No Privity

P-7. Strict Overrides

Count _____

Count _____

Count _____

P-8. Disclaimer, etc.

P-9. Waiver

P-10. Concurrent Sole Cause

P-1. The only damage that could be sustained by the third party petitioner in this case are economic damages and the Iowa law does not recognize a recovery for economic damages under the strict liability theory. (Economic Damages)

P-2. The plaintiff(s) voluntarily and knowingly assumed any risk that was present under the circumstances. Such assumption of risk is a complete bar to the claims herein or proportionately reduces the recovery of plaintiff(s). (Assumed Risk)

P-3. That the product which was allegedly manufactured by the defendant(s) was accompanied by a limited express warranty under the terms of which the defendant(s) could not be held liable as prayed for. (Limited Express Warranty)

P-4. That the product allegedly manufactured by the defendant(s) was accompanied by express disclaimers of any other express or implied warranties of fitness or merchantability. (Express Warranty)

P-5. Claims are made herein based upon breach of implied warranty. Said claims are barred and plaintiff(s) fail(s) to state a claim against defendant(s) on which any relief can be granted for

the reason that no timely notice of any breach of implied warranty, as required by §554.2607, Iowa Code Annotated, was given by the buyer to defendant(s), such notice being a condition precedent to any claimed cause of action. Winters v. Honeggers' & Co., Inc., 215 N.W.2d 316. (Implied Warranty - No Notice)

P-6. A claim is made herein for implied warranty. Plaintiff(s) (is/are) not within the class protected by the principles of implied warranty. Hahn v. Ford Motor Co., 126 N.W.2d 350, 354. Wagner v. Larson, 136 N.W.2d 312(12). (No privity)

P-7. Count ____ alleges a cause of action based upon strict liability. Count ____ alleges a cause of action based upon implied warranty. Since the plaintiff claims personal injuries, the theory of strict tort liability overrides recovery on a warranty theory and plaintiff is not entitled to have any warranty theory submitted to the jury and Count _____, therefore, fails to state a cause of action against the defendant(s). Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672(13), 199 N.W.2d 373, 382. (Strict Overrides)

P-8. Any warranties deemed to have been made by defendant(s) were either fulfilled, terminated or disclaimed. (Disclaimer, etc.)

P-9. Plaintiff(s) did not give notice to defendant(s) of any alleged breach of warranty within a reasonable time. Plaintiff(s) (has/have), therefore, waived any claim predicated upon a purported breach of warranty. (Waiver)

P-10. The negligence of (claimant's employer) either standing alone or combined with the negligence of (claimant), was the sole proximate cause of the injuries and damages claimed herein.

FIRST PARTY CLAIMS

THOMAS D HANSON
Des Moines, Iowa

INTRODUCTION

During the past several years plaintiff's lawyers, in search of a replacement for their conventional personal injury business have branched out in a number of directions in order to continue their practice of creating remedies where no rights exist.

One of the principal branches of this obnoxious weed is the attempt to create extra contractual liability for insurers in their dealings with their insured's in matters relating to claims by the insureds against their own carriers.

> "Narrowly viewed, an insurance policy is no more than a vehicle for defining the contractual rights and obligations of an insured and its insurer. Unlike most other private business arrangements, however, the insurance contract also implicates important public policy concerns. As society's principal mechanism for the transfer of risk, insurance serves essential social and economic goals, which the law seeks to foster and protect. Out of this interaction of private contractual relationships with broad public policy concerns has emerged the hybrid law of extracontractual damages, partaking of both contract and tort law principles." Burnbaum and Werbel, Extracontractual Damages Against Insurer" An Overview ABA Seminar 1982.

This paper will briefly discuss the most common theories used in other states for the imposition of such liability and the success of such theories in Iowa.

Traditionally, if an insurance company breached its contract to pay benefits to its insured, damages were limited by the Hadley v. Baxendale, rule to those which naturally flowed from the breach, those which were contemplated at the time of the contract. Consequential damages such as economic loss, mental distress and punitive damages were not recoverable. Certainly some courts in recent years have taken a more liberal approach to the foreseeability of damages but most courts in considering the issue of damages for breach of contracts of insurance have favored new tort theories.

THEORIES OF LIABILITY

1. Breach of Duty of Good Faith and Fair Dealing

A number of states have adopted this theory from imposing extra contractual liability. Not suprisingly the principle genesis and development of this theory arises in California. The tort of bad faith stems from the breach of the duty to deal fairly and in good faith with the insured i.e., the insurer refuses in bad faith to honor a claim on an insurance policy.

See, for instance. Fletcher v. Western National Life Ins. Co., 10 Cal. App. 3rd 376, 89 Cal. Rptr. 78 (1970); Gruenberg v. Aetna Ins. Co., 9 Cal. App. 3rd 566, 510 P.2d 1032 (1972)

The principle public policy rational used by courts in adopting this standard relates to a differentiation of insurance from other contracts because of several factors among them being

(1) unequal bargaining power, (2) the "reasonable expectations" of the insured, (3) the public interest in insurance because it promotes economic stability and risk allocation.

A number of courts have adopted this approach. Escambia Treating Co. v. Aetna Cas. & Sur. Co., 421 F. Supp. 1367 (N.D. Fla. 1976); Old Southern Life Ins. Co. v. Woodall, 326 So. 2d 727 (Ala. 1976); United Services Auto Assn'n v. Wesley, 526 P. 2d 28 (Alas. 1974); Grand Sheets Metal Products Co. v. Protection Mut. Ins. Co., 34 Conn. Supp. 46, 375 A. 2d 428 (Conn. 1977); Leadingham v. Blue Cross Plan, 29 Ill. App. 3d 339, 330 N.E. 2d 540 (1975); Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E. 2d 173 (Ind. 1976); State Farm Gen. Ins. Co. v. Clifton, 86 N.M. 757, 527 P. 2d 798 (1974); Frizzy Hairstylists, Inc. v. Eagle Star Ins. Co., 89 Misc. 2d 822, 392 N.Y.S. 2d 554 (Civ. Ct. 1977); United States Fidel. & Guar. Co. v. Peterson, 540 P. 2d 1070 (Nev. 1975); Kirk v. Safeco Inc. Co., 273 N.E. 2d 919 (Ohio 1970); Diamon v. Penn. Mut. Fire Ins. Co., 372 A.2d 1218 (PA. Super. Ct. 1977).

The Wisconsin Supreme Court — upon whom Iowa's has placed great reliance in this area— had defined the tort to be intentional but the test to be an objective one of ordinary care:

1. absence of a reasonable basis to deny the claim;
2. the insurer's knowledge or reckless disregard of the lack of a reasonable basis to deny the claim.

Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 6 92-3, 271 N.W.2d 368, 377 (1978)

From this case the Iowa Supreme Court has drawn its "fairly debatable" position with regard to first party bad faith. The Wisconsin Court relying on earlier precedent held

> "In Drake, under the facts alleged, this court concluded that an action for bad faith was not stated, because it was not a case "where the validity of the claim was not even fairly debatable." (70 Wis.2d at 984, 236 N.W.2d at 208) It is thus apparent from Drake that when a claim is "fairly debatable," the insurer is entitled to debate it, whether the debate concerns a matter of fact or law. In Drake, it was determined that "there was a genuine dispute over the status of the law at the time the denials were made, and it cannot be said that the company's denials were made in bad faith." (at 984, 236 N.W.2d at 208)
>
> The law which obliges the insurance company to pay proved and itemized fire and smoke damages to the Andersons is unquestioned. Under no view of the applicable law is that obligation "fairly debatable."
>
> Whether a claim is "fairly debatable" also implicates the question whether the facts necessary to evaluate the claim are properly investigated and developed or recklessly ignored and disregarded.
>
> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one. "Bad faith" by definition cannot be unintentional. "Bad faith" is defined as "Deceit; duplicity; insincerity." American Heritage Dictionary of the English Language (1969), p. 471. The same dictionary defines "deceit" as a "strategem; trick; wile" (p. 342), and duplicity as "deliberate deceptiveness in behavior or speech." (P. 405)
>
> Hilker, supra, 204 Wis. at 15, 231 N.W. 257, 235 N.W. 413, emphasizes that bad faith is the absence of honest, intelligent action or consideration based upon a knowledge of the facts and circumstances upon which a

> decision in respect to liability is predicated. While Hilker emphasizes the duty of ordinary care and reasonable diligence on the part of an insurer in handling claims, it is apparent from Filker that the knowing failure to exercise an honest and informed judgment constitutes the tort of bad faith.
>
> The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances. See, Hiler, supra, and Alt. v. American Family Mut. Ins. Co., 71 Wis. 2d 340, 237 N.W. 2d 706 (1976).

Thus, in Wisconsin, the jury determines whether the claim was fairly debatable under the standards set forth above.

In Iowa, the process of the development of this theory may be in its embryonic stage — or it may be still born. In three recent cases the Iowa Supreme Court has directly held that the theory of the tort of first party bad faith has not been adopted in Iowa. M-Z Enterprises, Inc. v. Hawkeye Security, 318 N.W.2d 408 (Iowa 1982); Higgins v. Blue Cross & Blue Shield, 319 N.W. 2d 232 (Ia. 1982); Brown Township Mutual v. Kress, 330 N.W.2d 291 (Ia. 1983). However a caveat is necessary here. In Seeman v. Liberty Mutual Ins. Co., 322 N.W. 2d 35 (Ia. 1982), the Court stated that the issue of first party bad faith had not been reached in M-Z Enterprises, because of the facts of that case. Secondly, in M-Z Enterprises, and Higgins, the Court after rejecting the theory of first party bad faith went on to analyze the particular facts of the case and held in both cases that since the district court had not directed a verdict on the issue

of liability for the plaintiff obviously the insurance company's position was fairly debatable. Therefore, the insurance carrier could not be acting in bad faith!

This leaves us in a rather unique position. If a plaintiff insured can allege that the insurance company's position is not fairly debatable and if he can prove to a district court's satisfaction that he is entitled to a directed verdict on liability, perhaps the Supreme Court will adopt the theory. How this additional burden on plaintiff will affect our normal rules about inferences to be drawn from facts in summary judgment and directed verdict situations will be interesting to watch.

2. Intentional Infliction of Emotional Distress

This theory has been around in other states since 1966, in California since 1970 and in Iowa since 1972. See Frishett v. State Farm Mut. Auto Ins. Co., 143 N.W.2d 612 (Mich. App. 1966), Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970) and Amsden v. Grinnel Mutual Reinsurance Co., 203 N.W. 2d 252 (Ia. 1972).

The elements of the prima facie case are as follows:

1. outrageous conduct by the defendant;

2. defendant's intention of causing reckless disregard of causing emotional distress;

3. plaintiff's suffering severe or extreme distress; and

4. Actual and proximate causation of the emotional distress by defendant's conduct.

The advantages of this theory are obviously that damages are not limited to breach of contract — punitive damages are

available — and the difficulties with other theories of liability. However, proof of the elements of this theory can also pose grave difficulty.

The Iowa pattern jury instructions are set forth below:

No. 30.3 OUTRAGEOUS CONDUCT - DEFINITION

The term "outrageous conduct" means conduct exceeding all bounds usually tolerated by decent society and which a reasonable person could not be expected to endure.

Outrageous conduct does not extend to mere insults, indignities, threats, annoyances, petty oppressions, hurt feelings, bad manners or other trivialities which a reasonable person could be expected to endure. All persons must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind.

No. 30.4 INTENTIONAL CAUSING - DEFINITION

A defendant intends to inflict emotional distress where he desires to cause such distress or knows such distress is certain, or substantially certain, to result from his conduct.

No. 30.5 RECKLESS DISREGARD - DEFINITION

A defendant's conduct is in reckless disregard of the probability of causing emotional distress if he knew or in the exercise of ordinary care should have known of a high degree of probability that emotional distress would result and the defendant acts with deliberate disregard of that probability.

No. 30.6 SEVERE OR EXTREME EMOTIONAL DISTRESS - DEFINITION

In order for plaintiff to recover, the emotional distress must in fact exist, and it must be severe or extreme, but it does not have to manifest itself physically.

The term "severe or extreme" means substantial or enduring as distinguished from trivial or transitory.

The term "emotional distress" includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embrrassment, anger, chargrin, disappointment and worry. It must be of such substantial quantity or enduring quality that no reasonable person could be expected to endure it.

AUTHORITIES

Amsden v. Grinnell Mutual Reinsurance Company, 203 N.W.2d 252 (Iowa 1972)

Meyer v. Nottger, 241 N.W. 2d 911 (Iowa 1976)

Restatment (Second) of Torts Section 46, Comment d (1965)

Poulsen v. Russell, 300 N.W. 2d 289 (Iowa 1981)

Restatement (Second) of Torts Section 46, Comment j (1965)

3. Statutory Liability

A number of states have statutes which provide a specific remedy for insureds who have been wrongfully denied benefits. Generally such statutes provide for the award of attorneys fees, "punitive damages" in addition to the claim (10% to 25%), a time limit within which payment must be made. See Keintz & Mann, Extra-Contract Damages for Breach of Insurance Contracts: The Statutory Approach, 1978 Ins. L.J. 7

In general, where such statutes exist they have held to preclude recovery in a tort action. Debolt v. Mutual of Omaha, 371 N.E. 2d 373 (Ill. App. 1978) Spencer v. Aetna Life and Cas. Ins. Co., 227 Kan. 914, 611 P. 2d 149 (1980). Iowa has a statute governing unfair claim practices. §507B.4.9.

"9. Unfair claim settlement practices. Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages of issue.

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information.

e. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.

g. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.

h. Attempting to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application.

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured.

j. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.

k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

l. Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a

preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

m. Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement."

Obviously, the Iowa statute and indeed the rules promulgated by the Commissioner do not provide a remedy for the insured. However, the Iowa Supreme Court in Seeman v. Liberty Mutual Ins. Co., 322 N.W.2d 35 (Iowa 1982) held that Section 507B.4.(9) did not create a private cause of action for damages for an individual entitled to the proceeds of a settlement with the carrier. Query does this statute set a standard to measure insurer's conduct in other types of tort suits?

4. Lesser Used Theories

a. Intentional Interference with a Protected Property Interest

A little used theory whereby courts equate an interest in an insurance policy with a property right and allow loss of the rights to be the substantial damage. Generally used in conjunction with claims for emotional distress. See Egan v. Mutual of Omaha, 63 Cal. App. 3d 659 (1976); Fletcher v. Western National Life Ins. Co., 10 Cal. App. 3d 376 (1970). Judge Stuart has rejected this theory applying Iowa law. Rodgers v. Pennsylvania Life Ins. Co., 539 F.Supp 879 S.D. Iowa 1982).

b. Fraudulent Inducement or Breach of Contract

These theories are based on the premise that the insurer fraudulently induced the insured to purchase the policy without the intention to pay benefits or

fraudulently refused to pay the benefits. See e.g. Sharp v. Automobile Club, 37 Cal. Rptr. 585 (1964); Miller v. National American Life Ins. Co., 54 Cal. App. 3d. 331 (1976); Old Southern Life Ins. Co. v. Woodall, 326 So. 2d 726 (Ala. 1976); Felder v. Great American Ins. Co., 260 F. Supp. 575 (D.S.C. 1966); Physicians Mut. Ins. Co. v. Savage, 296 N.E. 2d 165 (Ind. App. 1973).

c. Strict Liability

The theory basically holds the insurer liable for any mistaken failure to pay, regardless of intent. See Hirsch, Strick Liability: A Response to the Gruenberg - Silberg Conflict Regarding Insurance Litigation Awards, 7 S.W. L. Rev. 310 (1975), Zurek, First Party Insurance: Claims, Practices and Procedures in Light of Extra-Contractual Damage Actions, 27 Drake L. Rev. 666 (1977-78).

In conclusion, it should be noted that although the Iowa Supreme Court has not allowed extra-contractual liability to attach on any theory other than intentional infliction of emotional injury the obvious trend of the case law in other jurisdiction is toward extra-contractural liability. Counsel for insurance carriers should be aware of this trend and should martial their public policy defenses in order to avoid additional review of these theories by the Supreme Count when ever possible.

WORKER'S COMPENSATION UPDATE

Robert C. Landess
Iowa Industrial Commissioner

REPORTED CASES

JANDA V. IOWA INDUSTRIAL HYDRAULICS, INC., 326 N.W.2d 339 (Iowa 1982)

Judgment was rendered in employee Janda's favor in a breach of oral employment contract action. The judgment was appealed and modified to provide for interest at ten percent from the date the petition was filed, pursuant to Iowa Code section 535.3 (1981). The defendants assert the prior statute in force when Janda's action was filed, providing for only seven percent interest and containing no language of retrospection should apply.

Generally a statute will be given prospective application only, unless it appears the legislature clearly intended it to be applied retrospectively. When a statute relates solely to a remedy or procedure, however, it is ordinarily applied both prospectively and retrospectively.

The court found that the interest rate increase and the period over which interest is computed, provided by the Iowa Code section 535.3 amendment, relate to a remedy and were therefore, remedial provisions, not substantive.

Deciding the statute is remedially applied and therefore deserving of a presumption of retrospectiveness is not conclusive of the underlying question whether the statute is given retrospective application. We examine the language of the act, consider the manifest evil to be remedied, and determine whether there was an existing statute governing or limiting the mischief

that the new act is intended to remedy.

The court further found that there was a problem to be solved by this legislation. The market interest rates prevailing before this amendment were higher than the seven percent then provided. Thus appeals and delays in appeals were encouraged. The amendment was adopted March 28, 1980. Ordinarily, it would have been effective July 1, 1980. Iowa Code section 3.7 (1981). The legislature, however, delayed the effective date of this legislation until January 1, 1981, thus permitting and encouraging an orderly disposition of cases pending March 28, 1980, before the new interest rate would affect them. This is further evidence the legislature intended the amended act to be applied retrospectively.

Therefore, the trial court's judgment insofar as it provided for ten percent interest from the date the petition was filed in this cause was affirmed.

LARSON V. MASSEY-FURGUSON, INC., Iowa App., 328 N.W.2d 343 (1982)

Defendant appealed from a district court judgment entered in favor of an injured worker in a gross negligence suit. The court of appeals affirmed.

Plaintiff employee was hired to help set up a farm implement show. Codefendant Smith was plaintiff's immediate supervisor. One of plaintiff's duties was to erect a fence around a portion of the display area. A post-hole digger was obtained and Smith instructed the crew on how to operate the implement. The

post-hole digger is essentially a vertical auger, operated by mechanical power transferred through a rotary power takeoff (PTO) shaft on the rear of a tractor. The crew was instructed by Smith to "put weight" on the auger to facilitate its penetration of the hard ground. Apparently, Smith intended the crew to put weight on the back part of the auger arm, away from the unshielded, rotating PTO shaft.

Plaintiff had been putting his weight on the front part of the auger when his nylon jacket became caught in the PTO shaft. The spinning motion of the shaft pulled him into the turning auger wedging his arm between the auger and the tractor.

The trial court arrived at the following definition of gross negligence as used in section 85.20, The Code:

> Gross negligence is defined by the Statute to mean wanton neglect for the safety of others.
>
> Gross negligence as used herein is something substantially more than ordinary negligence which is defined in law as the failure to use reasonable care--the doing of something or the failure to do something that is not up to the standard of conduct one would expect of an ordinarily careful and prudent person under the same or similar circumstances. It falls short, however, of intending to injure or harm.
>
> To constitute in law an act as "wanton neglect," a party doing the act or failing to act must be conscious of his conduct and, though having no intent to injure, must be conscious from his knowledge of surrounding circumstances and conditions that his conduct will naturally and probably result in injury.

The appellant court held that the trial court's definition comports with the definition of gross negligence articulated in the case of Thompson v. Bohlken, 312 N.W.2d, 501, 505 (Iowa

1981). In Thompson, the court held:

> There are three elements necessary to establish "gross negligence amounting to such lack of care as to amount to wanton neglect" under section 85.20: (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

The court further found substantial evidence supporting the trial court's conclusion that defendant's conduct constituted gross negligence. They found the evidence to be uncontroverted that defendant knew of the danger associated with an unshielded PTO shaft and the reasons underlying the subsequently issued OSHA regulations requiring guards to shield the rotating PTO shafts. Defendant knew his order required plaintiff to work in close proximity to the unshielded PTO shaft and that injury was probable whenever working near unshielded moving parts. This was evident in that defendant warned his crew to stay clear of the moving portions of the PTO. Despite the obvious danger associated with an unshielded PTO shaft, defendant instructed his crew to put weight on the auger, which required them to work close to the PTO. Thus, defendant consciously disregarded the obvious peril in ordering his crew to put weight on the auger.

The court held that the defense of contributory negligence is not available in an action where liability is predicated on proof that defendant committed gross negligence amounting to such lack of care as to amount to wanton neglect. They further found that claimant's assumption of the risk was not voluntary because there was substantial evidence that plaintiff would have

been fired if he did not follow defendant's instruction.

MID-IOWA BUILDERS, INC. V. SIDDENS, Iowa App., 329 N.W.2d 301 (1982)

Employer appealed from an order of the district court affirming the industrial commissioner's refusal to set aside a default judgment entered against the employer in a workers' compensation case.

Claimant filed an original notice and petition claiming workers' compensation benefits for an alleged work-related heart attack. The original notice and petition was received by the employer on September 17, 1979. Because the employer failed to file any responsive pleading, a default judgment was entered against it on December 7, 1979. On December 27, the employer filed a motion to set aside the default judgment. The deputy industrial commissioner denied this motion after hearing, on the ground that the employer had failed to show the requisite "good cause" for setting aside the judgment.

The employer in this case failed to file an answer or responsive pleading almost three months after it received the notice. In fact, the only action taken by the employer was to send to the agency a statement from the company's insurance agency that claimant was self-employed, thus indicating that he was not covered under the employer's insurance plan. The court stated that this statement was not sufficient to comply with the mandate of the original notice and petition or with the law.

The employer contended that claimant stated that he would

not pursue his claim if he was not covered under the employer's insurance plan. The claimant denied making any such statements and the court found that the record supports claimant's position. Furthermore, the court stated the deputy commissioner had the opportunity to study the demeanor of the witnesses and chose to believe Siddens. The court, citing Russell v. Gardner, 256 F. Supp. 1022, 1023 (E.D. La. 1966) stated that on appeal, weight is given to the agency's determination of credibility.

Mid-Iowa's president testified that he neglected to take any action on the notice because he thought it was just "an insurance thing." However, the Iowa Supreme Court in Haynes v. Ruhoff stated that ignorance of the procedure or of the consequences of a failure to appear in response to the notice is insufficient to comply with Iowa Rule of Civil Procedure 236, which allows a default judgment to be set aside for "good cause." 261 Iowa 1279, 157 N.W.2d 914, 918 (1968). The Haynes court added: "The grounds for setting aside defaults and judgments entered thereon have been liberalized and we have given liberal interpretations of the requirements deemed sufficient to set aside a default, but we have never upheld such a grant where the movant fails to show any effort to appear in response to a due and timely notice." Id. at 916 (citations omitted). The court concluded that the rationale of the Haynes court is dispositive of the issue in this case, and therefore held that the trial court correctly affirmed the agency decision refusing to set aside the default judgment.

BEIER GLASS CO. V. BRUNDIGE, 329 N.W.2d 280 (Iowa 1983)

The issue in this appeal is whether a workers' compensation arbitration award of solely medical benefits renders a subsequent petition for disability benefits subject to the three-year statute of limitations on review-reopening or the two-year limitation on original claims.

Claimant sustained industrial injuries in 1973, 1974 and 1975 while working for defendant employer. In an arbitration decision filed in 1977, the deputy industrial commissioner found any claim based on the 1973 injury barred by the two-year statute of limitations imposed on original actions by Iowa Code section 85.26(1), and that the 1974 and 1975 injuries resulted in insufficient lost time to entitle claimant to compensation. The deputy found, however, that the claimant had a spondylolisthesis that was aggravated by claimant's employment activities. The employer was ordered to pay the cost of claimant's medical treatment.

In 1978, claimant filed a petition for review-reopening of the 1977 arbitration award claiming he was entitled to healing period and permanent partial disability benefits. The deputy commissioner ruled that although the 1977 arbitration established claimant's injuries arose out of and in the course of employment, denial of benefits other than medical payments precluded applicability of the three-year review-reopening limitation of Iowa Code section 85.26(2). Claimant's petition was therefore barred by the two-year limitation on original actions.

The industrial commissioner ruled the 1977 arbitration and award of benefits was sufficient to support review-reopening. The district court reversed the commissioner.

The district court ruled, and the employer argued on appeal before the supreme court, that the court's decisions in Powell v. Bestwall Gypsum Co., 255 Iowa 937, 124 N.W.2d 448 (1963), and Rankin v. National Carbide Co., 254 Iowa 611, 118 N.W.2d 570 (1962), preclude reopening because only medical benefits were paid. The court found Powell and Rankin were not controlling on the facts of this case. In those cases an employer voluntarily paid a claimant's medical expenses, but neither party initiated arbitration proceedings or filed a memorandum of agreement. The court found the claimant's petitions for review-reopening could not proceed under the three-year review statute, because in neither case had there been an "award for payments" or "agreement for settlement." Mere payment of medical expenses, absent a proceeding before the commissioner, was insufficient basis for reopening. Here there was a proceeding before the commissioner. Therefore, the court held that an arbitration award of medical benefits is sufficient to support review-reopening under section 85.26(2). They further held the limitation period commences on the date of the award or filing of the memorandum of agreement when no weekly benefits are awarded initially.

HARNED V. FARMLAND FOODS, INC., 331 N.W.2d 98 (Iowa 1983)

Plaintiffs, an injured employee and his wife, appealed from a district court dismissal of their tort suit based on the

refusal of defendants, employer and insurance carrier, to provide chiropractic care for the employee's back injury. The plaintiffs allege the denial of chiropractic care caused Mr. Harned unnecessary surgery, pain, and disability beyond that suffered in his original injury. The petition was in several counts: negligence; breach of third-party beneficiary contract; conspiracy; extreme and outrageous conduct causing severe emotional distress; punitive damages; and loss of consortium. Plaintiffs insisted this claim (denial of chiropractic care) did not constitute an injury arising out of and in the course of employment as defined by the workers' compensation law. They maintained the claim was for a separate and distinct injury not covered by workers' compensation.

The court held that plaintiffs' action was properly dismissed. Iowa Code section 85.20 creates no exemption for intentional torts by an employer. They further stated plaintiffs' claim was simply one of failure to provide requested care. There was nothing to indicate an intentional tort. Plaintiff was hospitalized after his injury and requested chiropractic care to treat his injury. Both defendants refused to provide chiropractic care. Under Iowa Code section 85.27 his employer could choose the medical care for him so long as it was reasonable. Exercising that choice the employer decided not to provide chiropractic care. The choice did not become unreasonable simply because the employer disagreed with it.

In his dissenting opinion, Carter, J., stated that he could

not conclude that the exclusive remedy provision of Iowa Code section 85.20 applies to all of the claims for which the plaintiff sought to recover in his petition. As to plaintiffs' claims against the insurance carrier, the exclusive remedy provision of section 85.20 is expressly limited to claims against an employer or other employee of such employer. The statute affords no defense to a direct action against an insurance carrier for alleged torts it has visited on an injured employee.

As to plaintiff's claims against his employer, the exclusive remedy provision of section 85.20 only extends to rights and remedies "on account of injury ... for which benefits under [the workers' compensation act] are recoverable." Whatever their merit or lack thereof, the dissenting opinion states that it appears that at least some of the plaintiff's claims are cognizable, if at all, entirely outside the scope of the workers' compensation act.

It is alleged that the employer willfully withheld from the employee the medical care to which he was entitled under the compensation act and that, as a result, he required additional surgery which could have been avoided and lost time from work which otherwise would not have been the case. Justice Carter, in his dissent, states he does not believe that such claims are of the type for which benefits under the compensation act are recoverable. The same is true for plaintiff's claims alleging intentional infliction of emotional distress as a result of alleged outrageous conduct by the employer. Reynoldson, C.J.,

joined in the dissent.

GRAVES V. EAGLE IRON WORKS, 331 N.W.2d 116, (Iowa 1983)

The court affirmed the district court and agency's determination that the compensation for the claimant's scheduled leg injury was limited by statute to the specific physical impairment and benefits were not to be measured by industrial disability factors such as loss of earning capacity.

Justice McCormick, concurring specially, wrote:

> As this case illustrates, no necessary correlation exists in fact between functional loss and industrial disability. Loss of a foot will mean one thing to a person with a desk job and quite another to a person who is trained only in work requiring standing, walking and lifting. But for the fortuity that his injury was to a scheduled member, Graves would have recovered for his actual industrial disability rather than the wholly arbitrary presumed industrial disability under the schedule.
>
> The schedule brings a windfall to the worker in some cases and gross hardship to the worker in others. Although it is argued the schedule has the advantage of simplicity, it is questionable whether that advantage is worth the cost. The result in the present case is indefensible except that it is demanded by an anachronistic statute.

BECK V. ROUNDS, Iowa App., 332 N.W.2d 109 (1982)

The employers appealed from a district court decision affirming the industrial commissioner's award of workers' compensation benefits. The court of appeals, in a per curiam decision, affirmed. William and Glenn Beck, father and son, each leased separate plots of farmland. Glenn leased land known as the Wallis Farm, and William leased the Wharton Trust Farm.

They agreed that in exchange for Glenn's labor on William's farm, William would let Glenn use his entire line of farm machinery, and William would pay for the major equipment repairs. Both men worked on both farms.

Claimant was one of the farm laborers hired to help on the farms. On the day he was injured, claimant was disking on William's land, the Wharton Trust Farm. Glenn had instructed claimant to do the work. Claimant was disking with equipment owned by William when he broke a hydraulic hose. Claimant drove to the Wallis Farm to fix the hose. When claimant arrived there, William instructed claimant to help Glenn repair another tractor. When he was helping fix the tractor, claimant injured his back. Glenn paid claimant for his work that day, and William paid for the tractor repair.

The court of appeals found that claimant was under the direction, control and supervision of both William and Glenn and affirmed the agency's finding that they employed the claimant jointly and he was an employee of both William and Glenn. The court also affirmed the agency's finding that Glenn and William were engaged in a partnership and/or joint venture because they pooled their money, their farm equipment, their labor and skill in the farming operation and agreed to divide the profits and share the losses.

DRINNIN V. HEARTLAND AREA EDUCATION ASSOCIATION, 332 N.W.2d 328 (Iowa 1983)

Plaintiff teacher appealed from an adverse ruling in a

declaratory judgment action to determine whether a public school teacher must use sick leave for those absences from work which are paid by workers' compensation. The court held that under Iowa Code section 279.40 (1979) (sick leave), one day of a public school teacher's accumulated sick leave may be deemed expended for each day of absence for medically related disability even though workers' compensation benefits are paid for part of the teacher's absences.

CRANE V. MEIER, Iowa App., 332 N.W.2d 344 (1982)

Appeal from a district court decision reversing the agency's decision finding claimant eligible for workers' compensation benefits.

Defendant, Crane Siding Company, was a sole proprietorship owned by John G. Crane. Crane was in the business of applying siding to homes. He sold siding packages to homeowners and then subcontracted the actual application of the siding to independent contractors. Delmar Werner was one of these subcontractors.

Claimant, Robert Meier, was injured when he fell from some scaffolding while applying siding to a home. The owner of the home had contracted directly with Crane to provide the siding for the home. Crane in turn contracted with Werner to apply the siding. Claimant, a friend of Werner, was working on the home with Werner when he was injured.

Crane denied liability for workers' compensation benefits contending that claimant was not Crane's employee. Crane claimed Werner was an independent contractor. As a general

rule, Crane required each of the subcontractors to sign two forms, both prepared by Crane. The first form repudiated the existence of any employer-employee relationship and the second form established the terms and conditions of the contractor-subcontractor relationship. Werner had signed the forms. Claimant had not.

The court found there was substantial evidence supporting the agency's conclusion that Werner was employed by Crane Siding Company. The court stated that the evidence was clear that Crane and Werner did not have a contractor-subcontractor relationship as defined in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (Iowa 1967). Crane instructed on the work methods to be used, the "subcontractors" had a more or less continuous relationship with Crane, Crane made provisions for rental of equipment needed by the "subcontractors," and Crane had, in at least one instance, exercised some control over who could work for the "subcontractors" and Crane had indicated the "subcontractors" could not work for any other siding company.

The deputy industrial commissioner concluded that Werner had the apparent authority to hire claimant and that in claimant's mind, Werner had the authority to fire him. In Bidwell Coal Co. v. Davidson, 187 Iowa 809, 817-18, 174 N.W. 592 (1919), the court held a shot firer in a mine, who was hired by the employees of the employer, was an employee of the employer for purposes of workers' compensation benefits. The court here found the situation in Bidwell to be sufficiently analagous to this case

to be dispositive. The court concluded that given the apparent authority for Werner to hire claimant to do work for the Crane Siding Company and Crane's apparent control over the operations of Werner, claimant was an employee of Crane Siding Company.

The court further found that claimant was not a casual employee who would be excluded from coverage of the act by section 85.1(2), The Code, 1975. Construing the terms of the exception strictly against the employer, Gardner v. Trustees of Main Street Methodist Episcopal Church, 217 Iowa 1390, 1401, 250 N.W. 740, 745 (1933), the court did not believe claimant's association could properly be labeled "occasional," "irregular," or "incidental." See Id. at 1400, 250 N.W. at 744. The mere fact claimant was injured shortly after he began the association is not sufficient to make him a casual employee. Id. The court reversed the district court and reinstated the findings and conclusions of the agency.

SIMBRO V. DELONG'S SPORTSWEAR, 332 N.W.2d 886 (Iowa 1983)

On appeal, the supreme court in reversing the district court, held that workers' compensation benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit.

Claimant sought disability benefits for an industrial injury which was caused by a single accident. The employee was treated by an orthopedic surgeon who eventually diagnosed her problem as a compression of the ulnar nerve in both wrists. Surgery was performed on each wrist. Her physician gave a permanent physical

impairment rating of three percent to each upper extremity following surgery.

In the hearing before a deputy industrial commissioner, the claimant testified that her injury-induced disability prevented her from resuming the heavy work required by her employment. She presented testimony of an expert witness who stated that she had a 35 percent permanent partial industrial disability. Based upon the medical opinion of her physician, the deputy concluded that claimant had a combined functional impairment of four percent. She was then awarded benefits based on functional disability of four percent of the five hundred weeks scheduled benefit. The industrial commissioner affirmed this ruling. The district court reversed the commissioner, however, and ruled that a partial loss to two members was an unscheduled loss that is determined industrially. The correctness of the commissioner's assessment of the functional disability was not in issue; the sole issue concerns the correct method of evaluating a partial loss of two members.

The commissioner, with regard to the interpretation of 85.34(2)(s), stated in his appeal decision:

> It appears, then, that an injury to two hands caused by the same accident was entitled to be evaluated industrially under the old law. . . . The claimant would be entitled to have the disability to his hands determined industrially under sections 85.34(2)(s), 85.34(2)(u) and 85.34(3) had not the Code of Iowa, in respect to those sections, been amended in recent years.

The district court accepted the commissioner's interpretation that before 1974 the present injury should be industrially

evaluated, but rejected the interpretation that after 1974 the injury should be functionally evaluated. The district court reasoned that by its 1974 amendment of paragraph (s) the legislature did not intend to change an unscheduled injury that is determined industrially into a scheduled injury that is determined functionally.

In overruling the district court, the supreme court concluded that the 1974 amendment to paragraph (s) clearly makes the paragraph a scheduled disability subject to functional evaluation. They stated that the plain and unambiguous language in the amendment of paragraph (s) which sets out a definite schedule of benefits shows a clear intent by the legislature to make the loss of two members a scheduled loss. The court assumed that at the time the legislature amended paragraph (s) it was familiar with the existing case law that evaluated scheduled disablity on a functional basis. See, Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980). The court further stated that if the legislature wished the court to apply a different method of evaluation to paragraph (s) losses than is applied to other scheduled losses, it would have so indicated.

McCormick, J., concurring specially, wrote the following:

> I concur in the opinion and write separately only to point out that this case illustrates again the vast disparity in workers' compensation benefits and injustice which can result from a determination that an injury has sufficient conceptual neatness to fit the schedule and thus be compensable without regard to actual industrial disability. See Graves v. Eagle Iron Works, ___ N.W.2d ___ (Iowa 1983) (McCormick, J., concurring).

Reynoldson, C.J., joins this special concurrence.

ARMOUR-DIAL, INC. V. LODE & SHIPLEY CO., 334 N.W.2d 142 (Iowa 1983)

The issue before the court was whether the failure by a self-insured employer to file a timely notice of lien pursuant to Iowa Code section 85.22 caused it to forfeit its right to be reimbursed for benefits paid an employee by a third party tortfeasor.

The employee lost her foot when it became caught in a machine manufactured by the Lode & Shipley Co. (L & S). Armour-Dial, Inc. paid the employee her workers' compensation benefits. The employee then filed a products liability suit against L & S. Subsequently, the employee filed the "Notice to Employer" pursuant to section 85.22, which informed the employer of her suit against L & S. The employer filed a notice of lien six days after the statutory thirty-day deadline. Approximately two months later the employee settled her suit against L & S. Neither party to the settlement attempted to obtain the written consent of the employer to the settlement.

Armour-Dial filed separate law suits against L & S and the employee demanding reimbursement for the workers' compensation payments, reduced by whatever amount the employer may receive from the other defendant. The employer moved for a summary judgment on both cases and the district court sustained each motion.

The employee contended that the failure to file a lien

terminated the employer's right to indemnification under section 85.22(1). The court held that the proper filing of the lien is not a condition precedent to the right of indemnification from recovery proceeds held by the employee. Accordingly, the employer is entitled to recover from the employee an amount equal to the amount of workers' compensation payments. No issue was made concerning any exceptions or deductions from said recovery; the sole issue presented concerned the untimely notice of lien. The trial court's ruling on the motion for summary judgment against the employee was affirmed.

L & S claimed that the employer was not entitled to seek indemnity against a third party. The trial court imposed liability in favor of the employer due to its right of subrogation to recover from the third party tortfeasor. The supreme court pointed out that section 85.22(1) provides for indemnification "out of the recovery of damages." L & S paid the damages. The supreme court held that indemnification from L & S under these facts and under section 85.22(1) would not be proper.

The court also concluded that the late filing of the notice of the lien resulted in its termination. This lien is created by a statute, and the terms of the statute are controlling with respect to the duration of the lien. Accordingly, the employer had no rights against L & S based on the statutory lien. The remaining issue was whether the employer had a statutory right of subrogation in this instance that allows it to recover against L & S. The court held that this right of subrogation

did not come into being. The right to subrogation is statutory and conditioned a proper demand on the employee and refusal or failure to bring an action against the third party. Those were not present in this case.

LEASEAMERICA CORP. V. IOWA DEPARTMENT OF REVENUE, 333 N.W.2d 847 (Iowa 1983)

The Iowa Department of Revenue appealed from a district court's dismissal of taxpayer Leaseamerica Corporation's petition for judicial review. The district court held Leaseamerica was required to appeal a hearing officer's proposed decision to the director of revenue in order to exhaust its administrative remedies, and dismissed on the ground it had no subject matter jurisdiction. The supreme court reversed and remanded for proceedings of the merits.

In December 1979 the department of revenue notified Leaseamerica that it owed a consumer use tax with accompanying penalty and interest. Leaseamerica filed a protest. After hearing, a department hearing officer issued a proposed decision on October 29, 1981, upholding the tax assessment. No appeal was taken to the director of revenue. Nor did the director of revenue, on its own motion, order a review. On December 24, 1981, Leaseamerica filed a petition for judicial review in district court. The district court dismissed the petition on the ground that Leaseamerica had failed to exhaust administrative remedies.

The supreme court held that the legislature provided for permissive, not mandatory, intra-agency appeals under Iowa Code

section 17A.15(3). Leaseamerica exhausted its administrative remedies by allowing the hearing officer's decision to become final without taking an appeal to the director of revenue. Thus, the controversy was postured for review in the district court. The district court's order dismissing the petition is reversed and the case remanded for review on the merits.

HEUMPHREUS V. STATE, 334 N.W.2d 757 (Iowa 1983)

Plaintiffs appealed from a district court's ruling sustaining defendant's special appearance in a wrongful death action. The supreme court held that if a correctional institution inmate working in connection with the maintenance of the institution suffers injury or death resulting from the performance of that work, the sole remedy is workers' compensation pursuant to Iowa Code section 85.59. However, if the injury or death does not result from the performance of the work, a tort claim against the state under Iowa Code chapter 25A may be available.

In the present case the survivors allege that their decedent, an inmate, suffered a heart attack while working and died because of negligent post-attack care. Since the petition does not allege that the work caused the heart attack, the supreme court held that the trial court was premature in sustaining the special appearance in this tort claim on the ground that workers' compensation was the sole remedy. The court went on to state that if a trial shows that the heart attack resulted from work the special appearance should be sustained, but if a trial shows that the heart attack would have occurred regardless of the work

the special appearance should be overruled.

Carter, J.D. concurring specially wrote:

> Under the holding of the majority, a determination by the fact finder that the heart attack resulted from decedent's performance of work would conclusively establish that compensation for his death may only be based on the worker's [sic] compensation law. I believe that it would be possible for the evidence to show that decedent's heart attack was caused by the performance of work but that his death was not. If this were found to be the case and if it is also shown that the death resulted from the negligence of agents of the state, this circumstance should permit a claim under chapter 25A regardless of whether the heart attack resulted from the performance of work.

McCormick, J., joins in this special concurrence.

GEORGE H. WENTZ, INC. V. SABASTA, ___ N.W.2d ___ (Iowa 1983)

Review from the Iowa Court of Appeals decision affirming an award of workers' compensation benefits to a claimant injured out of state. The supreme court reversed.

The employer is a Nebraska corporation with its principal place of business in Lincoln, Nebraska. Claimant, an asbestos worker, was at all pertinent times a resident of Sioux City, Iowa. In early April 1979, claimant contacted the business agent of Asbestos Workers' Local 57, headquartered in Sioux City, and was told a job was available at employer's work site in Sioux Falls, South Dakota. Claimant reported to employer's foreman at the Sioux Falls site, filled out income tax forms, and commenced work. On April 26, 1979 claimant sustained an injury during the course of his employment at the Sioux Falls jobsite. The employer had not engaged in any construction projects in Iowa during the five-year period prior to claimant's

injury, and had no registered agent in Iowa at the time. Claimant had performed no services for the employer within the state of Iowa.

The court held that to the extent employer's association's collective bargaining contract (with a local to which claimant did not belong) and alleged indirect reliance on a pool of Iowa workers indicate dependence on Iowa workers, the case is indistinguishable from Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981), where advertising by an employer with a work site located near the Iowa, Nebraska border would have supported the same contention. Claimant's local had an agreement with a contractor's association in which the employer was not a member. Claimant's referral by his local union in this case was no more materially related to his employer - employee relationship than the newspaper advertisement in Iowa Beef Processors, Inc. In neither instance were the employee's services attributable to business transacted in this state, nor was any portion of the employee's services performed here. The court held that claimant's employment was not principally localized in Iowa, and the commissioner lacked subject matter jurisdiction to award claimant Iowa workers' compensation benefits under the provisions of section 85.71(1).

Because subject matter jurisdiction is lacking, the court did not address the employer's contentions it possessed insufficient contacts in Iowa to constitutionally support assertion of personal jurisdiction, and the award therefore deprived it of property without due process of law.

UNPUBLISHED CASES

SIMON V. INSULATION SERVICE, INC., (Iowa Court of Appeals 1983)

Claimant appealed from the district court decision sustaining the defendants' special appearance in a workers' compensation case, asserting that his motion to reconsider or reinstate, filed before the industrial commissioner, should be deemed either an application for rehearing pursuant to Iowa Code section 17A.16(2) or a motion to enlarge or amend pursuant to Iowa R.Civ.P. 179(b) and that his petition for judicial review was therefore timely.

The court stated that claimant's motion recited no grounds for his contention that the commissioner's action in dismissing his appeal for failure to file a transcript, as required by law, was erroneous. It therefore failed to comply with the statute.

The claimant's second argument, that his motion to reconsider should be construed as being analogous to a motion under rule 179(b), Iowa R.Civ.P., was found to be without merit, for in his motion, he did not allege that the commissioner had failed to resolve any issue of fact or law or any claim or defense raised by claimant, and did not ask the commissioner to enlarge his findings and conclusions.

The court stated that the bold claim that the commissioner's actions were arbitrary, capricious, unconstitutional, and contrary to the law without specifying how they deserved to be so chracterized was not sufficient to comply with the requirements

of the IAPA for judicial appeals of administrative actions. The court, therefore, affirmed.

KURIMSKI V. LOVILIA COAL COMPANY, (Iowa Court of Appeals 1982)

Claimant was awarded a 40 percent industrial disability in a review-reopening decision rendered by a deputy industrial commissioner. Upon appeal to the industrial commissioner, this was affirmed to 25 percent, which reduction was affirmed by the district court on claimant's petition for judicial review. In a per curiam decision, the court of appeals affirmed.

Following his injury, claimant received a 10 percent impairment rating from one physician and a 45 percent rating from another. The court concluded that the commissioner was correct in giving little weight to the report of the physician who gave the 45 percent rating. The physician had based his rating on one examination which had been conducted for the sole purpose of arriving at the disability rating. Some of the physician's conclusions contradicted claimant's own testimony concerning the same matters. Furthermore, the court concluded that there were not sufficient physical criteria to support the rating.

OESTENSTAD V. QUAIL CONSTRUCTION CO., (Iowa Court of Appeals 1983)

Claimant appealed from a district court decision affirming the agency's denial of workers' compensation benefits. The court of appeals affirmed.

Claimant cut his thumb while operating machinery in the course of his employment. Claimant went to the doctor's office

to have stitches. He suffered a stroke while undergoing treatment for his thumb, resulting in paralysis and total disability.

Claimant contended that due to the difficulty in determining the exact cause of a stroke, he should be eligible to receive workers' compensation upon a showing that the work-related injury was one possible cause of the stroke.

The court found the evidence to be somewhat conflicting as to the exact time lapse between the thumb injury and the stroke. It appeared, however, that the stroke occurred twenty minutes to one hour after the claimant cut his thumb. There was an excessive loss of blood from the injury which may have contributed to the stroke. In fact, the medical experts testified that the cut may have been a possible cause of the stroke. However, there was no evidence that the cut was the probable cause of the stroke or even one proximate cause of the stroke. Further all agreed that evidence of claimant's blood pressure reading would have been helpful in determining the cause of the stroke, but no such evidence was documented. The court stated they could not rely on speculation or the assumption that claimant's blood pressure level, if documented, would have supported claimant's theory.

While recognizing that the workers' compensation statute is to be applied liberally, the court recited that it must be administered by the application of logical and consistent rules or formulas notwithstanding its benevolent purpose. There is no authority for applying a more lenient burden of proof in those cases in which the claimant has suffered a stroke.

SELECTED
INDUSTRIAL COMMISSIONER
APPEAL DECISIONS

AGGRAVATION -- PREEXISTING OSTEOMYELITIS

Hamilton v. Daily Industries, Inc. (July 29, 1982)

Claimant suffered a gunshot wound to the right knee in 1966 while in Viet Nam. He was discharged from active duty in 1967 because of osteomyelitis. Claimant underwent between 20 and 23 separate surgical procedures to either repair the right knee or relieve the osteomyelitis. In 1975 claimant sustained an injury to his knee during the course of his employment causing a flare-up of his osteomyelitis. Claimant's condition deteriorated and after discussing treatment options with his surgeon, made the decision to undergo an amputation at a point above the knee.

Defendants placed great emphasis upon the fact that claimant was presented treatment alternatives and voluntarily elected amputation. Any treatment, let alone a surgical procedure, is always elective on the part of the patient. The choice of amputation was a valid treatment for claimant's condition according to Dr. Laaveg. Testimony in the record indicates that the treating physicians encouraged amputation. Moreover, claimant's testimony indicates that he carefully weighed the factors and made his decision believing it to be the most practical. Defendants' liability extends to the effects of all treatment calculated to be reasonably necessary to improve claimant's condition. Claimant cannot be expected to live with a treatment that has the least expensive immediate consequences for a defendant. Had claimant refused amputation, the ultimate consequences may well have proved to be far more severe for all

parties involved. (Appealed to District Court; Affirmed. Appealed to Supreme Court; Pending)

AGGRAVATION--PREEXISTING PSYCHOLOGICAL PROBLEMS

Adair v. Furnas Electric Company (September 14, 1982)

Defendants appealed from a proposed review-reopening decision wherein a deputy found the claimant had not yet recuperated from a work-related aggravation of a preexisting psychological impairment; awarded continuing healing period benefits; and decided that the precise extent of disability can only be made after the claimant has received psychotherapy treatment.

When claimant started employment with the defendant employer she was 18 years of age. Claimant testified she noticed pain in her right arm and right shoulder one year after she became a "power screwdriver" operator under the employ of the defendant employer. Claimant testified the pain became disabling in January 1977. In the subsequent four years the claimant underwent a right transaxillary first rib resection for a right thoracic outlet syndrome in March 1977 and decompression right carpal tunnel surgery in September 1978. Each of these surgeries were followed by physical therapy and vocational rehabilitation efforts. The latest diagnosis of a physical problem within the claimant's upper right extremity is a cubital tunnel syndrome which the treating orthopedist states is not work-related. The orthopedist gave a 10 percent disability rating to the upper extremity caused by the residuals of claimant's prior surgeries. Claimant has had two clinical psychological evaluations and one

psychiatric examination during this time period. Claimant testified that she still has pain and numbness in her right arm and a change of emotional state since her 1977 work injury.

The record contains a strong presumption of a preexisting psychological impairment. The 1977 psychological evaluation requested by the vocational rehabilitation agency found the claimant to have experienced prolonged emotional stress due to family difficulties involving interpersonal conflicts which left her depressed. In the psychologist's opinion, his 1980 and 1981 psychological evaluation findings as compared to the 1977 psychological findings show a chronic vulnerability and fear likely arising out of claimant's family situation. Also, the psychiatrist's unexplained examination finding of "Axis I; - Life - Circumstance Problem," at least as interpreted by the psychiatrist, shows a long standing reactive process.

The psychologist believed that claimant's psychological condition was existent at the time of her injury, however, even though her coping skills were "marginally adequate" and her defensive system "very brittle," claimant was able to adapt and become functional. The psychologist believed that claimant's injury and her inability to work, pain, and numbness caused the claimant to see her vulnerability and this caused her to be overwhelmed emotionally. He opined claimant's emotional reactions of fear and apprehension caused her to experience more pain, then as she experienced more pain, the physical aspect of claimant's injury became more aggravated.

The defendants contended the psychologist was unqualified to express an opinion of an accelerating circular process between claimant's physical injury problems and a psychological injury. While this may be so, this point is not sufficient to reject the remaining portions of the psychologist's opinion relating to causal connection.

It is held that the deputy did not err in awarding running healing period benefits. The deputy's finding that psychotherapy treatment could improve the claimant's permanency rating is affirmed. (No Appeal)

ARISING OUT OF -- HEART ATTACK

Sumner v. Varied Enterprises, Inc. (December 30, 1982)

Claimant began feeling chest pains within 15 to 20 minutes of commencing his shift of driving a semi-truck in the course of his employment. Believing the pain was only heartburn, he decided to continue to drive onward to Atlanta where he could stop to get some bicarbonate of soda. Within 1 hour and 15 minutes later, the pain supposedly became "virtually unbearable." Due to this higher degree of pain, the claimant stated he decided to turn off at a smaller truck stop before Atlanta. However, he missed the appropriate exit, so he then proceeded to drive on to Atlanta. Claimant testified he arrived at the truck stop 2 1/2 hours after he started to drive. When pulling into the truck stop, he said he had to maneuver the semi-truck, which does not have power steering, through three 90 degree angles.

After consuming bicarbonate of soda at the restaurant truck

stop, he laid his head down on the counter, went to the washroom, had another bicarbonate and then began to feel worse. At this time, he decided he needed a doctor. He went outside and awoke his co-driver who called for emergency help. Claimant rapidly received ambulance treatment which included oxygen and rest. He was admitted to emergency care with a diagnosed acute myocardial infarction.

Both defendants' and claimant's medical experts agreed that claimant had severe preexisting atherosclerosis.

Claimant argues his case falls solely under the first concept of Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974), where the Iowa Supreme Court stated compensation is allowed when the work "ordinarily requires heavy exertions which superimposed on an already defective heart, aggravates or accelerates the condition." The record, however, does not support a finding that claimant was involved in any heavy exertions during the period of the onset of the infarction. Evidence attempting to show heavy exertions connected with the driving, such as the difficulty with the turns without power steering, were of incidents after the onset of the infarction.

Although claimant's allegation of a failing ability to adapt to life as a team truck driver was fully corroborated by his co-driver's testimony, and allegations of increasing emotional stress toward the end of his probationary period was partly corroborated by the co-driver, it cannot be said, upon a review of the whole record, that the onset of the infarction was caused

by employment related physical and mental stress accelerating his atherosclerosis.

However, the Iowa Supreme Court in Sondag expressly stated "that damage caused by continued exertions required by the employment after the onset of a heart attack is compensable." 220 N.W.2d at 906. Implementing the reasoning contained in Professor Larson's treatise, which was cited approvingly by the Sondag opinion, this agency finds a causal connection between claimant's employment and his disability. It can be inferred that if not for his duties occurring at the time of the onset, the claimant "would have gone somewhere to lie down at once." Sondag, 220 N.W.2d 903. He felt impelled to continue driving and he did not consciously realize that he needed medical help until after he consumed the bicarbonate of soda at the restaurant.

Regarding whether the continuing to drive aggravated the myocadial infarction, the weight of the medical testimony suggests the infarction was aggravated. Although claimant's expert witnesses are not exact on the amount of damage incurred as a result of the continuing exertions, the testimony establishes that there would have been less damage if rest and oxygen had been instituted earlier. On the basis of the medical testimony, a presumption for increased damage due to continuing exertions is warranted. (Appealed to District Court; Pending)

ARISING OUT OF -- SUBSEQUENT INJURY

Taylor v. Oscar Mayer & Co. (December 16, 1982)

Claimant had received a compensable injury to his knee in

November of 1978. In January of 1981, while shopping in a supermarket, the injured knee gave out and caused a strain in claimant's lower back. The medical evidence firmly showed that there was a causal relationship between the knee injury and the subsequent back episode. Therefore, compensation was allowed for the disability related to the back problem. (No Appeal)

COMMUTATION

Kelly v. Kroblin Refrigerated Xpress (May 18, 1982)

There was an issue of whether claimant, a surviving spouse, should have a large partial commutation to invest in a property in Chicago. The first issue concerned whether or not the period during which compensation was payable could be definitely determined as required by Code section 85.45(1). The case of Diamond v. The Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964) was cited by defendants as authority for the proposition that an expectancy table should not be used. In that case the court had stated that "[t]here is nothing in the statute injecting the question of probable life expectancy in the case before us." However, the Diamond case was decided before lifetime benefits became available to claimants in Iowa. Since that time, the industrial commissioner has adopted Rule 6.3 which requires that the appropriate tables be used in determining a sum to be paid in a commutation proceeding. Rule 6.3(3) is a life and remarriage expectancy table. This decision stands for the proposition that the life and remarriage expectancy table is a correct method to determine the compensable period.

The second main proposition of the case concerned whether the investment would be in the claimant's best interests. The commutation was granted on the basis that the industrial commissioner, as indicated in the Diamond case, should not be the unyielding conservator of the claimant's assets and on the basis that the investment was in fact a good one. (No Appeal)

COMMUTATION

Watters v. Clinton Engines Corporation (March 31, 1983)

Claimant, age 57, is currently an assistant vice-president of a bank. Claimant testified without contradiction that she is debt-free with substantial cash assets. Claimant further testified that she desires the entire commuted value of her claim so that she may invest these sums for her future retirement needs.

In his decision the deputy quoted from an opinion of the commissioner in Finn v. Gee Grading, Appeal decision filed November 5, 1980. This same or similar language is contained in appeal decisions filed prior and subsequent to Finn. (Williams v. HLV Community School District, Appeal decision, July 2, 1981; Dameron v. Neumann Brothers, Inc., Appeal decision, November 9, 1981) and states:

> The supreme court in Diamond v. The Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964), stated that commutation may be ordered when it is shown to the satisfaction of the court or judge that the commutation will be for the best interest of the person or persons entitled to compensation or that periodical payments as compared to lump-sum payment will entail undue expense, etc., on the employer. In Diamond the court looked to the circumstances of

the case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." Id. at 929, 129 N.W.2d at ___. A reasonableness test was applied by the court in Diamond to determine whether a commutation would be in the best interest of the person or persons entitled to the compensation.

Professor Arthur Larson's philosophy on granting commutation is much more restrictive than that of the Iowa Supreme Court in 1964. He warns that:

> In some jurisdictions the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system. Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings.... The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will be best served by a lump-sum award. The beginning point of the justifiability of the lump-summing in a particular case is the standard set by the statute. This is usually so general, however, as to supply little firm guidance and control, turning on such concepts as the best interests of the claimant or the avoidance of manifest hardship and injustice. Larson, Treatise on the Law of Workmen's Compensation, §82.70.

Professor Larson indicates that experience has shown that a claimant is often under pressure to seek a lump-sum payment, and once the payment is received it is soon dissipated.

Additionally, Iowa's first industrial commissioner, in the first Biennial Report of the Workmen's Compensation Service (1916) at page 12, pointed out that, although in exceptional cases commutation promotes

personal welfare, weekly payments should be regarded as a general rule better adapted to the real needs of compensation service since large lump sums are often unwisely used by beneficiaries.

Despite the rational reasoning in support of the more restrictive views on commutation of compensation benefits, the Diamond guidelines still prevail in Iowa. Relying on Diamond and claimant's substantial monetary resources, excluding weekly compensation benefits, this commissioner would be hard-pressed to conclude that a lump-sum payment would not be in the best interest of claimant, notwithstanding the periodic payment philosophy of wage replacement upon which the theory of workers' compensation is based.

Although workers' compensation benefits differ from the benefits claimant is receiving from Social Security they are philosophically for the same purpose, i.e., periodic payments to partially replace lost earnings. In this economic era few would not jump at the chance to have future earnings paid to them in advance so they could invest them in a lump-sum and live off the earned income. The difference in the workers' compensation law is that it provides a vehicle, commutation, for doing just that.

That a sum invested at today's prevailing interest rates would yield considerably more than the claimant is now receiving in workers' compensation benefits (even after taxes) is elementary.

....

Lump-sum awards in this and most other cases gives workers' compensation the appearance of damages in a tort action. Workers' compensation was implemented to replace tort damage cases. Until action is taken either by the courts or legislature this agency is duty bound to follow the current authority. As previously mentioned, it would be incredible for this agency to say that a commutation which would produce considerably more money than the claimant is currently receiving would not be in his best interests.

Defendants complain that the claimant has not shown a present need for the commutation. Other than the language in

Rule 500-6.2(6) the showing of present "need" is not indicated. In this rule a showing of need is one of the options of the claimant to indicate best interests, but it is not exclusive as the rule goes on to say "or other reason for a lump sum."

The evidence shows the lump sum would be in the best interest of claimant. (No Appeal)

CREDIT -- FOR PAYMENTS MADE BY AN EMPLOYER

Van Der Welt v. Sherman Produce Company (December 28, 1982)

Soon after his accident, claimant began receiving $50 every two weeks directly from his employer in addition to the workers' compensation benefits he was receiving. The $50 payments continued for 40 weeks. Testimony revealed that the employer gave claimant the money so that his wife could hire a cab to drive her around town and to have yard work done. The issue was whether these payments should be credited to defendant as an offset against the disability award.

In discussing the overpayment of healing period benefits by an employer to the injured employee and its decision to allow credit for such overpayment, the Supreme Court of Iowa stated:

> It is probably true that he will be seriously inconvenienced by the earlier cutoff of his benefits. Yet, under the district court ruling, he would receive every bit of the awards to which he was properly and legally entitled. Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982).
>
> It has been the settled law of this state for over seventy years that where money is paid voluntarily, without any compulsion and without any promise to repay, it cannot be recovered by the payor." Gronstal v. Van Druff, 219 Iowa 1385, 261 N.W. 638.

In this case, the hearing testimony indicated that the employer made these payments voluntarily, never indicated if they were to be viewed as a replacement for earned wages, and never discussed the issue of repayment with claimant. The circumstances surrounding these payments indicate to this tribunal that the employer did not intend that the $50 payment to claimant fulfill any legal obligation, rather they were to be viewed more as an act of generosity. It is not uncommon in some industries to have supplemental benefits which are payable in addition to workers' compensation benefits payable. As such, the payments shall not be credited against defendant's obligation. (No Appeal)

DEATH--EFFECT ON COMPENSATION

Handel v. Determann Industries, Inc. (January 28, 1983)

Claimant brought an action for permanent partial disability benefits as the surviving dependent spouse of decedent. Decedent had died in an accident unrelated to his industrial injury. At the time of his death decedent had not been awarded permanent partial disability benefits, nor did he have a claim pending before the industrial commissioner.

Permanent partial disability benefits were held to be personal to the decedent to compensate him for loss of earning capacity. They are not considered survivor benefits under section 85.31, Code of Iowa, and are thus payable only to the injured employee himself or the injured employee's legal representative. Because claimant's action was brought on her own behalf

as a dependent of decedent, benefits were denied. (No Appeal)

DISABILITY -- SCHEDULED MEMBER [§85.34(2)(s)]

Burgett v. Man An So Corporation (November 30, 1982)

Claimant had received extremely serious, crushing injuries to both his legs. Since the impairment was confined to the legs, defendants argued that the compensation for such an injury was restricted to the schedule under section 85.34(2)(s). This basic concept was affirmed by the Iowa Supreme Court in Simbro v. DeLongs Sportswear, filed April 20, 1983. However the Burgett case was different from Simbro in that claimant's injuries in fact did permanently and totally disable him from work.

It was held that under the statute which says "if said employee is permanently and totally disabled he may be entitled to benefits under subsection (3)" (permanent total benefits). It was ruled therefore that it is not necessary that the impairment be 100 percent also. (No Appeal)

DISABILITY -- SCHEDULED MEMBER

Scott v. W. A. Klinger, Inc. (August 31, 1982)

Claimant was a brittle diabetic who developed an abscess on the bottom of his right foot. Although the issue of causation was a difficult one, the doctor's testimony that "it's reasonable and probable that the alteration was initiated or aggravated by the work that was described" carried the day for the claimant. Claimant also argued that his disability was to the body as a whole because an aggravation of diabetes was the aggravation of

a systemic disease.

In this regard, claimant cited the case of Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) an Iowa Supreme Court case in which an employee was awarded industrial disability because of a work related thrombophlebitis of the leg. However in the case under consideration, it was held that the disability was confined to the foot because the medical evidence showed there was no systemic damage and that the impairment as well as the injury was confined to the foot.

The condition of the foot was extremely serious, benefits for 100 percent of the member to the extent of 150 weeks were awarded. (No Appeal)

EMPLOYER-EMPLOYEE RELATIONSHIP

Kausalik v. Paul Twedt and Patty Twedt d/b/a Arrow Drug
(July 28, 1982)

Claimant, who was regularly employed at a local hospital, was asked by the defendant if he would help unload 15 wood-burning stove cartons at the Arrow Drug Store. Fourteen cartons were unloaded without incident. The fifteenth and last carton "hung up" on the truck and flipped off the lift and landed upon claimant injuring him. The issue is whether or not claimant is an employee of the defendants.

The parties stipulated that there was no employment or compensation agreement between claimant and defendant. They further stipulated that claimant received no wages, salaries or any other form of compensation from the defendants.

While Iowa Workers' Compensation Law is, by its very purpose, to be interpreted liberally, claimant seeks to impose vacarious liability upon any business that benefits from the good intentions of passers-by. While it is unfortunate that claimant received an injury in return for his neighborly assistance, the legislature did not intend that the Iowa Workers' Compensation Law provide a remedy in such circumstances. Iowa Code section 85.61(2) clearly intends that contract of employment be present. No such contract, expressed or implied, existed in the facts before us. Claimant was a mere passer-by who offered his assistance. By stipulation, no employment or compensation agreement ever existed; nor would it appear that one was ever expected. The admission of the stipulation itself seems to place claimant's acts outside the test of Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Claimant asserts that the inclusion of Iowa Code section 85.36(10) is evidence that the lack of a compensation agreement is not determinative as to whether claimant was an employee of defendant's. While this may be so, there is still the necessity of a contract of service, express or implied, before section 85.36 may be applied. (No Appeal)

EVIDENCE -- CREDIBILITY

Bowman v. Kroblin Refrigerated (February 23, 1983)

The evidence showed that claimant had had a compression fracture of L5 in a non-work connected 1974 injury. When he applied for work with the employer, he did not admit to the

prior back injury. In 1981, he injured his back at work. In their defense, the employer and insurance carrier claimed that claimant's failure to reveal his prior back condition should preclude him from compensation benefits. According to Larson, the test is (1) whether the employee knowingly and willfully made a false representation as to his physical condition, (2) whether the employer relied on that false representation which must have been a substantial factor in the hiring, and, finally, (3) whether there was a causal relationship between the false representation and the injury. Although factors one and two may have been satisfied, the evidence clearly showed that there was no connection between the original compression fracture and the injury. There being no such causal relationship, the defense failed. (No Appeal)

EVIDENCE--MOTION PICTURES

Moore v. Ceco Corporation (February 23, 1983)

Claimant appealed from a proposed review-reopening decision which awarded only temporary total disability benefits. Prior to hearing, claimant received disability ratings of 2%, 4%, 25% and 100% from four individual doctors. Film evidence which was found to be credible, depicted claimant performing carpentry duties during the time period during which he allegedly suffered his greatest disability.

The weight to be given to motion picture evidence was discussed in Haws v. Esmark, Inc., 33 Biennial Report of the Industrial Commissioner 94 (1977). It was stated:

> Professor Arthur Larson in 3 Workmen's Compensation, §79.74 (1976 ed.) points out that "[a]lthough on the surface it might appear that nothing could be more cognent and even dramatic refutation of a disability claim than motion pictures of claimant jacking up a car or playing tennis, the courts have rightly observed that such evidence must be used with great caution."
>
> Some of the limitations of motion picture evidence were alluded to by the Pennsylvania Superior court in De Battiste, supra, at 787 with the court noting that claimant's activities were shown for a restricted period and that movies could not accurately record "speed, energy and efficiency at work."
>
> In following De Battiste, the Pennsylvania Commonwealth court in Kelly, supra, at 257 acknowledged another potential difficulty with motion picture evidence cautioning that "pictures must be carefully scrutinized because of the ease with which true films can be altered and distorted into frames of damaging fabrications." See also Powell, supra.
>
> The Louisana Court of Appeals accurately pinpointed problems with filmed evidence in Lambert, supra, at 527, stating that "pictures show only very brief intervals of the activities of the subject, they do not show rest periods, they do not reflect whether the subject is suffering pain, and they do not show the after effects of his activities."

Three of the four doctors who gave impairment ratings were later given an opportunity to view the films taken of claimant siding his garage and roofing a building. Two of the doctors withdrew their impairment ratings after seeing the films. One of those two doctors stated that if claimant's back had been abnormal, he would not be able to do much of anything on the following day. The films, however, depict claimant performing various carpentry duties over a period of four consecutive days. A viewing of the films showed them to be of good quality and to

provide an unobstructed view of claimant's activities. Because the film evidence was gathered over a period of hours during consecutive days, we believe that claimant's speed, energy, and efficiency at his work have been accurately represented. Film segments depicted claimant manipulating large sheets of plywood, bundles of shingles, twisting, hammering, operating an air gun, and loading ladders onto a truck. At no time did claimant appear to be in pain, nor did his mobility and flexibility seem to be hampered. While other persons could be seen in the films, claimant appeared to be doing the majority of the actual labor.

The physician who had determined claimant to be 100 percent disabled from doing any type of carpentry work, declined to alter his opinion after viewing the films. In light of the film's portrayal of claimant doing carpentry work over a four day period, the opinion of this doctor carries no weight. The fourth physician did not view the film evidence, and therefore the impairment rating must be discounted due to the absence of a basis for determining impairment.

The film evidence and the inconsistent statements given by claimant have not been used to deprive him of an award, rather the evidence presented does not show a further award to be merited. Claimant was clearly able to perform carpentry duties following the injury, and there has been no credible medical evidence to indicate that claimant is permanently disabled. Those factors alone support the decision of the deputy to deny claimant permanent disability benefits. (No Appeal)

HEALING PERIOD

Thomas v. William Knudson & Son, Inc. (November 18, 1982)

One of the issues on appeal was whether claimant was entitled to healing period benefits from the date of injury through December 31, 1980. This tribunal has held in the past that continued medical treatment does not necessarily indicate the continuation of healing period benefits. In Castle v. Mercy Hospital, Vol. I Industrial Commissioner Reports 50, it was held that treatment which does not improve a patient's condition, rather which is maintenance in nature, does not extend the healing period past the point when the patient actually stopped improving. The treatment claimant received from the board certified orthopedic surgeon after May, 1980, appears to be purely maintenance in nature. Such conclusion finds support in that: 1) the surgeon did not prescribe any new or different modes of treatment after May, 1980; 2) the physical restrictions imposed on claimant's activities remained unchanged; 3) claimant's physical evaluation visits became less frequent after May, 1980, and; 4) claimant's functional disability rating did not change after May, 1980.

Under the facts and circumstances of this particular case, it is improper to hold that December, 1980, was the date of maximum medical recovery. Simply because the treating physician opted to observe claimant's progress over a one year period before making any final recommendations as to release or further treatment does not mean the healing period will continue for a

minimum of one year. No matter how long the doctor felt it necessary to observe claimant's progress, the fact remains that maximum medical recovery occurred in May, 1980. While the doctor apparently treated his patient in the "usual" manner of treating persons with similar injuries by allowing a substantial period for observation, it is noted that not all patients will require the "usual" observation period to complete their own recovery. Some may require more and some may require less. Claimant in this case required only seven months to recover as fully as he would. We see no basis for an award of healing period benefits beyond the time claimant realized the full extent of his recovery. The fact that claimant did and does continue to experience physical discomfort is not a basis upon which the healing period is extended. The continued disability of claimant is the very basis upon which permanent partial disability benefits were awarded. (Appealed to District Court; Pending)

IN THE COURSE OF

Gillespie v. Weitz Company, Inc. (February 28, 1983)

Claimant suffered a severe cut on his left hand while operating an electric table saw owned and located at the employer's construction site. Claimant had been attempting to cut two broom handles which he had intended to use in the construction of a fabric stretcher for his wife. It was admitted by claimant that laborers did not use table saws in their regular work duties and further, that his union contract prohibited him from

performing work with table saws.

A determination that the injury occurred "in the course of" employment relates to the time, place, and circumstances under which the injury is sustained. Claimant's injury occurred on the employer's premises. An issue of fact was presented, however, as to the time at which the injury occurred, and whether or not claimant was still under the control of defendant employer at that time. We believe claimant not to have been sufficiently within the control of his employer so as to fulfill the element of occurring "in the course of" employment. The greater weight of the evidence indicates that the injury occurred after 4:30 p.m. The fact that claimant would sometimes do odd jobs at the job site without pay after 4:30 while waiting for his wife to pick him up is noted, as such activity might have been deemed as being beneficial to the employer's interests. On the day of the accident, however, claimant had no compelling reason to remain on the job site after his normal working hours other than to use the table saw for his own personal benefit. As such, the injury did not occur in a place where claimant was performing his employment duties at a time during which he was fulfilling those duties or was engaged in something incidental thereto.

Further, under the evidence presented it cannot be inferred that claimant had permission to use the table saw. No causal relationship appears to exist between claimant's use of the table saw and the conditions under which his work was to be

performed. As such, claimant's injury did not "arise out of" his employment. (Appealed to District Court; Pending)

INTEREST

Sloan v. Great Plains Bag Corp. (September 21, 1982)

In a review-reopening decision the deputy determined claimant's earning capacity was impaired to the extent of 15 percent of his body as a whole. Defendants were given credit for the prior 10 percent permanent partial disability compensation already paid unto claimant.

In a rehearing decision the deputy held that the statutory interest under section 85.30 accrued in this case from the date permanent partial disability compensation would have been payable "had such compensation been commenced immediately following the cessation of healing period compensation," citing Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979) and Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982).

In contrast to the case sub judice, Farmers Elevator Co., Kingsley, 286 N.W.2d 174, involved a situation where the employer from the beginning denied the compensability of the claim. In the present case, the defendants accepted the claim as compensable and paid compensation for healing period and permanent partial disability to the extent of functional impairment estimated by a physician.

The case of Wilson Food Corp., 315 N.W.2d 756, stands for the principle of prompt compensation. However, in that case it

was based upon credit to be allowed for payments made in excess of the amount later determined to be due rather than interest on additional amounts determined to be due.

Here the defendants admitted some degree of permanent disability and paid benefits accordingly. Thus, the case falls squarely within the parameters of Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957) where the court awarded interest on the amount of additional permanent partial disability compensation, over that which was previously paid, as of the date the agency found the claimant to be entitled to such compensation.

Therefore, on the basis of Bousfield, where the employer makes permanent partial disability payments before the proposed determination and such payments were made in good faith, based upon a reasonable measure, the statutory interest on any increase in degree of permanent partial disability accrues on the date the amount is determined by the proposed award. (No Appeal)

OCCUPATIONAL DISEASE -- ASBESTOSIS

Shull v. L & L Insulation and Supply Co. (September 9, 1982)

During his career as an insulator, claimant's decedent had been exposed to asbestos, first in its application as an insulating substance and then in its removal as new insulation was applied. Although the use of asbestos as an insulator had been curtailed in about 1970, decedent was still exposed to asbestos when refittings were made.

Claimant indicated that decedent had smoked for some time,

but had quit about six months prior to his death. She further indicated that decedent had developed a persistent cough at least a year prior to his death, but otherwise appeared to be in good health. Claimant testified she witnessed several of decedent's coughing spells at home and heard that decedent had experienced a coughing spell at work the night before his death that brought him to his knees. It remains unclear whether decedent was coughing just prior to his death.

Claimant testified that decedent died at home on May 12, 1978, prior to reporting to work. Claimant testified that she and decedent were sitting in their home when decedent suddenly stood up and left the room. A short time later, the decedent was found dead in a family trailer home parked a short distance from the house. The probable cause of death was listed by the pathologist as diffuse subarachnoid and interventricular fresh hemorrhage as a result of hypertensive cardiovascular disease.

The essence of claimant's action is that decedent inhaled asbestos which damaged his pulmonary and coronary systems; this damage to the pulmonary system in turn caused claimant to undergo a violent coughing attack which in turn resulted in a fatal cerebral hemorrhage. The evidence, however, does not establish the foregoing sequence of events.

It is not wholly clear that claimant's decedent suffered from asbestosis. Neither the coroner nor the pathologist found any asbestos fibers. Another expert testified he did find asbestos fibers, however, there were no other tests to confirm

whether the presence of asbestos fibers constituted the condition of asbestosis.

Both a board certified internist and the medical examiner indicated that an individual with coronary problems to the degree of the decedent's would be a candidate for stroke without any precipitating event at all. Given the unequivocal testimony of the internist that a violent coughing attack could not precipitate a cerebral hemorrhage and decedent's preexisting health problems, this agency cannot assume that not only did decedent experience a violent coughing attack because of asbestosis, but that he would not have died were it not for the asbestosis. While the law is to be interpreted liberally, speculation and conjecture do not meet a claimant's burden of proof on the facts. (Appealed to District Court; Pending)

SECOND INJURY FUND

McKee v. Wilson Foods Corporation (July 19, 1982)

Claimant was found to have a 25 percent permanent functional impairment to each lower extremity as a result of a 1974 work related injury at Wilson Foods. Claimant was further found to have a 10 percent functional disability of each upper extremity as of February 20, 1980, because of continuously aggravating degenerative joint disease as a result of performing repetitive employment tasks.

In Second Injury Fund v. Mich Coal Company, 274 N.W.2d 300 (Iowa 1979), the court indicated that where a second injury takes place so as to create the possibility of liability on the

part of the Second Injury Fund, the hearing deputy is to set forth the industrial disability created by the second injury alone. This finding of industrial disability then allows determination of what liability, if any, attaches to the Second Injury Fund pursuant to Iowa Code section 85.64.

The deputy found, and it was upheld on appeal, that as a result of claimant's second injury to his upper extremities, he suffers a permanent industrial disability of 60 percent entitling him to 300 weeks of compensation benefits.

Given claimant's 60 percent industrial disability attributable to the upper extremities, a 25 percent permanent functional impairment to each lower extremity, his age, education, and employment history, it would indeed appear that claimant is permanently and totally disabled.

As noted above, claimant is entitled to 110 weeks compensation for the injuries to the lower extremities and 300 weeks compensation for subsequent injuries to the upper extremities for a total of 410 weeks. Because, however, claimant is permanently and totally disabled as a result of the combined effects of the injuries, application of Code section 85.64 dictates that Wilson Foods is liable for 410 weeks of compensation with the Second Injury Fund liable thereafter. (No Appeal)

FORENSIC PSYCHOLOGISTS
CAROL SANNITO, EXECUTIVE DIRECTOR

801 DUBUQUE BUILDING
DUBUQUE, IOWA 52001
Phone 319-557-8461

A PSYCHOLOGIST'S VOIR DIRE

Dr Thomas Sannito
Forensic Psychologist
Dubuque, Iowa

I. Introduction -- four goals of jury selection

- A. Sorting
- B. Rapport
- C. Indoctrination
- D. Establishing Your Image

II. De-selecting the Plaintiff's Jurors -- four techniques

- A. Hypnotic Suggestibility
- B. Asking Questions Down A Correlated Line
- C. Using Nonverbal Cues
- D. Personality Typing

III. Individualizing the Jury -- customizing

IV. Turning "bad" Jurors Around

V. Group Dynamics of Deliberation

NOTE: Each registrant will receive a copy of Dr. Sannito's Booklet "A Psychologist's Voir Dire".

INDUSTRY CODES AS EVIDENCE

By: David L. Hammer

O'CONNOR, THOMAS, HAMMER, BERTSCH & NORBY

Dubuque, Iowa

INQUIRY: What would you think if the Flat Earth Society or the Baker's Street Irregulars or the Unicorn Searchers, Inc., enacted Codes about which neither you nor your client had ever heard but against which your client's conduct is measured? Absurd? Not at all. They are all legitimate organizations and if their pronouncements as to conduct have not been graced by the Iowa Court as constituting evidence of negligence, it is probably only because no plaintiff's attorney has seen fit to propose any codes which such organizations may have adopted.

RULE: Private standards promulgated by associations without any governmental relationship are now admissible in Iowa, and elsewhere, as evidence of negligence.

RATIONALE: They are admissible as an exception to the Hearsay Rule on the basis of trustworthiness and necessity . . . as such they are an alternative to or are intended to buttress expert testimony." Judge McCormick, speaking for the entire Iowa Court in Jorgensen v. Horton, 206 N.W.2d 100 (1973).

PRIOR RULE: Industry codes were not admissible as evidence: so spoke the Supreme Court of Iowa as recently as 1970 in Wagner v. Northeast Farm Service Company, 177 N.W.2d 1 (Iowa 1970). This is one citation which you may omit. The old rule joins celluloid, the Cord and the Laudable Pus theory.

PUTATIVE LIMITATION RE NEW RULE: Violations of such standards are not negligence per se but evidence of negligence. Quaere per Tinker Bell:

(1) Please clap your hands if you really believe that a jury understands this time-honored distinction?

(2) Please clap your hands if you really believe that you understand this distinction?

IOWA APPLICATIONS OF STANDARDS:

(1) Associated General Contractors of America Standards admitted in a vehicle pedestrian accident, Jorgensen v. Horton, cited Supra.

(2) Standards of the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers, admitted in a death from poison gas at a sewage treatment plant. Evans v. Howard R. Green Co., 231 N.W.2d 907 (Iowa 1975).

(3) National Association of Security Dealers Standards and the Standards of the New York Stock Exchange in a case to determine whether a stock broker was negligent in giving advice. Piper Jaffray and Hopwood, Inc., vs. Ladin, 399 Fed. Supp. 292 (S.D. Iowa 1975).

THEORIES OF ADMISSIBILITY:

(1) Current Iowa Rule -- Industry Codes "are admissible as an exception to the Hearsay Rule on the basis of trustworthiness and necessity." Jorgensen v. Horton, 206 N.W.2d 100, 103 (Iowa 1973).

(2) Arguably, prior industry codes are still admissible under Rule 803(18) or Rule 803(24) of the New Iowa Rules of Evidence which provide:

> "803(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness. If admissible, the statements may be read into evidence but may not be received as exhibits."
>
> "803(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."
>
> See Johnson v. William C. Ellis & Sons Iron Works, 609 F.2d 820 (C.A. 5th 1980).

EVIDENTIAL BASIS: The Jorgensen case states that industry codes and standards are admissible upon proper foundation but does not define what foundation is necessary. Elements of foundation which should be considered are:

(1) Evidence that the private standards involved are standards in the particular industry or profession being testified to;

(2) Evidence as to who prepared this private standard;

(3) Evidence as to who promulgated this private standard;

(4) Evidence as to the intent and purposes of this private standard;

(5) Evidence that the standard was in effect at the time of the incident involved in the lawsuit, [Rodrigues v. Elizabethtown Gas Co., 104 N.J. Super 436, 250 A.2d 408 (1969)]

(6) Evidence of whether or not this private standard is widely accepted in government and the industry or profession; and

(7) Evidence of the basis for this private standard's trustworthiness to allow exception to the hearsay rules.

POSSIBLE THEORIES OF EXCLUSION:

(1) Hearsay;

(2) Lacks trustworthiness so to be an exception;

(3) Lacks the justification of necessity so to be an exception;

(4) Lack of foundation; (see evidential basis above.)

(5) Lack of probity;

(6) Unconstitutional delegation of rule making authority; and

(7) Whatever else your facile lawyers' brain suggests. Remember Attorney Aaron Burr is reported to have defined law as what is boldly asserted and plausibly maintained.

PARRY AND THRUST: A DEFENSE TOOL: If you have the good fortune to be representing a client complying with an industry code, offer it. "Compliance with the safety code is a relevant fact on the question of due care." Cronk vs. Iowa Power and Light Co., 138 N.W.2d 843 (Iowa 1966). And if your client is not complying perhaps an expert may conclude what your client is doing, while different, is superior to the Industry Code.

SOME EXAMPLES OF GROUPS ISSUING CODES:

American National Standards Institute (ANSI)
National Electrical Safety Code
American Petroleum Institute (API)
American Society of Mechanical Engineers (ASME)
American Society for Testing and Materials (ASTM)
American Welding Society (AWS)
Compressed Gas Association (CGA)
Crane Manufacturer's Association of America, Inc. (CMAA)

Institute of Makers of Explosives (IME)
National Electrical Manufacturer's Association (NEMA)
National Fire Protection Association (NFPA)
National Food Plant Institute
National Institutes of Occupational Safety and Health (NIOSH)
Society of Automotive Engineers (SAE)
The Fertilizer Institute
Underwriters Laboratories (UL)
National Lighting Association
National Arborist Association

(There are many more - scratch an organization and you will find a code.)

SUMMARY: The beleagued (but unbowed) defense attorney, already confronted with the perils of legislation by the legislature and the judiciary is now burdened with legislation by trade associations.

INSTRUCTIONS - COMPARATIVE NEGLIGENCE

Following Goetzman v. Wichern

327 N.W.2d 742 (Iowa 1982)

SPEAKER: Louis A. Lavorato, Chief Judge
Fifth Judicial District
Chairman, Uniform Court Instructions Committee
Iowa State Bar Association

I. No. 2.18 Essentials For Recovery

A. Marshalling Instruction - Plaintiff

B. Lead-in to defense of comparative negligence

C. Advises jury of their task to compare negligence of parties and to determine percentage of combined negligence attributable to each party

II. No. 2.40 Comparative Negligence

Definition:

A. Definitional Instruction on Comparative Negligence

B. Not a bar to recovery but reduction in recovery

III. No. 2.41 Comparative Negligence - Single Defendant

A. Marshalling Instruction - defense of comparative negligence - single defendant

B. Lead-in to special verdict form

C. Advises jury of their task to compare negligence of parties and to determine percentage of combined negligence attributable to each party

IV. No. 2.42 Comparative Negligence - Single Plaintiff, Single Defendant, Claim and Counterclaim.

A. Sets forth claims of both parties

B. Lead-in to special verdict form

C. Advises jury of their task to compare negligence of parties on each claim and to determine percentage of combined negligence attributable to each party on each claim

V. No. 1.21A Return of Verdict - Special Verdict

A. I.R.C.P. 203, 204 and 205

VI. Special Verdict Forms with Issues to be Decided by Jury as to Negligence, Proximate Cause, Damages and Percentage of Combined Negligence Attributable to Parties.

A. Court makes final calculation of verdict using total damages found by jury and reducing same by percentage of negligence found by jury

B. Types of special verdict forms

1. Special Verdict - Single Plaintiff and Single Defendant

2. Special Verdict - Single Plaintiff and Multiple Defendants

3. Special Verdict - Single Plaintiff, Single Defendant, Claim and Counterclaim

VII. Other Changes in Uniform Instructions Necessitated by Goetzman.

A. Old No. 2.2D Contributory Negligence - Parent's Claim Under R.C.P. 8

1. No change in substance

2. Substitution of negligence for contributory negligence

B. Old No. 2.2E Contributory Negligence of Injured Spouse - Loss of Consortium

1. No change in substance

2. Substitution of negligence for contributory negligence

C. Old No. 2.7A Third Party Negligence Pleaded As Sole Proximate Cause

1. Deletion of following language on definition of concurrent negligence: "and, in such case, each of the negligent persons is liable and the extent to which the damages is attributable to the different causes is immaterial."

D. Old No. 2.7B Concurring Proximate Cause - Concurrent Negligence

1. Same change as in No. 2.7A

E. Old No. 2.7C Concurring Proximate Cause - Concurrent Negligence of Multiple Defendants

1. Same change as in No. 2.7A

F. Old No. 2.8 Concurrent Negligence

1. Deletion of following language third paragraph on proximate causes: "and, if so, the extent to which the damage is attributable to the different causes is immaterial."

NO. 2.18 - ESSENTIALS FOR RECOVERY

The Plaintiff asserts that the defendant was negligent in the following particulars:

1. _____

2. _____

These particulars or specifications of negligence have been explained to you in other instructions.

To entitle the plaintiff to recover the burden is upon him to establish by a preponderance of the evidence all of the following propositions:

A. That the defendant was negligent in some particular as charged by the plaintiff.

B. That such negligence was a proximate cause of his injury or damage.

C. That the plaintiff has sustained damage and the extent thereof.

If the plaintiff has established all of the foregoing propositions by a preponderance of the evidence, then plaintiff is entitled to recover in some amount (and you will then consider defendant's assertion of plaintiff's negligence in accordance with other instructions herein.)*

If the plaintiff has failed to establish by a preponderance of the evidence any one or more of the foregoing propositions, (then plaintiff cannot recover and you will then answer the issues in the special verdict submitted with these instructions accordingly)* (then plaintiff cannot recover and your verdict will be for the defendant)**.

AUTHORITY

Bauman v. City of Waverly, 164 N.W.2d 840 (Iowa 1969).

*Use where comparative negligence is alleged.

** Use where comparative negligence is not alleged. Also, use general verdict form in this situation.

April, 1983

NO. 2.40 - COMPARATIVE NEGLIGENCE - DEFINITION

The law provides that if a person who has sustained damages is negligent, such negligence will not bar recovery; rather, the recovery shall be reduced in the proportion or percentage that such negligence bears to the total negligence that proximately caused the damages.

AUTHORITY

Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982).

April, 1983

NO. 2.41 - COMPARATIVE NEGLIGENCE - SINGLE DEFENDANT

The defendant asserts that the plaintiff was negligent in the following particulars:

1. _____

2. _____

These particulars or specifications of negligence have been explained to you in other instructions.

Proximate cause has been heretofore defined. A particular result may have more than one proximate cause, and the negligence of two persons may combine so that the negligence of each is a proximate cause of an injury or damage. With respect to this defense, the negligence of the injured person must be a proximate cause of his injury or damage, but it need not be the only proximate cause.

To sustain this defense, the burden is upon the defendant to establish by a preponderance of the evidence both of the following propositions:

A. That the plaintiff himself was negligent in some particular as asserted by the defendant; and

B. That such negligence was a proximate cause of his injury or damage.

If the defendant has established both of the foregoing propositions by a preponderance of the evidence, and if the plaintiff, in accordance with Instruction No. ___, has established by a preponderance of the evidence that defendant was negligent and said negligence was a proximate cause of plaintiff's injury or damage, then you must determine what percentage of their combined negligence is attributable to plaintiff and what percentage is attributable to the defendant in accordance with the special verdict submitted with these instructions. The percentage attributable to the plaintiff will be used by the Court to reduce the amount of damage which you find plaintiff has sustained.

If the defendant has failed to establish either of the foregoing propositions by a preponderance of the evidence, then defendant has failed to prove his defense and you shall consider whether the plaintiff is entitled to recover against the defendant in accordance with other instructions herein.

AUTHORITY

Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982).

April, 1983

NO. 2.42 - COMPARATIVE NEGLIGENCE - SINGLE PLAINTIFF, SINGLE DEFENDANT, CLAIM AND COUNTERCLAIM

Each party to this suit claims to be entitled to damages from the other. The plaintiff claims damages under his petition and defendant claims damages under his counterclaim.

Because of these respective claims you may reach one of four results in answering the issues submitted to you in the special verdict submitted with these instructions.

First, you may find plaintiff is entitled to damages on his claim and defendant is not entitled to damages on his counterclaim.

Second, you may find defendant is entitled to damages on his counterclaim and plaintiff is not entitled to damages on his claim.

Third, you may find plaintiff is not entitled to damages on his claim and defendant is not entitled to damages on his counterclaim.

Fourth, you may find that plaintiff is entitled to damages on his claim and defendant is entitled to damages on his counterclaim.

Plaintiff claims defendant was negligent in the following particulars:

1. _____

2. _____

These particulars or specifications of negligence have been explained to you in other instructions.

Defendant claims that plaintiff was negligent in the following particulars:

1. _____

2. _____

These particulars or specifications of negligence have been explained to you in other instructions.

Proximate cause has been heretofore defined. A particular result may have more than one proximate cause, and the negligence of two persons may combine so that the negligence of each is a proximate cause of an injury or damage.

To entitle plaintiff to recover the burden is upon him to establish by a preponderance of the evidence all of the following propositions:

(continued)

A. That the defendant was negligent in some particular as charged by the plaintiff.

B. That such negligence was a proximate cause of his injury or damage.

C. That the plaintiff has sustained damage and the extent thereof.

If plaintiff has established all of the foregoing propositions by a preponderance of the evidence, plaintiff will be entitled to recover on his claim in some amount and you will answer the issues in the special verdict submitted with these instructions accordingly.

If plaintiff has not established all of the foregoing propositions by a preponderance of the evidence, plaintiff will not be entitled to recover and you will answer the issues in the special verdict submitted with these instructions accordingly.

If you find from a preponderance of the evidence that each party was negligent and that the negligence of each party was a proximate cause of the plaintiff's injury or damage, then you must determine what percentage of their combined negligence is attributable to the plaintiff and what percentage is attributable to the defendant in accordance with the special verdict submitted with these instructions. Negligence on the part of the plaintiff does not bar recovery by the plaintiff against the defendant. However, the percentage of negligence attributable to the plaintiff will be used by the Court to reduce the amount of damages which you find plaintiff has sustained.

To entitle defendant to recover the burden is upon him to establish by a preponderance of the evidence all of the following propositions:

A. That the plaintiff was negligent in some particular as charged by the defendant.

B. That such negligence was a proximate cause of his injury or damage.

C. That the defendant has sustained damage and the extent thereof.

If defendant has established all of the foregoing propositions by a preponderance of the evidence, defendant will be entitled to recover on his counterclaim in some amount and you will answer the issues in the special verdict submitted with these instructions accordingly.

If defendant has not established all of the foregoing propositions by a preponderance of the evidence, defendant will not be entitled to recover and you will answer the issues in the special verdict submitted with these instructions accordingly.

(Continued)

If you find from a preponderance of the evidence that each party was negligent and that the negligence of each party was a proximate cause of the defendant's injury or damage, then you must determine what percentage of their combined negligence is attributable to the defendant and what percentage is attributable to the plaintiff in accordance with the special verdict submitted with these instructions. Negligence on the part of the defendant does not bar recovery by the defendant against the plaintiff. However, the percentage of negligence attributable to the defendant will be used by the Court to reduce the amount of damages which you find defendant has sustained.

AUTHORITY

Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982).

April, 1983

NO. 1.21A - RETURN OF VERDICT - SPECIAL VERDICT

Herewith you will find a special verdict consisting of _____ issues. If you return a unanimous verdict, that is, if you each agree upon the answers to the issues in the special verdict submitted to you, such will be signed only by one of your number whom you will have selected as a foreman and return with it into court.

This case is submitted to you at _____ o'clock ___.M., at which time your deliberations are determined to have commenced.

If after deliberating for six (6) hours from this time, exclusive of meals or recesses outside of your jury room, then all but one of you may agree upon and return the special verdict. If your foreman is a dissenting juror, he should not sign the verdict.

When you have agreed upon the special verdict and appropriately signed it, you will then return with it into court.

AUTHORITY

I.R.C.P. 203, 204 and 205.

April, 1983

NO. 1.21A (Continued)
Page 2

We, the jury, find the following special verdict on the issues submitted to us:

Issue No. 1: _____

ANSWER: _____

Issue No. 2: _____

ANSWER: _____

_____
Foreman*

*To be signed only if verdict is unanimous.

_____ _____
Juror** Juror**

_____ _____
Juror** Juror**

_____ _____
Juror** Juror**

_____
Juror**

**To be signed by the jurors agreeing thereto after six hours or more of deliberation.

April, 1983

SPECIAL VERDICT - SINGLE PLAINTIFF AND SINGLE DEFENDANT

We, the jury, find the following special verdict on the issues submitted to us:

Issue No. 1: Was the defendant negligent?

Answer "yes" or "no".

ANSWER: _____

(If your answer is "no", do not answer any further questions.)

Issue No. 2: Was the negligence of the defendant a proximate cause of injury or damage to the plaintiff?

Answer "yes" or "no".

ANSWER: _____

(If your answer is "no", do not answer any further questions.)

Issue No. 3: What is the total amount of damages, if any, sustained by the plaintiff without taking into consideration any reduction of damages due to plaintiff's negligence, if any?

ANSWER: $_____

Issue No. 4: Was the plaintiff negligent?

Answer "yes" or "no".

ANSWER: _____

(If your answer is "no", do not answer any further questions.)

Issue No. 5: Was the plaintiff's negligence a proximate cause of his injury or damage?

Answer "yes" or "no".

ANSWER: _____

(If your answer is "no", do not answer any further questions.)

(Continued)

Issue No. 6: Using 100% as the total combined negligence of plaintiff and defendant which was a proximate cause of plaintiff's injury or damage, what percentage of such combined negligence is attributable to the plaintiff and what percentage of such combined negligence is attributable to the defendant?

ANSWER: Plaintiff _____ %

Defendant _____ %

Total 100%

_____
Foreman*

*To be signed only if verdict is unanimous.

_____ _____
Juror** Juror**

_____ _____
Juror** Juror**

_____ _____
Juror** Juror**

_____
Juror**

**To be signed by the jurors agreeing thereto after six hours or more of deliberation.

April, 1983

SPECIAL VERDICT - SINGLE PLAINTIFF AND MULTIPLE DEFENDANTS

We, the jury, find the following special verdict on the issues submitted to us:

(Name of Defendant No. 1)

Issue No. 1: Was (name of defendant No. 1) negligent?

Answer "yes" or "no".

ANSWER: _____

(If your answer is "no", do not answer Issue No. 2.)

Issue No. 2: Was the negligence of (name of defendant No. 1) a proximate cause of injury or damage to the plaintiff?

Answer "yes" or "no".

ANSWER: _____

(If your answer to either Issue No. 1 or Issue No. 2 is "no", then you shall not attribute any percentage of negligence to (name of defendant No. 1).

(Name of Defendant No. 2)

Issue No. 3: Was (name of defendant No. 2) negligent?

Answer "yes" or "no".

ANSWER: _____

(If your answer to Issue No. 3 is "no", do not answer Issue No. 4.)

Issue No. 4: Was the negligence of (name of defendant No. 2) a proximate cause of injury or damage to the plaintiff?

Answer "yes" or "no".

ANSWER: _____

(If your answer to either Issue No. 3 or Issue No. 4 is "no", ther you shall not attribute any percentage of negligence to (name of defendant No. 2.)

(Continued)

(Name of Defendant No. 3)

Issue No. 5: Was (name of defendant No. 3) negligent?

Answer "yes" or "no".

ANSWER: _____

(If your answer to Issue No. 5 is "no", do not answer Issue No. 6.)

Issue No. 6: Was the negligence of (name of defendant No. 3) a proximate cause of injury or damage to the plaintiff?

Answer "yes" or "no".

ANSWER: _____

(If your answer to either Issue No. 5 or Issue No. 6 is "no", then you shall not attribute any percentage of negligence to (name of defendant No. 3).

If your answer is "no" to either issue as to each and all of the defendants, do not answer any further questions.

(Name of Plaintiff)

Issue No. 7: What is the total amount of damages, if any, sustained by the plaintiff without taking into consideration any reduction of damages due to plaintiff's negligence, if any?

ANSWER $_____

Issue No. 8: Was the plaintiff negligent?

Answer "yes" or "no".

ANSWER: _____

(If your answer to Issue No. 8 is "no", do not answer any further questions.)

Issue No. 9: Was the negligence of the plaintiff a proximate cause of injury or damage to the plaintiff?

(Continued)

Answer "yes" or "no".

ANSWER: _____

(If your answer to Issue No. 9 is "no", do not answer the final question.)

Issue No. 10: Using 100% as the total combined negligence of the plaintiff and of one or more of the defendants which was a proximate cause of injury or damage to the plaintiff, what percentage of such combined negligence is attributable to the plaintiff and what percentage of such combined negligence is attributable to each defendant whose negligence was a proximate cause of injury or damage to the plaintiff?

(If in accordance with your previous answers you do not attribute any percentage of negligence to one or more defendants, then enter zero percent after his name.)

ANSWER:

(Name of plaintiff)	_____%
(Name of defendant No. 1)	_____%
(Name of defendant No. 2)	_____%
(Name of defendant No. 3)	_____%
Total	100%

_____
Foreman*

*To be signed only if verdict is unanimous.

_____ _____
Juror** Juror**

_____ _____
Juror** Juror**

(Continued)

_____ _____

Juror** Juror**

_____

Juror**

**To be signed by the jurors agreeing thereto after six hours or more of deliberation.

April, 1983

SPECIAL VERDICT - SINGLE PLAINTIFF, SINGLE DEFENDANT, CLAIM AND COUNTERCLAIM

We, the jury, find the following special verdict on the issues submitted to us:

Issue No. 1: Was the defendant negligent?

Answer "yes" or "no".

ANSWER: _____

(If your answer to Issue No. 1 is "yes", then answer Issue No. 2.)

Issue No. 2: Was the negligence of the defendant a proximate cause of injury or damage to:

2A The plaintiff?

Answer "yes" or "no".

ANSWER: _____

2B The defendant?

Answer "yes" or "no".

ANSWER: _____

Issue No. 3: Was the plaintiff negligent?

Answer "yes" or "no".

ANSWER: _____

(If your answer to Issue No. 3 is "yes", then answer Issue No. 4.)

Issue No. 4: Was the negligence of the plaintiff a proximate cause of injury or damage to:

4A The defendant?

Answer "yes" or "no".

ANSWER: _____

(Continued)

4B The plaintiff?

Answer "yes" or "no".

ANSWER: _____

(Answer Issue No. 5 only if your answer to question 2A is "yes".)

Issue No. 5: What is the total amount of damages, if any, sustained by the plaintiff without taking into consideration any reduction of damages due to plaintiff's negligence, if any?

ANSWER: $_____

(Answer Issue No. 6 only if your answer to question 4A is "yes".)

Issue No. 6: What is the total amount of damages, if any, suffered by the defendant without taking into consideration any reduction of damages due to defendant's negligence, if any?

ANSWER: $_____

(Answer Issue No. 7 only if your answer to both questions 2A and 4B is "yes". If your answer is "no" to either of those questions, do not answer Issue No. 7.)

Issue No. 7: Using 100% as the total combined negligence of plaintiff and defendant which was a proximate cause of injury or damage to the plaintiff, what percentage of such combined negligence is attributable to the plaintiff and what percentage of such combined negligence is attributable to the defendant?

ANSWER: Plaintiff _____%

Defendant _____%

Total 100%

(Answer Issue No. 8 only if your answer to both questions 2B and 4A is "yes". If your answer is "no" to either of those questions, do not answer Issue No. 8.)

(Continued)

Issue No. 8: Using 100% as the total combined negligence of defendant and plaintiff which was a proximate cause of injury or damage to the defendant, what percentage of such combined negligence is attributable to the defendant and what percentage of such combined negligence is attributable to the plaintiff?

ANSWER: Plaintiff _____%

Defendant _____%

Total 100%

_____
Foreman*

*To be signed only if verdict is unanimous.

_____ _____
Juror** Juror**

_____ _____
Juror** Juror**

_____ _____
Juror** Juror**

_____
Juror**

**To be signed by the jurors agreeing thereto after six hours or more of deliberation.

April, 1983

NO. 2.2D - CHILD'S NEGLIGENCE - PARENTS' CLAIM
UNDER R.C.P. 8

If you find that defendant has proven negligence on the part of the plaintiff (name of injured child) which was a proximate cause of his injuries, you are instructed that it is to be considered only as to the claim of the plaintiff (name of injured child) as stated elsewhere in these instructions and it is not a defense to the claim of the plaintiff(s) (name of injured child's parents(s)).

AUTHORITY

Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982).
Handeland v. Brown, 216 N.W.2d 574 (Iowa 1974).

April, 1983

NO. 2.2E - NEGLIGENCE OF INJURED SPOUSE - LOSS OF CONSORTIUM

If you find that defendant has shown negligence on the part of the plaintiff (name of injured spouse) which was a proximate cause of his injuries, you are instructed that it is to be considered only as to the claim of the plaintiff (name of injured spouse) as set forth elsewhere in these instructions and it is not to be considered as to the claim of the plaintiff (name of spouse seeking consortium).

AUTHORITY

Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982).
Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980).

April, 1983

NO. 2.7A - THIRD PERSON NEGLIGENCE PLEADED AS SOLE PROXIMATE CAUSE

The defendant has pleaded that the sole proximate cause of plaintiff's injury and damage was the negligence of (driver of car in which plaintiff was riding or driver of another car), and the defendant has the burden of proof to establish this contention.

Proximate cause has been heretofore defined. A particular result may have more than one proximate cause, and the negligence of two or more persons may combine so that the negligence of each is a proximate cause of an injury or damage.

Where the negligence of only one person is the proximate cause of an injury or damage, it is referred to as the "sole" proximate cause. Where the negligence of two or more persons combine to proximately cause an injury or damage, the negligence of each is referred to as a "concurring" proximate cause, or concurrent negligence.

Before the plaintiff can recover he must establish by a preponderance of the evidence that the defendant was negligent in one or more of the particulars alleged by plaintiff and that such negligence was either the sole proximate cause or a concurring proximate cause of any injury and damage to plaintiff.

However, if the defendant has proved by a preponderance of the evidence that (third person) was negligent and that such negligence was the sole proximate cause of the injury and damage to plaintiff, then the plaintiff cannot recover against the defendant.

NOTE: The defendant has the burden to prove the sole proximate cause defense whether it is raised by affirmative pleading or general denial.

Adam v. T.I.P. Rural Electric Cooperative, 271 N.W.2d 896 (Iowa 1978).

April, 1983

NO. 2.7B - CONCURRING PROXIMATE CAUSE - CONCURRENT NEGLIGENCE

Proximate cause has been heretofore defined. A particular result may have more than one proximate cause, and the negligence of two or more persons may combine so that the negligence of each is a proximate cause of an injury or damage.

Where the negligence of only one person is the proximate cause of an injury or damage, it is referred to as the "sole" proximate cause. Where the negligence of two or more persons combine to proximately cause an injury or damage, the negligence of each is referred to as a "concurring" proximate cause, or concurrent negligence.

In this case the defendant contends that the sole proximate cause of any injury and damage to plaintiff was the negligence of _____ and the defendant has the burden of proof to establish this contention.

If you find under the evidence and these instructions that the defendant was negligent in any of the particulars alleged by plaintiff as set forth in Instruction No._____, and as defined in these instructions, then you must determine whether or not such negligence of the defendant was in fact either the sole proximate cause or a concurring proximate cause of any injury or damage sustained by the plaintiff and if you fail to find any negligence of the defendant was either the sole or concurring proximate cause of plaintiff's injury or damage then plaintiff cannot recover.

NOTE: The defendant has the burden to prove the sole proximate cause defense whether it is raised by affirmative pleading or general denial.

Adam v. T.I.P. Rural Electric Cooperative, 271 N.W.2d 896 (Iowa 1978).

April, 1983

NO. 2.7C - CONCURRING PROXIMATE CAUSE - CONCURRENT NEGLIGENCE OF MULTIPLE DEFENDANTS

Proximate cause has been heretofore defined. A particular result may have more than one proximate cause, and the negligence of two or more persons may combine so that the negligence of each is a proximate cause of an injury or damage.

Where the negligence of only one person is the proximate cause of an injury or damage, it is referred to as the "sole" proximate cause. Where the negligence of two or more persons combine to proximately cause an injury or damage, the negligence of each is referred to as a "concurring" proximate cause, or concurrent negligence.

In this case the plaintiff has alleged and must prove that each of the defendants was negligent and that the negligence of each was a proximate cause of his injury and damage. Each of the defendants contends that the negligence of the other defendant was the sole proximate cause of any injury or damage to plaintiff, and each defendant has the burden of proof to establish his contention.

You must consider the claim of the plaintiff against each defendant separately--not only whether or not each was negligent but also whether or not any negligence of either was at least a concurring proximate cause of any injury or damage to plaintiff, and, in order for the plaintiff to recover against any defendant the plaintiff must establish by a preponderance of the evidence that the negligence, if any, of such defendant was either the sole or concurring proximate cause of his injury or damage. However, if a defendant has proved by a preponderance of the evidence that the other defendant was negligent and that such negligence was the sole proximate cause of the injury and damage to plaintiff, then the plaintiff cannot recover against that defendant.

NOTE: The defendant has the burden to prove the sole proximate cause defense whether it is raised by affirmative pleading or general denial.

Adam v. T.I.P. Rural Electric Cooperative, 271 N.W.2d 896 (Iowa 1978).

April, 1983

NO. 2.8 - CONCURRENT NEGLIGENCE

Proximate cause has been heretofore defined. A proximate cause need not be the sole and only cause of a damage or injury.

Where the negligence of two or more persons concurs or combines to cause injury to a third person, and the injury would not have resulted without such concurring negligence, the negligence of such persons would be the proximate cause of such injury. In other words, one whose negligence is a direct cause of injury to another is not relieved from responsibility for his negligence because some third person was also negligent and his negligence concurred or combined to cause the injury.

Where two causes, both of which are in their nature proximate, combine to produce an injury or damage, one of which is attributable to one person and one of which is attributable to another person, both may be proximate.

In this case it was alleged the both defendants _____ and _____ were negligent and that the negligence of each was a proximate cause of the collision. These allegations should be separately considered. A finding by you that either defendant was or was not negligent or that such negligence, if any, was or was not a proximate cause of the plaintiff's injury (damage) would not determine the questions of negligence and proximate cause as to the other defendant, unless you find that the negligence of one was the sole proximate cause.

SEE: Henneman v. McCalla, 260 Iowa 60, 148 N.W.2d 447 (1967).

April, 1983

IOWA'S DRUNK DRIVING LAW

Kermit L. Dunahoo
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III. Selected Other Current Issues

Part I: OVERVIEW OF THE REVISED DRUNK DRIVING (OWI) STATUTE *

A. Drunk Driving (OWI): The Criminal Offense

1. Elements

The substantive statute on drunk driving (OWI) has been revised to specify two alternative ways of proving the intoxication element of the criminal offense:

(1) Being "under the influence" of alcohol or drugs or both;

or

(2) having a blood alcohol content (BAC) of at least .13%.

2. Charging Considerations

(a) Alternative Theories. The revised OWI offense committed in two alternative ways -- being under the influence or the .13% per se statute. (Under the 1981 per se statute, these were separate offenses.) Thus, the State can charge both means and prosecute in the alternative, but defendant can only be convicted and sentenced for one crime even though both modes of OWI were committed in the same occurrence.

(b) Six-Year Limit. No change was made in the pre-1982 statutory limitation in computing prior offenses for punishment purposes. That is, no conviction or guilty plea to a violation which occurred more than six years prior to the date of the current charged violation can be considered in determining whether the instant offense is a second or subsequent offense.

3. Evidentiary Considerations.

(a) Preliminary Field Test. Although a preliminary breath screening test is now specifically authorized by statute, the results thereof are not admissible in evidence for either party in a criminal prosecution.

* [Excerpted from Iowa's New Drunk Driving Law

(b) Chemical Test Results. Under the revised implied consent statute, chemical test results of drug content in a driver's blood are now admissible in evidence.

(c) Chemical Test Refusal. Evidence that defendant refused to submit to a chemical test under the implied consent law remains admissible in a criminal prosecution under the revised OWI law.

(d) Presumptive Evidence. In An OWI prosecution for being under the influence of an alcoholic beverage, there is no change in the statutory rebuttable presumption that a person with a BAC of .10% or higher is under the influence. Therefore, if such test results are admitted into evidence, the jury is instructed that this permissible inference is to be considered with the other evidence in determining if defendant was under the influence.

(e) "Per Se" Offense. In an OWI prosecution via the "per se" alternative, the State merely needs to prove that defendant had a BAC of at least .13% while he was operating a motor vehicle. Whether or not this particular defendant was "under the influence" of the alcohol, including whether there was in fact any appreciable effect on his driving, is irrelevant.

4. Sentencing.

(a) First Offense

(i) Serious Misdemeanor. First-offense OWI remains a serious misdemeanor.

The non-mandatory minimum jail term for first-offense OWI, if incarceration is imposed, has been extended to "forty-eight" hours (instead of "two days"). However, any sentence to confinement (including the 48-hour "minimum) can be suspended.

A new statutory provision requires the court to give credit or any time of confinement following the arrest.

Express authority for courts to accommodate the "minimum" 48-hour sentence to defendant's work schedule has also been added.

(ii) Ameliorative sentencing options. Deferred judgments, deferred sentences, and suspended sentences still are authorized on first-offense OWI. However, the courts are prohibited from granting a deferred judgment or a deferred sentence when the defendant has been convicted of OWI within the previous six years or the defendant's driving record shows one or more OWI-related license revocations within the past six years.

(iii) **License Revocation**

(1) Deferred Judgment. Upon granting a deferred judgment (as opposed to a deferred sentence), a court must impose a license revocation for a 30-90 day period. This revocation apparently is in addition to and independent of any DOT-imposed administrative revocation already in effect.

(2) Conviction for Third or Subsequent Violation. A new six-year mandatory term of license revocation upon conviction of a third (or subsequent) OWI violation (as opposed to third-offense OWI) was added in 1982.

(b) **Second Offense**

(i) Aggravated Misdemeanor. Second-offense OWI remains an aggravated misdemeanor.

(ii) Ameliorative Sentencing Options. Deferred judgments, deferred sentences, and suspended sentences (to the extent that a mandatory minimum seven-day jail term has been created) have eliminated for second-offense OWI.

(iii) License Revocation. A new six-year mandatory term of license revocation upon conviction of a third (or subsequent) OWI violation (as opposed to third-offense OWI) was added in 1982.

(c) **Third and Subsequent Offenses**

(i) Penalty Classification. Third-offense OWI (and each subsequent offense) remains a class D felony.

(ii) Ameliorative Sentencing Options. Deferred judgments and deferred sentences cannot be granted for third or subsequent offenses.

However, the full prescribed five-year term of imprisonment can still be suspended, so there thus is no mandatory minimum term of confinement on third (and subsequent) offenses.

(iii) License Revocation. A new six-year mandatory term of license revocation upon conviction of a third (or subsequent) OWI violation (as opposed to third-offense OWI) was added in 1982.

(d) Commitment for Treatment. The courts' use of court-ordered commitments for in-patient treatment of alcohol or drug dependency no longer can be in lieu of punishment, but instead has been limited under the revised law to use as a condition of a

suspended sentence or as a portion of a sentence on second or subsequent offenses only. The time spent in commitment is to be credited against the sentence otherwise imposed.

This sentencing option is unavailable altogether on first-offense OWI.

(e) Drinking Drivers School. When a defendant is ordered by the courts to complete either drinking drivers school or evaluation, treatment, or rehabilitative services and his license is not already revoked administratively (by the DOT) under the implied consent law at that time, the court must revoke the license indefinitely until the required course or service has been completed and the proof of financial responsibility requirements of CODE Ch. 321A have been met.

An already-imposed administrative revocation (under CODE Ch. 321B) cannot be shortened by the courts upon defendant's completion of drinking drivers school or after evaluation, treatment, or rehabilitative services -- unlike under the pre-1982 law.

(f) Out-Patient Treatment or Services. As an alternative or addition to drinking drivers school, the courts are authorized to require a defendant to seek evaluation, treatment, or rehabilitative services for substance abuse on an out-patient basis. This sentencing alternative is available only after a conviction and can be used in lieu of other punishment on first-offense OWI but only as an additional penalty on second (and a subsequent) offense.

B. Implied Consent

1. Generally.

The basic approach in the implied consent law has not been changed. There still is no requirement that a driver submit to any chemical tests, and no provision is made for "forced" or involuntary test taking. And there is no penalty other than license revocation for refusing to submit to testing, except in the limited circumstances of a person resisting or obstructing the execution of a search warrant for a blood or breath test in a suspected vehicular involuntary manslaughter case.

The cornerstone of the implied consent law remains the admissibility of evidence of the test result or refusal in a criminal prosecution (for OWI or OWI-caused vehicular involuntary manslaughter) and a civil proceeding (for license revocation).

2. **Scope.**

(a) Drugs. The scope of the implied consent law has been broadened so that it may be invoked to secure body specimens for testing to detect the presence of drugs other than alcohol in the system.

(b) Juveniles. Juveniles have been made subject to the implied consent law after being taken into custody under CODE § 232.19.

3. **Invoking-Authorization**

(a) Grounds for Invoking Implied Consent. A formal arrest for OWI is no longer an absolute prerequisite for a peace officer to invoke the implied consent law to request a chemical test.

Three alternative grounds, besides a formal OWI arrest, which will enable a peace officer who reasonably suspects an OWI violation to invoke the implied consent law and request a chemical test have been added:

(1) The motorist was involved in an accident resulting in a death or personal injury, or

(2) The motorist has refused to take a preliminary breath screening test, or

(3) The motorist took the preliminary breath screening test and it indicated a possible BAC of .10% or higher.

(b) Preliminary Breath Screening Test. Peace officers are authorized to request and administer a preliminary breath screening test at the scene of a stop or an accident to assist them in determining the existence of probable cause for an OWI arrest or whether a chemical test should or may be requested under the implied consent law.

A person's refusal to submit to this preliminary test is a ground for invoking the implied consent law.

While testimony regarding the use of this preliminary test should be permissible, the results of this type of test are not admissible as evidence in any court action.

(c) Required Advice. Before requiring a person to elect whether to submit to a chemical test, a peace officer must advise the person that either (1) a chemical test result of .10% or higher or (2) refusal of the test will result in license revocation, and also advise the person of the various periods of revocation that may apply (depending upon the number of previous OWI convictions or OWI-related license revocations).

(d) Search Warrant. In an exception to the usual procedures under the implied consent law, peace officers have been authorized to obtain a search warrant for the withdrawal of a blood sample (or breath in certain circumstances) from a driver involved in an accident resulting either in death or serious personal injury likely to result in death, who has refused to submit to a chemical test under the implied consent law. This provision applies only to investigations of suspected Involuntary Manslaughter cases, however, and any evidence thus obtained would only be admissible in prosecutions for that offense.

Refusal to submit to withdrawal of the body specimen pursuant to a search warrant under this section constitutes the crime of Contempt.

4. Administering

(a) Tests -- Type. The same four chemical tests (blood, breath, saliva, and urine) are authorized under the revised OWI law.

(b) Choice of Tests. A driver still does not get to choose which test he takes -- other than having the right to refuse a blood test (in which the peace officer selects one other test to be offered).

(c) Independent Test. The motorist still has a right to an independent chemical test, provided that any new body specimen can be taken within the statutorily-prescribed two-hour limit following his arrest or offering of a preliminary breath screening test (whichever occurs first).

(d) Peace Officer's Request. The requirement that a peace officer's request to medical personnel to withdraw blood specimens be in writing has been eliminated.

(e) Physician's Assistants. Physician's assistants have been added to the classification of medical personnel authorized to withdraw blood specimens under the implied consent law.

(f) Physician's Authorization. The requirement that the authorized medical personnel other than doctors be designated by a licensed physician before withdrawing blood samples under the implied consent law has been eliminated.

(g) Testing -- Medical Procedures. The clinical procedures to be followed by the authorized medical personnel in taking body specimens under the implied consent law have not changed.

C. License Revocation

1. Forum

(a) Primary Forum-Administrative. The primary forum for drunk driving-related license revocation has shifted from the courts (under the old law) to the Department of Transportation (DOT) (under the new law). Thus, most license revocations now are handled entirely administratively by the DOT without being contingent on any action by the criminal courts -- subject, of course, ultimately to judicial review of the final administrative action. These include all revocations under the implied consent law for (1) refusals to submit to chemical tests and (2) chemical test results indicating BAC's of .10% or higher.

(b) Secondary Forum -- Judicially-Ordered Revocations. The courts' role in license revocation has been diminished under the new OWI law to these four limited situations:

(i) Imposition of Deferred Judgment. Courts are required to order the DOT to impose a 30-90 day license revocation when granting deferred judgments in first-offense OWI cases. This judicial revocation is in addition to and independent of any administrative revocation which may have already been imposed by the DOT, and thus cannot be "tacked on" to any administrative revocation.

(ii) Third or Subsequent OWI Violations. Courts are required to order the DOT to revoke a defendant's license for six years upon a plea or guilty verdict for a third or subsequent OWI violation (accumulated over any period of time). This relates to the third "violation" as opposed to "third-offense" OWI.

This 6-year revocation is independent of the habitual offender provisions in CODE § 321.560.

The defendant may petition the courts for restoration of his eligibility for a license after two years, but bears the burden of proving certain conditions by a preponderance of the evidence.

(iii) Drinking Drivers School. When a defendant is ordered by the courts to complete either drinking drivers school or evaluation, treatment, or rehabilitative services and his license is not already revoked administratively at that time (by the DOT) under the implied consent law, the court must revoke the license indefinitely until the required course or service has been completed and the proof of financial responsibility requirements of CODE Ch. 321A have been met.

An already-imposed administrative revocation (under CODE Ch. 321B) cannot be shortened by the courts upon defendant's completion of drinking drivers school or after evaluation, treatment, or rehabilitative services.

(iv) Conviction of OWI Where No Administrative Revocation. In at least three situations there would be no administrative revocation in effect at the time an OWI case goes to trial in the criminal court, and any subsequent criminal conviction would consequently trigger mandatory license revocation for one year under CODE §§ 321.209 & 321.212 (except where a deferred judgment is granted on first-offense OWI -- in which case the revocation period is 30-90 days in the court's discretion). These three situations would be (1) an implied-consent test result under .10% (but defendant is convicted nevertheless of being "under the influence" based upon other evidence such as erratic driving or especially in a combination alcohol-drug case); (2) an "under the influence" of drugs prosecution where there can be no BAC reading; and (3) where there was either a test resulting in a BAC of .10% or higher or a test refusal but for some reason the resultant administrative revocation was rescinded in the administrative hearing or review process.

2. Nature of Revocation

(a) Mandatory Revocation. License revocation is automatic under the new administrative provisions (as opposed to being discretionary by the courts under the old law).

Automatic revocation of a motorist's license by the DOT is required when a motorist either: (1) submits to a chemical test indicating a BAC of .10% or higher; or (2) refuses to submit to a chemical test under the implied consent law.

All three types of judicially-ordered revocation also are statutorily mandated. [See section I(D)(1)(b), supra.]

(b) Independent of Criminal Conviction. The DOT-imposed revocations are strictly administrative and effective regardless of the existence or outcome of any subsequent criminal OWI prosecution. Under the old law, a license could not be suspended (except for a chemical test refusal) unless the defendant was convicted, even when the chemical test indicated a BAC above the presumptive level of .10%.

3. Length of Revocation Periods

(a) Administrative Revocations. The periods of license revocation are fixed under the new administrative provisions (as opposed to being discretionary by the courts pursuant to a statutory range of 120 days to one year under the old law). Graduated periods of revocation (by the DOT) are provided either for a chemical test result of .10% or higher or for refusal to submit to a chemical test

under the implied consent law--with the fixed length depending upon the number of prior revocations related to OWI offenses or the implied consent law.

(i) Refusal to Submit to a Chemical Test. The fixed periods of administrative license revocation (by the DOT) that apply when a person refuses to submit to chemical testing under the implied consent law have been increased as follows:

* 180 days -- If no prior OWI-related revocation (under CODE §§ 321.209, 321.281, or 321B.15) during the person's lifetime.

* 365 days -- If one such prior OWI-related revocation.

* 540 days -- If two or more such prior OWI-related revocations.

(ii) Chemical Test Result Indicating a BAC of .10% or Higher. A BAC of .10% or higher shown by the results of a chemical test requires the DOT to impose the following periods of revocation:

* 120 days -- If no prior OWI-related revocation (under CODE §§ 321.209, 321.281, or 321B.15) during the past six years.

* 240 days -- If one such prior OWI-related revocation.

* 365 days -- If two or more such OWI-related revocations based upon separate occurences.

(b) Judicially-Ordered Revocations

(i) Conviction for Third or Subsequent OWI Violation

* Six years

(ii) Deferred Judgment Granted on First-Offense OWI

* 30-90 days

(iii) Court-Ordered Enrollment in Drinking Drivers School and/or Treatment or Services

* Indefinitely until completion of school, treatment, or services and posting of proof of financial responsibility (if, and only if, the license has not already been revoked administratively by the DOT).

(iv) Conviction for OWI Where No Administrative Revocation

* One Year

4. Notice of Intent to Revoke

(a) Immediate License Confiscation by Peace Officer

(i) License Confiscation. Peace Officers are authorized to immediately confiscate a person's drivers license at the point of arrest in two situations:

(1) The motorist refused to take a chemical test under the implied consent law; or

(2) The result of a direct breath-testing chemical test under the implied consent law showed a blood alcohol content (BAC) of .10% or higher.

(ii) Revocation Notice and Temporary License. In the two above-mentioned situations, peace officers give the person a combination license revocation notice (effective in 20 days) and temporary unrestricted license that remains valid for the 20-day period until the license revocation becomes effective.

(b) Delayed Notice of Revocation by the DOT. Upon certification by a peace officer that the result of a chemical test (other than a direct breath test) indicated a BAC of .10% or higher, the DOT sends the person (by restricted certified mail) a notice of revocation which becomes effective 20 days after the date the notice was mailed

The person retains his regular drivers license up until the effective date of the license revocation.

5. The Administrative Hearing Process

(a) Request for (Informal) Hearing

(i) Right to Hearing. A "revoked" motorist has a right, upon filing a timely request to the DOT, to an administrative hearing before the DOT to review a revocation before it becomes final or effective.

(ii) Timing of Request for (Informal) Hearing. If the license was immediately confiscated by a peace officer, the request for hearing must be made within ten (10) days of the license confiscation.

If the notice of revocation was served by the DOT by mail, the request for hearing must be made within ten (10) days of the effective date of the revocation as provided on the notice.

If the motorist does not file a timely request for hearing, the license revocation becomes final and effective on the designated day (i.e., 20 days after the immediate license confiscation or the mailing of notice of revocation by the DOT). Moreover, a temporary restricted drivers license (work permit) can only be obtained via the administrative hearing process after an appearance before a hearing officer.

(b) Informal Settlement Hearing

(i) General Scope. The first hearing (which is to be held within twenty (20) days, or as soon as possible after the request for a hearing) is informal and not recorded. It can serve, essentially, as a pretrial-type conference for the subsequent formal hearing.

This initial hearing is provided for only in the case of a test result-type revocation.

(ii) Temporary Restricted License (Work Permit). The principal concern at this level is determining whether or not to issue a temporary restricted license which serves as a work permit and for attendance at alcohol treatment facilities but not at drinking drivers school. A work permit cannot be issued to a person who refused to submit to a chemical test under the implied consent law.

A work permit is not granted as a matter of right, however, as stringent statutory and administrative standards must be met. A work permit is valid throughout the administrative and appellate processes.

(c) Request for a Formal Hearing. Either party aggrieved by the order at the informal settlement hearing may request a formal hearing. Such request must be made within ten (10) days of the effective date of revocation, if any, resulting from the informal settlement hearing (or presumably ten days after an order rescinding revocation in the case of a State's appeal).

(d) Formal Hearing (Contested Case Proceeding). The formal hearing is conducted by an administrative hearing officer, and according to the procedures under the Iowa Administrative Procedures Act. This hearing applies in cases of test result revocation and test refusal revocation. The ultimate issue, of course, is whether the initial administrative revocation shall be rescinded or sustained.

The scope of this administrative hearing is limited to the following issues: (1) whether the peace officer had reasonable grounds to believe the person was operating a motor vehicle while intoxicated; (2) whether the person refused to submit to a chemical test under the implied consent law; (3) whether the results of a chemical test warrant revocation; and (4) if there was a chemical test, whether a temporary restricted license (work permit) should be granted.

6. The Administrative Appellate Process

A decision by an administrative hearing officer may be appealed further to the designated review body of the DOT. The notice of administrative appeal must be filed within twenty (20) days of the date of the decision.

7. Judicial Review

Judicial review of the final agency action may be sought in district court, pursuant to CODE § 17A.19, as amended. The petition for judicial review must be filed either within 30 days of the final administrative action on a motion for reconsideration or within 30 days of the review body's final disposition of the administrative appeal from the decision of the hearing officer in the contested case proceeding (if no motion for reconsideration was filed).

D. Miscellany [Not discussed further herein]

1. Driving While License Suspended, Revoked, or Denied

The penalty classification for each of the several offenses related to driving while one's license is under suspension or revocation or is denied (CODE §§ 321.218, 321.282, and 321B.15) has been increased from a simple misdemeanor to a serious misdemeanor. See IOWA ACTS, Ch. 1167 (H.F. 2369) §§ 4, 6, 25 (1982).

Judicial magistrates, who are limited to simple misdemeanors and first-offense OWI, no longer have jurisdiction over these offenses. See IOWA ACTS, Ch. 1167 (H.F. 2369) § 26 (1982), amending IOWA CODE § 602.60 (1981). Charges under these sections must now be heard either in the District Associate Court or the District Court.

2. Financial Responsibility

The requirement for posting future proof of financial responsibility under CODE § 321A.17 has been extended to all persons whose licenses have been revoked under the implied consent law (Ch. 321B). See IOWA ACTS, Ch. 1167 (H.F. 2369) § 11 (1982). (Under prior law, this requirement applied only to those convicted of a drunk driving offense.). Proof of financial responsibility is required before a license will be reinstated in all types of revocation except deferred judgment. See IAC § 820--[07,C] 11.5(4), as discussed herein at part I(D)(4), infra.

3. Judicial Magistrates-Jurisdiction

Judicial magistrates have been authorized under the revised OWI law to exercise limited jurisdiction of first-offense OWI cases--but are limited to approving trial informations, conducting preliminary hearings and arraignments, accepting guilty pleas (from defendants represented by counsel), sentencing those who have pled guilty before them, and making appropriate orders under CODE § 321.283 (prescribing drinking drivers school and/or treatment and other services). See IOWA ACTS, Ch. 1167 (H.F. 2369) §§ 26 and 27 (1982), amending IOWA CODE §§ 602.60 and 602.62 (1981).

Concurrently, judicial magistrates no longer have jurisdiction over the three related criminal offenses concerning driving with a revoked or suspended license (under CODE §§ 321.218, 321.282, and 321B.15). This is because of the increase in the penalty for each of these offenses from a simple misdemeanor to a serious misdemeanor. See IOWA ACTS, Ch. 1167 (H.F. 2369) §§ 4, 6, 25 (1982).

MOTION TO PRODUCE

Defendant requests to inspect, photograph, and photocopy (if practical) the following:

1. All papers or documents relating or pertaining to any chemical or mechanical tests used to determine defendant's blood alcohol content including, but not limited to, those that would show or reflect the following:

(a) the nature of the tests;

(b) date of purchase of testing machine, or purchase invoice;

(c) warranties for the tests;

(d) date of manufacture;

(e) log or memos showing all repairs, maintenance inspections, and number of prior usages;

(f) all calibrations of the machine or test equipment;

(g) manufacturer's and supplier's specifications and promotional material;

(h) operation and repair manual or directions;

(i) the chemical composition of the test;

(j) the storage of the chemicals of the test;

(k) the results of all tests and anything used to interpret the same;

(l) internal government regulations, police, or directions relating to the test;

(m) laboratory results.

2. The results of all chemical or mechanical tests, including the preliminary breath screening test.

3. All oral, recorded, transcribed, written, or other statements, reports, or memoranda of:

(a) the defendant (whether or not to be offered into evidence);

(b) law enforcement personnel;

(c) other persons or witnesses with knowledge of the happenings or circumstances relating to the alleged crime;

(d) anyone who heard statements from the defendant or witnesses.

4. All photographs, motion pictures, video tapes, diagrams, or other tangible evidence showing the scene, the defendant, other witnesses, the automobile, the defendant's arrest and confinement, the tests, and laboratory results.

5. All evidence seized from the defendant whether it is to be used at trial, including but not limited to cans or bottles.

6. All books, pamphlets, learned treatises, or other papers used or relied upon by any persons claimed to be experts in any matters pertinent to the prosecution.

7. Any papers evidencing any governmental, police, or other policies, directions, or regulations relating to the apprehension, arrest, and conviction of persons charged with crimes in Iowa or the county, including police department manuals or directives purporting to show how to make arrests and conduct bookings.

8. Criminal records of defendant and all witnesses.

9. All exculpatory evidence.

This request is made pursuant to Iowa Rule of Criminal Procedure 13, in order to insure the rights secured by Amendments 5, 6, and 14 to the United States Constitution and Article I, Sections 9 and 10 of the Iowa Constitution, all of which insure the defendant due process of law, the right to have compulsory process for witnesses, the right to be confronted with witnesses against him, the right to be informed of the accusations against him, and the right to the effective assistance of counsel.

WHEREFORE, defendant requests that the court set a date and time for hearing and thereupon that the court order the requested inspection and prescribe a date and time within which the State shall make reasonable accommodation to defense counsel to effect the same.

REQUEST FOR HEARING

Defendant requests oral hearing.

Respectfully submitted,

_____

John R. Hearn

1300 Locust
Des Moines Iowa
50319
(515) 288-2910

[**Author's Note:** In certain cases, a broader general request for pretrial discovery/disclosure beyond that authorized by Rule 13 of the Iowa Rules of Criminal Procedure -- on the theory that Rule 13 itself may offer less discovery than the liberal discovery contemplated within pertinent caselaw -- might be sought to obtain such additional information as (1) the name of any person administering a chemical test, the department or agency by which such person is employed, and the degree of his training for administering and interpreting chemical tests for intoxication, and (2) the name of any person interpreting a chemical test, the department or agency by which such person is employed, and the degree of his training for administering and interpreting chemical tests for intoxication.]

MOTION IN LIMINE *

Comes now the defendant and in support of his motion, states to the Court:

1. That defendant is charged by information with violation of Section 321.281, 19___ Code of Iowa.

2. That the minutes attached to said information and the police reports, heretofore received and revealed to defendant, indicate that breath test evidence will be offered by the State.

3. That your defendant has filed heretofore a Motion to Suppress, which motion has not been ruled upon heretofore, and your defendant, in good faith and belief, states that the motion should be sustained for the reasons therein urged.

4. That unless otherwise ordered, defendant believes that the State will refer to the test or test results in the voir dire, opening statement, or attempt to call witnesses in their case in chief, referring to said test without proper foundation or meeting the admissibility requirements.

5. That defendant's counsel will be required to consistently object and take exception to said references or offerings of proof to the irreparable prejudice of the defendant, which will necessitate a mistrial through no fault of defendant; that said prejudice is reversible error and no admonition by the Court could clear the matter from consideration by a jury.

6. That the reference to the existence of a test or the results of said test in the absence of a showing of prima facia admissibility of the test results itself, by the witnesses endorsed on the true information, at any time, by counsel for the state or his witnesses in voir dire, opering statement, or the offer of proof, should be denied by order of this Court to prevent irreparable damage to defendant and to permit an orderly presentation at trial.

* Reproduced with the express permission of the Iowa State Bar Association and Mr. Lyle Rodenburg, Attorney at Law, Council Bluffs, Iowa, from Mr. Rodenburg's article entitled "Trial of an OMVUI Case" contained in Bridge the Gap (1981).

MOTION TO SUPPRESS EVIDENCE *

Comes now the defendant, and in support of his motion, states:

1. That defendant was given a breath test by a device used by law enforcement officers in Pottawattamie County, known commonly as the "Intoxilyzer".

2. That the plaintiff has offered to prove that the test results were _____ mg.%, in support of its charge of the public offense under Section 321.281 Code of Iowa.

3. That the test results are inadmissible as evidence for the following reasons:

a) That the breath testing device used by the plaintiff is inherently fallible and the results of said test have no probative value.

b) That the breath testing device used by the plaintiff was not certified as prescribed by law.

c) That the breath testing device used by the plaintiff was not operated by a person certified as provided by law.

d) That the operation manual provided for the plaintiff to follow in administering said test was not complied with in accord with the legal standard.

e) That the breath testing device used by plaintiff is not a chemical test authorized by law to be used in the State of Iowa. (Section 321.83).

f) That the breath testing device used by plaintiff is not a device authorized by law to be used in the State of Iowa.

g) That the defendant was not appropriately warned of his constitutional, statutory and legal rights with respect to invoking the implied consent law of the State of Iowa.

h) That during the arrest and booking procedures, defendant was not warned of his constitutional rights under the 5th amendment of the constitution of the State of Iowa.

i) That the testing procedure was not made within the time perimeter permitted by the manual for operation of the machine or the laws of the State of Iowa.

j) That there is no sufficient and proper foundation for introduction of any rules prescribed by the Criminal Laboratory of the State of Iowa.

k) That no presentation has been made of the sample given by defendant to allow for an independent testing.

l) That the breath testing devices are contaminated, contrary to law.

4. That there was no probable cause for the arrest of the defendant and therefore any evidence seized thereto is unlawfully seized.

WHEREFORE, your defendant prays for an Order of Court prohibiting the use directly or indirectly of any breath or blood testing results, or physical performance tests.

* Reproduced with the express permission of the Iowa State Bar Association and Mr. Lyle Rodenburg, Attorney at Law, Council Bluffs, Iowa, from Mr. Rodenburg's article entitled "Trial of an OMVUI Case" contained in Bridge the Gap (1981).

MOTION FOR ADJUDICATION OF LAW POINTS AND MOTION TO DISMISS OR TO ORDER AMENDMENT (HEARING REQUESTED)

COMES NOW Defendant, by counsel, and moves for an adjudication of law points, pursuant to Iowa R.Crim.P. 10(2), and for a motion to dismiss or alternatively for an Order for the State to amend the charge herein to limit the means of committing the OWI offense to the under-the-influence alternative only, and states in support thereof:

1. That Defendant is charged herein with the offense of Operating a Motor Vehicle While Intoxicated--Third Offense in a trial information filed on June 13, 1983.

2. That it is alleged in the trial information that Defendant "did operate a motor vehicle while under the influence of an alcoholic beverage . . . , or while having thirteen hundredths (.13) or more of one percent by weight of alcohol in the blood, contrary to the provisions of Section 321.281, Code of Iowa (1983) . . . ."

3 That the so-called .13 per se alternative mode of committing this offense is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment by not giving fair notice of the conduct it prohibits. More specifically, this statutory provision is based on a measured level of blood alcohol rather than on conduct or symptoms that could be identified by those who may be violating its provisions without any reasonably ascertainable means of knowing when their otherwise legal conduct becomes "criminal."

4. That this constitutional issue is strictly legal in nature and does not arise from any disputed facts.

WHEREFORE, Defendant moves to dismiss the .13 per se allegation and asks for an adjudication of law points on the question of the constitutionality of the .13 per se offense under Code § 321.281 and for an Order for the State to amend the trial information to limit the means of the OWI offense to being under the influence.

A hearing is requested and Defendant further requests to be heard in oral argument and to be permitted to file a trial brief on the legal issues herein within the time period set by this Court.

Respectfully submitted,

BRIEF IN SUPPORT OF MOTION
FOR ADJUDICATION OF LAW
POINTS AND MOTION TO DISMISS
OR TO ORDER AMENDMENT

The so-called .13 per se alternative mode of committing the revised OWI offense under section 321.281, The Code of Iowa (1983) is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment by not giving fair notice of the conduct it prohibits. More specifically, this statutory provision is based on a measured level of blood alcohol rather than on conduct or symptoms that could be identified by those who may be violating its provisions without any reasonably ascertainable means of knowing when their otherwise legal conduct becomes "criminal."

Defendant is not resting his argument of constitutional infirmity upon a claim that the per se statutory provision created a conclusive presumption of intoxication. The conclusive presumption approach was adopted in People v. Lujan, 141 Cal.App.3d Supp. 15 (1983), but has been rejected in the following several other cases. Another California intermediate court of appeals has stated that "per se" OWI "is a crime regardless of intoxication." Burg v. Municipal Court (Cal.App. Div.3 - slip op. No. AO19853, filed 6/22/83). Similarly, the Washington Supreme Court has stated that the Washington per se statute "does not presume, it defines." State v. Franco, 639 P.2d _____, 1323 (Wash. 1982). The Oregon Court of Appeals has opined that "the question is not whether they are intoxicated, but whether they have [.15] percent or more of alcohol in their blood." State v. Abbott, 514 P.2d 355, 357 (Ore. App. 1973).

The paramount issue, instead, is the fundamental one of notice. Drivers, in order to come within criminal penalties, must have fair notice of what conduct the applicable penal statute prohibits. Our concern with the per se statutory provision, as pointed out by a California district court of appeal in People v. Alfaro (Cal.App.Div. 1 - slip op. No. A019583, filed 6/2/83), is not with a penal statute "which forbid[s] driving a motor vehicle after some alcoholic ingestion"; but instead "with a law which allows persons to drink and drive, but gives no reasonably ascertainable means of knowing when such conduct becomes 'criminal.'"

The California per se statute was deemed to be "an explicitly defined crime" in Burg v. Municipal Court, with the court of appeals stating that "the statute could not be clearer in its creation of the standard of conduct for drinking drivers and the standard to be applied by trial courts." There is no doubt that the legislative standard to be applied by the courts is absolutely clear. The dispute lies in whether there is a clear standard for the layman motorist to conform his conduct to the law. The layman motorist essentially is charged with knowledge under the per se statutory provision that his blood alcohol content (BAC) exceeds a certain percentage level. Yet, he has no readily available means of determining his BAC level. This reading is ascertainable only through various chemical tests administered by peace officers. Even the most experienced peace officers are left guessing, like the drunken driving suspect, as to the BAC level. Instead, rather elaborate and sophisticated bodily-specimen tests --

breath, blood, urine, or saliva -- are used by peace officers to determine the BAC level of drunk driving suspects. Even the results of the field alcometer test, which is used as a preliminary screening device, are not admissible in evidence pursuant to Iowa Code section 321B (1983). This is because there is a strong indication that these preliminary tests are not reliable.

Thus, we have the anomaly of a field screening test being used essentially to determine if there is probable cause to administer an "official" chemical test. Yet this test is not considered reliable enough to be recognized in a court of law. Where then does that leave the layman motorist who doesn't even have access -- on his own initiative -- to this field screening test? How is he to know when his BAC level has reached the magic forbidden level? No instruments or other gadgets are available to the general public for measuring -- or even estimating -- a person's BAC level. Other definable sources are not readily available for the private citizen to become knowledgeable concerning BAC levels. For example, charts depicting the number of alcoholic drinks necessary for reaching the magical .130 level are not readily available in Iowa. See Burg v. Municipal Court, supra.

This very problem of no reasonable means of ascertaining BAC levels was paramount in the recent decision in State v. Alfaro, voiding the per se portion of California's OWI statute while leaving intact the under-the-influence portion thereof. The court stated in Alfaro that there is a "grave problem" since "potential violators are given no

rational means of measuring the relative level of alcohol consumption which the statute forbids, and that in some cases no such means are readily available."

In concluding that the California per se provision was fatally defective in its notice provisions, the court of appeals in People v. Alfaro mused:

> Posit any law-abiding citizen who, reasonably and correctly believing his driving ability to be unimpaired and his blood alcohol level to be below 0.10, decides to drive home after imbibing liquor at a social function. Stopped by the police for reasons unrelated to his driving ability--say, for a mechanical defect--and exhibiting no objective signs of impaired ability, but conceding his use of alcohol, he may then be detained, tested, arrested and convicted because, unbeknownst to him, his blood-alcohol level had by assimilation increased--as the result of factors beyond the ken of lay persons to a level of 0.10 percent--during the course of his trip home.
>
> We think that the challenged subsection will, if upheld, regularly produce convictions on such palpably unfair terms of notice, since the individual could only speculate as to how and when his blood-alcohol ratio would reach the criminal point.

In drawing the important distinction between a per se OWI offense and an under-the-influence OWI offense, the court of appeals stated at length in People v. Alfaro:

> Unlike [another part of the statute, this section] does not focus upon conduct or require recognizable impaired driving ability; instead, it is directed to a bodily condition based upon a measurement. While the [other section] presumes criminality where a blood-alcohol level of 0.10 percent is found, it is directed at invidious conduct, and its presumption is one "affecting the burden of proof" [citation] which the defendant can rebut by raising a reasonable doubt that the ultimate fact of driving under the influence has been established.

> Criminality under [the other section] is predicated ultimately upon conduct which is described in the statute and easily ascertainable: it may, incidentally, be proved on the basis of a blood-alcohol ratio of less than 0.10 percent. In contrast, the only standard stated in [this statute] is a blood-alcohol level of 0.10 percent, which need not be accompanied by evidence of impairment of driving ability.
>
> [It] gives notice only that a particular percentage of alcohol in the blood of a driver is illegal, without further explication, notwithstanding that the measured concentration of alcohol in the blood at any given time is plainly not a matter of common understanding, as demonstrated by the fact that test results of clinically obtained specimens must be interpreted at trial by an expert witness.

Courts do not disagree over the constitutional basis of the "void for vagueness" doctrine. "A penal statute creating a new criminal offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." Burg v. Municipal Court, supra. "A statute must be definite enough to provide a standard for the ascertainment of guilt by the courts called upon to apply it." Id.

Under such an accepted standard, Iowa's per se OWI statutory provision should be voided for vagueness.

Respectfully submitted,

MOTION FOR ADJUDICATION OF
LAW POINTS AND MOTION TO
REDUCE (HEARING REQUESTED)

COMES NOW Defendant, by counsel, and moves for an adjudication of law points, pursuant to Iowa R. Crim. P. 10(2), for an Order for the State to reduce the charge herein to OWI-second offense, and states in support thereof:

1. That defendant is charged herein with the offense of Operating a Motor Vehicle While Intoxicated -- Third Offense in a trial information filed on June 13, 1983;

2. That it is alleged in the trial information that defendant is "a third offender" having been previously convicted in Polk County Criminal Nos. OM9695 and OM11521 on April 28, 1983;

3. That both of said Polk County convictions were for first offense;

4. That defendant has never been convicted of second-offense OWI;

5. That defendant cannot be charged with third-offense OWI without ever having been convicted of second-offense OWI;

6. That this issue is strictly legal in nature and does not arise from any disputed facts.

WHEREFORE, defendant moves for an adjudication of law points on the question of whether a defendant can be charged with third-offense OWI based upon two prior convictions for first-offense OWI without first being convicted of second-offense OWI and for an Order for the State to reduce the current charge to OWI-second offense.

A hearing is requested and defendant further requests to be heard in oral argument and to be permitted to file a trial brief on the legal issues herein within the time period set by this Court.

Respectfully submitted,

BRIEF IN SUPPORT OF MOTION
FOR ADJUDICATION OF LAW
POINTS AND MOTION TO REDUCE

Defendant is charged with third-offense OWI based upon the current case and two prior convictions of first-offense OWI. He has never been charged with or convicted of second-offense OWI. The applicable Code section provides, in pertinent part:

> "A person convicted of a violation of this section . . . is guilty of:
>
> a. A serious misdemeanor for the first offense. . . .
>
> b. An aggravated misdemeanor for a second offense. . . .
>
> c. A class "D" felony for a third offense and each subsequent offense."

Section 321.281(2), The Code of Iowa.

Defendant contends that on dual grounds of statutory interpretation and Fourteenth Amendment due process violations he cannot be charged with third-offense OWI until he has been convicted of second-offense OWI (even though he does have two OWI first-offense convictions).

This question is of first impression in Iowa, and possibly in the United States. Interpretations of the related recidivist provision in the Iowa habitual offender statute appear to be applicable by analogy. An habitual offender is defined in Code section 902.8 as "any person convicted of a class 'C' or a class 'D' felony, who has twice before been convicted of any felony. . . ."

The Iowa Supreme Court follows the general rule that under the habitual offender statute "each succeeding conviction must be subsequent in time to the previous convictions, both with respect to commission of the offense and to conviction." See

State v. Hollins, 310 N.W.2d 216, 217 (Iowa 1981). In other words, the habitual offender statute "requires that the first conviction must precede the commission of the second offense." Id. In Hollins, the defendant had pled guilty to both of the first two unrelated offenses on the same day. Because Hollins was not convicted of the first offense before he committed the second, the Supreme Court held that the habitual offender statute was not triggered by his two prior convictions under these circumstances.

The obvious legislative intent in Code section 321.281(2) with its graduated penalty schedule is to deter repeat drunk drivers. The penalty dramatically shoots upward for recidivism. This is true for both the authorized maximum penalties and the commonly-imposed sentence. The three statutorily-authorized maxima are one, two and five years, respectively. Meanwhile, the "real" sentences are a suspendible two days in jail upon a conviction for first-offense, a non-suspendible seven days in jail upon a conviction for second-offense, and a suspendible five years in prison upon a conviction for third offense.

The penal philosophy behind these graduated penalties is to put an offender on notice of the greater penalties ahead for the repeater. As stated in State v. Conley, 222 N.W.2d 501 (Iowa 1974) involving interpretation of a related habitual offender statute:

> There can be no recidivism until after conviction of crime and imposition of penalty. . . . [Recidivist statutes] are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment.

222 N.W.2d at 503. The Supreme Court continued:

> In accordance with this logic each conviction and sentence which serves as a predicate for application of an habitual criminal statute is viewed as a separate warning. Even though the statute is silent on the point, it follows that the offense, conviction, and imposition of penalty must precede each succeeding offense, conviction, and imposition of penalty for the statute to be applicable.

Id.

The gist of what the Supreme Court was saying in State v. Conley is that the goal of a recidivist-offender statute is to deter repeaters by application of a graduated-penalty schedule. Until the second-level penalty schedule has been applied, the defendant has not been punished any greater than for his first offense.

The familiar concept of statutory interpretation that "[p]enal statutes are strictly construed" has been applied to the related habitual offender statute. See State v. Conley, 222 N.W.2d 501, 502 (Iowa 1974). That is, doubts in judicial interpretation of the scope of a criminal statute are to be resolved in favor of the defendant. Id. The same approach should be applied in interpreting the recidivist provisions of the OWI statute. Section 902.8 of the Code requires that the person "has twice before been convicted." There is no express language therein that requires that there have been a conviction before commission of the second offense. Yet, the Supreme Court's interpretation in State v. Hollins and State v. Conley, supra, has done so. Similarly, the OWI provision that prescribes a class "D" felony for "a third offense" does not expressly require that the defendant have

been convicted of second-offense OWI (as opposed to two convictions for first-offense OWI) and have been subjected to the aggravated misdemeanor penalty schedule. Any doubts in resolving this question should be resolved in favor of the accused. State v. Conley, supra. After all, the general assembly very easily could have phrased the third-offense penalty provision as, for example, "a class 'D' felony upon defendant's third conviction." The legislature did not do so, thus evidencing its intent that there be a conviction for second-offense OWI before the much more serious class "D" penalty should arise for third-offense OWI. As already noted, the fact that there are widely divergent penalties for the three "offenses" indicates a clear legislative intent that there be a conviction for first offense before there is an arrest for second offense and a conviction for second-offense OWI (with its attendant mandatory minimum 7-day day jail sentence) before a person can be charged with third-offense OWI. Moreover, even if the legislative intent was to the contrary, the legislative product failed to do so, and courts cannot repair the legislation.

If in fact it is determined that a third-offense charge can occur after two first-offense convictions, then Code section 321.281(2) is unconstitutional in contravention of the Due Process Clause of the Fourteenth Amendment. Due Process is infringed in two related respects: lack of reasonable notice and void for vagueness. No layman can read the statute and reasonably ascertain that his two prior convictions for first-offense OWI will subsequently be converted into convictions for first-offense OWI and second-offense OWI upon

his third arrest. Indeed, he already has had only the serious misdemeanor penalty schedule (maximum of one year confinement) applied to him on both previous convictions. In neither instance did he face any mandatory minimum sentence for first-offense OWI. Yet, he is put on notice that a conviction for second-offense OWI carries a mandatory minimum seven-day jail sentence and a maximum authorized penalty of two years in jail. Further, he is charged with knowledge (of the law) that third-offense OWI is a class "D" felony, with an indeterminate prison term of five years. It is certainly reasonable for the layman to expect that his two convictions for first-offense OWI will not be bootstrapped fortuitously into a conviction for second-offense OWI upon his mere third arrest for OWI. The reasonable expectations of the defendant must be considered on this question, as well as the general inability of the layman to ascertain that this could happen.

This statutory provision is also void for vagueness if it is interpreted to allow conversion of two first-offense convictions into a second-offense conviction upon a defendant's third OWI arrest. This is because the term "offense" is not statutorily defined and there is no general usage connotation which would delineate that a third "offense" prosecution includes two prior convictions for first-offense OWI.

The problem lies in semantics, with the General Assembly having used three related terms in Code section 321.281 -- "violation," "conviction," and "offense" -- without defining any of them. The key undefined term, of course, is "offense."

Does an "offense" occur per se when a motorist violates the OWI law and is arrested, whether or not he is subsequently convicted? Obviously not, as a person cannot be punished without first being convicted. Is, then, an "offense" synonymous with a "conviction"? At first blush, it would appear that the two terms are quite similar. However, they clearly are not when viewed in the context of a deferred judgment in general and of the peculiar OWI statutory grading pattern in particular. The key point is that a deferred judgment is not even a "conviction," see Iowa Beer and Liquor Control Department v. McBlain, 263 N.W.2d 226 (Iowa 1977). Therefore, a person who was granted a deferred judgment on his first OWI arrest can only be charged with first-offense OWI on his second OWI arrest.

Yet, the layman is presumed to know the law and is chargeable with sophisticated knowledge of the legal differences in these terms. The penalty schedule is vague by not being readily ascertainable by a layman in order for him to know that for a third offense he need not have been previously convicted of second-offense OWI, if in fact the statute is interpreted to permit prosecution for third-offense OWI in these circumstances.

Respectfully submitted,

MOTION TO STRIKE
AND TO REDUCE

COMES NOW Defendant, by counsel, and moves to strike his conviction for OMVUI-first offense and to reduce the current charge of OWI-third offense to OWI-second offense, and states in support thereof:

1. That Defendant was convicted of Operating a Motor Vehicle While Under the Influence-First Offense in OM-5383 on February 22, 1980, and sentenced to ninety (90) days in jail with all of the jail sentence but two (2) days suspended.

2. That Defendant was not represented by counsel in that proceeding (a copy of the judgment is attached).

3. That Defendant was convicted of Operating a Motor Vehicle While Under the Influence-Second Offense in OM-9814 on August 3, 1982, and sentenced to six (6) months in jail with the entire term of confinement suspended.

4. That Defendant was represented in this second-offense proceeding (by).

5. That Defendant was charged with Operating While Intoxicated-Third Offense on December 22, 1982, in a trial information filed on January 31, 1983.

6. That Defendant's conviction on February 22, 1980 for Operating a Motor Vehicle While Under the Influence-First Offense should be stricken as a violation of Defendant's Fifth, Sixth and Fourteenth Amendment rights of counsel and due process, in that Defendant was not represented by counsel

7. That under the doctrine of Baldasar v. Illinois, 446 U.S. 222 (1980) and a progeny of federal and state OWI cases an uncounselled prior conviction cannot be the basis for a subsequent enhanced violation.

8. That Defendant's conviction for OMVUI-Second Offense accordingly should be reduced to OMVUI-First Offense.

9. That the present charge accordingly should be reduced to OWI-Second Offense.

10. That Defendant desires an evidentiary hearing, oral arguments, and opportunity to file a trial brief within the schedule set by the District Court.

Respectfully submitted,

MEMORANDUM IN SUPPORT OF MOTION TO
STRIKE AND REDUCTION OF CHARGE

FACTS

Defendant was convicted of OMVUI on February 22, 1980, and was sentenced to 90 days in jail of which all but 2 days were suspended. Defendant was not represented by counsel at this proceeding and there is no mention that he was aware of his right to counsel or that he did or could have made a valid waiver of such right.

On August 3, 1982, Defendant was convicted of OMVUI-second offense and received 6 months suspended sentence. Defendant was represented by counsel at this proceeding. On December 22, 1982, Defendant was charged with OMVUI-third offense. Defendant alleges that his OMVUI-first offense should be stricken due to the fact that he was convicted in violation of his Fifth, Sixth, and Fourteenth Amendment rights to counsel and that his subsequent conviction of OMVUI-second offense should be reduced to OMVUI-first offense and that the current charge of OMVUI-third offense should be reduced to OMVUI-second offense.

ISSUE

1. May an uncounselled prior conviction be used as the basis for a subsequent enhanced violation?

ANSWER

1. No. Generally, a conviction gained as a result of a defendant's lack of counsel guaranteed as a constitutional right may not be used to impose a greater penalty upon a defendant.

DISCUSSION

Three United States Supreme Court cases form the basis upon which this problem may be resolved. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the court held that no accused may be deprived of his liberty as the result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel. Id. at 37-38. In Scott v. Illinois, 440 U.S. 367 (1979), the court held that the Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense, but do not require the state trial court to appoint such counsel for a criminal defendant who is charged with a statutory offense for which imprisonment upon conviction is authorized but not imposed. Id. at 373-4. The decision in Scott was built upon in Baldasar v. Illinois, 446 U.S. 222 (1980), where the court held that while an uncounselled misdemeanor conviction is constitutionally valid if the offender is not incarcerated, such a conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. Id. at 224.

Although Argersinger, Scott, and Baldasar did not involve OMVUI convictions, the application of their holdings to this case is clear. Argersinger held that one may not be jailed unless there is defense counsel present at the conviction proceedings. Here, defendant spent two days in jail as a result of proceedings in which he did not have the benefit of counsel. Based upon Argersinger alone it appears that defendant's OMVUI-first offense

should be stricken. Failing this, neither would Scott allow such a conviction to stand since in a case where imprisonment is imposed the state must provide legal counsel for the indigent defendant. Finally, Baldasar demands that any enhanced penalty due to repeat violations be reduced since the conviction for the first violation was imposed when the defendant was without the benefit of counsel. Clearly, the OMVUI-first offense should be stricken and the subsequent charges reduced.

The only difficulty in following the Argersinger-Scott-Baldasar trilogy is where the defendant has made a knowing and intelligent waiver of his constitutional rights. In such cases, the Argersinger-Scott-Baldasar rationale will not "kick in" since the court cannot be forced to provide counsel where counsel is waived or not desired. From the record, it is totally clear that in the OMVUI-first offense proceedings defendant did not make a valid waiver of his right to counsel. Obviously, any doubts with regard to waiver should be resolved in defendant's favor unless the State can prove otherwise.

Other states have applied Argersinger, Scott, and Baldasar to OMVUI cases and refused to impose enhanced subsequent violation penalties upon defendants where it was unclear whether, in prior convictions, their rights were made clear to them. Absent a showing of an intelligent waiver of their rights, the court accordingly reduced the defendants' sentences. For example, People v. Buller, 101 Cal. App. 3d 73, 160 Cal. Rptr. 657 (1980) (OMVUI-third offense reduced to first); State v. Parker, 411 So.2d 449 (La. 1982) (OMVUI-fourth offense reduced to first);

State v. Stephenson, 412 So.2d 553 (La. 1982) (OMVUI-third offense reduced to second); State v. Vezina, 391 So.2d 450 (La. 1980) (OMVUI-third offense reduced to first); State v. Ulibarri, 96 N. M. 511, 632 P.2d 746 (1981) (OMVUI-second offense to first); Schindler v. Clerk of Circuit Court, 551 F. Supp. 561 (W.D. Wisc. 1982) (habeas proceeding, OMVUI-third offense to second); and State v. Hooker, 131 Ariz. 480, 642 P.2d 477 (1982) (OMVUI conviction as a juvenile could not enhance a subsequent OMVUI conviction incurred as an adult).

CONCLUSION

The law is clear. Unless there is a showing that defendant made a knowing waiver of his rights during the first OMVUI proceeding, his first conviction and two day incarceration cannot stand and be used to enhance the penalty in his second and third violations. Consequently, the OMVUI-first offense should be stricken and the other charges reduced in a like manner.

Additionally, the plea is defective for almost total non-compliance with the Iowa Rules of Criminal Procedure. Specifically, there is no factual basis (as to the elements of operating, motor vehicle, and while); there is no showing of voluntariness; there is no evidence of jurisdiction or venue; and the colloquy is devoid of the following mandatory items: nature of the charge, maximum possible punishment, assistance of counsel, self incrimination privilege, waiver of any trial whatsoever, any plea agreement, necessity of filing motion in arrest of judgment, and right to appeal. Other than that, it wasn't too bad of a plea.

Respectfully submitted,

MOTION TO STRIKE AND TO REDUCE

COMES NOW Defendant, by counsel, and moves to strike his conviction for OMVUI--first offense and OMVUI--second offense and to reduce the current charge of OMVUI--third offense to OMVUI--first offense, and states in support thereof:

1. That Defendant was convicted of Operating a Motor Vehicle While Under the Influence--First Offense in OM-6324 on December 2, 1980.

2. That Defendant was convicted of Operating a Motor Vehicle While Under the Influence--Second Offense in OM-9041 on February 10, 1982, and served seven (7) days in jail and paid a fine of Five Hundred Dollars ($500).

3. That Defendant was represented in these proceedings by Nick Krpan.

4. That in these first two proceedings, Defendant alleges that he was not present in the courtroom either for plea or sentencing purposes.

5. That Defendant was charged with Operating a Motor Vehicle While Under the Influence--Third Offense on January 7, 1983, in a trial information filed on February 8, 1983.

6. That Defendant's convictions on December 2, 1980, of OMVUI--first offense and on February 10, 1982, of OMVUI--second offense should be stricken as a violation of Iowa Rule of Criminal Procedure 8 in that Defendant was available for but never made a personal appearance in court.

7. That under the doctrine of State v. Fluhr, 287 N.W.2d 857 (Iowa 1980), a duly-executed written plea form cannot substitute for the personal in-court colloquy between trial court

and Defendant.

8. That as a result of these violations, Defendant's first two OMVUI convictions are defective and should be rendered null and void.

9. That Defendant's convictions for OMVUI--first offense and OMVUI--second offense should be stricken.

10. That the present charge should accordingly be reduced to OMVUI--first offense.

11. That Defendant desires an evidentiary hearing, oral arguments, and opportunity to file a trial brief within the schedule set by the District Court.

Respectfully submitted,

MEMORANDUM IN SUPPORT OF MOTION

TO STRIKE AND TO REDUCE

There is no transcript of the proceedings in Crim. No. 6324 for the guilty plea and sentencing proceedings on the OMVUI-first offense conviction on December 2, 1980.

Linda Dye of the Polk County Clerk of District Court's Office will testify, if called, that she has charge of the criminal records and that in her search of the records she finds no notation that any short notes were filed by any court reporter for this proceeding. She will further testify that the ordinary and customary practice is for the court reporter to file the short notes within a week or two after the proceeding whenever the proceeding was recorded.

The lack of either a transcript or short notes raises the presumption that the proceedings were not recorded, in violation of Iowa law. "We conclude that in light of the explicit language of rule 8(2)(b) and the consistent view of some federal courts interpreting the less literally restrictive federal rule, trial courts in this state must determine on the record that a factual basis for the plea exists before the plea is accepted." State v. Fluhr, 287 N.W.2d 857, 868 (Iowa 1980)(emphasis added).

The recording requirement is explicit and clear, viz. "A verbatim record of the proceedings at which the defendant enters a plea shall be made." Iowa R. Crim. P. 8(3).

Respectfully submitted,

IN THE DISTRICT COURT FOR POLK COUNTY

Plaintiff, vs. IOWA DEPARTMENT OF TRANSPORTATION MOTOR VEHICLE DIVISION, Defendant.	DOCKET NO. A- PETITION FOR JUDICIAL REVIEW

1. That this is a petition for judicial review of a final administrative agency decision of the Iowa Department of Transportation.

2. That the agency action appealed from is the denial of a work permit to the plaintiff.

3. That the venue in this action is based upon the plaintiff's residence in Polk County.

4. That the relief sought is invalidation of the applicable DOT regulation, with the DOT ordered to issue a work permit to the plaintiff.

5. That Plaintiff does not contest any of the three underlying license suspensions.

6. That the only contested issue herein is the non-issuance of a work permit during the pending duration of the periods of suspension.

7. That Plaintiff's first revocation arose out of her first OWI arrest on September 1, 1982, because of her undisputed refusal to submit to a chemical test. Plaintiff's request for a work permit was denied in a DOT hearing on December 1, 1982, the decision being rendered on February 14, 1983.

8. That Plaintiff's second revocation arose out of a deferred judgment she received on December 14, 1982 for her first OWI arrest on September 1, 1982. That 30-day revocation is not at issue since she was not precluded thereby from getting a work permit, unless it was treated as a second OWI-related revocation which it should not be, since the first two revocations arose out of the same OWI arrest.

9. That Plaintiff's third revocation arose out of her second OWI arrest on or about January 17, 1983, based upon an undisputed BAC reading in excess of .100%. Plaintiff's request for a work permit was denied in a DOT hearing on or about March 25 1983, being based upon the prior test refusal and the fact that this was Plaintiff's second OWI-related revocation.

10. That there is no statutory authority for the DOT to deny work permits because of a test refusal, and thus the applicable DOT regulation is void for being in excess of DOT's statutory authority.

11. That section 321B.16, The Code, if relied upon by the DOT for denial of work permits because of a test refusal, is unconstitutional in violation of the Fourteenth Amendment of the U.S. Constitution as being void for vagueness by not being worded clearly so that a person of ordinary intellegence can determine its meaning.

12. That section 321B.16, The Code, if relied upon by the DOT for denial of work permits because of test refusal, is unconstitutional in violation of the Fourteenth Amendment of the U.S. Constitution as a denial of due process requirements of

fair notice by prohibiting a work permit on a test refusal even though there is no statutory requirement in section 321B.12, The Code, that the suspect be told that his test refusal will preclude him from getting a work permit.

13. That section 321B.16, The Code, if relied upon by the DOT for denial of work permits because of a test refusal, is unconstitutional in violation of the Fourteenth Amendment of the U.S. Constitution as constituting a denial of equal protection and the taking of property without due process of law by arbitrarily placing an unreasonable restriction on obtaining a work permit without a rational basis for the State's action in differentiating between OWI suspects who take the test and those that don't.

14. That section 321B.16, The Code, if relied upon by the DOT for denial of work permits because of a test refusal, is unconstitutional as it exceeds the limitations on a State's police powers under Article , section of the Iowa Constitution by arbitrarily placing an unreasonable restriction on obtaining a work permit without a rational basis for the State's action in differentiating between OWI suspects who take the test and those that don't.

15. That there is no statutory authority for the DOT to deny a work permit because of a prior OWI-related revocation and thus the applicable DOT regulation is void for being in excess of DOT's statutory authority.

16. That, even assuming arguendo that the DOT has authority to deny work permits, the applicable regulation relating to prior OWI-related revocations is improper and thus void for the reasons that: (a) the effect of the regulation constitutes a denial of due process in violation of the Fourteenth Amendment in light of there being no prior notice to the OWI suspect that he will be denied a work permit if he has a prior OWI-related revocation; (b) the effect of the regulation constitutes a denial of equal protection and the taking of property without due process of law by arbitrarily placing an unreasonable restriction on obtaining a work permit without a rational basis for the State's action in differentiating between OWI suspects with previous OWI-related revocations and first offenders; and (c) the regulation constitutes an unconstitutional infringement on the State's general police powers, in violation of the Iowa Constitution by arbitrarily placing an unreasonable restriction on obtaining a work permit without a rational basis for the State's action in differentiating between OWI suspects with previous OWI-related revocations and first offenders; and (d) there is no statutory authority for the regulation.

BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

On two separate occasions Iowa Department of Transportation Hearing officers denied the Plaintiff, , a work permit following the revocation of her Iowa driver's license, (See Petition). In both instances, the denials were purportedly premised on the Plaintiff's refusal to submit to a chemical test following stops by local police. The revocations were pursuant to Code of Iowa, Chapter 321B. The denials of the work permits were, it is assumed, also pursuant to Chapter 321B. Additionally, the Plaintiff was denied a work permit on the second occasion because her license had been revoked for the second time. Both of these issues are addressed herein.

A. Test Refusal

The only reference in the OWI statute to work permits is the rather obscure provision in the last paragraph of section 321B.16, The Code, (which is entitled "Test result revocation"). The preceding paragraphs of section 321B.16 deal with DOT's authority to revoke drivers licenses for BAC test results of .100% and higher, the varying lenghts of the revocation periods, and the times for said revocations to take effect. Finally, there is recognized DOT's authority to issue work permits in the last paragraph of this statutory provision on test result revocation. The very last sentence therein reads: "However, this paragraph does not apply to a person whose license is suspended or revoked for another reason."

This obscure provision cannot be relied upon by the DOT to justify denial of a work permit for a test refusal. If a test refusal was intended by the legislature to be a basis for denial of a work permit, the OWI statute must have so stated clearly--such that a person of ordinary intelligence can so understand it and have fair notice (in advance) of this most dire consequence. This statutory provision fails to do so in two respects: (1) the section heading "test result revocation" gives no clue whatsoever as to the inclusion of a provision prohibiting a work permit for a test refusal; and (2) the main thrust of the applicable paragraph is to grant authority for issuance of a work permit in test-result cases, and thus it is improper for this same provision to be used to deny the work permit privilege to other classes. Burying this principle within a provision on test result revocation in no way provides any kind of fair notice to a motorist suspected of OWI that a test refusal will prevent him/her from getting a work permit.

The proper (and only correct) provision to include the work permit prohibition would have been in section 321B.13, The Code, which is entitled "Refusal to Submit." In that section, the effect of a test refusal is set forth only in terms of license suspension, with no mention whatsoever of work permit ineligibility. The reasonable person--who under our law is presumed to be aware of the law--certainly is entitled to some logical semblance of statutory organization to enable him/her to find the law. Any prohibitions on work permit eligibility on test refusals should have been explicitly stated in the section (section 321B.13) on test refusals, not implicitly stated in the section (section 321B.16) on test result revocations. Because of this vagueness and

ambiguity, section 321B.16 cannot be relied upon by the DOT for its statutory basis for the DOT rule [I.A.C. 820--[07,C] 11.3(4)] denying a work permit for test refusal. To do so is to violate the due process clause of the Fourteenth Amendment by not giving fair notice of the consequences of penal statutes.

The notice requirement is aggravated by the provision in section 321B.12, Ihe Code, relating to the content of the peace officer's statement at the time of requesting a chemical test. The person is to be advised that "a refusal to submit to such test will result in revocation of the person's license or privilege to operate a motor vehicle." Not a word is mentioned therein as to the additional consequence of denial of a work permit. It certainly is reasonable to assume that the average layman believes that he/she will be able to get a work permt even though the BAC test is refused. After all, he/she is told that a test refusal will result in license revocation, and the reasonable implication is that this will be the only consequence.

This statutory and administrative rule prohibition on work permits for test refusals constitutes a denial of equal protection and due process by improperly differentiating without a rational basis between persons in the one class of test result revocations and persons in another class of test refusals. In both instances, the persons have been committing the actus reus of driving while intoxicated. The State has a legitimate interest in denying full driving privileges to drunk drivers, and the underlying license suspensions are not being contested herein. However, the State has no legitimate interest in going one step further in treating dissimiliarly persons who refuse to submit to

the BAC test and those who take it--by denying a work permit on test refusals while not doing so on test result revocations. There is no rational basis for the incremental penalty--denial of work permit--imposed for test refusals.

All drunk drivers--whether they submitted to a chemical test or not--should be treated alike for purposes of a work permit. A person who refused to take a test is no greater threat to public safety than is a person on a test result revocation. Both are drunk drivers, yet only the test refuser is automatically denied a work permit. This is an additional penalty for which there is no legitimate State interest in imposing.

B. Prior OWI-Related Revocations

The arguments in section A concerning test refusals apply also herein to work permit denials because of prior OWI-related revocations. The only difference is the distinction between test takers and test refusers in the first instance and first offenders and second or repeat offenders in the second instance.

In addition, there is no statutory authority whatsoever for the DOT rule [I.A.C. 820--[07,C] 11.3(4)] denying a work permit to a repeat offender. Such a policy impinges significantly on the fundamental constitutional right to travel and places an unreasonable restriction on the driving privilege without benefit of statutory basis. As such, the DOT rule is in excess of administrative rulemaking authority and constitutes legislating instead, in violation of the constitutional separation of powers doctrine and the principle that "legislating" must be left to the sole domain of the general assembly.

Respectfully submitted,

IOWA DEPARTMENT OF TRANSPORTATION
TRANSPORTATION REGULATION AUTHORITY
Des Moines, Iowa

IN RE THE MATTER OF:

Plaintiff,

vs.

IOWA DEPARTMENT OF TRANSPORTATION

TICKET OR CASE NO. 83-829

Enforcement Agency: Des Moines Police Department

MOTION TO REDUCE PERIOD OF SUSPENSION

For his motion to reduce the period of his license suspension, Plaintiff, by counsel, states the following:

Plaintiff was arrested for OWI-third offense on January 7, 1983. Because his BAC test result was in excess of .100, his drivers license was suspended for one year (see attached copy of suspension notice as Exhibit A). No appeal was filed at the time of his arrest because there was no basis to attack the underlying suspension itself.

Subsequently on May 6, 1983, the Polk County District Court granted Mensing's motion to strike his first OWI conviction (on December 2, 1980 in Polk County Crim. No. 6324) and to reduce the current charge from OWI-third offense to OWI-second offense. (A copy of that Order is attached as Exhibit B). Consequently, Mensing's license suspension period should be reduced to 240 days since this is only his second valid OWI-related license revocation His first license revocation occurred only because of his conviction of OMVUI-first offense on December 2, 1980. Under the applicable law at the time, there was no automatic test result

revocation by the DOT. Instead, either a conviction (in court) or a test refusal was necessary. Mensing's first revocation rested solely upon a conviction which has now been stricken. Thus, there no longer is a basis for the DOT-imposed revocation on that first offense and Mensing should now be treated as a two-time offender.

WHEREFORE Plaintiff, by counsel, moves for an order reducing the current license suspension to 240 days.

Respectfully submitted,

III. SELECTED OTHER CURRENT ISSUES

A. Probable Cause for Stop -- Use of Roadblocks

Three courts have recently considered the application of the Fourth Amendment to roadblocks used for purpose of detecting drunk drivers.

The Massachusetts Supreme Judicial Court held such roadblocks unconstitutional where there was no showing of sufficient police presence, adequate lighting, and adequate warning to approaching motorists. Commonwealth v. McGeoghegan, 449 N.E.2d 349 (Mass. 1983).

The Arizona Supreme Court held such roadblocks unconstitutional where the checkpoints involved a not insubstantial amount of discretionary law enforcement activity and were operated without specific directions or guidelines, the intrusion was not minimal, and no empirical data existed with which to weigh the reasonableness of the intrusion upon individual rights against the needs of the state. State v. Justice Court, 663 P.2d 992 (Ariz. 1983).

A New Jersey intermediate court, on the other hand, upheld a systematically-enforced roadblock. Where a driver was stopped as a result of a periodic, non-discretionary roadblock which stopped and tested every fifth driver on the road, imposition of inconvenience of test was held reasonable when balanced against State's interest in protecting the public from drunk drivers. State v. Coccomo, 427 A.2d 131 (N.J.Super. Ct. 1980).

B. Breath Test Accuracy

Several challenges concerning accuracy of breath testing equipment have been made recently across the country, including in Linn County, Iowa (see Des Moines Register 8/30/83, p. 1). In addition, the National Bureau of Standards has recently issued a report involving testing of various breath testing devices for susceptibility to radio frequency interference and electromagnetic interference. The types of machines most used in Iowa, the Intoxilyzer 4011A and 4011AS, showed "no interference

at any of the tested levels." See Drinking/Driving Law Letter, Vol. 2, No. 17 (8/19/83).

A few courts have recognized that a breathalyzer is subject to a certain amount of scientific error. This scientific error has been recognized in Hawaii as exactly .0165% of error. The Hawaii Court of Appeals said: "The margin of error in the breathalyzer test means that on any given breathalyzer test the defendant's actual blood alcohol content could be .0165% more or less than the reading shown by the breathalyzer test. . . ." State v. Boehmenr; State v. Gogo, 613 P.2d 916 (Hawaii 1980). See also State v. Bjornsen, 201 Neb.709, 271 N.W.2d 839 (1978) ("the results of such tests when taken together with its tolerance for error, must equal or exceed the statutory level.").

C. Independent Test -- Peace Officer's Duty in Assisting Defendant

Iowa Code section 321B.15 (1983) provides for the right of the defendant to obtain an independent test. The scope of a peace officer's duty in assisting an in-custody defendant in utilizing such a right was sharply limited by the Georgia Court of Appeals recently in Harper v. State [summarized in Drinking/Driving Law Letter of 4/15/83 (Vol. 2, No. 8] which stated:

> "Before the duty of the police arises to transport a defendant to the location of the test, he must first show that he had made arrangements with a qualified person of his own choosing, that the test would be made if he came to the hospital, that he so informed the personnel at the jail where he was under arrest, and that those holding him then 'either refused or in any event failed to take him to the hospital for that purpose.'"

D. Independent Test -- Breath Sample Preservation

California is the most recent state to hold that due process requires the preservation of a second breath sample to be given to the OWI driver who has submitted to breath testing, in order to facilitate independent testing by the defendant.

See Trombetta, 142 Cal.App.3d 138 (1983), rehearing denied by Cal. Sup. Ct. Absent such preservation, the result of the intoxilyzer reading is subject to being excluded on a pretrial motion to suppress. The Trombetta opinion states:

> "The failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence. . . . We hold, therefore, that in all cases where a defendant elects to submit to a breath test to determine his blood alcohol level, he must be given a separate sample of his breath at the time of the test or the alcoholic content of his breath in a manner which will permit scientifically reliable independent testing by the defendant, if that test is to be used as evidence."

E. Evidence -- Admissibility of Test Refusal

The United States Supreme Court recently held in South Dakota v. Neville, ____ S.Ct. ____ (1983) that the self-incrimination clause of the Fifth Amendment is not violated by a State OWI statute permitting admission into evidence (as part of the State's case in chief) the fact that the defendant refused to submit to a chemical test under the implied consent statute. See Iowa Code section 321B.29 (1983).

F. Charging Under Both Alternative Theories

The Iowa Supreme Court has not yet dealt with the constitutionality or legality of the common practice of prosecutors' charging the OWI offense in the alternative in the same indictment/trial information where the test result is at least .130 (or higher). This appears to be permissible, however.

In the State of Washington, which has an OWI statute very similar to section 321.281, The Iowa Code, as amended, it has been held that a drunk driver can be convicted under two different theories and the jury need not be unanimous on which one applies. Since the statute defines only one crime, juries may be instructed to return a guilty verdict if either or both conditions apply, and conviction will be set aside only if the evidence was insufficient to support either one of the theories. State v. Franco, 639 P.2d 1320 (Wash. 1982).

Operating a motor vehicle while having 0.10% BAC is the same crime as driving under the influence of alcohol. The statute (similar to section 321.281(1), as amended) defines one crime which may result from different conditions. (State v. Weidner, 219 N.W.2d 742 (Neb. 1974).

An indictment for an offense which may be committed by one or more means may charge two or more of those means in the alternative or disjunctive. State v. Fuhrmann, 257 N.W.2d 619 (Iowa 1977) (not error for trial court to not require the State to elect between alternative theories of murder -- or ways in which the crime may be committed -- incorporated in the same count of the information; there is but one crime called murder in Iowa and first-degree murder may be committed in several ways.)

RELEASES IN MULTI-PARTY LITIGATION

John M. Bickel
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The adoption of comparative negligence gives rise to the possibility that settling Defendants can now effectively terminate further involvement in litigation not only relative to the claims asserted by the Plaintiff but also cross-petitions seeking contribution (and possibly indemnity).

COMPARATIVE NEGLIGENCE IN IOWA

On December 22, 1982, the Iowa Supreme Court adopted the doctrine of comparative negligence:

> We now abandon the doctrine that contributory negligence is a complete bar to recovery. In its place we adopt the doctrine of comparative negligence under which an injured party's recovery is diminished in proportion to that party's contributory negligence. * * *
>
> In its pure form, the doctrine of comparative negligence assigns responsibility for damages in proportion to a party's fault and proximately causing them. The rule thus operates to reduce rather than bar recovery. * * *
>
> We hold that in all cases in which contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence. In such cases contributory negligence will not bar recovery but shall reduce it in the proportion that contributory negligence bears to the total negligence that proximately caused the damages." (emphasis added) Goetzman v. Wichern, 327, N.W.2d 742, 744, 752, 754 (1982).

Justice McCormick writing for the majority acknowledges:

> Like most other courts that have adopted the comparative negligence doctrine, we do not decide in advance collateral issues which eventually may be raised. Goetzman, supra, pp. 754.

Justice Carter's dissenting opinion notes:

> The majority opinion only tells us that we are adopting a "pure" form of comparative negligence * * *. This brief description leaves unresolved a sufficient number of legal questions * * *. A partial list of these unanswered questions include in the following: (1) What effect is given to the conduct of parties whose negligence contributed to plaintiff's injuries but who are: (a) not joined in the action * * *. (2) How are traditional concepts of joint and several liability affected? * * *. 4. What effect will the doctrine have upon contribution among tortfeasors? Goetzman, supra, pp. 754-755.

COMPARATIVE NEGLIGENCE AND SETTLEMENT

Settlements are encouraged under comparative negligence. This is one of the great benefits of the comparative negligence concept. Court congestion is one of the reasons given for abolition of the present tort system. In states adopting the concept of comparative negligence, litigation is resolved more expediently. This is due to the fact the philosophy of comparative negligence compels the parties to adopt a realistic view toward allocating liability. Heft & Heft, Comparative Negligence Manual, $4.10.

PIERRINGER RELEASE

The Pierringer release reflects a modern approach to releases in comparative negligence states. Simonett, "Release of joint tortfeasors: Use of the Pierringer Release in Minnesota," 3 William Mitchell Law Rev. 3 (1977).

In 1963, in Pierringer v. Hoger, the Wisconsin Supreme Court determined that the form of a settlement agreed to by a settling tortfeasor had the effect of completely removing the settling tortfeasor as a party defendant from both the claims of plaintiff and the cross-claims of non-settling cross-petitioning joint tortfeasors. Pierringer v. Hoger, 124 N.W.2d, 106. This case is recognized as the hallmark case interpreting the scope and validity of a settlement in comparative negligence jurisdictions.

Pertinent parts of the releases in Pierringer provided that:

1. Defendants were discharged from all claims and causes of action of the Plaintiff.

2. The settlement was a compromise of Plaintiff's claim, the claim exceeding the consideration paid.

3. Plaintiff and settling Defendants acknowledged the settling Defendants were not paying the full amount of Plaintiff's damages.

4. Plaintiff "does hereby credit and satisfy:

> [A] that portion of the total amount of damages of the undersigned * * * which has been caused by the negligence, if any, of such of the settling parties hereto as may hereafter be determined to be the case in the further trial or other disposition of this or any other action" and the plaintiff "does hereby
>
> [B] release and discharge, that fraction and portion and percentage of his total causes of action and claim for damages against all parties * * * which shall hereafter, by further trial or other disposition of this or any other action be determined to be the sum of the portions or fractions or percentages of causal negligence for which any or all of the settling parties hereto are found to be liable * * *."

5. The release reserved to Plaintiff the right to the balance of the whole cause of action against non-settling Defendants.

6. Plaintiff agreed to indemnify settling Defendants for any amount settling Defendants may be required to pay upon any judgment obtained for contribution.

7. Plaintiff agreed to satisfy any judgment Plaintiff recovered for the full cause of action against non-settling Defendant to the extent of the fraction of the cause of action released.

Pierringer v. Hoeger, supra, p. 108.

Plaintiff Pierringer sustained a personal injury in 1957 in a cement mixing plant explosion. Pierringer sued multiple joint tortfeasors who in turn interpleaded Defendants. All Defendants and interpleaded Defendants filed cross-complaints seeking contribution. Prior to trial all Defendants except one settled with Plaintiffs. Relying on the releases, the settling Defendants moved for summary judgment to dismiss the non-settling Defendant's cross-complaint seeking contribution. The trial court's ruling granting summary judgment was affirmed on appeal.

The Pierringer Court determined that the release constituted an effective BAR TO THE NON-SETTLING DEFENDANT TORTFEASORS RIGHT TO CONTRIBUTION. In so holding, the Wisconsin Court acknowledged historical rules and present law; the common law history; that joint tortfeasors are jointly and severally liable; that the release of one joint obligor which discharged his liability is considered satisfaction of the whole cause of action barring recovery from the other joint obligor; and that where the intention of the parties reflected that the release is not to satisfy the entire cause of action nor is it intended to constitute an accord and satisfaction extinguishing the cause of action, the agreement is treated as a release having the effect of a covenant not to sue. Pierringer, supra, pp. 109.

Pierringer cited as authority the Court's earlier decision, Heimbach v. Hagen, 83 N.W.2d 710 (Wisc. 1957), where an agreement released tortfeasors from direct liability to the Plaintiff, covenanted not to sue the released tortfeasors and agreed that Plaintiff's claim and cause of action were credited and satisfied to the specific numerical extent of fifty percent of Plaintiff's total claims.

The sole issue on appeal in Heimbach was whether the release was effective to bar the non-settling defendant's right to contribution from the settling joint tortfeasor. In Heimbach, where a definite percentage or portion of the cause of action was stated in the release, the Court held the effect of the release was to extinguish the non-settling tortfeasors right to claim contribution against the settling tortfeasor.

The Pierringer Court cited Bielski v. Schulze, 114 N.W.2d 105 (Wisc. 1962), which established that the liability for contribution of each joint tortfeasor depends on a question of fact determined by an apportionment of the causal negligence attributable to all the joint tortfeasors. (Iowa has not yet recognized apportionment in contribution.) The Court in Bielski further provided guidance for settling parties, where it suggested that:

> In order for a Plaintiff to give a release or covenant which would protect the settling tort-feasor from a claim of contribution that the Plaintiff must agree to satisfy such percentage of the judgment he ultimately recovers as the settling tort-feasor's causal negligence bears to all the causal negligence of all the tort-feasors. (emphasis added) Pierringer, supra, pp. 110.

The PIERRINGER FORM of release limits Plaintiff's cause of action and thereby recovery to the UNSATISFIED PERCENTAGE OF THE DAMAGES ATTRIBUTABLE TO THE NON-SETTLING TORTFEASOR. Since there is no payment sought beyond the non-settling tortfeasor's share, the Court reasoned

that there is no basis for a claim of contribution against a settling tortfeasor. The Pierringer release is based on the formula that each joint tortfeasor including the non-settling Defendant is liable only for that part of the award which is his percentage of causal negligence. Since the non-settling Defendant is relieved from paying more than his fair share of a verdict, it is proper to dismiss settling Defendants from further participation in the trial. Frey v. Snelgrove, 269 N.W.2d 918, 921-922 (Minn. 1978).

The Pierringer Court considered and rejected the contention that it is necessary, in order to determine the non-settling tortfeasor's percentage of liability, for the settling tortfeasors to continue as parties to the suit even if their participation is not necessary to protect their interests, because otherwise the Court would not have jurisdiction of them and the proper issue of causal negligence could not be submitted to the trier of fact. Plaintiff's cause of action was satisfied as to the settling tortfeasor. The issue between the Plaintiff and the non-settling Defendant is the percentage of causal negligence (if any) of the non-settling Defendant. Pierringer, supra, pp. 111-112.

299 NW 2d 234 — Pierringer release

PIERRINGER COMPONENTS

The basic goals of the Pierringer release are to:

1. Release settling Defendants from the action.

2. Discharge that part of the cause of action equal to that part (unspecified numerically) attributable to the settling Defendants' causal negligence.

3. Reserve the remainder (unspecified numerically) of the cause of action against non-settling Defendants.

4. Establish Plaintiff's covenant to indemnify settling Defendants from any claims of contribution (and arguably indemnity, as discussed further on in this paper) made by non-settling parties and satisfy any judgment obtained from non-settling Defendants to the extent settling Defendants have been released. The essential components of the "Pierringer" type release which are not a part of the Iowa Bar Association General Release are as follows:

Discharge cause of action.

> In accepting said sum I/we hereby release and discharge that fraction, portion or percentage of the total cause of action of claim for damages I/we now have or may hereafter possess against all parties responsible for my/our damages which shall by trial or other disposition, be determined to be the sum of the fractions, portions or percentages of causal negligence for which the parties herein released are found to be liable to me/us as a consequence of the above accident.

Reserve balance of cause of action.

> I/We further agree that any claim of whatever kind or nature released parties might have or hereafter have growing out of the above accident, is hereby expressly reserved to them. The parties to this agreement do not contemplate release of any non-settling tort feasor who may be determined to be legally liable to the undersigned for the injuries, damages, and resultant remaining unsettled claims of the undersigned.

Intention

> This release is given in full consideration of the named parties as being released liability on the claim which is being paid only. This release is intended to release only the parties specifically named. The undersigned expressly reserve the balance of the whole cause of action of any other claim of whatever kind of nature not released hereby which I/we may have or hereafter have against any other person or persons arising out of the above accident.

Indemnity

> As a further consideration, we the undersigned, agree to indemnify said parties released and save them harmless from any claims for contribution made by others so adjudged jointly liable with said parties released, and the undersigned agrees to satisfy any judgment which may be rendered in favor of the undersigned, satisfying such fraction, portion or percentage of the judgment as the causal negligence of the parties released is adjudged to be of all causal negligence of all adjudged tort-feasors. In the event the undersigned fails to immediately satisfy any such judgment to the extent of this fraction, portion or percentage of the negligence as found against the parties released, the undersigned hereby consents and agrees that upon filing a copy of this agreement, without furthuer notice, an order may be entered by the court in which said judgment is entered directing the Clerk thereof to satisfy said judgment to the extent of such fraction, portion or percentage of the negligence as found against the parties released and discharged under this release.

VALIDITY OF PIERRINGER RELEASE IN IOWA

1. Release of one releases all.

Under the Iowa law, where separate and independent acts of negligence by different participants combine to produce a single injury, all participants are jointly and severally liable to the injured person to the full amount of such person's damages (even though the negligent act of one of the participants alone would not have caused such damage). Bolton v. Ziegler, 111 F.Supp. 516, 521 (USDC, N.D. Iowa, J. Graven, 1953).

In Bolton, Plaintiff entered into a loan receipt agreement containing covenant provisions not to sue with settling tortfeasors. The non-settling tortfeasor asserted the release constituted a satisfaction of Plaintiff's claim which extinguished the Plaintiff's right of action against the non-settling Defendant under the English common law rule that a release of one joint

tortfeasor released all, satisfaction being presumed. In rejecting this argument Bolton holds:

> In the case of Miller v. Beck, supra, at page 346 of 79 N.W., the Iowa Court states: It is important that we distinguish in this connection between what the law denominates a 'release' and what is called a 'satisfaction.' A release may be given, although no part of the damage has been paid, and a technical release to one who is not a joint wongdoer will not release another, who may have had some connection with the wrong. * * * A satisfaction, however, by whomsoever made, if accepted as such, is a bar to further proceedings on the same cause of action. * * * In the case of Latham v. Des Moines Electric Light Co., supra at page 855 of 6 N.W.2d, the Iowa Court states: "* * * Whether a cause of action is released depends not on the amount of money received, but on whether the amount received was accepted in full satisfaction of the claim.
>
> It is believed that the Iowa rule in this regard is, that an injured person who receives satisfaction of his claim or cause of action against one of two claimed joint tort-feasors, cannot, by a reservation in the release given, preserve his claim or cause of action against the other claimed joint tort-feasor, but, that if by the transaction he does not receive satisfaction of his claim or cause of action, a release with reservations would be regarded as the equivalent of a covenant not to sue. (emphasis added) Bolton, supra, pp. 524, 525.

In Iowa, satisfaction is the requisite of a release. The injured party may have but one satisfaction for a single injury.

> But it seems clear that if the Iowa Supreme Court applies the maxim, "a release of one joint tort-feasor releases all", at all it does so only after it has been determined that the injured person has received full satisfaction for his injury. * * * Anything but full satisfaction results in pro tanto discharge, from whomsoever received. There can be but one satisfaction, but there can always be one. Bolton v. Ziegler, super. pp. 525.
>
> The American Courts * * * have rather hopelessly confused release with satisfaction.

* * *

> The only desirable rule would seem to be that a Plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, or unless he has received such full compensation that he is no longer entitled to maintain it. Community S.D. of Postville, 176 N.W.2d 169, 174 (Iowa 1970), citing with approval Prosser, Law or Torts, Third Ed., §46, pp. 268-273.

In Johnson v. Harnisch, 147 N.W.2d 11 (Iowa 1966), Plaintiff settled with two of three alleged tortfeasors during trial, and the Court was subsequently called upon to determine the effect of settlement contract. In holding the settlement by two alleged tortfeasors did not constitute a full settlement so as to bar Plaintiff's claim against the third alleged tortfeasor. The Court stated:

> An analysis of Iowa cases makes it clear that satisfaction has been, and is, a requisite of release. The Iowa cases relating to releases, releases with reservations, and covenants not to sue are consistent and explainable in light of the basic doctrine underlying them, that an injured party may have but one satisfaction for a single injury. p. 15.
>
> We are not aware of any compelling reason to justify precluding a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers who desires to avoid litigation to accept a sum by way of partial compensation and to discharge that wrongdoer from further liability without releasing his right of action as against the other wrongdoers for the remainder of the judgment. Compromises are favored generally in the law, and it would be inconsistent to regard such arrangements with disfavor. p. 15.

The Court in Johnson distinguished the subject release from the common law rule that a release of one tortfeasor releases all, thereby avoiding the necessity of overruling previous Iowa cases which affirm this common law rule.

Passing upon the settlement amount the Court stated:

> We note that the right of pro tanto credit for the proceeds of the Harnisch settlement is not in issue here. Such pro tanto credit is, of course, to be allowed, if necessary, in arriving at any future judgment in favor of Plaintiffs against [the remaining alleged joint tortfeasor].
>
> * * *
>
> This pro tanto credit directly affects the question of whether or not the plaintiffs have in fact received full satisfaction for their entire claims. For if the jury finds that plaintiffs' total damages aggregate $19,000 or less, the judgment will be nil. Either the jury under proper court instructions or the court, depending on the mechanics used, will subtract the amount paid by the Harnisches from the value damages found to have been suffered. In no event, under such arrangement can a double recovery eventuate. Johnson v. Harnisch, supra, pp. 16, 17.

Johnson does hold, however, that although a settling tortfeasor under Iowa is discharged pro tanto from liability, the discharge does not protect the settling party from a claim of contribution.

The Iowa Court in Peterson and Johnson quoted with approval the Minnesota Court holding in Gronquist v. Olson, 64 N.W.2d 159 (1954), which states:

> We believe that the factors determinative of whether a release of one of several joint tort-feasors will operate to release the remaining wrongdoers should be and are: (1) The intention of the parties to the release instrument, and (2) whether or not the injured party has in fact received full compensation for his injury. If we apply that rule, then, where one joint tort-feasor is released, regardless of what form that release may take, as long as it does not constitute an accord and satisfaction or an unqualified or absolute release, and there is no manifestation of any intention to the contrary in the agreement, the injured party should not be denied his right to pursue the remaining wrongdoers until he has received full satisfaction. * * * Properly speaking, a clear distinction should be made between a satisfaction and a release, since the existence of the latter does not necessarily indicate that the plaintiff has received full compensation for his injury, i.e. satisfaction. * * * Community S. D. of Postville v.

Peterson, supra 174; Johnson v. Harnisch supra 16.
N.W.2d 11, 16 (1966).

The effect of a settlement between parties is a matter of intention. In the absence, however, of an express reservation of rights, it disposes of all claims between the parties arising out of the event to which it relates. Casey v. Koos, 323 N.W.2d 193, 198 (1982).

A covenant not to sue, while resolving the Plaintiff's claim against the settling tortfeasor, does not protect the settling tortfeasor from the cross-claims by non-settling joint tortfeasor Defendants. A settlement payment pursuant to a covenant not to sue discharges the defendant pro tanto from liability. That is, the settling tortfeasor is entitled to a pro tanto reduction for that amount paid from the judgment for contribution the non-settling tortfeasor obtains against the settling tortfeasor. A covenant not to sue coupled with an indemnity agreement still leaves the settling tortfeasor vulnerable to involvement in litigation as a Defendant to a cross-claim for contribution.

Contribution in Iowa is on the basis of an equal division among all tortfeasors. Best v. Yerkes, 77 N.W.2d 23 (1956); Schnebly v. Baker, 217 N.W.2d 708 (1974). (Schnebly created an exception where two Defendants were treated as one since one of the two was vicariously liable.)

The Pierringer release approaches this problem from a different perspective by not assigning a dollar amount to the proportionate negligence of the settling tortfeasor but rather releasing, for the consideration paid, the tortfeasor's undefined proportionate negligence as may be ultimately determined. The second effect of the Pierringer release is that under no circumstance is the non-settling party called upon to pay for any portion of the settling parties negligence which, it can be asserted, constitutes one of the

underlying theories allowing contribution. Left unsettled is the non-settling tortfeasors "several" liability for a non-party tortfeasor.

The non-settling Defendant may argue that the Pierringer release is not effective as to his claim for contribution against the settling joint tortfeasor since he was not a party to the release. The non-settling joint tortfeasor may assert that it is necessary to keep the settling tortfeasor in the case in order to determine the percentages of fault of all tortfeasors. The response to these arguments is that the Plaintiff has in settlement satisfied and discharged the Plaintiff's claim for relief to the extent of the settling party's negligence. The result of this settlement and satisfaction of Plaintiff's rights as to the settling party is again that the non-settling Defendant can in no circumstance be held liable for the settling party's negligence.

2. Trial court policy favors settlement. See discussion and citations above.

3. Splitting the cause of action. The rule prohibiting a Plaintiff's splitting his cause of action derives from the policy of protecting a single Defendant from more than one lawsuit. Settling a part of the cause of action with one joint tortfeasor does not constitute the splitting of a cause of action as to non-settling joint tortfeasors. The Pierringer release creates no danger of a second suit being brought against the settling tortfeasor or the non-settling tortfeasor. Simonett, supra, pp. 11-12.

4. Joint and several liability. The concept of several liability of tortfeasors is a longstanding and well established principle in Iowa. The basis for

joint and several liability is full compensation to the plaintiff as opposed to apportionment of fault amongst the tortfeasors. The theory of joint and several liability is founded on the principle that a Plaintiff is entitled to a full and complete recovery against one or more joint tortfeasors which takes precedence over a joint tortfeasor's right to only be held accountable for the portion of the damages attributable to his own negligence or his proportionate share when compared with the negligence of the other tortfeasors. McDonald v. Robinson, 244 N.W. 820 (1929).

The adoption of the doctrine of pure comparative negligence does not require abandonment of joint and several liability. Weeks v. Feltner, 297 N.W.2d 678 (Mich. 1980).

The Wisconsin Supreme Court in 1934 construed the Wisconsin statute on comparative negligence to require comparison of the negligence of all parties to the negligence. Under the Wisconsin system of comparative negligence, joint and several liability was retained. The Court reasoned that a comparison of all potential Defendants applied the rule of joint and several liability and noted the Plaintiff's recovery was in no manner diminished by the fact that a part of the total causal negligence was attributable to a non-party tortfeasor, due to the continued existence of the joint and several liability rule. Walker v. Kroger Grocery Bakery Co., 252 N.W. 721 (Wisc. 1934).

Plaintiff, in giving the indemnification provisions in the Pierringer release, indirectly releases the non-settling tortfeasor from any "joint" liability but of course retains the right to "several" liability against the non-settling tortfeasor. The Court in Pierringer noted that this indemnity provision was "second-line in protection" in the event the provisions discharging settling tortfeasors and their

share of the cause of action were later determined to be ineffective. Pierringer, supra, pp. 108.

In conjunction with joint and several liability it should be noted that Senate file 531, §28 provides:

> the doctrine of joint and several liability shall not apply if a Plaintiff is found to bear any comparative negligence with respect to any claim.

Section 29 of the file provides that this provision shall apply to cases tried or retried on or after July 1, 1984. Section 30 directs the legislative counsel to establish a joint subcommittee to study the matter of comparative negligence, comparative fault and contributory negligence as they may apply to the broad spectrum of tort law in Iowa during the interim between the 17th General Assembly's first and second sessions.

5. Theory of contribution. The doctrine of "contribution" is founded upon the equitable principle that each person subject to a common duty or debt should bear his proper share of the common burden and one person should not bear more than his just share to the advantage of his co-obligors. Daniel v. Best, 5 N.W.2d, 149 (Iowa 1942).

The difference between "indemnity" and "contribution" in cases between parties liable for a wrong is that for indemnity the law implies an agreement or obligation and enforces a duty on the primary or principle wrongdoer to respond for all the damages, whereas in contribution, there is no agreement, express or implied, but a common burden which the parties stand in equal fault and which in equity and good conscience should be equally borne. American Dist. Tel. Co. v. Kittelson, 179 F.2d 946 (Ia. App. Iowa 1950).

Until the Iowa Supreme Court decided otherwise in 1956, joint tortfeasors were not allowed the right to claim contribution or indemnity. Best v. Yerkes, 77 N.W.2d 23 (Iowa 1956).

Both the Minnesota and Wisconsin laws provide for comparative apportionment in the contribution. Simonett, supra, pp. 18. Although not relied upon in the controlling cases, the impact of these two statutory rules for apportionment of contribution could be argued to constitute the determinative factor in affirming the validity of the release in these two states. Conversely it could be asserted the release does not bar third party claims for contribution in Iowa in the absence of such a statute or court adopted rule. This claim overlooks the reasoning advanced by the Court in Pierringer in justifying the dismissal of the third-party action. This reasoning is that the non-settling party is never required to pay more than his share.

The majority rule is that a settling Defendant is normally released from further potential liability for contribution after settling even where the settling tortfeasor has paid less than his proportionate share of the damages. W. Herndon & F. Israel, "Contribution" Civil Practice And Litigation in Federal and State Courts, pp. 738 (1981). Also see Uniform Contribution Among Tortfeasors Act §4(b)(1955).

"The Uniform Contribution Amongst Tortfeasors Act," Uniform Laws Annotated, Volume 12, Section 1(b), p. 63, provides that a tortfeasor seeking contribution, who has paid more than his pro rata share of the common liability, is limited to recover the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability. The Uniform Act (Section 1(d)) provides that a settling tortfeasor

is not entitled to contribution from a non-settling tortfeasor. Section 4 of the Act provides that a release given in good faith to a party liable in tort for the same injury or death discharges the settling tortfeasor to whom it is given for all liability for contribution to other tortfeasors. Contribution Amongst Tortfeasors, ULA, supra, p. 98.

6. Whose negligence considered. It can be argued that since only the named Defendants in the lawsuit have their negligence considered (which can be argued to be unclear in Goetzman), the Pierringer release would be invalid. This confuses the theory of joint and several liability with the proposition that a judgment against the non-settling Defendant will never include the amount which the settling Defendant owes the Plaintiff.

The effect of the settlement by one tortfeasor is to eliminate the Plaintiff's cause of action against that party and to that extent, the "joint" concept of liabilitity is eliminated. Consistent with this result is the elimination of the Plaintiff's cause of action and accompanying right to seek from the non-settling tortfeasor the "several" liability of the settling tortfeasor. Present recommended Iowa jury instructions do not address these effects.

Should the non-settling Defendant be allowed to present evidence proving the settling Defendant's negligence?

Should the instructions direct that the jury is either not to assess the settling Defendant's negligence to the non-settling Defendant or in the alternative that the jury is to determine the negligence of the settling Defendant and thereafter the verdict is to be adjusted (presumably by the Court) to reflect the settling Defendant's negligence as well as the negligence of the Plaintiff?

7. Indemnity. The word "indemnity" as used in connection with the law relating to tort-feasors means the shifting of entire loss, while the word "contribution" means a sharing of the loss.

Section 1(f) of the Uniform Contribution Amongst Tortfeasors Act, supra, p. 64, provides that the Act does not impair any right of indemnity. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution and the obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

It is claimed by the leading Minnesota Law Review article on comparative negligence that the Pierringer release relates solely to situations where a contribution claim is brought against the settling tortfeasor. The assertion is that the release is not effective to protect settling parties against third-party indemnity claims. Simonett, supra, pp. 22-23.

The reason asserted for Pierringer's lack of effectiveness to protect a settling party from claims for indemnity is that the Pierringer release is predicated upon the non-settling party not being prejudiced. Two tortfeasors may be commonly liable to Plaintiff but the settling tortfeasor may only be secondarily liable. If the Pierringer release were effective as to the settling tortfeasor who is primarily liable, the effect would be highly prejudicial and unfair to the non-settling tortfeasor if his right to indemnity were extinguished.

It is possible to modify the Pierringer release to protect a settling party in a case where indemnity is claimed. The modified release would provide Plaintiff agrees not only to indemnify against contribution claims but also against any indemnity claims brought against the settling party by the non-settling party and

satisfy any judgment Plaintiffs obtain against non-settling party if the non-settling party is determined to be entitled to indemnity from the settling party. The effect of this arrangement would be to, in essence, terminate the litigation against the non-settling party in the absence of the presence of the theory of "comparative indemnity". Simonett, supra, pp. 24, 25; see Dole v. Dow Chemical Co., 282 N.E.2d 288 (NY 1972); Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362 (Minn. 1977). In the Dole and Tolbert cases Courts adopted a comparative apportionment standard where the ground for indemnity was active—passive conduct. California has also adopted the concept of comparative indemnity to handle questions of equitable distribution amongst multiple tortfeasors. American Motorcycle Association v. Superior Court, 578 P.2d 899, 907 (1978).

In Frey v. Snelgrove, 269 N.W.2d 918 (1978), decided after the Simonett article, the Minnesota Supreme Court confirmed the validity of the Pierringer release in Minnesota. In addition to release terms in the Pierringer release, the release in Frey contains two additional provisions which are an indemnity clause covering cross-claims for indemnity as well as contribution and the provision that the amount paid for the settlement was contingent upon the amount recovered against the nonagreeing party at trial rather than a sum certain (i.e. a Mary Carter type arrangement).

On the issue of indemnity the court stated:

> "There is no legal reason why the indemnity provisions of the release should not also be upheld if it is in accord with public policy. The court should encourage settlements openly made with prompt and adequate notice to the trial judge and all interested parties. Frey, supra, pp. 922.

8. Products liability. Since the Pierringer release operates in a comparative negligence context, it can be asserted that would be inapplicable where the cause of action asserted against the Defendant settling party is based on the theory of strict liability or breach of warranty. The Iowa courts have not yet considered issues relating to apportionment of non-negligent liability. In Wisconsin, the Court in Dipple v. Sciano, 155 N.W.2d 55 (1967), allowed a comparison between negligence and strict liability. See also, Frank v. Badger Ford Truck Sales, Inc., 207 N.W.2d 866 (Wisc. 1973), where the concept of comparative cause was reaffirmed. Minnesota commentators urge expansion of the comparative negligence concept to comparative cause for cases in addition to those alleging just negligence. Simonett, supra, pp. 27.

SETTLEMENT CONSIDERATIONS

Dealing with future cases involving Pierringer releases, the Minnesota Court in Frey, supra, p. 923, suggested the following guidelines:

1. When a settlement or release is entered into, the trial court and other parties should be immediately notified and the terms of the agreement made part of the record.

2. If the Plaintiff has agreed to indemnify the settling Defendant against all possible cross-claims of the non-settling parties, the trial court should ordinarily dismiss the settling Defendant from the case.

3. Since the settling Defendant has fixed his limits of financial liability to the Plaintiff by entering into the release he is deemed to have relinquished any cross-claims against the remaining Defendants.

4. If a non-settling party has cross-claims for both contribution and indemnity, either of which is not covered by the terms of the release, then the Defendant should continue as a party for the limited purpose of defending against a surviving type and claim.

5. In almost every case the trial court should submit to the jury the fault of all parties including the settling Defendants even though they have been dismissed from the lawsuit.

6. The Court should usually inform the jury that there has been a settlement and release if there is not reason then to explain the settling tortfeasor's conspicious absence from the courtroom. The fact of the existence of a release agreement is admissible if offered for a purpose such as showing bias or prejudice of a witness, but as a general rule the amount paid in settlement should never be submitted.

In 1981, the state of Washington enacted a statute authorizing the Court to approve settlements made out of Court between Plaintiffs and Defendants even though other Defendants not party to the settlement remain in litigation without recourse against the settling Defendants (i.e., the same effect as the Pierringer release). Grover v. Tacoma General Hospital, 98 Wash.2d 708 (1983), delineates the factors to be considered in determining the reasonableness of the settlement which include: Plaintiff's damages, the merit of Plaintiff's liability theory, the merits of the settling Defendants' defense theory, settling Defendants' relative faults, the risks and expenses of continued litigation, the settling Defendants' ability to pay, evidence of bad faith, collusion or fraud, the extent of the Plaintiff's investigation and preparation of the case, the interest of the Defendants remaining in the case.

The guidelines laid out in Frey should be considered in every instance where parties undertake to execute a Pierringer release. The factors listed in Grover suggest how a court may evaluate the validity of the release once it has been executed.

FEDERAL RULES REVIEW AND NEW DEVELOPMENTS

HON. RICHARD W. PETERSON
United States Magistrate
Council Bluffs Iowa

I. Amendments and Additions to Federal Rules of Civil Procedure

(A) Effective date: August 1, 1983

(B) Amendments and Additions;

1. Rule 6 (b) - Enlargement of time.

2. Rule 7 (b) - Motions and other papers: makes enlargement applicable to additonal rules. Makes rules regarding captions and pleadings applicable to all motions and other papers and requires signing of motions in accordance with Rule 11.

3. Rule 11 - Signing of pleadings - : Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the perosn who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

4. Rule 16 - Pre-trial Conferences; Scheduling; Management - :

(a) PREIRIAI CONFERENCES; OBJECIIVES. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

(b) SCHEDULING AND PLANNING. Except in categories of actions

exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by the district court rule upon a showing of good cause.

(c) SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evident;

(4) the avoidance of unnecessary proof and of cumulative evidence ;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentiality difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party particpating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) FINAL PRETRIAL CONFERENCE. Any final pretrial conference shall

be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) PRETRIAL ORDERS. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pre-trial conference shall be modified only to prevent manifest injustice.

(f) SANCTIONS. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to particpate in good faith, the judge, upon motion or his own initiative, may take such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

5. Rule 26 - General Provisions Governing Discovery;
Increases possibility of contact by court to prevent abuses (e.g.) (duplication, expense, bad faith) requires signature of requests, responses and objections; makes such a certificate of good faith and provides sanctions for violations.

6. Rule 52 - Findings by the Court. Expands rule to allow oral finding, if recorded in open court or appears in an opinion memorandum filed by the court.

7. Rule 53 - Masters. Limited changes in provisions for appointment and use of masters. (allowing magistrates to be appointed as such).

8. Rule 67 - Deposit in Court. Limited changes in provisons for deposit of money with the court.

9. Rule 72 - Magistrates;Pre-trial Matters:
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C. Local Rules of the United States District Courts Northern and Southern District of Iowa in process of revision to conform to these amendments and additions.

II. "Jaquette" and "Pacemaker," and Their Impact on Civil Procedure In The Iowa Federal Districts

A. Jaquette v. Black County et al., U.S. Court of Appeals, Eighth Circuit, (No. 82-1750, June 27, 1983). Plaintiff was a probationary employee of Black Hawk County whose employment was terminated by the county. She then filed suit in the U.S. District Court for Northern District of Iowa under 42 U.S.C. Section 1983 alleging a violation of her first and fourteenth amendment rights. After three years of preliminary motions, discovery procedure and negotiations, plaintiff and defendants settled the case by payment of a modest settlement to plaintiff and agreement that she was the prevailing party which laid a foundation for an award of attorney's fees by the Court under the statute. Substantial attorney's fees were requested (over $96,000); the court granted an amount of over $20,000. On appeal, the Eighth Circuit Court of Appeals affirmed award but in its opinion spent considerable time in criticizing the length of time the cases required. The opinion states:

> "In almost all cases the key to avoiding excessive costs and delay is early and stringent of judicial management of the the case. Sending council off into extended 'paper chases' in compliance with pretrial orders has now been demonstrated not to be the answer (citing authorities) the recognition of early judicial management, not by the clerk, not by the magistrate, but by the trial judge before whom the case will be tried is essential. Management conference at the pleading stage, which simplify the extended discovery as well as the issues involved, have proven successful. The newly adopted Federal Rule of Civil Procedure 16 (b) contemplates such a practice. We request each district judge to re-evaluate local rules with the view toward early case management. With such manager procedure, we are confident that litigations such as this, extending almost three years in the district court, would be avoided. Excessive costs of litigation is as much the Court's as it of council and litigates. We fully recognize district judges are busy people; it has been our good that they do not have time for pretrial scrimages because of they are too busy in the 'judication' cases (that is, the trial itself). However, it is time to recognize that the adjudication process began of the time of the filing of the complaint and carries to the last appeal. Lack of proper judicial supervision in the pretrial stage leads to excessive discovery, the developement of complex and multiple issues, extended motion practice and long expensive trials. Conversing, time expended wisely by council and the district judge at the early stages will save many hours of unnecessary labor later in the process. . . ."

B. Pacemaker

Peacemakers Diagnostic Clinic of America, Inc. v. Instromedic, Inc., U.S. Court of Appeals, Ninth Circuit (No. 82-3152, August 5, 1983).

Facts

Plaintiff filed in action against defendant in the U.S. District Court for district Oregon charging patent infringement. Parties consented to have the case tried by magistrate and the provisions of 28 U.S.C. 636 (c) empowering him to enter judgment. Upon judgment, both parties appeal to the Ninth Circuit Court of Appeals. On its own motion, the Court raised the issue of the magistrate's jurisdiction because of "the possible unconstitutionality of 28 U.S.C. Section 636 (c)".

Held:

The statute empowering a federal magistrate to enter a civil judgment upon consent of the parties (28 U.S.C. 636 (c)) is unconstituional.

Rationale

1. Article III of the U.S. Constitution directs that judges shall hold office during good behavior and shall not have their compensation diminished during their tenure.

2. Since magistrates do not have these protections, they are not Article III judges.

3. By their nature, magistrates are not Article I judges.

4. The delegation of duties to magistrate under the Magistrates Act is restricted since the essential attributes of judicial power are retained by the Article III judges (i.e., review final determination of final decisions).

5. Litigant consent to the entry of judgment by magistrate does not effectively fulfill due process and Article III requirements which cannot be delegated.

6. Internal delegation of judicial authority to magistrate is ineffective due to the magistrates' tenure and compensation being creations of the legislature and not the Constitution, and therefore not of Article III status.

7. Article III requirements are not satisfied by the appellate review of a magistrate's judgment; the excercise of judcial power must be met at all stages of adjudication.

8. This holding will be prospective and not retroactive in its application.

THE IOWA RULES OF EVIDENCE

HON CHARLES R WOLLE
Justice, Supreme Court of Iowa
Des Moines Iowa

Introduction to Outline

On July 1, 1983, the law of evidence in Iowa entered a new phase. Until then, Iowa case law and Iowa statutes (including the 106 sections and several rules collected in Iowa Code Chapter 622) provided the basis for most evidentiary rulings. Effective July 1, 1983, Iowa has rules of evidence patterned after the Federal rules of evidence. Now a judge or attorney confronted with a question of evidence should initially turn not to the Iowa Code or Northwestern Reporters, but rather to the newly-issued special pamphlet containing the Iowa and Federal Rules of Evidence, with legislative history. The rules and other material found in this slim volume will suggest answers to most evidentiary questions which are likely to arise during trials in Iowa courts.

In adopting rules of evidence similar to the Federal rules, Iowa has followed the lead of more than half of our other state courts or legislatures. Our neighbors in Minnesota, South Dakota and Nebraska adopted similar rules some time ago.

The background to Iowa's adoption of these rules may be instructive. Initially the Iowa legislature during its 1981 session made the following formal request to the Iowa Supreme Court:

> "The Supreme Court is requested to undertake a study of the Federal Rules of Evidence for United States courts and magistrates for the purpose of determining which rules should be adopted for use in Iowa's state court system." Laws of the Sixty-Ninth General Assembly, 1981 Session, Chapter 203, §1 (act of 5-19-81).

Pursuant to that request, the Iowa Supreme Court on December 14, 1981 appointed an eleven-person advisory committee to study the Federal Rules of Evidence. The Committee was directed to submit by November 1, 1982, its report and recommendation as to which rules should be adopted for use in our Iowa state courts. The Committee held ten formal meetings in Des Moines and Iowa City, including a meeting in Des Moines on June 17 when public comment was invited and received.

On October 29, 1982, the Committee filed its Report with the Iowa Supreme Court, proposing Iowa Rules of Evidence quite similar to the Federal Rules of Evidence. (Differences are noted on Appendix A.) The Supreme Court then submitted its own Report to the Iowa General Assembly on January 28, 1983, prescribing Iowa Rules of Evidence which, with a few important exceptions, noted on Appendix A, are the rules proposed by its advisory committee. The proposed rules, pursuant to Iowa Code Sections 684.18-19 (1983), were to take effect on July 1, together with such changes as were enacted during the 1983 session of the Iowa Legislature. The Legislature made no changes in the proposed

rules, but it did enact legislation which repealed or modified a number of Iowa statutes which potentially would have conflicted with the new rules. Noteworthy among the repealed statutes are Iowa Code §§622.4-.6 (the former deadman statute), 622.7 (general competency of husband or wife to testify against the other), and §622.12 (judge as witness).

Our Iowa appellate courts have not yet been confronted with the interesting question as to what law trial judges were to apply on evidentiary questions arising in cases commencing before July 1, 1983 and ending after that effective date of the new rules. Hopefully, those cases have by now been settled.

The Iowa Advisory Committee is now a standing committee of the Iowa Supreme Court. Lawyers and judges who detect errors in the rules as adopted, whether the problems be technical or more substantive in nature, should direct their recommended changes to Des Moines attorney Nick Critelli, the present Committee chairman.

GETTING INTO THE RULES - LEVEL I

What Are We Getting Into?

[Labyrinth or Improved Interstate System]

1. Features of Federal and Iowa Rules stressed by critics

   A. More Rules? Bureaucratic redtape

   B. Body of Common Law lost

   C. Loss of control to "Federal" systems

   D. Substantive provisions questioned

      (1) Expert Testimony - too permissive
      (2) Hearsay exceptions too broad
      (3) Generally - philosophy of admission, not exclusion
      (4) Generally - too much discretion in judges

2. Features of Federal and Iowa Rules stressed by proponents

   A. Ease of access

   B. Greater body of meaningful precedents

   C. Uniformity

   D. Substantive provisions preferred

      (1) Modern trends accepted
      (2) Emphasis on fair trial
      (3) Approval of philosophy of admission, not exclusion
      (4) Approval of balancing tests

3. Comparing the Federal and Iowa Rules

   A. Appendix A - annotating the Table of Contents

   B. Deja Vu - how "new" to Iowa are the Federal Rules
      See, e.g., State v. Hall, 297 N.W.2d 80 (Iowa 1980)

GETTING INTO THE RULES - LEVEL II

How Do We Get Into the Rules?

[A Roadmap - Trees in the Forest]

1. Eleven little Articles, all in a row

   A. One bite at a time

   B. By the numbers

   C. With Table of Contents (Appendix A)

2. Six down, five to go

   A. Article II - Judicial Notice

      (1) Adjudicative facts
      (2) Effect - Civil vs. Criminal

   B. Article III - Presumptions in General in Civil Actions

      (1) New definition of effect of a presumption
      (2) State law applies if state law supplies "rule of decision"
      (3) Iowa rules - no change

   C. Article V - Privileges

      (1) Federal common law
      (2) State law applies if state law supplies "rule of decision"
      (3) Iowa rules - no change

   D. Article IX - Authentication - Identification

      (1) Seldom contested
      (2) Multiple examples

   E. Article X - Contents of Writings, Recordings and Photographs

      (1) "Best Evidence" Rule
      (2) Watch for hooker in Rule 1008 (judge and jury)

F. Article XI - Miscellaneous

(1) Where and when Rules applicable
(2) How amended
(3) How cited - Iowa R. Evid.

3. Witnesses - Lay and Expert

A. Article VI - Witnesses

(1) Civil vs. Criminal Proceedings
(2) Competency (e.g., Deadman statute)
(3) Methods of examining witnesses
(4) Rule 701 - opinions of lay witnesses

B. Article VII - Opinions and Expert Testimony

(1) Remember Rules 103-04
(2) Bases of opinion testimony
(3) How far can experts go - and with what
(4) McCormick article - 67 Iowa L. Rev. 879 (1982)
(5) Rule 706 - court-appointed experts

4. "It's Incompetent, Irrelevant, Immaterial and Hearsay, Your Honor"

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(2) 803 - Exceptions (Declarant's availability immaterial)
(3) 804 - Exceptions (Declarant unavailable)
(4) 803(24), 804(b)(5) "Other exceptions" - Residual rules
(5) 805 - Hearsay within hearsay
(6) 806 - Credibility of declarant

5. The Last Shall Be First

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(1) Scope, purpose, construction
(2) Making a record

(3) Preliminary questions - procedure (avoiding the hasty verdict)
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(5) Burden of proof for admissibility [State v. Miller, 204 N.W.2d 834, 840 (Iowa 1973)]

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APPENDIX A
"TABLE OF CONTENTS" to
THE FEDERAL RULES OF EVIDENCE

PUNITIVE DAMAGES IN STRICT LIABILITY CLAIMS

ROLAND C ANDERSON
Dallas Texas

"'My punishment is greater than I can Bear. Behold, thou hast driven me this day away from the ground; and from thy face I shall be hidden; and I shall be a fugitive and a wanderer on the earth, and whoever finds me will slay me.'"
Genesis 4:13-15

I. INTRODUCTION

Cain's statement that his punishment might be greater than he could ever bear is one current manufacturers might consider making themselves. With the advent of strict liability in tort, a "no-fault" liability structure judicially and legislatively created to circumvent the plaintiff's responsibility of establishing culpable conduct in order to recover damages, manufacturers have increasingly become the prime target of our litigious society. Compounding this situation has been our culture's recently renewed enthusiasm concerning the award of punitive damages in product liability litigation. While punitive damages have historically been recognized as a viable deterrent tool in the area of willful misconduct, only until recently has the subjective and potentially dangerous weapon of punitive damages been applied to the no-fault area of strict liability.

This paper will argue that assuming willful misconduct or assuming punitive damages have a valid purpose to deter gross negligence, they nevertheless are inconsistent with and antithetical to the policies and purposes of strict tort liability. Therefore, an action in strict tort liability should not, as a matter of law, be allowed to support any award of punitive damages.

It is important to delineate the scope of this argument, something recent judicial decisions have often failed to do. The terms "product liability" and "strict liability" are oftentimes bantered about as synonymous. This is clearly not the case. Generally speaking, the term "products liability" refers to a personal injury action involving a product. The actual theory of liability, however, may lie in negligence, warranty and/or strict liability. In this regard, negligence is a tort

action, warranty is generally considered a hybrid form of contract, and strict liability is essentially a no-fault form of tort responsibility. This paper will argue that punitive damages should not, as a matter of law, be applicable in a strict liability cause of action. Policy and logistical concerns, as well as common sense, simply demand that the manufacutrer, unlike the Biblical Cain, not be subjected to a punishment greater than one can bear.

II. PUNITIVE DAMAGES: AN HISTORICAL PERSPECTIVE

A. The Purported Purpose

Punitive damages have historically been denounced as inappropriately interjecting into our civil system a criminal form of justice generally reserved for the criminal arena. In this regard, punitive or exemplary damages punish a defendant without the usual safeguards of criminal procedure, such as proof of guilt beyond a reasonable doubt, the privilege against self-incrimination, and the rule against double jeopardy. P. JAMES, GENERAL PRINCIPLES OF THE LAW OF TORTS 13-15, 402 (3d ed. 1969); WALTHER, Punitive Damages - A Critical Analysis, 49 Marq.L.Rev. 369 (1965). Additionally, punitive damages have been assailed as providing undue compensation for the plaintiff beyond his just desserts. Conversely, proponents of punitive damages have hailed their effect of punishing the defendant and deterring similar wrongdoing in the future. Morris, Punitive Damages and Tort Cases, 44 Harv.L.Rev. 1173 (1931). Additionally, punitives have been lauded as a mithod of enticing injured plaintiffs into having their wrongs redressed with the hope of inflated damages, thereby creating a form of private law enforcement. Owen, Punitive Damages in Products Liability Litigation, 74 Mich.L. Rev. 1258, 1287 (1976). Regardless of these criticisms and praises, the general utilization of punitive damages in the negligent and intentional tort area seems to be embedded in our history. Nevertheless, the question arises today as to whether or not the purposes of punitive damages are commensurate with the policies underlying our newest form of tort responsibility, strict liability.

One of the most often cited purposes of punitive damages is that of punishment. When the judicial system, whether civil or criminal, punishes an alleged wrongdoer, the injured party receives the satisfaction of seeing

justice administered. Kings vs. Towns, 120 Ga.App. 895, 902-903, 118 S.E.2d 121, 128 (1960); I. KANT, THE PHILOSOPHY OF LAW, pt. 2, §29, E (W.Hastie transl. 1887). Additionally, punitive damages allegedly serve the purpose of not only punishing the defendant in relationship to the injured party, but as to society as a whole. This rationale, at least theoretically, is supported by the notion that properly channelled retribution into the civilized halls of our courtroom will prevent vigilante justice on the streets. O. HOLMES, THE COMMON LAW, 41-42 (1881). Finally, it has been written that punishing the wrongdoer and rewarding the injured party, as the case may be, also reinforces in our law- abiding citizens the confidence necessary to maintain an overall functioning purportedly nonviolent culture. C. FRIED, AN ANATOMY OF VALUES, 121-26 (1970).

While the policy of retribution, revenge if you will, is supportive of punitive damages in only a theoretical and psychological sense, it nevertheless gives way to the primary rationale for punitive damages: deterrence. The key rationale to punishing a defendant above and beyond compensatory damages is that such punishment deters the defendant from acting in an improper manner in the future. Fletcher vs. Western Natl. Life Ins. Co., 10 Cal.App. 3rd 376, 89 Cal.Rptr. 78 (1970); Walker vs. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961). While the practical effectiveness of punishment as a deterrence factor in a

civil system has long been debated, it is arguable that at least some deterrent effect is achieved by punishment. W. MIDDENDORFF, THE EFFECTIVENESS OF PUNISHMENT, 49, 53-67 (1968). The key debate, then, focuses upon whether the amount of deterrence achieved is worthy of the harm created by the infiltration of punishment into a civil system of justice.

The effectiveness of rationalizing punishment as a means of achieving deterrence presupposes that manufacturers of products are aware of the potential effect of punitive damages and can actually engage in production of a safer product. While some have argued that, as a general rule, a manufacturer is always able to market a "safer" product if it so desires, this ignores such factors as cost practicalities and the state of the art. 2 F. HARPER AND F. JAMES, LAW OF TORTS, 756-57, 1205-06 (1956) (arguing manufacturers may virtually always improve their products).

Private law enforcement of public protection is another rationale advocated by some in addition to the other previous goals of punitive damages. Proponents of a liberal punitive structure argue that allowing exemplary damages motivates many reluctant plaintiffs to press their claims. Owen, supra, at, 1287. In other words, punitive damages encourage plaintiffs to act as "private attorneys general," and thereby increase the number of tortfeasors who should be punished for their wrongdoings. Fay vs. Parker, 53 N.H. 342, 347 (1873). Thus, the private prosecuting plaintiff is

"compensated" for prosecuting his claim with an award of punitive damages; in other words, punitive damages serve as the "attorneys fees" for pursuing compensation. Neal vs. Newburger Co., 154 Miss. 691, 700, 123 S. 861, 863 (1929). Additionally, it has been argued that punitive damages help put into effect our various rules of substantive law. Becker & Stigler, Law Enforcement, Malfeasance and Compensation of Enforcers, 3 J. Legal Studies, 1, 6 (1974). In this regard, the substantive rules of tort law are seen not only as a compensation method for the injured plaintiff, but are viewed as a form of criminal enforcement through which society should conform to a normative behavior.

The final rationale usually put forth for the advent of punitive damages is that of a hybrid form of compensation. As noted above, many have argued that punitive damages are compensatory in nature in that they reimburse the plaintiff for attorneys fees paid in pursuit of compensation. Hicks vs. Herring, 246 S.C. 429, 437, 144 S.E.2d 151, 155 (1965); Pan Am. Petroleum Corp. vs. Hardy, 370 S.W.2d 904, 908 (Tex.Civ.App. -- Waco 1963, writ ref'd n.r.e.). In this regard, punitive damages do act as a mechanism of compensation, even if this rationale does circumvent the firmly established American rule unequivocally prohibiting awards of attorneys' fees in the absence of statutory authorization. Sillinger vs. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 521 P.2d 1119 (1974)(en banc); RESTATEMENT (2nd) OF TORTS §914 (Tent. Draft No. 19, 1973).

While the above rationales have been touted as supporting the creation and maintenance of a punitive damage structure in general, they fail to focus upon the specific policy doctrines inherent in strict liability, as opposed to gross misconduct product litigation. These historical rationales may fit in the confines of a negligence system. They do not, however, sound in harmony with the purposes of a no-fault strict liability mechanism for compensatory recovery. The incompatibility of punitive damages with strict liability can best be viewed in the context of punitive damages in a fault-based system.

B. Punitive Damages in Fault-Based Negligence

Some courts have held that product liability suits grounded in negligence and strict liability, where the verdict is based on both theories (or it is unclear which theory the jury based its verdict upon) are amenable to an award of punitive damages. For example, in Gillham vs. Admiral Corporation, 523 F.2d 102 (6th Cir. 1975), cert. denied, 424 U.S. 913 (1976), the United States Court of Appeals for the Sixth Circuit upheld a punitive damage award of $100,000 based upon the plaintiff's alternative pleading of strict liability, negligence, and breach of warranty. The jury returned a general verdict as to liability, and the court held that a punitive damage award required a finding of "fraud, insult, or malice"; malice could, however, be inferred from conduct and surrounding circumstances. Id.,

at 108. Conduct giving rise to an inference of malice included "reckless, wanton, willful and gross acts which cause injury to person or property." Id. Thus, in addition to putting on proof of the defendant's lack of reasonability in marketing its product, the plaintiff was also allowed to delve into the allegedly gross misconduct of the defendant in its actions. Instructed in this regard, the jury levied punitive damages, and this award was held commensurate with policies of deterrence and punishment.

In 1978, the Missouri Court of Appeals upheld a $460,000 award of punitive damages, stating that punishment and deterrence are as much needed in the products liability area as they are in more traditional torts. In Rinker vs. Ford Motor Company, 567 S.W.2d 655 (Mo.App. 1978), the Court applied the following standard for punitive damage recovery: "Complete indifference to or conscious disregard for the safety of others." Id., at 667. Again, in addition to proof establishing the negligent conduct of the defendant, the plaintiff attempted to and was successful in establishing a greater lack of care than mere unreasonability. This allowed the jury to return a verdict of punitive damages.

The Supreme Court of Wisconsin has also been fertile ground for the award of punitive damages in product liability cases. In Wangen vs. Ford Motor Company, 97 Wis.2d 260, 294 N.W.2d 437 (1980) a product liability suit predicated on theories of both strict liability and negligence, the court held that where it was unclear from the verdict

whether the jury relied on either the liability theory of negligence or strict liability, it would be presumed that punitive damages were appropriate. There the court rejected the argument that punitive damage awards were inappropriate because they may financially ruin many defendants, thereby causing undesirable social consequences which outweigh the historical rationale for the award. This court also concluded that punitive damages are as much needed in the products liability field as they are in any other area of tort law. The standard of recovery in Wisconsin was stated to be a "showing of reckless indifference to or disregard of the rights of others." Id. at 442. Additionally, the burden of proof for establishing such a punitive base of conduct must be met by "clear, satisfactory and convincing" evidence. Id. at 458.

The state of Florida has likewise recently held that a plaintiff may recover punitive damages in a products liability case. In American Motors Corporation vs. Ellis, 403 So.2d 459 (Fla. Dist. Ct. App. 1981), the Florida court held that when the plaintiff alleges both strict liability and negligence as bases for liability in attempting to recover for an injury, punitive damages will lie when the plaintiff establishes the following standard of defendant conduct: "willfulness, recklessness, maliciousness, outrageous conduct, oppression or fraud." Id. at 467. In this case, because evidence established the manufacturer was aware of a product defect prior to marketing and had refused to correct

the problem for economic reasons, the claim for punitives presented a question for the jury. That claim was upheld.

The state of Texas has also recently recognized the viability of exemplary damages in product liability cases. In Burk Royalty Company vs. Walls, 616 S.W.2d 911 (Tex. 1981), the Texas Supreme Court accepted and approved the long recognized definition of gross negligence which could be the basis for an exemplary damages award in products liability litigation; the basis for such an award must be either "heedless and reckless disregard" or "gross negligence":

> Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.

Id. at 920.

However, the Burk Royalty court reversed the long-standing Texas tradition that a defendant had the opportunity to overturn a jury verdict of gross negligence, either in a trial court review of the verdict on a Motion for Judgment NOV or in an appellate review on a "no evidence" point. The court reassessed the standard of review in cases involving jury findings of gross negligence and significantly changed the standard of review. Id. at 920-22. In reviewing a jury finding of gross negligence, both the Texas Supreme Court and the lower courts are now to consider "only the evidence, when viewed in its most

favorable light, that tends to support the jury's finding of gross negligence and to disregard all evidence leading to a contrary conclusion." Id. at 915. This change in the standard of review actually creates a change in the substantive law relating to gross negligence and punitive damages, although the Texas Supreme Court attempted to avoid so holding in the language of its opinion. In addition to changing the standard of review on "no evidence" points relating to gross negligence verdicts, the Texas Supreme Court also emphasized that in reviewing a jury finding of gross negligence, the phrase "an entire want of care" must be understood in the context of the whole definition of gross negligence. Id. at 922. Thus, a finding of "gross negligence" may be had on the entire record of appeal as opposed to specific instances of the defendant's conduct.

This brief review of recent state and federal decisions affirming punitive damage awards in negligence or negligence and strict liability cases indicates an adoption of the historical rationale for exemplary damage awards. In the classic product injury suit, the plaintiff often alleges negligence, breach of warranty and strict liability. While the latter two of these liability theories may be easier to prove in that the plaintiff is not required to show any form of culpable conduct, whatever evidence the plaintiff can muster as to such wrongdoing by the alleged tortfeasor is nevertheless beneficial for the plaintiff if for no other reason than to cast doubt upon the credibility of the

defendant. In this classic case, then, the plaintiff will put on evidence of the wrongdoing of the defendant, the existence of some type of warranty agreement and breach thereof, as well as the nature of the defect in the product as defined under applicable strict liability laws. Assuming the plaintiff is attempting to recover punitive damages, the injured party will also engage in an attempt to show some form of willful or reckless conduct in order to support punitive damages. In this regard, the defendant's conduct should be either intentional or so reckless and wanton as to border on criminal. However, typically the plaintiff attempts to support a claim of punitive damages by evidence of, at most, some "advanced form" of negligence. Assuming that the jury is given a general verdict, or assuming that their verdict includes at least two of the three proposed theories of liability (for example, negligence and strict liability), the court may permit an award of punitive damages. The rationale for the award is the already discussed policy theories of punishment, deterrence, law enforcement and compensation.

What is important to note about these cases is that none of them involve the application of punitive damages to a strict liability theory standing alone. Indeed, several very recent decisions have refused to address the issue of whether punitive damages should be applied only to a strict liability count. See, e.g., Vanskike vs. ACF Industries, Inc., 665 F.2d 188 (8th Cir. 1981)(refusing to address the

issue of whether or not to allow punitive damages in solely strict liability case, but indicating that the State of Missouri would find punitive damages inconsistent with strict liability). Courts are apparently hesitant to address this specific issue because of the lack of precedent for a decision as well as the inherent difficulties in balancing the policies involved.

It is also important to note that the cases discussed above allow punitive damages in circumstances where culpable conduct of the defendant is directly in issue as to liability. When negligence is a proposed theory of recovery, evidence of the defendant's allegedly wrongful conduct is obviously an essential element. Evidence to support a punitive damages award is an extreme and aggravated version of this evidence, for the strategically-wise plaintiff will attempt to make out the defendant's wrongful conduct in as heinous a light as possible. In this regard, evidence of gross misconduct deserving of exemplary damages is at least somewhat consistent with the type of evidence introduced under negligence theories. Conversely, such wanton or reckless conduct is inconsistent with the underlying policies of strict liability; while punitive damages focus on the conduct of the defendant, the strict liability cause of action clearly focuses on the product itself. Thus the cases allowing punitive damages where the defendant's fault is in issue do not necessarily support, either on practical or

theoretical grounds, the grant of a punitive damage award where strict liability is the only basis of liability.

The issue, then, is whether punitive damages should be allowed when a cause of action is brought only in strict liability or when it is clear from the verdict that the only basis for the plaintiff's award is that of a strict liability theory.

III. STRICT LIABILITY: PURPOSE AND EFFECT

The doctrine of strict liability originally arose in response to the inability of injured plaintiffs to achieve compensation under preexisting liability structures. The initial rationale for its proliferation was the theory of economic distribution of loss. That is, the risk of injury can best be borne by the manufacturer as an insured party and then distributed amongst the public as a cost of doing business. Greenman vs. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1962)(Traynor, J., concurring). Strict liability has thus been viewed as an instrument of social engineering to handle accident compensation problems that cannot otherwise be provided for. This risk spreading technique has often been seen as the very core of the rationale supporting a strict liability structure. Wilson, Products Liability, 43 Calif.L.Rev. 809 (1955). Compare Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products - An Opposing View, 24 Tenn.L.Rev. 938 (1957).

Additional policy arguments advanced by commentators and courts alike include the following:

1. Sellers are in a better position than consumers to identify potential product risks, to determine acceptable levels of those risks, and to prevent those risks from reaching the public. Therefore, product sellers should be held to a form of no-fault liability;

2. Most product accidents not caused by some form of product misuse or contributory fault of the user are probably due to the negligent act or omission of the manufacturer during some stage of the manufacturing or marketing process, yet the difficulties of discovering and proving this negligence are often practically insurmountable, thereby necessitating what is essentially a more liberal form of liability;

3. Only through a no-fault liability structure will manufacturers be induced to market products that are generally safe for consumer consumption;

4. Consumers simply no longer have the ability to protect themselves from defective products. The days of caveat emptor are long gone due to the vast number and complexity of products consumed in our modern day society. P. KEETON, D. OWEN, AND J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY, 212 (1980); Montgomery and Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C.L.Rev. 803, 809-10 (1976). See also Klemme, The Enterprise Liability Theory of Torts, 47

Colo. L. Rev. 153, 175-94 (1976); Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. J. 825-26 (1973); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L. J. 1099, 1114-24 (1960).

Additionally, it is often argued that raising a level of a manufacturer's legal responsibility from "reasonable care" to "strict accountability" necessarily increases the manufacturer's care in producing and distributing his product and thereby deters the proliferation of defective products into the marketplace. While many defense lawyers have argued that this standard of "defective" or "unreasonably dangerous" is too vague to establish a meaningful product safety net by discouraging poorly made products, deterrence is still one of the basic tenets of strict liability. This rationale is likewise cemented in Justice Traynor's concurrence in Greenman, supra. See Raleigh, The "State of the Art" in Product Liability: A New Look at an Old "Defense", 4 Ohio N. L. Rev., 249, 250-52 (1977)(citing a manufacturer's dissatisfaction with prevailing rules of strict liability and noting that deterrence is not effected).

For a perceptive review of traditional strict liability policy arguments, critical of those rationales, see Owen, Rethinking the Policies of Strict Products Liability, 33 Vand. L. Rev. 681 (1980).

These varying rationales are recognized in differing combinations by all states adopting some form of strict liability. Whether the adoption be judicially created or

legislatively mandated, and regardless of the similarity of each state's phraseology of the theory in relation to 402A of the RESTATEMENT (2d) OF TORTS, these policy arguments stand as the very foundation of the imposition of strict liability. As Professor Owen quite aptly points out, it may be time for plaintiff and defense lawyers alike to rethink the need for such a liability structure in current society.

Nevertheless, even assuming that these policy rationales are valid, the question remains whether the use of punitive damages in conjunction with strict liability meets the goals of the two separate judicial devices. Let us assume that strict liability and the underlying policy rationales are valid. Society wishes the potential plaintiff to have some reasonable forum in which to pursue compensation for legally recognized injuries. Assuming that these structures of punitive damages and strict liability are viable in their respective ends and means, are they consistent when one structure is overlayed upon the other? If so, would allowing punitive damages in a strict liability action further the policies of both. If <u>not</u>, the two must be made to operate exclusively, and one must give way to the other, depending on which policy goals are deemed the more important

IV. THE CAIN AND ABEL OF PRODUCT LITIGATION: PUNITIVE DAMAGES AND STRICT LIABILITY STRANGE BEDFELLOWS MAKE

The theory of punitive damages is inconsistent with the doctrine of strict liability. Punitive damages were developed long before the idea of holding a manufacturer liable for defective products became effective. Huckle vs. Money, 95 Eng. Rep. 768 (1763)(first case recognizing punitive damages). Exemplary damages evolved in the context of tortious activity as a deterrent for intentional or reckless conduct. The key focus in awarding punitive damages is the character of the act; that is, a person must act or fail to act in a specific way for punitive damages to properly lie. Thus, the intent of the defendant or his state of mind at the time of the tortious act are of paramount importance.

Strict liability, conversely, relieves the plaintiff of the burden of proving any particular type of conduct on behalf of the defendant. See, e.g., Dippel vs. Sciano, 37 Wis. 2d 443, 155 N.W. 2d 55 (1967). Thus liability does not arise from any particular negligent act or finding of fault, but rather from a factual finding that the product released into the stream of commerce is defective or unreasonably dangerous. In this regard, strict liability focuses upon the nature of the product as opposed to the conduct of the individual defendant. This is the key difference between negligence and strict liability, and is indeed the very purpose for the promulgation of the latter theory. Thus, strict liability and negligence are mutually exclusive theories of liability and as such are to be pleaded in the alternative. Consequently, "Negligence is conduct-oriented,

asking whether defendant's actions were reasonable; strict liability is product-oriented, asking whether the product was reasonably safe for its foreseeable purpose." Gold vs. Johns-Manville Sales Corporation, 553 F.Supp. 482, 483-84 (D.N.J. 1982).

It is evident that the very focus of punitive damages, as opposed to strict liability, creates a type of disharmony between the two doctrines. To advocate both structures predicated upon public policy reasons would allow plaintiffs to essentially have their cake and eat it too. In other words, strict liability evolved as a method of lessening the plaintiff's burden of proof in order that compensation may be had when appropriate. This burden of proof was lessened by allowing compensation even though the plaintiff was unable to prove any type of culpable conduct on the part of the defendant. Thus, the plaintiff's only substantial burden was establishing that the product was "defective." To allow punitive damages, however, it is clear the plaintiff should be required to establish much more than culpable conduct on the part of the defendant. The aggrieved party must establish willful or reckless conduct as well. To allow the plaintiff a lesser burden of proof to establish liability because of the difficulty of establishing culpable conduct, but then to turn around and allow the plaintiff to attempt to establish punitive damages based on an extreme form of culpable conduct, particularly once liability has been established, defies logical explanation. On the one hand,

plaintiffs are demanding a no-fault form of liability so they can recover compensation, but at the same time, they are demanding punitive damages which require proving extreme culpable conduct. If a plaintiff is confident he can establish the culpable conduct necessary to support punitive damages, or even come close to that proof, then surely his theory of liability will be negligence as well as strict liability. If that is the case, in those instances strict liability is not needed as a basis of affording compensation for the plaintiff. Thus, strict liability and punitive damages are inconsonant with the purpose of the respective doctrines' focus.

It is interesting to note that the only common policy rationale supporting punitive damages and strict liability is that of deterrence, discouraging the manufacturer from producing defective products. This could be a laudable policy in the abstract with the argument that strict liability actually does deter such acts. However, this one common goal is constantly on tenuous ground when placed into effect in a civil system of law. Clearly the criminal law system has historically been recognized as the primary method of deterring bad acts in our society. It is again questionable whether our civil system of compensation should be actively engaging in this same type of societal molding. Indeed, it should be agreed that the key purpose of our civil system is to provide an adequate compensation system for plaintiffs. To allow both punitive damages and strict

liability to be supported by this tenuous civil system of deterrence should at best cause us some concern. Thus, while deterrence of bad acts is clearly a legitimate goal in general, it may very well not be the type of activity in which our civil system should engage. At the very least, we should question whether this type of tangential rationale for our civil system of compensation should support both punitive damages and strict liability. Even if one accepts the premise that punitive damages are appropriate in our civil justice system, it would seem that the application of punitive damages upon proof of gross negligence is more than adequate to safeguard the applicable social policies. Allowing punitive damages based upon underlying strict liability is an inconsistent and unnecessary duplication and will, in practice, create a different and probably lesser standard for the imposition of this most extreme remedy.

It is also apparent that other underlying policies of the two doctrines directly conflict. For example, punitive damages have long been seen as a method of punishment. Strict liability, conversely, has been forced upon manufacturers based on the theory they are in a better position to control the risk of a defective product and thus should bear the heavy burden of risk allocation. It is highly questionable whether heaping additional punishment upon the defendant will encourage him to create a more fair risk allocation or result in any additional deterrence other than

that presently existing from the threat of a punitive damage assessment upon proof of gross negligence.

Likewise, the private law enforcement policy supporting punitive damages directly conflicts with the compensatory nature of strict liability. The result of this private law enforcement theory, particularly where punitive damages are involved, will have one of several effects: bankrupting the defendant, increasing insurance and product costs, or simply encouraging excessive litigation because of the promise of unjustly excessive awards. The results are detrimental to everyone. If a defendant is driven out of business, no one is well served. In essence, the fastest plaintiff to the courthouse wins not only his share of the pie, but also potential shares of other injured parties. Finally, encouraging spurious litigation serves no other purpose than clogging up an already backlogged court system, thereby denying speedy and efficient justice to those who may deserve it.

Recent case law at the federal level supports these arguments. In Wolf by Wolf v. Proctor & Gamble Company, 555 F.Supp. 613 (D. N.J. 1982), the district court held that under New Jersey law punitive damages are not recoverable under strict liability. The holding was based on the fact that punitive damages are based on a theory inconsistent with a claim for compensatory damages under strict liability. Because the plaintiff in Wolf had also alleged theories of negligence and warranty, however, the trial judge refused

to rule as a matter of law that punitive damages were not available in the case.

The same result was reached by the trial judge in Gold v. Johns-Manville Sales Corporation, 553 F.Supp. 482 (D. N.J. 1982). Here again, the court, examining New Jersey law, held that an action based on strict products liability cannot support a claim for punitive damages. The court analogized the situation to the case precedent in New Jersey, holding that state of the art cannot be a complete defense to liability because it is based upon the defendant's knowledge; thus, it is a negligence concept that focuses upon the reasonableness of the defendant's behavior rather than upon whether or not the product was reasonably safe. Therefore, as state of the art as a complete defense to liability is held inconsistent with strict products liability in New Jersey, punitive damages were likewise held not to be consonant with a strict liability theory: "Put another way, the claim of punitive damages based on the fact that the defendants knew too much is the flip side of this state of the art defense. Both are 'negligence concepts with their attendant focus on the reasonableness of the defendant's behavior' which should be eschewed in product liability litigation for policy reasons." Id. at 484.

The Gold court specifically held that the use of punitive damages in strict liability litigation directly contradicts the strict liability theory of risk distribution. The decision noted that the allowance of punitive damages would

warp the evaluation process implicit in the strict liability litigation process. That is, the product's price should reflect the cost of accidents or the cost of accident avoidance mechanisms in order that the market may assess the usefulness of the product. The assessment of punitive damages to manufacturers and distributors could thus be analyzed as the imposition of costs for poor managerial decisions. The court held that these costs should not be spread to the buying public through an upward adjustment of a product's price. To do so would be to deflate the usefulness of a product on the basis of facts which do not relate directly to the product itself. Id. at 484. Additionally, the decision emphasized that a finding of punitive damages in a strict liability cause of action compromises the policy of isolating specific theories of strict liability from general concepts of negligence. Because punitive damages is clearly a gross negligence concept concerned with behavior, the Gold court concluded that the inclusion of punitive damages in a strict products liability suit would confuse the jury and undermine the goals of the cause of action. Therefore, punitive damages cannot be supported by a strict liability theory at trial.

The Federal District Court for the State of Maryland is in accordance. In Butcher vs. Robertshaw Controls Company, 550 F.Supp. 692 (D.Md. 1981), the court held that under Maryland law, a claim for punitive damages could not be included in the plaintiff's strict liability count brought

against manufacturers of a hot water heater. Citing to the policy rationale of the RESTATEMENT (SECOND) OF TORTS, §402A, Comment C, the Butcher court simply held that this policy-based theory of strict liability is incompatible with punitive damages. Therefore, punitive damages as a matter of law cannot be supported by a strict liability claim.

Other courts have refused directly to address the issue but have indicated they would hold against allowing punitive damages. In Vanskike vs. ACF Industries, Inc., 665 F.2d 188 (8th Cir. 1981), cert. denied, 102 S.Ct. 1632 (1982), the Eighth Circuit Court of Appeals refused to directly address this issue under Missouri law. Citing a series of Missouri cases, however, the Eighth Circuit concluded that if confronted with the question, Missouri would find punitive damages inconsistent with strict liability because punitive damages look to the defendant's fault as opposed to the product itself. Id. at 208, n.18. The Eighth Circuit discussed the issue at some length and intimated in dictum it was in agreement with this approach.

In Maxey vs. Freightliner Corporation, 665 F.2d 1367 (5th Cir. 1982), the Fifth Circuit Court of Appeals held that punitive damages would lie if there was an adequate finding of "gross negligence" at the trial level. The case was remanded to the trial court which found plaintiff failed to prove misconduct of the defendant sufficient to support the jury's award of punitive damages and is on its way back up to the Fifth Circuit on appeal. Maxey vs. Freightliner

Corporation, _____ F.Supp. _____ (N.D.Tex. January 4, 1983).

See also, Reed vs. Tiffen Motor Homes, Inc., 697 F.2d 1192 (4th Cir. 1982)(refusing to address the issue whether punitive damages are recoverable in an action sounding only in strict liability, and noting the split in authority on the issue).

Various state courts, however, have held to the contrary and supported punitive damage awards based upon strict liability. In Sturm Ruger & Company vs. Day, 594 P.2d 38 (Alaska 1979), modified, 615 P.2d 621 (Alaska 1980), the Alaska Supreme Court held that punitive damage claims were permissible in strict product liability actions. Noting Professor Owen's exhaustive article advocating punitive damages in the strict liability context, supra, the court decided that punitive damages would have a deterrent effect on manufacturers when a defective product caused numerous injuries of a minor magnitude to persons who could not afford to sue if punitive damages were otherwise not available. It is unclear whether the court would extend punitive damages beyond this realm, that is, when serious injuries apply from a defective design. The court thus held that if a plaintiff could prove that the manufacturer knew its product was defective, was aware of resulting injuries or deaths, and nevertheless continued to market the product in reckless disregard of the public's safety, the jury could award punitive damages. The standard adopted by the Alaska

Supreme Court was that of "reckless indifference." It is interesting to note that at trial the jury awarded almost $3,000,000 in punitive damages. On appeal, the Supreme Court reduced the award to $250,000 and on rehearing, modified its ruling to raise the award to $500,000.

Addressing the viability of punitive damages in a suit based solely upon strict liability, the Minnesota Supreme Court has also held that punitive damages are an appropriate device to prevent manufacturers from distributing defective products in flagrant disregard of public safety. In Gryc vs. Dayton-Hudson Corporation, 297 N.W.2d 727, cert. denied, 101 S.Ct. 320 (1980), the court upheld a $1,000,000 punitive damage award for an act that was achieved "maliciously or in a willful or wanton manner." Id. at 738 n.5. In this case the court found that the evidence below supported a punitive damage award even though the defendant had complied with federal safety regulations in the manufacture of its products.

See also Grimshaw vs. Ford Motor Company, _____ Cal. App.3rd _____, 174 Cal.Rptr. 348 (1981)(holding plaintiff could recover punitive damages in strict products liability suit based on theory of deterrence; manufacturer has shown callous indifference to public safety in marketing product that its own tests had shown to be "highly dangerous"); Leichtamer vs. American Motors Corporation, 67 Ohio St.2d 456, 424 N.E.2d 568 (1981)(strict liability suit was basis for punitive damages where conduct was a "flagrant

indifference to the possibility that the product might expose consumers to unreasonable risks of harm"). See generally D'Hedouville vs. Pioneer Hotel Company, 552 F.2d 886 (9th Cir. 1977)(applying Arizona law and allowing strict liability with punitive damages); Johnson vs. Huskey, Ind., Inc., 536 F.2d 645 (6th Cir. 1976)(applying Tennessee law with punitives and strict liability); Simmons vs. Atlas Mach. Company, 475 F.Supp.1181 (E.D.Wis. 1979); Thomas vs. American Cytoscope Makers, Inc., 414 F.Supp. 255 (E.D.Pa. 1976); Heil Company vs. Grant, 534 S.W2d 916 (Tex.Civ.App. - Tyler 1976, n.r.e.)(allowing punitive damages on a strict liability count but only in a wrongful death action).

Thus the authorities are split on the issue of whether a strict liability count should be able to support a punitive damage theory. The deciding factor seems to be whether the inherently conduct-oriented posture of punitive damages can or cannot be seen as compatible with the defect-oriented issue of strict liability. The resolution of that issue would seem to resolve the conflict.

V. CONCLUSION

When the Biblical Cain fatally injured his brother Abel and was required to answer for his wrong, the Lord refused to place upon him punishment greater than he could bear. Manufacturers approaching the twenty-first century likewise cry out for assistance. Utilizing the potentially deadly weapon of punitive damages in conjunction with the liberal

theory of strict liability places the manufacturer in a no-man's land of litigation. The plaintiff has the opportunity to prove a case under a relatively simple standard, purportedly because that is the only way to achieve compensation, but then the plaintiff is inexplicably allowed to turn forces toward the issue of culpable conduct of the defendant. When this occurs, the plaintiff is allowed to prove liability based upon a product oriented theory then add evidence of culpable conduct to the mix to produce a punitive damage award. Such a situation will almost certainly lead to punitive awards based upon a standard much lesser than gross negligence since the plaintiff is not required to first prove culpable conduct (negligence) and then extreme culpable conduct (gross negligence). Allowing the application of punitive damages in a strict liability context will have the practical effect of substantially reducing the standard for punitive awards in an area which is already punitive in nature due to the low standard which the plaintiff must meet to succeed on a strict liability theory.

It was once said that one of the weaknesses of our age is our apparent inability to distinguish our needs from our greeds. Attempting to establish a dual system of strict liability and punitive damages not only turns need into greed, it actually places one in contradiction to the other. The policy objectives supporting strict liability are inconsistent and conflict with those based in punitive damages. In the final analysis, to allow the plaintiff to avoid

having to prove culpable conduct in order to recover, yet likewise allowing the plaintiff to delve into that issue in terms of remedy is inherently contradictory and unfair. If a plaintiff thinks he has the ammunition with which to prove or come close to proving punitive damages, then clearly negligence will be his cause of action. If he does not, then strict liability is the path to follow, and punitive damages are immaterial. Additionally, the fact that punitive damages focus upon culpable conduct, and strict liability focuses on the product itself, mandate that the two inconsistent theories not be utilized in the same breath.

Thus, as a policy matter, in an action based solely on strict liability, or in an action in which the verdict is based solely upon a theory of strict liability, punitive damages, as a matter of law, should not be allowed. If a case is submitted to jury on theories of both negligence and strict liability, specific fact findings on the theories should be required. To allow otherwise would be to juxtapose the policy concerns of punitive damages against strict liability in an effort to allow injured consumers to have their cake and eat it too. We are all born brave, trusting and greedy, and while most of us remain greedy, there is no reason to inject our judicial system with the malaise of such inherent contradictions.

It can also be argued that if a punitive damage structure is to be allowed the plaintiff should be required to prove the existence and amount of punitive damages by "clear

and convincing proof," an evidentiary burden greater than a preponderance but less than beyond a reasonable doubt. Punitive damages are penal in nature, yet they are levied through a civil system; therefore, the safeguards of our criminal system are unavailable to the punished manufacturer. If exemplary damages are to be recognized in this regard, the burden of proof for those damages should be raised above that of a mere preponderance. Indeed, one court has already seen fit to implement such a structure. Wangen vs. Ford Motor Company, 97 Wis.2d 260, 294 N.W.2d 437, 458 (1980). To allow otherwise will allow the plaintiff the authority to exercise penal sanctions without allowing the defendant to defend himself in conjunction with our narrative policies of judicial punishment. What's fair is fair. If the plaintiff is granted the power to punish in a civil system, so too should the defendant be allowed to protect itself with safeguards consonant with a penal remedial system.

Our sense of justice and fairness tells us that the punishment must fit the crime. If a manufacturer's only "crime" is being subject to the policy-oriented myth of strict liability, surely the most severe "punishment" available should be that of compensation. Allowing the greed of overcompensation to subassume the need for a proper compensatory system will simply crumble the structure upon which the policy of strict liability is built. If that

occurs, eventually the injured consumer will be the most injured party of all.

SUBROGATING ECONOMIC LOSS

John B. McCabe*

Lisa D. Marco**

I.

INTRODUCTION

A. Economic Loss Defined:

1. Economic loss has been variously defined.

Most often it is described as:

"damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits--without any claim of personal injury or damage to other property. . . (Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966)) and also. . . diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." (Note, Manufacturers' Liability to Remote Purchasers for 'Economic Loss' Damages--Tort or Contract? 114 U. Pa. L. Rev. 539, 541 (1966)).

2. Some courts have attempted to abolish the "physical harm" distinction between property damage and economic loss and instead focus upon the commercial expectations of the contracting parties.

a. Fireman's Fund Amer. Ins. Co. v. Burns Electronic Security Services, Inc., 93 Ill. App. 3d 298, 417 N.E.2d 131 (1980).

Justice Simon espoused that economic loss is the loss of the benefit of the user's bargain and wrote:

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"We see no reason to make the presence or absence of physical harm the determining factor; the distinguishing central feature of economic loss is not its purely physical characteristic, but its relation to what the product was supposed to accomplish. For example, if a fire alarm fails to work and a building burns down, that is 'economic loss' even though the building was physically harmed; but if the fire is caused by a short circuit in the fire alarm itself, that is not economic loss." Id. at 300.

b. Purvis v. Consolidated Energy Products Co., 674 F.2d 217 (4th Cir. 1982).

Similarly, the court held that when a loss results from mere product ineffectiveness, the law of contracts governs since the user simply lost the benefit of its bargain.

c. This definition of economic loss has not received wide acceptance and was recently rejected by the Illinois Supreme Court in Moorman Manufacturing Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

B. Breach Of Warranty--The Traditional Means Of Recovery:

1. When recovery for solely economic losses is sought and there is privity between the parties, the U.C.C. warranties have generally provided the road to recovery.

a. § 2-313 -- Express Warranties;
b. § 2-314 -- Implied Warranty of Merchantability;
c. § 2-135 -- Implied Warranty of Fitness for a Particular Purpose.

Loyola Law School (J.D. 1981).

2. Even where there is no privity between the parties, there is a modern trend to expand U.C.C. remedies or to create new quasi-contractual implied warranties.

   a. Blagg v. Fred Hunt Co., Inc., 612 S.W.2d 321 (Ark. 1981).

      The court held that a builder-vendor of a house impliedly warranted fitness for habitation not only to the first owner, but also to subsequent purchasers for a reasonable length of time where there is no substantial change or alteration in the condition of the building from the original sale.

   b. Accord: Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 441 N.E.2d 324 (1982); Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979).

   c. Indeed, Mississippi has statutorily abolished the requirement of privity of contract for breach of warranty claims, including actions brought under the U.C.C. See, Miss. Code Ann. § 11-7-20 (Supp. 1982).

II.

RECOVERY OF ECONOMIC LOSSES IN TORT ACTIONS.

A. General Rule: Economic Losses Are Not Recoverable In Tort.

When a contract contains a limitation of liability, disclaimer or exculpatory clause or where privity is required but not present, attempts have been made to circumvent contractual obstacles by bringing suit in tort.

B. Negligence Actions:

1. A minority of jurisdictions have permitted recovery of solely economic losses under a theory of negligence.

Iowa: Iowa Electric Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25 (N.D. Iowa, W.D. 1978).

Recovery for failed transformer may be allowed in negligence action if not barred by contract.

Oregon: Oksenholt v. Lederle Laboratories, CCH Prod. Liab. Rpts. ¶ 9510 (1982).

A physician who settled with a patient for $100,000 after the patient suffered blindness as a result of using Myambutol could maintain an action against the manufacturer for negligence in failing to warn and recover for loss of business and damage to reputation.

Western Seed Production Corp. v. Campbell, 442 P.2d 215 (Or. 1968).

Plaintiff, sugarbeet growers, purchased defective seed causing crop losses and loss of use of land. Because defendant was a remote manufacturer, thereby precluding recovery under the U.C.C., the court permitted the action for negligence to stand.

Washington: Berg. v. General Mot. Corp., 87 Wash. 584, 555 P.2d 818 (1976).

Plaintiff permitted to recover anticipated value of fish catch that predictably could have been taken during the period its boat was out of use due to the repair of a defective engine manufactured by defendant.

Wise v. Hayes, 58 Wash. 2d 106, 361 P.2d 171 (1961).

Recovery permitted against the manufacturer of a negligently labeled insecticide for lost profits and damage to orchards.

Wisconsin: City of LaCrosse v. Schubert, Schroeder & Assoc., Inc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

City permitted to recover, under a theory of negligence, the repair, and replacement costs of defective roof.

Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961).

Builder-vendor could be held liable to purchasers of a home for the cost of repairing latent defects which resulted from the negligent construction of the residence.

2. The majority of jurisdictions, however, hold that solely economic losses are not recoverable in negligence.

Florida: Monsanto Agricultural Products Co. v. Edenfield, 426 S.W.2d 574 (Fla. 1982).

Georgia: Gainous v. Cessna Aircraft Co., 491 F. Supp. 1345 (N.D. Ga. 1980).

McClain v. Harveston, 152 Ga. App. 422, 263 S.E.2d 228 (1979).

Flintkote Co. v. Dravo Corp., 678 F.2d 942 (11th Cir. 1982).

Idaho: Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978).

Illinois: Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

Indiana: Babson Bros. Co. v. Tipstar Corp., 446 N.E.2d 11 (Ind. 1983).

Louisiana: PPG Industries, Inc. v. Bean Dredging Corp., 419 So. 2d 23 (La. 1982).

Minnesota: Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981).

Northern States Power Co. v. International Tel. & Tel. Co., 550 F. Supp. 108 (D. Minn. 1982).

Missouri: Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978).

R. W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818 (8th Cir. 1983).

Nebraska: National Crane Corp. v. Ohio Steel Tube Co., CCH Prod. Liab. ¶ 9564 (1983).

Nevada: Local Joint Executive Bd. of Las Vegas v. Stern, 651 P.2d 637 (Nev. 1982).

New York: County of Westchester v. General Mot. Corp., 555 F. Supp. 290 (S.D.N.Y. 1983).

3. In denying tort recovery for solely economic losses, the foregoing courts have generally determined that contract law provides the appropriate remedies for such losses. To permit recovery in tort would be to thwart remedies provided by the U.C.C.

Indeed, the distinction between economic loss and property damage may be the distinction between tort interests and contract interests. Tort theory is best suited where the physical safety of person or property is threatened. On the other hand, where the loss is solely that of a purchaser's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause, its remedy lies in contract.

Thus, in Trans World Airlines, Inc. v. Curtiss-Wright Corp., 148 N.Y.S.2d 284 (1955),

the court denied recovery in negligence for the cost of replacing defective engines since the defect had been discovered prior to the occurrence of physical damage and held that plaintiff's remedy lay for breach of warranty. Tort interests simply had not been invaded. At page 290, the court stated:

> "The damage asserted by TWA is for replacement cost of allegedly inferior engines--a matter of qualitative inadequacy in a product purchased from Lockheed, a proper subject for a claim of breach of warranty, pure and simple. It is true that when the engines 'failed to operate' the planes became 'imminently dangerous'; but the danger was 'averted'. There was no accident. The malfunctioning of the engines had not yet turned into a misadventure."

C. Strict/Products Liability:

1. For many of the same reasons that recovery under a theory of negligence has been denied, courts have been unwilling to extend the application of products liability where solely economic losses are claimed. This has been especially true where a jurisdiction has adopted Section 402A of the Restatement (Second) which expressly applies only where property damage or personal injury results.
2. Additionally, some courts fear that to permit recovery of economic losses in strict liability would expose a manufacturer to an unlimited scope of damages for unsatisfactory performance of a task that the manufacturer may be unaware and which may only be known by the retailer or distributor.

In Seely v. White Mot. Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965), the court refused to apply strict liability where plaintiff sought recovery of repair costs, purchase price, and lost profits resulting from a defective truck. Fearing unlimited liability of manufacturers, the court held that contract law is best suited for commercial losses because while a consumer should not have to bear the risk of physical injury when he buys a product on the market, he can be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

3. The court in Santor v. A & M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965), took a contrary position. There, plaintiff purchased from a retailer carpeting that shortly thereafter developed unsightly lines. In holding the manufacturer liable for the carpet's diminution of market value, the court noted:

> ". . .the great mass of the purchasing public has neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective. Obviously, they must rely upon the skill, care, and reputation of the maker. . .The obligation of the manufacturer thus becomes what in justice it ought to be--an enterprise liability, and one which should not depend upon the intricacies of the law of sales." Id. at 311-312.

4. Subsequent to these two seminal cases in the area, some courts have held a manufacturer liable under the theory of strict liability in tort for economic losses:

Michigan: Cova v. Harley Davidson Mot. Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970).

Ohio: Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979).

Washington: Berg v. General Mot. Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976).

Wisconsin: City of Lacrosse v. Schubert, Schroeder & Assoc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

5. Far more jurisdictions, however, have denied recovery under strict liability for solely economic losses:

Alaska: Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976).

Arizona: Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962 (D.Ariz. 1975).

Colorado: Hiigel v. General Mot. Corp., 190 Colo. 57, 544 P.2d 983 (1975).

Illinois: Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

Iowa: Midland Forge, Inc. v. Letts Industries, Inc., 395 F. Supp. 506 (N.D. Iowa 1975).

Sioux City Community School District v. International Telep., 461 F. Supp. 662 (N.D. Iowa, W.D. 1978).

Minnesota: Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981).

Northern States Power Co. v. International Tel. & Tel. Co., 550 F. Supp. 108 (D.Minn. 1982).

Missouri: Forrest v. Chrysler Corp., 632 S.W.2d 29 (Mo. 1982).

Nebraska: Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973).

New York: County of Westchester v. General Mot. Corp., 555 F. Supp. 290 (S.D.N.Y. 1983).

Pennsylvania: Posttape Assoc. v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976).

South Carolina: Purvis v. Consolidated Energy Prod., 674 F.2d 217 (4th Cir. 1982).

Texas: Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977).

Mid-Continent Aircraft Corp. v. Curry County Spraying Service, Inc., 572 S.W.2d 308 (Tex. 1978).

Mercer v. Long Mfg., Inc., 665 F.2d 61 (5th Cir. 1982).

West Virginia: Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W.Vir. 1982).

III.

THE EXCEPTIONS TO THE RULE.

A. Allegations Of Damage To "Other Property:"

1. While recovery for solely economic losses in tort is often denied, recovery of such losses are permitted when damage to other property is alleged.

a. Compare: Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1966), where plaintiff purchased several air conditioners that leaked water or other liquids into hotel rooms thereby damaging carpeting, furniture, and walls. Plaintiff sought recovery for repair and

replacement of the damaged furniture and carpeting as well as for lost rental income. Since other property damage had been claimed, plaintiff was entitled to recover for all foreseeable damages, including loss of rental income, under a theory of negligence. Accord: Boone Valley Cooperative Processing Assn. v. The French Oil Mill Machinery Co., 383 F. Supp. 606 (N.D. Iowa 1974).

b. With: Alfred N. Koplin & Co., Inc. v. Chrysler Corp., 49 Ill. App. 3d, 364 N.E.2d 100 (1977), in which plaintiff bought two air conditioning units from defendant which failed to cool adequately. Plaintiff brought suit to recover costs incurred in repairing and replacing the units. Distinguishing Admiral Oasis which had "involved damage to other property as well as economic loss in replacing the malfunctioning units," the court declined to permit recovery for solely economic losses outside of warranty.

c. The physical nature of the loss is the distinction between economic loss and property damage. The point was made in Signal Oil & Gas Co. v. Universal Oil Products, 572 S.W.2d 320 (Tex. 1978), where the product, a water heater,

exploded causing damage to plaintiff's refinery. The court held:

> "In the instant case, Signal has alleged property damages in the form of damages to the product itself, as well as to other surrounding property . . .Where such collateral property damage exists in addition to the product itself, recovery for such damages are recoverable under Section 402A of the Restatement (Second) of Torts as damage to property . . ." (Emphasis supplied.)

Accord: Sioux City Community School Dist. v. International Tel. & Tel. Corp., 461 F. Supp. 662 (N.D. Iowa 1978)

d. Thus, if the contracting party's expectations were not met--if he did not receive the benefit of his bargain and if that was his only loss, a claim in tort will not lie. If, however, the contracting party sustained injury to person or property as the result of an occurrence, the fact that his commercial expectations were not met will not obviate the fact that he has been the victim of a tort.

2. Some courts, however, have been unwilling to permit recovery for economic damages even when damage to other property is present.

a. In Northern States Power Co. v. International Tel. & Tel. Co., 550 F. Supp. 108 (D.Minn. 1982), plaintiff brought suit to recover $1.9 million for the cost of replacing defective screw anchors in a construction project as well

as $100,000 in damage to aluminum power towers. Although it was undisputed that plaintiff was not claiming solely economic damages, the court refused to permit recovery for the $1.9 million stating:

> "To allow a plaintiff to recover over two million dollars in negligence or strict liability because of some $100,000 in damage to the fallen towers would appear to thwart the policy implications of Superwood, and application of its rule here limits plaintiff's recovery for negligence or strict liability to other property, one of the explicit exceptions to the rule." Id. at 111.

b. In Mercer v. Long Mfg., Inc., 665 F.2d 61 (5th Cir. 1982), plaintiff purchased a peanut combine manufactured by defendant. The defective combine required numerous repairs thereby causing delay and permitting the crop to deteriorate. Additionally, when in use, the combine destroyed parts of the crop which were dropped to the ground after combining. The court held that because plaintiff's complaint sounded in strict liability which permits recovery only for personal injury or property damage, only the damage to the crop would be recoverable.

c. In an effort to fall within the "other property" exception to the economic loss rule, the plaintiff in County of Westchester v. General Mot. Corp., 555 F. Supp. 290 (S.D.N.Y. 1983), claimed that defective air conditioning units in its G.M. buses caused damage to a nondefective component of the units. The court, however, denied recovery under the theories of strict liability and negligence. To recover in tort, the court noted, the alleged defective product must cause physical damage or injury to unrelated property or a portion of the defective property itself which is unrelated to the inherent nature of the alleged defect. Here, where the condenser was the main component of the air conditioning unit, it cannot support a claim in tort.

B. Damage To The Defective Product Caused By A Violent, Sudden, And Calamitous Accident:

1. Although damage to the product itself has been termed "direct economic loss," many courts have recognized that like "other property," when a defective product is destroyed the owner has, in essence, suffered a loss of property. Thus, in situations where only damage to the product itself is suffered, the

majority approach is to identify whether a particular injury amounts to economic loss or physical damage. In drawing the distinction, the items for which damages are sought, such as repair costs, are not determinative. Rather, the line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim. Pennsylvania Glass Sand Corp. v. Caterpiller Tractor Co., 652 F.2d 1165, 1172-73 (3d Cir. 1981).

a. In Pennsylvania Glass, supra, damage to a front-end loader occurred as the result of a fire, a sudden and highly dangerous occurrence. Because the alleged defect posed a serious risk of harm to people and property, the Third Circuit found that the complaint fell within the ambit of tort law.

b. Similarly, in Cloud v. Kit Manufacturing Co., 563 P.2d 248 (Alaska 1977), severe damage was caused to a trailer from a fire caused by the ignition of polyurethane padding that came with the trailer. The court found that

deterioration and other qualitative defects should be considered economic loss, whereas "sudden and calamitous" damage, as in the instant case, constituted physical property damage recoverable in tort.

c. In contrast, the plaintiff in Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3rd Cir. 1980) (applying Illinois law), sought to recover the cost of repairing and replacing defective roofing materials which proved unsatisfactory over a period of time. The court held that such qualitative defects were more properly handled by warranty law.

C. Allegations Of Negligent Misrepresentations By Those In The Business Of Supplying Information Or Of Intentional Misrepresentation.

1. Misrepresentation, both negligent and intentional is an exception to the general rule that economic loss is not recoverable in tort. The preclusion of the recovery of purely economic loss is bottomed upon the constraints that the parties have contractually placed upon their economic expectations. In the case of misrepresentation, those constraints are not binding. The claimant has relied, to its detriment, upon untruths promoted by the defendant and cannot

realistically be deemed to have contemplated such misrepresentation.

a. The exception carved by the law in the case of negligent or intentional misrepresentation is well established. Maxey v. Quintana, 84 N.M. 38, 499 P.2d 356, 360 (1972); Howell v. Fisher, 49 N.C. App. 488, 272 S.E.2d 19, 24 (1980); Zeller v. Bogue Electric Manufacturing Corp., 476 F.2d 795, 803 (2d Cir. 1973); Ashley v. Kramer, 8 Ariz. App. 27, 442 P.2d 564, 568 (1968); Prosser, The Law of Torts § 107 (4th ed. 1971).

b. In Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969), subsequent purchasers of a home brought suit against a surveyor who furnished a faulty survey causing them to incur the expense of moving the house and garage. The court held that the fortuitous circumstance that the ultimate loss resulting from the erroneous survey fell upon one other than the person for whom the survey was made should not insulate defendant from responding in damages. Plaintiffs were, therefore, permitted to recover their economic losses.

D. Wilful And Wanton Misconduct.

1. May be an exception to the rule that denies recovery in tort for solely economic loss. See, Sioux City, supra.

E. Unequal Bargaining Power Between Plaintiff And Defendant.

1. Recovery may be allowed in tort. See, Iowa Electric Power, supra. See also, Sioux City, supra.

CONCLUSION

Although solely economic losses are not generally recoverable in tort, the rule does not necessarily spell the death knell of subrogation claims. Careful pleading and thorough investigation prior to instituting suit can obviate many of the obstacles posed by this recent trend in the law. The inclusion of allegations of damage to property other than the defective product can circumvent dismissal of a claim for economic losses in most jurisdictions. Where only the defective product itself is damaged, couching the loss in terms of a sudden and dangerous occurrence should prove sufficient to invoke the protective interests of tort.

Alternatively, development of implied warranties should be attempted and expanded upon to mitigate the harshness of the economic loss rule especially where the damaged plaintiff is not in

privity with the defendant or where recovery is barred or limited by a contractual provision. Similarly, a concerted effort should be made to limit the economic loss rule to products cases thereby permitting the recovery of economic losses against professionals and others providing services not covered by the remedies provided by the U.C.C. If these steps are taken, the distinction between tort and contract can be preserved and still afford protection under the law for those suffering a loss.

EMOTIONAL DISTRESS

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I. BACKGROUND.

A. Impact Rule: No contact - no recovery.

1. One of the first American cases in which negligent infliction of emotional injuries was considered was in Mitchell vs. Rochester Railway, 151 N.Y. 107, 45 N.E. 354, 1896. In that case, a woman who had a miscarriage because of a negligent operation of a horse buggy was denied recovery because the negligence did not result in physical contact.

2. Mahoney vs. Dankworth, 79 N.W. 134, (Iowa 1899). Because plaintiff's emotional stress was induced by her aprehension for her mother's safety rather than the negligent act itself, recovery was denied.

3. Physical injury necessary for recovery.

a. While proof of physical injury was not necessary to recover for emotional injury caused intentionally, such proof was necessary for emotional injuries caused negligently. Holdorf vs. Holdorf, 1895 IA 939, 169 N.W. 739, 1918.

b. Elements necessary to prove tort of intentional infliction of severe emotional distress.

(1) Outrageous conduct of the defendant.

(2) The defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress.

(3) The plaintiff's suffering severe or extreme emotional distress, and,

(4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

Amsden v. Grinnell Mutual Reinsurance Co., 203 N.W.2d 252, 255 (Iowa 1972), and Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976).

4. In 1979, in Dictum, the Court watered down the requirements by stating in Wamsgans v. Price, 274 N.W.2d 362 (Iowa 1979), "while we do not adhere to the impact rule which requires a physical injury in order to recover for emotional distress or mental anguish, we have never allowed

such a recovery for negligence alone."

B. Zone of Danger: Bystanders' safety must be threatened because the bystander was in the "radius of risk". Leading case, Amaya v. Home, Ice, Fuel and Supply Company, 59 Cal.2d 295, 379 Pacific 2d 513 (California 1963).

II. BYSTANDER - EXPANDED CAUSE OF ACTION.

A. Dillon v. Legg, 68 Cal.2d 728, 441 Pacific 2d 912, (California 1968).

1. Overrruled zone of danger concept as set forth in Amaya case.

2. Reiterated the Law of Torts that the chief element in determining whether a defendant owes a duty or obligation to a plaintiff is the forseeability of risk.

3. Factors to be considered in determining whether or not the defendant should have reasonably forseen the injury.

a. Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance from it.

b. Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident as contrasted with learning of the accident from others after its occurrence.

c. Whether plaintiff and the victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship.

B. Iowa followed in 1981 with Barnhill v. Davis, 300 N.W.2d 104. With the elements of a bystander's claim for emotional distress caused by witnessing peril to a victim proximately caused by the negligence of another being as follows:

1. The bystander was located near 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 were 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. (In Barnhill the court adopted a definition of serious injury from 702.18 of the Code of Iowa, 1979, as follows: "Bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member and organ."

5. Emotional distress of the bystander must be serious.

a. The Court recognizes that mental distress may exist without objective symptoms, but

b. On the other hand, stated that compensible mental distress should ordinarily be accompanied with physical manifestations of distress.

6. In Poulsen v. Russell, 300 N.W.2d 289 (Iowa 1981), decided the same day as the Barnhill case, the Iowa court said:

a. Emotional distress does not have to manifest itself physically to become compensible.

b. Emotional distress includes all highly unpleasant mental reactions.

c. In some cases the outrageous conduct of the defendant may be enough evidence to show that the distress is severe.

d. For most members of the community toughening of mental hide is better protection.

III. IOWA'S EXPANDED FORSEEABILITY.

A. Walker vs. Clark Equipment Company, 320 N.W.2d 561 (Iowa 1982) was the first court of last resort to expand recovery for bystander's emotional distress to:

1. Manufacturers of defective products and strict liability.

2. Manufacturers of a product under theories of breach of warranty.

B. Court's rationale.

1. Prior cases had extended strict products liability to bystanders.

2. Relied on an on point California appeals case, Shepard v. Superior Court, 76 Cal. App. 3d 16, 142, Cal. Rep. 612 (1977).

a. The other relevant case is Park vs. Standard Chemway Company, 60 Cal. App. 3d 47, 131, Cal. Rep. 338, 1976. In this case, the California Appeals Court held that a bystander could not recover under strict products liability for emotional distress.

b. Consequently, although Iowa Court relied on an on point California appeals decision there is an equally inconsistent California appeals decision of record, and the California court of last resort is yet to decide the issue.

IV. CASES FROM OTHER JURISDICTIONS.

A. D'Ambra et al v. United States of America, 338 Atlantic Reporter 524 (Rhode Island 1975).

1. Problems of proof for emotional injuries in intentional torts have been faced and overcome.

2. Law should not compensate for every minor psychic shock incurred in the course of daily living...however, a person threatened by severe mental injuries should be able to enforce his claim to reasonable psychological tranquility.

3. A non-negligent mother, who although suffering no physical impact suffers serious mental and emotional harm accompanied by physical symptoms from actually witnessing the death of her unnegligent minor child as a direct result of the defendant's negligence, may maintain an action for negligent affliction of emotional distress, despite the fact that she herself was never in physical danger.

B. Molien v. Kaiser Foundations Hospital, 616 P.2d 813 (California 1980).

1. Forseeability of risk is a critical factor and must be adjudicated on a case-by-case basis.

2. Physical injury is not required - recovery may be had for affliction of emotional distress alone.

C. Leong v. Takasaki, 520 P.2d 758 (Hawaii 1974).

1. Serious mental distress may be found where reasonable man, normally constituted, would be unable to

adequately cope with the mental stress engendered by the circumstances of the case.

2. Defendant does not need actual knowledge of plaintiff's presence to be liable.

3. Absence of blood relationship between injured party and plaintiff should not foreclose recovery.

D. Landreth v. Reed, 570 S.W.2d 486 (Texas 1978)... Actual observance of the accident is not required if there is otherwise an experiential perception of it, as distinguished from learning of it from others after its occurrence...

E. Toms v. McConnell, 207 N.W.2d 140 (Michigan 1973).

1. Plaintiff need not be within the "zone of danger".
2. Problems of limiting bystander recovery is best resolved by treating each case on its own individual facts.
3. When child is in danger by negligent injury by other parties, it is forseeable that the mother may be somewhere in the vicinity and will suffer serious shock.

V. DISSENTS AND PROBLEMS.

A. Justice Albee in Barnhill, "it is complex, fraught with problems and difficult to administer, as is conceded by its most ardent supporters."

B. Dillon Dissent, "the majority, obviously recognizing that we are now embarking upon an excusion into the 'fantastic realm of infinite liability' undertake to provide so called 'guidelines' for the future."

C. Questions raised in Amaya and reiterated in Dillon dissent.

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1. What if the plaintiff was honestly mistaken in believing the third person to be in danger or to be seriously injured?

2. What if the third person had assumed the risk involved?

3. How "close" must a relationship be between the plaintiff and the third person?

4. How near must the plaintiff have been to the scene of the accident?

5. How soon must the shock have been felt?

6. What is the magic in the plaintiff actually being present?

7. Is the shock any less real if the mother does not know of the accident, until her injured child is brought into her home?

8. Is it any less real if the mother is physically present at the scene but nevertheless unaware of the danger or injury to her child until after the accident has occurred?

VI. DEFENSES.

A. Negligence of bystander where bystander had a duty to moniter or otherwise protect the injured party from danger.

B. In most cases the defense to the bystander will be the same defense as the defendant would be able to assert against the injured party.

FOR FURTHER REFERENCE:

Bystander Recovery for Negligent Infliction of Emotional Distress in Iowa: Implementing an Optimal Balance, Iowa Law Review, Volume 67/No.2, Page 333, January 1982.

Product Manufacturers' Strict Liability for Emotional Injuries in Iowa: Walker v. Clark Equipment Co., Iowa Law Review, Volume 68/No.4, Page 853, May 1983.

LEGISLATIVE UPDATE

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I. Bills of Interest to Defense Attorneys

A. S.F. 531 -- An Act appropriating the budget for the Department of Public Safety, that also repeals the doctrine of Joint and Several Liability and Negates Liability for Public Bodies for failure to update design standards.

B. S.F. 504 -- Act to repeal or modify statutes and rules affected by the proposed Iowa rules of evidence.

C. S.F. 498 -- An Act which includes attorneys in a manner similar to insurers and other third parties in subrogation claims for medical care or expenses through a medical assistance program.

D. S.F. 495 -- An Act reorganizing the Iowa Judicial system by placing the district courts and its employees under the supervision of the Supreme Court and by shifting the financial responsibility for these offices to the state.

E. S.F. 493 -- An Act relating to the motor vehicle code by defining residency, increasing the penalty for improper use of registration, and prescribing limitations on passing on the left.

F. S.F. 477 -- An Act relating to the liability of dog owners.

G. S.F. 423 -- An Act relating to workers' compensation by modifying the intoxication defense, raising the interest rate on subrogation recoveries, providing that the statute of limitations does not run on certain medical benefits and transferring certain administrative responsibilities to the Treasurer of State.

H. S.F. 51 -- An Act relating to workers' compensation coverage and employers' liability coverage provided to corporate officers.

I. H.F. 606 -- An Act allowing a corporation to indemnify its directors, officers, employees, and agents for judgements, penalties, fines, settlements and reasonable expenses incurred as a defendent an an administrative or court proceeding.

J. H.F. 57 -- An Act relating to access to accident reports filed by law enforcement officers.

II. Bills of General Interest to Attorneys

A. S.F. 549 -- An Act relating to court structure and procedures by increasing certain filing fees, by adding one member to the Court of Appeals, by allowing a division of the Court of Appeals to hear cases and petitions, by appropriating funds for legal assistance services, and for additional judicial salaries and support.

B. S.F. 492 -- An Act relating to the method of selecting petit Jurors.

C. S.F. 470 -- An Act relating to the payment of cost in certain civil and administrative actions to which the state is a party.

D. S.F. 459 -- An Act awarding reasonable attorney fees to a plaintiff in a successful court action to enforce a mechanic's lien if the plaintiff provided labor or materials to the defendant.

E. S.F. 433 -- An Act relating to the rule against perpetuities and the manner in which they are determined by the courts.

F. S.F. 386 -- An Act updating references to the Internal Revenue Code for Individual and Corporate income tax and franchise and inheritance tax.

G. S.F. 370 -- An Act allowing a governmental subdivision to purchase liability insurance covering its officers and employees against punitive damages in a tort action. This bill also removes recklessness as a basis for punitive damages against an officer or employee for acts occurring in the performance of law enforcement or emergency duties.

H. S.F. 354 -- An Act repealing the requirement that documentary stamps be used to prove that the real estate transfer tax has been paid.

I. S.F. 304 -- An Act relating to the time limit for petitioning for judicial review of a no-probable-cause decision by the Iowa Civil Rights' Commission.

J. S.J.R. 6 -- Proposes an amendment to the state constitution allowing the legislature to void a rule of a state agency by concurrent resolution. This proposed amendment will be on the ballot in the general election in November of 1984.

K. H.F. 646 -- An Act raising the salaries of certain public officials and employees and providing benefits.

L. H.F. 635 -- An Act amending chapter 450 concerning inheritance tax by deleting the requirement that a preliminary inventory and inheritance tax be filed. Only a final inheritance tax return is required.

M. H.F. 592 -- An Act exempting a certificate of interest, certificate of indebtedness, and building note from the registration requirements of the Iowa Uniform Securities Act.

N. H.F. 570 -- An Act amending sections of the uniform commercial code regarding the recording of financing statements for security interests.

O. H.F. 517 -- An Act limiting the time for filing an action based upon a security interst in farm products to two years from the date of sale.

P. H.F. 514 -- An Act amending the Iowa Uniform Securities Act and providing penalty.

Q. H.F. 315 -- An Act increasing the small claims court amount from one thousand to two thousand dollars and increasing the docket fee.

R. H.F. 37 -- An Act prohibiting required polygraph examinations as a condition of employment.

III. Bills of General Interest to Society.

A. S.F. 461 -- An Act establishing a tax study committee to examine the tax structure in this state and making an appropriation for the study.

B. S.F. 10 -- An Act authorizing judges and ministers to charge a reasonable fee for solemnizing a marriage and resulting expenses.

C. H.F. 631 -- An Act allowing residential property located in an urban revitalization area to receive a one hundred per cent property tax exemption for the actual value added by improvements for ten years.

D. H.F. 313 -- An Act relating to the policy of compensation based on comparable worth and providing for a study. Effective upon publication except for section 1, effective 7/01/84.

E. H.F. 312 -- An Act relating to the powers of the Iowa Commerce Commission to regulate public utilities, the rates that may be charges, terms of service, and establishing a consumer advocate office for utility matters.

F. H.F. 176 -- An Act providing that a political party, candidate committee, or party organization for the purpose of conducting games of skill, chance, and raffles.

G. S.F. 92 -- An Act permitting pari-mutal horse and dog racing and betting in Iowa, creating a state racing commission provided for licensing of certain organizations to conduct racing, imposing taxes and fees and providing for their use and prohibiting certain acts and prescribing penalties for certain acts.

H. H.F. 634 -- An ACt authorizing a state lottery, creating a state lottery board, providing a penalty, and stating that the revenue shall go to the general fund.

ANNUAL APPELLATE DECISIONS REVIEW

September, 1982 through September, 1983

By Robert V. P. Waterman, Jr.*
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700 Davenport Bank Building
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ADMINISTRAIIVE LAW: Exhaustion of Administrative Remedies

Administrative remedies are exhausted when a tax payer allows the hearing officer's decision to become final without taking an appeal. It is error for the District Court to dismiss the taxpayer's petition and require an interagency appeal because interagency appeals are permissive, not mandatory under Iowa Code Section 17A. 15(3)(1981). Leaseamerica Corp. v. Iowa Dept. of Revenue, 333 N.W.2d 847 (Iowa 1983).

ADMINISTRATIVE LAW: Judicial Review

"[W]e conclude that in the review of contested cases a hearing must be held for submission of the issues for decision unless an alternative means of submission on written arguments is established by the court under Rule 333(b)." Kernodle v. Commissioner of Ins., 331 N.W.2d 132, 135 (Iowa 1983).

ADMINISTRATIVE LAW: Procedure for Adoption of Rules

An administrative agency is not required to provide a concise statement for and against adoption of a rule pursuant to Iowa Code Section 17A.4 (1)(b) at the time the rule is adopted where the request for the statement is made prior to the date of the adoption of the rule. It was the legislatures intent to make such time constraints operative on demand rather than mandatory.
Iowa Bankers Ass'n v. Iowa Credit Union Dept. 335 N.W.2d 439 (Iowa 1983).

ADMINISTRATIVE LAW: Review Ability of State Appeal Board Rulings

Notwithstanding either the finality language of the local budget law, Iowa Code Section 24.32, or the need of local units of government for timeliness in the budgetary process, the decisions of the state appeal board are reviewable, because the state appeal board is an agency under the Iowa Administrative Procedure Act, Chapter 17A of the Iowa Code. "We address respondents concerns about the need for expeditious handling of budget review by directing that judicial review of State Appeal Board decisions be heard by the courts at the earliest opportunity. Continuances should not be granted except in the most compelling circumstances."

Polk County v. State Appeal Bd., 330 N.W.2d 267,276 (Iowa 1983).

ATTORNEY FEES: Condemnation

A trial is not a prerequisite for taxation of an owner's attorney fees, which may be recovered in a district court appeal to secure just compensation for the taking of property for levee district purposes. The provisions of Iowa Code Section 472.33 (1981) (attorney fees in imminent domain proceedings) apply because there is no contravening definition of costs of appeal in either chapter 455 (levee and drainage districts) or 457 (intercounty levee or drainage districts) of the Iowa Code.

Riverbend Farms v. M & P Missouri River Levee Dist. 324 N.W.2d 460 (Iowa 1982).

ATTORNEY FEES: Wage Claims

Employer who is held liable to an employee for unpaid wages is also liable for the employee's attorney fees, whether the failure to pay was intentional or otherwise. Said fees should be taxed as costs by the trial court rather than being determined as an element of damages by the fact finder. Maday v. Elview-Stuart Sys. Co., 324 N.W.2d 467 (Iowa 1982).

CONTRACTS: Implied Warranty--Particular Purpose

Although a contract for installation of a sewer line is predominantly a contract for services and therefore not within the ambit of Article 2 of the Uniform Commercial Code, the code's policies and reasons may nevertheless apply. The court applied the elements for recovery established in Iowa Code Section 554.2315 (1981) and extended that sections' policies to the service contract for installation of a sewer line. In so doing, the court found that an implied warranty of fitness for a particular purpose existed. The court extended the construction contract implied warranty and further narrowed the application of cavieat emptor.
Semler v. Knowling, 325 N.W.2d 395 (Iowa 1982).

CONSORTIUM: Parental Consortium

A child no longer has an independent right of action for loss of parental consortium previously granted in Weitl v. Moes. Rather, the child's claim for loss of parental consortuim in the case of a parent's death should be brought by the decedent's administrator under Iowa Code Section 613.15.

The injured parent is the proper party to recover damages for the child in the case of parental injury. The court also held that Iowa Code Section 613.15 includes intangible consortium damages, which may be brought for death or injury. Lastly, the court held that a child's damages for loss of parental consortium are not limited to the period of the child's minority. In the above three respects, Weitl v. Moes was overruled by the court.

Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R. Co., 335 N.W.2d 148 Iowa (1983).

CONSORTUIM: Spousal Consortium

"Services" under Iowa Code Section 613.15 mean a consortuim claim can be brought without regard to whether the spouse or parent was injured or killed. The spouse should bring the action for pre-death loss of consortium, and the administator should bring the action for post-death loss. In so holding, Wilson v. Iowa Power and Light, Lampe v. Lagomarcino-Grupe Co. and Wietl v. Moes were overruled.

Audubon-Exira Ready Mix Inc. v. Illinois Cent. Gulf R. Co., 335 N.W.2d 148 (Iowa 1983).

CONSORTUIM: Unmarried Cohabitants

The injury to one unrelated cohabitant in a "stable and significant relationship" does not give the other cohabitant a right of action for loss of consortium. "We believe the plaintiff has failed to demonstrate why persons who do not accept the legal responsibility of marriage should have

the legal rights of married person."

Laws v. Griep, 332 N.W.2d 339 (Iowa 1983).

CONSTITUTIONAL LAW: Discovery--The Reporter's First Amendment Privelege

With regard to newspaper reporter's sources, the court has eliminated one of its previously adopted criteria for "subordinating a first amendment privelge to a compelling state interest in obtaining the evidence." Although the need for such evidence must be "compelling" or "paramount," the one seeking discovery may establish the need by showing (1) that the information is necessary or critical and (2) that other reasonable available means for obtaining the information have been exhausted. The separate showing that the claim or defense is not patently friviolous, required by Winegard v. Oxberger, 258 N.W.2d 827 (Iowa 1977), is no longer necessary.

Lamberto v. Brown, 326 N.W.2d 305 (Iowa 1982).

CONSTITUTIONAL LAW: Indigent's Right to Appointed Counsel in Paternity Cases

The putative father has no right to appointed counsel in paternity cases even though the state provided counsel to the mother by seeking to recoup ADC funds paid to her in the contempt action. Denial of appointed counsel to the putative father does not violate the equal protection clause of the United States Constitution because the mother and putative father are not members of the same class.

State ex rel. Hamilton v. Snodgrass, 325 N.W.2d 740 (Iowa 1982).

CORPORATIONS: Share Holder Derivative Action--Iowa Code Chapter 491

In a shareholder derivative action a board of directors of a corporatin organized under Chapter 491 of the Iowa Code may not appoint a special litigation committee composed of other directors when all of the directors are parties to the action. This is because of the potential for structural bias on the part of those appointed. A corporation may, however, apply to the court for appointment of a "special panel" to make an investigation and report on the pursuit or dismissal of a stockholder derivative action.

Miller v. The Register and Tribune Sindicate, Inc., __N.W.2d __ (Iowa July, 1983).

DAMAGES: Interest as Consequential Damages

Where the record contains evidence that plaintiff would not have needed to borrow but for defendant's defective performance of its construction contract, the plaintiff's interest payments to its lender are reoverable as consequential damages.

Metropolitan Transfer v. Design Structures, Inc., 328 N.W.2d 532 (Iowa App. 1982).

DISCOVERY: Experts not Expected to Testify

Where an expert is not expected to testify at trial, dicovery of facts known or opinoins held by that expert is governed by Iowa R. Civ. P. 122(d)(2), which requires the showing of exceptional circumstances. The court adopted the

rule denying such recovery where the party seeking it has reasonable available alternatives.

Sullivan v. Chicago and Northwestern Transp. Co., 326 N.W.2d 320, 327 (Iowa 1982).

DISCOVERY: Production of Expert's Documents

Documents prepared by an expert expected to testify at trial may be discovered if the movant first propounds interrogatories asking for the substance of the experts testimony and then files a motion for further discovery under Iowa R. Civ. P. 122(d)(1). It is error to require movant to show substantial need to qualify for such discovery, as the applicable rule does not contain that requirement. "[A] movant should be allowed production of the documents if the purpose is to provide for effective cross examination; production should not be allowed if it is sought to assist in presenting the movant's own case."

Sullivan v. Chicago Northwestern Transp. Co. 326 N.W.2d 320,328 (Iowa 1982).

DISCOVERY: Sanctions--Exclusion of Witnesses

It is not an abuse of discretion for the trial court to sanction a party by excluding the testimony of both an expert and an eyewitness, where the defendant had consciously withheld the name of his expert and had failed to correct the omission of an eyewitness' name from answers to interrogatories until three weeks before trial.

Sullivan v. Chicago and Northwestern Transp. Co. 326 N.W.2d 320,324 (Iowa 1982).

DISCOVERY: Work Product

Even though a liability insurers investigation is routine, a party seeking discovery of the same must make the requisite showing of substantial need and inability to obtain the substantial equivilent without undue hardship. The limitation of Iowa R. Civ. P. 122(c) still applies whenever the primary motivating purpose of the investigation is to be prepared to defend a third party claim.

Ashmead v. Harris, __ N.W.2d __ (Iowa July 1983).

DISSOLUTION: Child Support--Change of Circumstances

The state need not show a change of circumstances before obtianing modification of child support payments set in the dissolution decree where the ex-spouse with custody of the children subsequently receives ADC benefits.

State of Iowa ex rel. Blakeman v. Blakeman, __N.W.2d __ (Iowa July 1983).

DISSOLUTION: Contempt Proceedings--Enforcement of Property Division

The provision of a dissolution decree, requiring the husband to repay a debt to a third person (his former mother-in-law) bears "no reasonable relationship to support of the spouse or child." Therefore, the contempt proceedings of section 598.23 of the Iowa Code, do not apply, and it was error for the trial court to punish the nonpaying spouse by contempt. The enforcement procedures of Iowa Code Section 626.11 (Execution and attachment) are to be used instead.

DeKlotz v. Ford, 332 N.W.2d 110 (Iowa App. 1982).

DISSOLUTION: Contempt Proceedings

A party relying on Iowa R. Civ. P. 56.1 (n) for service of an order to show cause why contempt should not be entered must prove that service under that rule is justified; that is, that service could not be made in the manner provided in rule 56.1(a)-(m). Service on former husband's attorney is not sufficient to give the court jurisdiction over the former husband.

Beauchamp v. Iowa Dist. Court of Cass County, 328 N.W.2d 527 (Iowa 1983).

DISSOLUTION: Contempt Proceedings

Where the trial court had jurisdiction over the husband in the previous dissolution action, personal service of the order to show cause on the former husband in Illinois is sufficient to give the Iowa Court jurisdiction over him for contempt proceedings. The court's continuing jurisdiction to modify a dissolution decree also applies to actions to enforce the decree.

Opperman v. Sullivan, 330 N.W.2d (Iowa 1983).

DISSOLUTION: Contempt Proceedings

Contempt proceedings are available to enforce property settlements in dissolution decrees.

In re the Marriage of Linda S. Linger and Joseph J. Linger, 334 N.W.2d 368 (Iowa 1983).

EVIDENCE: Proof of Mailing

Testimony as to office custom is sufficient, absent

proof to the contrary, to raise a presumption that a notice was mailed.

Public Finance Co. v. Van Blaricome, 324 N.W.2d 718 (Iowa 1982).

EVIDENCE: Abscence of Prior Accidents

It is not error to permit the defendant grocery store to introduce evidence of the absence of prior accidents without specific proof of the existence of similar circumstances, when "the experience sought to be proved is so extensive as to justify the inference that it included an adequate number of situations like the one in suit." Testimony establishing that the store customarily placed its ashtrays in the same position as at the time of the accident, and evidence that 4 million customers have previously been in the store was enough to permit the conclusion that the circumstances were substantially similar.

Schuller v. Hy-Vee Food Stores, Inc., 328 N.W. 2d 328 (Iowa 1982).

EXECUTORS AND ADMINISTRATORS: Effect of Closing Estate

It is error to grant a motion to dismiss a wrongful death action merely because the decedent's estate was closed after the suit was brought.

Troester v. Sister of Mercy Health Corp., 328 N.W.2d 308, 313 (Iowa 1982).

GARNISHMENT: Child Support Assingment

Where a prior court order requires a judgment debtor

to assign more than 25 percent of his disposable earnings to pay child support obligations and said garnishment subsumed all of the judgment debtor's nonexempt disposable earnings, the debtors wages are not subject to garnishment by a second judgment creditor. The wage assignment made by defendent to satisfy his child support obligations was a garnishment within the meaning 15 U.S.C. Section 1672(c). Koethe v. Johnson, 328 N.W.2d 293 (Iowa 1982).

INSURANCE: Definition of Accident

In the absence of policy language defining the term "accident," a collision caused by the insured intentionally disabling her vehicle's brake line will be considered an accident withing the meaing of the policy.
Farm and City Ins. Co. v. Potter 330 N.W.2d 263 (Iowa 1983).

INSURANCE: Subrogation Rights

Under Iowa Code Section 516A.4, the insurer has a right to the proceeds of a settlement with an uninsured motorist or any other party to the extent of the insurer's payment under its uninsured motorists portions of the policy. The majority of state courts disallow subrogation unless the plaintiff collects all his damages, but the Iowa Supreme Court concluded that the plain language of Section 516A.4 makes the majority view inapplicable in Iowa. Accordingly, the insurer has the right to collect from the insured to the extent of the uninsured motorists payments made even though the settling plaintiff does not recover the full amount of the judgment.

Davenport v. Aide Ins. Co., __N.W.2d __(Iowa June 1983).

INSURNACE: Negligent Inspection

Iowa Code Section 517.5 bars any action against an insurance company or its inspector that is based upon the making of an inspection. The court did not reach the question as to whether Section 517.5 violated an injured employees right to equal protection under the Iowa and U.S. Constitutions. Slater v. Farm Land Mut. Ins. Co., 334 N.W.2d 728 (Iowa 1983).

INSURANCE: Punitive Damages

An insurance policy requiring the company to pay "all sums that the insured shall become legally obligated to pay as damages . . ., includes coverage for punitive damages." This construction elevates "the public policy of freedom of contract for insurnace coverage above the public policy purposes of punitive damages." The decision does not "totally abrogate the sting of punitive damages," however, because poor risks will still have difficulty in obtaining insurance and will pay a premium for the same.
Skyline Harvest Store Sys. v. Centennial Ins. Co., 331 N.W.2d 106, 109 (Iowa 1983).

INSURANCE: Waiver of Contractual Limitations

When the insurer continued settlement negotiation through the end of the contractual limitations, it waived its right to limit suits through that period. The waiver could not be retracted by any action of the insurer, nor did it expire by

operation of law. As a result, the statuatory limitations, applicable to all other written contracts applies.

Scheetz v. IMT Ins., Co., 324 N.W.2d 302 (Iowa 1982).

INHERITANCE: Legitimazation through Common Law Marriage

A child is legitimized by the legal, common law marrige of her mother to decedent, and the child therefore has a right to share in the decedent's estate under the laws of intestate succession.

Estate of Hawk v. Lane, 329, N.W.2d 660 (Iowa 1983).

INTEREST: Punitive Damages--Appellate Reversal

A defendant is entitled to interest on punitive damages paid by the defendant to the plaintiff but subsequently returned to the defendant after appellate reversal. The rate of interest should be 5 percent as specified by Iowa Code Section 535.2(b), from the date of execution until the date restitution was ordered, and 10 percent from the latter date until payment of the restored amount.

Muchmore Equip., Inc. v. Grover, 334 N.W.2d 605 (Iowa 1983).

ISSUE PRECLUSION: Promisory Estoppel

Plaintiff's claim against his deceased father's estate for improvements to the father's farm based on promisory estoppel was barred by issue preclusion and race judicata as a result of a judgment against the plaintiff in an earlier suit. Issue preclusion applies because claimant's assertion of promisory estoppel comes squarely within the court of appeals

holding in the first appeal that there was no estoppel; this satisfies the "necessary and essential" requirement of issue preclusion and claimant is thus foreclosed from prosecuting his estoppel assertion.

Noel v. Noel, 334 N.W.2d 146 (Iowa 1983).

JUDGEMENTS: Execution

A senior judgment lienholder cannot redeem from a junior judgment lienholder by paying only the execution costs. The section of the code requiring payment only of execution costs (Section 628.9) is intended to apply only when the section requiring additional payments (628.11) first applies.

Blue v. Oehlert, 331 N.W.2d 112, 116 (Iowa 1983).

JURISDICTION: Fiduciary Shield Doctrine

In determining whether the exercise of inpersonam jurisdiction by an Iowa court violates the due process clause of the United States Constitution, the court will apply the fiduciary shield doctrine as a due process limitation on jurisdiction. Where a foreign corporation is amenable to suit under the Iowa long-arm statute, exercise of personal jurisdiction over the nonresident corporate agent in his individual capacity for activities undertaken on the corporation's behalf does not violate due process. Allegations of fraud standing alone are sufficient to permit disregard of the corporate enity for jurisdictional purposes and to treat the corporate agent as though he had sen an individual agent into Iowa to do business.

State ex rel. Miller v. Internal Energy Management Corp., 324 N.W.2d 707 (Iowa 1982).

LANDLORD TENANT: Mobile Home Parks

In its first interpretation of the Mobile Home Parks Residential Landlord and Tenant Act, Chapter 562B of the Iowa Code, the court held that the act does not require a written lease for either a one year or a 60 day term. The statute, while requiring 60 days written termination notice, does not provide that the lease must terminate on the periodic rental date. The act did not abrogate the landlord s common law right to terminate a tenant without cause.
Sunset Mobile Home Park v. Parsons, 324 N.W.2d 452 (Iowa 1982).

LEGAL MALPRACITCE: Damages--Jury Instructions

The plaintiff/client in a suit for negligent prosecution of a damage action has the burden of proving not only the amount of the judgment she would have obtained but for the negligence of her attorney, but also what she would have collected. The client must introduce substantial evidence from which a jury could determine what portion of the judgment would have been collectible. In any event, the client's recovery is limited to the amount which could have been collectible, and refusal to instruct on the collectibility requirment is error. Pickens, Barns, and Abernathy v. Heasley, 328 N.W.2d 524 (Iowa 1983).

LIMTATION OF ACTIONS: Discovery Rule

The statue of limitations for a personal injury

action based upon a defect in a product begins to run from the earlier of either the time the defect in the product is discovered or from the time of the injury. This constitutes a reversal of the court's earlier holding in Brown v. Ellison, 304 N.W.2d 197, 200 (Iowa 1981), that allowed the period to run from the later of the two dates. It also expanded the application of the discovery rule found in Brown, 304 N.W.2d at 201, from express and implied warranties to include also actions for personal injury based on strict liability in tort. Franzen v. Deere and Company, 334 N.W.2d 730 (Iowa 1983).

MEDICAL MALPRACTICE: Informed Consent--"Patient Rule"

Where a patient is seeking elective surgery, the "patient rule" (of informed consent) rather than the "professional rule" should apply. Under the patient rule, the physician's communications to the patient are to be measured by the patient's needs and must include all information 'material' to his or her decision in having the elective surgery. In most jurisdictions materiality is the "significance a reasonable person, in what the physician knows or should know is his patient's position, would attach to the disclosed risk or risks in deciding whether to submit or not to submit to surgery or treatment." Exceptions may limit the necessity for full disclosure in all circumstances, however. Ordinarily, the patient has the burden of producing expert testimony 'to identify the risks of the therapy, the frequency of their occurrence, the consequences of leaving existing maladies

untreated, the existence of emergenices, and proximate cause. The burden of going forward with evidence pertaining to a priviledge not to dislcose, however, rests on the physician, in whose hands the necessary evidence ordinarily rests.' Summary judgment in favor of defendant-doctor was held inappropriate, even where plaintiff admitted he would produce no expert testimony at trial to establish the profession standards for disclosure.

Cowman v. Hornaday, 329 N.W.2d 422 (Iowa 1983).

MUNICIPALITIES: Antitrust

The ambulance service of the city of Dubuque, operated as a monopoly, is subject to the provisions of the Iowa competition law, Chapter 553 of the Iowa Code (1981), and is not exempt under Section 553.6(4). Ambulance service is "economic activity" and therefore subject to the restrictions of section 553.5 as "trade or commerce." The 1968 Home Rule Amendment to the Iowa Constitution is not a basis for the state action exemption from the reach of the competition law, because the Home Rule Amendment did not meet the test for exclusion from the Sherman Act liability established in Parker V. Brown, 317 U.S. 341 (1943), and its prodigy.

Neyens v. Roth, 326 N.W.2d 294 (Iowa 1982).

MUNICIPALITIES: Constitutional "Taking"

A constitutional "taking" occurs when a city brings and drops condemnations procedings three times, thereby substantially interfering with the owners use of the property.

The "taking" occurs in circumstances where the property was held primarily for its development potential, the city acquired fee interest in all other property along a proposed project but gained the practical use of the needed portion of the contested property through easements only. The trial court should have issued a Writ of Mandamus compelling the city to proceed with its condemnation against the property.

Osborne v. City of Cedar Rapids, 324 N.W.2d 471 (Iowa 1982).

MUNICIPALITIES: Tort Claims Act

The plaintiff's unjust enrichment claim against the city of Cedar Rapids is outside the scope of Section 613A.2 of the Iowa Code (1981), and therefore neither the notice provisions of 613A nor the two year statute of limitations applies. Instead, the claim was subject to the five year statute of limitations on unwritten contracts.

Dolezal v. City of Cedar Rapids, 326 N.W.2d 355 (Iowa 1982).

NEGLIGENCE: Comparative

"We hold that in all cases in which contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence. In such cases contributory negligence will not bar recovery but shall reduce it in the proportion that the contribuatory negligence bears to the total negligence that proximately caused the damages." This doctrine applies to all cases tried or retried after the date of filing of this opinion, and all pending

cases, including appeals, in which the issue has been preserved. A number of legal questions were left unresolved by the court. A partial list of these unanswered questions includes the following:

1. What effect is given to the conduct of parties whose negligence contributed to plaintiff's injuries but who are:

a. Not joined in the action;

b. Entitled to a special defense such as a statute of limitations; or

c. insolvent?

2. How are traditional concepts of joint and several liability affected?

3. For purposes of liability insurance coverage, are the separate damage entitlments of the plaintiff and the defendant set off against each other, or does each one recover from the other?

4. What effect will the doctrine have upon contribution among tort feasers?

Goetzman v. Wichern, 327 N.W.2d 742, 754-55 (Iowa 1982).

NEGLIGENCE: Defense of Sole Proximate Cause

"Because the sole proximate cause defense is not subsumed in the plaintiff's burden to prove proximate causation, we adhere to our cases holding that a defendant is entitled to have the jury instructed on it when substantial

evidence supports it." The court refused to abolish the defense of sole proximate cause.

Sponsler v. Clark Elec. Coop. Inc., 329 N.W.2d 663, 665 (Iowa 1983).

NEGLIGENCE: Violation of Statute

Where the defendant permits a beer party to be held on his property but does not purchase the beer or know minors will attend, an action may not be predicated upon Iowa Code Sections 123.47 and 233.1 (3), which prohibit furnishing beer to minors and contributing to the deliquency of minors. Liability may not be based upon section 123.47 since the defendant did not sell, give, or otherwise supply beer to minors. Violation of Iowa Code Seciton 233.1(3) does not necessarily prove a negligene claim because the standard of care that is required may vary depending upon what other law or ordinance has been violated by the minor.

DeMore v. Dieters, 334 N.W.2d 734 (Iowa 1983).

NEW TRIAL: Competency of Jury Foreman's Affidavit

Where a jury foreman's post-trial affidavit reports the internal workings of the jury, the affidavit is incompetent evidence and should not have been considered by the trial court in ruling on the motion for new trial. A juror may testify about external matters improperly effecting the jury deliberations, but "it is better to accept as established those matters which inhere in a jury verdict" and to refuse to

"encourage such post-mortems."

Crowley v. Glessner, 328 N.W.2d 513, 514-15 (Iowa 1983).

OPEN RECORDS: Hospital Records

A hospital tissue typing record concerning a potential organ donor is exempt from disclosure under Iowa Code Section 68A.7(2) because it is a hospital record involving the condition, diagnosis, care or treatment of a patient or former patient.

Head v. Colloton, 331 N.W.2d 870 (Iowa 1983).

PROCEDURE: Service

Plaintiff's Motion for Summary Judgment was mailed to the defendant rather than to his attorney. After an adverse ruling, defendant challenged the jurisidction of the trial court to rule on the motion because defendant was not properly served. "We think the mailing of a motion to a party rather than to his attorney is not jurisdictional and does not deprive the court of power to proceed unless the party sustains prejudice as a result . . . ."

Shirk Oil Co. v. Peterman, 329 N.W.2d 13 (Iowa 1983).

PROCEDURE: Notice of Appeal

The defendant waived his motion for a new trial by oral representations made at the joint hearing on both parties' motion to vacate or for new trial. This was true even though the trial court was without jurisidiction over the parties' post-trial motion as a result of plaintiff's appeal on the

issue adverse to him. Because of the waiver, the trial court had no jurisdiction over defendant's post-trial motion. Therefore, defendant's access to review was limited to his cross appeal of defendant's appeal. Since the cross-appeal was not timely filed by defendant, the Supreme Court had no jurisdiction over it and it was dismissed.

Hulsing v. Iowa Nat'l Mut. Ins. Co., 329 N.W.2d 5 (1983).

PROCEUDRE: Time Limit on Appeals

A motion for enlargement or amendment of findings and conclusions under Iowa R. Civ. P. 179(b) is unavailable to attack a ruling on a motion to dismiss for failure to state a claim because such a ruling involves a legal rather than a factual inquiry. Rule 179(b) only applies where the court is trying an issue of fact without a jury. Therefore, "motion to set aside, vacate, or modifiy a dismissal or for new trial," later denominated a rule 179(b) motion does not stay the 30 day time limit for appeal of dismissal ruling.

Kunau v. Miller, 328 N.W.2d 529 (Iowa 1983).

SCHOOLS: Tort Claims By and Against

One school district' s suit against another for failure of the defendant district to charge full tuition for non-residents as requried by Iowa Code Section 282.1 is not subject to a motion to dismiss. Since the "predatory practice' of the defendant school district denied the plaintiff district its expected state foundation school aide, damages exist and the need for injunctive and declaratory relief may concievably

be proved. If the plaintiff's claim meets the requirements of the Iowa Tort Claims Act, Chapter 613A of the Iowa Code, the plaintiff also has a potential claim for money damages against the defendant district on the basis of the tort of unlawful interference with a business relationship.
Lakota Consol. Independant School Dist. v. Buffalo Center/Rak Community Schools, 334 N.W.2d 704 (Iowa 1983).

STATE TORT CLAIMS ACT: Highways

The decision whether to upgrade existing highway guard rails is an "operational" decision rather than a planning decision, and therefore it is not protected by the "discretionary function" exception to Iowa Code Chapter 25A (1981). Whether the DOT acted as a reasonable agency when it attempted to prioritize the needs of the entire highway system and make maximum use of its limited resources to best serve all of the traveling public was a question for the fact finder.
Butler v. State of Iowa, __N.W.2d __(Iowa July, 1983).

TAXATION: Exemption from Payment of Unemployment Tax

Three Lutheran Schools successfully appealed a department of Job Service ruling denying them an exemption from Iowa Unemployment Laws. In construing Iowa's unemployment taxation law, Iowa Code Section 96.19(6)(a), (b) & (c)(1981), the court noted this section to be identical to the internal revenue code section 3309(b). Therefore, the court considered federal cases decided under the internal revenue code and adopted the test from one such case for determing whether a

separately incorporated school is entitled to an exemption. See St. Martin Evangelical Lutheran v. South Dakota, 451 U.S. 772 (1981). The two prong test requires that a separately incorporated school shall show "(1) it is operated primarily for a religious purpose and (2) it is operated, supervised, controlled or principally supported by a church or convention or association of churches." The department of job service hearing officer had used this test and determined that the schools met the second prong of the test but failed the first prong. In overruling the hearing officer and the district court, the court noted that the testimony of school personal regarding the permeation of religion in the schools and held that Lutheran Schools are "operated primarily for religious purposes." Accordingly, the Lutheran schools are therefore exempt from the tax.

Community Lutheran School v. Iowa Dep't of Job Serv. 326 N.W.2d 286 (Iowa 1982).

TAXATION: Property Tax--Exemptions

A school corporation is entitled only to the exemption from property taxation set forth in Iowa Code Section 427.1 (2). It is not a charitable society for tax purposes, and privately owned property leased by a school corporation is therefore not entitled to an exemption from property taxes. Merged Area (Education) VII v. Board of Review, 326 N.W.2d 310 (Iowa 1982).

IORTS: For Death of a Viable Unborn Child

The term "minor child" as used in Iowa R. Civ. P. 8 includes unborn persons. Therefore, a parent may sue for the expense and actual loss of services, companionship and society resulting from the injury to or death of an unborn person. Under Wietl v. Moes, a wrongful death action may not be brought on behalf of an unborn person, however, because a viable unborn child has no legal status. "The survival statute [611.20] and rule 8 serve different functions and compensate different people for different wrongs. Under section 611.20 the wrong is done to that person's estate. Under rule 8 the wrong is done to a child's parents."

Dunn v. Rose Way, Inc., 333 N.W.2d 830, 832 (Iowa 1983).

TORTS: Intentional Infliction of Emotional Distress--
Dissolution of Marriage

Conduct leading to dissolution of marriage may give rise to a claim of intentional infliction of emotional distress even though Iowa has abolished the tort of allienation of affections. "The elements of intentional infliction of emotional distress, and some of its policy considerations, are different from those in an allienation claim." Refusal to grant defendant's motion to dismiss for failure to state a cliam was proper.

Van Meter v. Van Meter, 328 N.W.2d 497, 498 (Iowa 1983).

TORTS: Marital Consiliation

Ihe tort of intentional interference with marital conciliation is not recognized in Iowa.

Roalson v. Chaney, 334 N.W.2d 754 (Iowa 1983).

UNEMPLOYMENT COMPENSATION: Racial Harassment

Where an employee's failure to perform a specific task was allegedly cause by racial harassment of co-employees, undeterred by the employer, the extent of harassment becomes a fact issue which must be resolved at the department level. Since this issue was not resolved by the Iowa Department of Job Services hearing officer, the case should be reversed and remanded for determination of the fact issue.

Woods v. Iowa Dep't of Job Ser., 327 N.W.2d 768 (Iowa App. 1982).

UNIFORM COMMERICAL CODE: Commerical Paper

The drawer of a check is personally liable where he signed without an indication of representative capacity, even though the check signed was imprinted with the corporate name. This holding interprets Iowa Code Section 554.3403(2)(b)(1981). To overcome a motion of summary judgment, the drawer of the check must plead and prove that another procedure was established between the parties as provided in the code. Where the drawer had failed to plead an exception to or provide evidence of a contrary agreement between parties, it was error to deny a motion of summary judgment.

Colonial Baking Co. of Des Moines v. Dowie, 330 N.W.2d 279 (Iowa 1983).

UNIFORM COMMERICAL CODE: Set Off

A bank's right of set off takes priority over a perfected security interest only in certain circumstances after insolvency. Iowa Code Section 554.9-306 (1981). Therefore, if a set off occurs before insolvency, the purchase money security interest and the proceeds of collateral deposited in the debtor's bank account takes priority over the bank's right of set off. This is true in spite of section 554.9-104, which makes article 9 inapplicable to rights of set off because that section "only means that the common-law right of a bank. . . is not changed by the statute. The right of set off is not a security interest." The court also adopted the "lowest intermediate balance rule for tracing proceeds." The proceeds are identifiable in their entirety [in spite of co-mingling] . . . because the account balance always exceeded the amount of proceeds during the period involved."

Coachmen Indus. Inc. v. Security Trust and Sav. Bank, 329 N.W.2d 648, 650 (Iowa 1983).

VARIANCE: Special Use Permit

The district court's invalidation of a requested variance to the Des Moines Municipal Code Section 2A-7(F) does not per se render invalid a special use permit issued by the city board of adjustment and thus prevent an apartment building project from complying with the zoning ordinace. This is because the special use permit was not conditioned upon a granting of the variance.

Jorgensen v. Board of Adjustment, City of Des Moines; Des Moines Public Hous. Auth., __N.W.2d __ (Iowa July 1983).

VENUE: Interest in Real Estate

It would defeat the purpose of the venue statute governing actions involving interest in real estate for parties to contract to place venue in a county other than the one where the real estate is located. Therefore, it was correct for the trial court to decide that such a contract was void. Cornell v. Wunschel, 329 N.W.2d 651 (Iowa 1983).

WILLS: Automatic Revocation after Dissolution of Marriage

In applying Iowa Code Section 633.271 (1981) for the first time since its enactment, the court concluded "that the legislature intended . . . any provision in a will in favor of the former spouse of a decedent . . . to be revoked when there is a divorce or dissolution of marriage prior to death. . . . [T]his provision is equally applicable when the marriage of the parties takes place after the execution of the will." Russel v. Johnston, 327 N.W.2d 226, 229 (Iowa 1982).

WILLS: Construction--Life Estate

Where a will gave the wife a life estate in a farm, language stating "that the farm shall be operated by my two sons and they shall pay the rental for the same to my wife for life," was held to be precatory and repugnant to the life estate and therefore invalid.
Escher v. Morrison, __N.W.2d __ (Iowa May, 1983).

WORKER'S COMPENSATION: Exclusivitiy of Remedy

Denial of chiropractic care by an employer for an injured employee does not constitute a separate and distinct injury outside of the worker's compensation statute, even where the denial gives rise to claims alleging intentional infliction of emotional distress as a result of alleged outrageous conduct by the employer. Because Iowa Code Section 85.27 (1981) grants the employer the power to select the treatment, such a claim is unfounded under the facts in this case. The employer's "choice did not become unreasonable simply because the employee disagreed with it."

Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

WORKER'S COMPENSATION: Industrial vs. Functional Evaluation

The claimant/employee injured both wrists in a single accident. At issue in the case was whether the injury should be evaluated functionally or industrially. Determinative was whether the injury was scheduled (to be evaluated functionally) or unscheduled (to be evaluated industrially). The court held that the 1974 amendments to the Worker's Compensation Act clearly intended to make the loss of two members a scheduled loss. Thus, it was error for the district court to permit an industrial evaluation of the injury.

Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

WORKER'S COMPENSATION: Limitation to Compensation for Scheduled Injuries

The court rejected the claimant/employees challange to the rule that the scheduled award for a specific member is

the exclusive remedy available to the employee injured on the job. The claimant/employee argued that the 20 percent impairment of his leg produced a disability greater than 20 percent because the impairment to his leg prevented him from continuing his employment. The court rejected this argument, declining to overturn its "long established rule" stating that such abandonment should come by statuatory amendment.

Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

WORKER'S COMPENSATION: Statue of Limitations

The three year statute of limitations on review-reopening, rather than the two year statute of limitations on original personal injury claims, applies to an arbitration award of solely medical benefits.

Beier Glass Co. v. Brundige, 329 N.W.2d 280 (Iowa 1983).

WORKER'S COMPENSATION: Subrogation Rights

Under Iowa Worker's Compensation Law, an employer's right of subrogation to an employee's claim against a third party tort feaser is created specifically in Iowa Code Section 85.22 (2). Without the employers 90 day demand for the employee to commence suit required by that subsection, there is no subrogation of the rights of the employee to maintian an action, notwithstanding fact that employee did in fact, of her own accord, commence suti against third party and obtain a recovery. An employer may maintian indemnification claim against employee despite employer's failure to file a timely notice of lien.

Armour-Dial, Inc. v. Lodge and Shipley Co., 334 N.W.2d 142 (Iowa 1983).

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