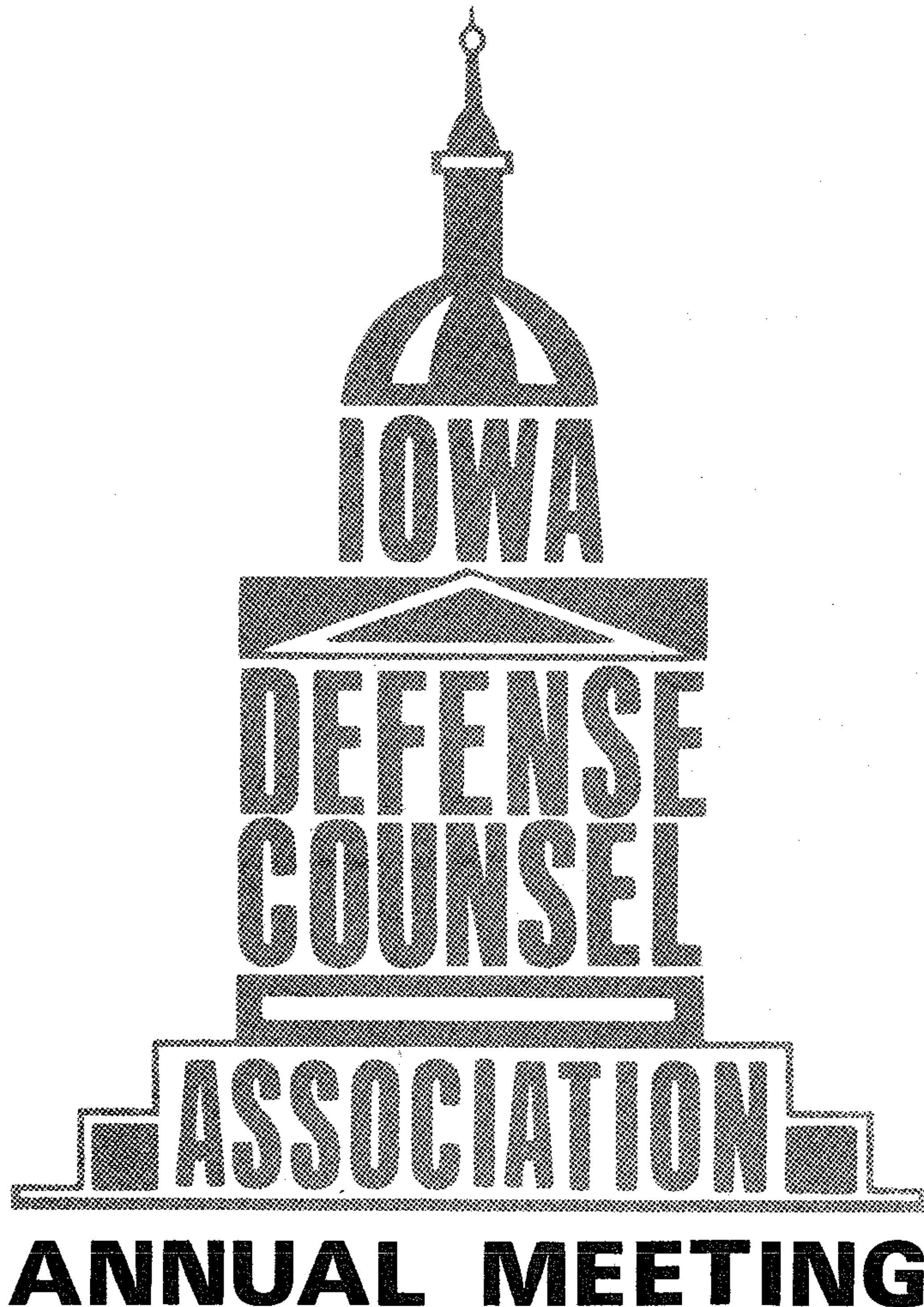
OCTOBER 10, 1975

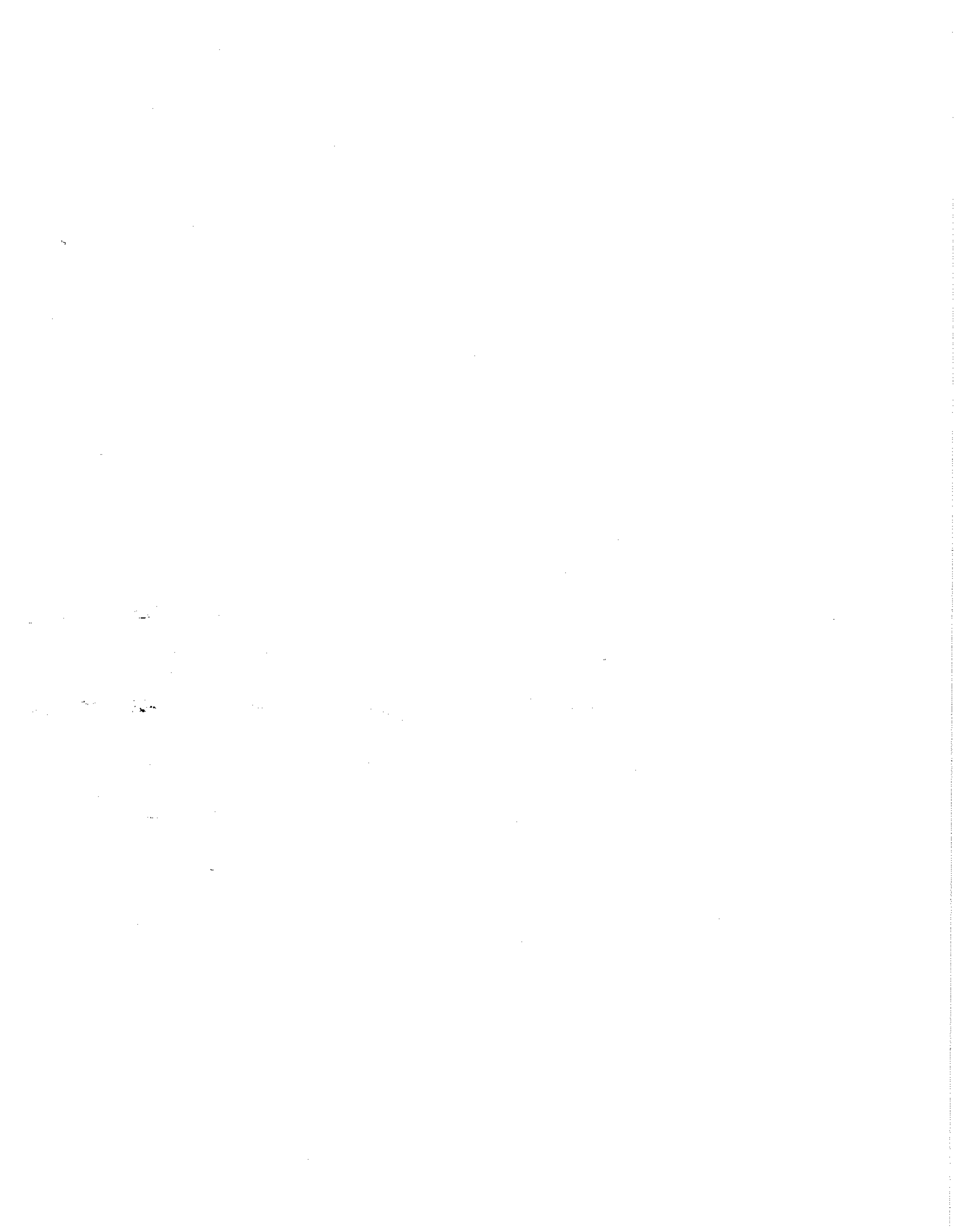


ANNUAL MEETING

Convened at 1:00 p.m., Friday, October 10, 1975

JOHNNY & KAY'S HYATT HOUSE
Des Moines, Iowa

President Ralph W. Gearhart, Presiding



Annual Meeting
of the
Iowa Defense Counsel Association

October 10 & 11, 1975

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Ralph W. Gearhart
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INDEMNITY AND CONTRIBUTION IN IOWA

By Don W. Burington
Mason City, Iowa

CONTRIBUTION AND INDEMNITY DISTINGUISHED. The difference between contribution and indemnity briefly stated is that the former indicates liability for loss occasioned by a tort is shared by those responsible for it. Indemnity indicates the entire liability for loss is shifted from one person held legally responsible to another person.[1]

For other statements of the distinction between contribution and indemnity see Prosser Laws of Torts, 3rd Edition, Sec. 68, and Indemnity Between Negligent Tort-Feasors: A Proposed Rationale, 37 Iowa L. Rev. 517, E. Eugene Davis.

GROUNDS FOR INDEMNITY IN IOWA. Indemnity may be based on: (1) express contract, implied contract, express warranty, implied warranty or strict liability in tort,[2] (2) vicarious liability[3] (respondent superior or the statutory liability imposed on the owners of automobiles, (3) breach of an independent duty running from the employer to third party,[4] or (4) active (primary) as opposed to passive

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[1]Key-Wash Company v. Stauffer Chemical Company, 177 NW2d 5 (Iowa, 1970)
Federated Mutual Implement and Hardware Insurance Company v. Dunkelberger, 172 NW2d 137, 142 (Iowa, 1969)

[2]Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133
Peter v. Lyons, 168 NW2d 759 (Iowa, 1969)
Hawkeye-Security Insurance Company v. Ford Motor Company, 174 NW2d 672 (Iowa, 1970)
Stowe v. Wood, 199 NW2d 323, (Iowa, 1972)
Hawkeye-Security Insurance Company v. Ford Motor Company, 199 NW2d 373 (Iowa, 1972)

[3]Rozmajzl v. Northland Greyhound Lines, 242 Iowa 1135, 49 NW2d 501
Hobbs v. Illinois Central Railway Co., 171 Iowa 624, 152 NW 40
Denver-Chicago Trucking Co. v. Lindeman D.O. Iowa, 73 F.Supp. 925
Graham v. Worthington, 259 Iowa 845, 146 NW2d 626
Archibald, Administrator v. Midwest Paper Stock Company, 176 NW2d 761 (Iowa, 1970)
Dairyland Insurance Company v. Concrete Products Company, 203 NW2d 558 (Iowa, 1973)

[4]Iowa P. & L. Co. v. Abild Const. Co., 259 Iowa 314, 144 NW2d 303
American Dist. Telegraph Co. v. Kittleson, 8 Cir. (Iowa) 176 F.2d 946
Blackford v. Sioux City Dressed Pork, Inc., 254 Iowa 845, 118 NW2d 559
Stowe v. Wood, supra

(secondary) negligence.[5] However, there can be no indemnity if the person seeking the relief has been guilty of intentional wrong or moral turpitude.[6] Nor is indemnity applicable when the injury sustained is the result of concurrent negligence of two or more persons. If the injury is the result of concurrent negligence, the remedy is contribution, not indemnity.[7]

For example, a guest in a motel brought an action against the lessee of the motel for injuries sustained when he slipped on ice in front of a unit. The lessee brought in the landlord on Cross Petition claiming improper design and construction of the motel roof which contributed to the icy condition. The lease provisions required the lessee to remove snow and ice from the walk. A verdict was returned in favor of plaintiff and against the lessee. The jury found the landlord negligent by way of (1) improper and negligent design and construction of the motel roof allowing snow and ice to collect and accumulate at the motel entrance, (2) this negligence was a proximate cause of the injury, (3) construction of the roof did not meet accepted standards of the architectural profession, and (4) the slippery condition leading to plaintiff's fall was caused not alone by dripping from the roof and freezing but by a combination of this factor and natural conditions. Lessee asked for indemnity or in the alternative contribution against the landlord. The Court refused both and held that the lessee violated a contractual right created by the lease for the removal of the snow from the sidewalks and by reason of this contractual duty, the landlord would have been entitled to indemnity against the lessee had a judgment been rendered against the landlord.[8]

The insurance carrier settled with an injured third party which injury grew out of an automobile accident which was caused by a brake failure. The insurance company then sued the automobile manufacturer who in turn brought in on Cross Petition the manufacturer of the brake. The Court held that the Cross Petition of the automobile manufacturer against the manufacturer of the brake should have been submitted on the theories of breach of an express warranty and strict liability in tort.[9]

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[5]Rozmajzl v. Northland Greyhound Lines, supra
Hathway v. Sioux City, 244 Iowa 508, 57 NW2d 228
City of Des Moines v. Barnes, 238 Iowa 1192, 30 NW2d 170

[6]Iowa P. & L. Co. v. Abild Const. Co., supra
Best v. Yerkes, 247 Iowa 800, 77 NW2d 23, 60 A.L.R.2d 1354
Hawkeye-Security Insurance Co. v. Lowe Const. Co., 251 Iowa 27, 99 NW2d 421

[7]Iowa P. & L. Co. v. Abild Const. Co., supra
Best v. Yerkes, supra
Hawkeye-Security Insurance Co. v. Lowe Const. Co., supra
Harper and James, The Law of Torts, Vol. I, Sec. 10.2, p. 718

[8]Stowe v. Wood, supra

[9]Hawkeye-Security Insurance Company v. Ford Motor Company, 199 NW2d 373 (Iowa, 1972)

After being told the approximate weight and propensities of the dog, a clerk picked out a chain and said "It's the best we've got, that ought to do it". Shortly thereafter the dog broke the collar and inflicted injuries on the plaintiff. The insurance carrier for the owner of the dog settled with plaintiff and then sought indemnity against the retail seller of the dog collar. The Court held there was substantial evidence of an implied warranty of fitness of this collar.

The retailer argued that indemnity wasn't available because Section 351.28 of the Code imposes absolute liability on the owner of a dog which is nondelegable. In overruling this contention the Court in part said as follows:

> "The breach of nondelegable duties may constitute a basis for an action in indemnity against a third person who creates a dangerous condition. Harper and James, the Law of Torts, Volume 1, Sec. 10.2, page 724.
>
> To the injured plaintiff, it makes no difference how the dog got loose. But as between the dog owner and the person whose wrong is claimed to have caused or contributed to the loss, the statutory duty imposed on the dog owner will not, as such, protect the claimed wrongdoer."[10]

If an employer is held liable for the negligent acts of his servant, he is entitled to indemnity from the servant.[11]

Where the Northland Greyhound Bus Lines, which employed a Sioux Line bus and driver for that particular day, was held liable to a passenger for the negligent operation of the bus, it was entitled to indemnity from the Sioux Line which in turn was entitled to indemnity from its driver.[12]

Indemnity was allowed a property owner who permitted the city to remove dirt, by reason of which removal the property owner and the city were liable to third party property owners who sustained damage resulting from lack of lateral support. The primary and active wrongdoer in the removal of the dirt was the city and the property owner was only a passive wrongdoer and only secondarily liable to the third party property owners. The wrong involved was malum prohibitum. It involved no intentional wrong or moral turpitude.[13]

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[10]Peters v. Lyons, supra

[11]Rozmajzl v. Northland Greyhound Lines, supra
Hobbs v. Illinois Central Railway Co., supra
Denver-Chicago Trucking Co. v. Lindeman, supra
Dairyland Insurance Company v. Concrete Products Company, supra
Archibald, Administrator v. Midwest Paper Stock Company, supra

[12]Rozmajzl v. Northland Greyhound Lines, supra

[13]Hathaway v. Sioux City, supra

A contractor is entitled to indemnity from the city where he, without knowledge of his wrongdoing, constructed a bridge upon property which the city hadn't actually acquired. His construction was at the place and according to the plans and specifications provided by the city. The Court stated the rule to be:

> "Where one is employed or directed by another to do an act not manifestly wrong, the law implies promise of indemnity by the principal for damages resulting proximately from the good faith execution of the agency."[14]

Where a city was compelled to pay for the injuries sustained by a pedestrian who slipped on ice caused by a downspout, the city is entitled to indemnity against the property owner.[15]

A hotel company was held liable to a guest for injury sustained while riding on an elevator. The Court held the hotel company entitled to indemnity against the manufacturer where it was shown that the accident was caused by the negligence of the manufacturer.[16]

Where a railroad had been held liable for the death of a horse that came upon its tracks through an open gate, it was entitled to indemnity from the abutting landowner who had removed the gate. The railroad was liable in the first instance on the ground that it permitted the gate to remain down. However, its negligence was only passive whereas the negligence of the abutting landowner in removing the gate was active.[17]

A tenant on the second floor who had been liable to a lessee on the first floor because of water leakage from the second floor was entitled to indemnity from the plumber who had negligently repaired the plumbing.[18]

Section 613A.8 of the Code of Iowa provides in substance that every municipality, which includes school districts, shall defend its officers and employees except in cases of malfeasance or wilfull or wanton neglect of duty and save them harmless and indemnify them against any tort claim arising out of an alleged act or omission occurring in the performance of duty. Three students were injured as a result of the alleged negligence of a schoolteacher. The school district carried liability insurance as did the schoolteacher. The insurance carrier for the school district made settlement with the three parties and then sought contribution from the insurance carrier

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[14]Horrabin v. City of Des Moines, 198 Iowa 549, 119 NW 998

[15]City of Des Moines v. Barnes, supra

[16]Hoskins v. Hotel Randolph Co., 203 Iowa 1152, 211 NW 423

[17]C. & N.W. Railway Co. v. Dunn, 59 Iowa 619, 12 NW 786

[18]Weidert v. Monahan Post Legionnaire Club, 243 Iowa 643, 41 NW2d 400

for the schoolteacher. The Court in substance held that the statute clearly provided that the schoolteacher was to be held harmless and would be entitled to indemnity from the school district. The insurance companies were each bound by the same provisions. Had the insurance carrier for the teacher have paid all or a part of the settlement, it could have recovered by way of indemnity against the insurance carrier for the school district. Such being the case, the insurance carrier for the district is not entitled to contribution from the other insurance carrier. As was stated by the Court:

> "One who must indemnify another cannot at the same time claim contribution from that person. Stowe v. Wood, 199 NW2d 323, 326 (Iowa, 1972)"[19]

An indemnity right is generally denied a contractee who actively participates in the control or supervision of the work.[20]

Generally four situations have been recognized which if found to exist will allow one negligent person to be indemnified by another notwithstanding any contract for indemnity:

(1) Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged;

(2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged. Restatement, Restitution, Sec. 90;

(3) Where the one seeking indemnity has incurred liability because of a breach of a duty owed to him by the one sought to be charged;

(4) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.[21]

INDEMNITY AGAINST EMPLOYER UNDER WORKMANS COMPENSATION. An employer under workman's compensation may be liable for indemnity to a third party from whom the employee has recovered where there is a breach of a duty running from the employer to the third party. There can be no contribution, however, where workman's compensation is involved as there can be no common liability.[22]

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[19] St. Paul Insurance Companies v. Horace Mann Insurance Company, ___ NW2d ____ (Iowa, 1975)

[20] Evans v. Howard R. Green Co., ___ NW2d ____ (Iowa, 1975)

[21] Epley v. S. Patti Constr. Co., 228 F.Supp. 1, 5 (1964
Peters v. Lyons, supra

[22] Iowa P. & L. Company v. Abild Const. Co., supra
Blackford v. Sioux City Dressed Pork, Inc., supra
Kittleson v. American Dist. Telegraph Co., 179 F.2d 946 (8th Cir.)
Stowe v. Wood, supra

In Blackford the employer of plaintiff entered into a contract with defendant to wash the walls, equipment and floors in the plant. Employer was to furnish and pay for supervision and control of the labor necessary to perform the job. In the course of cleaning the equipment, plaintiff got his hand caught in the machinery sustaining injury. He was paid workman's compensation by his employer but sued the third party alleging negligence in failing to properly guard the machinery, failure to warn, etc. Defendant brought in plaintiff's employer by a Cross Petition. Employer set up as a defense his liability and payment under the Workmen's Compensation Act. The Court held there was an obligation running from the employer to the defendant to perform this work in a safe manner and that obligation was breached by the employer thus creating liability on his part to the defendant.

In Iowa P. & L. Co. an employee of that company received severe injuries when an angle iron he was holding came in contact with a high-voltage power line belonging to the utility company. The utility company settled the claim made by the injured party and sued the construction company for indemnity or in the alternative contribution. The Court held there could be no contribution because there was no common liability between the employer and the utility to the injured party. However, the facts showed that there was an oral understanding or agreement that the construction company would notify the utility when the digging reached a certain area so that proper precautionary measures could be taken by the utility to de-energize its lines at that particular place. There was evidence that obligation was breached by the construction company by failing to notify the utility. The Court held that under such facts there was an obligation running from the construction company to the utility which was breached and which would give rise to recovery for indemnity by the utility.

<u>IN INDEMNITY CASES A THIRD PARTY PRIMARILY LIABLE MAY BE VOUCHED IN.</u> If the party primarily liable is not made a party defendant to the action, the party secondarily liable may vouch him in.[23] Such party is vouched in by the defendant notifying him of the pendency of the suit, demanding that such third party assume the defense of it and that in the event that the third party fails to do so and a judgment is rendered against the defendant, the defendant will seek indemnity from the third party for the amount of the judgment together with costs and attorney fees.[24] In such instances the judgment rendered against the defendant is conclusive against the indemnitor pro-

[23] City of Des Moines v. Barnes, supra
Hoskins v. Hotel Randolph Co., supra
42 C.J.S. Indemnity, Sec. 32
72 AmJur Indemnity, Sec. 34 and 35
Indemnity Between Negligent Tort-Feasors: A Proposed Rationale, 37 Iowa L. Rev. 517, 556, E. Eugene Davis

[24] Hoskins v. Hotel Randolph Co., supra
City of Des Moines v. Barnes, supra
State Bank of New Prague v. American Surety Co., 206 Minn. 137, 288 NW 7

viding he has been vouched in.[25] The conclusiveness of the judgment is co-extensive with the questions determined in the case in which it was rendered and to ascertain what questions were determined, recourse may be had, not only to the pleadings, instructions, verdict and judgment therein[26] but also the entire record including the testimony.[27] If the indemnitor after proper notice and demand does not come in and assume the defense, he may be liable not only for damages and interest in the amount that is rendered against the party defendant, but also for costs, expenses and attorney fees.[28]

Vouching in is not a technical procedure, no particular form is required and it is ordinarily done by letter. The notice must, however, be sufficient and timely and the party notified must have been afforded a reasonable opportunity to participate in the defense.[29] The form used in Hoskins v. Hotel Randolph Co. is set out at page 425 of 211 NW.

"Vouching in", as above discussed, is not to be confused with bringing in third party defendants as is authorized under Rules 33 and 34 of the Iowa Rules of Civil Procedure.

Section 364.14 of the Code of Iowa 1975 authorizes municipal corporations to vouch in persons primarily liable and specifies the procedure for doing so.[30]

<u>BOTH INDEMNITY AND CONTRIBUTION PRESUPPOSE NEGLIGENCE TO THE THIRD PERSON</u>. One seeking contribution or indemnity must admit or prove his own actionable negligence to the third party injured. Actionable negligence and liability to the injured third party on the

[25] Hoskins v. Hotel Randolph Co., supra
City of Des Moines v. Barnes, supra
B. Roth Tool Co. v. New Amsterdam Casualty Co., 161 F. 708, (8th Circuit)
St. Joseph and GI Railway Co. vs. Des Moines Union Railway Co., 180 Iowa 1292, 162 NW 812
International Indemnity Co. v. Steil, 30 F.2d 654 (8th Circuit)
Aluminum Co. of America v. Hully, 200 F.2d 257 (8th Circuit)
42 C.J.S. Indemnity, Sec. 32

[26] B. Roth Tool Co. v. New Amsterdam Casualty Co., supra
St. Joseph and GI Railway Co. v. Des Moines Union Railway Co., supra
Hoskins v. Hotel Randolph Co., supra
42 C.J.S., Sec. 32

[27] Washington Gas Light Co. v. District of Columbia, 161 U.S. 316, 16 S. Ct. 564, 40 L. Ed. 712

[28] 42 C.J.S. Sec. 24, p. 602

[29] 42 C.J.S. Sec. 32

[30] Franzen v. Dimock Gould & Co., 251 Iowa 742, 101 NW2d 4
Section 364.14 of the Code of Iowa 1975

part of the party from whom contribution or indemnity is sought must be established.[31]

Where a party, who has settled with the claimant out of Court, seeks indemnity or contribution from a third party, it is necessary that the one seeking indemnity or contribution allege and prove that he, the one seeking the relief, was negligent and it will not suffice to allege,

> "the facts of the matter were such that if the matter had been litigated, the trier of fact might reasonably have found that the plaintiff's insurer was negligent in the operation of said motor truck unit at said time and place..."

or some such allegation because indemnity and contribution are based on actionable negligence by both parties and if the party seeking the relief cannot prove that he was negligent, then he has pursued the wrong remedy, if any he has. As stated by Justice Thompson in Allied Mutual Casualty Co. v. Long:

> "If he thinks he was in fact not liable, he may take an assignment of the claim, or perhaps proceed under a theory of subrogation, in a proper case. But if he elects to recover on a theory of contribution, he must be prepared to bring himself within the universally defined rules which govern it."[32]

This problem arises only where settlement has been made with the claimant by the person seeking indemnity or contribution. It does not arise where such person has had a judgment rendered against him in a previous action, nor does it arise where he may have judgment against him in pending litigation in which the party against whom indemnity or contribution is sought is a party as a defendant on cross-petition.

<u>THE BASIS FOR CONTRIBUTION BETWEEN TORT-FEASORS IS ALSO BASED ON COMMON LIABILITY</u>. When two or more persons have been guilty of concurrent negligence causing injury or damage to a claimant and the tort-feasor seeking contribution has been guilty of no intentional wrong, moral turpitude or any conserted action by alleged tort-feasors, he is entitled to contribution against the other tort-feasor to such an extent that they each equally share the loss.[33]

"Common liability" held not to exist however, where the injured wife of the driver sued the cab company, with whom her husband's car

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[31] Key-Wash Company v. Stauffer Chemical Company, supra
Allied Mutual Casualty Co. v. Long, 107 NW2d 682, (Iowa 1961)
Constantine v. Scheidel, 249 Iowa 953, 90 NW2d 10
Best v. Yerkes, supra
National Farmers Union Ins. v. Nelson 254 Iowa 288, 147 NW2d 839

[32] Allied Mutual Casualty Co. v. Long, supra

[33] Shanka v. Campbell, 260 Iowa 1178, 152 NW2d 242, 244
Allied Mutual Casualty Co. v. Long, supra
Iowa P. & L. Co. v. Abild Const. Co., supra

collided, and the cab company asked contribution against her husband for any sum that it is compelled to pay. There is no common liability in such a case because there is no liability on the part of the husband for the injuries sustained by his wife because of the husband and wife relationship. The Court stated the rule to be:

> "An injured party plaintiff in the suit from which a right of contribution develops must have had a cause of action against the party from whom contribution is sought."[34]

Where plaintiff passenger sued driver of other car and that driver filed a cross petition against plaintiff's driver, there can be no contribution unless host driver is guilty of recklessness. Otherwise, there is no common liability of each defendant to the plaintiff.[35]

Contribution can never be recovered where the party against whom contribution is sought is the employer of the party injured.[36] In such instances if there is any recourse to be had by the third party against the employer, it is by way of indemnity growing out of a breach of an independent duty running from the employer to the third party.[37]

THE COMMON LIABILITY MAY BE BASED UPON BOTH STATUTORY AND COMMON LAW LIABILITY. By "common liability" is not meant that both tort-feasors are liable to the injured person under common law or by statute. Nor does it mean that both tort-feasors are liable to the injured person under the same theory of liability. All that is meant by the phrase "common liability," is that each of the tort-feasors is liable to the injured person under some applicable theory of the law. Moreover one tort-feasor may be liable under the Federal Statute and the other tort-feasor liable under common law or a State statute.[38]

A railroad that settled with an Administratrix because of its potential liability under the Federal Employer's Liability Act was entitled to contribution from the owner of a truck, not subject to that act, that ran into the train and whose negligence was based upon a violation of State statutes. The fact that contributory negligence was not available to the railroad as a defense under F.E.L.A. but was a defense under State statutes as far as the truck owner was concerned did not destroy the "common liability" of the railroad and the truck owner. Nor was the "common liability" destroyed by reason of the fact

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[34] Yellow Cab Co. v. Dreslin, 181 F.2d 626
Indemnity Between Negligent Tort-Feasors: A proposed Rationale, 37 Iowa L. Rev. 517, 535, E. Eugene Davis

[35] Shanka v. Campbell, supra
Troutman v. Modlin, 353 F.2d 382 (8th Cir.)
Iowa P. & L. Co. v. Abild Const. Co., supra
Blunt v. Brown, 225, F. Supp. 325 (S.D. Iowa 1963)

[36] Iowa P. & L. Co. v. Abild Const. Co., supra
American Dist. Telegraph Co. v. Kittleson, supra
Blackford v. Sioux City Dressed Pork, Inc., supra

[37] Iowa P. & L. Co. v. Abild Const. Co., supra

[38] Katcher v. Heidenwirth, 254 Iowa 454, 118 NW2d 42
Shanka v. Campbell, 152 NW2d 242 (Iowa, 1967)

that under the F.E.L.A. the right of action is by the personal representative while under the Wrongful Death Act in Minnesota the right of action is by a Trustee appointed under the Act. In each instance, the beneficiary of the damages is the surviving widow. Nor was it material that no claim was made by the personal representative of the deceased party against the truck owner but that the claim against the truck owner originated from the demand for contribution by the railroad.[39]

A bus company whose vehicle had collided with a U.S. Mail truck injuring one of its passengers was entitled to contribution for the settlement made with its passenger even though the bus company, as a common carrier, was under a duty to exercise a higher degree of care to its passengers than was the operator of the mail truck.[40]

The fact that contributory negligence on the part of the claimant is a complete bar insofar as one tort-feasor is concerned but only goes to mitigate the damage insofar as the other tort-feasor is concerned does not destroy the "common liability". However, in a suit for contribution, if it is shown that the claimant is guilty of contributory negligence, then the party who is entitled to the defense of contributory negligence is exonerated from contributing.[41]

The fact that negligence on the part of one tort-feasor is personal and on the part of the other is vicarious does not destroy the "common liability".[42]

If as between the injured party and the tort-feasor from whom contribution is sought, the injured party is barred from recovery on the grounds of assumption of risk, the other tort-feasor is not entitled to contribution.[43]

The fact that the injured party released one tort-feasor did not bar the other tort-feasor, who subsequent to the release made a reasonable settlement with the injured party, from recovering contribution from the first. The "common liability" to support a cause of action for contribution is determined as of the time the accident occurs and not as of the time the cause of action for contribution is later asserted. Consequently that "common liability" is not destroyed by releasing the first tort-feasor.[44]

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[39]Zontelli Brothers v. Northern Pacific Railway, supra

[40]D.C. Transit System, Inc. v. Slingland, 105 U.S. App. D.C. 264, 266 F.2d 465

[41]Zontelli Brothers v. Northern Pacific Railway, supra
Chicago & Northwestern Railway Company v. Chicago, Rock Island & Pacific Railroad Company, supra

[42]Knell v. Feltman, 85 App. B. C. 22, 174 F.2d 662

[43]Saxby v. Cabigen, 266 Wisc. 391, 63 NW2d 820
Shrofe v. Rural Mutual Casualty Insurance Co., 258 Wisc. 128, 45 NW2d 76

[44]State Farm Mutual Auto Insurance Co. v. Continental Casualty Co., 264 Wisc. 493, 59 NW2d 425

When one tort-feasor settled with the claimant and procures a covenant not to sue, that tort-feasor nevertheless may be liable for contribution from the other tort-feasor if the second tort-feasor has paid more than his share of the total settlement. The first tort-feasor, however, will be entitled to credit for the sum originally paid.[45]

CONTRIBUTION LIES EVEN THOUGH THE FIRST TORT-FEASOR PAID BY SETTLEMENT AND WAS NOT COMPELLED TO PAY BY JUDGMENT. Where an insurance company, after making its investigation, was satisfied that the offers of settlement were fair, reasonable and just, the payment to the claimant was no less involuntary than the payment of a judgment rendered.[46] The burden of proving that the settlement was fair, reasonable and just is upon the tort-feasor making the settlement.[47] Moreover, where contributory negligence is a defense for the party being sued for contribution, the burden of proving freedom from contributory negligence of the injured party is upon the party seeking contribution.[48]

RECOVERY OF ATTORNEY FEES. If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of the other party and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit, and may call upon him to defend it; if he fails to defend, then if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense, including reasonable attorney fees.[49]

But if the party who seeks recovery of attorney fees was defending not only the allegations of negligence of the other party, but also allegations of primary negligence directed against him, then he cannot

[45] Employers Mutual Casualty Co. v. Chicago, St. P.M. & O. Ry. Co., 235 Minn. 304, 50 NW2d 689
State Farm Mutual Auto Insurance Co. v. Continental Casualty Co., supra

[46] Key-Wash Company v. Stauffer Chemical Company, 177 NW2d 5, 9, (Iowa, 1970)
Federated Mutual Implement and Hardware Insurance Company v. Dunkelberger, supra
Hawkeye-Security Insurance Co. v. Lowe Construction Co., supra
Zontelli Brothers v. Northern Pacific Railway, 263 F.2d 194 (8th Circuit)
Evans v. Howard R. Green Co., supra

[47] Hawkeye-Security Insurance Co. vs. Lowe Construction Co., supra

[48] Chicago & Northwestern Railway Company v. Chicago, Rock Island & Pacific Railroad Company, 280 F.2d 110 (8th Circuit)

[49] Peters v.Lyons, 168 NW2d 759, 768-771 (Iowa, 1969)
Rauch v. Senecal, 253 Iowa 487, 491, 112 NW2d 886, 888-889
Turner v. Zip Motors, Inc. 245 Iowa 1091, 1097-1101, 65 NW2d 427, 45 A.R2d 1174
Restatement, Torts, Sec. 914
5 Corbin on Contracts, Sec. 1037, p. 225, 228-229

recover attorney fees and expenses.[50] However, if the one seeking indemnity for attorney fees and expenses is successful in defending the action alleging primary negligence against that party (indemnitee), then that party is entitled to the recovery of attorney fees plus expenses against the party whose primary negligence caused the injury.[51]

STATUTE OF LIMITATIONS. The limitation applicable to an action for contribution or indemnity is that fixed for an implied contract. As the right to enforce contribution is not complete until payment or discharge in whole or in part of the common obligation, the Statute of Limitations does not begin to run against a claim for contribution until one tort-feasor has discharged the common debt or has paid more than his share of it.[52] The fact that the Statute of Limitations has run against the claimant is immaterial.

As a general proposition, a cause of action for indemnity accrues or becomes enforceable when the indemnitee's legal liability becomes fixed or certain as in the entry of a judgment or a settlement.[53]

Under Section 613A.5 a person claiming damages from a governmental unit must bring an action within six months unless within sixty days written notice is given to the governmental unit of the time, place and circumstances from which the injury arose. This provision is not applicable to one seeking indemnity or contribution from the governmental unit.[54]

PROCEDURE

BRINGING IN THIRD PARTY DEFENDANT. At any time after commencement of the action a defending party, as a third party plaintiff, may file a Cross-Petition and cause an Original Notice to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third party plaintiff need not obtain the leave to make the service if he files the Cross-Petition not later than ten days after he files his original Answer. Otherwise he must obtain leave on Motion upon notice to all parties to the action. The issues may then be made up between the respective parties. Any party may move to strike the third party claim

[50] Peters v. Lyons, 168 NW2d 759, 769-770 (Iowa, 1969)
Rauch v. Senecal, 253 Iowa 487, 491-495, 112 NW2d 886, 888-890

[51] Peters v. Lyons, 168 NW2d 759, 770 (Iowa, 1969)

[52] American Casualty Co. v. American Automobile Insurance Co., 259 Wisc. 201, 47 NW2d 898
Ainsworth v. Berg, 253 Wisc. 438, 34 NW2d 790
Schnebly v. Baker, 217 NW2d 708 (Iowa, 1974)
18 C.J.S. Sec. 13 b, p. 22
42 C.J.S. Sec. 33, p. 620

[53] Vermeer v. Sneller, 190 NW2d 389, 392 (Iowa, 1971)
Kroblin Transfer, et al v. Birmingham Fire Insurance Co., 239 Iowa 15, 18, 30 NW2d 325, 327

[54] Olsen v. Jones, 209 NW2d 64, 65-68 (Iowa, 1973)

or for its severance or for separate trial. A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or a part of the claim made in the action against the third party defendant.

When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.[55]

But a person seeking indemnity or contribution need not bring another in to the pending action but may wait to determine whether or not judgment is rendered against him and if so, then bring a separate action for contribution or indemnity against the third party.[56]

PLEADINGS. A Cross-Petition in a pending action should allege (1) a general statement of the allegations contained in the Petition; (2) an incorporation of the Petition into the Cross-Petition by reference; (3) that the Cross-Petitioner was guilty of no intentional wrong or moral turpitude in connection with said accident; (4) that if there was any negligence on the part of this Cross-Petitioner in connection with said accident or if this Cross-Petitioner is liable to plaintiff under any theory of law for injuries sustained in said accident, said negligence, if any there was, was passive or secondary and the negligence, if any there was, was on behalf of defendant on Cross-Petition whose negligence, if any there was, was active and primary.

If plaintiff is able to prove the material allegations of his Petition and recovers judgment against this defendant, then and in that event this defendant is entitled to indemnity from said defendant on Cross-Petition for the amount of any judgment and costs which are rendered against and paid by this Cross-Petitioner. (The above paragraphs to be adjusted to the facts in the case.)

Under certain circumstances it may be desirable or necessary to plead specific acts of negligence against the defendant on Cross-Petition.[57]

If it is a case where there is a possibility that either indemnity or contribution could be awarded, the prayer should be in the alternative.

If a separate action is brought for contribution, plaintiff must plead and prove his own actionable negligence and also prove the negligence of the party from whom contribution is sought. Of course, proximate cause must also be proved.[58]

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[55] R.C.P. 34

[56] Chicago & Northwestern Railway Company v. Chicago, Rock Island & Pacific Railroad Company, 280 F.2d 110 (8th Circuit)
Hawkeye-Security Insurance Co. v. Lowe Construction Co., supra

[57] R.C.P. 33
Franzen v. Dimock, Gould & Co., 251 Iowa 742, 750-751, 101 NW2d 4, 10

[58] Key-Wash Company v. Stauffer Chemical Company, 177 NW2d 5, 9-10, (Iowa, 1970)
Evans v. Howard R. Green Co., supra

Where a separate action is brought for indemnity the party bringing the action must prove (1) it was liable to the injured party; (2) the settlement was reasonable; and (3) the facts are such as to give rise to a duty on the part of the indemnitor to indemnify the indemnitee. Where the indemnitee has settled with the third party, it is not sufficient to plead and prove that there was potential liability to that third party but must plead and prove actual liability.[59]

RELEASE. Where an injured party gives a covenant not to sue and a hold harmless agreement to a negligent employee, such an agreement affords a complete defense in a suit later brought by the injured party against the employer and the owner of the vehicle leased to the employer.[60] The same would be true even though the agreement contained a provision reserving all claims against the employer. The master's liability under the doctrine of respondeat superior is based not on his own misdeeds but those of his servant and therefore when a servant is not liable, the master for whom he was acting at the time should not be liable.[61]

RIGHT TO JURY TRIAL. A party seeking or defending against contribution or indemnity is entitled to a jury trial upon those issues if a demand is made, however, the demand for a jury trial by the plaintiff against one or both of the tort-feasors does not suffice as a demand for a jury trial on the issues of contribution or indemnity.[62]

FUNCTION OF JURY. The function of the jury is solely to make findings of fact. The jury does not bring in a verdict either for or against the parties. The Court applies the law and enters the judgment based upon the facts found by the jury.[63]

AMOUNT OF CONTRIBUTION. Ordinarily in cases of contribution the total amount of the judgment is divided equally among those liable to the injured person. But when a person is vicariously liable, that person and the tort-feasor whose negligence is imputed to him are

[59] Key-Wash Company v. Stauffer Chemical Company, 177 NW2d 5, 11-12 (Iowa, 1970)

[60] Bruce v. Miller, et al, ___ F. Supp. ____ (Iowa, 1975)

[61] Dickey v. Estate of Meier, 188 Neb. 420, 197 NW2d 385

[62] Chicago & Northwestern Railway Company v. Chicago, Rock Island & Pacific Railway Company, supra
Hawkeye-Security Insurance Co. v. Lowe Construction Co., 251 Iowa 27, 32, 99 NW2d 421, 425
Brandt v. Olson, et al, 190 F. Supp. 683 (D.C. Iowa)
McAndrews v. United States Lines Company (D.C. 1958), 167 F. Supp. 41
National Farmers Union Property & Casualty Company v. Nelson, 260 Iowa 163, 171, 147 NW2d 839, 844

[63] McCarthy v. Cullen & Son, 199 NW2d 362, 371
Stowe v. Wood, 199 NW2d 323, 327 (Iowa, 1972)
Brandt v. Olson, et al, supra
Evans v. Howard R. Green Co., supra

considered together for contribution purposes and likewise when several persons together violate a common responsibility, they will be considered together for contribution purposes.[64]

WHEN CONTRIBUTION BECOMES COMPLETE. A party is not entitled to have an execution issue for contribution until he has discharged more than his equitable portion of the judgment and then only for the amount that he paid in excess of his equitable portion.[65]

APPLICABILITY OF NON-RESIDENT STATUTE TO CONTRIBUTION OR INDEMNITY. An action for contribution or indemnity has been held to be one growing out of a motor vehicle mishap and therefore service may be had upon non-resident under Sections 321.498 - 321.512 of the Code of Iowa 1966.[67]

INTEREST. Interest is recoverable at the legal rate from the date of payment.[68]

[64] Schnebly v. Baker, 217 NW2d 708, 731-732 (Iowa, 1974)

[65] Schnebly v. Baker, supra
Brandt v. Olson, et al, supra
Smith v. Whittemore, 270 F.2d 741 (3rd Cir.)
Hawkeye-Security Insurance Co. v. Lowe Construction Co., 251 Iowa 27, 32, 99 NW2d 421, 426
Dairyland Insurance Company v. Mumert, 212 NW2d 436, 439

[66] Key-Wash Company v. Stauffer Chemical Company, 177 NW2d 5, 9, (Iowa, 1970)
Federated Mutual Implement and Hardware Insurance Company v. Dunkelberger, supra
Hawkeye-Security Insurance Co. v. Lowe Construction Co., supra
Zontelli Brothers v. Northern Pacific Railway, 263 F.2d 194 (8th Circuit)
Evans v. Howard R. Green Co., supra

[67] Cannon v. Century Construction Company, 252 Iowa 88, 106 NW2d 65
Brandt v. Olson, et al, supra

[68] D.C. Transit System v. Slingland, supra
20 A.L.R.2d 1268

ADDITIONAL REFERENCES

Distributing Tort Liability: Contribution and Indemnity in Iowa, 52 Iowa Law Review 31

Contribution Between Joint Tort-feasors as Affected by the Yerkes Case, 6 Drake Law Review 30

Contribution and Indemnity Among Tort-feasors in Minnesota, 37 Minn. L. Rev. 470

Sufficiency and Timeliness of Notice by Indemnitee to Indemnitor of Action by Third Person, 73 A.L.R.2d 504 (Anno)

Contribution Between Negligent Tort-feasors at Common Law, 60 A.L.R. 2d 1366 (Anno)

Rights of Defendant in Action for Personal Injury or Death to Bring in Joint Tort-feasors for Purpose of Asserting Right of Contribution, 11 A.L.R. 2d 288 (Anno)

Right of Tort-feasor to Contribution While Judgment Creditor is Spouse, Parent, Child etc. of Other Tort-feasor Against Whom Contribution is Sought, 19 A.L.R. 2d 1003 (Anno)

Running of Statute of Limitations Against Claim for Contribution of Indemnity Based on Tort, 20 A.L.R. 2d 925 (Anno)

Judgment Obtained by Third Person Against Indemnitee as Conclusive Against the Latter, Irrespective of its Conclusiveness Against Indemnitor for Amount Paid in Satisfaction of Judgment, 24 A.L.R. 2d 329 (Anno)

Rights of One Entitled to Contribution to Recover Interest, 27 A.L.R. 2d 1268 (Anno)

CONTRACTUAL INDEMNITY

By Claire F. Carlson
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I. Express Contracts

A. Indemnity for acts of another

A wealth of cases can be found construing express agreements to indemnify a party from damage caused by the acts of another. There is no difficulty in the application of the general rule that such agreements are valid. 41 Am. Jur. 2d 691-692. The problem arises with the language used and fitting the facts to the language.

Evans etal. v. Green, 1975, Ia., 231 NW 2 907. In barring the right of Green to recover indemnity against Dory Builders, the Court determined that the contractual provisions itself precluded this since Plaintiff recovered against Green on the basis of negligent design, the provisions of Dory's indemnity agreement covering "alleged act or omission of the contractor" could not be extended to loss or liability incurred prior to the contract.

McCarthy v. J. P. Cullen & Son Corp., 1972, Ia., 199 NW 2d 362

Iowa Power & Light Co. v. Abild Construction Co., 1966, 259 Ia. 314, 144 NW 2d 303. Here contract terms requiring contractor to do job in good and workmanlike manner and safeguard premises did not grant indemnity to electric company on basis of failure to notify it of work in progress.

Hawley v. Davenport, R.I. & NW Ry. Co., 1951, 242 Iowa 17, 45 NW 2d 513. Operating agreement between various railroads using track called for indemnity against railroad whose train caused injury or damage.

B. Indemnity for own acts

1. Contracts Covering Sole Negligence of the Indemnitee

(a) Public Policy

An agreement to indemnify for an indemnitee's negligence is not against public policy.

Santa Fe, Prescott & Phoenix Railway Co. v. Grant Brothers Construction Co., 1913, 228 U.S. 177, 33 S. Ct. 474, 57 L.Ed. 787
Restatement, Law of Contracts, Sec. 574
42 C.J.S., Sec. 7, page 573

"It is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract." 41 Am. Jur. 2d, Sec. 9, page 694.

Since 1894, the Iowa Supreme Court has consistently held that parties may validly contract to avoid liability for their own negligence.

Griswold v. Illinois Central Railroad Co., 1894, 90 Iowa 265, 57 NW 843, 24 L.R.A. 647
Mayhew v. Iowa-Illinois Telephone Company, 1967, 279 Fed. Supp. 401
Weik v. Ace Rents, 1958, 249 Iowa 510, 87 NW 2d 314

(b) Construction of these Contracts

Indemnity contracts are construed in accordance with the rules for the construction of contracts generally.

Chicago & NW Railroad Co. v. Kramme, 1953, 244 Iowa 944, 59 NW 2d 204

"Each contract must be construed according to its own terms"

Duke v. Tyler, 209 Iowa 1345, 230 NW 319, as quoted in Chicago & NW Railroad Co. v. Kramme, supra

"A contract of indemnity is construed in accordance with the rules for the construction of contracts generally. The cardinal rule is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. To do this, it has been held that the courts must consider not only the language of the contract, but the facts and surrounding circumstances under which the contract was made."

41 Am. Jur. 2d, Sec. 13, page 697.

"The well-recognized canon of construction giving words their legal, natural, and ordinary meaning is controlling where the language of the contract indemnity is neither technical nor ambiguous. And where the general import of a contract is one of indemnity, it is the rule that all the words used therein should be construed to be in harmony with, and subservient to, the general purpose of the bond."

41 Am. Jur 2d, Sec. 14
Herchelroth v. Mahar, 1967, Wis., 153 NW 2d 6

Although Courts have generally held that contracts indemnifying the negligent acts of an indemnitee must be clear and unequivocal, (42 C.J.S., Indemnity, Sec. 4, page 567), Courts have varied as to the language necessary to be "clear and unequivocal".

The Iowa Court appears to take the position that, whether the contract to be construed is one for indemnity for negligence or not, the usual and ordinary meaning should be given to the wording of the contract.

The Court, in Huntsman v. Eldon Miller, Inc., 1960, 101 NW 2d 531-533, stated, only where a contract is ambiguous and the language used is susceptible of various meanings, the usual rules of construction apply; where clear and concise language is used, its meaning is for the court to determine as a matter of law.

In this particular case, the Court reiterated the rule that a contract is most strictly construed against the party who prepares it (in this case the defendant) but that the rule of strict construction cannot apply when the words must be given their normal meaning. By way of note, the case involved a forfeiture of a surety bond which the Court held was in the nature of a penalty and unenforceable so it managed to find in favor of the Plaintiff although on grounds other than the expressed provisions of the contract.

Weik v. Ace Rents, 1958, involved a rental agreement wherein the Lessee agreed to exonerate, indemnify and save harmless the rental company for all claims or liability arising out of the use of the equipment. Here, the Iowa Court held that the language was so clear and its meaning so unambiguous that the court could not construe the contract other than to give it its normal, natural meaning which meant that regardless of whether the equipment was in good working condition when rented, no liability attached to the Defendant.

Judge Hanson in his opinion, found in Eppley v. S. Patti Construction Co. (D.C. Ia.) 1964, 228 F. Supp. 1, said "Under Iowa law the contract need not expressly specify that it is intended to indemnify--------for their own negligence if the clear intent of the language is to indemnify---------."

As of this writing, the Iowa court has not specifically decided an indemnity contract specifying indemnity against ones own negligence. Jurisdictions that have dealt with this fall into two categories: "express reference" or "all inclusive."

Depending upon the actual facts in the case, the New York Court appears to coincide with the Iowa decisions, as shown by the case of Levine v. Shell Oil Co., 28 N.Y. 2d 205, 321 N.Y.S. 2d 81, 269 NE 2d 799, overruling Thompson - Starrett Company v. Otis Elevator Company, N.Y., 2 NE 2d 35, where the court stated, "any and all liability" has to be taken to mean just that and the court is not at liberty to substitute or limit the normal meaning of the words.

California appears to take a moderate view, as shown by the case of Price v. Shell Oil Co., Cal. (1970) 466 P.2d 722 and Markley v. Beagle, Cal. (1967) 429 P. 2d 129. The California court has not gone so far as to say that they will construe an indemnity contract to exclude indemnity for ones own negligence unless the word "negligence" is specifically used but the California court has gone on record that if, given the opportunity to find an indemnity provision to be unclear, they will adopt this rather than allow indemnity for ones own negligence.

The Illinois, Minnesota and Nebraska Courts appear to follow the general rule for construction of contracts as far as indemnity agreements are concerned, that is, "The intent and meaning of a written contract should be determined from the contents of the entire contract and resort to other evidence of intent of the parties should only be when the words of the contract itself cannot be clearly understood." Actual cases on this point will be reviewed in more depth in later parts of this outline.

Many courts, particularly those located in the Southern states and some Eastern states absolutely refused to construe an indemnity contract to cover negligence unless the actual word "negligence" is used. This theory is known as the "express reference rule" and Ohio has gone so far as to adopt a statute to this effect.

Some examples of the "express reference rule" are listed below:

Employers Mutual Life Insurance Company v. Griffin Construction, Ky. (1955) 280 SW 2d 179. Here the court stated that unless the intent to indemnify for the indemnitee's negligence is expressed in unequivocal terms so that no other meaning could be ascribed to it and every presumption is against such an interpretation, there would be no fnding of indemnity.

Mitchell v. Southern Railway Co.,, Ky., 74 SW 216, "Mere general, broad, and seemingly all-inclusive language in the indemnifying agreement has been said not to be sufficient to impose liability for the indemnitee's own negligence."

Gulf Oil Corp. v. Atlantic Coast Line R. Co., Fla. 196 So. 2d 456.
Arnold v. Stupp Corp. La., (1968) 205 So. 2d 797.

Public policy has been said to require such contracts to be restricted rather than extended, and the liability of the indemnitor is regarded as so hazardous, and the character of the indemnity so unusual, that there can be no presumption that the indemnitor intended to assume it in the absence of express stipulation. 41 Am. Jur. 2d, Indemnity, Sec. 15, page 701. Arnold v. Stupp Corp., supra.

(c) General or Express Indemnity Provisions

Because each indemnity contract must be construed according to its particular language and the situation of the parties, it is difficult to devise a general statement as to what the Iowa Court might do in construing a particular contract.

In the jurisdictions that have followed the general or all-inclusive theory as to indemnity for one's own negligence, certain key phrases have appeared in all contracts where indemnity has been granted. In those states where the express theory is followed, the Courts specifically require the use of the term "negligence of the indemnitee" or similar phrases. And as is common to our system of court decisions, there are always exceptions to either example, where the Court, for reasons of equity, manner in which the injury occurred, relationship of the parties or other reasons, has taken a middle stand, using as justification the general basic rules of construction of contracts whether in or out of context.

In those states where the express reference rule is not in use, the phrase "any and all liability" is construed to mean what it appears to say, that is, any and all liability whether occasioned by the indemnitor or the indemnitee, as shown by the following examples, where the court found indemnity for either the sole negligence of the indemnitee or concurring negligence, even though one was active and one passive:

Weik v. Ace Rents, 1958, 249 Iowa 510, 87 NW 2d 314, "do hereby exonerate, indemnity and save harmless the company from all claims or liability to all parties for damage or loss to any person, persons or property in any way arising out of or during the use of said equipment------------."

Chicago Great West Ry. Co. v. Farmers Produce Co., 1958, 164 Fed. Supp. 532, Judge Graven Opinion, "protect, indemnify and save harmless the railway company from and against any and all liability, loss, cost, damage, expense, claims of every kind and character--------------arising directly or indirectly out of or incident to the existence, use, maintenance or condition of said crossing." In this case the only negligence was on the part of the railroad but indemnity was granted it over and against Farmers Produce under the agreement.

In a well-reasoned and exhaustive opinion in the case of Fire Association of Philadelphia v. Allis Chalmers Manufacturing Co., N.D. Iowa, W.D. 1955, 129 F. Supp. 335, beginning on page 354, we quote verbatim from Judge Graven's opinion:

> "The question as to whether the language used by the parties in a contract encompasses negligence has arisen most frequently in connection with indemnity contracts or contracts containing an indemnity provision.
>
> In the case of Chicago & N.W.R. Co. v. Chicago Packaged Fuel Co., 7 Cir., 1950, 183 F. 2d 630, at page 632, the Court stated:

'It is true that contracts indemnifying parties against losses caused by their own negligence are generally subject to strict construction, as stated by the District Court, and generally, 'where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts.' Annotation, 175 A.L.R. 10, at page 30. However, the Annotator there, at page 37 calls attention to the qualification of this strict construction rule in a number of cases where the language of the agreement was so broad as to indicate the intention of the parties that it should include negligence.* * *'

In accord with the view that a provision may encompass a party's own negligence even though it does not contain the word "negligence" are the cases of Griffiths v. Broderick, 1947, 27 Wash 2d 901, 182 P. 2d 18, 175 A.L.R. 1, and Payne v. National Transit Co., D.C. Pa. 1921, 300 F. 411, affirmed, National Transit Co. v. Davis, 3 Cir., 1925, 6 F. 2d 729, certiorari denied, 1925, 269 U.S. 579, 46 S. Ct. 104, 70 L.Ed. 422."

This particular case involved damage caused by fire from faulty electrical equipment sold by the defendant. The purchase order and proposal in contract had the following provision:

"The liability of the company-----------arising out of the supplying of said apparatus, or its use, whether on warranties or otherwise, shall not in any case exceed the cost of correcting defects in the apparatus as above set forth, and, upon the expiration of said one year, all such liabilities shall terminate. The company shall not in any event be liable for indirect or consequential damages."

Judge Graven held that these words should be given their ordinary and usual significance and in doing so concluded that the provision <u>did</u> encompass the defendant's negligence.

<u>Aluminum Co. of America v. Hully,</u> 1952, 8th Cir., 200 F. 2d 257, involved a contract to be performed in Davenport, Iowa but to be construed by Pennsylvania law. The Court held that the indemnity provision, "The contractor shall save and hold the owner harmless from and against all liability, claims and demands on account of personal injuries----------- arising out of or in any manner connected with the performance of this contract------------", was valid and plainly indicated an intention of the parties that the contractor should defend and indemnify Plaintiff against the demands made by contractor's employee for injuries suffered by the negligence of Plaintiff.

The Illinois Courts seem to have dealt with the question of indemnity for one's own negligence more than any other court. The following cases all held the indemnity provision to include one's own negligence:

<u>U.S. Steel Corp. v. Emmerson-Comstock Co.,</u> 1956, D.C. Illinois, 141 Fed. Supp. 143, "to save harmless and defend from and against actions, of legal proceedings, claims, demands, damages, costs, expenses and attorney fees, in any manner caused by, arising from, incident to, connected with or growing out of the performance of this contract."

On page 146 of the Opinion, the Court finds that Illinois holds the words "in any manner caused" or "all claims-------- in any manner-----------incident to, connected with or growing out of the performance of this contract" are sufficient to encompass indemnity for negligence.

In this particular case, the injured employee was under the supervision of U.S. Steel and was injured by the negligence of U.S. Steel, and there was no question that the indemnitor had control or could have contributed to the injury. The Court based its decisions on the following leading Illinois cases:

Insurance Company of North America v. Elgin, J & E Railway Co., 7th Cir., 229 F. 2d 705; Chicago & Northwest Railway Co. v. Chicago Packaged Fuel Co., 7th Cir., 1950, 183 F. 2d 630, 632; Russell for use of Continental Casualty Co. v. Shell Oil Co., 1949, 339 Ill. Appellate 168, 89 NE 2d 415.

In the few cases decided in Minnesota on this question, it appears that Minnesota and Illinois agree on interpretation.

Christy v. Menasha Corp., 1973, Minn., 211 NW 2d 773, "Sub-contractor agrees to assume entire responsibility and liability for all damages or injury to all persons, whether employees or otherwise, arising out of, resulting from or in any manner connected with the execution of the work -----------and agrees to save contractor harmless from all such claims----------". The Court held an injury to an employee performing work for the sub-contractor comes within this language regardless of the injury's cause, including indemnity for one's own negligence.

Zerby v. Warren, Minn., 1973, 210 NW 2d 58. Here the Court failed to find indemnity on the basis that the injury was caused by a violation of a law. However, the Court agreed that indemnity would be granted for negligence:

> "If an indemnity agreement does not violate public policy, it is generally held that a party may contract to indemnity against his own negligent acts. However, any agreement that relieves a person from the consequences of the violation of an absolute duty imposed by law is against public policy and is void."

N. P. Ry. Co. v. Thornton Bros. Co., 1939, Minn., 288 NW 226.

It is difficult to make a broad statement as to the law on this point in Wisconsin. In the case of Herchelroth v. Maher, Wisc., 1967,153 NW 2d 6, involving a truck lease agreement which contained the following indemnity provision:

> "Lessor agrees to secure and pay for property damage and public liability insurance on the leased equipment and to save Lessee harmless from any damage thereby"

the injury and damage was caused by Lessee's negligence and the Court granted indemnity stating that the only reason for the hold harmless provision was to cover negligence of the Lessee in view of the requirement for liability insurance.

However, in the case of Hartford Accident & Indemnity Co. v. Worden-Allen Co., Wisc., 297 NW 436, previously cited herein, the Court seems unsure as to its decision in the event of sole negligence on the part of the indemnitee.

The following cases have held that the words "all losses" or "to hold harmless from all loss or damage arising from any cause or for any reason whatsoever" cover and include damages occasioned by the indemnitee's own negligence:

Jacksonville Terminal Co. v. Railway Express Agency, Inc, (CA 5 Fla.) 296 F. 2d 256, Cert. Den. 369 U.S. 860, 8 L. Ed. 2d 18, 82 S. Ct. 949; Cavenaugh v. C. P. Poland Co., 268 N.Y.S. 390; Griffiths v. Henry Broderick Inc., Wash., 182 P. 2d 18, 175 A.L.R. 1; Metropolitan Paving Co. v. Gordon Herkenhoff & Assoc. Inc., N.M., 341 P. 2d 460; General Acci. Fire & LIfe Assur. Corp. V. Smith & Oby Co. (CA 6 Ohio) 272 F. 2d 581, 77 A.L.R. 2d 1134, reh. den. 274 F. 2d 819, 77 A.L.R. 2d 1142.

In California, the Courts do not require the use of the word "negligence". However, they use a strict construction as to the meaning of the words used where sole negligence of the indemnitee is allegedly covered. Roendahl Corp. v. H. K. Ferguson Co. , 1962, 27 Cal. Rptr. 56, 211 CA 2d 313.

Other general interpretation rule cases are as follows: Fossen v. Ashland Oil & Refining Co., Ky., 1957, 309 SW 2d 176; Rice v. Pennsylvania Railway Co., CA 2 N.Y., 202 F 2d 861.

In those states following the express reference rule, the Courts flatly announced that unless negligence of the indemnitee is referred to in the contract, they will assume that the parties did not intend it to be covered. Quoting from Arnold v. Stupp Corp., La., 1968, 205 So. 2d 797, "The general rule is that a contract of indemnity will not be construed to cover negligent acts where such intent is not clear and unequivocal. 'Any and all liability' is not construed to import intent to render an indemnitor liable for damage caused by the indemnitee's sole negligence."

Kansas City Power & Light v. Federal Construction Co., Mo., 1961, 351 SW 2d 741. Here, even though the agreement stated "indemnify and save harmless from all suits or actions of every nature and description----------------sustained by any party in the performance of the work", the Court refused to indemnify for negligence.

Whirlpool Corp. v. Morse, D.C. Minn., 222 Fed. Supp. 645, Affirm. (CA 8) 332 F. 2d 901, where a property owner had full and complete knowledge and notice of a dangerous condition, the failure of a contractor to comply with statutes and safety regulations as agreed to was not the proximate cause of the injury and the property owner could not recover on grounds of indemnity.

McDonald & Kruse, Inc. v. San Jose Steel Co., Inc., 1972, 105 Cal. Rptr. 725, 29 C.A. 3rd 413; Gulf Oil Corp. V. Atlantic Coast Line Railroad Co., Fla., 196 So. 2d 456; Swartz v. Merola Bros. Construction Corp., N.Y., 48 NE 2d 299; Batson-Cook Co. v. Industrial Steel Erectors, 5th Cir., 257 F. 2d 412.

The Court in the case of Employers Mutual Life Insurance Co. v. Griffin Construction, Ky., 280 SW 2d 179, 1955, went further to state in an instance where indemnification was sought for the indemnitee's negligence, that unless such intention is expressed in unequivocal terms so that no other meaning could be ascribed to it and every presumption is against such an interpretation, there would be no finding of indemnity.

In the case of Price v. Shell Oil Company, Cal, 1970, 466 P. 2d 722, the Court refused to find indemnity in view of the provision "lessee would indemnify Shell against any and all claims and liability for injury or death of persons or damage to property caused by or happening in connection with the equipment or the condition, maintenance, possession, operation or use thereof", holding the phrase was not clear and explicit enough to indemnify against negligence of the indemnitee.

(d) Indemnity Covering Damage Arising out of Performance of the Contract

It is normal to limit indemnity for negligence to operations arising out of the contract that contains the indemnity provision. All of the cases listed in ——— determined that the hold harmless provision covered the indemnitee's negligence and that the injury or damage occurred as a result of the operations or conduct carried on in performance of the contract.

Where an injury occurs to an employee of an indemnitor while engaged in the business of his employer on the premises of the indemnitee, the Courts have universally found that damage is occasioned by the performance of the contract, as shown in the following cases:

Aluminum Company of America v. Hully, supra;
Russell v. Shell Oil Co., Ill., 1950, 89 NE 2d 415;
White v. Morris Handler Co., Ill., 287 NE 2d 203;
U.S. Steel Co. v. Emerson-Comstock, Ill., supra;

Christy v. Menasha Corp., 1973, Minn. 211 NW 2d 773. The Court said that the indemnity provision could not be limited to matters within the control of sub-contractor. "An injury to an employee performing work for the sub-contractor at the construction site comes within this language (agrees to assume entire responsibility and liability for all damages ------arising out of, resulting from or in any manner connected with the execution of the work provided for in this sub-contract) regardless of the injury's cause.

General Accident Fire & Life Assurance Corp. v. Smith & Oby Co., CA 6 Ohio, 272 F. 2d 581, 77 A.L.R. 2d 1134, reh. den. 274 F. 2d 819, 77 A.L.R. 2d 1142.

Metropolitan Paving Co. v. Gordan Herkenhoff & Assoc., Inc., N.M., 341 P. 2d 460.

However, in jurisdictions where the Courts do not hold fast to the "express reference rule", but tend toward this interpretation, they have used the "arising out of the performance of the contract" as a means of escaping indemnity for sole negligence of the indemnitee.

In Price v. Shell Oil Co., supra, the California court refused indemnity on two grounds - failure to explicitly show an intent to indemnify for negligence and that the injury was not caused or resulting from the actions protected against in the indemnity agreement contained in the lease.

Whirlpool Corp. v. Morse, D.C. Minn., 222 Fed. Supp. 645, Affirm (CA 8) 332 F. 2d 901; as was the case in Phillip Wick Co. v. Lee Dyeing Co. of Johnstown, 335 N.Y.S. 2d 619.

See also Halliburton Oil Well Cementing Co. v. Paulk (CA 5 Tex) 180 F. 2d 79, cert. den. 340 U.S. 812, 95 L. Ed. 596, 71 S. Ct. 38. Here the Federal Court followed the Texas rule of strict or express reference.

In the case of Goldman v. Ecco-Phoenix Electric Corp. Cal., 396 P. 2d 377, the California Court attempted to set forth some guidelines without specifically getting into the subject of whether the injury or damage occurred in the performance of the contract. The Court seemed to say that if the damage occurred from a matter over which the indemnitee exercised exclusive control, they would not read indemnification for negligence into the agreement. The Court did state that there would be no indemnity if the injury resulted from a conduct or omission unrelated to the indemnitor's performance.

2. Contracts Covering Indemnity of Joint Tortfeasors

Courts have not had the problem granting indemnity covered by an express agreement where both parties are negligent or participate in the action causing the damage or injury.

Epley v. S. Patti Construction Co., 1964, 228 F. Supp. 1, reversed on other grounds by Carstens Plumbing & Heating Co. v. Epley, 342 F. 2d 830. Here the Court held as a matter of law that, even though the jury had found both the general contractor, S. Patti, and the sub-contractor, Carstens, negligent, the terms of the sub-contract calling for indemnity against "all loss, cost, damage, liability or expense which it may incur or sustain in consequence of any claim of personal injury alleged to have been caused by an act or omission of Carstens--" covered the negligence of S. Patti.

U.S. v. Seckinger, 1970, 397 U.S. 203, 25 Law Ed. 2d 224, 90 S. Ct. 880, reh. den. 397 U.S. 1031, 25 Law Ed. 2d 546, 90 S. Ct. 1255. Indemnity action brought by United States under terms of construction contract after employee of Defendant recovered under Tort Claims Act. Contract stated the contractor responsible for "all" damages that occurred as a result of contractor's "fault" or "negligence". Court allowed recovery under comparative negligence theory of damage caused by contractor but not any attributed to the United States.

Rouse v. Chicago R.I. & P.R. Co., 1973, Ia., 474 F 2d 1180. Because of lease provisions between railroad and elevator, when railroad acquiesced in unsafe condition caused by elevator could recover fifty per cent rather than indemnity for total damage and judgment

In Cole v. Chevron Chemical Company-Oronite Div., (La) 477 F. 2d 361, recovery was not allowed where both parties negligent because contract not unequivocally clear as to intent on this point. Louisiana is in the minority on this Beaumont v. Graham, Tex., 441 SW 2d 829; Moak v. Link-Belt Co., La., 229 So. 2d 395
See also: Anno.: Indemnity-Contractors Liability, 27 ALR 3 663, 716-742
Warren v. Herdson Pulp & Paper Corp., N.Y., 477 F. 2d 229

II. Implied Contracts

The right of implied indemnity in contractual cases is based upon a breach of contract by the person against whom indemnity is sought, while in non-contractual indemnity, the right rests upon the fault of another which has been imputed to or constructively fastened upon him who seeks indemnity. 41 Am. Jur. 2d, Sec. 19, page 705.

In construction cases, implied indemnity is often based on the theory that the contractor impliedly agrees to perform the work in a proper and workmanlike manner and to exercise due care to avoid injury to third persons. His failure to do so constitutes a breach of the contract entitling the contractor to recover damages (i.e. indemnity) sustained as a result of such breach.
Anno.: Duty of Construction Contractor to Indemnify Contractor in absence of express contract for indemnity, 37 ALR 853
Read v. U.S. (CA 3P) 201 F. 2d 758.
Barker Greene v. Bruning Co., (CA 8 Neb) 357 F. 2d 231
Pfarr v. Standard Oil Co., 165 Iowa 657, 146 NW 851
Grand Union Co. v. Prudential Bldg. Maintenance Corp., Fla., 226 So. 2d 117.

Where the right of implied indemnity rests upon a contractual relationship between the person seeking and the one resisting indemnity, it is not necessary or appropriate to apply the theories of primary or secondary liability or active or passive negligence.
Cahill Bros. Inc. v. Clementina Co., 1962, 208 Cal App. Ed. 367, 2 Cal. Rptr. 301

A. The following cases found implied indemnity based upon failure to properly do a job as contracted which failure resulted in third party recovery against the contractor:

Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co., 1926, 10 F. 2d 769
D.M. Picton & Co. v. Eastes, 1947, La., 160 F. 2d 189, cert. den. 331 U.S. 859, 91 L.Ed. 1866, 67 S. Ct. 1756
Barber SS Lines, Inc. v. Quinn Bros. Inc., 1952, Mass., 104 F. Supp. 78
Read v. U.S., 1953 Pa., 201 F. 2d 758
Weidert v. Monahan Post Legionnaire Club, 1952, 243 Iowa 643, 51 NW 2d 400

In the Weidert case, above, the second and third floor tenant was allowed indemnity against the plumber for damage to first floor resulting from leaking pipes.

Walker Mfg. Co. v. Henkel Const., 1972, Ia., 346 F. Supp. 621. General contractor liable on contract with owner could recover on implied indemnity theory against subcontractor for failure to follow specifications for laying roof.

Where the court finds no breach of contract such as fitness of product, merchantibility, or quality of job or work, implied indemnity cannot be granted and indemnity must be based on (1) derivative or vicarious liability, (2) direction, reliance or in the interest of another, (3) liability is based on failure to perceive negligence of another, (4) express contractual indemnity. Olson v. Village of Babbitt, 1971, Minn. 189 NW 2d 701. Here no indemnity allowed manufacturer of fireworks as facts did not fit any of the above situations.

Cases refusing to find implied indemnity because of breach of duty:

North River Ins. Co. v. Alpine Development Corp., 307 NYS 2d 582

In Epley v. S. Patti Construction Co., Ia., 1964 228 F. Supp. 1, Judge Hanson held indemnity could be based on breach duty to properly supervise work.

B. An agreement to indemnify also can be implied from a manufacturer or seller's warranty of fitness or merchantibility of his product.

Peters v. Lyons, 1969, Iowa, 168 NW 2d 759, is the famous dog collar case. Here Kresge was required to indemnify the purchaser of a dog chain for liability incurred when the chain broke.

Ke-Wash Co. v. Stauffer Chem. Co.,1970, 177 NW 25. This case turned on construction of statements in correspondence between parties which could be assumed to imply acceptance of indemnity by Defendant.

See also Gen. Electric Co. v. Cuban American Nickel Co., La., 396 F. 2d 89, for a different slant because of Louisiana law; Hawkeye Security Ins. Co. v. Ford Motor, 1972, 199 NW 2d 373

Implied indemnity has been allowed on basis of respondeat superior or employer-employee relationship.

Fireman's Fund American Ins. Cos. v. Turner, 1971, Ore., 488 P 2d 429. Employer's insurance carrier brought indemnity action against employee for amounts paid for employer held liable in auto accident. Indemnity allowed because employer only vicariously liable and employee actively negligent.

Gen. Electric Co. v. Cuban American Nickel Co., 1968, La., 396 F. 2d 89. Again unique in that employer could recover workmen's compensation payments regardless of contributory negligence.

Archibald v. Midwest Paper Stock Co.,1970, Ia. 176 NW 2d 761

Denver-Chicago Trucking Co. v. Lindeman, 1947, 73 F. Supp.925

Graham v. Worthington, 1966, 259 Iowa 845, 146 NW 2d 626

C. Right to indemnity based on products liability is extensively covered in the annotation found in 28 ALR 3d 943.

In Schneider v. Swaney Motor Car Co., 1965, 257 Iowa 1177, 136 NW 2d 338, the jury found no express or implied warranty of fitness, which precluded application of the implied indemnity doctrine.

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ALLOCATING CONTRIBUTION AMONG TORTFEASORS

I.

Ideas of a Young Liberal

" Indemnity should be confined to a rather narrow field. It should be kept closely within the bounds of those cases where the disparity of the duties owed to the injured person by the two negligent tortfeasors is such that the liability of the one receiving indemnity is without the indemnitee's personal fault, or closely approximates absolute liability."

* * *

" Where, however, there is no pronounced disparity in the severity of the duties of the two negligent tortfeasors, the two are roughly on the same 'plane of moral guilt' and should be allowed contribution against one another in proportion to the fault of each. Otherwise the temptation is to shift the entire responsibility for a tort loss to the one who seems the more guilty. The result is a distorted law of indemnity, with indemnity being allowed in some cases where contribution would be more proper. There should be no shifting of responsibility where sharing is proper."

" In order to prevent distortion of indemnity * * * the substantive law of the state should allow contribution -- preferably in proportion to fault --"

* * *

" In order to have a mature, well-rounded law governing relations between negligent tortfeasors, contribution should be allowed between them in proportion to their relative fault in cases where indemnity is not proper."

Indemnity Between Negligent Tortfeasors, 37 Iowa Law Review 517, 552-3, 560.

II.

Contribution Comes to Iowa

> " There is here no claim or showing of an intentional wrong, or of moral turpitude or any concerted action by the alleged tort-feasors. We hold the true rule to be that under such circumstances there is at least a right of equitable contribution between them"

Best v. Yerkes (1956), 247 Iowa 800,810, 77 N.W.2d 23.

III.

How to Apportion the Contribution

> " Under the circumstances of this case, is the doctrine of equitable contribution applicable? We think it is."
>
> * * *
>
> " Venturing into an uncharted field of law for us, we shall confine our discussion here to the application of the recently announced rule solely to the matter at hand. We are not now disposed to discuss questions of primary and secondary liability or who is guilty of the greater wrong.
>
> " The fact that each party, the landlord and the tenant, had breached a like duty to inspect properly and discover the defective screw eye gave rise to a like liability of both."
>
> * * *
>
> " Each had a primary duty to discover. Both the tenant and the landlord were negligent in their duty toward the window washer invitee, who was at the time on the premises under joint control by the plaintiffs-owners and defendants-tenants. There is no claim or showing that these parties were guilty of an intentional wrong or of moral turpitude, or any concerted action. Best v. Yerkes, supra. There is no statutory or contractual agreement involved. See Hawley v. Davenport, R.I.& N.W. Ry. Co., 242 Iowa 17, 45 N.W.2d 513, and cases cited therein. There is little of a persuasive nature that one was more at fault, wrong or remiss in his duty, than the other, so as to bar contribution and permit indemnity.
>
> " We, therefore, conclude, as did the trial court, that this was indeed a proper case for equitable contribution and that each should bear one half the loss in the sum of $7069.31. The judgment of the trial court is, therefore, affirmed."

Constantine v. Scheidel (1958), 249 Iowa 953,956-7, 958, 90 N.W.2d 10.

" How do we apportion contribution? Ordinarily the total amount of the judgment is divided equally among those liable to the injured person."

* * *

" We have four such persons or legal entities here: Dr. Baker, the Mason City hospital, Dr. Joyce and Dr. Potter.

" But two complications exist. One is that the trial court held the hospital to be vicariously liable and the other is that Drs. Joyce and Potter operated the laboratory together.

" As to the first complication, after finding Drs. Joyce and Potter negligent the trial court found the Mason City hospital negligent 'vicariously through them.' Since that finding is unchallenged, we accept it. As a result of the finding, an exception to the rule of equality applies. When a person is vicariously liable, that person and the tortfeasor whose negligence is imputed to him are considered together for contribution purposes."

* * *

" The result is that the vicariously-liable hospital is considered with the pathologists and not separately.

" As to the second complication, Dr. Baker contends Dr. Joyce and Dr. Potter each had a duty to see that procedures were established and followed which assured a fresh reagent, that each breached the duty, and that each is therefore liable for a separate portion of contribution. We think, however, that those two pathologists come within another exception in which several persons together violate a common responsibility -- here, to establish and enforce a proper laboratory procedure."

* * *

" The result is that the hospital and the pathologists are liable to contribute one-half. Dr. Baker bears the other half; under the contribution rules, that is his equitable portion."

Schnebly v. Baker (Iowa 1974), 217 N.W.2d 708, 731, 732.

(Note the dissent by Justice LeGrand, joined in by Justice Rees, in which it is argued that the Court should have ruled as a matter of law that the liability of the hospital was not vicarious, that the hospital should have been required to bear its portion of the burden, and that the contribution should have been three ways).

V.

Contribution in Proportion to Fault -- the Wisconsin View

> " If the doctrine is to do equity, there is no reason in logic or in natural justice why the shares of common liability of joint tortfeasors should not be translated into the percentage of the causal negligence which contributed to the injury. This is merely a refinement of the equitable principle. It is difficult to justify, either on a layman's sense of justice or on natural justice, why a joint tort-feasor who is 5% causally negligent should only recover 50% of the amount he paid to the plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5% causally negligent should be required to pay 50% of the loss by way of reimbursement to the co-tortfeasor who is 95% negligent."

Bielski v. Schulze (Wisconsin 1962), 114 N.W.2d 105, 109.

VI.

Contribution by the Plaintiff (Per Contract)

Upon the remand of Schnebly v. Baker, supra, a second hearing was held in which it was brought out that, as part of a settlement with the hospital and the pathologists, the plaintiff had agreed to indemnify them against the contribution claims of Dr. Baker, and had supplemented this with a partial assignment of any judgment against Baker that would make them liable for contribution. The effect was to reduce plaintiff's $912,000 judgment against Baker to $456,000.

Schnebly v. Baker (Iowa 1974), 221 N.W.2d 739.

VII.

Thoughts of a Middle-Aged Conservative

Why not let the fault principle work?

--legalize the compromise verdict (comparative negligence)

--apportion contribution according to fault (with the plaintiff paying his share)

--eliminate the artificial barriers to contribution (common liability rule)

What happens if one tortfeasor is insolvent?

PROCEDURAL QUESTIONS RELATING TO CONTRIBUTION AND INDEMNITY

PHILIP WILLSON
COUNCIL BLUFFS, IOWA

I. STATUTE OF LIMITATIONS APPLICABLE TO CONTRIBUTION AND INDEMNITY CLAIMS.

A. STATUTE OF LIMITATIONS FOR CONTRIBUTION CLAIMS.

1. A cause of action for contribution is inchoate until one pays more than a fair share and then the cause of action accrues and the statute of limitations begins.

   Chicago & M.W. Ryp. v. Chicago, R.I.P.R.R., 179 F. Supp. 33 (N.D. Iowa 1959), affd (C.A. 8 Iowa) 280 F2d 110, cert. den. 364 U.S. 931 5 L. Ed. 2d 364, 81 S. Ct. 378.

   Anno.: When statute of limitations commences to run against claim for contribution or indemnity based on tort, 57 ALR 3rd 867.

   Dairyland Insurance Company v. Mumert, 212 NW2d 436 (Iowa 1973).

   a. The notice requirements of I.C.A. §613A do not apply to claims for contribution or indemnity.

      Olsen v. Jones, 209 NW2d 64 (Iowa 1973).

2. Contribution is a separate cause of action from the original tort and is based on an implied contract arising by operation of law to rectify and inequity where one has discharged more than a fair share of a common liability. Therefore, the five year statute of limitations for unwritten contracts under Iowa Code §614.1(5) applies.

   Furnish, Distributing Tort Liability: Contribution and Indemnity in Iowa, 52 Iowa L. Rev. 31, 53 (1966).

   State Farm Mut. Auto Ins. Co. v. Schara, 56 Wis. 2d 262, 201 NW2d 758 (Wis. 1972).

   Anno.: What statute of limitations applies to action for contribution against joint tortfeasor, 53 ALR 3rd 927.

   Daniel v. Best, 224 Iowa 1348, 279 NW 374.
   In re, Lunt's Trust, 237 Iowa 1097, 24 NW2d 467.

   There is dicta that no implied promise should be applied to contribution. See Iowa Power & Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 309 (Iowa 1966).

B. STATUTE OF LIMITATIONS IN INDEMNITY CASES.

1. When a cause of action for indemnity accrues.

   Vermeer v. Sneller, 190 NW2d 389, 392 (Iowa 1971) holds that as a general proposition, a cause of action for indemnity accrues or becomes enforceable when the indemnitor's legal liability becomes fixed or certain as in the entry of a judgment or a settlement.

   Chicago & Northwestern Ry. Co. v. Chicago R.I. & P.R. Co. (D.C. Iowa 1959) 179 F. Supp. 3rd 33, affd. (C.A. 8 Iowa) 280 F2d 110, cert. den. 364 U.S. 931, 5 L. Ed.2d 364, 81 S. Ct. 378, held that the statute of limitations for indemnity began when one had paid a judgment or had settled a claim.

2. Indemnity may arise from an express contract.

   McCarthy v. J.P. Cullen & Son Corp., 199 NW2d 362, 372 (Iowa 1972).

   See cases cited in Iowa Power & Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 308 (Iowa 1966).

   Ke-Wash Company v. Stauffer Chemical Company, 177 NW2d 5, 9 (Iowa 1970).

   Davis, Indemnity between Tortfeasors: A proposed rationale, 37 Iowa L. Rev. 517.

   Furnish, Distributing Tort Liability: Contribution and Indemnity in Iowa, 52 Iowa L. Rev. 31.

3. Indemnity may be based upon the breach of a duty created by an independent contract.

   Iowa Power & Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303.

   American District Telegraph Co. v. Kittleson (C.A. 8 Iowa) 179 F2d 946.

   Blackford v. Sioux City Dress Pork, Inc. 254 Iowa 845, 118 NW2d 559 (1962).

   Western Casualty & Surety Co. v. Groiler, Incorporated, (C.A. 8 Iowa) 501 F2d 434 (1974).

4. Indemnity may be granted where one is only vicariously liable by statutory liability or respondeat superior.

   Dairyland Insurance Co. v. Concrete Products Co., 203 NW2d 558, 564 (Iowa 1973).

Graham v. Worthington, 259 Iowa 845, 146 NW2d 626 (1966).

Rozmajzl v. Northland Greyhound Lines, 242 Iowa 1135, 49 NW2d 501 (1951).

Federated Mutual Inp. & H. Ins. Co. v. Dunkelberger, 172 NW2d 137 (Iowa 1969).

Weidert v. Monahan Post Legionaire Club, 243 Iowa 643, 51 NW2d 400 (1952).

5. Indemnity may be granted where the negligence of one is active or primary as opposed to passive or secondary negligence of the other. (In such situations, indemnity is "an extreme form of contribution". Iowa Power & Light Co. v. Abild Construction Co., 259 Iowa 314, 144 NW2d 303, 309 (Iowa 1966)).

   Hawkeye-Security Insurance Co. v. Ford Motor Co., 174 NW2d 672, 681 (Iowa 1970).

   Peters v. Lyons, 168 NW2d 759, 767 (Iowa 1969).

   Federated Mutual Inp. & H. Ins. Co. v. Dunkelberger, 172 NW2d 137, 142 (Iowa 1969).

6. If an indemnity claim is based upon an express contract, the statute of limitations would be ten years for a written contract and five years for an unwritten contract. I.C.A. §614.1 (4, 5).

7. In indemnity cases arising other than under an express contract, the applicable limitations would be five years for breach of an implied contract under I.C.A. §614.1(4).

   Johnston v. Belden, 49 Iowa 301 (1878).

   Anno.: Limitation applicable to Indemnity action, 57 ALR 3rd 833.

   Furnish, Distributing Tort Liability: Contribution and Indemnity in Iowa, 52 Iowa L. Rev. 31, 53.

8. If the duty to indemnify is created by statute, the limitations would be five years. I.C.A. §614.1(4).

   I.C.A. §85.22(1) requires an employee who has collected workman's compensation to indemnify out of any recovery against a third party the employer or insurance carrier making the payment.

   I.C.A §613A.8 requires governmental subdivisions to indemnify officers, employees, and agents arising out of alleged acts or omissions occurring within the scope of their employment or duties.

I.C.A. §364.14 states a City may notify a third person alleged to have neglilgentedly caused personal injuries resulting in a claim against the City. However, this statute relates only to notice. The liability under this statute is based on common law duties. Franzen v. Dimock Gould & Co., 251 Iowa 742, 101 NW2d 4 1960).

I.C.A. §123.94 prohibts insurers, indemnitors, etc. of intoxicated persons from making claims against Dram Shops for contributions or indemnity.

II. MECHANICS OF SUBMITTING A CONTRIBUTION OR INDEMNITY CLAIM.

A. 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).

B. ORDINARILY FACT QUESTIONS RELATING TO INDEMNITY AND CONTRIBUTION WILL BE SUBMITTED TO THE JURY.

Brandt v. Olsen, (N.D. Iowa, 1961) 190 F. Supp. 683.

National Farmers Union Property & Cas. Co. v. Nelson, 260 Iowa 163, 147 NW2d 839, 844 (1967).

Stowe v. Wood, 199 NW2d 323, 327 (Iowa 1972).

Hawkeye-Security Insurance Co. v. Ford Motor Co., 174 NW2d 672, 681 (Iowa 1970).

1. A petition may be dismissed for lack of fact questions for jury determination.

   McCarthy v. J.T. Cullen & Son Corp., 199 NW2d 362, 372 (Iowa 1972).

   Hawkeye-Security Insurance Co. v. Ford Motor Co., 174 NW2d 672 (Iowa 1970).

2. Where the construction of a contract is involved the issue is for the Court rather than the jury.

   McCarthy v. J.T. Cullen & Son Corp., 199 NW2d 362, 373 (Iowa 1972).

   Evans v. Howard R. Green Company, ___ NW2d ___ V (Iowa, filed July 31, 1975).

C. A THIRD PARTY CLAIM FOR CONTRIBUTION OR INDEMNITY GIVES NOTICE OF AN INDEMNITY CLAIM FROM THE INDEMNITEE TO THE INDEMNITOR AND GIVES THE INDEMNITOR THE OPPORTUNITY TO DEFEND OR SHARE IN THE DEFENSE OF THE ORIGINAL ACTION AGAINST THE INDEMNITEE IF SO DESIRED.

Jennings v. United States, (C.A. 4 1967) 374 F2d 983, 986.

1. Rule 34 allows the third party defendant to raise defenses against the claim of the original plaintiff.

2. Under the principles of vouching in and issue preclusion any judgment in favor of the original plaintiff is binding on third party defendant.

   Hoskins v. Hotel Randolph Co., 203 Iowa 1152, 211 NW 423.

   Chicago, Great Western Ryp. Co. v. Farmers Produce Co., (N.D. Iowa 1958) 164 F. Supp. 532.

   Hawkeye-Security Insurance Co. v. Ford Motor Co., 199 NW2d 373, 379 (Iowa 1972).

D. ORDINARILY, SEPARATE TRIALS WILL NOT BE GRANTED.

1. In general, there should be an attempt to avoid duplication of time, effort or expense, and to minimize the inconvenience to Court, counsel, litigance and witnesses.

   Johanik v. Des Moines Drug Co., 235 Iowa 679, 17 NW2d 385 (1945).

   Barnard v. Cedar Rapids Cab Co., 257 Iowa 734, 133 NW2d 884 (1965).

2. In deciding whether to grant a motion for separate trials, the court must weigh the rights of the respective parties.

   Way v. Waterloo, Cedar Falls, & Northern R., 239 Iowa 244, 29 Nw2d 867 (1947).

3. In the interest of avoiding any prejudice and affording full protection to all parties, the court in its discretion, may order a separate trial of a cross-petition until after it has been determined whether plaintiff is entitled to recover.

   Beights v. W.R. Grace & Company, (W.D. Oklahoma 1974) 62 F.R.D. 546.

   The issues of convenience to the court and serious prejudice to the rights of the parties should be considered and normally there must be a showing that there will be serious prejudice to a party without a separate trial and that the issues to be tried are so distinct and separable from the others that a trial of those issues alone may be had without injustice.

   Lusk v. Pennzoil United, Inc., (N.D. Miss. 1972) 56 F.R.D. 645.

E. IF INDEMNITY IS BASED ON CONTRACT OR PRIMARY LIABILITY, TIMELY AND ADEQUATE NOTICE MUST BE GIVEN TO THE INDEMNITOR AND IT MAY BE NECESSARY TO OFFER EITHER PARTICIPATION IN OR CONTROL OF THE DEFENSE.

Anno.: 73 ALR 2d 504 suggests the following form:

"NOTICE

You are hereby advised that on ______, 19__, (name of plaintiff) brought an action against me (us), claiming that I (we) am (are) liable to him for the following reasons: (Set out the claim and issues as specifically as possible; in case the action is in tort, specify the date and place of injury.)

The action is pending in (specify court) and will be tried in (specify place of trial) on ____ ________, 19__. In case an adverse judgment is rendered against me (us) in this trial, I (we) will hold you responsible under our agreement of indemnity of __________, 19__, (or as the party primarily liable).

I (we) request that you defend the action and offer you the control of the defense."

Attorney fees may be recovered. Peters v. Lyons, 168 NW2d 759 (Iowa 1969).

F. WHERE THERE IS NO EXPRESS AGREEMENT FOR INDEMNITY AND WHERE THE PARTY SEEKING INDEMNITY HAS MADE A SETTLEMENT WITH THE INJURED PERSON, THE FOLLOWING ARE THE ELEMENTS WHICH MUST BE PLEADED AND PROVED:

1. It was liable to the injured party,

2. The settlement was reasonable, and

3. The facts are such as to give rise to a duty on the part of the indemnitor to indemnify the indemnitee.

   Ke-Wash Company v. Selford Chemical Company, 177 NW2d 5, 11 (Iowa 1970).

   a. Proof of a prior judgment against the indemnitee and settlement of the case by payment of a lesser amount is sufficient evidence of reasonableness of the amount paid.

      Hawkeye-Security Insurance Co. v. Ford Motor Co., 174 NW2d 672, 681 (Iowa 1970).

G. SPECIAL VERDICTS MAY BE USED IN A CLAIM FOR INDEMNITY OR CONTRIBUTION.

Berhow v. Kroak, 195 NW2d 379, 383 (Iowa 1972) involved a claim where Berhow was the bailee and operator of a tractor without a workable rear red light which was struck by the defendant, Kroak, and which had been leased from one Jensvold. With reference to the issues between the

bailee, Berhow, and the bailor, Jensvold, the Court submitted the case on a special verdict with the following interrogatories to the jury:

"(C) Was Berhow negligent in any of the particulars as alleged in Instructions 1, 2 and 3 and as explained in these Instructions? Answer: YES

"(D) If your answer to (C) is 'yes', then, was Berhow's negligence either the sole or a concurring proximate cause of the collision? Answer: NO

"(E) Was Jensvold negligent in any of the particulars as alleged in Instruction 2? Answer: YES

"(F) If your answer to (E) is 'yes', then was Jensvold's negligence either the sole or concurring proximate cause of the collision? Answer: YES"

H. ORDINARILY, THE ISSUES ON THE CLAIM OF THE PLAINTIFF ARE SUBMITTED BY GENERAL VERDICTS WITH INTERROGATORIES TO THE JURY AS TO ISSUES INVOLVED IN THE THIRD PARTY CLAIMS FOR INDEMNITY AND CONTRIBUTION.

See Uniform Jury Instructions, Chapter 15.

I. THE FOLLOWING FORM OF JUDGMENT ENTRY WAS SUGGESTED BY JUDGE GRAVIN IN BRANDT V. OLSEN, (N.D. Iowa 1961) 190 F. Supp. 683, 688:

"'And now, to wit, (date), in accordance with the verdict and the jury's answer to an interrogatory, it is

"'Ordered that Judgment be and the same is hereby entered in favor of Plaintiff, * * * (name of plaintiff), and against the defendant, * * * (name of defendant), in the sum of * * * (amount of judgment), together with costs, and it is further

"'Ordered and Adjudged, that the defendant, * * * (name of defendant), and the third party defendant, * * * (name of third party defendant), are joint tortfeasors and that the right of contribution exists in favor of the said * * * (name of defendant) and against the said * * * (name of third party defendant), and the said * * * (name of defendant) may hereafter have judgment against the said * * * (name of third party defendant) for the amount which he proves he has paid to the Plaintiff, * * * (name of plaintiff) in excess of the sum of * * * (defendant's pro rata share of plaintiff's judgment).'"

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 counterclaims 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 defendant;

    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]

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

    h. File jury demand.

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;

3. Any party may move for separate trial (See also Rule 186);

4. Motion to vacate order granting leave to bring in third party.[3]

[1] Creates independent actions which may result in different judgments. Lusk v. Pennzoil United, Inc., (D.C. Miss. 1972), 56 F.R. D. 645.

[2] Results in a single judgment. Lusk v. Pennzoil United, Inc., (D.C. Miss. 1972), 56 F.R.D. 645.

[3] §1460, Wright and Miller, Federal Practice and Procedure.

CHAPTER 15

Contribution

Inst. No. 15.1 Contribution - A Matter Separate from Plaintiff's Claim

Inst. No. 15.2 Contribution on Cross Petition

Inst. No. 15.3 Contribution - Concurrent Negligence

Inst. No. 15.4 Contribution - If Verdict for Defendant, Ignore Cross-Petition.

Inst. No. 15.5 Contribution - Instruction Re First Interrogatory

Inst. No. 15.6 Contribution - Instruction Re Second Interrogatory

Inst. No. 15.7 Contribution - Interrogatories

NOTE: In the judgment of the Committee there are insufficient definitive decisions to provide guide lines for preparation of uniform instructions on contribution <u>after settlement.</u>

No. 15.1 CONTRIBUTION - A MATTER SEPARATE FROM PLAINTIFF'S CLAIM

You are further instructed that in this case there are really two lawsuits; namely, (1) the Petition or claim of the plaintiff A against the defendant B wherein she seeks damages as a result of the accident involved herein; and (2) the claim or cross-petition of the defendant B against the defendant C wherein the defendant B claims a right of contribution against the defendant C in the event you find plaintiff is entitled to recover on her petition against the defendant B. The issues in the latter will be determined by your answers to special interrogatories and the Court will enter the appropriate judgment.

No. 15.2 CONTRIBUTION ON CROSS PETITION

For his cross-petition against the defendant C, the defendant B states that the defendant C was negligent in the following particulars:

1.

2.

3.

The defendant B further states that the negligence of defendant C was a proximate cause of the accident and damages, and states said negligence was concurrent with the negligence, if any, of the defendant B.

No. 15.3 CONCURRING PROXIMATE CAUSE - CONCURRENT NEGLIGENCE SUITS FOR CONTRIBUTION

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, and, in such case, each of the negligent persons is liable and the extent to which the damage is attributable to the different causes is immaterial.

In this case the plaintiff alleges that the defendant was negligent and that such negligence was a concurring proximate cause of the injury or damage to ______________. The defendant contends that the negligence of the plaintiff was the sole proximate cause of the injury or damage to ________________________.

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 a concurring proximate cause of any injury or damage to ________.

> NOTE: If the defendant specifically pleads that the negligence of the plaintiff was the sole proximate cause, it would appear that he would assume the burden of proof with respect to his contentions. In such cases the above instruction should be changed. See Instruction 2.7.

No. 15.4 CONTRIBUTION - IF VERDICT IS FOR DEFENDANT, IGNORE CROSS-PETITION

In this case you will first determine the claim of plaintiff A against the defendant B, and in the event you find plaintiff is entitled to recover on her petition against said defendant, you will use form of verdict No. 1 which is submitted herewith, filling in the amount of plaintiff's recovery against said defendant and sign the same by your foreman.

If you find plaintiff A is not entitled to recover anything on her petition against the defendant B, you will use form of verdict No. 2 submitted herewith and sign the same by your foreman.

In the event your verdict is for the defendant B on plaintiff's petition, then you need not consider the issues raised by the cross-petition of said defendant B against C.

In the event you find plaintiff A is entitled to recover in some amount against said defendant B, then you will proceed to determine the issues submitted to you on the cross-petition of said defendant B against C.

The matters to be decided by you on said cross-petition are being submitted in the form of interrogatories which must be answered by the jury and signed by your foreman. From your answer or answers, the Court will enter an appropriate order.

No. 15.5 CONTRIBUTION - INSTRUCTION RE FIRST INTERROGATORY

In answering the interrogatories submitted herewith, you are instructed that before you can answer Interrogatory No. 1 in the affirmative, the defendant B must establish by a preponderance or greater weight of the evidence in this case that the defendant C was guilty of negligence in one or more of the particulars as set out in Instruction No. _________ .

If you find that defendant B has failed to establish by a preponderance or greater weight of the evidence that the defendant C was negligent in one or more of the particulars set forth in Instruction No. _________, then you must answer Interrogatory No. 1 in the negative.

After you have determined your answer to Interrogatory No. 1, you will write in either "Yes" or "No", and sign the same by your foreman.

No. 15.6 CONTRIBUTION - INSTRUCTION RE SECOND INTERROGATORY

If your answer to the first interrogatory No. 1 is "No", you shall not answer Interrogatory No. 2, but if your answer to Interrogatory No. 1 is "Yes", then the burden of proof rests upon the defendant B to prove by a preponderance or greater weight of the evidence that said negligence of the defendant C was a proximate cause of plaintiff's injury and damage.

If you find from all the evidence that defendant B has established by a preponderance or greater weight of the evidence that such negligence was a proximate cause of plaintiff's injury and damage, then you will answer Interrogatory No. 2 in the affirmative; but if you find he has failed to establish that such negligence was a proximate cause of the injury and damage, then you will answer Interrogatory No. 2 in the negative.

After you have determined the answer to Interrogatory No. 2, you will then write in your answer of either "Yes" or "No" and sign the same by your foreman.

Allan D. Vestal

Des Moines

October 10, 1975

ISSUE PRECLUSION

I. Nature of the Problem Involved

When a litigant has had the incentive and opportunity to litigate an issue and has lost on the issue, that litigant will not be allowed to litigate that issue a second time. He is precluded on that issue.

A. The issue must be the same in the two actions.

Schneberger v. U.S.F. & G., 213 N.W.2d 913 (Iowa 1973)

Larsen v. McDonald, 212 N.W.2d 505 (Iowa 1973)

B. There may be some question about the preclusive effect of a judgment where the issue involved was not actually litigated.

". . .preclusion is appropriate in those situations where there is reason to believe that the failure to litigate the matter in fact was a recognition of the validity of the opposing claim."

Palma v. Powers, 295 F.Supp. 924 (N.D. Ill. 1969).

C. Necessarily decided.

II. Adjudicating Bodies

First Court	Second Court
State 1	State 1
State 1	State 2
Federal	Federal
Federal	State
State	Federal
Foreign Court	State

A. Article IV of the United States Constitution, Section 1
"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts,Records and Proceedings shall be proved, and the Effect thereof."

"Full faith and credit. . .generally requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it." Durfee v. Duke, 375 U.S. 106, 109 (1963).

"[W]e think the conclusion inescapable that the decree must have the same effect when relied upon in the court of another state. The full faith and credit clause 'compels that controversies be settled so that where a state court has jurisdiction of the parties and subject matter the judgment controls in other states to the same extent as it does in the state where rendered.' Therefore, this decree prevents the litigation of a matter already determined in New York in the courts of another state for the collateral estoppel division [issue preclusion] of res judicata is included within that clause." United States v. Silliman, 167 F.2d 607, 620-621 (3rd Cir.) cert. den. 335 U.S. 825 (1948).

B. 28 U.S.C. § 1738

"Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

C. "Full faith and credit must be accorded a judgment of the federal court . . . . Such a judgment has the same effect in the courts of this state as it would in a federal court. . . . In the federal jurisdiction, as in the courts of California, the doctrine of res judicata prevents the relitigation of issues determined by a final judgment in a prior action between the same parties." In re Bailleaux, 47 Cal.2d 258, 302 P.2d 801 (1956) cert. den. 353 U.S. 957 (1957).

"The statute, 28 U.S.C. § 1738, requires each state to give the same effect to the judgments of state and federal courts as those judgments have in the jurisdictions where rendered. . . . The collateral estoppel division of res judicata is included within the full faith and credit mandate of the statute." Shell Oil Co. v. Texas Gas Transmission Corp., 176 So.2d 692 (La. App. 1965).

III. Nature of the Issue Involved

A. Issues of Fact v. Issues of Law

B. Related and Remote Consequences

C. Jurisdictional Matters; Of the Person; Subject Matter

-Durkee v. Duke, 375 U.S. 106 (1963)

D. Constitutional Rights; Habeas Corpus

-State Court Judgment as Preclusive in § 1983 Litigation in a Federal Court, 27 Okla. L.Rev. 185 (1974)

-Alsager v. District Court, 384 F.Supp. 648 (S.D. Iowa 1974)

IV. Parties

A. Adverse Parties

B. Nonadverse Parties

C. Participating Nonparties

-See Hawkeye Sec. Ins. Co. v. Ford Motor Co., 199 N.W.2d 373 (Iowa 1972)

D. Strangers Claiming Preclusion; No Mutuality Required

-Res Judicata/Preclusion and Mutality, 1971 Personal Injury Annual 851.

-Goolsby v. Derby, 189 N.W.2d 909 (Iowa 1971)

-Richardson v. Dunlap Livestock Auction, 210 N.W.2d 834 (Iowa 1973).

-Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 91 S.Ct. 1434 (1971).

-See Mizer v. State Automobile and Casualty Underwriters, 195 N.W.2d 367 (Iowa 1972)

E. Preclusion Against Strangers

-Bertran v. Glens Falls Insurance Company, 186/2-57018 (Aug. 29, 1975)

-Privity

-Close Relationship

-Lamoni Packing Co. v. Tellier, Civil No. 13642 (Humboldt City District Court 1972)

-Res Judicata/Preclusion: Expansion, 47 S.Cal. L.Rev. 357 (1974)

V. Criminal Conviction Followed by Civil Litigation

A. Mutuality Not Required

B. Same Issue

C. Difference in Burden of Proof

-Vestal and Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand.L.Rev. 683 (1966)

-Tomlinson v. Lefkowitz, 334 F.2d 262 (5th Cir. 1964), cert.den. 379 U.S. 962 (1965).

-Eagle Star and British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).

THE AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW SECOND, JUDGMENTS*

Tentative Draft No. 2

April 15, 1975

TOPIC 1. PARTIES AND PERSONS REPRESENTED BY PARTIES

§ 78. Parties to an Action

(1) A person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action.

(2) A party is bound by and entitled to the benefits of the rules of res judicata with respect to determinations made while he was a party, except as stated in §§ 79 to 82.

(3) A person who is not a party to an action is not bound by or entitled to the benefits of the rules of res judicata, except as stated in §§ 73 and 74, §§ 79 to 88, and —.

§ 79. Incapacity of a Party

The lack of legal capacity of a person or organization named a party to an action does not prevent application of the rules of res judicata to the judgment therein unless the incapacity of the named party had a substantial adverse effect on the adequacy of the protection afforded his interests or the interests of others whom he represents.

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§ 80. Party Appearing in Different Capacities

(1) A party appears in his individual capacity unless, in his designation as a party or by other manifestation, it is made evident that he appears in some other capacity.

(2) A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.

§ 81. Nominal Parties

A person denominated as the party having the proprietary or other enforceable interest in the subject matter of an action is bound by and entitled to the benefits of the rules of res judicata if he has put the person controlling the action in a position so to denominate him, unless he lacks such an interest and the opposing party has knowledge of that fact.

§ 82. Parties Aligned on the Same Side.

Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are bound by and entitled to the benefits of issue preclusion with respect to issues they actually litigate as adversaries to each other and which are essential to the judgment rendered.

§ 83. Person Who Controls Participation.

A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.

§ 84. Person Agreeing to be Bound by Adjudication Between Others

A person who expressly or impliedly agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement.

§ 85. Person Represented by a Party

(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the rules of res judicata as though he were a party. A person is represented by a party who is:

(a) The trustee of an estate or interest of which the person is a beneficiary; or

(b) Invested by the person with authority to represent him in an action; or

(c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or

(d) An official or agency invested by law with authority to represent the person's interests; or

(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

Exceptions to this general rule are stated in § 86.

§ 86. Exceptions to the General Rule of Representation

(1) A person is not bound by a judgment for or against a party who purports to represent him if:

(a) Notice concerning the representation was required to be given to the represented person, or others who might act to protect his interest, and there was no substantial compliance with the requirement; or

(b) The subject matter of the action was not within the interests of the represented person that the party is responsible for protecting; or

(c) Before rendition of the judgment the party was divested of representative authority with respect to the matters as to which the judgment is subsequently invoked; or

(d) With respect to the representative of a class, there was such a substantial divergence of interest between him and the members of the class, or a group within the class, that he could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked; or

(e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.

(2) A person bound by or entitled to the benefits of a judgment in a previous action upon a claim is not bound by or entitled to the benefits of a judgment in a subsequent action concerning the same claim that is brought or defended by a party representing him.

§ 87. Actions by Bailee or Bailor

(1) A judgment in an action by either bailee or bailor against a third party for interference with ownership or destruction of or damage to property that is the subject of a bailment precludes a subsequent action by either, except that:

(a) Where the claim is limited to the claimant's own loss in the property it does not preclude an action by the other for his loss;

(b) If the action is by the bailee it does not preclude an action by the bailor if the judgment was based on a defense not available against the bailor;

§ 88. Issue Preclusion in Subsequent Litigation with Others.

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 68 and 68.1, is also precluded from doing so with another person unless he lacked full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which consideration should be given include those enumerated in § 68.1 and also whether:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) Other circumstances make it appropriate that the party be permitted to relitigate the issue.

IMPORTANT RECENT IOWA SUPREME COURT DECISIONS
(222 N.W. 2d to 232 N.W. 2d)

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LONG ARM STATUTE -- Jurisdiction.

Section 617.3 requires the contract to have been performed in whole or in part by either party in Iowa for there to be valid service thereunder.

CREATIVE COMMUNICATION CONSULTANTS, INC. vs. BYERS TRANSPORTATION CO., INC., 229 N.W. 2d 266 (May 21, 1975)

FACTS: Plaintiff, foreign corporation, admittedly doing business in Iowa, entered into contract with Defendant, Iowa corporation, which contract was made and being performed in State of Missouri. Defendant brought suit on contract serving Plaintiff under long arm statute (Section 617.3, which provides for service on foreign corporation which makes a contract with an Iowa resident to be performed in whole or in part by either party in Iowa and by virtue thereof such act shall be deemed to be doing business in Iowa by such foreign corporation for the purpose of service).

Plaintiff appeared specially alleging that jurisdiction had not been obtained via Section 617.3 since the contract was not made nor to be performed in Iowa. Defendant alleged claims that Plaintiff was otherwise doing business in Iowa and therefore service was valid.

HOLDING: Section 617.3 created a new method for obtaining jurisdiction over foreign corporations where ordinary modes of service were not available. Jurisdiction over a corporation depends on compliance with the terms of Section 617.3, which statute must be strictly construed. Notwithstanding Defendant's presence in Iowa by virtue of doing business, this contract was not made nor to be performed in Iowa and therefore jurisdiction was not obtained.

Additionally, in order to subject an out-of-state Defendant to our process, it must be shown that the application of the statutory rule does not violate federal due process standards which have here been shown.

LONG ARM STATUTE -- Jurisdiction

DOUGLAS MACHINE & ENGINEERING CO., INC. v. HYFLOW BLANKING PRESS CORPORATION, 229 N.W. 2d 784 (May 21, 1975)

FACTS: Plaintiff, Iowa corporation, entered into contract with foreign corporation, and subsequently brought suit based on breach of contract serving Defendant pursuant to Section 617.3. The contract provided for the purchase of a machine by Plaintiff from Defendant. Plaintiff received a price quotation on said machine and mailed its acceptance to Defendant, along with a down payment, which Defendant refused to return and further refused to perform on contract.

Defendant appeared specially, urging that the court did not have jurisdiction over it for reason that it had not entered into a contract in Iowa, nor was said contract to be performed in Iowa.

The issue facing the court on appeal was whether there were sufficient minimum contacts with Iowa established to obtain jurisdiction over Defendant by service under Section 617.3.

HOLDING: Under the terms of the subject contract, Defendant warranted the machine for six months and agreed to repair it if requested.

"It cannot be logically denied that the contract alleged by Plaintiff was to be performed in whole or in part in Iowa By necessity, performance of any of Defendant's obligations under the foregoing warranty and service agreement would be performed in Davenport." (pp. 788-789)

The amount and kind of activities which must be carried on by foreign corporations in the state of the form so as to make it amenable to jurisdiction in that state are to be determined on a case by case basis.

The Eighth Judicial Circuit has established in several cases five factors to be considered in determining whether the "fair play and substantial justice" requirements are satisfied in order to subject a foreign corporation to jurisdiction, these being: (1) quality of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the foreign state; and (5) convenience.

The due process guaranty of the constitution requires that for a foreign corporation to be subject to a judgment in personam, he must have certain minimum contacts with the state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice". (citing from International Shoe Company v. State of Washington, 326 U.S. 310, 66 Sct. 154, 90 L.ed. 95.

As part of the negotiations, Defendant's president came to Iowa in an attempt to sell Plaintiff the merchandise. Defendant's assertion that the doctrine of form non convenience should be invoked by the court to deny Plaintiff jurisdiction over Defendant was rejected, although the court did note that this principal does establish the right of a court to resist imposition of its jurisdiction, although such jurisdiction could be properly invoked. It is only an exceptional case where, after considering all factors, will the doctrine be so utilized

STATUTE OF LIMITATIONS: Discovery Doctrine Related to Commencement.

BAINES v. BLENDERMAN
223 N.W. 2d 199 (November 13, 1974)

FACTS: Plaintiff commenced his action against Defendant doctor and Defendant hospital for damages as a result of an alleged malpractice on May 23, 1972. Defendant doctor performed surgery on Plaintiff March 30, 1970 (over two years prior to Plaintiff's commencement of this action). Plaintiff alleges loss of vision as a result of the herniated disc repair performed by Defendant doctor relying on the doctrine of res ipsa loquitur. Defendant's motion for summary judgement based on two year statute of limitation granted by the trial court is reversed by the Supreme Court. Plaintiff's resistance to Defendant's motion, supported by affidavit, urged he was excusably unaware of his cause of action until July 15, 1970, at which time he was advised by a physician his loss of vision was occasioned by interruption of blood supply to the eye during surgery on the disc.

HOLDING: Iowa has adopted the rule for malpractice cases that "the limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by exercise of reasonable care, Plaintiff should have discovered the wrongful act. The cause does not accrue until it is or should have been discovered." (p. 201).

Plaintiff had the right to rely upon the advice and opinions of his physicians relative to the reasons for his vision difficulties, although this source of assurance is not determinative of the issue of knowledge. The issue is what Plaintiff actually knew or in

the exercise of reasonable diligence should have known. The fact Plaintiff knew he had an injury which occurred during surgery is insufficient to charge him with knowledge it was caused by Defendant's malpractice.

CAMERON v. MONTGOMERY
225 N.W. 2d 154 (January 22, 1975)

Discusses the discovery doctrine as related to the statute of limitation in a case where the attorney had assured personal representatives of decedent's estate that the Internal Revenue Service would accept late filing of the estate tax return. The statute of limitations for commencement of an action against the attorney would begin to run when the personal representatives learned the attorney's assurances were incorrect.

STATUTE OF LIMITATIONS: Filing claim in estate.

IN RE: ESTATE OF NORTHUP
230 N.W. 2d 918 (June 25, 1975)

Filing of claim in probate after expiration of six month period required by Section 633.410.

FACTS: Claimant and decedent were involved in an automobile collision October 31, 1971. Decedent died November 14, 1971 and his estate was subsequently opened with notice to creditors published November 18 and 25, 1971. A claim for damages as a result of claimant's injuries arising from the automobile accident was filed August 7, 1972.

At the time of decedent's death, claimant was hospitalized with injuries sustained in the accident. Decedent's insurance carrier later contacted claimant who in turn referred the carrier to her attorney. Claimant required surgery on numerous occasions after the accident, the last being June 24, 1972, and did not reside in the county in which decedent had been a resident. Claimant's attorney first received notice of decedent's death July 14, 1972. Prior thereto claimant nor her attorney were aware of decedent's death, notwithstanding periodic contact by decedent's insurer.

HOLDING: Claimant's late filing of the claim is excused under the circumstances shown. The court noted the six month period provided in the statute bars later claims unless peculiar circumstances entitle the claimant to equitable relief which is determined by the circumstances surrounding him taken in connection with the condition of the estate and its administration at the time relief is sought. A strong showing of peculiar circumstance is not necessary, especially when the estate is open and unsettled, and violance of a late filing should be liberally construed to effectuate justice.

> "Peculiar circumstances entitling a claimant to equitable relief exist when "the delay beyond the period fixed by statute for filing claims be so excused and explained as that, when considered in connection with the claim asserted and the condition of the estate, good conscience and fair dealing demand that a hearing on the merits be accorded the claimant." (p. 922)

The court distinguished prior case law on the basis that here the evidence showed claimant's incapacity and noted that in this case the estate was open, solvent and unsettled at all material times and decedent's insurance carrier did not advise claimant nor her attorney of the death.

STATUTE OF LIMITATIONS: Equitable Estoppel.
DAMAGES

DeWALL v. PRENTICE and SCHELLER
224 N.W 2d 428 (December 18, 1974)

FACTS: Plaintiff driver was involved in a highway vehicle collision with a vehicle driven by Scheller and owned by Prentice on July 14, 1969. Plaintiff filed a damage seeking action against Defendants July 9, 1971, and on that date delivered directions and original notice for service by Pocahontas County Sheriff who determined Defendants resided out of state and so notified Plaintiff July 16, 1971, which was after the two-year statute of limitations ran. Subsequent thereto, the Plaintiff made service on Defendants through the Iowa Commissioner of Public Safety pursuant to the nonresident motorist long-arm statute. The trial court overruled Defendants' Motions to Dismiss based on the running of the statute of limitations which was again raised by Defendants in their answer as an affirmative defense.

The jury received instructions on recovery of damages by Plaintiff for lost earnings and recovery for damages for loss of services and support as a parent and spouse. Additionally, the jury was instructed to total all such amounts found in reaching a verdict and was not instructed that the loss of parental and interspouse support could not be added to lost earnings in reaching a verdict.

ESTOPPEL: The doctrine of equitable estoppel is applicable to the statute of limitations when the facts demand its application in the interest of justice and rights when the existence of the essential elements of such an estoppel have been established.

> This court also stated, in Walters v. Walters, 203 N.W. 2d 376, 379 (Iowa 1973):
>
> "The essential elements of equitable estoppel or estoppel in pais are:
> "(1) a false representation or concealment of material facts; (2) lack of knowledge of true facts on part of actor; (3) intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury." (p 430)
>
> "One may not omit to avail himself of readily accessible sources of information concerning particular facts, and thereafter plead as an estoppel the silence of another who has been guilty of no act calculated to induce the party claiming ignorance to refrain from investigating." Lingar v. Harlan Fuel Co., 182 S.W. 2d 657, 659 (Kentucky)

Defendant Prentice and an agent for his insurance carrier visited Plaintiff and left information with Plaintiff indicating an Iowa address, as did the registration of Prentice's vehicles. Prentice, by affidavit, declared residency in Minnesota since 1962, although he continued licensing and registering his vehicles in Iowa using the Rodman, Iowa address. Plaintiff was lulled into a false sense of security regarding the location and in-state accessibility of Defendant Prentice and as such the doctrine of equitable estoppel would be applicable to barring the defense of the statute of limitations.

The accident report executed by Defendant Scheller designated Rodman, Iowa as his residence at the time of the accident. There being no showing as to when Defendant Scheller moved to the State of Washington, the theory of equitable estoppel would not be available to Plaintiff to avoid the operation of the statute of limitations.

DAMAGES: An instruction allowing recovering for damages by Plaintiff for lost earnings and an instruction permitting an additional award for loss of services and support as a

parent and spouse without a related instruction precluding an allowance for both lost earnings and loss of support to the extent such lost earnings would be the source of any loss of support enables the jury to award Plaintiff duplicate damages.

> The situation is otherwise regarding tortious death damages. There the representative of an estate may recover, in addition to the value of decedent's services and support as a spouse or parent, only the net amount which would have come to decedent had he or she lived. Thus no double damages problem is presented. See Adams v. Deur, 173 N.W.2d at 107–108. See also Hankins v. Derby, 211 N.W.2d 581 (Iowa 1973); Wardlow v. City of Keokuk, 190 N.W.2d 439 (Iowa 1971); 15 Drake L.Rev. 107, 109 (1966). See generally Egan v. Naylor, 208 N.W.2d 915 (Iowa 1973). **(p. 434)**
>
> * * * *
>
> Since plaintiff DeWall was instructionally permitted recovery for loss of earnings, the jury was impermissibly allowed to award him additional compensation for loss of support to his wife and children to the extent such support would be provided from recoverable lost earnings. **(p. 434)**

The Court further held that evidence as to impairment of ability to work and earn was permissible evidence to support an instruction relating to future loss of earning capacity.

> "A person may not have worked or may have had no income prior to trial, but still suffer impairment of future earning capacity. Shover v. Iowa Lutheran Hospital, 107 N.W. 2d 85, and 22 AmJur 2d, Damages, Section 100, page 147." (p. 435)

Impairment of physical capacity creates an inference of lessened earning ability in the future. In considering impairment of earning capacity, we are dealing with after injury decreased earning potentiality which cannot alone be determined by earnings before and after the accident.

Evidence showed Plaintiff's income to have been substantially decreased subsequent to the accident and also disclosed Plaintiff's difficulty in performing physical tasks necessitated in the operation of the farm. Although Plaintiff is required to establish his claim for damage with some reasonable measure of certainty and show facts afforded a reasonable basis upon which their damages could be ascertained, there is no basis upon which a self-employed farmer may establish his injury-related loss of income with the degree of certainty comparable to that of a salaried person. (p. 434).

JURY DEMAND -- A demand for jury on later filed amendments must be directed to the issues raised in those amendments and cannot be a general demand.

UNIVERSAL C.I.T. CREDIT CORPORATION v. JONES
227 N.W. 2d 473 (March 19, 1975)

FACTS: Plaintiff filed its Petitions in replevin September 8, 1970 alleging Defendant's default in payment under a security instrument covering a 1969 automobile. Defendant filed his answer September 28, 1970 and a year later filed an amendment claiming damages

for loss of use during the time his vehicle was wrongfully detained. At this same time, Defendant filed a jury demand seeking "a trial by jury on all the issues in the above-captioned matter". The trial court denied Defendant's demand for jury. Defendant's first amendment sought $7,000 for wrongful detention of his automobile and a second amendment sought $2,400 representing the reasonable value of the automobile. Both amendments alleged that notwithstanding the correction of the Defendant's default, the Plaintiff refused to surrender the vehicle which was in its possession. The trial court awarded Defendant $1,700, the reasonable value of the car on October 20, 1970, the date the trial court found Defendant was entitled to return of the vehicle. Defendant's second amendment alleged wrongful conversion of the automobile by Plaintiff January 30, 1973.

JURY DEMAND: Defendant's amendment raised a new issue, namely the question of damages for loss of use of the vehicle during the period of alleged wrongful detention. Rule 177(b) R.C.P. provides a jury demand may be had by written demand within ten days after the "last pleading directed to that issue". An amendment is a pleading and, therefore, Defendant would be entitled to a jury demand on the issue of damage for wrongful detention but not on the main issue concerning right to possession of the car.

His request was for a jury trial on *all* issues. The record does not reflect any indication by defendant to the trial court that he was asking a limited jury trial under Rule 177(c). We assume the trial court considered the request for what it was—a demand for a complete trial by jury.

Under this record we cannot say the trial court was wrong. It is possible, although he now argues otherwise, defendant did not want a partial jury trial. When a general jury demand is made, a court should not have to sort out the various issues to see which are triable to a jury and which are not. It is justified in ruling on the request as made.

Defendant further claims he is entitled to a jury trial under the discretionary provisions of the rule. See Rule 177(d). No motion for such relief was made and there is nothing before us to review on that issue. See Egan v. Egan, supra, 212 N.W.2d at 464.

We affirm the trial court's denial of defendant's demand for jury trial. (pp. 475-476)

DAMAGES:

We believe these three cases (Becker & Degen v Staab, Powers v Benson, and Newbury v Gibson) form the genesis of what is still our law on damages in replevin cases, when the successful party is not already in possession of the property, assuming the property has not been sold or otherwise disposed of. The rule may be summarized as follows:

(1) The injured party may demand the return of his property plus damages for its wrongful detention.

(2) He may seek judgment for the money value of the property, treating the conversion as complete either at the time it was taken or at the time of trial.

(3) If the former, he may have interest on the value as determined by the trier of fact from the date of the seizure until the date of the judgment and nothing more. The judgment itself, of course, bears interest thereafter.

(4) If he elects under (2) above to rely on a conversion as of the time of trial, he may have the money value of the property as of that date, plus damages for loss of use from the time it was seized until the time of trial.

Relief may be sought in the alternative, and the particular rule applicable in any case depends upon the pleadings and the evidence adduced in support thereof. As we have already pointed out, the election may be postponed until the verdict is in (or trial court findings have been made) and judgment is about to be entered. (p. 478)

The injured party may at his option treat the conversion as having taken place when the property was siezed or at the time of the trial, his election being important in limiting or enlarging his claim for damages for wrongful detention.

Honorable Justice Reynoldson concurring specially with the majority's statement relative to damages, disagreed with the holding relative to the jury demand.

NEGLIGENCE: Railroad duty to mark underpass

WITTRUP v. CHICAGO AND NORTHWESTERN RAILWAY CO.
116 N.W. 2d 822 (March 19, 1975)

FACTS: Truck owner sued for damages to truck caused by collision with unmarked railroad overpass. Railroad argued that no statutory law required the railroad to post a low clearance warning sign and, therefore, no duty existed to do the same. The court noted that in the absence of the statutory obligation, to state there is or is not a duty is merely to state a result, a conclusion that Plaintiff's interests are or are not entitled to legal protection against Defendant's action or lack thereof.

It is better to reserve "duty" for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other. In negligent cases, the duty is to conform to the legal standard of reasonable conduct in light of the apparent risk. (p. 823)

> "We would have no difficulty holding any other nongovernmental person or corporation maintaining a rigid obstruction across a highway at a height no higher than the ceiling in the ordinary home had an obligation to warn affected motorists. There should be no reason to exempt railroads unless our statutes compel it." (p. 824).

The court rejected the railroads assertion that it was the obligation of and only the state could post such a warning sign.

The court notes that in Jasper vs. Chicago Great Western Railway Company, 248 Iowa at 1296, 84 N.W. 2d at 27, the railroad's argument is that it could not erect a barrier or warning at a crossing due to the statutory limitation on private individual's right to so do pursuant to statute was rejected (Section 321.259 provides that no person shall maintain upon any highway any unauthorized sign which purports to be an official signal or attempts to direct traffic)

The railroad's alleged negligence in failing to warrant should not have been adjudicated by the trial court as a matter of law, nor should the vehicle driver's contributory negligence have been decided as a matter of law.

The Honorable Justice Rees writing for the dissent, ordered that the question of negligence and contributory negligence were both issues for the trial court to have decided, which it correctly did in favor of the Defendant railroad

> **The majority concedes defendant was under no statutory duty to post signs advising motorists of low clearance beneath railroad overpasses but apparently goes on to hold that a jury applying logic, sound reasoning and enlightened public policy might none**theless find such a duty existed even though it was not statutorily imposed. While I would be persuaded by that line of reasoning in the ordinary case, I cannot reconcile it here in the face of § 321.259, The Code. That statute provides:
>
> "No person shall place, maintain, or display upon or *in view of* any highway

any sign, signal, marking, or device which purports to be or is an imitation of or resembles an official parking sign, curb or other marking, traffic-control device or railroad sign or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any official traffic-control device or any railroad sign or signal, if such sign, signal, marking, or device has not been authorized by the state highway commission. (pp. 827-828)

Justice Rees further cited a diverse number of cases where drivers were found contributorily negligent as a matter of law for failing to judge clearance adequately

NEGLIGENCE: Duties of Emergency Vehicles.

CITY OF CEDAR RAPIDS v. MOSES
223 N.W. 2d 263 (November 13, 1974)

FACTS: City brought suit for damages to motorcycle involved in collision with Defendant's vehicle while motorcycle was in the process of responding to an emergency call with its lights and siren in operation. At the time of the impact, Plaintiff's motorcycle was operating to the left of a double yellow center line dividing traffic on First Avenue in Cedar Rapids, Iowa.

ISSUE: Could Defendant's conduct in operating the motorcycle to the left of the double yellow center line be construed so as to avoid holding him negligent as a matter of law.

HOLDING: The Court pointed out that since 1932, it has consistently held with the exception of violation of Section 321.298 requiring vehicles meeting each other to give one half of the travelled way by turning to the right which constitutes merely prima facia evidence, violation without legal excuse of other statutes regulating the law of the road is negligence pur se as a matter of law. Lemke v. Mueller, 166 N.W. 2d 860, 866.

Section 321.324, requiring vehicles to yield the right-of-way to emergency vehicles by coming to stop on the right hand side of the roadway, does not grant emergency vehicles the right to operate over the center line.

The only special privileges accorded emergency vehicles responding to emergency calls are the privilege granted in approaching a red or stop signal (321.231) and the privilege to exceed speed limitations (321.296). Grounds for the doctrine of legal excuse are restated by the court as part of its decision.

The Honorable Justice Harris spoke for the defense urging Section 321 334 relating to yielding the right-of-way allows operation of the vehicle to the left of the center line.

NEGLIGENCE OF ATTORNEY IMPUTABLE TO INSURER.

PETERSEN v. FARMERS CASUALTY COMPANY
226 N.W. 2d 226 (February 19, 1975)

FACTS: Insured brought action against insurer for excess liability as a result of judgment entered in a case against insured, to which insured's policy of insurance with insurer was applicable. Insured had been told by attorney hired by insurer to protect insured's interest that the judgment for damages would be appealed, which attorney failed to do. The insurer is not immune from its own attorney's negligence in failing to perfect the appeal and such negligence is imputed to the insurer. The court rejected the insured's argument that the attorney was insured's attorney also in the case (Plaintiff's personal attorney did not participate), then therefore attorney's negligence was equally imputable to insured

INDEMNITY

EVANS v. HOWARD R. GREEN COMPANY
231 N.W. 2d 907 (July 31, 1975)

FACTS: Actions brought for wrongful death of employees of contractor killed by poison gas while working in sewage treatment plant against architect, defendant Howard Green Company. Green cross-petitioned against contractor employer Dory Builders, claiming contractual indemnity. Dory cross-petitioned against City, claiming indemnity against architect. Over objection the issue of indemnity was submitted to the jury. The architect directed cutting an opening in the wall which separated the wet and dry wells in the final sludge pumping station which permitted lethal gas to seep from one well to the other, which gas was responsible for the death of Plaintiff's decedent The jury returned sizable verdicts for both Plaintiffs, found for Green on its claim of indemnity against Dory and against Dory on its claim of indemnity against the City.

HOLDING: An architect's duty to exercise reasonable care continues during construction operation and does not arise only after construction is completed. (citing with approval 5 AmJur 2d, Architects, Section 25, p. 688) where it is stated:

> "An architect may be held liable for negligence in failing to exercise the ordinary skill of his profession, which results in the erection of an unsafe structure whereby anyone lawfully on the premises is injured. An architect's liability for negligence resulting in personal injury or death may be based upon his supervisory activities or upon defects in the plans. The liability of the architect, moreover, is not limited to the owner who employed him; the modern view is that privity of contract is not a prerequisite to liability. * * * " (Emphasis added.)
> (p. 913)

Green's duty of care extended to all persons lawfully on the premises, including Dory's employees.

An indemnity agreement generally will not be construed to cover losses to the indemned by his own negligence In order to do so, the agreement must be clear and unequivocably expressed. (p. 916) Indemnity for negligent design is generally denied a contractee who actively participates in the control or supervision of the work. In this case, the court found the architect so participated and therefore denied Green the right of indemnity from Dory on the theory of primary responsibility.

The question directed to Green's project engineer asking if liability insurance would be included as an out-of-pocket expense paid by the City while irrelevant, would not be presumed to be prejudiced to the jury so as to warrant a mistrial. In this case, the subject was inadvertantly entered into the case by the witness rather than the attorney. The subject was raised by one Defendant and the motion for mistrial was made by another Defendant. Further, the question was never answered

CONTRIBUTION

ST. PAUL INSURANCE COMPANIES v. HORACE MANN INSURANCE COMPANY
231 N.W. 2d 619 (July 31, 1975)

FACTS: Explosion injured several students in a chemistry class at school in Cedar Rapids, Iowa. Plaintiff had, in effect, a written liability insurance contract which insured the school district and its teachers against suits from personal injuries. Additionally, the chemistry teacher had a contract for personal liability insurance in connection with his teaching activities with Defendant. As a result of the explosion, suit was commenced

by the injured students, which claims were settled by Plaintiff, who prior to settlement advised Defendant of its intention to seek contribution. Plaintiff sued the Defendant for its refusal to contribute to the settlement, court costs and legal fees.

Defendant asserts 613A.8 which requires the school district to indemnify teachers for claims arising out of their negligence and eliminates any grounds for contribution on Defendant's part. Plaintiff asserts Defendant's interpretation amounts to acceptance of premiums without providing any coverage whatsoever. In the absence of Chapter 613A, both company's policies would require equal contribution under the facts. Plaintiff, however, insured the school district as well as the teacher.

HOLDING: Where there is so called double or concurrent insurance with one or more policies providing the same or duplicate coverage, the right to contribution has been held to exist between such insurers. There must be an identity between the policies as to the parties and the insurable interest and risk.

Contribution is a principal sanction in equity and arises between co-insurers only, permitting one who has paid the whole loss to obtain reimbursement from other insurers who are also liable therefor. Each policy's "other insurance" clause will normally cancel the other out. Therefore, the general coverage of each policy applied and each company is obligated to share in the cost of the settlement and expenses.

Defendant concedes that if Chapter 613A did not exist, it would be jointly liable with the Plaintiff. 613A in effect on the date of the explosion provided:

> "The governing body shall defend any of its officers and employees. . . shall save harmless and indemnify such officers and employees against any tort, claim or demand, whether groundless or otherwise arising out of an alleged act or omission occurring in the performance of duty . . ."

Extensive review of cases relied upon by the parties is undertaken by the Iowa Supreme Court. The court concluded that the amounts paid by St. Paul were in satisfaction of claims which were the ultimate responsibility of the school district to indemnify its teacher for negligence under the provisions of Section 613A.8

One who must indemnify another cannot at the same time claim contribution from that person. (citing Stowe v. Wood, 199 N.W. 2d 323, 326 (Iowa, 1972) (p.625).

LEGAL EXCUSE -- Sudden Emergency.

RUBEL v. HOFFMAN
229 N.W. 2d 261 (May 21, 1975)

FACTS: Plaintiff brought action for damages as a result of accident which occurred when Defendant travelling in a westerly direction failed to stop at the intersection of the private lane on which Defendant was travelling and entered onto the public gravel road on which Plaintiff was travelling in a northerly direction. The jury was instructed on legal excuse due to the fact that Defendant's view in the direction which Plaintiff was travelling on approach to the intersection was obstructed by a dirt embankment. Defendant was well acquainted with the intersection and the obstruction to vision.

HOLDING: Defendant asserts his view to the south (the direction from which Plaintiff was coming) would have been obstructed by the dirt embankment had he complied with Section 321.353 requiring him to stop at the intersection and therefore this failure was excusable. The court held that the dirt embankment did not pur se give rise to an emergency and places emphasis on the fact that Defendant was familiar with the intersection and knew the entrance onto the gravel road was dangerous because of the embankment.

"In this regard, the sudden emergency rule cannot be invoked by one whose own negligence or wrongful conduct creates an emergency or gives rise to a situation of peril." (p. 265)

"Even though Defendant's view to the south may have been obstructed, it was his statutory duty to stop, look and listen in order to ascertain whether there was oncoming traffic before entering the public highway. See Hunter v. Irwin, 220 Iowa 693, 263 N.W. 34 (1935) (p. 265)

The court further noted that the record was absent of evidence from which the jury could conclude a force over which Defendant had no control made compliance with Section 321.353 impossible. (This is notwithstanding the recognition of the obstruction to view caused by the embankment).

EVIDENCE: Hospital Records

IN RE: ESTATE OF POULOS v. STAVROPOULOS
229 N.W. 2d 721 (May 21, 1975)

FACTS: Will contestants brought action to set aside decedent's will on the alternative grounds that decedent was unduly influenced, lacked testamentary capacity, and the document was forged.

Contestants attempted to introduce hospital records relating to decedent's care and treatment which were admitted after statements were deleted following objection. These statements included the observation that decedent is being bothered by a young visitor, the fact that the young visitor had indicated he wished to take decedent home, decedent's statement that he had not signed the will as indicated by another lawyer, and decedent's statement that Chris states, "Peter will kill me if I go home."

HOLDING: Hearsay statements in medical and hospital records which are not germaine to physical condition or medical treatment or inadmissible unless nonprejudicial.

A statement of the rule is found in 2 Jones on Evidence, § 12:12 at 362 (Sixth Ed. 1972):

"Recitals in hospital records may not be admitted to show the facts or circumstances of an accident as recited by the patient for inclusion in the record, or facts of case history recited by the patient for inclusion in the records, to prove the truth of the facts stated, unless they qualify under some other exception to the hearsay rule, such as declarations against interest, spontaneous statements, or, as most common, statements made to the physician for diagnosis and treatment. In such cases they may not be excluded as they fall within the rule of admissible included hearsay"

Admissibility under exceptions has not been limited to reports of statements by the patient. Reports of statements by other persons are also admissible if they come within exceptions to the hearsay rule. See Mayor v. Dowsett, 240 Or. 196, 400 P 2d 234 (1965), and citations; McCormick on Evidence, supra. (p. 727)

The above statements in this case relate to decedent's care and condition and are properly admitted in evidence as part of hospital's records.

EVIDENCE -- A statement constituting a double inference is inadmissible in evidence.

TONINI v. MALONEY
228 N.W. 2d 91 (April 16, 1975)

FACTS: Co-administrators of an estate brought action to recover nearly $18,000 found by Defendants while demolishing house owned by decedent. Estate appeals judgment adverse to it on claim to money. At trial plaintiff, on objection, was prevented from offering testimony of a witness that decedent had told witness that upon his death he wanted all his money hidden in the house to go to a named individual.

HOLDING: In this case, the issue to be proven was that the money found had been hidden by decedent. Decedent's statement that "all my money hidden in the house is to go to Hal Cervi" evinces decedent's belief he had hidden money in the house and secondly infers the money found had been hidden by him. The statement here in question is equivalent to an out of court assertion of ownership by decedent to which cross-examination is foreclosed.

> "Circumstantial use of same as evincing a state of mind on the part of decedent is nothing more than a pretext to establish indirectly that which could not be proven directly." (p. 94)

The trial court correctly disallowed this evidence.

The fact that the information contained in the statement cannot be obtained in a more purified or authentic form offers no basis for a ground of inadmissibility. Nor was the statement admissible on the theory that it was offered to show decedent knew he had money concealed in the house and not to show that he hid the money subsequently after it was found and thus that the decedent's utterance was not offered to prove the truth of the matter asserted and therefore could not be hearsay.

DAMAGES
BEST EVIDENCE RULE

SCHILTZ v. CULLEN-SCHILTZ & ASSOCIATES, INC.
228 N.W. 2d 10 (April 16, 1975)

FACTS: The rule of best evidence obtainable relates to documentary evidence and has no application for the fact to be proved is independent of any writing, even though the fact may have been reduced to a writing or is evidenced by a writing.

Plaintiff contractor sued Defendant consulting firm for damage to a partially finished sewage treatment facility contractor was building. Contractor is allowed to offer evidence of a run down of equipment rental costs and wages to employees to which Defendant objected on the basis that such testimony was not the best evidence, the best evidence being the receipts, vouchers, agreements and other written evidence relating to these elements of damage.

The general rule in Iowa for repairs or for replacement is the fair and reasonable cost for replacement or repair, but not to exceed the value of the property immediately prior to the loss or damage. (citing State v. Urbanek, 177 N.W. 2d 14, 16-17 (1970). Since the sewage disposal facility was in this case only partially built, the actual value is the test in determining the value of the construction immediately prior to the damage.

The principal underlining allowance of damages is to place injured party in the same position, so far as money can do, as he would have been in had there been no injury or breach of duty. Where the injury is such that the premises may be restored to as good a condition as was before the measure of damages is a fair and reasonable cost of expenses of such restoration which includes the expenses incurred for rental of equipment and clean-up operations which are an intregal part of the direct property damage.

DAMAGES

McBROOM v. STATE
226 N.W. 2d 41 (February 19, 1975)

FACTS: State prisoner brought action for damages as a result of accident in license plate factory resulting in the loss of his hand. The court affirmed the admission of evidence showing Plaintiff's status as a prisoner and the effect his injury had on one so situated, including the special psychological problems faced by one so situated. The basis for the court's holding was the well-established rule that a tort feasor takes the person he injures as he finds them. The principle applies where the injury complained of is a mental or neurological condition. (authorities follow)

DAMAGES: Pleading Mitigation Required.

WHEWELL v. DOBOSON
227 N.W. 2d 115 (March 19, 1975)

FACTS: Plaintiff seller brought suit against Defendant purchaser for Defendant's breach of contract to purchase Christmas trees. Prior to agreed delivery date of trees and after entering into contract, Defendant purchaser notified Plaintiff seller of repudication of the contract by cancelling same and intent to refuse delivery of trees. The contract, the repudication thereof and damages are subject to Chapter 554 I.C.A., Uniform Commercial Code. The court held that mitigation of damages is a special defense which Defendants must plead and prove if he wishes to raise and rely upon it in answer to Plaintiff's assertion.

RES IPSA LOQUITUR

TOWN OF REASNOR v. PYLAND CONSTRUCTION COMPANY
229 N.W. 2d 269 (May 21, 1975)

FACTS: Plaintiff brought action against two Defendant construction companies who engaged in construction of a sewage system for Plaintiff. Defendant Pyland constructed sewer mains and manholes and Defendant Rozendaal constructed a sewage lagoon, lift station and force main. Subsequent to completion of work, difficulties with the system developed at the point where each Defendant's work "tied in" with the other.

Plaintiff appealed from the court's refusal to instruct on this doctrine of res ipsa loquitur. Plaintiff urges it sufficient for the jury to determine whether the claim negligence occurred during the exclusive control of the first contractor or the second. Defendant urges any control by either of them was shared by the other and accordingly, not exclusive.

HOLDING: Res ipsa loquitur is a rule of evidence, not a statement of tort law which requires a showing that (1) injury is caused by an instrumentality under the exclusive control of

Defendant and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used.

Control at the time of the alleged negligence is required for application of the doctrine while control at the time of the injury is not required, provided it is shown there was no change in the condition of the instrumentality between the two events.

> "A special problem is faced by a Plaintiff who seeks to apply the doctrine against multiple defendants.
>
> " * * * Unless there is vicarious liability or shares control, the logical rule usually is applied, that the plaintiff does not make out a preponderant case against either of two defendants by showing merely that he has been injured by the negligence of one or the other. * * * " Prosser on Torts, Fourth Ed., § 39, page 221. (p. 272)

The court further noted res ipsa loquitur was not applicable for the reason that the Plaintiff failed to eliminate its own involvement with the system.

> **Although the res ipsa doctrine as developed in our cases is, in several respects, at variance with the Restatement we approve the following:**
>
> **"It is never enough for the plaintiff to prove that he was injured by the negligence of some person unidentified. It is still necessary to make the negligence point to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where there is no doubt that it is at least equally probable that the negligence was that of a third person, the court must direct the jury that the plaintiff has not proved his case. Again, however, the plaintiff is not required to exclude all other possible conclusions beyond a reasonable doubt, and it is enough that he makes out a case from which the jury may reasonably conclude that the negligence was, more probably than not, that of the defendant." Restatement (Second) of Torts, § 328D, comment (f) at 160. (p. 273)**

RES JUDICATA

<u>BICKFORD v. AMERICAN INTERINSURANCE EXCHANGE</u>
224 N.W. 2d 450 (December 18, 1974)

<u>FACTS:</u> American's insured, Bickford, was involved in an auto accident with Cutting, uninsured, on January 20, 1970. Bickford brought an action for damages. Cutting filed a counterclaim for damages. July 7, 1972, Bickford withdrew his claim against Cutting without prejudice, then on July 20, 1972, filed suit against American based upon the uninsured motorist clause in his policy. August 31, American filed its answer asserting no affirmative defense and on the same date moved to consolidate Bickford's suit against American with Cutting's counterclaim against Bickford. The Court denied the motion to consolidate.

February 14, 1973, the jury returned a verdict in favor of Bickford on Cutting's counterclaim. The jury answered affirmatively the following interrogatories posed to them: "Do you find William Bickford was negligent?"; "Do you find Cutting was contributorily negligent?" The jury did not answer the interrogatory "Did you find Bickford's negligence was the proximate cause of the accident?"

February 20, 1973, American amended a previously filed motion to dismiss alleging the jury's answers to interrogatories above stated and by reason thereof, res judicata would be applicable barring Bickford's action against American.

In answer to Bickford's assertion that the prior judgment and answers to interrogatories should have been raised in a responsive pleading, American asserts it raised the affirmative defense at the earliest opportunity, pointing out it was impossible to plead res judicata until after a judgment was returned in the Cutting counterclaim case which was subsequent to the filing of American's answers in the instant case.

HOLDING: Res judicata must be raised by responsive pleading. The defense of res judicata is not available by a motion to dismiss and the trial court erred in sustaining the motion on that basis.

> Boone Biblical College v. Forrest, 223 Iowa 1260, 1264, 275 N.W. 132, 135, 116 A.L.R. 67 has this statement: "* * * The rule seems to be well established in most jurisdictions, including our own, that a party, who desires to set up a prior adjudication as a bar to a claim made by an opposing party, must properly plead such adjudication before evidence will be admissible in regard to it. * * * [citing authorities]." See also Lambert v. Rice, 143 Iowa 70, 74, 120 N.W. 96, 97; Perry v. Reeder, 235 Iowa 532, 535, 17 N.W.2d 98, 100; State v. Nichols, 241 Iowa 952, 969–970, 44 N.W.2d 49, 58–59. A motion is not deemed a responsive pleading. **(p. 453)**

Bickford's negligence was not necessary to the jury's verdict in the Cutting counterclaim action, it having been found Cutting was contributorily negligent which barred her recovery from Bickford. Finding that Cutting was contributorily negligent, does not presuppose a finding of negligence on Bickford's part notwithstanding the uniform instruction "If the Defendant has so provided both of the foregoing propositions (Plaintiff was contributorily negligent, and such negligence was a proximate cause), then Plaintiff is not entitled to recover, etc."

> "Matters in which the one, against whom res judicata is sought, * * * *were not* * * * *necessary* to the decision, even though adjudicated, cannot conclude him in a subsequent proceeding. * * [citing authorities]" (Emphasis supplied) Kunkel v. Eastern Iowa L. & P. Co-op., 232 Iowa 649, 659, 5 N.W.2d 899, 904. See also Jordan v. Stuart Creamery, Inc., 258 Iowa 1, 6, 137 N.W.2d 259, 261–262. **(p. 455)**

The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Additionally, the jury in the Cutting counterclaim did not pass upon Bickford's negligence as a proximate cause in its answers to interrogatories in that it failed to answer the interrogatory dealing with this matter.

FOSSELMAN v. WATERLOO COMMUNITY SCHOOL DISTRICT
229 N.W. 2d 280 (May 21, 1975)

FACTS: Plaintiff brought action against school district, its board of directors, the individual members of the board, the superintendent of schools, the director of health and physical education, the principal of the school involved and the teacher of the physical education class in which Plaintiff was injured which gave rise to this action. Plaintiff's injury occurred while engaged in a game in an organized physical education class. The trial court sustained Defendant's motion to strike those part of Plaintiff's petition alleging res ipsa loquitur.

HOLDING: Res ipsa loquitur is a rule of evidence which, when applied, permits but does not impel an inference that Defendant was negligent. The doctrine of res ipsa loquitur is not a rule of law but rather an evidenciary principle which normally is determined at the conclusion of trial.

Plaintiff urged that it was error to rule on the applicability of the doctrine prior to introduction of any evidence. The court noted that Plaintiffs failed to produce substantial evidence of either element requiring submission of the doctrine of res ipsa loquitur.

The court further confirmed the trial court's dismissal of the action against all but the district and individual instructor.

The general rule is thus stated in 78 C.J.S. Schools and School Districts § 129d, page 931:

"School officers, or members of the board of education, or of directors, trustees, or the like, of a school district or other local school organization are not personally liable for the negligence of persons rightfully employed by them in behalf of the district, and not under the direct personal supervision or control of such officer or member in doing the negligent act, since such employee is a servant of the district and not of the officer or board member, and the doctrine of respondeat superior accordingly has no application, and members of a district board are not personally liable for the negligence or other wrong of the board as such. A school officer or member of a district board is, however, personally liable for his own negligence or other tort, or that of an agent or employee of the district when acting directly under his supervision or by his direction; but such officers or members are not liable for injuries where their negligence was not the proximate cause thereof." **(Authorities follow) (p. 285)**

DIRECTED VERDIT -- Medical Malpractice.

McCLEEARY v. WIRTZ
222 N.W. 2d 409 (October 16, 1974)

FACTS: Malpractice against Defendant doctor and hospital. Hospital filed counterclaim against Plaintiff for services and supplies. Defendant's motion for directed verdict at close of Plaintiff's case was granted March 8, 1973. No ruling was made at that time on Defendant's hospital counterclaim. Plaintiffs gave notice of appeal April 6, 1973 and thereafter hospital filed application for correction and modification of record, after which trial court entered judgments on the directed verdicts for both doctor and hospital as to Plaintiff's actions and for hospital on counterclaim. Plaintiffs then gave second notice of appeal.

ISSUE: Were verdicts properly directed for hospital on Plaintiff's action and hospital's counterclaim and for doctor on Plaintiff's action.

HOLDING: In order to establish a jury question, substantial evidence of negligence must be adduced to create a fact issue. (Authority cited, p. 412)

> Furthermore, evidence regarding requisite skill and care exercised by a physician must ordinarily be given by experts. There are, however, exceptions to this rule when (1) the physician's lack of care is so obvious as to be within the comprehension of a layman's common knowledge or experience, or (2) the physician harms a part of the body not under treatment. See Wiles v. Myerly, 210 N.W.2d 619, 629 (Iowa 1973). But those exceptions are inapplicable to the case at hand. See Sinkey v. Surgical Associates, 186 N.W.2d 658, 660–662 (Iowa 1971).

The court held Plaintiff failed to present adequate evidence as to proximate cause, cited the definite of proximate cause set out in Winter vs. Honeggers' & Co., Inc., 215 N.W. 2d 316, 320 (Iowa, 1974), where it was stated:

> "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." (p. 413)

Although proximate cause is usually a jury issue (R.C.P. 344(f)(10), in this case causal connection is essentially a matter which must be founded upon expert evidence, common knowledge and every day experience not being sufficient to permit a layman to express an opinion. The testimony of witnesses established that severance of Plaintiff's leg would have been necessary regardless of the doctor's conduct and therefore "it must follow this conduct could not have been a substantial factor in bringing about the harm of which complaint is made. See Restatement, Second, Torts, Section 432 (1) and Comment (1)(b)." (p.415)

The court went on to find that judgments having not been entered on directed verdicts in favor of the Defendant and further a verdict having not been rendered on the hospital's counterclaim, Plaintiff's first notice of appeal was ineffective and the trial court's jurisdiction was not terminated. The hospital's application for correction and modification of record was taken under R.C.P. 340(e) which allows nothing more than correction of a record already made, not the making of an additional record. It would accordingly follow

that ordinarily the trial court would therefore have no authority to belatedly enter a direct verdict and related judgment for the hospital on the counterclaim. Under the circumstances as are reflected in this record, the court however elected to treat the hospital's application for correction and modification of the record as a motion to reopen the case for further proceedings on the previously mentioned counterclaim. The court further rejected Plaintiff's assertion first raised on appeal that the hospital's action was barred by the statute of limitation.

SUMMARY JUDGMENT.

DABOLL v. HODEN
222 N.W. 2d 727 (October 16, 1974)

FACTS: Estate brings action against Defendant doctors and hospital for damages and malpractice resulting in decedent's death. Subsequent to filing answer, Defendant doctors moved for summary judgment attaching an affidavit of one Defendant doctor setting out his involvement in decedent's care and treatment and stating that the care and treatment given by all Defendants was proper. Plaintiff's resistance stated the Defendant's affidavit did not state genuine facts, which additional information would be presented at trial. An additional affidavit by decedent's mother contained her observations of the physical difficulties encountered by the decedent while in the hospital prior to his death.

HOLDING:

The following pronouncement in Lab v Hall, 200 So 2d 556, 558 (Fla.App.1967) is worthy of note:

'It has been recognized by the overwhelming majority that summary judgments must be cautiously granted in negligence cases * * * [citing authorities] Issues of negligence are ordinarily not susceptible of summary adjudication. * * * This is particularly true in malpractice suits where, as here, the attendant facts are peculiarly within the knowledge of the movants and the show of negligence is generally dependent upon expert testimony as to the standard of care required and observed."

The court, in holding the motion for summary judgment was not properly sustained by the trial court, goes into an indepth discussion of the use of the summary judgment rule in Iowa.

The Honorable Justice Uhlenhopp writing the dissent noted the defendants supported their motion for summary judgment with an affidavit of medical experts, which required the Plaintiff to counter this affidavit with an affidavit or testimony of their own of an expert nature. Plaintiff's only affidavit in support of his resistance contained no statements by nor reference to expert testimony on Plaintiff's behalf.

SUMMARY JUDGMENT

CARTER v. JERNIGAN
227 N.W. 2d 131 (March 19, 1975)

FACTS: A party against whom a summary judgment motion is made, may discover and rely on testimony of his adversary in resistance to the summary judgment. A party against whom a summary judgment motion is made should first be allowed to discover the facts if he desires, includes utilization of the tools of discovery provided in the discovery rules. (Prior case law required the opponent of a summary judgment to rely upon his own evidence and not the evidence of his adversary as the basis for opposing the motion).

DECLARATORY JUDGMENT. An injured person is a proper party to a declaratory judgment action relating to policy coverage question.

FARM AND CITY INSURANCE COMPANY v. COOVER
225 N.W. 2d 335 (January 22, 1975)

FACTS: Farm and City's insured under a motor vehicle liability insurance policy, Coover, was involved in a collision with Bovis. Bovis sued Coover for damages. Coover demanded Farm and City defend and indemnify him pursuant to the policy. Farm and City denied coverage and brought a declaratory judgment action against Coover and Bovis seeking adjudication that its policy did not cover Coover with respect to Bovis's claim Bovis's motion to dismiss the declaratory petition was granted.

HOLDING: Bovis was a proper party to the declaratory judgment action as a justiciable controversy existed as to him as well as to Coover.

A declaratory judgment action may not be sought against a party who does not hold a concrete adverse legal interest. The question in each case, admittedly one of degree, is whether there is a substantial controversy between parties having antagonistic legal interests of sufficient immediacy and reality to warrant declaratory judgment. If the injured person was not a party to the declaratory judgment action, he would not be bound by it and confronted with an adjudication of non-coverage, might obtain an opposite interpretation of the insurance policy in another lawsuit.

Although Iowaa's direct action statute which gives an injured party the right to proceed against the insurer if his execution against the judgment debtor is returned unsatisfied does not accrue until after judgment is obtained, this statute gives the injured person an interest in the liability insurance policy adverse to both the insurer and the insured at the time of the time of the injury This interest is sufficient to make a coverage dispute between the insurer and the insured a justiciable controversy between the insurer and the injured party.

APPEAL -- Amount in Controversy

BRIDAL PUBLICATIONS, INC. v. RICHARDSON
229 N.W. 2d 771 (May 21, 1975)

FACTS: Plaintiff appeals from adverse judgment denying it recovery of amounts claimed to be due from Defendants under advertising contracts. Defendants seek to cross-appeal from dismissal of their counterclaims. Defendants whose businesses were connected with the wedding market, entered into a contract with Plaintiff who was to publish and distribute a booklet advertising the various Defendant's services. Defendants

found the booklets did not provide them with customers and rescinded their contracts with Plaintiff.

Plaintiff in turn brought actions against fourteen defendants seeking money judgment for nonpayment due under the contract. Thirteen defendants affirmatively alleged fraud and certain defendants counterclaimed for amounts paid by them to Plaintiff. Each individual claim made by Plaintiff against Defendants and Defendants back against Plaintiff involved less than $100.00, and the aggregate of all such claims slightly exceeded $1,000.00.

R.C.P. 133, Amount in Controversy, requires $1,000.00 as the minimum jurisdictional amount in controversy.

HOLDING:

> "The real test, as we have said several times, is this: could the trial court enter judgment against any party for more than the jurisdictional minimum? If not, the appeal must fail. [citing authorities]." Benttine v. Jenkins Truck Lines, Inc., 182 N.W. 2d 374, 376 (Iowa 1970). (p. 774)

Plaintiff's appeal was accordingly dismissed.

The several Defendants cannot aggregate the amount of their counterclaims for the purpose of supplying the jurisdictional amount.

This conclusion is contrary to our previously decided case Tuthill Spring Co. v. Smith, 90 Iowa 331, 335, 57 N.W. 853, 855 (1894) To that extent, Tuthill is no longer to be considered as stating the law.

INSURANCE CONTRACTS -- Subject to the doctrine of reasonable expectations, implied warranty and unconsionability.

C & J FERTILIZER, INC. v. ALLIED MUTUAL INSURANCE COMPANY
227 N.W. 2d 169 (March 19, 1975)

FACTS: Operator of fertilizer plant brought action to recover from a burglary loss under two separate policies of insurance, which was tried by the court who found for Defendant.

The insured's policies definition of burglary required the exterior of the premises to bear visible marks of force and violence, whereas only an interior door of the insured's warehouse was damaged during the instant burglary. Evidence showed the front door of the insured's place of business could be forced open without leaving any visible marks and, in fact, the front door was found unlocked the morning after the burglary.

At the time negotiations for purchase of the policies took place, insurer's agent pointed out to insured that to be covered for burglary under the policy, the definition required visible evidence of burglary. No further reference thereto was made. The agent was completely taken by surprise when the insurer denied coverage.

ISSUE: Can a defined term in a policy of insurance be disregarded so as to allow coverage under a policy.

HOLDING:

> "Extrinsic evidence that throws light on the situation of the parties, the antecedent negotiations, the attendant circum-

stances and the objects they were thereby striving to attain is necessarily to be regarded as relevant to ascertain the actual significance and proper legal meaning of the agreement."

Interpretation of a contractual agreement is always a matter of law for the court.

REASONABLE EXPECTATIONS.

The trial court made no determination as to whether or not a burglary actually took place, nor did it consider the layman's concept of burglary, but rather it chose to adopt the definition of burglary contained in the policy in reaching its conclusion that coverage did not apply. No evidence existed the insured knew of the definition of burglary as contained in the policy before the event. (pp. 172-173)

The court discussed the revolution and formation of contractural relationships pointing out the unequal bargaining position and the abilities to interpret agreements which existed between the insured and insurer.

The court rejected the insurer's argument that statute required policy forms to be approved by the Commissioner of Insurance (Section 515.109) which acts to safeguard the insured.

"The objectively reasonable expections of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Rodman vs. State Farm Mutual Insurance Co., 208 N.W. 2d 903, 906. (p. 176)

IMPLIED WARRANTY.

The policy included as a part thereof the section entitled "Exclusions" which did not contain therein the above referenced definition of burglary.

"Plaintiff should also prevail because defendant breached an implied warranty that the policy later delivered would be reasonably fit for its intended purpose: to set out in writing the obligations of the parties (1) without altering or impairing the fair meaning of the protection bargained for when read alone, and (2) in terms that are neither in the particular nor in the net manifestly unreasonable and unfair. See K. Llewellyn, The Common Law Tradition -- Deciding Appeals, p. 371. (pp. 177-178)

There is little justification in depriving purchases of merchandise "protection" of those remedies long available to purchasers of goods.

UNCONSCIONABILITY.

Plaintiff is also entitled to a reversal because the liability-avoiding provision in the definition of the burglary is, in the circumstances of this case, unconscionable.

We have already noted the policies were not even before the negotiating persons

> when the protection was purchased The fair inference to be drawn from the testimony is that the understanding contemplated only visual evidence of bona-fide burglary to eliminate the risk of an "inside job"
>
> The policies in question contain a classic example of that proverbial fine print (six point type as compared with the twenty-four point type appearing on the face of the policies: "BROAD FORM SIOREKEEPERS POLICY' and "MERCANTILE BURGLARY AND ROBBERY POLICY") which "becomes visible only after the event" **(p. 179)**

Situations such as faced in this case plainly justify application of the unconscionable doctrine where standardized contracts drafted by powerful commercial units are put before individuals on a "this or nothing" basis. In considering a claim of unconscionability, the court examined the factors of assent, unfair surprise, notice, disparity of barganing power and substantive unfairness.

The Honorable Justice LeGrand writing for the dissent, pointed out that the policy contained a definition of burglary not claimed to be ambiguous.

> We may not—at least we *should* not—by any accepted standard of construction meddle with contracts which clearly and plainly state their meaning simply because we dislike that meaning, even in the case of insurance policies Stover v State Farm Mutual Insurance Corporation, 189 N W 2d 588, 591 (Iowa 1971); Hein v. American Family Mutual Insurance Company, 166 N W 2d 363, 366 (Iowa 1969); Mallinger v State Farm Mutual Insurance Company, 253 Iowa 222, 226, 111 N W 2d 647, 651 (1961); Wenthe v Hospital Service, Inc, 251 Iowa 765, 768 100 N W 2d 903, 905 (1960); Hiatt v Travelers Insurance Company, 197 Iowa 153, 156, 197 N W. 3, 4, 33 A L R 655 (1924) **(p. 183)**

Had the insured read the instant policy, there could be no effective argument that he was confused or misled by the definition of burglary. Further, the court's adoption of the theory of implied warranty is without authority.

CONTRACTS: Exclusion Clause in Manufacturers and Contractors Policy

<u>CONNIE'S CONSTRUCTION CO., INC. v. FIREMAN'S FUND INSURANCE COMPANY</u>
227 N.W. 2d 207 (March 19, 1975)

<u>FACTS:</u> Plaintiff insured brought action against Defendant insurer on liability insurance policy after Plaintiff, one of several subcontractors working on projects, dropped steel on a building under construction, resulting in property damage. The question on appeal centered around interpretation of the exclusion common in manufacturers and contractors liability policies which excludes liability to property damage to "property in the care, custody or control of the insured or as to which the insured is, for any purpose, exercising physical control".

<u>HOLDING:</u> With respect to consideration of contractual provisions, <u>interpretation</u> and <u>construction</u> have different and distinct meanings.

Interpretation, the meaning of contractual words, is an issue for the court unless it depends on extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence.

Construction, the legal effect of a contract, is always a matter of law to be decided by the court.

When a case is tried to the court, this distinction is applicable to the scope of review in that interpretation of words of a contract by the court as trier of fact is binding if supported by substantial evidence. The terms "care", "custody", and "control" denote a possessory as opposed to a proprietory right in the property involved and mean the insured must be in charge of the damaged property. Care refers to temporary charge, custody implies a keeping or guarding and control indicates the power or authority to manage, superintend, direct or oversee "Physical control" means bodily possession, the kind of possession which is more likely to exist when personal property is involved.

The purposes of the exclusion are that were it not for the exclusion there would be the greater moral hazard as far as the insurance company is concerned and the exclusion eliminates the possibility of the insured of making the insurer a guarantor of its workmanship.

There is general agreement among the courts that the exclusion is inapplicable when the property damaged is merely incidental to the property upon which the work is being performed at the time of the accident. The exclusion is applicable if the property damaged is under the supervision of the insured and is a necessary element of the work being performed. Generally, control of the damaged property by the insured must be exclusive and applicability of the exclusion is usually denied when a subcontractor's work on real estate is involved.

Factors to be considered in determining what constitutes care, custody and control or exercise of physical control depends on the nature of the property (realty or personalty), location, size, shape, and other characteristics of the property, what the insured was doing and how, and the interest in and relationship of the insured and others to the property. In this case, the insured was one of several contractors and the damage was not shown to have been cause to work in progress by the insured at the time of the accident. The exclusionary provision of the contract therefore is not applicable

CONTRACT
RIGHT TO MAINTAIN ACTION

The statute restricting right of foreign corporations to sue in Iowa does not bar suit by foreign corporate assignee of foreign judgment.

AMERICAN TITLE INSURANCE COMPANY v. STOLLER FISHERIES, INC.
227 N.W. 2d 481 (March 19, 1975)

FACTS: Stoller, an Iowa corporation, contracted to purchase seafood products from Gorton Corporation, a foreign corporation, which had not filed a certificate of authority in Iowa.

Section 496A.120 states that a foreign corporation transacting business in this state without a certificate of authority shall not be permitted to maintain any action, suit or proceeding in any court of this state until a certificate is obtained, nor shall any suit be maintained in any court in this state by any successor or assignee of such corporation of any right, claim or demand arising out of the transaction of business by such corporation in the state.

Gorton sued and obtained a judgment against Stoller in the state of Florida where Stoller's president had a winter home. Stoller in the meantime had contracted to sell property it owned in Florida and American Title issued its policy insuring title

to this property having overlooked the said judgment. In order to avoid liability to the purchaser of this property, American Title paid Gorton the judgment in consideration for a written assignment of the judgment and brought suit against Stoller.

HOLDING: Stoller's argument that, allowing American Title to maintain its action without filing the certificate of authority, would be to allow Gorton (American Title's assignor) to do indirectly what it could not do directly and thereby evade the intent of 496A.120 is rejected.

American Title in bringing this litigation is not required to obtain a certificate of authority since the maintenance of suit is not considered to be the transaction of business (R.C.P. 5). Contracts in violation of this statute are not void but merely unenforceable in Iowa courts. As a general rule, if an action results in judgment for a foreign corporation the doctrine of merger would merge the contract in the judgment and no further action could be taken on the contract.

CONTRACTS
FOREFEITURE OF REAL ESTATE CONTRACT -- Thirty-day statutory notice of forefeiture is not in all cases sufficient notice.

BETTIS v. BETTIS
228 N.W. 2d 193 (April 16, 1975)

FACTS: The thirty-day statutory notice (I.C.A Section 656.2) required to be given for forefeiture of a real estate contract was not intended to preclude, in all cases, the right of a contract vendor to additional time within which to bring previously waived payments to current status where personal and financial disasters plagued purchasers and vendor had previously waived payments but revoked waiver.

MARITIME ACCIDENTS.

PFEIFFER v. WEILAND
226 N.W. 2d 218 (February 19, 1975)

FACTS: Plaintiff was injured in a water skiing-boating accident on the waters of the Mississippi River and brought action against the boat operator for personal injury damages. Plaintiff alleged his claim was cognizable in admiralty because the tort occurred on navigable waters of the Mississippi River and therefore instructions on comparative negligence rather than contributory negligence should have been submitted to the jury.

ISSUE: Is this tort maritime in nature and therefore cognizable in admiralty.

HOLDING: State court jurisdiction of claims cognizable in admiralty are claims arising under general maritime law derived from the "saving to suitors" clause of Section 1333(1), 28 U.S.C.A. It is now generally recognized that if an action in tort is cognizable in admiralty, maritime law governs with respect to the rights and liabilities of the parties even though suit is brought in a state court. Under general maritime law, contributory negligence of the Plaintiff is not regarded as a complete defense but instead requires an apportionment of damages in cases other than death.

Two lines of cases relative to determination of the applicability of admiralty law have developed. The locality-alone test line holds that locality alone determines whether a tort is maritime in nature and all torts occurring on navigable waters are cognizable in admiralty. The "benedict's doubt" test holds that in secondary locale (inland navigable waters) admiralty jurisdiction depends upon the existence of some relationship between the tort and commerce and navigation

A recent Iowa case, Harris vs. United Airlines, Inc., 275 Fed. Supp. 431 (S.D. Iowa 1967), followed the locality-alone test which is the majority view.

Executive Jet Aviation, Inc. vs. City of Cleveland, 409 U.S 249, 93 S. Cp. 493, 34 L.Ed. 2d 454, narrowly read, appears to hold that maritime locality-alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases. The court goes on to review and discuss a number of other recent federal court cases dealing with the question of admiralty jurisdiction and discussing the two above outlined lines of cases in determining this jurisdiction.

> "For a cause of action sounding in tort to be cognizable in admiralty and for an Iowa court to be bound by general maritime law, a showing must be made that the tort not only occurred on navigable waters, but that it had some connection with "traditional forms of maritime commerce and navigation'."

In this case, the parties were engaged in a strictly recreational activity having no relationship with and presenting no danger to traditional maritime commerce and navigation and accordingly, maritime law was not applicable.

The owner of the boat who was behind the boat preparing to water ski along with Defendant and yelled "Hit it" to the person actually operating the boat which resulted in the boat accelerating and pulling Defendant through the water and his arm becoming tangled in the pull rope used for skiing, was not in actual operation of the boat and would not be thereby held liable as the "operator" pursuant to Section 106.18 of the Iowa Code.

UNINSURED MOTORIST INSURANCE

HOLLAND v. HAWKEYE SECURITY INSURANCE COMPANY
230 N.W. 2d 517 (June 25, 1975)

FACTS: Declaratory judgment action was brought by insurer and multiple parties and representatives of persons injured and killed while passengers in insured vehicle which was struck by uninsured motorist. Insurer issued one policy of insurance covering nine vehicles owned by insured. Insured paid a premium of $3.00 annually per vehicle for the uninsured motorist coverage in said policy. The policy provided limits of liability of $10,000 per person and $20,000 for "each accident". Damaged parties claim insured paid a premium to insurer for each vehicle which modifies and enlarges the uninsured motorist coverage to $180,000.00 ($20,000 times nine vehicles) which constitutes stacking or pyramiding of the uninsured motorist coverage.

HOLDING: The court rejected damaged parties' claim seeking pyramiding of the uninsured motorist provisions. The court noted that this case was one of first impression and cited a number of jurisdictions which were consistent with the conclusion raised by this court and in so doing rejected a contrary line of cases

INHERITANCE TAX. Award for wrongful death damages is not subject to state inheritance tax.

ESTATE OF DIELEMAN v. DEPARTMENT OF REVENUE
222 N.W. 2d 459 (October 16, 1974)

Wrongful death proceeds are not taxable in that they do not constitute "property" of the decedent.

> "It seems apparent the 'property' passing by will or intestacy referred to in Section 450.3(1), must be all or a portion of

the same 'property' in which decedent must have had an interest in order for the tax to be imposed under the provisions of Section 450.2". (p. 461)

The broad basis concept of an inheritance tax is to levy a duty on the shifting of the economic benefits and enjoyment of property from the dead to the living. Section 633.336 which indicates wrongful death or damage proceeds shall be disposed of as personal property belonging to the estate, merely makes the estate the conduit for the payment to the distributees.

HOME RULE CONSTITUTIONAL.

BECHTEL v. CITY OF DES MOINES
225 N.W. 2d 326 (January 22, 1975)

FACTS: Property owners and taxpayers brought declaratory judgment action relating to constitutional amendment granting home rule to cities (25th Amendment to the Iowa Constitution). In 1868, Chief Justice Dillon set out the relative positions of the Iowa General Assembly and cities to be: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. A municipal corporation possesses and can exercise (1) powers granted in express words; (2) those necessarily implied or necessarily incident to the powers expressly granted; (3) those absolutely essential to the declared objects and purposes of the corporation and none other. Doubt as to the existence of power is to be resolved by the courts against the corporation. The 25th Amendment to the Iowa Constitution states:

> "Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.
>
> "The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state."

Defendant City of Des Moines elected to come under the home rule act enacted subsequent to the adoption of the 25th Amendment.

HOLDING: "The General Assembly, in the exercise of its authority, may from time to time retain, repeal, or amend statutes on cities in effect on November 7, 1968, or enact new ones, and that subject to such authority, cities have power to deal with local affairs and government, except to levy taxes -- unless the General Assembly gives them that power, too. Thus the provisions of the Home-Rule Act repealing and amending existing statutes and enacting new ones affecting cities do not contravene the home-rule amendment, but implement it." (p. 332).

The seat of legislative authority is the General Assembly and that body may exercise all rightful legislative powers not expressly prohibited. In connection with the exercise of such powers what the Constitution authorizes rather than what it prohibits is looked to. The General Assembly may repeal, amend and enact statutes regarding cities and the authority of the General Assembly is superior to cities' powers. (p. 333). The Home-Rule Act further grants cities the power of eminent domain for public purposes which are reasonable and necessary as an incident to the powers and duties conferred upon cities.

CONSTITUTIONALITY
PREGNANCY LEAVE FOR SCHOOLTEACHERS

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT v. PARR
227 N.W. 2d 486 (March 19, 1975)

The Supreme Court held unconstitutional school district maternity leave regulations which provided for termination of pregnant non-tenured teachers, regulated the time at which tenured pregnant teachers could return to their duties, payment of sick/disability pay while absent due to pregnancy and required termination of teaching commencing no later than fifth month of pregnancy.

KRUSE v. BOARD OF DIRECTORS OF LAMONI COMMUNITY SCHOOL DISTRICT
231 N.W. 2d 626 (July 31, 1975)

FACTS: This case deals with the statutory requirement (Chapter 279) setting out the requirements for terminating an employment contract with a school teacher. The court held the school district must strictly comply with the statutory requirement as to notice. The schoolteacher's action after receiving the notice and employing counsel and making a protest to the Board, including present at a board meeting, did not constitute a waiver of this requirement of notice.