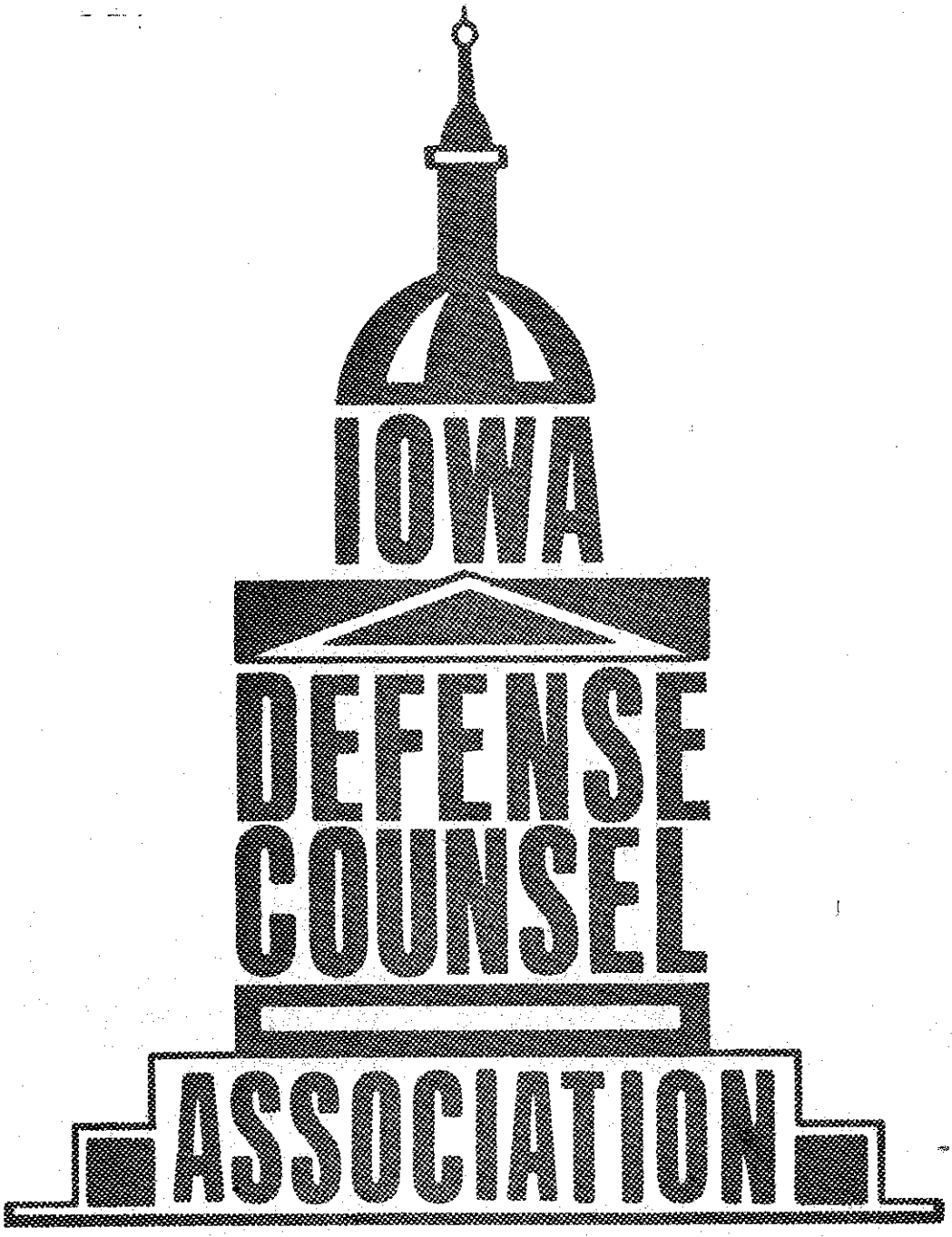

ANNUAL MEETING

October 23, 24, & 25 1980

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1979 — 1980
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200 Home Federal Building
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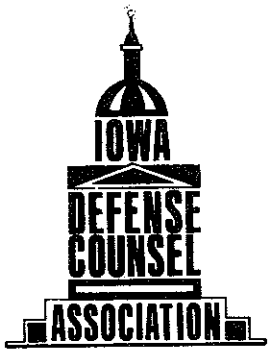

1980 Annual Meeting

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COMPARATIVE NEGLIGENCE

BY: DAVID L. PHIPPS

WHITFIELD, MUSGRAVE, SELVY, KELLY & EDDY

DES MOINES, IOWA

I. Alternative treatments for Plaintiff's negligence.

A) Contributory negligence as a complete defense.

B) Ignore the Plaintiff's negligence (abandon contributory negligence as a defense).

C) Comparative negligence (various forms).

D) No fault system.

E) Specific exceptions ("escape doctrines").

1) Last clear chance.

2) Willful and wanton misconduct.

3) Violation of statute.

4) Gross negligence.

5) "Direct - remote" rule.

6) Assumption of the risk.

II. Traditional rationale for the contributory negligence rule:

A) Plaintiff's negligence is an intervening insulating cause.

B) The Court will not aid one who is at fault ("clean hands" doctrine).

C) Discourage accidents by refusing to reward for own negligence.

III. Rationale for the comparative negligence rule:

A) Contributory negligence rule is unfair in visiting the results of two people's negligence on one only.

B) Permit an actual division of fault rather than subterfuge (more honest approach).

IV. Objections to comparative negligence rule.

A) Impossible to compare fault (pure speculation)

B) Juries are not reliable enough to weigh fault (passion and prejudice interjected).

C) Appellate review is difficult if not impossible (often not sure what the jury really decided).

V. Status of other jurisdictions:

A) 15 states retain the contributory negligence rule (with some exceptions).

B) 35 states have some form of comparative negligence.

VI. The current status in Iowa:

A) Stewart v. Madison, 278 N.W.2d 284 (Iowa 1979). Held that the question of comparative versus contributory negligence was properly for the legislature, not the Court. Specifically noted the legislature's previous involvement in this question. Also noted no unanimity on question of need for a change.

B) Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980). Held that the Court would defer the question of whether the Court should abrogate the rule of contributory negligence but noted that the comparative rule is now widely considered to be superior to the contributory rule. Decision "more appropriately rest(s) with the legislature."

VII. Forms of Comparative Negligence:

A) "Pure" comparative negligence (apportionment of each party's fault).

B) "Not as great as" (plaintiff may recover so long as his negligence is "not as great as" that of the defendant) 49% rule.

C) "Not greater than" (plaintiff may recover so long as his negligence is "not greater than" that of the defendant) 50% rule.

D) "Slight vs. gross" rule (plaintiff may recover so long as his negligence is "slight" compared to defendant's - or defendant's is gross as compared to plaintiff's.

VIII. Basis of comparison.

A) No "rule of thumb" for comparison. Campanelli v. Milwaukee Elec. Ry. & Transport Co., 242 Wis. 505, 8 N.W.2d 390 (1943).

B) Jury is to consider both elements of negligence and causation (no formulae as to how much weight on each factor). Raszeja v. Brozek Heating & Sheet Metal Corp., 25 Wis.2d 337, 130 N.W.2d 855 (1964).

C) Number of respects in which party is negligent is not controlling. Van Wie v. Hill, 15 Wis.2d 98, 112 N.W.2d 168 (1961).

D) Kind or category of negligence is not controlling. Fronczek v. Sink, 235 Wis. 398, 291 N.W. 850 (1940).

E) Same "kind" of negligence may be of different degree. Kraskey v. Johnson, 266 Wis. 201, 63 N.W.2d 112 (1954).

F) Multiple defendants.

1) Plaintiff's negligence must be compared to the negligence of each defendant, Walker v. Kroger Grocery & Backing Co., 252 N.W. 721 (Wis. 1934); Reiter v. Dyken, 290 N.W.2d 510 (Wis. 1980); Mishoe v. Davis, 14 S.E.2d 187 (Ga. App. 1941).

2) Plaintiff's negligence must be compared to the negligence of all the defendants combined. Walton v. Tull, 356 S.W.2d 20 (Ark. 1962).

3) Must also consider the negligence of non-parties or parties who have settled prior to trial. Perringer v. Hoger, 124 N.W.2d 106 (Wis. 1963).

4) Plaintiff may not require jury to apportion fault among various defendants. Klemme v. Hoag Memorial Hosp. Presbyterian, 163 Cal. Rptr. 109 (Cal. App. 1980).

5) Comparative negligence rule alone does not affect rule of equal contribution among joint tortfeasors. Wedel v. Klein, 229 Wis. 419, 282 N.W. 606 (1938).

IX. Mechanics.

A) The special verdict form is the main tool of control, including the following questions:

1) Was each party negligent?

2) Was that negligence a proximate cause of the injury?

3) The respective proportions of causal negligence?

4) The total damages which would fully compensate each claimant.

5) For good forms, see Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 497 (1953).

B) Informing the jury of the effect of its apportionment of negligence.

1) The jury should not be informed of the effect. Wis. rule see Heft & Heft, Comparative Negligence Manual, §8.10 (1971).

2) The jury should be informed of the effect. Roman v. Mitchell, 513 A.2d 322 (N.J. 1980); Thomas v. Board of Trustees of Salem Township, 582 P.2d 271 (Kan. 1978).

C) Mandatory set-off rule is not applicable where both parties are fully insured. Jess v. Herrmann, 604 P.2d 208 (Cal. 1979).

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PUNITIVE DAMAGES: THE DOCTRINE OF JUST ENRICHMENT

By Tom Riley

"For all manner of trespass, whether it be for ox, for ass, for sheep...the case of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double..."

Exodus 22:9

I. INTRODUCTION: The general principles of punitive damages

A. THE RATIONALE: Redressing affronts to personal feelings not susceptible of measurements, financing cost of litigation where only small compensatory damages expected, and both punishment and deterrence from future misconduct. Roginsky v. Richardson-Merrell Inc., 378 F 2d 832 (2nd Cir. 1967). Example: Quarry operator who dynamited without precautions since cost of replacing plaintiff's home cheaper than cost of precautions. Funk v. Kerbaugh 70 A 953 (Penn. 1908).

B. THE ELEMENTS: Traditionally, malice is a prerequisite, but need not be express or actual; legal or implied malice from recklessness will suffice. Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Ia. 1953); Gross negligence will support punitive damages. Sebastian v. Wood, 66 NW 2d 841 (Ia. 1954).

C. THE ACTUAL DAMAGES REQUIREMENT: Most jurisdictions (including Iowa: Speed v. Beurle, 251 NW 2d 217 (Ia. 1967)) require the plaintiff sustain actual damages.

D. THE REASONABLE RELATIONSHIP RULE: Most jurisdictions (including Iowa, McCarthy v. J. P. Culler & Son Corp., 199 NW 2d 362 (Ia. 1972)) require that there be a reasonable relationship between actual and punitive damages. No set mathematical ratio exists. Northrup v. Miles Homes, Inc., 204 NW 2d 850 (Ia. 1973).

E. WEALTH OR POVERTY OF DEFENDANT: Evidence of defendant's financial condition is material in punitive damages actions. Hall v. Montgomery Ward & Co 252 NW 2d 421 (Ia. 1977). Query: If defendant pleads poverty, can plaintiff show existence of a liability policy? No, according to Michael v. Cole, 595 P 2d 995 (Ariz. 1979).

F. WEALTH OR POVERTY OF PLAINTIFF: Split of authority with no reported Iowa decision. Admit: Wisner v. S.S. Kresge Co., 465 SW 2d 666 (Kan. Ct. App. 1971). Exclude: Hensley v. Paul Miller Ford, Inc., 508 SW 2d 759 (Ky. 1974).

II. PARTIES WHO MAY BE LIABLE

A. The party directly committing the misconduct unless mentally incompetent (vis a vis incompetency of a minor per se. See 2E) Phillips' Comm. v. Ward's Admir., 43 SW 2d 331 (Ky. 1931).

B. VICARIOUS LIABILITY:

1. Corporate or non-corporate employer. (Syester v Banta, 133 NW 2d 666 (Ia. 1965)--if agents wanton act is in scope of employment. Restatement of Torts Sec. 909 requires authorization or ratification. No reported decision in Iowa on non-corporate employers liability for punitive damages.

2. Non-profit corporations. No reported cases in Iowa but liability of municipal corporations for punitive damages (Young v. City of Des Moines , 262 NW 2d 612 (Ia. 1978) suggests other non profit corporations not exempt.

3. Partnerships. No reported decisions in Iowa. In case seeking compensatory damages only, partners held liable for fraud representations of partner. Stanhope v. Swafford, 45 NW 403 (Ia. 1890).

C. GOVERNMENTAL LIABILITY

1. Federal Government exempt: 28 U.S.C. § 2674, but federal employee not. Environmental Defense Fund v. Corp. of Eug. 325 F. Supp. 728 (E.D. Ark. 1971).

2. State of Iowa exempt: Section 25A.4

3. Municipal Subdivisions are not exempt. Young v. City of Des Moines, 262 NW 2d 612 (Ia. 1978).

D. ESTATES NOT LIABLE: Walder v. Rahm, 249 NW 2d 630 (Ia. 1977).

E. MINORS CAN BE LIABLE: No reported cases in Iowa. See Singer v. Marx, 301 P 2d 440 (Cal. 1956).

III. NOT ALLOWED FOR BREACH OF CONTRACT:

A. Breach, even if intentional, will not support punitive damages. Pogge v. Fullerton Lumber Co., 277 NW 2d 196 (Ia. 1979).

B. If breach amounts to independent tort, punitive damages may be allowed for tort committed maliciously. Kuiben v. Garrett, 51 NW 2d 149 (Ia. 1952).

C. EXCEPTION RULE IN SPECIAL CONTRACT CASES:

Breach of contract for funeral services. Meyer v. Nattger , 241 NW 2d 911 (Ia. 1976);

Breach of promise of marriage contract by public utility or common carrier, wrongful failure to honor depositions check, breach of contract of employment, breach of fiduciary duty. Pogge v. Fullerton Lumber Co., 277 NW 2d 916.

IV. BASIS FOR PUNITIVE DAMAGES AGAINST INSUROR:

A. Fraud, malice or bad faith in refusing payment for which pecuniary and non-pecuniary damages, including emotional distress has been sustained. State Farm Mutual Auto Ins. Co. v. Ling, 348 So. 2d 472 (Ala. 1977); Austero v. Natl. Cas. Co., 84 Cal. App. 1 (1978); Campbell v. Govt. Emp. Ins. Co. 306 So. 2d 525 (Fla. 1974)

B. Intentional infliction of emotional distress by:

1. Oppressive conduct, including economic coercion; or

2. Outrageous conduct; or

3. Bad faith violation of covenant of good faith and fair dealing; or

4. Tortious interference with a protected property interest of the insured.

Amsden v. Grinnel Mutual Reinsurance Co., 203 NW 2d 252 (Ia. 1972); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. (31 376, 89 Cal Rptr. 78 (1970).

Note: Intent to harm not pre-requisite to breach of covenant of good faith and fair dealing. Silberg v. Cal. Life Ins. Co., 521 P 2d 1103 (Cal. 1974). Not a punitive damage case but included for general interest.

V. DEFENSES AND MITIGATION

> "The idea (punitive damages) is wrong. It is a monstrous heresy. It is unsightly and unhealthy excrescence, deforming the symmetry of the body of law". Fay v. Parker, 53 N.H. 342, 382 (1873).

A. Use discovery to expose lack of evidence to support punitive damages recovery.

B. Move for summary judgment to keep wealth out of case. (See sample motion at end of outline).

C. Move for bifurcation and in the alternative, in limine. (See sample motion at end of outline).

D. Consider Contrition:

> "To confess a fault freely is the next best thing to being innocent of it". Syras.

E. Mitigation by corrective or remedial steps (vis a vis "stonewalling").

F. Plaintiff's misconduct or provocation. Gronan v. Kukkuck 12 NW 748 (Ia. 1882) Fed. Prescrip. Ser. Inc. v. Amalgamated Meat Cutters, 527 F. 2d 269 (8th Cir. 1975).

G. Take credit for other judgments in multiple disaster or litigation cases

VI. RECENT DEVELOPMENTS IN LAW OF PUNITIVE DAMAGES

A. Insurability: Where conduct not intentionally inflicted injury, coverage for punitive damages not against public policy. Harrell v. Travelers Indem. Co., 567 P. 2d 1013 (Ore. 1977).

Note: Insured under homeowners policy intended to shoot member of family during domestic dispute but hit innocent bystander by mistake. Coverage for punitive damages allowed. Grange Mutual Cas. Co. v. Thomas, 301 S. 2d 158 (Fla. App. 1974).

B. Claimant's suit for bad faith refusal to settle is recognized. Jones v. National Emblem Ins. Co., 436 F. Supp. 1119 (E.D. Mich. 1977). Definitely a minority position.

C. Injury caused by Negligence of Hospital Orderly. Punitive damages for recklessness of hospital in hiring unfit employee. Wilson N. Jones Memorial Hospital v. Davis, 553 SW 2d 180 (Tex. 1977).

VII. CONCLUSION

A. Punitive damages serve a useful purpose in punishing and detering outrageous conduct.

B. Allowing punitive damages in cases of only gross negligence (vis a vis reckless, wanton or malicious) invites abuses.

SAMPLE MOTION FOR SUMMARY JUDGMENT

The following motion involves a products liability case but the form may be used in other cases as well.

COMES NOW the defendant and moves for summary judgment on plaintiff's claim for punitive damages, and in support of same, states as follows:

1. Plaintiff's products liability claim is based on strict liability and breach of implied warranty of fitness, and claims punitive damages based upon the allegation that the "wrongful conduct of the defendant which caused plaintiff's damages was committed and continued with a willful and reckless disregard of the rights of the plaintiff and with a willful and wanton disregard of the consequences of such conduct toward him.

2. Defendant, by interrogatory, requested plaintiff to state the facts he intended to rely on in establishing his right to punitive damages and his answer stated he would rely on his own testimony as to his injury, while operating the machine manufactured by the defendant and by the testimony of an expert witness that the machine was defective. See answer to Interrogatory No. ____.

3. Summary judgment may be had where the pleadings, together with the affidavits, show that there is no genuine issue

as to any material facts and the moving party is entitled to judgment as a matter of law.

4. Punitive damages lie only for an act done intentionally, maliciously, wantonly or recklessly (in some jurisdictions add "or with gross negligence"). In a products liability case, punitive damages lie only where the facts also establish an independent willful tort or where the manufacturer had knowledge of the products defects.

5. Viewing the facts alleged in plaintiff's complaint and answer to interrogatory in the light most favorable to the plaintiff, plaintiff is unable to establish entitlement to punitive damages as a matter of law and there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law in plaintiff's claim for punitive damages.

SAMPLE MOTION FOR BIFURCATION AND, IN THE ALTERNATIVE, IN LIMINE

COMES NOW the defendant, prior to the commencement of the selection of a jury to try this cause, and moves the court as follows:

reference to the wealth, income or financial condition of the defendant during the presentation of evidence in this cause unless and until the plaintiff first offers proof of her entitlement to punitive or exemplary damages to the extent that a jury question thereon has been engendered; that the wealth, income or financial condition of the defendant is not relevant on plaintiff's claim for actual or compensatory damages and its introduction would be prejudicial with respect to said claim for actual or compensatory damages and deny the defendant a fair trial with respect thereto and this defendant states herein that plaintiff will fail in her proof of establishing either express or legal malice on the part of the defendant and the injection into evidence of defendant's wealth, income or financial condition, ostensibly as bearing on the assessment of punitive damages will deny the defendant a fair trial on the merits of the plaintiff's claim for actual or compensatory damages; and in the interest of justice demand that defendant's wealth, income or financial condition be withheld from jury consideration unless and until plaintiff first establishes a prima facie case for punitive damages; that an order of the court admonishing plaintiff, her counsel and plaintiff's witnesses to refrain from introducing evidence of the defendant's wealth, income or financial condition is necessary to avoid a mistrial in the event the plaintiff introduces evidence of or injects reference to defendant's wealth, income or financial condition without engendering a jury question on her cause of action for punitive damages.

1. To bifurcate the trial of this cause on the question of liability for compensatory and punitive damages and the award of compensatory and punitive damages, if any, said bifurcation to take the form of trying the question of defendant's alleged liability for compensatory and punitive damages only to the jury and in the event the jury finds in favor of the plaintiff on the question of liability for either compensatory damages or punitive damages, or both, then and only then, to resume the trial for the purpose of permitting the party to introduce evidence bearing on the question of damages, including if the jury finds in favor of plaintiff on the question of liability for punitive damages, evidence of defendant's financial condition and matters in mitigation of damages, to the end that the defendant will not be prejudiced or otherwise denied a fair trial by the introduction of extraneous, irrelevant and highly prejudicial evidence of defendant's wealth or financial condition in the event plaintiff fails to prove entitlement to punitive damages.

2. In the alternative, in the event the defendant's motion to bifurcate is overruled, then and only then, defendant moves the court in limine for a limited bifurcation of proof on the plaintiff's claims for actual and punitive damages by providing that the plaintiff be barred from making any reference to the wealth, income or financial condition of the defendant during opening statement and from offering any evidence or making any

WHEREFORE, the defendant moves for a bifurcation of the trial between the liability and damage issues and, in the alternative, in limine for limited bifurcation of proof, which bifurcation shall take the form of an order of this court barring plaintiff, her counsel and her witnesses from making any reference to or offering any evidence of the defendant's wealth, income or financial condition, during any stage of the proceedings unless and until the court rules that plaintiff's evidence engenders a jury question on her claim for punitive damages.

TRAUMATIC NEUROSIS — THE ZONE OF DANGER

By Alan E Fredregill

I. Definitions and Explanation of Terms.

A. Trauma - Traumatic.

1. Does not mean the same thing to psychiatrist as it does to claims people.

a. Claims people think of physical injuries and impacts when they think of trauma.

b. Psychiatrists say trauma is any occurrence that is harmful psychologically, whether or not accompanied by actual physical injury.

c. To a psychiatrist, trauma also means stress.

B. Neurosis.

1. An emotional disorder of psychic rather than physical origin.

2. Contrasted with psychosis, neurosis is usually less serious and is more likely to respond to therapy; in psychosis, there is frequently a loss of contact with realty; in neurosis, while thought, feeling and behavior are disturbed, there is no loss of contact with reality.

3. Often said that most people exhibit neurotic symptoms to some degree, but you are clinically neurotic only if you can't function in society without psychiatric help.

4. Anxiety is the source of all neuroses, and is the predominate symptom of many of the more predominate types.

C. Traumatic Neurosis.

1. Defined as any type of neurotic response to a psychic injury with or without physical injury.

2. The term is not recognized in the classification of mental diseases in Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association (1968).

3. Neuroses are referred to by their clinical description, such as:

   a. Anxiety neurosis - sometimes called "anxiety reaction" or "anxiety state" - anxiety is the major symptom - can be coupled with others.

   b. Phobic neurosis - uncontrollable and irrational fears (phobias) such as traumatophobia - avoiding the scene of the accident; agoraphobia - fear of open spaces - afraid to leave hospital or home.

   c. Hysterical neurosis -

      i. conversion type - where anxiety is converted into physical symptoms, such as paralysis.

      ii. dissociative type - behavior becomes separate or dissociated from conscious awareness - result is amnesia.

   d. Depressive neurosis - usually follows severe physical injuries - as a reaction to loss - morbid sadness, dejection, melancholy.

4. It is said that, except in the case of brain injuries, physical injury itself will not cause neurosis - psychological trauma is required.

5. Two basic phases:

   a. Acute - "traumatic syndrome" - "primary response" - brief.

   b. Chronic - indeterminate length - the actual neurosis stage - secondary response (not to be confused with secondary gain).

II. General Rules - Liability for Mental Disturbance with Physical Symptoms.

A. Actor Liable.

1. Restatement of Torts, 2d, Section 313, "Emotional Distress Unintended":

"If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor:

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise then by knowledge of the harm or peril of a third person, and

(b) From facts known to him, should have realized that the distress, if it were caused, might result in illness nor bodily harm.

The rule stated in subsection 1 has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

3. Prosser says:

"Where the defendant's negligence inflicts an immediate physical injury, such as a broken leg, . . . courts . . . allow . . . compensation for purely mental elements of damage accompanying it, such as fright at the time of injury, apprehension as to its effects, nervousness, or humiliation at disfigurement. With a cause of action established by the physical harm, parasitic damages are awarded, and it is considered that there is sufficient insurance that the mental injury is not feigned." W. Prosser, Law of Torts, p. 330 (4th Ed. 1971) [hereafter, Prosser]

III. General Rules - Purely Mental Disturbance Without Physical Symptoms, or with Physical Symptoms Ocurring at Later Time, Caused Solely by the Mental Disturbance.

A. No Liability.

1. The general rule is that in a normal case, there can be no recovery for negligent infliction of mere mental distress. Case note, 26 Drake L. Rev. 212, 218, N.54 (1977).

2. Prosser says:

> "Where the defendant's negligence causes only mental disturbance without accompanying physical injury or physical consequences, or any other independent basis for tort liability, there is still agreement that in the ordinary case, there can be no recovery. The temporary emotion of fright so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence . . ." Prosser, p. 328.

3. Restatement of Torts, 2d:

> Section 436A. Negligence Resulting in Emotional Disturbance Alone. "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

a. Examples - Fly on the Onion Chip case.

b. Illustration - Restatement of Torts, 2d, Section 436A. Comment:

> "A negligently manufactures and places upon the market, cottage cheese containing broken glass. B purchases a package of the cheese, and upon eating it, finds her mouth full of glass. She is not cut or otherwise physically injured, and she succeeds in removing the glass without bodily harm; but she is frightened at the possibility that she may have swallowed some of the glass. Her fright results in nausea and nervousness lasting for one day and an inability to sleep that night, but did no other harm. A is not liable to B.

B. Exceptions to the General Rule of Nonliability.

1. Physical harm resulting from emotional disturbance. See Restatement of Torts, 2d, Section 436.

2. Parasitic to another independent tort such as:

   a. Assault - Trogdon v. Terry, 172 N.C. 540, 90 S.E. 583 (1916).

   b. Battery - Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884).

   c. False imprisonment - Gadsen General Hospital v. Hamilton, 212 Ala. 531, 103 So. 553 (1925).

   d. Seduction - Anthony v. Norton, 60 Kan. 341, 56 P. 529 (1899).

   e. Blasting - Annot., 75 A.L.R.3d 770 (1970): Recovery of damages for emotional distress, fright, and the like resulting from blasting operations.

3. Special duty situations:

   a. Telegrams - Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W.1 (1895).

   b. Mishandling of corpses.

      (i) Negligent embalming - Brown Funeral Homes & Ins. Co. v. Baughn, 226 Ala. 661, 148 So. 154 (1933).

      (ii) Leaky casket - Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949)

      (iii) Negligent shipment - Louisville and Northern Railway Co. v. Wilson, 123 Ga. 62, 51 S.E. 25 (1905).

      (iv) Running over the body - St. Louis Southwest Railway Co. v. White, 192 Ark. 350, 91 S.W.2d 277 (1936).

      (v) Misdelivery - Renihan v. Wright, 125 Ind. 536, 25 N.E. 822 (1890).

      (vi) Confusion of bodies - Loft v. State, 32 Misc.2d 296, 225 N.Y.S.2d 434 (1962).

   c. Common carriers - Payne v. McDonald, 150 Ark. 12, 233 S.W. 813 (1921).

d. Landlord-tenant - Gray v. Linton, 38 Colo. 175, 88 P. 749 (1906).

3. Intentional or reckless infliction - See Restatement of Torts, 2d, Section 46. Amsden v. Grinnell Mutual Reinsurance Company, 203 N.W.2d 252 (Iowa 1972); Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976).

4. Impact rule - Prosser, p. 332; Annot. 64 A.L.R.2d 100 (1959). Now largely abrogated - adaptation to cover a situation where there may follow some later physical consequence, not directly from the trauma, but as a result of the neurosis or mental disturbance - the rationale was that the physical impact was some basis for concluding that the psychic injury was genuine. Nearly any impact, no matter how slight will do. See the following:

a. Slight blow - Homans v. Boston Elevated Railway Co., 180 Mass. 456, 62 N.E. 737, (1902).

b. Trifling burn - Kentucky Traction and Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929).

c. Electric shock - Hess v. Philadelphia Transportation Co., 358 Pa. 144, 56 A.2d 89 (1948).

d. Shock wave from explosion - Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wash.2d 468, 374 P.2d 549 (1962).

e. Dust in the eye - Porter v. Delaware, L & W Railway Co., 73 N.J.L. 405, 63 A. 860 (1906).

f. Inhalation of smoke - Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).

g. And finally, as Prosser so amusingly points out,

> "A Georgia circus case has reduced the whole matter to a complete absurdity by finding "impact" where the defendant's horse "evacuated his bowels" into the plaintiff's lap." Prosser, p. 331.

5. Zone of Danger.

a. Fear for own safety.

(i) Recovery allowed if plaintiff is within the zone of danger and the other specific situations are available as noted above.

(ii) No recovery if not within zone.

b. Fear for the safety of another.

(i) If plaintiff is within the zone of danger, some courts have allowed recovery in the right circumstances, "If the plaintiff herself is threatened with physical injury by the defendant's negligence, as where she is standing in the path of his vehicle and suffers physical harm instead through fright at the peril to her child," Prosser, p. 333.

Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933);

Cosgrove v. Beymer, 244 F.Supp. 824 (Del. 1965);

H. E. Butt Grocery Co. v. Perez, 408 S.W.2d 576 (Tex. Civ. App. 1966);

Frazee v. Western Dairy Products Co., 182 Wash. 578, 47 P.2d 1037 (1935).

(ii) Other courts have denied such recovery even when the plaintiff is within the zone of danger. See Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959);

Lessard v. Tarca, 20 Conn. Superior, 133 A.2d 625 (1957).

(iii) Until 1968, if plaintiff was outside the zone of danger, then no recovery was allowed to the plaintiff under any circumstances.

Uncle Willard.

See Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935);

Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950);

Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952).

The Iowa rule is in accord as of today. See Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899). It was there held that no recovery could be had for the mental distress of a daughter who suffered the same after seeing her mother collapsed in the doorway following a defendant's negligent blasting operation.

(iv) After 1968, the law may be headed in new directions. Recovery has been allowed in a few jurisdictions even where the plaintiff is outside the zone of danger. Dillon v. Legg, 69 Cal. Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316 (1968).

In this case, the mother standing on the curb saw her infant daughter killed by a car as she crossed at an intersection. She brought suit against the defendant driver in three counts:

(1) For compensation of her loss,

(2) For emotional trauma for witnessing the accident, and

(3) For the emotional trauma of another infant daughter who was crossing the street with her little sister and saw her killed.

The trial court granted the defendant a judgment on the pleadings on the second count, based upon the prior decisions of the California Supreme Court that no cause of action is stated unless the plaintiff's shock has resulted from fear for his own safety, or, stated another way, was within the zone of peril.

The Supreme Court reversed and held that the plaintiff was not required to be within the zone of danger to recover, and that general tort law would control to determine whether or not a reasonable man under the circumstances should have foreseen fright or shock severe enough to cause substantial injury to a normal person. The key to the case is the question of foreseeability, which is determined by 3 elements. 1) proximity to the scene of the accident, 2) presence or absence of firsthand observation, and 3) proximity of kinship to the victim.

The opinion quotes from Dean Prosser with the following language:

"All ordinary human feelings are in favor of her action against the negligent defendant. If a duty to her requires that she herself be in some recognizable danger, then it has properly been said that when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity and will suffer serious shock."

The court went on to say, "The case thus illustrates the fallacy of the zone of danger rule that would deny recovery in one situation and grant it in the other. We can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death, and yet deny to the mother merely because of a happenstance that the sister was some few yards closer to the accident."

And in a footnote later in the case, the court said, "The concept of the zone of danger cannot properly be restricted to the area of those exposed to physical injury; it must encompass the area of those exposed to emotional injury."

The California rule has been adopted by the courts of Hawaii, Rhode Island and Michigan, and rejected in New Hampshire and Vermont, among others. See Leong v. Takasaki, 520 P.2d 758, 94 A.L.R.3d 71 (1974);

D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975);

Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973);

Jelly v. LaFlame, 108 N.H. 471, 238 A.2d 729 (1968);

Guilmette v. Alexander, 259 A.2d 12 (Vt. 1969).

IV. Bibliography.

A. 30 Proof of Facts 1, Anxiety neurosis following trauma (1973).

B. 29 Proof of Facts 529, Depression following trauma (1972).

C. 7 Proof of Facts 427, Malingering (1960).

D. Note, "Negligence - infliction of emotional harm - A suggested analysis", 54 Iowa L. Rev. 914 (1969).

E. Case note, in appropriate cases, there may be recovery for mental distress, absent physical trauma, arising out of a breach of contract to perform funeral services, 26 Drake L. Rev. 212 (1977).

F. Restatement of Torts 2d, Section 46, 313, 436 and 436A.

G. Annot., "Relationship between victim and plaintiff - witnesses affecting right to recover damages in negligence for shock or mental anguish at witnessing victim's injury or death, 94 A.L.R.3d 486 (1979).

H. Annot., "Blasting: recovery of damages for emotional distress, fright, and the like, resulting from blasting operations", 75 A.L.R.3d 770.

I. Annot., "Debt collection: recovery by debtor, under tort of intentional or reckless infliction of emotional distress, in damages resulting from debt collection methods", 87 A.L.R.3d 201.

J. Annot., "Wrongful conduct: recovery for mental or emotional distress resulting from injury to, or death of, member of plaintiff's family aArising from physician or hospital's wrongful conduct", 77 A.L.R.3d 447.

K. Annot., "Witnessing injury: right to recover damages in negligence for fear of injury to another, or shock on mental anguish at witnessing such injury", 29 A.L.R.3d 1337.

L. Annot., "Impact: right to recover for emotional disturbance or its physical consequences, in the absence of impact or other actionable wrong, 64 A.L.R.2d 100.

M. W. Prosser, Law of Torts, (4th Ed. 1971).

N. J. Elam and A. Radnor, "Defending the psychiatric case - the importance of prior history", 19 For the Defense 47 (April 1978).

O. Defense Research Institute, "Excessive medical treatment in personal injury cases - the causes and cures", (Monograph 1966)

P. 26 Defense Law Journal 118 (1977), "Discovery - psychiatric or psychological examination of plaintiff".

PERCEPTIONS OF TOXIC HAZARDS: THE VIEW FROM THE EXPERT WITNESS STAND

By Dr. Donald P. Morgan, M.D.
College of Medicine-University of Iowa

I. Scope of the problem

A. The enormous man-chemical interface

1. Workplace

2. Agriculture

3. Home

B. Public perceptions and attitudes

1. Intense suspicion of "chemicals"

a. Traditional

b. Exaggerated by modern scientific interest

c. Media Hype

d. Government hype

2. Primitive level of public education in matters of science and technology

3. Anti-establishment sentiment: "Prove it safe" or don't market it

a. David-Goliath viewpoint

C. Regulatory and judicial precedents

1. Farmer's lung disability in England

2. Black-lung in U.S.

3. Regulatory actions in U.S.

II. Causality: the basis for rational decision making

A. Toxic properties of the agent

B. Use experience

C. Chronology of disease with respect to chemical exposure

D. Characteristics of previously reported cases of poisoning

E. Identification of suspect chemical in body fluids or tissues

F. Biochemical and biophysical tests for toxicant effects

III. Can decisions in toxic-hazard cases be made rationally?

A. Requires assembly of a great volume of information about chemical and about the person who was in contact with the chemical

1. Toxicologic information may be difficult to come by

2. Complete health history information may be impossible to come by

B. Evaluation of disease manifestations required judgment

1. Symptom complexes are not disease-specific

2. Laboratory test results are not disease-specific

3. Some features of an illness are of great importance diagnostically, others are of little help

4. The temporal sequence of disease manifestations may be of great significance

C. The case must be judged by persons prepared to understand the toxicologic and medical aspects

IV. Outlook

A. Increasing litigation

B. No substantial change in present system of decision-making

C. Decreasing reliance on judgmental aspects of case; more emphasis on factual elements - occupation, documented exposure

D. Increasing costs to consumers

E. Possibly more lawyer-medical-toxicology graduates

LEGISLATIVE CHANGES AND PRODUCTS LIABILITY

By: E. Kevin Kelly
Attorney at Law
1400 Dean Avenue
Des Moines, Iowa 50316

I. Bills of interest to attorneys

A. H.F. 2546 -- Exempts sales of cattle, hogs, sheep or horses from the implied warranty provisions of the commercial code if certain disclosures are made in advance of the sale.

B. H.F. 54 -- Phases out regular, alternate and substitute full-time magistrates and converts those judicial offices to regular, alternate and substitute district associate judgeships. Commencing with the election in 1982, these judicial officers would stand for retention in office as other judicial officers, except that they would have terms of office of four years. Retention elections would be on a judicial election district basis. Effective January 1, 1981, for those who qualify. Those not qualifying would continue to serve as full-time magistrates until expiration of their terms of appointment.

C. H.F. 402 -- Provides that attorney notices of subrogation to the department of social services under the medical assistance program (Medicaid) are legally adequate if the notices are mailed and deposited through the United States postal system and addressed to the department of social services at its state or district office location.

D. H.F. 668 -- Amends a section of the Code to delete the schedule of attorney fees recoverable on written contracts, and authorizes the court to approve a reasonable fee. As amended, the section also would permit the recovery of a reasonable attorney's fee and certain other personal expenses incurred in the collection of a no-account or insufficient-funds check or draft.

E. H.F. 715 -- Deletes tax assessment lists from permissible sources of names designated for use by jury commissions in drawing jury lists.

F. H.F. 2562 -- Expands the present Code section which authorizes the Court to make orders in relation to the children, properties, parties and maintenance, and to modify such orders, in cases of dissolution, annulment and separate

maintenance. Specific factors are set forth which must be considered by the court, including the economic value of each party's contribution in homemaking and child care and the provisions of an antenuptial agreement. Upon a finding of previous failure to pay child support, the court may order the person obligated for permanent child support to make an assignment of periodic earnings or trust income to the clerk of court. Unless waived by both parties, each party must file a statement of net worth prior to the dissolution hearing. The court may order either party to vacate the homestead pending entry of a decree of dissolution upon a showing that the other party or the children are in imminent danger of physical harm if the order is not issued.

G. S.F. 190 -- Amends the chapter of the Code relating to mechanics liens, to require clerk of court to mail a lien statement to the property owner when filed. Also adds a new section establishing a deadline for filing of a lien against an individual dwelling unit in a cooperative apartment or condominium. Takes effect July 1, 1980. Act probably applies to any lien perfected after effective date.

H. S.F. 464 -- Relates to the final report of the personal representative of a decedent's estate and requires that the report state whether a lien on estate property continues to exist for any federal estate taxes and not just those which were deferred. The report would include an itemization of the services and times spent by the personal representative's attorney or a statement that the personal representative did not request an itemization.

I. S.F. 2154 -- The Iowa supreme court has held that to recover under the dram shop act "It is enough that the injury was by an intoxicated person, regardless of whether it would have been committed by him if sober. In other words, if by an intoxicated person, it is not necessary to prove that the injury was in consequence of intoxication." This Act provides that a liquor control licensee or beer permittee can avoid civil liability under the dram shop Act by establishing that the intoxication did not contribute to the injurious action.

J. S.F. 460 -- Requires the commissioner of insurance to: publish a notice in the Iowa administrative bulletin at least 30 days before the effective

date of proposed workers' compensation insurance rates filed by a licensed rating organization; hold a public hearing on the proposed rates upon the written demand of a workers' compensation policyholder or an established organization of policyholders; hold the hearing within 20 days after receipt of the written demand and give 10 days prior written notice of the hearing; give all parties to the hearing the opportunity to respond and present evidence and to require the rating organization to bear the burden of proof to support the proposed rates by a preponderance of the evidence; and approve or disapprove the proposed rates within 15 days of the hearing. The Act exempts the hearing from the requirements of the Iowa administrative procedure Act.

K. S.F. 2337 -- Increases minimum financial responsibility under motor vehicle liability insurance law in two steps. Effective January 1, 1981, the minimum limits are raised from $10,000/$20,000/$5,000 to $15,000/$30,000/$10,000. Effective January 1, 1983, the limits are again raised, to $20,000/$40,000/$15,000. The Act also requires liability insurers to offer underinsured motorist coverage in addition to the uninsured coverage presently required to be offered. Takes

effect January 1, 1981, and this requirement applies to policies renewed on or after January 1, 1981.

L. S.F. 359 -- Incorporates accepted standards of percentage of hearing loss into the workers' compensation law. The employer is liable for occupational hearing loss of its employees except for employees who have not worked for the employer at least 90 days at excessive noise levels. Also an employer is not liable for occupational hearing loss suffered by an employee in previous employment if the previous loss is established by competent evidence. In addition, an employer is not liable for occupational hearing loss if the employer required, in writing, that the employee wear employer-provided hearing protection devices and the employee failed to wear the devices. Compensation is not to be reduced because of improved ability to hear due to the use of a hearing aid; and the employer must supply the injured employee with a hearing aid unless it will not materially improve the employee's hearing ability. Compensation is payable for a maximum of 175 weeks and is prorated proportionate to the degree of hearing loss.

M. H.F. 733 -- Repeals recapture tax on residential and agricultural property. Effective upon publication and retroactive to January 1, 1978.

N. H.F. 673 -- Raises the percent of interest on money due on judgments and court decrees from seven percent to ten percent.

O. H.F. 2492 -- Amends or preempts provisions relating to the terms and conditions of certain loans, advances and extensions of credit (usury).

P. H.F. 2481 -- Legalizes the possession of antique slot machines and antique pinball machines. Antique is defined as a machine 25 years old or older. Use of an antique slot or pinball machine for gambling purposes remains unlawful.

II. Products Liability

A. 1980 Proposed Bill

1. PRODUCTS LIABILITY ACTION DEFINED. As used in this title of the Code, "products liability action" means an action or claim for damages against any person for or on account of personal injury, death, or property damage caused by or resulting from the design, formulation, preparation, manufacture, processing, construction, assembly, testing, packaging, labeling, advertising, marketing, distribution or installation of a product, and the issuance of warnings, instructions and directions respecting the use of a product. The term includes but is not limited to actions based upon the theories of negligence, strict liability, express warranty, and implied warranty.

2. PRODUCTS LIABILITY. A products liability action based upon a theory of strict liability in tort or breach of an implied warranty shall not be brought more than eight years after the product was first delivered for use or consumption.

3. ALTERATION, MODIFICATION, DETERIORATION OF A PRODUCT. In a products liability action the defendant is not liable for damages which arose from alteration or modification of the product

by the plaintiff or a third party or alteration, modification or deterioration of the product by reason of the failure of the product owner or user to properly maintain, service, or repair the product, whether or not such acts or failure to act were foreseeable by the manufacturer, if the alteration, modification or deterioration had the effect of altering or modifying the condition, purpose, use or the manner of use of the product as originally intended by the manufacturer or for which the product was originally manufactured; and if the injury would not have occurred but for the alteration, modification or deterioration.

4. IMMUNITY FROM SUIT. A products liability action based on the doctrine of strict liability in tort or breach of an implied warranty where the cause of action is based solely on an alleged defect in the original design or original manufacture, other than final assembly not performed by the original manufacturer, shall not be commenced or maintained against a wholesaler, distributor, retailer or other person who distributes or sells a product, nor shall such a person be liable for damages arising from a suit based solely on these causes of action, unless the

original manufacturer is not subject to service of process within the state or the original manufacturer has been judicially declared insolvent.

5. PRODUCTS LIABILITY -- EVIDENCE OF SUBSEQUENT CHANGES. In a products liability action the following are not admissible as evidence, except for the limited purpose of the impeachment of a witness:

   a. Evidence of advancement or changes in technical knowledge or techniques, in design theory or philosophy, in labeling, or instructions for use, or in manufacturing or testing techniques or processes which have been made, learned or placed into use, or in manufacturing or testing techniques or processes which have been made, learned or placed into use subsequent to the time of the design, manufacturing and testing of the product allegedly causing the injury, death or damage.

   b. Evidence of a change made in the design or methods of manufacturing, testing, labeling, or instructing for use the product in issue or any similar product subsequent to the time the product in issue was designed, manufactured and tested.

B. 1980 Proposed Bill as Passed Senate

1. PRODUCTS LIABILITY ACTION DEFINED. As used in this title of the Code, "products liability action" means an action or claim for damages against any person for or on account of personal injury, death, or property damage caused by or resulting from the design, formulation, preparation, manufacture, processing, construction, assembly, testing, packaging, labeling, advertising, marketing, distribution or installation of a product, and the issuance of warnings, instructions and directions respecting the use of a product. The term includes but is not limited to actions based upon the theories of negligence, strict liability, express warranty, and implied warranty.

2. PRODUCTS LIABILITY. In a products liability action based upon a theory of strict liability in tort or breach of an implied warranty brought more than eight years after the product was first delivered for use or consumption it is presumed until rebutted by a preponderance of the evidence to the contrary that the product was free of defects.

3. ALTERATION, MODIFICATION, DETERIORATION OF A PRODUCT. In a products liability action the defendant is not liable for damages which arose

from alteration or modification of the product by the plaintiff or alteration, modification or deterioration of the product by reason of the failure of the product owner or user to properly maintain, service, or repair the product, if the alteration, modification or deterioration had the effect of altering or modifying the condition, purpose, use or the manner of use of the product as originally intended by the manufacturer or for which the product was originally manufactured; and if the injury would not have occurred but for the alteration, modification or deterioration. This section does not eliminate any requirement for adequate warnings or directions by the manufacturer, and will not bar recovery when adequate warnings or directions are not given relative to alteration or modification.

4. IMMUNITY FROM SUIT.

a. A products liability action based on the doctrine of strict liability in tort or a breach of implied warranty where the cause of action is based solely on an alleged defect in the product as originally designed or manufactured shall not be commenced or maintained against a wholesaler, distributor,

retailer or other person who distributes or sells the product, nor shall any of these persons be liable for damages arising from a suit based solely on that cause of action.

b. Subsection (a) of this section does not apply in any action in which one or more of the following conditions exist:

1. The identity of the original seller cannot be determined.

2. The original seller is not subject to the jurisdiction of the courts of this state.

3. The court determines, in a hearing held without a jury, that it is highly probable that the claimant would be unable to enforce a judgment against the original seller.

4. The immunity established by subsection (a) of this section does not apply to any person who controlled or participated, either directly or indirectly, in the original design or manufacture of the of the product.

5. DUTY TO HOLD HARMLESS.

a. As used in this section, "chain of distribution" means a descending order of

distribution from the manufacturer to the retailer, either directly or through one or more distributors, wholesalers, or similar entities.

b. In a product liability action, any entity that is higher in the chain of distribution shall defend all entities that are lower in the chain of distribution, and shall indemnify entities that are lower in the chain of distribution against loss sustained by virtue of the action.

c. An entity in a chain of distribution of a product is not entitled to defense or indemnification under subsection (b) of this section if any of the following conditions exist:

1. The entity is liable to the claimant on account of negligent, reckless or intentional acts or omissions.

2. One or more acts or omissions of the entity directly or indirectly caused the defect upon which liability to the claimant is based.

6. PRODUCTS LIABILITY -- EVIDENCE OF SUBSEQUENT CHANGES. In a products liability action the following are not admissible as evidence, except

for the limited purpose of the impeachment of a witness:

a. Evidence of advancements or changes in technical knowledge or techniques, in design theory or philosophy, in labeling, or instructions for use, or in manufacturing or testing techniques or processes which have been made, learned or placed into use subsequent to the time of the design, manufacturing and testing of the product allegedly causing the injury, death or damage.

b. Evidence of a change made in the design or methods of manufacturing, testing, labeling, or instructing for use of the product in issue or any similar product subsequent to the time the product in issue was designed, manufactured and tested.

NEW UNNUMBERED PARAGRAPH. In a products liability action based upon a theory of strict liability or breach of implied warranty the duty of the manufacturer with respect to the design and manufacture of the product shall be determined as of the date of the manufacture of the product and not as of the date of the damage or the filing of the action. Nothing contained herein shall eliminate any requirement for adequate warnings by the manufacturer.

PRODUCTS LIABILITY REVIEW

III. Review of Recent Products Cases

A. Iowa Cases

1. Protection to third parties

a. Eickelberg v. Deere & Co.

276 NW2d 427. 442

2. Proximate Cause and misuse

a. Hedwood v. General Motors Corp.

286 NW2d 29

b. Hughes v. Magic Chef, Inc.

288 NW2d 542

B. Public Policy of Products Liability

1. Scandinavian Airline System v. United Aircraft Corp.

601 F2nd 425 (9th

C. Comparative Negligence

1. Suter v. SanAngelo Foundry & Michigan Co.

405 A2d 140 (New Jersey)

2. Seay v. Chrysler Corp.

609 P2d 1382 (Wash)

D. Alteration of Product

1. Robinson v. Reed Prentice

44 NY2d 471

E. Used Products

1. Tillman v. Vance Equip. Co.

596 P2d 1299 (Oregon)

2. Charon v. Fairchild-Hiller Corp.

F Supp

(W.D. Wash. Oct. 11, 1979)

CCH Products Liability Reports #8606

3. Tauber-Arans Acutioneers Co. Inc. v.

Superior Ct. for County of Los Angeles

161 Cal Rptr 789

F. Defects Defined

1. Barker v. Lull

20 Cal.3d 413

G. Intermediate Handling

1. Shawver v. Roperts Corp.

280 NW2d 226 (Wisc.)

2. Baines v. U.S. Pipe and Foundry Co. Inc.

463 F supp 107 (N.D. Ala.)

3. Wiler v. Firestone Tire & Rubber Co.

157 Cal Rptr. 248 Cal.

4. Davis v. Pacific Diesel Power Co.

P2d Oregon Aug 20, 1979

CCH Pro. Liab. Rptr #8566

H. Market Share or Enterprise Liability

1. Sindell vs. Abbott Laboratories

Cal3d March 1980.

2. Bichler v. Eli Liby & Co.

1979 New York Jury Judgment for Plaintiff

on Appeal

a. First suggested

Hall v. E. I. Dupont

345 F Supp 353 (E.D. N.Y. 1972)

b. Drake Law Review

THE EXCLUSIVE REMEDY DOCTRINE: DEAD OR ALIVE

By Mark A. Braun*

I. THE DOCTRINE

A. Defined: The schedule of benefits of a Worker's Compensation statute is the sole and exclusive remedy of an employee against his employer and certain others. (See Appendix infra)

B. VALIDITY: The abrogation of the right at common law to damages for injury is constitutionally justified as a reasonable exercise of the police power of the State. The imposition of liability without fault upon an employer is a reasonable exercise of the police power because of the consideration of a limited but exclusive liability. New York Central Railroad v. White, 243 U.S. 188 (1917).

II. SCOPE OF THE DOCTRINE

A. Protected Parties: The doctrine establishes a class which is immune to suit for general damages for injuries sustained by a person entitled to Worker's Compensation benefits.

B. Variation in Protected Class

1. Immunity granted to employer only. About one-third of states by statute or decision give immunity to the employer only.

   a. Consequence - Employer may have subrogation right against its own tortfeasor employee. Employer's vehicular coverage or G.L. Policy may cover negligent employee if acting in course of employment.

   b. Employer only immunity in: Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Rhode Island, South Dakota, Vermont and Wisconsin. (See Larson, Vol, 2A W.C., 1979 Supp. Sec. 72.10, Note 14)

*Braun, Lynch, Smith & Strobel, Ltd., Chicago, Illinois. Member of ABA, CBA, DRI and FIC: Adjunct Professor of Law, Loyola University School of Law in Chicago.

2. Immunity to Employer, Co-employees and Certain Others -
In the majority of states a general damage action suit by an employee against the employer, co-employees and certain others is barred by the doctrine. Most states include a variation of others, such as:

a. Physicians -
Komel v. Commonwealth Edison, 372 NE 2d 842 (Ill. 1978). Doctor employed by company immune: employee/doctor immune with employer responsibility via respondeat superior. (McCormick v. Caterpillar Tractor, 402 NE 2d 412 (Ill. 1980); contra, Ross v. Shubert, 388 NE 2d 623 (Ind. 1979); Stevens v. Kimmel, 394 NE 2d 232 (Ind. 1979)

b. Insurers and Safety Inspectors -
See Insurers Liability for Safety Inspections (20 F.T.D. April 1979 by F. L. Bardenwerper)

c. Brokers -
By statute (Ill.Rev.Stat., Ch. 48, Sec. 138.5)

d. Contractors -
If statutory employer, majority yes. Illinois no, Iowa no as no statutory employer provision.

e. Persons in Common Employment -
See Massachusetts, Florida, Utah by statute or decision.

States which extend immunity beyond the employer include: Alaska, California[1], Colorado, Connecticut[1], Delaware, Hawaii[1], Illinois[2], Indiana, Iowa, Kansas, Kentucky, Louisiana[4], Massachusetts, Michigan, Montana, Nebraska[3], Nevada, New Jersey[3], New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania[3], South Carolina, Tennessee, Texas, Utah, West Virginia and Wyoming[2]. (See Larson Vol. 2A, 1979 Supp. Sec. 72.20, Note 23.

1. Except willful acts or conduct caused by toxication.
2. Except willful or malicious conduct.
3. Except deliberate and unprovoked physical aggression.
4. Except non-management co-employees.

3. General Immunity: Immunity to all covered by the State Act without regard to relationship - - In the formative years of the compensation principle many states invited participation of employers by offering freedom from a general damage action brought by any other person in the system irrespective of relationship of employer and employee. (Illinois prior to 1953; Washington prior to 1957) Question: If compensation coverage universal and remedy adequate, should general immunity to all be restored?

III. EXCEPTIONS TO DOCTRINE --- GENERAL DAMAGE ACTION ALLOWED AGAINST STATUTORILY PROTECTED PERSON.

A. Direct Action Against Employer

1. Physical misconduct of employer.

a. Intentional assault. Compensation recovery allowed. Doctrine inapplicable because of presumed public moral outrage against such conduct. Larson Vol. 2A, Workmen's Compensation Law, Sec. 68.11.

Legal theories:

1) Injury not accidental.
2) Employment relation severed by intentional tort.
3) Injury did not arise out of employment.

b. Physical misconduct of supervisory employee - Corporate alter ego distinction.

1) Doctrine applied - If intentional tortfeasor is merely supervisory employee, damage action barred. McGrew v. Consolidated Freightways, Inc., 377 P.2d 350 (Mont. 1963).
2) Doctrine avoided - Damage action allowed:

a) If intentional tortfeasor is employer in person of alter ego of corporation. Estupian v. Cleanarama Drive-In Cleaners, Inc., 329 NYS 2d 448 (1972).

b) If employee commits tort under direction of employer or corporate alter ego. Lynch v. General Motors, 213 SE 2d 525 (Ga.1975)

2. Non-physical Misconduct of Employer:

a. Deceit, fraud, and false representation.

1. Allegation of fraud, conspiracy and concealment of unsafe environment and after disease contracted, deliberate failure to inform. Held to state a cause of action for general damages against employer. Johns-Manville Products Corp. v. Contra Costa Superior Court - Reba Rudkin, 612 P. 2d p.948 (Cal. 1980); McDaniel v. Johns-Manville Sales Corp., 487 Fed.Supp. 714 (Ill. 1978) Complaint allowed against employer on allegation intentional and felonious poisoning, fraud and misrepresentation and conspiracy to deceive; contra, Kofron, et al v. Amoco Chemical Corp., Sup. Ct.- Dela. 78 C-OC-79 (April 1980). See also Silkwood v. Kerr McGee (Okla.-pending)

b. Intentional infliction of emotional distress. Recovery generally denied if essence of action is for physical injury or death while action may stand if in essence it states a claim for non physical injury. (Larson Vol.2A, Sec.68.34; Martin v. Travelers Insurance Co., 497 F. 2d 329 (1st Cir. 1974); M.B.M. Co., Inc. v. Counce, 596 SW (Ark. 1980); Vigue v. Evans Products, 608 P.2d 488 (Mont. 1980); Unruh v. Truck Insurance Exchange, 498 P.2d 1063 (Cal. 1972).

c. Failure to inform employee of dangerous disease or physical condition.

1. Damages allowed Wojcik v. Aluminum Co. of America, 183 N.Y.S. 2d 351 (1959); Johns-Manville v. Rudkin, 612 P.2d 949.

2. Compensation held not to be exclusive remedy on basis that injury not work-connected. (Reid v. United States, 244 F.2d 102 (5th Cir. 1955)

3. See generally, Annotation, 69 ALR 2d 1218 Sec. 6.

d. False Imprisonment. Skelton v. W. T. Grant Co.

331 F.2d 593 (5th Cir. 1964), action allowed. Barnes v. Chrysler Corp., 65 F.Supp. 80 (N.D. Ill. 1946)

e. Defamation of character. Braman v. Walthall, 225 SW 2d 342 (1949), action allowed.

f. Misconduct based on violation of employment related statute.

1. Employers failure to provide safety devices.
2. Illegal employment of minors.
3. Willful failure to establish financial responsibility.

g. Retaliatory discharge. Kelsay v. Motorola, Inc. 384 NE 2d 353 (Ill. 1979), Ill.Rev.Stat., Ch.48, Sec. 138.4(g) (1975); Frampton v. Central Indiana Gas Co., 297 NE 2d 425 (Ind. 1973); Sventko v. Kroger, 245 NW 2d 151 (Mich. 1976).

B. Action By Spouse Or Children.

1. Massachusetts court has allowed general damage action by wife (loss of consortium) and by children (emotional distress) allegedly resulting from observation of employee in hospital following work related occurrence. Ferriter v. Daniel O'Connell's Sons, Inc., (Sept. 1980)

IV. DUAL CAPACITY

A. Definition: An employer who occupies a second capacity in addition to that of employer which creates obligations independent of those imposed on it as an employer. See Kelly, Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine, 5 St. Mary's Law Journal 818, 819 (1974).

B. Test of Dual Capacity: Second function must generate obligations unrelated to those flowing from first as employer. Dual capacity may require a distinct separate legal person, not just a separate theory of liability of the same legal person. Larson Vol. 2A, Sec. 72.80, Supp. p. 154. Separate legal person establishes dual capacity. Bobbs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir. 1979)

C. Application of Doctrine

1. Doctor/Employer: Duprey v. Shane, 249 P. 2d 8 (1952). Employee of chiropractor injured in course of employment entitled to compensation and cause of action against chiropractor for alleged negligent treatment of the injury. Similar result for hospital in Guy v. Thomas, 378 NE 2d 488. See McCormick v. Caterpillar Tractor Co., 402 NE 2d 412 (Ill. 1980) Co-employee doctor immune employer liabile to injured employee for doctor employees malpractice.

2. Landowner/Employer: State of Luckie, 145 So. 2d 239 (Fla. 1962). General contractor otherwise immune as statutory employer of subcontractor's employee not immune as owner of land and building; Marcus v. Green, individual employer engaged in construction on land owned by employer and another in land trust held subject to suit as owner, 300 NE 2d 512 (Ill. 1973). Distinguished by Walker v. Berkshire Foods, Inc., 354 NE 2d 626 (Ill. 1976) and Carey v. Coca-Cola Bottling Co. of Chicago, 363 Ill. NE 2d 400 (Ill. 1977).

3. Manufacturer of Product/Employer: Douglas v. E.J. Gallo Winery, 137 Cal. Rptr. 797 (1977) Employer may be subject to general damages under products liability in addition to compensation if product manufactured by employer for sale to general public rather than solely for use of employees. Goetz v. Avildsen Tool & Machines, Inc., 403 NE 2d 555 (Ill. 1980). (Theory labeled unsound, Larson Vol. 2A, Sec. 72.80, 1979 Supp. p. 154); Rosales v. Verson Allsteel Press Co., 354 NE 3d 553 (Ill. 1976). Car seat manufacturer alleged to be engaged in business of design and manufacture by virtue of alteration of punch press - Action Barred. See also, Sago v. Amax Aluminum Mill Products, Inc., 385 NE 2d 17 (1978).

4. Joint Venture/Employer: Smith v. Metropolitan Sanitary District of Greater Chicago, 377 NE 2d 1088 (1978). Construction company engaged in a joint venture held liable to employee of joint venture. Construction company found to be separately engaged in providing trucks to joint venture.

5. Shipowner/Employer: Reed v. The Yaka, 373 U.S. 410 (1963). In rem action permitted against vessel

owned by employer. See also, Smith v. M/V Captain Fred, 546 F.2d 119 (5th Cir. 1977). Smith permitted in rem action inspite of strengthened exclusive remedy provisions of 1972 longshore act amendments (U.S. Code Ch. 18, Sec. 905 (1972)).

V. SUCCESSIVE RECOVERIES

The exclusive remedy provisions of statutes of competing jurisdictions apparently do not eliminate concurrent jurisdiction and successive recoveries.

Justice Brennan in Sun Ship, Inc. v. Commonwealth of Pa., 100 S.C. 2432 (June 1980) wrote that a state may apply its workmen's compensation scheme to land based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

The federal jurisdiction is not exclusive, but conscurrent with state jurisdiction. Not specifically decided is whether the exclusion remedy provision becomes effective upon exercise of preferred jurisdiction.

APPENDIX

EXCLUSIVE REMEDY PROVISIONS

IOWA: Section 85.20 - Rights of Employee Exclusive

"The rights and remedies provided in this chapter or chapter 85A for an employee on account of injury or occupational disease for which benefits under this chapter or chapter 85A, are recoverable, shall be the exclusive and only rights and remedies of such employee, his personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or occupational disease against:

(1) his employer; or

(2) any other employee of such employer, provided that such injury or occupational disease ariss out of and in the course of such employment and is not caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another. Amended by Acts 1970 (63 G.A.) ch. 1051, Sec. 6; Acts 1974 (65 G.A.) ch. 1111, Sec. 1" (Iowa Code Annotated, Vol. 5, Sec. 85.20)

ILLINOIS: Section 5(a) - Damages-Illegally employed minors - Third party liability.

"No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the comppensation herein provided, is available to any empployee who is covered by the provisions of this Act, to any one wholly or partially deppendent upon him, the legal representative of his estate, or any one otherwise entitled to recover damages for such injury. * * *" (Ill.Rev.Stat., Ch. 48, Sec. 138.5(a))

FEDERAL: LHWCA Sec. 933(i) - Right to compensation as exclusive remedy.

"The right to compensation or benefits under this chapter shall be the exclusive remedy to an empployee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the

same employ: Provided, That this provision shall not affect the liability of a ppperson other than an officer or employee of the employer." (U.S.C.A., Ch. 33, Sec. 933(i))

LHWCA Sec. 905(a)(b) - Exclusiveness of liability

(a) "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his empployment, or that the injury was due to the contributory negligence of the employee.

"(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. (USCA,Ch.33, Sec.904(a)(b))

September 10, 1980

CIVIL RIGHTS ACTIONS UNDER SECTION 1983

by

James D. Hodges, Jr.

I. Introduction:

II. Jurisdiction:

A. Generally it has been held that 42 U.S.C. § 1983 merely creates a cause of action but is not an independent grant of jurisdiction to the Federal Courts. Accordingly, jurisdiction must be founded upon another statute.

1. Normally jurisdiction is founded without regard to the amount in controversy, under 28 U.S.C. § 1343, However, this is not always the case and in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1978), the Supreme Court held that neither federal supremacy claims nor claims not arising under laws intended to guarantee equal protection of the law fell within § 1343.

2. If Section 1343 is unavailable, then plaintiff must fall back on 28 U.S.C. § 1331(a) which requires jurisdictional amount.

B. Pendent Jurisdiction: In considering this question

it is important to keep in mind that the doctrine has two branches.

1. Pendent Claims: The same general principles apply that the federal claim must be substantial enough for the vesting of subject-matter jurisdiction; the claims must present one constitutional case (common nucleus of facts which would normally be tried together); and its exercise is a matter of discretion. See generally United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Koke v. Stifel, Nicolaus & Co., Inc., 620 F.2d 1340 (8th Cir. 1980). For cases applying pendent claim principles in 1983 actions, see Mendoza v. K-Mart Inc., 587 F.2d 1052 (10th Cir. 1978); Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978); Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976).

2. Pendent parties: Unlike pendent claim jurisdiction, this area appears to be in a state of flux. The test that seems to be developing is that the existence of a common nucleus of operative facts is not enough, but rather the statute must be examined to determine whether Congress has expressly or by implication negated the exercise of jurisdiction over the party. See Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). In Aldinger v. Howard, 427 U.S. 1 (1976) the court refused to allow pendent party jurisdiction to be asserted against a county relying heavily on the legisla-

tive history of the statute. This history has been to a large extent reanalyzed in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1977) and hence Aldinger may be ripe for reevaluation. C.f. Owen, supra at 372 FN 12.

III. Cause of Action:

A. 42 U.S.C. § 1988 and State Law: Section 1988 provides for recourse to state law only where that law is not inconsistent with the Constitution and Laws of the United States. See Moore v. County of Alameda, 411 U.S. 693 (1972). This section is not an act of Congress providing for the protection of civil rights under 28 U.S.C. § 1343. Moore, supra 702-06.

B. Elements Generally: To state a claim under Section 1983, plaintiff must allege that some person has deprived him of a federal right and that the person who has deprived him of that right acted under color of state or territorial law. See Gomez v. Toledo, _____ U.S. _____, 48 L.W. 4600 (May 27, 1980).

1. Defendant has the burden of pleading any good faith or qualified immunities, Gomez v. Toledo, supra.

2. Respondent superior does not apply to 1983 claims. Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). Specifically, in Rizzo the court stated "that the mere right to control without any control or direction having been exer-

cised without any failure to supervise is not enough to support § 1983 liability. Rizzo, supra at 362. See also Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977) (police chief failure to train officer); Dimarzo v. Cahill, 575 F.2d 15 (1st Cir. 1980) (Commissioner of correction proper defendant because of statutory duty and failure to act on basis of others' acts); McKinnon v. Patterson, 568 F.2d 930 (2nd Cir. 1977) (personal involvement required); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3rd Cir. 1976) (Warden's lack of knowledge of need for medical care); Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) (knowledge of officers violent tendencies sufficient); Perry v. Elrod, 436 F.Supp 229 (ND Ill 1977) (Personal involvement must be alleged, this includes constitutional deprivations which take place at direction of defendant or with his knowledge and consent); Jennings v. Davis, 476 F.2d 1271 (8thCir. 1973); Milton v. Nelson, 527 F.2d 1158 (9th Cir. 1976); Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976); (actual participation or acquiescence in constitutional deprivation required).

3. "Under color of any statute, ordinance, regulation, custom or usuance of any state or territory."

a. Plaintiff must allege that the defendant or defendants were acting under color of state law. Private conduct by itself is generally not enough. Basically, this requires a pretext of authority and misuse of power possessed

by virtue of state law and made possible only because the wrongdoer is clothed with authority of state action or action taken under color of state law. See Monroe v. Pape, 365, U.S. 167, 184 (1961). See also, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (private conduct sanctioned by state statute not necessarily state action); Burton v. Willington Parking Authority, 365 U.S. 715 (1961); Moose Lodge No. 197 v. Irvis, 407 U.S. 163 (1963); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Duriso v. K-Mart No. 4195, Div. of S.S. Kresge Co.. 559 F.2d 1274 (detention by store employees in concert with police); Triplett v. Azordegan, 570 F.2d 819 (8th Cir. 1978) (witnesses not under state law).

b. A custom or governmental practice is sufficient even if it has never received formal approval of any state decision-making authority. Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1977). However, it must be supported by state law or authority. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

4. Person: It is now generally accepted that state officers acting under color of state law, municipalities and other local governmental units, are persons under § 1983. See generally Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978). Neither a state or state agency

is a person under 1983. Rochester v. White, 503 F.2d 263 (3rd Cir. 1974). In this regard, it should be noted two questions are involved; one dealing with the question of what is a person under 1983 and the other dealing with questions of immunity under the Eleventh Amendment. C.f. Quern v. Jordan, 440 U.S. 332 (March 5, 1979).

5. Negligence: It seems clear that § 1983 is not a general federal tort statute and does not embrace causes of action founded solely on negligence without a resulting deprivation of a federally protected right. In other words, state law tort claims and violations of local law do not generally rise to the level of stating a cause of action under Section 1983. See Estelle v. Gamble, 429 U.S. 97 (1976); Paul v. Davis, 424 U.S. 693 (1976). Questions do arise as to the state of mind necessary. Monroe v. Pape, 365 U.S. 167 (1961) held specific intent to deprive plaintiff of constitutional rights is not a prerequisite. However, it sometimes is difficult to distinguish between mere negligence and a claim under 1983. Most courts have held that to sustain an award of damages the defendant's actions must be deliberate, reckless intention or in bad faith, and neglect, carelessness or malpractice is not enough. See Hampton v. Holmesburg Prison Officials, 546 F.2d 1977 (3rd Cir. 1976); Patzia v.

O'Neil, 577 F.2d 841 (3rd Cir. 1978); Douglas v. Muncy, 570 F.2d 499 (4th Cir. 1978); Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976); Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976); Jamison v. McCurrie, 565 F.2d 483 (7th Cir. 1977); Ervin v. Ciccone, 557 F.2d 1260 (8th Cir. 1977); Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978).

Generally instances of isolated negligence and misconduct are not within the statute. See Walton v. Salter, 536 F.2d 1023 (5th Cir. 1976); Williams v. Vincent, 508 F.2d 541 (2nd Cir. 1974). Further, any analysis of a claim must also consider the inapplicability of the doctrine of respondent superior and the possibility of the existence of a good faith defense.

III. Damages:

A. Compensatory: In Carey v. Piphus, 435 U.S. 247, the court indicated the basic purpose of a § 1983 damage award should be to compensate persons for injuries caused by the deprivation of constitutional rights. Further, since the purpose is to protect certain interests, rules governing compensation should be tailored to the interests protected by the particular right in question. The general starting point is the closest corresponding common law tort action.

B. Punitive: May be awarded in some circumstances.

See Cochetti v. Demond, 572 F.2d 102 (3rd Cir. 1978); Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978). Guzman v. Western State Bank of Devils Lake, 540 F.2d 948 (8th Cir. 1976).

C. Attorneys' Fees: Attorney fees may now generally be awarded under 42 U.S.C. § 1988.

1. Plaintiff:

a. While the award of attorneys' fees is discretionary, a successful plaintiff should ordinarily recover attorney fees unless special circumstances would render such award unjust. See Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Criterion Club of Albany v. Board of Com'rs of Dougherty County, Ga., 594 F.2d 118 (5th Cir. 1979).

b. A party need not prevail on his entire claim to receive attorney's fees. Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978).

c. In accessing attorneys' fees, the district court should consider the following facts: 1) the time and labor required, 2) the novelty and difficulty of the question, 3) the skill requisite to perform the legal services properly, 4) the preclusion of other employment due to acceptance of the case, 5) the customary fee, 6) whether the fee is fined or contingent, 7) time limitations imposed by client or the circumstances, 8) the amount involved and results obtained, 9)

the experience, reputation and ability of the attorneys, 10) the undesirability of the case, 11) the nature and length of the professional relationship with the client, and 12) awards in similar cases. See Zoll v. Eastern Allamakee Community Sch. District, 588 F.2d 246 (8th Cir. 1979); Johnson v. Georgia Highway Exp. Inc., 488 F.2d 714 (5th Cir. 1974).

d. Generally the minimum award should not be less than the number of hours claimed times the attorney's regular hourly rate. Crain v. City of Mountain Home, 611 F.2d 726 (8th Cir. 1979).

2. Defendant:

a. Under some limited circumstances a prevailing defendant may recover attorneys' fees. See Golf v. Texas Instruments, Inc., 429 F.Supp 973 (ND Tex 1977); Moss v. Ward, 434 F.Supp 69 (SD NY 1977).

IV. Immunity:

A. Generally there are two types of immunity available in 1983. Absolute immunity defeats a damage suit at the pleading stage, once it appears the actions complained of were within the immunity's scope and qualified immunity based on good faith which generally cannot be disposed of at the pleading stage. See Gorman Gowers, Inc. v. Bogoslavsky, _____ F.2d _____ (8th Cir. July 22, 1980, No. 79-1760).

1. Absolute Immunity - Damages:

a. Legislative Immunity: Tenney v. Brandhove, 341 U.S. 367 (1951). State Legislators are immune from damages when they act in a field where Legislators traditionally have power to act. See also Supreme Court of Virginia v. Consumers Union of the United States, _____ U.S. _____, 48 L.W. 4620 (1980) (State Supreme Court has legislative immunity in in-acting Code of Professional Responsibility); Gorman Towers Inc. v. Bogoslavsky, supra (zoning).

2. Judicial Immunity: Stump v. Sparkman, 435 U.S. 349 (1978), Judge has immunity from damages for his judicial acts unless they were taken in clear absence of all jurisdiction.

3. Prosecutors: Imbler v. Pachtman, 424 U.S. 409 (1976), State prosecuting attorneys acting within the scope of their duties in initiating and pursuing a criminal prosecution, are absolutely immune.

4. No immunity for court appointed counsel. Ferri v. Ackerman, _____ U.S. _____ 48 L.W. 4054 (1979).

B. Qualified Immunity: In certain cases a qualified good faith immunity exists. Generally it is an affirmative defense which must be pled by defendant and involves objective reasoness and subjective good faith. See Gomez v. Toledo, _____ U.S. _____. 48 L.W. 4600 (1980). It has been extended to the following:

1. Prison Officials: Procunier v. Navarette, 434 U,S. 555 (1978).

2. Certain Executive Officials: Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975).

3. Mental Hospital Administrators: O'Connor v. Donaldsen, 422 U.S. 563 (1975).

4. Police Officers: Pierson v. Ray, 386 U.S. 547 (1967).

5. No Immunity for Municipalities: Owen v. City of Independence, _____ U.S. _____ (1980).

Defense strategies you can use to stop misuse of the doctrine in products cases.

COLLATERAL ESTOPPEL IN THE MULTI-PLAINTIFF PRODUCTS CASE

By Gary Crapster

The growing wave of products liability litigation involving mass produced consumer and industrial goods is creating serious questions about the manner in which we adjudicate similar issues within the boundaries of our traditional notions of due process The problems are not entirely novel, since the concepts of *res judicata*, collateral estoppel, and the prevention of needless relitigation of issues are deeply rooted in the common law [1] But just as the Industrial Revolution spawned new legal doctrines and institutions, the combination of our consumption-oriented, litigious society with the liberalization of products liability and procedural law is posing substantial social, economic and judicial problems.

Should literally thousands of individual complainants separately and individually litigate the reasonableness of a warning on a drug label or an asbestos product? Should literally thousands of juries decide whether a part which was identically mass-produced on an assembly line is defective?

Not surprisingly, a number of commentators and judges are answering these questions in the negative and are looking to the traditional procedural tools of *res judicata* and collateral estoppel to effectuate judicial economies.[2] In fact, when faced with this problem, many attorneys and jurists are inclined to embrace quickly a technique designed to preclude relitigation of such issues on a massive scale. So much appears to be gained — so little appears to be lost. But the evils of crowded dockets, judicial delay and increased legal expenses (perceived by both plaintiffs and defendants alike) must be dealt with in a cautious manner, with care for preserving our highest social goal in such disputes: fairness and justice

The following discussion reviews the traditional principles controlling the application of collateral estoppel. It also collects defensive legal concepts which may be helpful in attacking its application in various situations, and some policy considerations which might be beneficial in demonstrating that the first impression (favoring collateral estoppel in mass-produced products litigation) may be erroneous, in light of the higher goals of fairness and justice.

Res Judicata and Collateral Estoppel

An extensive review of the principles of *res judicata* and collateral estoppel will not be made here, because they are rather common and familiar legal concepts. It is helpful, however, to remember their relationship Both are preclusive doctrines — they preclude relitigation of certain matters. *Res judicata* precludes the relitigation of an identical cause of action between identical parties (or their privies). Thus, it is the entire "cause of action" or factual basis for a "claim,"[3] between the same parties, which is precluded by *res judicata* Because the entire cause of action and the parties must be identical before *res judicata* will apply, its preclusive effect is broad and all defenses and claims related to that cause of action which could or might have been litigated in the prior proceeding are barred from further litigation.[4] Collateral estoppel, on the other hand, only bars the relitigation of specific issues which were unquestionably decided

The author practices with the Dallas, Texas firm of Strasburger & Price. He is a member of the Dallas and American Bar Associations and the State Bar of Texas

in a prior proceeding, according to *Cromwell v. County of Sac*, 94 US 351 (1876) Thus, *res judicata* is often called "claim preclusion" and collateral estoppel called "issue preclusion."[5]

Because "claim preclusion" bars relitigation of all elements to the claim which *might* have been heard, *res judicata* seems broader in scope and effect than its purported little brother, collateral estoppel, which merely bars relitigation of specific issues. However, this concept is deceiving; upon careful analysis one realizes that, because "issue preclusion" does not require the total identity of parties and claims, it may be unforeseeably broad and hence, the more dangerous preclusion of the two

Early jurists recognized this danger. Strict, fundamental rules were therefore established to regulate the application of collateral estoppel within the boundaries of due process Judge Learned Hand, in *Evergreens v Nunan*, 141 F2d 927 (2 Cir 1944), cert denied 323 US 720 (1944), stated that the doctrine of collateral estoppel must be applied only to ultimate facts which were unquestionably and specifically decided and necessary to the prior judgment. He found this limitation necessary in order to avoid an extension of the preclusive effect of a judgment "for which there is no conceivable limit."

Identity of Issue Test

The initial test for determining if collateral estoppel is appropriate involves a thorough examination of the *issue* to be precluded and its treatment in the first action. Although the specific threshold requirements for the application of collateral estoppel may change somewhat from jurisdiction to jurisdiction, the following check list should be satisfied before collateral estoppel may be applied:

(1) Precisely identify the issue sought to be precluded in the second action. Is it identical to the issue in the first action?
(2) Was this precise issue actually litigated and decided by the fact finder in the first action?
(3) Considering all of the objections, motions, and rulings which related to this issue, was it finally judicially determined in the first action?
(4) Was the judgment in the first action actually dependant on the determination of this issue?

If any one of these questions is answered in the negative, it is likely that collateral estoppel is inappropriate as a matter of law and that its application would violate due process.[6] Some examples of common situations which can bar application of collateral estoppel, due to failure to meet the requirements of this check list, are discussed below.

Identity Of Parties Test

After examining the issue sought to be precluded,

and its treatment in the prior action, the parties to both the present and prior action should be analyzed.

Most practicing attorneys are familiar with the rise and fall of the "mutuality of estoppel" concept in American jurisprudence and the manner in which the issue has been treated in their respective juris-

"For a defendant facing multiple, consecutive litigation, the best lesson . . . is beautifully simple: Win!

dictions. Stated briefly, the old mutuality rule required that an identity of parties (or their privies) exist with respect to the attempted estoppel and the prior case.[7] The risk of the estoppel in the prior action had to have been mutual; a party in the subsequent suit could not assert the estoppel unless that same party would have been bound unfavorably on the prior issue if it had been decided against him in the first suit.[8] Thus, under the mutuality rule, if Suit I involved parties A and B, no estoppel of any kind could be asserted if Suit II were between parties A and C, (unless party C were in privity with party B of Suit I).

The fall of the mutuality rule began in 1942, when California Supreme Court Justice Traynor enunciated the celebrated *Bernhard* doctrine. He explained, in *Bernhard v Bank of American Nat'l Trust & Sav. Ass'n.*, 122 P2d 892 (Cal 1942), that it made no sense to require both parties in Suit II to have participated in Suit I; only the party against whom the estoppel is asserted must have been a prior party, because due process only guarantees a party *one* day in court.[9] Thus, under *Bernhard*, if in Suit I, Party A lost to Party B on issue X, in Suit II Party C could assert the finding on issue X against Party A because A had his chance and lost in Suit I, regardless of the fact that A could *not* estop C in Suit II with issue X if A had in fact won the issue in Suit I.

Soon after *Bernhard* was decided, Professor Currie pointed out that the rule announced by Traynor could be very dangerous if it were not monitored carefully. Some of the very problems we face today in the products liability context were pointed out by Professor Currie and are amply illustrated by Currie's well-known multi-plaintiff railroad accident hypothetical:

> Suppose, that . . the first injured passenger to sue loses his action against the railroad. The railroad cannot plead that judgment against the next passenger to sue, because the second passenger was not a party to the first action, nor in privity with the first passenger. Nevertheless, let us say that the second passenger also loses, and indeed that twenty-five passengers in twenty-five separate actions, all fail to establish negligence on the part of the railroad. Are we to understand that the remaining twenty-four passengers can plead the judgment in the case of No. 26 as conclusively establishing that the railroad was guilty of negligence, while the railroad can make no reference to the first twenty-five cases which it won?
>
> There is only one possible answer to this question: no such absurdity would be tolerated for a moment.
>
> Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan L Rev 281, 285-6 (1957).

The powerful, one-sided nature of this use of estoppel results from the due process requirement that no estoppel can be asserted against a litigant who has not had his very own day in court on the issue. The United States Supreme Court has reiterated this familiar concept in precisely this collateral estoppel context:

> The requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safe-guard.
>
> Some litigants — those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.
>
> *Bonder-Tongue Laboratories v University Foundation*, 402 US 313 (1971).

"the best strategy for a defendant is to pick the best case possible and try it, before suffering an adverse judgment elsewhere."

Thus, because the defendant in a multiple-plaintiff situation cannot assert prior victories against a succeeding line of plaintiffs, the sword of estoppel belongs solely to the plaintiffs and the risk of loss is substantial for the defendant. It is this "multiple plaintiff anomaly" which creates the great risk for injustice in the mass produced product context

Some early commentators, such as Professor Currie, distinguished between the offensive and the defensive use of estoppel. The defensive use of collateral estoppel occurs in situations in which a losing party in the first suit attempts to bring a second action on the same issues against a third party, and the third party raises the judgment in the first suit as a defense. This is exemplified by the *Bernhard* case. Offensive use of collateral estoppel occurs in those situations in which a losing party in the first suit is sued by a third party who seeks preclusion of an issue on the basis of the decision in the first suit. This is exemplified by *Zdanok v. Glidden Co., Durkee Div.*, 327 F2d 944 (2 Cir 1964), cert denied 377 US 934 (1964). As a defensive maneuver, the assertion of collateral estoppel creates the just and beneficial result of preventing a party from relitigating an issue, already determined against him, simply by picking out new defendants.[10]

While there has been recognition of the offensive-defensive distinction, the United States Supreme Court has approved the offensive use of estoppel in the securities fraud context, in *Parklane Hosiery v. Shore*, 439 US 322 (1979). Other courts have allowed such estoppel even in the volatile multiple plaintiff context.[11] Thus, while one might argue that offensive use should be more strictly guarded, there appear to be no solid legal obstacles based upon the offensive distinction alone, although there is language in *Parklane Hosiery* indicating more caution should be used in the offensive context

If the rule of mutuality still exists in the law of the forum which applies to a particular case, the multiple plaintiff anomaly cannot occur; it remains merely a nightmare for defendants in other forums to face. But mutuality is very much on the wane, and a great many jurisdictions have rejected it.[12]

A federal court should adopt the state law on *res judicata* and estoppel principles, if jurisdiction is based upon diversity.[13] But where jurisdiction is invoked by a federal question, there is little doubt that the federal law, which has abandoned mutuality, will apply.[14] Even in a diversity suit, a federal court may be expected to look far and wide for a reason to disregard the strict mutuality rule.[15]

Privity Test

The parenthetical reference to privity in the preceding paragraphs has indicated that even one who is not a party to a prior suit may be bound by that suit (whether the mutuality rule controls or not), if the non-party were in privity with a prior party. Thus, privity is a form of allowing the estoppel of a non-party to the first suit

"There is substantial authority for precluding any subsequent estoppel against a defendant after he has won one or more cases."

The concept of privity in the estoppel context usually involves nothing more than determining, under all of the circumstances, whether a non-party to a prior suit should be bound by that suit, due to some unusually close relationship with one who was a prior party.[16] The relationship almost always is required to arise from circumstances other than simply a shared interest in the outcome.[17] Otherwise, a line of awaiting plaintiffs could be estopped after the defendant won the first case. The more common grounds for finding privity include situations involving partners, spouses, shareholders, joint tenants, and actual successors in interest.[18]

But some courts have gone beyond the traditional tests and bound non-parties where the non-party was very interested in the first suit and actually participated in some manner, albeit not as a named party. Several leading commentators on collateral estoppel have examined and analyzed a number of these cases of non-party estoppel.[19]

While it appears that no movement exists to use the theory of privity to neutralize the huge estoppel advantage held by members of a large group of plaintiffs against a single defendant, at least one case bears the scent of this rose, although it is labeled with another name: "judicial estoppel." The case is *Cauefield v. Fid. & Cas. Co.*, 378 F2d 876 (5 Cir 1967), affirming 247 FSupp 851 (ED La 1965), cert denied 389 US 1009 (1967). A cemetery owner cleared brush from his cemetery, and forty-one

relatives of decedents buried there filed claims for cemetery desecration. In suit I, a judgment was rendered against the plaintiff, on a finding that no desecration had taken place. In suit II, relatives of the plaintiff in suit I (who had also testified as witnesses in the first action) sued the cemetery owner. The same lawyer who litigated the first action represented the plaintiffs in suit II. Under Louisiana law, a finding of desecration of any part of the cemetery would have established a claim in favor of all the parties. The Fifth Circuit recognized that the Louisiana Civil Code required an identity of parties for application of *res judicata* But, nevertheless, it allowed estoppel of the plaintiffs in suit II on a Louisiana common law concept of judicial estoppel. Since the plaintiffs in suit II admitted that they could present no new evidence which was not presented in suit I, the court reasoned that they were judicially estopped.

Although *Cauefield* involves a Louisiana common law principle, and is not likely to be persuasive on its own in the face of traditional due process requirements, it may be an early example of a new trend in an increasingly difficult area.[20]

A final note on privity: Careful attention to this concept in a jurisdiction in which the highest court has not yet explicitly adopted *Bernhard* or rejected mutuality is important, because a court's testing of an asserted estoppel based upon privity can be interpreted by some as embracing the *Bernhard* doctrine. For example, in *Kirby Lumber Co. v. Southern Lumber Co.*, 196 SW 357 (Tex 1946), the Texas Supreme Court confirmed its adherance to the mutuality rule some four years after *Bernhard,* and has never formally reversed that holding. But in 1971, (with the *Bernhard* bandwagon well on its way), the court decided *Benson v. Wanda Petroleum Co.*, 468 SW2d 361 (Tex 1971), in which a prior party attempted to assert a prior judgment against one who was not a party to that first suit. Because the Texas Supreme Court did not dispose of the issue by simply referring to the mutuality rule, some writers and lower courts have concluded that mutuality must no longer be the Texas law But the point before the Texas Supreme Court was actually whether the non-party was in privity with the unsuccessful party to the first suit Given that issue, it would have been improper for the court to have referred to the mutuality requirement or the *Bernhard* doctrine as such; where a non-party is in privity with a prior party, even the strict mutuality rule is satisfied, because it binds privies. (See note 9 to this article) And further, where a case involves an attempted estoppel against a non-party, even the *Bernhard* doctrine is inapplicable, because a non-party is never adversely bound, unless found to be in privity with a prior party

Defensive Strategies In General

If collateral estoppel appears to apply after analyzing the issues and parties in the pending and prior suits, possible defenses to its application still may be found by looking more deeply into the circumstances.

For a defendant facing multiple, consecutive litigation, the best lesson gleaned from the words of the wisest legal scholars and the deepest research is beautifully simple: *Win!* This strategy tops the list because, obviously, it is the first thing to think about. Of course, collateral estoppel problems do not arise in suit II if suit I was successfully defended. But if suit II is lost, the collateral estoppel problem facing suits III, IV, and V, etc , will be much less difficult with the victory in suit I on the books. On the other hand, a loss in suit I might set up a chain of collateral estoppel rulings which would preclude the chance of a victory in subsequent suits.

Inconsistent Verdicts

It is a fundamental rule of fairness that no estoppel should be allowed based upon one judgment, where another suit has resulted in a different judgment It was mentioned in *Bernhard* that the application of collateral estoppel is tested pursuant to the Constitutional grounds of due process. One of the most widely cited due process standards was stated by the United States Supreme Court in *International Shoe Co. v. Washington,* 326 US 310, 316 (1945) — albeit in the *in personam* jurisdiction context In announcing the famous minimum contacts standard, Justice Stone stated that "due process requires . . . [the minimum contact be such that] the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

This test for due process in the jurisdictional context should not be abandoned in the collateral estoppel context. Clearly, no procedure should pass due process muster which violates our traditional notions of fair play and substantial justice Professor Currie's railroad hypothetical, quoted above, indeed demonstrates the unfairness of applying collateral estoppel to all remaining plaintiffs after the defendant has won against one or more plaintiffs.

There is substantial authority for precluding any subsequent estoppel against a defendant after he

has won one or more cases. Another commentator has stated:

> In situations of multiple claimants whose suits cannot be consolidated, the common defendant should never be bound if he wins the first and then loses a later trial; there is no policy which commands that either judgment should be available to non-parties to the actions in such a situation. Both judgments should be ignored in the subsequent actions, not because of lack of mutuality or offensive-defensive distinctions, but because of common sense.
>
> Semmel, *Collateral Estoppel, Mutuality And Joinder of Parties*, 68 Colum L Rev 1457, 1466-7 (1968)

The American Law Institute has also incorporated this approach into its tentative draft number two of the *Restatement (Second) Judgments*, §88 (4). Comment (f) to Section 88 states:

> Giving a prior determination of an issue conclusive effect in subsequent litigation is justified as not merely avoiding the costs of litigation but also by underlying confidence that the result reached is substantially correct. Where a determination relied on as conclusive is itself inconsistent with some other adjudication of this same issue, that confidence is generally unwarranted. The inference, rather, is that the *outcomes may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence or the appropriate application of a legal rule to the evidence*. That such a doubtful determination has been given effect in an action in which it was reached does not require that it be given effect against the party in litigation and against another adversary. (emphasis added)

Further, the United States Supreme Court has recently spoken on this issue in dictum in the *Parklane Hosiery* case: "allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied on as the basis for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant."

Thus, it would appear that the best strategy for a defendant is to attempt to pick the best case possible and try it, before suffering an adverse judgment elsewhere.

Differing Facts and Issues

In products liability cases, it usually can be argued, with varying degrees of persuasiveness, that the ultimate issues of liability are not precisely the same as those in a prior case. Of course, the nature of the argument depends upon the facts and the alleged defect.

In a failure to warn case, for example, the plaintiff's attorney will usually argue that, in a prior case, the particular warning was found defective or the absence of one rendered the product defective. But the argument may be painted with a broad brush — that the defendant cannot now deny it breached its "duty to warn." The defendant should be quick to point out that no "duty to warn" exists in the abstract. The true question is whether the defendant should have warned a particular plaintiff about a particular danger.

It is important to determine carefully whether the plaintiff's exposure to the product was the same as the prior plaintiff's. In a drug case, for example, was there a difference in dosage? Age? Other physical difference between the plaintiffs? Was there a significant difference in the plaintiffs' prior knowledge and background regarding the risk or the ability to perceive it? For example, a prior finding — that a defendant should have warned a fifteen year old with a given propensity for disease that six tablets of a drug could be harmful — should not preclude the issue of whether the defendant should have warned a pharmacist's wife with no history of medical problems that three tablets of the same drug could be harmful. Thus, the issue is not whether the warning was inadequate, but whether it was inadequate to warn a certain person about a certain risk.

A myriad of other differences could arise in other cases. In summary, the fact finder in the prior case must have evaluated the precise nature of the particular risk which faced the particular plaintiff. That risk could only have been perceived in the context of the particular plaintiff's exposure to the product and vulnerability to it. If the risk for a subsequent plaintiff is different, based upon other circumstances, the prior finding should not be determinative, because it cannot be assumed that the finding would have been the same for a different risk and plaintiff. This was the court's conclusion in *Vincent v Thompson*, 377 NYS2d 118 (App Div 1975).

Defective design and defective manufacturing cases also present substantial identity of issue problems. The reader may wish to consult Weinberger, *Collateral Estoppel and the Mass Produced Product: A Proposal*, 15 New England L J 1 (1980), a new and thorough law review article on this subject. Michael Weinberger, of the New York City firm of Herzfeld and Rubin, suggests that a distinction be

made between intrinsic and extrinsic defects in a product; if the defect must be demonstrated or determined through extrinsic evidence or evaluations, collateral estoppel should not apply. One of his hypotheticals demonstrates an intrinsic defect which might be subject to estoppel. It involves a disposable serum-containing syringe which has been erroneously manufactured so that the interior diameter is too large and consequently contains a lethal overdose. If (in suit I) the manufacturing error is proven to have existed for an entire manufacturing lot, then the defendant might well be estopped to deny liability in suit II — if a plaintiff proves his syringe came from the same lot, and was otherwise used in accordance with the manufacturer's instructions. The defect is intrinsic to the product itself and may be demonstrated by fundamental measuring techniques demonstrating it was too large.

On the other hand, alleged design defects by their very nature usually involve such questions as whether a safer product could have been manufactured, given the reasonable expectations of a consumer and the availability of additional safeguards which were reasonable in relation to costs and other practical considerations.[21] In such a case, Weinberger argues, the reasonableness of a particular safeguard may be determined differently from jury to jury based upon their considerations of factors wholly extrinsic to the product itself; therefore, collateral estoppel is not appropriate.

The differences which may be found in any given product liability estoppel issue range from the meticulous to the obvious, and their cumulative effects may be substantial. If a failed steering system was found defective in one accident, surely that defect without more would not estop the manufacturer from ever denying liability in any other alleged steering failures of that model. In such a subsequent case, many questions would have to be answered conclusively to even begin to support an estoppel. Was it the exact same part which failed and in the exact same place? Were the probable causes of failure identical? Were the automobiles of an identical age with equivalent maintenance records? Was the usage of the vehicle at the time of the accident the same? Was the physical structure of the failed piece the same, including its microscopic chemical structure? Was the type of physical stress placed upon it the same? Was it from the same manufacturing lot, etc.? It is soon realized that, once the plaintiff has demonstrated all of the necessary identities, the *fact* of defect in this particular case virtually will have been proven anyway and there is little benefit, if any, of an estoppel. But this is simply an illustration that estoppel, as such, is not appropriate in such a situation.

"In Katz, *the court allowed the party opposing the estoppel to depose jurors in the prior suit."*

General Verdict

If the fundamental facts in the cases are very similar, it is important to review carefully all of the issues and instructions submitted in the first case. If the prior suit were submitted to the jury on a general verdict, it would be difficult for the plaintiff to argue successfully that the defendant was estopped on any particular issue. An early United States Supreme Court decision stated:

> It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record — as, for example, *if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indication the judgment was rendered – the whole subject-matter of the action will be at large, and open to a new contention,* unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. *Russell v. Place*, 94 US 606 (1876)

Assume, for example, that suit I were tried on a general charge instructing the jury that it could find for the plaintiff if it found liability on either negligence, strict liability, or breach of warranty. The plaintiff in suit II should not be allowed to estop the defendant specifically on strict liability, since it cannot be determined which of the three grounds the prior verdict was based upon. A plaintiff might argue in this situation that the defendant clearly lost on at least one of the three theories in the first suit and, therefore, should be estopped on liability generally — regardless of which of the theories the first verdict was based upon. But the traditional principles of collateral estoppel as indicated by the *Russell* quotation above, have not contemplated such a broad usage of estoppel where the grounds upon

which the judgment is based remain unclear.

New Evidence

Another aspect of an attempt to show that the issues are not identical involves the situation in which new factual or expert evidence exists, which was not used in the prior case. A good example of this is found in *Vincent v. Thompson*, 377 NYS2d 118 (App Div 1975). *Vincent* was one of several Quadrigen drug cases[22] which have discussed collateral estoppel in the products context. In *Vincent*, the plaintiff attempted to bar the manufacturer from denying that the drug was defective. But the court refused, partly on the basis that the scientific theory which was relied upon in explaining the alleged defect in suit I had since been discredited (377 NYS2d at 130):

The *Restatement (Second) of Judgments* §88, comment (i) Tentative Draft No. 2 (1975), also indicates that additional evidence on a subject previously litigated should bar the application of collateral estoppel.

With regard to scientific evidence in a duty to warn case, it should be noted that the actual "risk" about which a plaintiff must be warned never actually changes (given an identity of products), but our ability to perceive that risk certainly does change as scientific skills advance. It is only after various experts explain the nature of a risk that a jury decides whether the defendant should have warned of the risk. Therefore, that determination should not remain binding if subsequently available evidence would totally alter the perception of the risk itself. Of course, this may only be applicable in regard to an alleged defect which is beyond the ability of lay persons to fully appreciate, such as in drug, chemical and asbestos exposures. The reader may wish to consult Moore[23] for cases discussing the effect of changed circumstances on the application of collateral estoppel.

Opportunity to Litigate

The general test for the application of collateral estoppel is whether or not there was a full and fair opportunity for the defendant to litigate that issue in the first suit.[24] Even if the defendant has participated in the prior suit and the other collateral estoppel requisites appear to be satisfied, it should be determined if the defendant actually had a full opportunity to defend the issue. Although some examination of the circumstances surrounding the first trial may be fruitful, more than likely it will be found that a full and fair opportunity to defend existed. But if there is a showing that the magnitude of the prior suit was much less than that of the case in which the estoppel is sought, a court might be persuaded to deny estoppel, based upon the simple fact that suits involving huge risks are tried differently from suits involving small risks.

This problem has been acknowledged even in aircraft accidents, in which a single set of operative facts usually indicates that collateral estoppel is more appropriate. In *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F2d 532 (2 Cir. 1965), the plaintiff was required to show willful misconduct on the part of the airline in order to receive damages in excess of the Warsaw Convention limits. After the airline successfully defended an action by the estate of one passenger, a new trial was granted and a jury awarded only $35,000, although the petition sought $500,000. Thereafter, a second action was brought by the administrators of the estate of the famous pianist, William Kappell — a case which presented the possibility of a much higher verdict. Although the administrators asserted that the airline was collaterally estopped from denying liability, the court reasoned that it would be unfair to estop the airline under the circumstances, since the airline had been unaware that it would be estopped against the larger claim by reason of its defense in the first litigation.

There are other examples of courts denying the offensive use of collateral estoppel against one who has had less incentive to litigate vigorously the prior claim.[25]

A different but similar concept exists when the defendant demonstrates that, in conducting the defense of the first suit, it was not contemplated that so many subsequent cases were being determined. The argument of the defendant, in effect, is that it has not been given the proper notice required by due process of the effect of the litigation. Therefore, even if the magnitude of the individual cases were similar, it would be unfair to determine the outcome of hundreds of cases where there is no prior notice to the defendant of the preclusive effect.

To support this argument, the law of the forum on collateral estoppel at the time of the first suit should be examined. If mutuality or other limitations on the doctrine of estoppel prevailed at that time, the argument against the subsequent estoppel will have much more force. But note that if a party vigorously defends suit I with full awareness of pending actions and the possibility of estoppel, preclusions may be invoked, as in *Zdanok v. Glidden Co., Durkee Div.*, 327 F2d 944 (2 Cir. 1964), cert. denied, 377 US 934, 955-956 (1964).

Other Non-Party Defendants

If several defendants are in a case in which collateral estoppel appears otherwise applicable (or if they may be brought in as third parties), and one of them is subject to the same issue sought to be estopped — but was not a party to the prior action — collateral estoppel clearly would not be available against that co-defendant. (See *Blonder-Tongue Lab., Inc., v. University of Ill. Foundation*, 402 US 313 (1971.)) If it is clear that one of the defendants will fully try the very issue on which the plaintiff seeks estoppel against the other defendants, of what benefit is the estoppel? The primary object of collateral estoppel is judicial economy. In such a case, that goal would not be served by the estoppel and conversely, significant prejudicial effects against all of the defendants would occur. Even those defendants not technically estopped could be prejudiced by the court's instruction that the other defendants' products have already been found defective. On the other hand, the estopped defendant might find itself prejudiced on other issues in the eyes of the jury, due to being singled out in such a manner. Thus, if the issue must be submitted against another defendant not subject to the estoppel, adverse effects far outweigh benefits in the interest of a fair, consistent, and symmetrical trial, the issue should be submitted for all parties with an interest in it

Deposing Prior Jurors

A recent development in the collateral estoppel area is found in the case of *Katz v. Eli Lilly Co.*, No 75-C-1244 (ED NY Memorandum & Order, Nov 29, 1979). In *Katz*, the court allowed the party opposing the estoppel to depose jurors in the prior suit. The court ruled that, if the original judgment were questioned on the basis of a possible compromise verdict, every opportunity must be afforded the party against whom the offensive estoppel is asserted to explore the basis for the prior verdict. Whether this technique will be upheld and followed remains to be seen. But, due to the potential serious effects of estoppel, any method which succeeds in preventing an injustice should be employed.

Judicial Economy At What Price?

Undoubtedly, there will be fact situations in which the estoppel is difficult to argue against, due to very similar fact circumstances. In *Ezagui v. Dow Chemical Corp.*, 598 F2d 727 (2 Cir 1979), the Second Circuit has recently applied a broad estoppel against a drug manufacturer on the basis of a prior finding that the drug warning materials were inadequate. The estoppel was apparently based upon a prior finding that the warning in question inaccurately informed medical practitioners that adverse reactions to the drug were no less severe than those experienced with a more familiar drug, although the

FOOTNOTES

[1] Cromwell v. County of Sac, 94 US 351 (1968). Jeremy Bentham discussed the issue in 7 Works of Jeremy Bentham 1972 (Bowring Ed 1838 - 1843)

[2] See for example, a recent application of collateral estoppel in the mass produced drug context: Ezagui v. Dow Chemical Corp., 598 F2d 727 (2 Cir 1979)

[3] States which have not adopted the liberal pleading methods demonstrated by Rule 8 of the Federal Rules of Civil Procedure generally use the phrase "cause of action" in the res judicata context, as opposed to 'claim," but essentially, the estoppel applies to relitigation of issues involving the same set of operative facts. Mirin v. State of Nevada ex rel Pub Serv Comm., 547 F2d 91 (9 Cir. 1976), cert denied 432 US 906 (1977); Himel v. Continental Ill. Natl. Bank and Trust Co., 430 FSupp 651 (ND Ill 1977)

[4] Cleary, Res Judicata Reexamined, 57 Yale L. J. 339 (1948)

[5] Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27 (1964)

[6] See 1B Moore's Federal Practice 3901 (1974) and authorities from many jurisdictions cited therein.

[7] Restatement of Judgments §93 (1942); 34 CJS Judgments §1405 (1924). For a discussion of the traditional mutuality of estoppel cases, see Comment, Privity and Mutuality in the Doctrine of Res Judicata, 35 Yale L. J. 607, 608-9 (1926) and Annot., 31 ALR3d 1044, 1060 (1970)

[8] New Orleans v. Warner, 175 US 120, 132 (1899); Litchfield v. Goodnow, 123 US 549, 551-52 (1887)

[9] Traynor enunciated 3 pertinent issues in determining whether a plea of estoppel was valid: "1. Was the issue decided in the prior adjudication identical with the one presented in the action in question? 2. Was there a final judgment on the merits? 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" 122 P2d at 895

[10] Currie, 9 Stan. L. Rev. at 292. Such defensive use of collateral estoppel was sanctioned in Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 US 313 (1971) (discussed supra in the text), to prevent the holder of a patent that had been previously determined invalid from having the validity of his patent relitigated by simply suing new defendants unless it could be shown by the patent holder that he had not been afforded a full and fair opportunity to litigate the matter in the prior suit.

[11] See Ezagui, supra note 2; Zdanok v. Glidden Co., Durkee Div., 327 F2d 944 (2 Cir. 1964), cert. denied, 377 US 934 (1964); United States v. United Air Lines, Inc., 216 FSupp 709 (ED Wash, D Nev 1962) aff'd in part and modified in part on other grounds, United Air Lines, Inc. v. Wiener, 335 F2d 379 (9 Cir. 1964), petition for cert. dismissed 379 US 951 (1964); Desmond v. Kramer, 232 A2d 470 (1967); Hart v. American Airlines, Inc., 304 NYS2d 810 (Sup Ct 1969); Guarino v. Mine Safety Appliance Co., 297 NYS2d 639 (App Div 1969)

[12] Shepardizing Bernhard is a good method of checking the law of an unfamiliar forum since most courts addressing the issue refer to that case. See also, 53 Cal L. Rev. 25, 38 (1965), for a list of developments following Bernhard.

manufacturer apparently had evidence in its possession to the contrary. While unstated, a factor in the application of the estoppel seems to be the court's conviction that the prior finding was obviously correct for that case and, due to the nature of the issue, would be correct for all other cases.

Whether or not the warning in *Ezagui* was actually defective or even obviously defective is, of course, irrelevant here, but the effect of *Ezagui* on future cases may be significant. It would be unfortunate for courts to apply the *Ezagui* type of estoppel to an ordinary failure to warn products case, which was decided by a jury balancing various tests involving reasonableness. While it is clear that two different juries might find differently after hearing such a case, it is even clearer that their verdict might be different after hearing another plaintiff's case under different, albeit similar, circumstances.

Thus, in the ordinary products case, the simple fact that one plaintiff has prevailed should not preclude the defendant from defending all subsequent cases which would turn on a jury's assessment of the reasonableness of some aspect of the product. As authority, it seems that *Ezagui* should be distinguished as a case which demonstrates that a defendant might be estopped to defend its warning after it has been judicially determined that the warning included patently incorrect or misleading information. To extend *Ezagui* further would create a danger of precluding valid defenses. The danger is multiplied hugely when a widely distributed product is involved.

Unfortunately, the temptation for a court to apply the estoppel may become proportionately greater as larger numbers of plaintiffs are involved. But — if the question of liability is so clear and obvious that the court would preclude the defendant from arguing individual cases to different juries — why is estoppel so necessary? If the issue is so clear and easy to determine, the cases would more likely settle or be fought primarily on the grounds of damages anyway — lest the defendant lose total credibility with the court and jury. The real danger is that, instead, a court may attempt to apply the *Ezagui* type of estoppel to prohibit the risk of numerous juries grappling with the more difficult problem of a product's reasonableness — in order to avoid numerous trials and inconsistent verdicts. But it is this precise motive which is so unjust because, as part of its very premise, it contains a recognition that differing verdicts are likely to occur. The defendant might ask the question posed by Bentham, who also was interested in judicial economy, but not at the expense of justice: "One is tempted, however, to ask, whether justice be a thing worth having, or no? and if it be, at what time it is desirable that litigation should be at the end? after justice is done, or before?"[26] Δ

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[13] Semler v. Psychiatric Institute of Wash., D.C., Inc. 575 F2d 922, 927 (DC Cir. 1978). See also, Comment, Civil Procedure - State Law of Res Judicata Applied in Federal Court Exercising Diversity Jurisdiction, 9 Cumberland L. Rev. 569, 573 (1978).

[14] Aerojet General Corp. v. Askew, 511 F2d 710, 715 (5 Cir.), rehearing denied, 514 F2d 1072, cert. denied, 423 US 908 (1975).

[15] See In Re Air Crash Disaster Near Dayton, Ohio, 350 FSupp 757, 761, rev'd on other grounds, Humphreys v. Tann, 487 F2d 666 (6 Cir. 1973). Although Ohio law still applied mutuality, the federal district court ruled that strong federal considerations of efficient administration of justice in the interstate aviation context allowed the disregarding of mutuality. On appeal, the Sixth Circuit did not decide which law should apply, since the estoppel was against a non-party and therefore violated due process even if the federal rule were applicable. 487 F2d at 668.

[16] Vestal, Res Judicata/Preclusion: Expansion, 47 S. Cal. L. Rev. 357 (1974); Note, Collateral Estoppel of Nonparties, 87 Harv. L. Rev. 1485 (1974).

[17] Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 US 111, 128-29 (1912); Sodak Distrib. Co. v. Wayne, 93 NW2d 791, 795 (SD 1958); Griffin v. Burns, 570 F2d 1065 (1 Cir. 1978); Fabricus v. Freeman, 466 F2d 689 (7 Cir. 1972).

[18] For a good collection of cases on privity in the preclusion context, see 1B Moore, supra note 6 at 1651-1680.

[19] Vestal, supra note 16 at 357 (1974); Note, supra note 16 at 1485 (1974); Vestal, Claim Preclusion and Parties in Privity: Sea-Land Services v. Gaudet in Perspective, 60 Iowa L. Rev. 973 (1975); Comment, Non-Parties and Preclusion by Judgment: The Privity Rule Reconsidered, 56 Cal. L. Rev. 1098 (1968). See also, Mpiliris v. Hellenic Lines, Ltd., 323 FSupp 865 (SD Tex. 1070) aff'd, 440 F2d 1163 (5 Cir. 1971).

[20] In Parklane Hosiery, Inc. v. Shore, 439 US 322 (1979). Justice Stewart recently stated: 'The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant a trial judge should not allow the use of offensive collateral estoppel.' Id. at 331.

[21] See Prosser, The Law Of Torts §96 (4 Ed. 1971).

[22] See also, Tinnerholm v. Parke Davis & Co., 411 F2d 48 (2 Cir. 1969); Grant v. Parke Davis & Co., 544 F2d 321 (7 Cir. 1976); Ezagui v. Dow Chemical Corp., supra note 2.

[23] 1B Moore, supra note 6 at 4231.

[24] United States v. United Air Lines, Inc., supra note 11.

[25] Lewis v. International Business Machines Corp., 393 FSupp 305 (D. Ore. 1974); Rawls v. Daughters of Charity of Saint Vincent DePaul, Inc., 491 F2d 141, 148 (5 Cir. 1974).

[26] Bentham, The Rationale of Judicial Evidence, in 7 Works of Jeremy Bentham, supra note 1.

COLLATERAL ESTOPPEL AND THE MULTIPLE PLAINTIFF ANOMALY IN IOWA

Alanson K. Elgar

Mt. Pleasant, Iowa

I. Iowa has recognized the three traditional prerequisites to applying collateral estoppel:

A. Identity of issues raised in the successive proceedings,

B. Determination of these issues by a valid final judgment to which such determination is necessary,

C. Identity of the parties or privity, often referred to as mutuality of estoppel. Annot., 31 A.L.R. 3d 1044 (1970).

1. A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. In Re Estate of Marty, 126 N.W.2d 303 (Iowa 1964).

2. Historically, the mutuality of estoppel rule, has prevented one not a party to the judgment nor in privity therewith to be bound by the judgment, and subsequently was not entitled to rely on its effect in a subsequent suit. Third Missionary Baptist Church of Davenport v. Garrett, 158 N.W.2d 771 (Iowa 1968) (dictum).

II. However, the strict observance of mutuality of estoppel has been eroded in Iowa in recent years.

A. The first exception to the rule recognized the defensive use of collateral estoppel.

1. The Iowa Supreme Court in Goolsby v. Derby, 189 N.W.2d 909 (Iowa, 1971), and citing Bernhard v. Bank of American National Trust & Savings Association, 122 P.2d 892 (Cal. 1942), allowed the defensive

use of collateral esoppel.

2. A pragmatic approach to use of the doctrine was adopted:

> "The most important factors in determining availability of the doctrine of collateral estoppel notwithstanding a lack of mutuality or privity are whether the doctrine of collateral estoppel is used offensively or defensively, whether the party adversely affected by collateral estoppel had a full and fair opportunity to litigate the relevant issue effectively in the action resulting in the judgment....
>
> Courts are generally reluctant to make exceptiors to the mutuality rule where a party is urging the offensive use of collateral estoppel to recover damages. Our research discloses perhaps four jurisdictions so holding - Nevada, New York, Wisconsin, and the District of Columbia. The courts have been more liberal with the exception to the mutuality rule where collateral estoppel is proposed for defensive purposes to bar an action. Such is the present case. Jurisdictions allowing this exception are collected in 31 A.L.R. 3rd at 1072. Jurisdictions in addition to Iowa denying any exceptions to the rule to date are cited at 1062 of the annotation."

B. The court went even further in Hawkeye Security Insurance Co. v. Ford Motor Co., 199 N.W.2d 373 (Iowa 1972), when it applied issue preclusion to an insurance company as a participating non-party.

> 1. "Vestal has defined participating non-parties as those persons not parties to a suit, but who, nevertheless, control the course of the litigation. Vestal, Preclusion/Res Judicata Variables: Parties 50 Iowa L. Rev. 37-8 (1964) In the instant matter, Hawkeye as insurer of both Kolby and Tri-B Corporation was such a participating non-party in that it controlled the defense in the case of Koppold v. Kilby and Tri-B Corporation. Hawkeye, as the insurer of both defendants in the original action, having had the opportunity to control the course of the proceedings, and incentive to litigate the matter of the brake failure as it related to the negligence in that action is barred from relitigating that issue."

C. The "control" issue was also the subject of an issue preclusion action involving a plaintiff seeking intervention in Edmundson v. Miley Trailer Co., 252 N.W.2d 415 (Iowa 1977).

> 1. In Edmundson the owner of a horse killed when the horse's trailer broke loose from the vehicle pulling it sought to intervene in an action for damages brought by the owner of the trailer and vehicle against the manufacturers of the trailer, the hitch and their installers. The Plaintff sought intervention based

on the possibility that he would be precluded by the direct legal operation of any judgment in the action brought by the owner of the vehicles. In finding that the owner of the horse would not be precluded, the court relied on the absence of the control factor.

a. "Comment C (to Section 83 in Tentative Draft No. 2 Restatement, Second, Judgments) states:

> " Elements of control. To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain appellate review. Compare §68.1(a). Whether his involvement in the action is extensive enough to constitute control is a question of fact to be resolved with reference to these criteria. It is sufficient that the choices were in the hands of counsel responsible to the controlling person; moreover, the requisite opportunity may exist even when it is shared with other persons. It is not sufficient, however, that the person merely contributed funds or advice in support of the party or appeared as amicus curiae. (Emphasis in original).
>
> The only evidence supporting a finding of control by Cooperman is the fact the same attorney represents both Edmundson and Cooperman. That fact, in and of itself, would not warrant a finding Cooperman's control of the litigation had been established. In Re Estate of Richardson, 250 Iowa at 288-289, 93 N.W.2d at 785. "

III. The latest pronouncement on issue preclusion reiterates the exceptions to mutuality and the requirement of privity where the preclusive use is defensive.

A. The Supreme Court in In Re Matter of Evans, 267 N.W.2d 48 (Iowa 1978) stated:

> " Identity of parties is no longer always necessary to give validity to a claim of issue preclusion. Schneberger v. United States Fidelity & Guaranty Co., 213 N.W.2d 913 (Iowa 1973) We have ceased requiring privity where the issue preclusion doctrine is invoked defensively against a party who was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant issue and properly be bound by its resolution. Betran v. Glen Falls Insurance Company, 232 N.W.2d 527 (Iowa 1975)."

B. The only case in Iowa to have addressed the identity of parties requirement in an offensive issue preclusion action has flatly rejected its use. Betran v. Glen Falls Insurance Co., 232 N.W.2d 527 (Iowa 1975).

1. In Betran, an employee obtained a judgment against an electrical contractor for injuries sustained due to an electrical shock while operating his employer's conveyor. The execution issued on the judgment was returned unsatisfied and the employee then initiated an action against the contractor's insurer. In denying issue preclusion on the question of whether the injury was due to an "incompleted or completed" operation which had been previously decided in favor of the employee the Court stated:

> " In the case before us plaintiff was apparently successful at trial in asserting the offensive use of res judicata/issue preclusion to bar a subsequent determination of whether Richey's repair constituted a "completed operation". The fact plaintiff attempts to use the doctrine offensively against one not a party to the earlier judgment is an important factor in determining the availability of the doctrine of issue preclusion since courts are generally reluctant to make exception to the mutuality rule in such a circumstance. Goolsby, supra at 916. We have in no case accepted such an offensive use where there is no mutuality, and to allow the same in this case would be most inappropriate."

C. The Court has recognized, however, that the area of preclusion is still "emerging." Mauer v. Rohde, 257 N.W.2d 489 (Iowa 1977) (dictum).

CONTRIBUTION

By Ken J. Smith
Selby, Updegraff & Smith
Newton, Iowa

I. Introduction

A. Importance as defense lawyers' device, before and after liability is established, in terms of claiming contribution against other joint tortfeasors and in terms of defending against claim of contribution from joint tortfeasors.

B. Enlarged arena of contribution due to removal of defenses of interspousal immunity and guest statute.

C. Imminent adoption of comparative negligence rule as it affects contribution.

II. Contribution In Iowa Today

A. History

1. Contribution and common law :

(a) Merryweather v. Nixan, (1799) 8 Term. Rep. 186 Eng. Rep. 1337, no contribution in tort as between intentional tortfeasors (See Prosser, Torts 2d, Page 305)

(b) Rule against contribution applied generally in American courts to include cases where independent, concurrent negligence contributed to a single result (See Prosser, Torts 2d, Page 306)

(c) A few states eventually developed common law contribution (including Iowa and Wisconsin) (See Best v. Yerkes, 1956, 247 Iowa 800, 77 NW2d 23, 60 ALR2d 1366)

2. Contribution and statutory law :

(a) Variety of states have enacted statutes modifying initial rule against contribution to allow contribution

between negligent joint tortfeasors.

(b) Uniform Contribution Among Tortfeasors Act adopted by 19 states, including some states which also adopted comparative fault contribution (e.g. Hawaii, Delaware, Arkansas).

(c) Uniform Comparative Fault Act includes provisions for the apportionment of contribution according to comparative fault.

B. Elements and Pre-requisites of Contribution

1. Definitions:

(a) Rationale--equitable distribution of damages as between negligent tortfeasors who have produced single injury.

(b) "When two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them." Restatement of Torts 2d Section 886A (1)

(c) ". . . there is at least a right of equitable contribution between joint tort-feasors where there is no intentional wrong, moral turpitude or concerted action between them." Hawkeye-Security Insurance Company v. Lowe Construction Company, 99 NW2d 421, 425.

2. Common liability as fundamental basis of claim:

(a) Right of contribution arises where common liability is found as a result of litigation. Constantine v. Scheidel, 249 Iowa 953, 90 NW2d 13.

(b) Right of contribution arises where one joint tortfeasor makes settlement instead of litigating with injured party.

(1) "The concurring negligence which gives rise to a right of contribution must have existed at the time of the accident. Contribution . . . has as its foundation the thought that, when two parties have contributed to an injury to a third party, it would be

unjust to require one who has paid the entire loss to carry the whole burden; the one who has paid nothing should be required to assume his share." Allied Mutual Casualty Company v. Long, 107 NW2d 682, 687.

(2) One who has a claim of contribution arising from the settlement with the injured party must plead and prove his own negligence, as well as the negligence of the other joint tort feasor, to establish common liability. Allied Mutual Casualty Company v. Long, 107 NW2d 682.

(c) The meritorious defense of a joint tortfeasor to the claim of the injured party will operate to defeat a claim of contribution by abrogating common liability.

(1) Workers' Compensation Act--a joint tortfeasor liable for injuries to a worker is not entitled to recover contribution from the worker's employer, even though the latter's negligence concurred in causing the injury or death, where the employer, the employee, or the particular injury or death is covered by the act. Iowa Power and Light Company v. Abild Construction Company, 144 NW2d 303 (See 53 ALR2d 977 Et Seq.)

(2) Family status or immunity--The bar to an action against another joint tortfeasor because of family relationships, whether marital, filial or other relationship, or immunity, i.e. governmental, would constitute a defense in an action by an injured party. Blunt v. Brown, (D.C. Iowa) 225 F. Supp. 326 (See 19 ALR2d 1003 seq.) But note effect of Shook v. Crabb, 281 NW2d 616, which abrogated the doctrine of interspousal immunity as it pertained to actions for personal injury which is the result of spousal negligence (See discussion in III).

(3) Guest Statute--A joint tortfeasor who was protected from an action by an injured party by the Guest Statute was likewise protected from a claim for contribution deriving from the same accident. Shonka v. Campbell, 152 NW2d 242; Blunt v. Brown, (D.C. Iowa)

225 F. Supp. 326 (See also 26 ALR3d 1283). But note effect of Bierkamp v. Rogers, 293 NW2d 577, holding that the Iowa guest statute is unconstitutional and abrogated same (See discussion in III).

(4) All other defenses normally available in negligence cases, e.g. contributory negligence, assumption of risk, etc.

(d) No effect is given to the distinction between common liability arising from statute or from common law as providing common law liability basis for right of contribution. Federated Mutual Implement and Hardware Insurance Company v. Dunkelberger, 172 NW2d 137, which permitted contribution from one liable under Dram Shop Act to one liable under common law negligence.

3. Payment of common liability:

(a) As basis of claim

(1) "The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tort-feasor can be required to make contribution beyond his own equitable share of the liability." Restatement of Torts 2d Section 886A(2).

(2) "Ordinarily the right of contribution becomes complete and enforceable only upon payment by the claimant which discharges more than his just share of the common obligation. Chicago and Northwestern Ry.Company v. Chicago R.I. and P.R. Co., 179 F. Supp. 33 (applying Iowa law).

(b) As basis of accrual of claim for purposes of the statute of limitations--a claim for contribution does not accrue and the Statute of Limitations does not start to run until payment has been made on the underlying claim, payment of a judgment thereon, or payment of a settlement thereof, in the amount of more than the claimant's just share. Chicago and Northwestern Ry. Company v. Chicago R.I. and P.R. Co., (D.C. Iowa) 179 F. Supp. 33.

4. Apportionment of contribution:

(a) Pro-rata share--Rule that "equality is equity"--"There is little of a persuasive nature that one (joint tortfeasors) was more at fault, wrong or remiss in his duty, than the other, so as to bar contribution and permit indemnity . . .(T)his was indeed a proper case for equitable contribution and . . . each should bear one-half of the loss . . ." Constantine v. Scheidel, 249 Iowa 953, 957, 90 NW2d 10.

(b) Effect of vicarious liability--"When a person is vicariously liable, that person and the tortfeasor whose negligence is imputed to him are considered together for contribution purposes." Schnebly v. Baker, 217 NW2d 708, 731.

(c) Apportionment by comparative fault--See discussion in IV.

C. Defenses to contribution

1. Lack of common liability--defense of joint tortfeasor to original claim of injured party (See discussion at II B. (2) (c)).

2. Lack of common liability--defense of joint tortfeasor to claim of other joint tortfeasor.

(a) Joint tortfeasor making claim acted in intentional, reckless, grossly negligent manner or one involving moral turpitude. Best v. Yerkes, 247 Iowa 800, 77 NW2d 23, 60 ALR2d 1366.

(b) Joint tortfeasors from whom claim is made is entitled to indemnification from joint tortfeasors making claim.

(1) Indemnity arising from an express contract. Iowa Power and Light Company v. Abild Construction Company, 144 NW2d 303.

(2) Indemnity arising upon the breach of a duty created by independent contract. Iowa Power and Light Company v. Abild Construction Company, 144 NW2d 303.

(3) Indemnity arising from vicarious liability by statutory liability or respondeat superior. Federated Mutual Implement and Hardware Insurance Company v. Dunkelberger, 172 NW2d 137.

(4) Indemnity arising where the negligence of one is active or primary as opposed to passive or secondary negligence of the other. Iowa Power and Light Company v. Abild Construction Company, 144 NW2d 303.

(c) Lack of claimant joint tortfeasors' negligence to injured party (volunteer) or unreasonableness of settlement.

(1) "If one seeking contribution was not in fact liable to the injured party but has made a payment in the mistaken believe that he was or might be or for other reasons, he may be barred from contribution by the equity rule that it will not be allowed in favor of a volunteer." Restatement of Torts 2d Section 886A, Comment e.

(2) Unreasonable settlement-open to inquiry in the action for contribution is the reasonableness of the settlement, and the tortfeasor making the claim has the burden of establishing the reasonableness of the payments made. Restatement of Torts 2d Section 886A, Comment d.

(d) Statute of Limitations applicable-contribution is governed by five (5) year statute of limitations for unwritten contracts under Iowa Code, Section 614.1(4), in that contribution is based on an implied contract arising by an operation of law. (See Furnish, Distribution Tort Liability: Contribution and Indemnity in Iowa, 52 Iowa L. Rev. 31, 53 (1966); also see 53 ALR3d 927), but if indemnity is defense to claim of contribution, note various statutes of limitations depending on type of indemnity, supra.

D. Effect of Settlement

1. When all joint tortfeasors enter into settlement:

(a) No claim for contribution survives.

(b) Joint-tortfeasors may effect comparative fault settlement between themselve on basis of comparative fault and ability to pay v. judgment proof.

(c) Dissatisfied tortfeasor with greater share of payment cannot later seek contribution from joint tortfeasors after agreed-upon settlement has been made with injured party.

2. When one tortfeasor enters into settlement and obtains total release as to all tortfeasors (full release)

(a) Settlement with one tortfeasor settles claim with all. " . . . (I)f the claim is satisfied as to the release, it is thereby satisfied by operation of law against all others who may be or may be claimed to be liable for the same injury. Dungy v. Benda, 102 NW2d 170, 176.

(b) Right of contribution exists against non-participating tortfeasors in same manner as if settling tortfeasor had paid a judgment in court. Allied Mutual Casualty Company v. Long, 252 Iowa 829, 833, 107 NW2d 682, 684.

3. When one tortfeasor enters into settlement and obtains less than a total release for sum short of full satisfaction or received an agreement which does not release the injured party's tort claim against other joint tortfeasors (covenant not to sue).

(a) Payment short of full satisfaction results in pro tanto discharge of injured party's claim.

(1) Amount of payment of settling joint tortfeasor and additional amounts paid to injured party to make him whole should be totaled to determine amount of loss.

(2) Each joint tortfeasor is credited with amount he had already paid to the injured party.

(b) Contribution must be made by joint tortfeasor only to the extent that his share of the total liability exceeded the amounts he has already paid to the injured party.

(c) If joint tortfeasor has already paid more than his share, he should be reimbursed by other joint tortfeasor in the amount of the excess. Seymour v. Chicago and Northwestern Ry., 255 Iowa 780, 124 NW2d 157.

III. Removal of Defenses to Common Liability between Joint Tortfeasors.

A. Interspousal Immunity

1. Old result--The driver and owner of an automobile involved in a collision had no right to contribution from the first driver, where the driver of the automobile in which the injured plaintiffs were riding as passengers was not liable to the plaintiffs because of marital immunity. Blunt v. Brown (D.C. Iowa) 225 F. Supp. 326.

2. Abrogation of Doctrine of Interspousal Immunity. Shook v. Crabb, 281 NW2d 616.

3. Hypothetical examples.

B. Iowa Guest Statute

1. Section 321A.494, Code of Iowa, afforded negligent host-driver immunity from liability for contribution to a third party tortfeasor. Shonka v. Campbell, 152 NW2d 242, 26 ALR3d 1274. (See also 26 ALR3d 1283 at Seq.)

2. Abrogation of Guest Statute (Section 321.494, Code of Iowa) Bierkamp v. Rogers, 293 NW2d 577

3. Hypothetical examples

IV. Contribution and Comparative Negligence

A. Impact of Fuller v. Buhrow, 292 NW2d 672

1. Analysis of Fuller opinion:

(a) Whether doctrine of contributory negligence should be abrogated and replaced by comparative negligence.

(1) In favor - 5 (Allbee, Larson, Uhlenhopp, Reynoldson, McCormick)

(2) Against or no opinion - 4 (Harris, McGiverin, LeGrand, Rees)

(b) Whether the Legislature should adopt the comparative negligence standard by statute, or whether the Court should adopt comparative negligence by common law rule, (Justice Rees has since retired).

(1) In favor of legislative action - 6 (McGiverin, LeGrand, Allbee, Harris, Rees, Larson)

(2) In favor of court action - 2 (Reynoldson, McCormick)

2. Rational connection between adoption of comparative negligence standard and alteration of pro-rata apportionment rule in contribution.

(a) Adoption of comparative negligence standard would foster greater equity and more precise allocation of fault between tort-feasors.

(b) "If the doctrine(of contribution) 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 cause of 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 tortfeasor 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 was found 5% causally negligent should be required to pay 50% of a loss by way of reimbursement to the co-tortfeasor who is 95% negligent." Bielski v. Schulze,(Wisconsin, 1962) 114 NW2d 105, 109.

B. Types of proposed changes

1. Common law decision as model, Bielski v. Schulze, (Wisconsin, 1962) 114 NW2d 105.

2. Statute as model - Uniform Comparative Fault Act:

(a) Section 4 (right of contribution) "(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with the claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable."

(b) Section 2 (apportionment of damages) "(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) The percentage of the total fault of all the parties to each claim that is alleged to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose, the Court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the tryer of facts shall consider both the nature of the conduct of each party at fault

and the extent of the causal relation between the conduct and the damages claimed.

(c) . . . For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than (one year) after judgment is entered, the Court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The parties whose liability is reallocated is none the less subject to contribution and to any continuing liability to the claimant on the judgment."

3. Hypothetical examples.

The considerable assistance of Christopher Cogley of the Iowa Bar in the preparation of this material is acknowledge gratefully.

CONFLICTS OF INTEREST

(Insurance Defense Litigation)

Donald P. Catterall
Seitzinger, Morain & Catterall
Des Moines, Iowa

I: The Basis of the Problem.

A. Attorney's relationship with insurer is contractual.

B. Attorney's relationship with insured.

II: Conflicts at Different Stages or Times of Attorney's Representation.

III: Legal Basis of Lawyer's Liability

A. Based upon Bad Faith or Upon Malpractice
Lysick vs. Walcom (1968) 258 Cal. App. 2d 136, 65.
36 Insurance Counsel Journal 51, 57 (1969).
Keeton, "Ancilary Rights of the Insured Against His Liability Insurer," 13 Vanderbilt Law Review, No. 4, 28 Insurance Counsel Journal, 395 (1961).

IV: Attorney Discovering Facts Which Will Jeopardize the Insured's Coverage.

Allstate Insurance Company vs. Keller, 17 Ill. App. 2d 44, 149 N.E. 2d 482, 486.

V: Is There Confidentiality Between Defense Counsels to Clients as to Communication.

Henke, 87 N.W. 2d 920.

VI: May Insurer's Counsel Representing an Insured Under a Non-Waiver Take the Position in Trial Against Insureds Being Covered by the Insurer.

Crum vs. Anchor Casualty Company, 119 N.W. 2d 703.
The attorney may not be permitted to take a position adverse to the interests of his client.

VII: Duties of an Insurer and Its Counsel Where the Petition Fails to State a Cause of Action That is Covered by the Policy, but an Independent Investigation Indicates There is Coverage.

Crum vs. Anchor Casualty Company Supra

VIII: Petition Alleges a Cause of Action Within the Coverage of an Insurance Policy, but Insured Admits to Insurer Facts Showing No Coverage.

Weis vs. State Farm Mutual, 64 N.W. 2d 366.

IX: Duties of an Insurer Seeking to Avoid the Obligation to Defend Its Insured.

Prahm vs. Rupp Construction Company, 277 N.W. 2d 389 Minn. (1979). Lanoue vs. Firemen's Fund American Companies, 278 N.W. 2d 49.

X: Can the Insured Sue the Defense Lawyer for Settling a Claim.

Rogers vs. Robson, Masters, Ryan, Brumund, and Belom, 392 N.E. 2d 1365 Ill. (1979). The Court held that the defense firm could be liable because they had a conflict of interest and had violated the duty that they owed to the insured.

XI: Where Insured Undertakes to Appeal an Adverse Judgment, Is It Liable for the Failure of Its Attorney to Do So.

Peterson vs. Farmers Casualty Company, 226 N.W. 2d 226, Iowa (1975). Lulling the insured into a sense of security, the insurer was not immune from liability to the insured for any damage to the insured arising from the attorney's negligent failure to perfect the appeal.

XII: Is the Negligence of the Attorney Imputable to the Insured That Would Defeat the Insured's Claim Against the Insurer.

Peterson vs. Farmers, Supra.

XIII: Can Anyone Not Having a Contractural Relationship With an Attorney Complain of Impropriety in Representing Conflicting Interests.

Forecki, 295 N.W. 7. The Court said, "Only a party who sustains a relation of client to an attorney who undertakes to represent conflicting interests may be entitled to object to such representation.

XIV: May Insurance Defense Counsel, After Terminating the Tripartite Relationship Represent the Insurer in Subsequent Litigation With the Insured.

Moritz , 428 F. Sup. 865 Wis. (1977). One of the basic reasons precluding adverse representation is the risk of a breach of confidence.

XV: Representing Multiple Defendants.

Guiding Principles #8, Spindle vs. Chub-Pacific Indemnity Group, 152 Cal. Rptr. 776 (APP. 1979). The Court held: That facts did not, per se, constitute conflict of interest.

APPENDIX

LIABILITY INSURERS†

GUIDING PRINCIPLES

I. GENERAL STATEMENT

Under a policy providing liability insurance, the company has a direct financial interest in any claim presented against its insured which the company may be obligated to defend or pay, and in any suit on such claim, whether or not the company is named as a party. The company has the right to have counsel of its own choice to defend this interest. So long as no conflict of interests exists, that counsel also represents the insured. If and when representation of the company by its attorney conflicts with the interest of the insured, the company and its attorney are under a duty to inform the insured of such conflict and to invite him to retain his own counsel at his own expense.

II. CLAIM OR SUIT IN EXCESS OF LIMITS

In any claim where there is a probability that the damage will exceed the limits of the policy and the company has retained counsel to defend the claim, or in any suit in which the prayer of the complaint exceeds the limit of the policy, or in which there is an unlimited or indefinite prayer for damages and a probability that the verdict may exceed the coverage limit, the company or its attorney should timely inform the insured of the danger of exposure in excess of the limit of the policy. The insured should be invited to retain additional counsel at his own expense to advise him with respect to that exposure. So long as the financial interest of the company in the outcome of the litigation continues, the company retains the exclusive right to control and conduct the defense of the case, in good faith, subject to the right of the insured or such additional attorney to participate.

III. SETTLEMENT NEGOTIATIONS IN CLAIMS OR SUITS WITH EXCESS EXPOSURE

In any claim where there is a probability that the damage will exceed the limit of the policy and the company has retained counsel to defend the claim, or in any suit in which it appears probable that an amount in excess of the limit of the policy is involved, the company or its attorney should inform the insured or any additional attorney retained by the insured at his own expense of significant settlement negotiations, whether within or beyond the limits of the policy. Upon request the insured, or such additional attorney, shall be entitled to be informed of all settlement negotiations. The company shall, upon request, make available to the insured or such additional attorney all pertinent factual information the company and its attorney may have for evaluation by the insured or such additional attorney.

IV. CONFLICTS OF INTEREST GENERALLY—DUTIES OF ATTORNEY

In any claim or in any suit where the attorney selected by the company to defend the claim or action becomes aware of facts or information which indicate to him a question of coverage in the matter being defended or any other conflict of interest between the company and the insured with respect to the defense of the matter, the attorney should promptly inform both the company and the insured, preferably in writing, of the nature and extent of the conflicting interest. In any such suit, the company or its attorney should invite the insured to retain his own counsel at his own expense to represent his separate interest.

V. CONTINUATION BY ATTORNEY EVEN THOUGH THERE IS A CONFLICT OF INTERESTS

Where there is a question of coverage or other conflict of interest, the company and the attorney selected by the company to defend the claim or suit should not thereafter continue to defend the insured in the matter in question unless, after a full explanation of the coverage question, the

† The House of Delegates of the American Bar Association on February 7, 1972 approved "Guiding Principles" previously adopted by the National Conference of Lawyers and Liability Insurers on May 22, 1969. Between that time and the end of 1971 the "Guiding Principles" were accepted by each of the major casualty and liability insurance companies in the United States. Action of the ABA House of Delegates followed on February 7, 1972.

insured acquiesces in the continuation of such defense.

If the insured acquiesces in the continuation of the defense in the pending matter following a reservation of rights by the company or under an agreement that the rights of the company and the insured as to the coverage question are not waived or prejudiced, the company retains the exclusive right to control and conduct the defense of the case in good faith, subject to the right of the insured or the additional attorney acting at the expense of the insured to participate.

If the insured refuses to permit the insurance company and the attorney selected by the company to defend the claim or suit to continue the defense of the pending matter while reserving the rights of the company and of the insured as to the coverage question, or if the full protection of the separate interests of the insured and the company requires inconsistent contentions which cannot be presented in a common defense of the pending matter, the insurance company or the insured should seek other procedures to resolve the coverage question.

If facts or information indicating to the attorney a lack of coverage for the insured should first come to the attention of the attorney after the trial of the lawsuit has begun, the attorney should at the earliest opportunity inform and advise the insured and the company of the possible conflicting interests of the insured and the company. The attorney should further seek to provide both the insured and the company with time and the opportunity to consider the possible conflict of interests and to take appropriate steps to protect their individual interests.

VI. DUTY OF ATTORNEY NOT TO DISCLOSE CERTAIN FACTS AND INFORMATION

Where the attorney selected by the company to defend a claim or suit becomes aware of facts or information, imparted to him by the insured under circumstances indicating the insured's belief that such disclosure would not be revealed to the insurance company but would be treated as a confidential communication to the attorney, which indicate to the attorney a lack of coverage, then as to such matters, disclosures made directly to the attorney, should not be revealed to the company by the attorney nor should the attorney discuss with the insured the legal significance of the disclosure or the nature of the coverage question.

VII. COUNTERCLAIMS

In any suit where the company or the attorney selected by the company to defend the suit becomes aware that the insured may have a claim for damages against another party to the lawsuit, which is likely to be prejudiced or barred unless it is asserted as a counterclaim in the pending action, the insured should be advised that the pending suit may affect or impair such claim; that the insurance policy does not provide coverage for any legal services or advice as to such claim; and that the insured may wish to consult an attorney of his choice with respect to it.

VIII. SUIT INVOLVING MORE THAN ONE INSURED IN THE SAME COMPANY

If the same company insures two or more parties to a lawsuit, whose interests are diverse, the complete factual investigation made by the company should be made available to each insured or his attorney with the exception that any statement given by one insured or his employees shall not voluntarily be given to any other party to the litigation whose interest may be adverse to such insured or to any attorney representing such other party.

The company should employ separate attorneys not associated with one another to defend each insured against whom any suit is brought, if the interest of one such insured is diverse from or in conflict with that of any other insured; and all insureds should be informed by the company of the fact that it insures the liability of the others and the method being employed to handle the litigation.

IX. WITHDRAWAL

In any case where the company or the attorney selected by the company to defend the suit decides to withdraw from the defense of the action brought against the insured, the insured should be fully advised of such decision and the reasons therefor; and every reasonable effort should be made to avoid prejudice to or impairment of the rights of the insured.

NOTES

X. UNINSURED MOTORIST COVERAGE

The company should employ separate attorneys not associated with one another to defend the company against a claim by the insured under the Uninsured Motorist Coverage, and to defend the insured in any suit brought against the insured arising out of the same accident. If the controversy regarding the Uninsured Motorist Coverage has been disposed of before a lawsuit has been commenced against the insured, the same attorney who defended the company in the first instance could represent the insured in the later lawsuit.

Any statement made by the insured to the company with respect to the defense of any claim made against him arising out of the same accident should not be used against the insured in order to defeat the insured's claim under the uninsured motorist coverage.

NOTE: This coverage is a part of the automobile liability policy and pays the insured (the owner or operator of the insured car) for damages for bodily injury that he would be entitled to recover from an uninsured motorist. Any dispute between the insured and the company regarding negligence, contributory negligence and damages under this coverage is subject to arbitration, unless arbitration is barred by local law. If a suit arising out of the same accident is pending against the insured while the insured is at the same time seeking a recovery from the company under the Uninsured Motorist Coverage, the company is faced with a conflict of interest because in order to defeat the insured's claim, the company may wish to contend that the insured was guilty of negligence or contributory negligence while at the same time in order to defeat the claim against the insured, the company may wish to contend that the insured was blameless. Such a conflict arises out of the very nature of the combination of coverages.

WHEN CORPORATIONS CHOOSE COUNSEL

By Donald C Byers

A. Understanding the role of the law department.

1. Proliferation of laws, regulations and expectations of society.

a. Means the creation of more law business.

b. Who will handle it and how.

(1) Growth of law departments.

(2) Relative expense of inside vs. outside counsel.

2. The general counsel and staff have become an action point.

a. They are the ones to whom outside counsel must relate.

b. Gone are the days of getting to know the chairman of the board and working with the president. Now it is the general counsel.

3. A law department is a major element of the business organization.

a. General counsel reports directly to the C.E.O. in most instances.

b. Days of episodic relationships with laws and regulations are past.

c. The in-house counsel is the principal contact with the outside law firm.

d. Its capability and role must be a standard at least as high as the more traditional departments.

e. An integral part of the executive team and attends board meetings.

f. Recognize, even so, there is an uneasy acceptance by executives of the role of the law.

4. General counsel has to be a generalist.

a. Constantly alert and sensitive to the needs of the corporation. Gets involved early.

b. Must know where the potential trouble spots may be.

c. Objective is to develop a preventative system to avoid or minimize trouble.

d. Has duties not just to management, but also to the board of directors and to shareholders.

5. When must he go outside?

a. Major litigation because of advantages of local counsel.

(1) Knowledge of local court practices, judges and opposing counsel.

(2) Knowledge of jurors and jurors more likely to respond favorably to local counsel.

b. Special expertise on unusual problems.

c. Matters of great complexity.

d. Peaks and valleys.

6. General counsel now a shopper.

a. Expertise

b. Efficiency

c. Billing rates

7. Relationship expectations.

a. Help in in-house staff development.

b. Do not keep close to vest.

c. Treat house counsel as professional equals.

B. Selection procedure.

1. Determine expertise needed for the particular problem.

2. Selection is of the individual attorney rather than firm.

3. Match needs with the degree of experience and skill of outside counsel.

4. Initially ask others who they would use in an area until two or more recommend the same individual.

5. Contact person recommended and determine:

   a. Availability and lack of conflict of interest.

   b. Whether it would be handled personally.

   c. If there is a willingness to provide references from recent similar work.

6. Check references provided.

7. If a significant matter, personally interview before retention.

C. Retention and understanding.

1. Provide suggestions in a litigated matter to be considered by retained attorney. (see Attachment #1)

2. Indicate importance of monthly or at least regular billings. (No up front retainer or contingency fees)

3. Emphasize law department member involvement in every stage of the matter.

4. Again, state matter may not be delegated, but may involve a capable assistant.

D. Ongoing relationship.

1. Establish that the attorney's expertise will be honored and that he or she makes all of the final decisions on strategy, handling, etc.

2. Law department is to be the only contact with the corporation.

3. Law department will establish a detailed docket on the matter for the purpose of recording proceedings, follow-ups and reports to management.

4. Consultation in advance, when possible, on all items of significance with house counsel.

5. Discuss whether all-out preparation is in order or whether it should be delayed.

6. Examine whether settlement is desirable and at what stage.

7. Provide at the earliest practicable time a thorough and objective evaluation of the case.

8. Take advantage of house counsel's superior knowledge of the corporation, its people and, in most instances, the nature of the problem.

   a. Example - knowledge of product in a strict liability case.

   b. Likelihood that house counsel has worked a similar case.

9. Keep preparations up to date to put other side on the defense and to avoid creating unnecessary crises.

10. Evaluate, when present, the problem of co-defendants so as to gain their confidence and cooperation.

11. Be sensitive to needs to work efficiently and without unnecessary cost.

12. Communicate developments promptly, whether favorable or adverse.

13. Avoid delays in proceedings, unless strategy suggests otherwise, because corporations are <u>do-it-now</u> organizations.

14. Sketch out the witnesses needed, including experts, at a very early time and involve in-house counsel in the selection. Interview as necessary.

15. Determine the need for exhibits, demonstrations, films, etc., during early stages of preparation.

16. Win, lose or draw, treat adversaries, court and jury with courtesy and respect.

E. What of settlement?

1. It is a rare case that doesn't have a settlement value, even if it is only cost of defense, because economics carry great weight.

2. Should always be considered in connection with any case evaluation.

3. A settlement, when structured, should never be easy or attractive to the opposing side.

4. There should be a stipulation that settlement should not be publicized by the parties.

5. Good settlements are forged, in our experience, from thorough preparations and aggressive tactics.

6. The precedent setting characteristics of a settlement should always be considered.

F. Closing the case after trial or settlement.

1. Retained counsel should deliver recommendations on:

a. Preparation of case.

b. Quality of witnesses.

c. Degree and quality of help and cooperation from house counsel and company.

d. Any weaknesses in the company position that can be corrected or improved upon.

2. Company will close file and request the outside attorney to retain all necessary information for furture reference.

G. Final steps.

1. Complete a simple form (Attachment #2) to evaluate outside counsel's performance on litigation, or other matter.

2. Qualities judged are thoroughness or preparation, cooperativeness, promptness, professionalism, results and interpersonal relationships.

3. Sources of evaluation are detailed dockets maintained in the law department and the notes of house counsel.

MAYTAG SUGGESTIONS FOR RETAINED ATTORNEY

In our ongoing relationship with retained attorneys, certain questions or concerns tend to be repeated. The following represent our views on some of these, but we want you to know that we would be interested in any comments that you may have concerning them.

1. Billings:

   a. The company prefers to receive monthly billings for any month in which significant services were rendered. Should a matter drag on with little work being done, it would be acceptable to bill less frequently.

   b. It is important to show the number of hours worked and a brief description of the work done.

   c. If you represent the company in more than one case, it is requested that each billing list the individual case or cases covered by the billing, and specify the number of hours and amount due applicable to each case.

2. During litigation:

   a. Consult with the company's attorney before any pleading is filed, discovery scheduled, or any other significant step is undertaken.

   b. Provide to the company attorney copies of all correspondence, pleadings, depositions, interrogatories, etc.

   c. If our insurance company is involved, provide to it the amount of information requested and at least that shown in "b" above.

   d. Give notice and proceed with discovery at the earliest practicable time, so that we have available a maximum of information before we are reached for discovery or the depositions of our people are scheduled. Circumstance may, of course, either vary this or make it impossible to accomplish.

3. Settlement negotiations:

   Although the company has an attitude of making it generally known that we are not an easy mark for the litigator, there are obviously situations where settlement is the wisest choice. When a settlement is in order, whether it is accomplished early or late, is a matter of judgment and we rely on the outside attorney. It should never be overlooked, however, that any settlement authority must be approved by the company's management.

4. Closing the case:

   a. Provide the necessary documentation for disposition.

   b. After the company attorney is satisfied with the disposition, he will close the company file and ask the outside attorney to retain the file in the case of future need for access. In some instances, it may be necessary to retain portions of files to satisfy government record-keeping regulations.

Attachment #2

EVALUATION OF COUNSEL ON LITIGATION

Case Name: _____

Date of Case - Beginning _____
Closing _____

Attorney Firm (Attorney handling) _____

_____

Comments: _____

_____

_____

_____

COMPUTERIZED LEGAL RESEARCH — WESTLAW

By Frank Loomis, Bloomington, Minnesota

I. Concept

(A) Central computer containing caselaw.
(B) The Computer's information may be accessed with a telephone and a terminal in the office.
(C) The terminal consists of three components
  1. Display screen which displays the cases retrieved by the computer.
  2. Keyboard similar to a typewriter which allows the user to transmit information to the computer.
  3. Printer which prints any material displayed on the screen.

II. Benefits

(A) The user acquires a massive library that is always expanding.
(B) The user may use a descriptive word and phrase approach to extract caselaw from the computer.
(C) The user may use the West keynumber system to obtain caselaw.

III. Westlaw Databases

(A) Presently available:
  1. U. S. Supreme Court Reporter from 1932 (full text and headnotes).
  2. Federal Reporter from 1961 (full text and headnotes).
  3. Federal Supplement Reporter from 1961 (full text and headnotes).
  4. All states from at least 1967 (being expanded to include full text in addition to the headnotes currently online; 27 states have now been expanded to full text from at least 1967).
  5. West Bankruptcy Reporter (full text and headnotes).
  6. Shepard's Citations.
(B) Future databases
  1. The U. S. Code (this Fall).
  2. Federal Tax (this Fall).
  3. Slip opinions for federal cases.

IV. Westlaw Search Techniques

(A) Descriptive word and phrase search against the full text of the court's opinion.
(B) Keynumber search.
(C) Descriptive word and phrase search against headnotes only in order to limit the word scan to points of law.
(D) Descriptive word and phrase search within a specific subject area (West topic).
(E) The opinions of a state, circuit court of appeals, judge or year.
(F) Any combination of the above.

V. The Equipment

(A) Terminal and printer may be leased from West Publishing.
(B) Terminal and printer may be purchased.
(C) Several word processors function as Westlaw terminals.

VI. Cost

(A) Equipment
    1. Terminal, printer and phone line leased from West Publishing is $375.00 per month.
    2. Terminal and printer may be purchased for approximately $2,800.00. Phone line leases for approximately $80.00 per month.
    3. Purchase price of word processor plus approximately $80.00 per month for phone line.
(B) Online time is $75.00 per house, billed in increments of seconds.
    1. One hour minimum if equipment is leased from West Publishing.
    2. Three hour minimum if user supplies equipment.
(C) Training fee is $200.00 per day which will train up to 8 people.
(D) There are no start up fees, installation fees, subscription fees, or search surcharges.

VII. Other available Databases

(A) Disclosure (Dialog).
(B) Index to legal periodicals beginning in 1980 (Dialog).
(C) New York Times Information Service.
(D) Medline.
(E) Many other sources of information dealing with a wide variety of subjects.

IOWA'S NEW CLASS ACTION LAW

By Professor Allan D Vestal

IN THE MATTER OF THE RULES OF CIVIL PROCEDURE) REPORT OF THE SUPREME COURT

TO THE 1980 REGULAR SESSION OF THE SIXTY-EIGHTH GENERAL ASSEMBLY OF THE STATE OF IOWA:

Pursuant to sections 684.18(1) and 684.19, The Code, the Supreme Court of Iowa has prescribed and hereby reports to the General Assembly changes in existing Rules of Civil Procedure as follows:

Rule 42.

That rule 42 be stricken and the following new rules 42.1 through 42.20 be substituted:

"42.1. COMMENCEMENT OF A CLASS ACTION.

One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:

(1) the class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable; and

(2) there is a question of law or fact common to the class.

"42.2. CERTIFICATION OF CLASS ACTION.

(a) Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be

maintained as a class action and by order certify or refuse to certify it as a class action.

(b) The court may certify an action as a class action, if it finds that (1) the requirements of rule 42.1 have been satisfied, (2) a class action should be permitted for the fair and efficient adjudication of the controversy, and (3) the representative parties fairly and adequately will protect the interests of the class.

(c) If appropriate, the court may (1) certify an action as a class action with respect to a particular claim or issue, (2) certify an action as a class action to obtain one or more forms of relief, equitable, declaratory, or monetary, or (3) divide a class into subclasses and treat each subclass as a class.

"42.3. CRITERIA CONSIDERED.

(a) In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under rule 42.2(c), the court shall consider, and give appropriate weight to, the following and other relevant factors:

(1) whether a joint or common interest exists among members of the class;

(2) whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would

establish incompatible standards of conduct for a party opposing the class;

(3) whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;

(4) whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole;

(5) whether common questions of law or fact predominate over any questions affecting only individual members;

(6) whether other means of ajudicating the claims and defenses are impracticable or inefficient;

(7) whether a class action offers the most appropriate means of adjudicating the claims and defenses;

(8) whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;

(9) whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding;

(10) whether it is desirable to bring the class action in another forum;

(11) whether management of the class action poses unusual difficulties;

(12) whether any conflict of laws issues involved pose unusual difficulties; and

(13) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

(b) In determining under rule 42.2(b) that the representative parties fairly and adequately will protect the interests of the class, the court must find that:

(1) the attorney for the representative parties will adequately represent the interests of the class;

(2) the representative parties do not have a conflict of interest in the maintenance of the class action; and

(3) the representative parties have or can acquire adequate financial resources, considering rule 42.17, to assure that the interests of the class will not be harmed.

"42.4. ORDER ON CERTIFICATION.

(a) The order of certification shall describe the class and state: (1) the relief sought, (2) whether the action is maintained with respect to particular claims or issues, and (3) whether subclasses have been created.

(b) The order certifying or refusing to certify a class action shall state the reasons for the court's ruling and its findings on the facts listed in rule 42.3(a).

(c) An order certifying or refusing to certify an action as a class action is appealable.

(d) Refusal of certification does not terminate the action, but does preclude it from being maintained as a class action.

"42.5. AMENDMENT OF CERTIFICATION ORDER.

(a) The court may amend the certification order at any time before entry of judgment on the merits. The amendment may (1) establish subclasses, (2) eliminate from the class any class member who was included in the class as certified, (3) provide for an adjudication limited to certain claims or issues, (4) change the relief sought, or (5) make any other appropriate change in the order.

(b) If notice of certification has been given pursuant to rule 42.7, the court may order notice of the amendment of the certification order to be given in terms and to any members of the class the court directs.

(c) The reasons for the court's ruling shall be set forth in the amendment of the certification order.

(d) An order amending the certification order is appealable. An order denying the motion of a member of a defendant class, not a representative party, to amend the certification order is appealable if the court certifies it for immediate appeal.

"42.6. JURISDICTION OVER MULTI-STATE CLASSES.

(a) A court of this state may exercise jurisdiction over any person who is a member of the class suing or being sued if:

(1) a basis for jurisdiction exists or would exist in a suit against the person under the law of this state; or

(2) the state of residence of the class member, by class action law similar to subdivision (b), has made its residents subject to the jurisdiction of the courts of this state.

(b) A resident of this state who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this state.

"42.7. NOTICE OF ACTION.

(a) Following certification, the court by order, after hearing, shall direct the giving of notice to the class.

(b) The notice, based on the certification order and any amendment of the order, shall include:

(1) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

(2) a statement of the right of a member of the class under rule 42.8 to be excluded from the action by filing an election to be excluded, in the manner specified, by a certain date;

(3) a description of possible financial consequences on the class;

(4) a general description of any counterclaim being asserted by or against the class, including the relief sought;

(5) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

(6) a statement that any member of the class may enter an appearance either personally or through counsel;

(7) an address to which inquiries may be directed; and

(8) other information the court deems appropriate.

(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if his identity and whereabouts can be ascertained by the exercise of reasonable diligence.

(e) For members of the class not given personal or mailed notice under subdivision (d), the court shall provide, as a minimum, a means of notice reasonably calculated to apprise the

members of the class of the pendency of the action. Techniques calculated to assure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups.

(f) The plaintiff shall advance the expense of notice under this rule if there is no counterclaim asserted. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.

(g) The court may order that steps be taken to minimize the expense of notice.

"42.8. EXCLUSION.

(a) A member of a plaintiff class may elect to be excluded from the action unless (1) he is a representative party, (2) the certification order contains an affirmative finding under paragraph (1), (2), or (3) of rule 42.3(a), or (3) a counterclaim under rule 42.11 is pending against the member or his class or subclass.

(b) Any member of a plaintiff class entitled to be excluded under subdivision (a) who files an election to be excluded, in the manner and in the time specified in the notice, is excluded from and not bound by the judgment in the class action.

(c) The elections shall be made a part of the record in the action.

(d) A member of a defendant class may not elect to be excluded.

"42.9. CONDUCT OF ACTION.

(a) The court on motion of a party or its own motion may make or amend any appropriate order dealing with the conduct of the action including, but not limited to, the following: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given as the court directs, of (i) any step in the action, (ii) the proposed extent of the judgment, or (iii) the opportunity of members to signify whether they consider the representation fair and adequate, to enter an appearance and present claims or defenses, or otherwise participate in the action; (3) imposing conditions on the representative parties or on intervenors; (4) inviting the attorney general to participate with respect to the question of adequacy of class representation; (5) making any other order to assure that the class action proceeds only with adequate class representation; and (6) making any order to assure that the class action proceeds only with competent representation by the attorney for the class.

(b) A class member not a representative party may appear and be represented by separate counsel.

"42.10. DISCOVERY BY OR AGAINST CLASS MEMBERS.

(a) Discovery may be used only on order of the court against a member of the class who is not a representative party or who has not appeared. In deciding whether discovery

should be allowed the court shall consider, among other relevant factors, the timing of the request, the subject matter to be covered, whether representatives of the class are seeking discovery on the subject to be covered, and whether the discovery will result in annoyance, oppression, or undue burden or expense for the member of the class.

(b) Discovery by or against representative parties or those appearing is governed by the rules dealing with discovery by or against a party to a civil action.

"42.11. COUNTERCLAIMS.

(a) A defendant in an action brought by a class may plead as a counterclaim any claim the court certifies as a class action against the plaintiff class. On leave of court, the defendant may plead as a counterclaim a claim against a member of the class or a claim the court certifies as a class action against a subclass.

(b) Any counterclaim in an action brought by a plaintiff class must be asserted before notice is given under rule 42.7.

(c) If a judgment for money is recovered against a party on behalf of a class, the court rendering judgment may stay distribution of any award or execution of any portion of a judgment allocated to a member of the class against whom the losing party has pending an action in or out of state for a judgment for money, and continue the stay so long as the losing party in the class action pursues the pending action with reasonable

diligence.

(d) A defendant class may plead as a counterclaim any claim on behalf of the class that the court certifies as a class action against the plaintiff. The court may certify as a class action a counterclaim against the plaintiff on behalf of a subclass or permit a counterclaim by a member of the class. The court shall order that notice of the counterclaim by the class, subclass, or member of the class be given to the members of the class as the court directs, in the interest of justice.

(e) A member of a class or subclass asserting a counterclaim shall be treated as a member of a plaintiff class for the purpose of exclusion under rule 42.8.

(f) The court's refusal to allow, or the defendant's failure to plead, a claim as a counterclaim in a class action does not bar the defendant from asserting the claim in a subsequent action.

"42.12. DISMISSAL OR COMPROMISE.

(a) Unless certification has been refused under rule 42.2, a class action, without the approval of the court after hearing, may not be (1) dismissed voluntarily, (2) dismissed involuntarily without an adjudication on the merits, or (3) compromised.

(b) If the court has certified the action under rule 42.2, notice of hearing on the proposed dismissal or compromise shall be given to all members of the class in a manner the court directs. If the court has not ruled on certification, notice of hearing on the proposed dismissal or compromise may be order-

ed by the court which shall specify the persons to be notified and the manner in which notice is to be given.

(c) Notice given under subdivision (b) shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, (1) any payments made or to be made in connection with the dismissal or compromise, (2) the anticipated effect of the dismissal or compromise on the class members, (3) any agreement made in connection with the dismissal or compromise, (4) a description and evaluation of alternatives considered by the representative parties and (5) an explanation of any other circumstances giving rise to the proposal. The notice also shall include a description of the procedure available for modification of the dismissal or compromise.

(d) On the hearing of the dismissal or compromise, the court may:

(1) as to the representative parties or a class certified under rule 42.2, permit dismissal with or without prejudice or approve the compromise;

(2) as to a class not certified, permit dismissal without prejudice;

(3) deny the dismissal;

(4) disapprove the compromise; or

(5) take other appropriate action for the protection of the class and in the interest of justice.

(e) The cost of notice given under subdivision (b) shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

"42.13. EFFECT OF JUDGMENT ON CLASS.

In a class action certified under rule 42.2 in which notice has been given under rule 42.7 or 42.12, a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class who has not filed an election of exclusion under rule 42.8. The judgment shall name or describe the members of the class who are bound by its terms.

"42.14. COSTS.

(a) Only the representative parties and those members of the class who have appeared individually are liable for costs assessed against a plaintiff class.

(b) The court shall apportion the liability for costs assessed against a defendant class.

(c) Expenses of notice advanced under rule 42.7 are taxable as costs in favor of the prevailing party.

"42.15. RELIEF AFFORDED.

(a) The court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary, or other relief to individual members of the class or the class in a lump sum or installments.

(b) Damages fixed by a minimum measure of recovery provided by any statute may not be recovered in a class action.

(c) If a class is awarded a judgment for money, the distribution shall be determined as follows:

(1) The parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.

(2) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed.

(3) The court may order steps taken to minimize the expense of identification.

(4) The court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant.

(5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.

(6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willful-

ness on the part of the defendant; (iii) the impact on the defendant of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.

(7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

(8) Any amount to be distributed to a state shall be distributed as unclaimed property to any state in which are located the last known addresses of the members of the class to whom distribution could not be made. If the last known addresses cannot be ascertained with reasonable diligence, the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state, the court shall give written notice of its intention to make distribution to the attorney general of the state of the residence of any person given notice under rule 42.7 or 42.12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.

"42.16. ATTORNEY'S FEES.

(a) Attorney's fees for representing a class are subject to control of the court.

(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney's fees from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class.

(c) If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney's fees and litigation expenses of the class to be paid from the recovery.

(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney's fees and litigation expenses if permitted by law in similar cases not involving a class or the court finds that the judgment has vindicated an important public interest. However, if any monetary award is also recovered, the court may allow reasonable attorney's fees and litigation expenses only to the extent that a reasonable proportion of that award is insufficient to defray the fees and expenses.

(e) In determining the amount of attorney's fees for a prevailing class the court shall consider the following factors:

(1) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

(2) results achieved and benefits conferred upon the class;

(3) the magnitude, complexity, and uniqueness of the litigation;

(4) the contingent nature of success;

(5) in cases awarding attorney's fees and litigation expenses under subdivision (d) because of the vindication of an important public interest, the economic impact on the party against whom the award is made; and

(6) appropriate criteria in the Iowa Code of Professional Responsibility for Lawyers.

"42.17. ARRANGEMENTS FOR ATTORNEY'S FEES AND EXPENSES. (a) Before a hearing under rule 42.2(a) or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately: (1) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts; (2) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees and (3) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts

with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

(b) Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be defrayed by the representative parties or by other available sources, the court by order may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, advances by the attorneys or others, or both, subject to reimbursement from any recovery obtained for the class. The court may order any available funds so contributed or advanced to be applied to the payment of any costs taxed in favor of a party opposing the class.

"42.18. STATUTE OF LIMITATIONS.

The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

(1) upon his filing an election of exclusion;

(2) upon entry of an order of certification, or of an amendment thereof, eliminating him from the class;

(3) except as to representative parties, upon entry of an order under rule 42.2 refusing to certify an action as a class action; and

(4) upon dismissal of the action without an adjudication on the merits.

"42.19. UNIFORMITY OF APPLICATION AND CONSTRUCTION:

Rules 42.1 through 42.20 shall be construed and applied to effectuate their general purpose to make uniform the law with respect to the subject of these rules among states enacting them.

"42.20. SHORT TITLE.

Rules 42.1 through 42.20 may be cited as the Uniform Class Actions Rules."

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ANNUAL APPELLATE DECISIONS REVIEW

OCTOBER 1979 - SEPTEMBER 1980

By Richard S. Fry
Shuttleworth & Ingersoll
Cedar Rapids, Iowa

APPEAL

As pertains to trial court rulings on Rule 105 Applications For Adjudication of Law Points, the appellate court will pass only on those issues argued to and passed upon by the trial court. Rule 105 does not limit subsequent reference or objection to those points of law already adjudicated. To preserve error, issue must be argued to and passed upon by the trial court in its ruling, or subsequent reference or objection made. Matter of Estate of Dodge, 281 NW2d 447 (Iowa, 1979).

APPEAL

Plaintiff commenced actions against defendants for breach of covenant not to compete. The actions were consolidated, bifurcated, and the issue of liability tried to the court. The court ruled favorably to plaintiff on liability but left determination of damages for later. Motions for new trial were filed and denied and all parties appealed. The Supreme Court dismissed all appeals on the basis it had no jurisdiction because no final order had been entered from which to appeal as the issue of damages remained for determination so the trial court had not finally disposed of the cases. The motions for new trial and ruling thereon could not in and of themselves provide the element of finality necessarily required for appeal. Decatur-Moline Corp. v. Blink, 283 NW2d 347 (Iowa, 1979)

APPEAL

Where appellee fails to file appellate brief, the court will not go beyond the ruling of the trial court in searching for a theory upon which to affirm its decision. The failure does not entitle appellant to reversal as a matter of right. Jefferson County v. Barton - Douglas Contractors, 282 NW2d 155 (Iowa, 1979)

APPEAL - JURISDICTION

Where jury returned verdict for plaintiff, defendant filed motion for judgment N.O.V. and Motion For New Trial, and trial court entered judgment N.O.V. but failed to rule on Motion For New Trial, plaintiffs filing of Notice of Appeal prior to ruling on Motion For New Trial was not premature and the Supreme Court had jurisdiction of appeal. Loudon v. Hill, 286 NW2d 189 (Iowa, 1979).

ARBITRATION

Plaintiff county commenced action against architectural firm, engineering firm, contractors and sureties because of its dissatisfaction over a project. The county had arbitration agreements with four of the eight defendants and only one sought to invoke the agreement. The country sought an injunction with regard to arbitration with the one seeking to invoke it and for damages. The trial court granted an injunction then dissolved and the Supreme Court on appeal stated that arbitration agreements failing to comply with Chapter 679, Iowa Code are governed by common law principles. The court refused to declare whether an executory arbitration agreement is revocable at any time, but declared the arbitration agreements here involved were not properly acknowledged, the court normally favors arbitration but in this case the policy of favoring joinder of claims, avoidance of piecemeal litigation and multiple proceedings with potential inconsistent results should control. The Supreme Court reversed the trial court, reinstating the injunction against arbitration. Jefferson County v. Barton Douglas Contractors, 282 NW2d 155 (Iowa, 1979).

ARBITRATION

Insured invoked arbitration clause in uninsured motorist provision of insurance policy which provided that if disagreement arose either party could demand arbitration to settle the matter. An arbitration proceeding was commenced and following the close of all evidence the insurance company unilaterally withdrew from the proceeding. The arbitrator then found for the insured who commenced action to enforce the arbitration decision, Insurance Company moved to dismiss and the trial court sustained the motion. On appeal the Supreme Court reversed holding (1) All requirements of Chapter 679 Iowa Code (Arbitration) were not met as the provision constituted agreement to arbitrate future dispute. (2) Under common law any party can withdraw from arbitration at any time prior to final decision. (3) Insured may compel enforcement of arbitration clause in his or her insurance policy and same is excepted from general common law rule. Court discusses changing attitude toward arbitration-note concurrences. Litchsinn v. American Interinsurance Exchange 287 NW2d 156 (Iowa, 1980).

ATTORNEY - CLIENT

Clabaugh was sued for $17,500 and entered into agreement with his defense counsel that counsel would be compensated for his services in defending the action on the basis of 1/3 contingent fee of any amount saved Clabough under the $17,500 prayer. The jury returned a verdict against Clabough in the amount of $1,750 and his counsel sent statement showing fee for services pursuant to agreement to be $5,250. Clabaugh refused to pay, the attorney commenced an action and the trial court entered judgment on that amount. On appeal the Supreme Court reversed, adopting the position of the committee on Professional Ethics and Conduct of the Iowa State Bar Association that a defense contingent fee contract in a tort action based upon a percentage of the difference between the prayer and the verdict is improper and void. The court noted, however, that its decision was without prejudice to counsel's right to obtain a reasonable fee from Clabaugh on a quantum merit basis.
Wunschel Law Firm P.C. v. Clabaugh, 291 NW2d 331 (Iowa, 1980).

CO-EMPLOYEES

Action by two co-employees against a third for injuries sustained on jobsite (Prior to amendment to Section 85.20 limiting co-employee liability to gross negligence). Defendant appealed jury verdicts for plaintiff and the Supreme Court affirmed holding (1) workers' compensation statute does not immunize persons other than the employer for liability, (2) an employee may be held individually liable for personal breach of delegated personal responsibility for safety (3) employee has duty of reasonable care toward co-employees whether any delegation of safety responsibility has occurred or not. (4) breach of a delegated duty requires proof of delegation and acceptance of a responsibility which results in a personal duty owed by the defendant to the injured person which is breached through personal as opposed to technical or vicarious fault.
Pease v. Zajja, 295 NW2d 43 (Iowa, 1980).

CONSORTIUM CLAIM

Plaintiff husband was injured when dragline came in contact with high voltage line. He and his spouse commenced an action, he to recover for injuries, and she to recover for loss of consortium. During the pendency of the case plaintiffs' marriage was dissolved. The dissolution decree did not preserve wife's right to maintain claim for loss of consortium. Defendant moved for directed verdict on wife's claim for this reason. The trial court overruled the motion. On appeal the Supreme Court held the trial court erred in failing to direct a verdict on the wife's claim. The court stated (1) consortium claim is a right acquired by marriage (2) entry of dissolution decree which fails to preserve the right to maintain a loss of consortium claim results in its forfeiture. Michael v. Harrison County Rural Elec. Co-op, 292 NW2d 417 (Iowa, 1980).

CONSUMER CREDIT - REGULATION Z

Consumer Credit transaction requires disclosures pursuant to Regulation Z and is subject to right of rescission Loan involved in this action was a consolidation loan of prior business and personal loans. The Supreme Court held that transactions in which ratio of private purpose funds to business purpose funds is only slightly greater than one to twelve is not primarily for personal purposes and Regulation Z is not applicable. Toy National Bank of Sioux City v. McGarr, 286 NW2d 376 (Iowa, 1979).

CONTINUANCE

Plaintiff was injured when a drag line came into contact with high voltage line and commenced action against the owner of the high voltage line. Prior to the July 1979 trial, plaintiff sought continuance on the grounds that an employee of defendant whose testimony was critical to plaintiff had recently had open heart surgery and would not be able to give testimony. Plaintiff contended that the witness was unwilling and hostile and while his deposition had been taken previously, plaintiff needed to confront him with documents and evidence coming to light since the deposition. The trial court had previously granted a continuance in April 1979 on the basis of the health of the witness but overruled this motion. On appeal, the Supreme Court affirmed stating (1) trial courts are granted broad discretion in ruling on motion for continuance and absent clearly shown abuse there will be no interference with ruling (2) the question was close here and the trial court would not have abused its discretion in ruling either way.
Michael v. Harrison County Rural Elec. Co-op. 292 NW2d 417 (Iowa, 1980).

CONTRACTS - DEFENSE OF UNCONSCIONABILITY

"The unconscionability defense originated in equity but is now generally available in contract actions at law. See 1 A. Corbin, Contracts § 128 (1963); 14 S. Williston, A. Treatise on the Law of Contracts § 1632 (3d ed. W. Jaeger 1972). A bargain is said to be unconscionable at law if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."

* * *

"We hold that the defense of unconscionablity is available in any contract action. The trial court erred in holding otherwise." Casey v. Lupkes, 286 NW2d 204 (Iowa, 1979).

DAMAGES

Adult children can recover loss of services and support in wrongful death action. Trial court should have instructed jury "services" does not include grief, mental anguish or suffering.
Iowa - Des Moines National Bank v. Schwerman , 288 NW2d 198 (Iowa, 1980).

DAMAGES -- COLLATERAL SOURCE RULE

Iowa Code Section 147.136 abrogates the collateral source rule in cases involving malpractice suits against designated health care providers. The trial court declared this statute unconstitutional as a violation of equal protection. On appeal, the Supreme Court held the statute was not unconstitutional.

As to the problem of proof of future receipt of collateral source benefits the court stated:

"Defendant established through an offer of proof that William was covered by social security, which has disability income features, and TIAA-CREF, a retirement plan of his employer, but the offer of proof was wholly lacking in any showing as to the circumstances and extent of payment of benefits. Although the jury had evidence of William's earnings, earning capacity and disability, which would permit it to make an award for reduction in earning capacity and future disability as authorized by the court's instructions, it would have no way to determine the conditions under which those losses might be reimbursed or the amounts which might be paid. Thus, assuming the alleged possible future benefits would otherwise constitute collateral payments under section 147.136, the record was inadequate to permit the jury to calculate them in order to exclude them from the verdict. Any finding by the jury regarding such benefits would rest on mere speculation. Therefore the trial court would not have been justified in permitting the jury to reduce the verdict by any amount based on the availability of reimbursement from collateral sources for future economic loss. Cf. Iowa-Des Moines National Bank v. Schwerman Trucking Co., 288 N.W.2d 198, 203-04 (Iowa 1980) (speculative evidence of elements of future economic loss will not support an instruction on such elements)."
Ruldoph v. Iowa Methodist Medical Ctr., 293 NW2d 550 (Iowa, 1980).

Note - 3 Justices dissented.

DAMAGES - INTEREST

Interest on award from date of fire loss may have been recoverable if properly pleaded, but if not prayed for, an award of interest from the time of the loss cannot be made.
Bosch v. Garcia, 286 NW2d 26 (Iowa, 1979)

DAMAGES - INTEREST

As to whether interest is assessed from date of death or date of verdict in death claim, the Supreme Court stated:

"The circumstances are different as to the death claim. Whether interest is allowable from the date of death or from the date of verdict depends upon the instruction as to how damages should be computed. If loss to the decedent's estate is computed as of the date of the verdict (as it was here), the interest is allowable only from that time."

Kuper v. Chicago North Western Trans. Co., 290 NW2d 903 (Iowa, 1980).

DISCOVERY

Defendant failed to adequately answer or supplement answers to Interrogatory seeking names of persons having knowledge of subject matter of action. At trial defendant sought to call two witnesses not listed. After some discussion, the trial court permitted the witnesses to testify. Plaintiff claimed this was error, to which the Supreme Court stated:

"The second problem is that plaintiff failed to make an adequate record to permit corrective action to be taken at trial. Plaintiff's remedy was to move for a continuance under Iowa R. Civ. P. 182(a) and sanctions under Iowa R.Civ.P. 134, including a request to prohibit defendants from introducing the testimony of those two witnesses. However, plaintiff did neither.

Based on the failure of plaintiff to preserve error, we can give no relief on his second assignment."

Blink v. McNabb, 287 NW2d 596, (Iowa, 1980)

DISCOVERY

Former employee commenced action against employer seeking recovery of "award" he claimed due him under a "suggestion" plan employer maintained. Employee requested inspection of employer's records. From this data, employee sought to show the benefit derived by employer because of his suggestion. Employer resisted on the grounds of lack of relevance and burden and inconvenience and the trial court refused the requested inspection. On appeal the Supreme Court held the trial court had abused its discretion with regard to the discovery request. The court noted a certain amount of inconvenience inheres in discovery and must be tolerated by the parties and pointed out employer should have sought a protective order which would permit the court to set reasonable limitations for the discovery and distribute the costs and burden between the parties. Pollock v. Deere and Co., 282 NW 2d 735 (Iowa, 1979).

DISCOVERY

Plaintiffs served requested admissions on defendants pursuant to Rule 127. Defendants objected to them and denied them for lack of information. Plaintiffs moved to determine the sufficiency of their response. The trial court overruled plaintiffs' motion but provided it could be raised again at the pre-trial conference. At the pre-trial conference, the motion was renewed and sustained and the trial court ordered reponses be filed within 20 days and if not so filed, the requests would be deemed admitted. Defendants unsuccessfully sought interlocutory appeal and some 50 days later filed responses. On motion by plaintiffs the responses were striken.

On appeal the Supreme Court held the trial court did not err in deeming the initial responses insufficient and did not abuse its discretion in ordering amended answers be filed. The court noted when the amended responses were not timely filed, the matters were deemed admitted by operation of law.
In re Eckman Estate, 291 NW2d 308 (Iowa, 1980).

DISMISSAL

Employee commenced two separate actions against employer both of which were dismissed for want of prosecution pursuant to Rule 215.1. Thereafter he commenced a third. All three actions, while varying slightly in allegations, were based on the same subject matter. Employer moved for Summary Judgment in the third action claiming the 215.1 dismissals constituted adjudication on the merits and the trial court sustained the motion. On appeal, the Supreme Court reversed holding a Rule 215.1 dismissal does not in and of itself bar the filing of a new action between the parties. Pollock v. Deere and Co. 282 NW2d 735 (Iowa, 1979)

DRAM SHOP

Plaintiff, a minor brought action against host driver and two establishments serving beer or intoxicating liquor for injuries sustained in collision. Plaintiff was 15 at time of collision, she failed to give the establishments notice of her intention to bring dram shop action within required six months (Section 123.93) and it was conceded her injuries did not prevent her from doing so. Dram shop defendants were granted summary judgment because of the failure to give timely notice. On appeal, the Iowa Supreme Court reversed stating:

"We hold that minority is incapacitating within the meaning of section 123.93. Therefore the dram shop notice period begins to run on the claim of an injured child only when the child comes of age or is earlier emancipated."

The court distinguished this case from the line of cases relating to incapacity under 613A.5 (Duty to give notice of tort claims against municipalities).
Ehlinger v. Mardorf, 285 NW2d 27 (Iowa, 1979)

EVIDENCE

In wrongful death action in Iowa, where awards are not subject to Federal Estate Taxes, fact of avoidance of taxation by reason of premature wrongful death is inadmissable as admissability of same would circumvent the collateral source rule.
Iowa Des Moines National Bank v. Schwerman, 288 NW2d 198 (Iowa, 1980).

EVIDENCE

Husband and wife killed in collision. Their estates commenced wrongful death actions. They owned 87% of a corporation which constituted the family business and the other 13% was owned by their three adult children. At trial and over defendant's objection plaintiff's expert was permitted to testify as to the future value of the ownership position in the corporation if decedents had continued its operation (based on theory corporate salaries not true reflection of earning power). The jury returned a verdict for plaintiff and on appeal, the Supreme Court reversed stating (1) evidence of growth and past profits of corporation admissable as bearing on earning ability (2) evidence of projected growth of corporation is inadmissable as being too speculative and based upon too many variables. The court noted that plaintiffs' evidence should not be limited to salaries they took out of corporation they controlled if salaries were not a fair reflection of the amounts they earned by their own efforts.
Iowa - Des Moines National Bank v. Schwerman, 288 NW2d 198 (Iowa, 1980).

EVIDENCE - DISCOVERY

Trial court permitted plaintiff to offer at trial deposition taken by defendant, of plaintiff's witness, but excluded some portions thereof based on objections made by defendant at trial. On appeal the Supreme Court stated that pursuant to Rule 144(c) (unavailability) one party may introduce a deposition taken by his adversary which the adversary declines to offer. The court went on to state:

"The above authorities lead us to believe that in the situation where the opponent (plaintiff) offers at trial deposition questions propounded by the other party (defendant) and answers received thereto, then the other party has the right to object at trial under the "rules of evidence," rule 144, to any such questions or answers. This right is without regard to the provisions of rules 158(d) and (e), which we believe apply only to the situation where the propounder of the deposition questions is offering the deposition into evidence at trial; however, those rules apply only as to that portion of the deposition wherein he asked the questions. Therefore, rules 158(d) and (e), did not operate to restrict defendant's right to object at trial, on any grounds, to the Wardle deposition questions defendant propounded and the answers thereto."
Osborn v. Massey-Ferguson, Inc. 290 NW2d 893 (Iowa, 1980).

EVIDENCE - PRIOR ACCIDENTS

In action against RR claiming crossing was extrahazardous, trial court admitted evidence of two prior accidents at the same crossing. On appeal by defendant the Supreme Court reversed holding the conditions were so dissimilar that evidence should not have been received. The court stated evidence of prior accidents is permitted, not to show negligence, but to show existence of dangerous condition and notice, but it must appear the prior accidents occurred under substantially similar circumstances.
Kuper v. Chicago & North Western Trans. Co. 290 NW2d 903 (Iowa, 1980).

EVIDENCE - EXPERT TESTIMONY

Trial court sustained defendant's objection excluding much of expert opinion testimony of Dr. Donald Madsen. The case involved a combine which had veered off the road and the hydraulic steering line had been severed and the question was which had occurred first. Madsen did not examine the combine or the drive belt and hydraulic tubing but did review several photographs which had been admitted into evidence and examined similar combines. On appeal, the Supreme Court reversed stating the facts on which he based his opinion had to be sufficient to enable him to express an opinion that was more then mere speculation and conjecture and:

"Plaintiff attempted to elicit Dr. Madsen's opinions by use of hypothetical questions based on the following evidence in the record, inter alia: plaintiff was driving down the road and felt and heard a "thumping" or beating from beneath the floorboard of the cab on the left side of the combine, the precise location of the broken main drive belt nad severed hydraulic line; and that shortly thereafter he experienced a loss of steering control as the combine veered to the left.

In the offer of proof Dr. Madsen testified as to the kinetic energy involved when the drive belt was moving and that when the belt broke, it was adequate to sever, rather than bend, the nearby hydraulic line. He stated that the happening of these events caused the loss of hydraulic pressure and loss of ability of the combine operator to steer and control the machine.

Other offered testimony of Dr. Madsen concerned the likely effect of mechanical damage to the hydraulic line, circumstantially supporting his opinion that the line was severed while the combine was still up on the road.

These facts, we believe, provide a sufficient and sound factual basis for the expert opinions plaintiff attempted to elicit from Dr. Madsen, which would take such opinions out of the realm of mere speculation and conjecture."
Osborn v. Massey-Ferguson, Inc., 290 NW2d 893 (Iowa, 1980).

EXEMPLARY DAMAGES

Plaintiffs commenced actions against defendant for breach of covenant not to compete given by defendant when he sold business to plaintiff. Upon trial to court the court found defendant had breached the covenant, but the actual damages by reason of the breach were incapable of determination because defendant's records were destroyed. The trial court awarded exemplary damages only. On appeal, the Iowa Supreme Court affirmed holding (1) exemplary damages may be awarded when conduct breaching contract also constitutes an intentional tort committed maliciously and (2) a failure to award actual damages will not bar exemplary damages when actual damage has in fact been shown. The amount of exemplary damages must be reasonably proportionate to the actual damages as shown, not necessarily as assessed. Pringle Tax Service, Inc. v. Knoblauch 282 NW2d 151 (Iowa, 1979).

FRAUD

Lending institution commenced action against debtor on promissory note and debtor counterclaimed alleging fraudulent misrepresentation. A jury verdict was returned for lender, the court of appeals affirmed and the Supreme Court reversed on the basis of instructions to the jury. The court stated scienter could be proved by showing the following:

"(1) actual knowledge of the falsity of the representation; (2) that the statement was made as of the knowledge of the party or in such absolute unqualified and positive terms as to imply his personal knowledge of the fact, when in truth he had no knowledge whether the language was true or false; or (3) that the party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation."

and the following with regard to burden of proof:

"Any instruction attempting to define the fraud burden of proof, in any of its various formulations, should make clear that it is qualitatively, rather than quantitatively, distinguishable from a mere preponderance of the evidence."

Mills County State Bank v. Fisher, 282 NW2d 712 (Iowa, 1979).

FRAUD - STANDARD OF CARE

"In keeping with this trend and in reaffirmation of Sutton, we hold that the test for determining whether a party to a transaction has a right to rely on representations of the other is not whether a reasonably prudent person would be justified in relying on such representations but rather, whether the complaining party, in view of his own information and intelligence, had a right to rely on the representations. This subjective standard depends not on what an ordinarily prudent person reasonably would do to protect his or her interests, but upon what the complaining party reasonably could be expected to do."

Lockard v. Carson 287 NW2d 871 (Iowa, 1980).

HUSBAND AND WIFE

Husband and wife were occupants of aircraft owned and piloted by husband. Plane crashed and wife's estate commenced action against husband's estate for wrongful death based upon negligence. The trial court sustained defendant's Motion For Summary Judgment on the basis the suit was barred by the doctrine of interspousal immunity. The Iowa Supreme Court, in reversing and after a lenghthy discussion of the doctrine stated as follows at 281 NW2d 620:

"We therefore abrogate the doctrine of interspousal immunity in this jurisdiction as it pertains to actions for personal injury the result of spousal negligence and, acknowledging the equal applicability of the basic considerations, intentional torts. This result is compelled by the fundamental proposition of public policy that the courts should afford redress for a wrong, and the failure of the rationales supporting the doctrine to withstand scrutiny. We therefore reverse the order of the trial court sustaining the defendant's motion for summary judgment, and remand this case for further proceedings.

The holding of this case shall be applicable to all actions in which a final order, decree or judgment has not been entered as of the date of the filing of this opinion."

Shook v. Crab, 281 NW2d 616 (Iowa 1979).

INDEMNITY

Supreme Court distinguishes between active and passive negligence stating:

"The active-passive negligence distinction is predicated on the principles governing primary-secondary liability generally. Active negligence is the negligent conduct of active operations. It involves some positive act or some breach of duty to act which is the equivalent of a positive act. It exists when the person seeking indemnity has personally participated in an affirmative act of negligence, was connected with a negligent act or omission by knowledge or acquiescence, or has failed to perform a precise duty in breach of an agreement. The crucial issue is whether the person seeking indemnity has participated in some manner in the conduct or omission which caused the injury beyond a mere failure to perform a duty imposed by law. In contrast, passive negligence is nonfeasance or inaction, such as the failure to discover a dangerous condition or to perform a duty imposed by law. However a negligent failure to act when one is charged with a duty to do so is active rather than passive negligence. The difference is qualitative rather than quantitative."

Sweeny v. Pease, 294 NW2d 819 (Iowa, 1980).

INSURANCE

Plaintiff sold fleet of 32 automobiles to car rental agency and provided financing. It then assigned the contract to a bank with recourse. The bank perfected its security interest by recording the contract. The contract provided the rental agency had to pay for insurance for loss or damage to vehicles and plaintiff obtained the insurance at rental agency's expense. The "loss payable" clause was not filled in on the policy. One of the cars was thereafter destroyed and rental agency filed proof of loss stating it was the owner of the vehicle, no other person had any interest therein and proceeds belonged ot it. The proceeds were then paid to rental agency which shortly thereafter went defunct without paying insurance proceeds to bank. Thereafter plaintiff took assignment from bank and sued insurance company for proceeds claiming insurance company had duty to search public records before paying loss. The trial court found for insurance company and on appeal the Supreme Court affirmed, stating:

"The question becomes whether an insurer, before paying a routine loss, must conduct a search of public records in order to avoid becoming liable to some secured but otherwise undisclosed creditor. Such a startling--and expensive--requirement is certainly not required by the uniform commercial code. The act provides that insurance proceeds are subject to priority between lien holders. §554.9104 and §554.9306, The Code 1979. But these provisions would merely accord plaintiff a prior right to the insurance proceeds against a third party who might assert a claim or lien against a car owned by Dollar.

According to section 554.9318(3):

The account debtor is authorized to pay the assignor until the account debtor received notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective.

Under this section the insurer as debtor had a right to settle with Dollar unless and until it had actual notice of an assignment of the debt. According to section 554.120(26) a person receives notice or notification when (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as a place for receipt of such communications.

There was not such notice.

We believe it is clear that the insurer had a right to pay Dollar. It had no obligation to search the records in the courthouse. The trial court was right in so holding.

Judah AMC & Jeep v. Old Republic Ins. Co., 293 NW2d 212 (Iowa, 1980).

INSURANCE - RESERVATION OF RIGHTS

Suite was commenced against Myer by person injured on his land. Myer's insurance carrier had reservation about whether coverage applied so had Myer execute a reservation of rights agreement authorizing the carrier to "investigate, negotiate, settle, deny or defend any claims" without waiving its rights under the policy. The carrier then undertook defense of the claim against Myer. The carrier later commenced a declaratory judgment action to determine if there was coverage under the policy. Myer filed an application for adjudication of law points seeking an adjudication that by reason of the carrier's assuming the defense of Myer, it was thereafter estopped from challenging coverage. The trial court so ruled and on appeal the Iowa Supreme Court reversed declaring that it recognized that while there may be cases in which a reservation of rights works on estoppel, ordinarily it does not. The court stated the questions of estoppel were not determinable as a matter of law and remanded for trial on the merits. IMT Ins. Co. v. Myer, 283 NW2d 316 (Iowa, 1979).

JURISDICTION

Plaintiff Iowa Corporation, engaged in the business of auctioning, entered into agreement with Florida resident whereby Florida resident would ship rare coins to Iowa, the Iowa Corporation would pay him by mail an advance on the sale price then sell the coins at auction in Atlanta, Georgia. The agreement was carried out and the coins sold but a dispute later arose over the commission and related problems. The Iowa Corporation commenced action in Iowa and the defendant filed a special appearance claiming he lacked sufficient minimum contacts with Iowa to be amenable to suit here. The trial court sustained the special appearance and on appeal, the Iowa Supreme Court reversed holding the contract was to be performed in part in Iowa (defendant had sent coins to Iowa, knew they would be catalogued there, corresponded and communicated with plaintiff in Iowa from Florida) and that Section 617.3 (Long arm statute) as applicable in this situation did not violate the due process clause of the U.S. Constitution. The court distinguished Rath Packing Co. v International Meat Traders on the facts. Kagin's Numismatic Auctions v. Criswell, 284 NW2d 224 (Iowa, 1979)

JURISDICTION - SECTION 617.3

Co-employee defendants filed special appearances claiming defects in service under Section 617.3 (long arm statute). The trial court overruled special appearances and on appeal the Supreme Court reversed in part and affirmed in part.

Defendant Bryant's notification was sent to address of co-employee Cherry, whose wife receipted for it. Bryant filed affidavit in support of special appearance giving correct address and stating he had never resided with Cherrys or authorized them to receive mail for him. The court held the address was not proper so proper service was not had.

Defendant Cherry's notification was sent to Route 1, Box 7, Battleboro, North Carolina and receipted for by his wife. In his affidavit in support of special appearance he stated his correct address to be Box 883, Battleboro. The court noted Battleboro had a population of 688, it was reasonably probable the mail would reach Cherry and it did not and any discrepancy was insubstantial so that trial court properly overruled his special appearance.

Defendant Webb's notification was sent to Route 4, Box 357, Rocky Mountain, North Carolina while his exact address was Route 4, Box 357-B. He received 2 notices from post office but did not claim it. The court held the trial court properly overruled Webb's special appearance on these facts since (1) issue under 617.3 is whether notification mailed by certified mail at his address (2) the discrepancy in the address was insubstantial and (3) trial court could reasonably find Webb's failure to respond was chargeable to him.

The court noted that Rule 59(d) provides failure to make proof of service does not affect validity of service and overruled Gray v. Lukowski, 241 NW2d 35 (Iowa, 1976).

Each co-employee also challenged the trial court's jurisdiction on constitutional grounds of due process which the trial court rejected. The Supreme Court reversed as to one co-employee stating:

"We hold that Duke's special appearance should have been sustained on the due process ground. It would be unreasonable to subject him to jurisdiction in Iowa in these circumstances. His only contact with the forum was on business for Ceco which was unrelated to the construction activity. From this contact and the mere performance of his managerial duties in Mississippi, we cannot say he could have reasonably foreseen he would be sued in Iowa for a tort arising from the construction work."
Barrett v. Bryant, 290 NW2d 917, (Iowa, 1980).

JURISDICTION

Plaintiff Iowa Corporation commences action against employee residing in Taiwan managing plaintiff's operation there. Plaintiff served defendant pursuant to section 617.3 (Long Arm Statute) and defendant appeared specially. The trial court denied the special appearance and on appeal the Supreme Court affirmed, finding there were sufficient contracts between Defendant and Iowa to make him amendable to suit here, including an employment contract which according to its term was governed by the laws of Iowa and day to day communications between Defendant in Taiwan and plaintiff in Iowa. Berkley Inter. Co. Ltd. v. Devine, 289 NW2d 600 (Iowa, 1980).

Note--Court commented it need not decide in this case if World-Wide Volkswagen Corp v. Woodson 100 S.Ct. 559 (1980) overruled its earlier case of Edmundson v Miley Trailer Co. 211 NW2d 269 (Iowa, 1973).

JURISDICTION - DISCOVERY

Employee sues employer and co-employees alleging their gross negligence caused a fall and injuries. Defendant employer appeared specially claiming it was not a separate legal entity but a division of another corporation. Plaintiff requested the trial court defer ruling on this special appearance until after discovery because the court lacked sufficient information to rule. The trial court agreed, overruling the special appearance. On interlocutory appeal the Supreme Court stated the trial court could defer ruling, (1) trial court has discretion to order discovery on jurisdictional issue (2) the discretion has limits, and discovery should not be allowed when pleadings and other evidence show there is no disputed issue of material fact (3) issue of jurisdiction should be resolved in advance of trial.
Barrett v. Bryant, 290 NW2d 917 (Iowa, 1980).

JURY

Wrongful death action commenced by decedent's father; count I seeking damages to estate and Count II seeking damages to father individually. The case was submitted to the jury and it was given two verdict forms for each count or claim. It was agreed that the jury would return a sealed verdict pursuant to Rule 203(c). The jury reached a verdict and the foreman executed the second verdict form for count II indicating the jury had found for defendant but failed to execute either form for count I. The trial court did not discover this until after the jury was discharged, over objection of plaintiff, called the jury back the next day, gave further instruction and the jury deliberated for 20 minutes and returned with the second form for both counts I and II executed, being a verdict for defendant in both claims. Plaintiff appealed and the Supreme Court affirmed, stating:

"In summary, we confirm the longrecognized power of trial courts to recall a separated or discharged jury for the purpose of correcting a ministerial error in a sealed verdict. This power is excluded from the provisions of rule 203(c) as long as (1) the court neither requires nor permits further deliberations by the jury, (2) proof of the ministerial nature of the error is indisputable and (3) the losing party fails to show prejudice resulting from the reassembly of the separated or discharged jury.

In this case we hold that the jury's failure to record the verdict that it had previously reached indisputably constituted ministerial error, which was properly corrected by the jury upon its reassembly. Accordingly, trial court's judgment is affirmed."
Rutledge v. Johnson, 282 NW2d 111 (Iowa, 1979).

JURY DEMAND

Action commenced in State District Court and removed by defendant to Federal District Court where it timely filed Answer and Jury Demand. Thereafter, in August 1972 the case was remanded to State District Court when Federal District Court declined to take jurisdiction. In February 1973 defendant filed Answer in State Court but no Jury Demand. The only Jury Demand ever filed was the one filed by defendant in Federal Court. The trial court refused to permit trial to a jury, ruling no Jury Demand was filed under Iowa Rule 177 and defendant had failed to show good cause under Rule 177(d) which permits the court to order trial by jury where no demand is filed if good cause shown. Defendant appealed and the Supreme Court affirmed stating the general rule to be that on remand the case reverts to the same status it had when petition for removal was filed, and that it has been held answers filed in Federal Court do not constitute answers in State Court after remand. The Supreme Court further stated the trial court did not abuse its discretion in refusing to order a jury trial pursuant to Rule 177(d) on the finding failure to request jury trial was due to inadvertence or mistake which it held was not good cause. Federal Deposit Ins. Corp. v. National Surety Corp., 281 NW2d 816 (Iowa, 1979).

JURY MISCONDUCT

"Plaintiff also claims his motion for new trial should have been granted due to misconduct by the jury. Attached to his motion was an affidavit of one juror containing assertions that: (1) three jurors indicated that they knew the meaning of several legal terms, including proximate cause, and "were not interest in" listening to or reading the court's instructions; (2) "a few other jurors" said that the instructions were "not applicable to this case"; (3) some jurors wanted to vote immediately upon entering the jury room, and would not look at the exhibits; (4) an accident report allowed into the jury room was inaccurate to a serious extent, confusing the jury; (5) a jury member declared that denying plaintiff recovery would prevent a future suit by the estate of the driver of the car against the truck driver; and (6) "several" jurors expressed the opinion that plaintiff and the driver were "talking and gawking around" before the accident, when there was not evidence of this.

After seven hours' deliberation, the jury returned a unanimous verdict."

The court noted motions based on alleged jury misconduct involved two problems, the procedural problem of proving the facts and the substantive problem of the effect of the facts. The court discussed the difference between internal workings of the jury and external pressures brought on the jury, noted internal workings "inhere" in the verdict and are not subject to attack by juror affidavit. The court here held the alleged misconduct involved internal workings of the jury, inhere in the verdict and are outside the scope of permissable juror inquiry. Wirtanen v. Provin, 293 NW2d 252 (Iowa, 1980).

MALICIOUS PROSECUTION-ABUSE OF PROCESS

Creditor commenced actions and debtor counterclaimed alleging malicious prosecution. Subsequently, debtor obtained release of encumberance, sold assets, satisfied his indebtedness and creditor dismissed its actions. Thereafter the trial court granted creditors motin for summary judgment against debtor on counterclaim. On appeal, the Supreme Court affirmed the trial court's ruling on the malicious prosecution claim on the basis that disposition of the creditor's action was compromise settlement through payment of money by debtor which constituted a distinct admission of liability on his part. Therefore debtor could not establish a necessary element of the tort, i.e. termination of litigation by acquittal or discharge.

The court reversed on the abuse of process theory stating:

"The existence of this cause of action recognizes that even in meritorious cases legal process may be abused. That abuse involves using the process to secure a purpose for which it is not intended. We can see no reason why there must be subsequent activity to support the cause of action. Such activity may be very probative in determining the intent to abuse; however, there need not be such a subsequent action to commit the tort. To rule otherwise would protect the tortfeasor when the abuse is most effective--where the issuance of the process alone is sufficient to accomplish the collateral purpose."

The court refused to decide whether the "special injury" requirement applicable to malicious prosecution claims also applied to abuse of process.

Mills County State Bank v. Rowe, 291 NW2d 1 (Iowa, 1980).

MUNICIPALITY - NOTICE

Employee commences action against co-employee and city for injuries sustained in collision. Employee gave no Section 613A.5 notice to city or employees and did not commence the action within the six month alternative to written notice but claimed no notice was necessary since defendants had actual knowledge of the collision and injuries. The trial court sustained all defendants Motion For Summary Judgment on the notice question and on appeal the Supreme Court affirmed, holding (1) actual knowledge by governmental body does not supplant Section 613A.5 written notice of claim (2) Section 613A.5 notice is reuqired to hold municipal employee liable for tort committed in the course of employment (but no notice required if employee sued in individual capacity for action outside scope of employment) Franks v. Kohl, 286 NW2d 663 (Iowa, 1979).

NOTICE TO MUNICIPALITY

Plaintiff body shop owner commenced action against municipal employees individually claiming their alleged willful unauthorized acts outside the scope of their employment injured his business. He did not comply with the statutory notice requirements pertaining to municipalities, defendant moved to dismiss, the trial court granted the motion and on appeal the Iowa Supreme Court reversed on the basis that Chapter 613A and the liability arising therein relate to employees acting within the scope of employment, and consequently the statutory notice requirement was not applicable here where the employees were sued individually relating to claimed acts outside the scope of employment. Roberts v. Timmins, 281 NW2d 20 (Iowa, 1979).

NEGLIGENCE

Actions commenced and consolidated seeking recovery for injuries and deaths in connection with apartment building fire. Owner of building and city were named defendants. Defendant City was allegedly negligent in inspections and failure to force owners to comply with statutes and regulations. Defendant City filed a motion to dismiss on the grounds that it had no duty of care toward fire victims. The trial court granted the motion and the Supreme Court reversed and remanded stating (1) a prerequisite to any negligence action is a duty or obligation owed by the actor to the victim (2) Duty can be created by statute if the legislature purposed or intended to protect a class of persons to which the victim belongs against a particular harm which the victim has suffered and (3) the specific and novel language of chapter 613A clearly indicates a legislative intent to impose liability for tortious acts and omission of municipal employees acting within the scope of their duties related to municipal business or affairs. Wilson v. Nepstad 282 NW2d 664 (Iowa, 1979)

NEGLIGENCE - GUEST STATUTE

Iowa Supreme Court declared Iowa Guest Statute (section 321.494) unconstitutional as violative of Article 1, Section 6, Iowa Constitution (Equal Protection Clause). The court stated:

"We hold that the classifications contained in the guest statute do not rationally further the legitimate state purpose of preventing collusive recoveries from insurance companies. We further hold that the classification drawn in section 321.494 bear no rational relationship to any conceivable legitimate state purpose and is therefore violative of Article I, section 6, of the Iowa Constitution. Whatever feature or features which may once have distinguished automobile guests from guests in other conveyances or other contexts no longer exist. After consideration of the effect of our decision, we conclude that our holding in this case shall apply only to trials beginning on or after the date the present opinion is filed, to cases tried before the filing of this opinion in which error was preserved and the time for appeal has not expired, and those causes of action which have accrued and are not barred by any applicable statute of limitations."

Bierkamp v. Rogers, 293 NW2d 577 (Iowa, 1980).

(3 Justices dissent)

NEGLIGENCE

Plaintiff pedestrian commenced action against motorist for injuries received in collision on verdict for defendant, plaintiff appealed. The supreme court in reversing stated Iowa Code Section 321.329 imposes a duty on a motorist to exercise due care to avoid hitting the pedestrian and to warn by horn when reasonably necessary and the defendant is not excused from his duty to sound his horn by mere reason of the fact the pedestrian is aware of the presence of the automobile.

Wright v. Welter, 288 NW2d 553 (Iowa, 1980).

NEGLIGENCE

"We hold that the contributory negligence of an injured spouse which is not the sole proximate cause of that spouse's injury does not bar a claim by the other spouse for loss of consortium."

Fuller v. Buhrow, 292 NW2d 672 (Iowa, 1980).

Note - 3 Justices dissented.

NEGLIGENCE

In action against county for negligence in claimed failure to place adequate and proper warning signs on a dangerous curve, county took exception to trial court's instruction to jury that applicable standard of care in placing road signs was that of a "reasonable person under the circumstances" test. County contended standard should be that of reasonable professional engineering judgment. On appeal the Supreme Court, in reversing for other reasons, approved the trial court's instructions stating the county owed a duty to the travelling public and:

"Our standard would allow a finding of negligence when there has been compliance with existing professional engineering standards. As indicated by the evidence presented in this case, we doubt whether this would occur often. The obligation of the county is broader than that of an engineer to a client. Our standard recognizes this distinction."
Schmit v. Clayton County, 284 NW2d 186 (Iowa, 1979)

NEGLIGENCE

Action against county for injuries sustained in one car accident based on county's alleged negligence in failing to place adequate and proper warning signs on dangerous curve. County alleged contributory negligence and among other things, failure to travel at a reasonable and proper speed under existing conditions in violation of section 321.285. Over county's objection the jury was instructed the failure to travel at a reasonable and proper speed under existing conditions was prima facie evidence of negligence (not negligence per se). The jury returned a verdict for plaintiff and on appeal the Supreme Court reversed declaring that violation of the duty to travel at a reasonable and proper speed under circumstances as mandated by 321.285 constitutes negligence per se. The court stated:

"While the reasonable and proper standard to be applied by the trier of fact under §321.285 is similiar to that which would be used to determine whether the aforementioned common law duties had been abrogated, it does not follow that the legal implications stemming from such violations should be synonymous. If a violation of a statutory duty of care is found, our case law requires a finding of negligence * * * "
Schmitt v. Clayton County, 284 NW2d 186 (Iowa, 1979)

NEGLIGENCE

Supreme Court discussed whether doctrine of contributory negligence should be abrogated and replaced by comparative negligence, noted that since its decision in Stewart v. Madison, 278 NW2d 284 (Iowa, 1979) the number of states adopting comparative negligence increased to 35, 30 by legislation and 5 by judicial decision. The court noted that the primary factor voiced in decisions judicially adopting comparative negligence is that it is the fairer doctrine. The court stated:

"For the present, we defer consideration of whether these notions of fairness impose upon this court a duty to abrogate contributory negligence. We have indicated in Stewart and continue to believe that such a decision and the accompanying formulation, if necessary, of an alternative system, more appropriately rest with the legislature.

Fuller v. Buhrow, 292 NW2d 672 (Iowa, 1980).

Note - 1 justice concurred, 2 justices concurred specially, 2 justices concurred in result and 2 dissented.

NEW TRIAL - TIME FOR MOTION

" Prior to reaching the issues directly presented in this appeal, we wish to clarify a question of construction which was raised by the parties when we were considering defendant's petition for rehearing, which we denied on September 18, 1979 by order entered that date, but in which order we directed the per curiam opinion filed on July 25, 1979 be withdrawn. Our reading of Iowa Rule of Civil Procedure 247 leads us to conclude that the maximum period of time which a trial court may allow for post-trial motions is 40 days; the initial 10-day period provided for by the rule, plus an additional period of up to 30 days upon the required showing of good cause. We take judicial notice of the fact that the rule has been interpreted in a number of districts to allow a maximum period of 30 days and are confident that our construction will provide for a uniform application of the rule throughout the State." Schmitt v Clayton County, 284 NW2d 186 (Iowa, 1979).

MOTION FOR NEW TRIAL

After completion of evidence but prior to submission of case to jury, defendant moved orally for an extension of time of 30 days after verdict within which to file post-trial motions. The trial court sustained the motion. Thereafter the jury returned a verdict for plaintiff. 28 days later defendant filed motion for new trial and plaintiff moved to strike on the ground it was not timely, as the order extending time was invalid since the motion was premature and without showing of good cause. The trial court overruled the motion to strike noting good cause existed because a local rule precluded contact with jurors until the end of their four week period of service. After appeal by defendant, plaintiff moved to dismiss on jurisdictional grounds claiming the order for extension was invalid so the Notice of Appeal was not timely. In overruling the motion to dismiss, the court stated:

"Nothing in rule 247 prevents the motion for extension of time from being filed before the verdict. The rule specifies that post-trial motions "must be filed within ten days after the verdict, report or decision is filed," thus requiring that any extension of time for filing such motions be granted before the expiration of that period. However, while the rule establishes a deadline by which the motion for extension must be filed, it does not purport to prohibit an earlier filing. Cf. Bloom v. Arrowhead Area Education Agency, 270 N.W.2d 594,597 (Iowa 1978) (reaching a similar conclusion under a statute requiring certain action "no later than sixty days" after a stated event). At least when no objection is made asserting a sufficient reason for requiring the motion to be made after the verdict is filed, we agree with the trial court that a motion to extend the time for filing a rule 247 motion may be made and ruled on before verdict."
Rudloph v. Iowa Methodist Medical Ctr. 293, NW2d 550 (Iowa, 1980).

PRE-TRIAL PROCEEDINGS

A party in a stockholder's derivative action sought to call at trial an expert not listed in required pre-trial proceedings and the trial court excluded the testimony because the expert's name had not been listed. On appeal, the Supreme Court affirmed this action holding the trial court had authority pursuant to Rule 138 to require the parties to list experts and had inherent power to enforce its orders. The court held the trial court had not abused its discretion in excluding the testimony on the basis the expert had not been disclosed. Rowen v. LeMars Mutual, 282 NW2d 639 (Iowa, 1979).

PROCEDURE - NOTICE PLEADING (RULE 69)

"The clear purpose of the rule is to give notice to the other party and not to formulate issues or fully summarize the facts involved." It therefore follows that a specific theory of recovery need not be pled to justify an instruction on that theory. What would appear to be essential is that any requested instruction must be so related to the pleadings as to logically follow from the statement of the claim therein, thus giving the adverse party "fair notice of the nature of the claim" and ensuring an opportunity to litigate the same. This determination would lie in the discretion of the trial court." Christensen v. Shelby County, 287 NW2d 560 (Iowa, 1980)

PROCEDURE - NOTICE PLEADING

Purchasers of new home brought action against vendors based on theory of express warranty. During trial to the court, over defendant's objection, court permitted testimony of implied warranties and in its ruling, found for plaintiff on breach of implied warranty. On appeal, the Supreme Court reversed on the basis that defendant was not given sufficient notice of theories upon which plaintiff relied to make an adequate response. The court remanded the case with directions the trial court entertain a motion to amend the pleadings to conform to proof, and if the trial court in its discretion grants same, the defendant is to have opportunity to offer additional evidence in response.
Gosha v. Woller, 288 NW2d 329 (Iowa, 1980).

PROCEDURE - NUNC PRO TUNC ORDER

Trial court entered judgment and plaintiff filed motion for order nunc pro tunc 28 days later asserting trial court had made error in calculations. The trial court called defendant's counsel, notified him of the filing of the motion and that he would grant the relief. He then entered an order nunc pro tunc accordingly. Defendant appealed and the Supreme Court reversed holding (1) Courts have inherent and statutory power to correct their own judgments by nunc pro tunk order, (2) while notice is unnecessary under some circumstances this nunc pro tunk order without notice and hearing unfairly prejudiced defendant's rights.
McVay v. Kenneth Montz Implement Co., 287 NW2d 149 (Iowa, 1980)

PRODUCTS LIABILITY

Plaintiff's decedent killed in one car accident. Plaintiff commenced action against automobile manufacturer with the theory being manufacturer should be held responsible for supplying car capable of speeds in excess of 123 mph while without adequate warning equipping it with tires tested to 85 mph. The case was tried to the court which found for defendant. On appeal the Supreme Court affirmed the trial court ruling holding there was substantial evidence that abuse or misuse of tires was proximate cause of collision.
Hegwood v. General Motors Corporation, 286 NW2d 29 (Iowa, 1979).

RAILROADS

Plaintiff's decedent was driving a semi which struck a standing train at a crossing. The trial court instructed the jury that while defendant RR was under no duty to place reflectorized or bright materials on the side of its box cars, such absence could be taken into consideration in determining whether crossing was more than ordinarily dangerous. On appeal after plaintiff's verdict, the Supreme Court reversed stating:

"The instruction as given reversed the principles which should govern. If the jury first finds the crossing is extra hazardous, then the absence of reflectorized material or other safeguards might constitute negligence but this is only because the crossing is extra hazardous. The absence of such warnings does not make it so.

In other words, whether a crossing is extra hazardous must be determined on factors relating to the crossing, not to the equipment which uses it."

Kuper v. Chicago North Western Trans. Co. 290 NW2d 903 (Iowa, 1980).

PRODUCTS LIABILITY - AFFIRMATIVE DEFENSES

The Supreme Court held plaintiff does not have the burden in a products liability action to establish defects were not discoverable by ordinary inspection.

The court further stated:

"Misuse of product is no longer to be considered an affirmative defense in products liability actions but is rather to be treated in connection with the plaintiff's burden of proving an unreasonably dangerous condition and legal cause. Regardless of whether a defendant does or does not plead misuse of the product the burden is on the plaintiff to prove that the legal cause of the injury was a product defect which rendered the product unreasonably dangerous in a reasonably foreseeable use. Any prior language in our decisions which may be considered contrary may no longer be taken as the law.

* * * By adopting this view we do not imply that a defendant may not be entitled to jury instructions on misuse. The usual procedure obtains that the trial court must sua sponte instruct on the material issues on the case, including the pertinent principles to which it is alerted by requested instructions of either or both parties."

* * * the instructions with respect to the use to which the stove was put must place the burden of proof on Hughes to establish by a preponderance of the evidence that the use made of the stove was reasonably foreseeable by Magic Chef. Reference to knowledge reasonably attributable to the ordinary user may be made, but the instruction must make clear that such knowledge is one factor to be weighed in determining whether Hughes' manner of using the product was reasonably foreseeable by Magic Chef. If on retrial Hughes proves by a preponderance of the evidence that the use made of the stove was reasonably foreseeable and that the stove was unreasonably dangerous when so used, then he will have established the first element of his case; otherwise the case is over."

The defense of assumption of risk requires an unreasonable assumption of a known risk.

Hughes v. Magic Chef, Inc. 288 NW2d 542 (Iowa, 1980)

RES ISPA LOQUITUR

Malpractice action against obstetrician for damages arising out of birth injury. Plaintiff sought recovery both on theories of specific negligence and res ipsa loquitur, both were submitted to the jury over defendant's objection and it returned a verdict for plaintiff. On appeal defendant urged it was improper to submit both as they were supported by identical evidence, it gave the jury a "second bite" at the apple and submission of res ipsa was improper where the evidence clearly established all facts and circumstances surrounding the ocurrence. The Iowa Supreme Court affirmed stating (1) res ipsa does not apply where there is direct evidence of the precise cause of the injury (2) the controversial area is approached when plaintiff's evidence tending to prove specific acts of negligence is so strong there is little left to infer through application of the doctrine and "Although there was substantial evidence to support plaintiff's allegations his injury could not have occurred but for the negligent conduct of defendant, we do not believe it went so far as to pinpoint the precise cause of injury and all the facts and circumstances attending the occurrence. (Citation omitted) Only defendant was in position to furnish all facts and circumstances surrounding the incident. As a matter of policy, we do not believe a plaintiff who has produced all the evidence he or she has available should be penalized by being deprived of the res ipsa loquitur doctrine he or she would otherwise be permitted to rely on, unless that evidence fully explains all the facts and circumstances surrounding the incident. In this instance the evidence did not go that far." Reilly v. Straub, 282 NW2d 688 (Iowa, 1979).

RULE 215.1

Action filed March 19, 1976. On July 19, 1977 a clerk's notice pursuant to Rule 215.1 was sent to counsel. On December 23, 1977 an order was entered pursuant to joint stipulation continuing the case until December 31, 1978 but no trial date was set. No action was taken and no 215.1 notice sent by clerk during 1978 and on January 10, 1979 a dismissal order was entered. On February 19, 1979 plaintiff filed a motion to reinstate the action, one of the grounds being the clerk failed to send out a 215.1 notice in 1978. The court granted the motion. On interlocutory appeal, the Supreme Court reversed, stating:

"We hold the legislative intent was to require one timely notice to trigger the try-or-dismiss status, which status is not revoked by failure to serve subsequent notices. A case under timely 215.1 notice is automatically dismissed at the end of a continuance when it has not been tried and no further continuance has been obtained, even if the continuance extends through another notice period." Rhiner v. Arends, 292 NW2d 399 (Iowa, 1980).

STATUTE OF LIMITATIONS

Section 614.1(2) provides that actions for personal injury must be commenced within 2 years or they are barred. Section 614.8 provides times limited for actions is extended for minors and mentally ill persons so that they have one year from and after termination of the disability within which to commence an action. Plaintiff was injured on April 30, 1976, attained majority on June 2, 1977 and commenced the action on May 8, 1979. The trial court dismissed the action as being barred by the statute of limitations and on appeal the Supreme Court affirmed rejecting plaintiff's claim that Section 614.8 was unconstitutional. The court noted:

"The effect of the two sections, 614.1(2) and 614.8, is to give a minor tort plaintiff whichever period is longer in which to bring suit. Such a plaintiff has not less than two years under section 614.1(2) to bring suit. The two-year period will however, be extended under §614.8 when its operation extends to a date more than two years beyond when the cause arose. But section 614.8 may operate only to extend, not to reduce, the two-year period allowed under section 614.1(2)."
Conner v. Fettkether, 294 NW2d 61 (Iowa, 1980).

TRIAL

The Supreme Court stated the following concerning whether jurors may submit questions to be asked by witnesses:

"We approve the practice in principle. As finders of fact, jurors should receive reasonable help in resolving legitimate questions which trouble them but have not been answered through the interrogation of witnesses by counsel. Of course the questions must call for admissible evidence, and trial court discretion must be exercised to prevent abuse of the practice.

When jurors manifest a desire to ask questions, the court should direct that the questions be submitted to the court in writing. The court should then conduct a hearing out of the presence of the jury in which objections may be made. When the court determines that questions are proper and may be asked, the inquiry of the witness should be conducted by the court rather than by counsel, unless counsel agrees to a different procedure. Finally, counsel should have the opportunity for additional interrogation of the witness on the subject raised by the questions after the court has asked the juror's questions."
Rudloph v Iowa Methodist Medical Ctr, 293 NW2d 550 (Iowa, 1980).

VENUE

Defendants were tenants on plaintiffs' Greene County Farm. Plaintiffs commenced forcible entry and detainer action in Carroll County, on defendants' motion the trial court transferred the action to Greene County. Plaintiffs failed to file the papers in Greene County as required by Rule 175(b). (This was completed 60 days after court order). The trial court disposed of the case favorably to plaintiffs by way of summary judgment on the merits and on appeal the court of appeals affirmed. The Supreme Court reversed holding that the court had no authority to enter judgment or act because by reason of plaintiff's failure to file the papers within 20 days there was no petition before the court and no action pending. The court in entering judgment in Greene County acted without legal authority to do so and lacked subject matter jurisdiction. Wederath v. Brant, 287 NW2d 591 (Iowa, 1980).

UCC - LEASES

Lease is exempt from UCC provisions. The Supreme Court discusses standards for determining when "mixed" contract for goods and services is controlled by UCC.

M & W Farm Services Co. v. Callision, 285 NW2d 271 (Iowa, 1979).

WORKERS' COMPENSATION

Employee commenced working for employer on part time basis while attending high school, and in Summer 1974, became full time employee. Employee's job was to reconstruct tractor part and when he ran out of work, was assigned miscellaneous tasks by employer. He was paid by the hour and number of parts reconstructed. On the day of accident, employee ran out of work and was requested to paint trim on employer's wife's house. The materials and directions were given by employer and the employee was told he would be paid the same hourly rate. Employee was injured while painting house and awarded compensation benefits. Employer appealed claiming separate and distinct employment purely casual in nature. The Iowa Court of Appeals in affirming the award of benefits stated the findings by the commissioner have the force of a jury verdict and will not be overturned if supported by substantial evidence; and pointed out it has been held the term "purely casual" as used in the statute is strictly construed against the employer and liberally.

Shook v. Crab, 281 NW2d 616 (Iowa 1979).

WORKERS' COMPENSATION

Decedent was president, sole stockholder, chief operating officer, and employee of an auto dealership. He was killed in an airplane crash while returning from a business trip. His widow sought benefits. The evidence showed decedent had broken several FHA rules in connection with the flight including consumption of alcohol just prior to flying, flying farther than the 25 mile limit to which his student certificate limited him, and flying at night in bad weather without instrument rating. The Deputy Industrial Commissioner held the death compensable, but in a review decision the Commissioner applied the "unusual and rash act" doctrine (an employee who by an unusual and rash act exposes himself to risks not occasioned by the nature of the employment and sustains injury acts outside the scope of his employment) to deny compensation. On judicial review the District Court reversed the commissioner and the Supreme Court affirmed the District Court stating that it overruled the "unusual and rash act" doctrine and holding the doctrine cannot bar recovery of workers' compensation benefits. Hawk v. Jim Hawk Chev-Buick Inc. 282 NW2d 84 (Iowa, 1979)

Claimant filed his petition for arbitration, claiming to have suffered deleterious effects from inhaling coal dust and toxic gases while working underground in coal mines and seeking permanent and total disability benefits. The Supreme Court upheld the commission's finding that claimant did not have pneumoconiosis. The court noted that the statute fails to delineate the characteristics indicative of pneumoconiosis. The court thereby concluded that "it is left to the deputy industrial commissioner or industrial commissioner reviewing the medical evidence presented to determine the particular characteristics of pneumoconiosis which must be present to justify a finding of the disease." The court wrote that the purpose of the presumption in section 85A.13(2) is to establish a causal link between the disease and the employment not to establish the disease in the first place. The court further wrote that this particular presumption can only serve to aid defendants' cases, not claimants' cases. The court believed that 85A does not require that the claimant prove that his disease was actually caused by exposure, but rather it is "sufficient that he show that the hazardous employment condition which at some time caused his disease existed to the extent necessary to possibly cause the disease at this employer's place of employment." The effect of this is to raise a narrow presumption of causation by a particular period of employment. The court concluded "that both the existence of pneumoconiosis and disability resulting from it must be proved in accordance with the statutory criteria before the presumption in 85A.10 and the exception to the presumption in section 85.A13(2) apply. The Supreme Court remanded so the deputy could state his reasons for rejecting the conclusion that chronic bronchitis and asthma constituted occupational diseases under chapter 85A. The court indicated that such diseases were occupational diseases under 85A. The court ordered that claimant be allowed to present further evidence concerning the existence of quantities of coal dust in defendant--employer's mine which could have caused his disease.

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

McSpadden v. Big Ben Coal Co. 288 NW2d 181 (Iowa, 1980).

WORKERS' COMPENSATION

Appeal from district court decision affirming industrial commissioner's denial of relief in a review-reopening proceeding. The Supreme Court reversed and remanded. The issue was whether the industrial commissioner erred in denying additional workers' compensation to an employee who was transferred by his employer to a lower-paying job following a work-related phlebitis attack. The court stated: "An increase in industrial disability may occur without a change in physical condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under section 85.26(2) and 86.14(2)." The court further stated that "[t]he fact that a similar disability occurred previously does not alone constitute substantial evidence that either incident results from a preexisting injury or disease. To be a preexisting condition under our cases, an actual health impairment must exist, even if it is dormant." The court held the commissioner erred in attributing Blacksmith's job transfer to a preexisting condition in reliance on a medical report from Dr. Torruella. The court relied on McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980), in holding that Blacksmith did incur an increased industrial disability and is not barred from recovery by failure to prove an increased functional disability of his leg.
Blacksmith v. All-American, Inc., 290 NW2d 348 (Iowa, 1980).

WORKERS' COMPENSATION

Claimant worked as salesman for elevator selling among other things Supersweet feed products to farmers. A dinner was given for customers of elevator who purchased a mimimum amount of Supersweet products. Supersweet obtained the place where the dinner was to be held and furnished drinks while elevator purchased the steaks. Elevator did not order claimant to attend dinner but he arrived early, and helped prepare and serve food and entertain customers. Following the dinner and while he was returning home he was involved in a collision. Claimant sought benefits and employer resisted on the basis of no connection with employment and the "coming and going" rule. A deputy commissioner found the injuries arose out of and in the course of claimant's work, and he was entitled to benefits. The employer exhausted administrative remedies, and appealed to District Court which affirmed. On appeal by elevator, the Supreme Court affirmed holding (1) record contained sufficient evidence that claimant's participation in the dinner was both beneficial to and authorized by elevator (2) factual setting is not appropriate for application of "coming and going rule" (court stated most courts addressing issue hold when injury occurs while employee travels to and from social function which occurs somewhere other than workplace, compensation depends on extent to which function is employment related) (3) evidence would support finding that compensation appropriate for injury that occurred during trip home from event.
Farmers Elevator Co. Kingsley v. Manning, 286 NW2d 174 (Iowa, 1979).

WRONGFUL DEATH

Decedent's spouse and personal representative brought action against defendants for decedent's wrongful death. Recovery was sought based on negligence. As surviving spouse she sought recovery for loss of consortium and as personal representative, statutory wrongful death damages. Defendants denied any negligence on their part and alleged that decedent's negligence caused his death and barred plaintiff's claims. The evidence showed decedent's death was instantaneous so plaintiff dismissed her consortium claim during trial. The trial court instructed the jury over objection of plaintiff that plaintiff's wrongful death claim would be barred if defendants established their defense of contributory negligence. The jury returned a defendant's verdict and on appeal plaintiff claimed the trial court erred in its instruction because decedent's negligence was not a bar to the estates claim for loss of services and support. The Iowa Supreme Court affirmed, characterizing the wrongful death action as derivative in nature (redress of a wrong done to another) so that a defense available against the decedent, had he survived, is good against the personal representative. The court reaffirmed the rule that the loss of consortium claim is limited to damages sustained during the period between injury and death. Wilson v. Iowa Power and Light Co., 280 NW 2d 372 (Iowa, 1979)