defense UPDATE

The Iowa Defense Counsel Association Newsletter Vol. 1 No. 1

LEGISLATIVE STATUS REPORT

THE IOWA DEFENSE COUNSEL has long taken pride in its legislative efforts to improve the tort system in Iowa. Ed Seitzinger, one of the founders of the Iowa Defense Counsel, has taken special interest to see that the Iowa Defense Counsel remains active in the legislative area. Consistent with our tradition, we have taken an active role. The Legislative Committee is composed of Herb Selby of Newton, Chairman, and the following members: Edward F. Seitzinger, Tom Hansen, Gene Marlett, A. K. Elgar.

The Board of Directors has hired for the past several years Kevin Kelly as a lobbyist to promote the legislative goals of the Iowa Defense Counsel Association. This year extensive hearings were held before the Legislative Session started on the question of tort reform in Iowa. The Iowa Defense Counsel presented position papers on various aspects of the issues studied by the Legislative Interim committee. These position papers are summarized below in our Legislative Update.

TORT REFORM IN IOWA
Iowa Defense Counsel's Position

WITH THE LEGISLATURE in session and newspaper articles and letters to the editor increasing, an update on the Defense Counsel's activities seems appropriate. Last summer the Defense Counsel was invited to present comments on tort reform to the Special Legislative Subcommittee. Four position papers were submitted, with an overview entitled Litigation Cost Containment and Fairness in Litigation by former president Claire F. Carlson. Following is a synopsis of these papers:

PUNITIVE DAMAGE CLAIMS

The Defense Counsel has advocated a bill to restrict the abuse of punitive damage claims for some time. Alanson Elgar presented the paper on punitive damages. He stated that Iowa Code Section 668A.1 (S.F. 2265) was the first step in correcting the abuse of this claim. A comprehensive reform bill passed the House and narrowly missed Senate passage in 1986. This bill reflects our position. Where punitive or exemplary damages are claimed, the trial should be conducted in two phases. First, based on the facts, concurrent with all other issues presented, whether plaintiff has proved beyond a reasonable doubt that defendant acted with malice, oppression or fraud. Second, if so proved, the court should then assess the amount of punitive or exemplary damages. In the first phase, the verdict, if a jury, should be unanimous. Evidence of wealth or financial condition should not be admissible and discovery of this not permissible.

In the second phase, the court may consider evidence to aid in determining the amount, including evidence of remedial measures taken by the defendant. None should be assessed where (1) there is no finding of actual damage, compensatory damages are not awarded or are only nominal, (2) defendant has previously been assessed punitive damages for the same conduct, (3) defendant has been criminally or civilly punished by fine or imprisonment, or such proceedings are pending, arising out of the same conduct, (4) defendant acted in good faith, the actions were proper, or on advice of legal counsel, (5) against a principal or employer for acts of an employee unless authorized or ratified by the principal or employer, (6) for tortious breach of contract unless it is determined that the contract involves a subject matter of great public interest.

In the event of an award for punitive damages, they should be distributed as follows: (1) no more than 10 per cent of all compensatory damages awarded to the plaintiff, (2) no more than 15 per cent of the punitive or exemplary damage awarded to the crime victim reparation program, Chapter 912, (3) the remainder, if any, to the general fund of the State.

In advocating these limits on punitive damages, Elgar stated, "With the development of sophisticated rules to protect individuals, the continued existence of punitive damages in our civil justice system, in which adequate compensation is awarded to tort victims, is an unfair and expensive concept that has outlived any usefulness it ever had." With punitive damages insurable, it loses its concept as a deterent. A lay jury should not be authorized to compensate and

also have unlimited right to punish.

PREJUDGMENT INTEREST

Marvin Heidman presented the paper on prejudgment interest. As Iowa code Section 535.3 now stands, 10 per cent interest accrues from the data of filing the lawsuit, not only on losses sustained prior to filing and those incurred prior to a determination of liability and the amount of the loss, but also on future losses, including future medical and hospital expense, loss of future earnings, consortium, pain and suffering.

Court congestion results from lawsuits being filed, and therefore being rewarded, before investigation, gathering of facts and settlement is explored. Claimants are not encouraged to settle early and settlement costs become more expensive.

COMPARATIVE FAULT ACT

Interfacing Comparative Fault with Worker's Compensation was presented by Craig Warner. With adoption of the Comparative Fault Act (Iowa code Chapter 668), an employer's rights to subrogation pursuant to Section 85.22 creates inequities in favor of the employer whose fault partially causes the employee's injuries. Having paid worker's compensation to the injured employee, the employer is immune from damage liability to the injured employee and, in most cases, is also immune from liability for contribution to other persons sharing in the fault for the employee's injuries.

Since the object of comparative fault is that each party contributing to an injury pay only a proportionate part of the total damages, it is unfair that others must pay for the employer's share of the fault. The employer is then reimbursed for the compensation benefits paid the employee.

This inequity can be corrected by amending Chapter 668 to allow the percentage of the employer's fault to be assessed and then treated as a settling party who has been released under Code Section 668.7. By interfacing the Comparative Fault Act with the Worker's Compensation Act, if the amount of benefits paid are more than the allocated fault to the employer, then the amount of reimbursement to the employer, or its worker's compensation insurer, would be reduced by the percentage of allocated fault. Where worker's compensation benefits paid are equal or less than the amount of allocated fault, then the rights to reimbursement under Iowa code Section 85.22 would be extinguished. This would allow all parties at fault to pay no

A special report from our lobbyist

Kevin Kelly, the Iowa Defense Counsel lobbyist, has submitted the following report on the status of his lobbying efforts in the Iowa Legislature:

The work of a Legislative representative is usually both offensive and defensive. In other words, there is often as much effort in trying to kill bills as there is in attempting to pass favorable legislation. The 1987 session has brought a slightly different approach to the whole process. The Legislature is moving at a very slow pace so few bills of any kind are moving out of committee and through the process. It makes it easy when you are trying to kill bills but very difficult to advance our interests. And to make matters worse, the top leaders of each of the Houses have decided that they do not want any tort legislation passed this year unless all the parties agree to it. It takes very little imagination to realize it is hard enough to get the plaintiffs' bar and the defense bar to agree to anything but can you imagine the Medical Society and the plaintiffs' bar finding common ground?

Pursuant to instructions from the Board of Directors, we are working on four bills. These bills deal with prejudgment interest, abolition of the collateral source rule, the awarding of punitive damages and interfacing existing tort law with the Workers' Compensation statutes. The bills are drafted in accordance with the Iowa Defense Counsel's position papers which are summarized in this publication.

At this point, there is little probability that the judiciary committees will let any of our four bills out of committee for debate. Our only hope is that we can find a piece of legislation in a close enough related area that would be subject to an amendment that would be to our benefit. Unless such a vehicle becomes available, it is extremely doubtful we will have any success in this year's session, at least as far as passing our own package is concerned. On the other hand, it looks highly unlikely that anything that is at all detrimental to our interests will be enacted so the session looks like it is headed for a stalement.

more than their allocated percentage of fault.

COLLATERAL SOURCE RULE

John B. Grier presented the Board's position on elimination of the Collateral Source Rule. Grier advocated on behalf of the Iowa Defense Counsel that the Collateral Source Rule be abolished. The position was taken that in lieu of the Collateral Source Rule that legislation be adopted which would allow juries to take into consideration payments from collateral sources and the obligations in regard to repayment in fixing damages.

CONCLUSION

Kevin Kelly and Herb Selby report that there is much maneuvering in this Legislative Session and that it is too early to predict what action, if any, the Legislature will take in regard to tort reform in Iowa. All members are encouraged to contact any of the members of the Legislative Committee in regard to the issues currently before the Iowa Legislature.

NEW CASES

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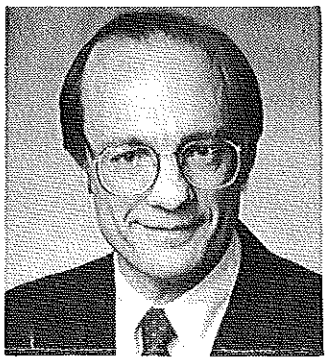
was for damage to personal property, not for rule 8 damages. The unequivocal language in **McIntosh,** causes one to suspect, at least, that rule 8 claims will be treated the same as spousal consortium claims.

The resulting inequity to defendants is limited to instances where the defendant is judged to be 50% or greater at fault. When the defendant is judged to be less than 50% at fault, the defendant is not jointly and severally liable to the spouse who sues for loss of consortium.

LETTER FROM THE PRESIDENT

the Defense Identity



"Just what is the Iowa Defense Counsel Association?" that is a question which all of us as officers or members of the Association are frequently asked. There are several popular misconceptions about our group and its purposes. It is tempting at times to seek our identity by describing what we are not — or by contrasting our organization to other groups.

Upon closer examination, however, we find real pride in our own positive identity. We are a professional group of persons who handle claims and defend persons who have been sued in civil litigation. We seek to recognize those whose skills and experience have distinguished them as leaders in the trial arena. We seek to share those skills in training, education, and demonstration. We provide the opportunity for sharing mutual concerns, questions and interests. We provide a forum for sharing contemporary developments in the defense arena and for professional fellowship with our peers. We pursue legislation which promotes the rights of defendants in civil litigation and which recognizes the interests of all citizens.

While the foregoing specifics are all good, in and of themselves, the goal of the Iowa Defense Counsel Association really transcends those functions. Above all else, our organization seeks to exemplify those qualities which make the practice of "trial law" a true and time-honored profession. We seek to cultivate those skills and personal qualities which make the phrase "my lawyer" one of the most fulfilling descriptions that any person can enjoy in their personal or professional lives. While recognizing the validity of business, economic, and scientific factors in the practice of defense law we seek to preserve that quality of advocacy that permits the judicial system in general, and the jury system in particular, to remain strong and functional.

As our group continues to increase in size and strength, we salute the members who have created and preserved the organization and we welcome those who share this commitment. It is great to have such an opportunity for service and for action! I trust that our organizational activities this year will accomplish those goals.

David L. Phipps, President

NEW CASES

DEVELOPMENTS IN THE LAW

Greg M. Lederer of the law firm of Simmons, Perrine, Albright & Ellwood in Cedar Rapids will be one of the speakers at our 21st Annual Defense Counsel Meeting to be held in Des Moines on October 8, 9, and 10 at the Ramada Inn (formerly Johnny & Kay's). Greg is responsible for the case law update. He reports below on the effects of the old contributory negligence cases on the Court's decisions in the comparative negligence setting.

VALIDITY OF CONTRIBUTORY NEGLIGENCE PRECEDENTS

For many years while contributory negligence was still the rule, the Iowa Supreme Court issued decisions that reflected a desire to temper the effects of a doctrine perceived by some to be inequitable. One such decision was **Fuller v. Buhrow,** 292 N.W.2d 672 (Iowa 1980), in which the Court held that consortium claims were independent and not derivative. As a result, the negligence of the injured plaintiff did not bar the spouse's recovery for loss of consortium. The same protection had been previously provided to parents with rule 8 and consortium claims in cases where the injured child was negligent. See **Handeland v. Brown,** 216 N.W.2d 574 (Iowa 1974).

After **Goetzman,** defense lawyers wondered whether the emphasis on "fairness" in that decision would fuel a re-examination of many decisions that, like **Handeland** and **Fuller,** were designed to limit the now-defunct doctrine of contributory negligence. The reform movement stopped quickly after **Goetzman,** however, and has not received any boost from chapter 668.

The most recent examples of the Court's refusal to reconsider precedent from the contributory-negligence era are **McIntosh v. Barr,** 397 N.W.2d 516 (Iowa 1986), and **Telegraph Herald, Inc. v. McDowell,** 397 N.W.2d 518 (Iowa 1986).

In **McIntosh,** the Court held that a tortfeasor could not sue the injured but negligent plaintiff for contribution toward liability to the plaintiff's spouse for loss of consortium. After purporting not to decide whether or not abrogation of interspousal immunity permits one spouse to sue another for harm to the marital relationship, the Court held that a suit for contribution fails the common liability test, because one spouse has no duty to provide marital services to the other. With no actionable duty, there is not liability, therefore no common liablility and no right to contribution from the negligent spouse.

In **McDowell,** a tortfeasor sued a minor for contribution toward a liability to his parent for property damage to the parent's car. The minor had been judged to be 75% negligent in a **Goetzman** case. In ruling on whether the tortfeasor was entitled to summary judgment on its claim against the minor for contribution, the Court held that the minor had asserted facts which, if true, would immunize him from suit by the parent.

Comparison of the language of the two opinions, both by Justice Larson, suggests that contribution claims against children may have some viability. The language in **McIntosh** was unequivocal, while **McDowell** simply said the minor "could conceivably bring the case under some remaining vestige of parent-child immunity." The difference in language may be due to no more than the fact that the parent's claim in **McDowell**

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EDITORS' NOTE

With fear and trepidation, not that it is not a worthy venture, but because of your editors' inexperience and shortcomings, we launch this first edition of the Iowa Defense Counsel Newsletter. Already we have received numerous offers of assistance, articles and *help*. If we can only correlate this and keep interest and assistance vibrant, we will have achieved our first goal. (Second goal—the next publication.) We look forward to your comments, good or bad, but hopefully constructive, and particularly news and articles.

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