defense UPDATE

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THE DEFENSE OF CATASTROPHIC DAMAGES

(THREE PART SERIES)

By Michael W. Ellwanger, Sioux City, Iowa, and Joseph L. Fitzgibbons, Estherville, Iowa

INTRODUCTION

This topic will be covered in three seperate articles dealing with various aspects of the defense of a case in which the plaintiff is claiming damages based upon a a catastrophic injury (an injury involving brain damage or some other lifetime disability). Three seperate areas will be covered--the so called "life care plan," the use of annuity evidence and proving life expectancy.

These articles will contain occasional reference to an obstetrical malpractice case that was tried in 1990. This case involved a claim based upon substantial brain damage incurred by a child, allegedly during labor and delivery. The physician was defended by Francis Fitzgibbons and Joseph Fitzgibbons and the hospital was defended by Maurice Nieland and Michael Ellwanger. The case originally commenced trial in May of 1990. On the third day a mistrial was declared because of juror and witness misconduct. Thereafter the plaintiff dismissed the hospital from the action. The case went to trial against the physician in September of 1990. After several weeks of trial a defense verdict was returned. The jury specifically found that there was no negligence on the part of the physician defendant. In this case the defendants vigorously contested various aspects of the plaintiff's claim for damages. The plaintiff contended that the present value of the special damages alone was in the range of $12-$15 million.

A threshold decision must be made in every case as to whether it is proper to defend damages at all. Conventional wisdom suggests that whenever a defendant feels that he has a good case of liability, it is unwise to litigate the damage issue for fear that the jury would take this as some sort of admission. Conventional wisdom has also suggested that in the catastrophic injury case there really is not much to be said by a defendant on the damage issue, and the jury may become punitive if the defendant attempts to somehow contest or belittle the plaintiff's injuries.

This wisdom is being increasingly abandoned for a variety of reasons. First, the size of the awards have become so astronomical that a defendant can no longer simply ignore damages and assume that the jury will exercise common sense and return a reasonable verdict in the event that the defendant loses on liability. Furthermore, plaintiff's attorneys have become increasingly sophisticated and their experts have become increasingly outlandish in their projections. A defendant can no longer sit by in a case like this and allow a jury to hear only evidence which suggests an incredibly high damage claim.

It should be noted that if a defendant seriously contests liability, but also desires to contest the damage claim, the jury must properly be prepared. It must be explained to the jury that the damage claim is an element of the plaintiff's case, along with negligence and causation, and that the defendant is required to defend all aspects of the plaintiff's contentions. It should further be explained to the jury that some of the claims that are being made by the plaintiff in the damage area are felt to be unsupportable, and that the defendant cannot simply sit back without contesting those claims. Promises must be exacted from the jurors during voir dire that they will not construe the litigation of the damage issue to be an admission on the part of the defendant. Furthermore, assurances from the jury must be obtained that they will not hold it against the defendant for litigating the damage issue. The defendant is not intending to belittle the plaintiff or make light of the plaintiff's injuries. Rather, claims are being made which are felt to be excessive and the defendant is obligated to contradict those claims if it feels that they are not supported by the evidence.

It is felt that most jurors will be able to accept these explanations from defense counsel and the defense of liability should not be undermined. After the mistrial was initially declared in the above-described case, various jurors were contacted to determine their reaction to the voir dire questions concerning the contest of damages. They generally indicated that they

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MESSAGE FROM THE PRESIDENT

Alan E. Fredregill
President

DO YOU HATE SETTLEMENTS?

Pennsylvania lawyer Charles W. Rubendall II created quite a stir his February, 1990 article in *For the Defense,* "I Hate Settlements: A Defense Lawyer's Lament." Rubendall claimed, "the drive toward settlement that infects the courts and trial bar [is] *the* problem with thecivil justice system...." His theory is that settlements breed more suits, and that they let judges and lawyers get rusty from lack of courtroom practice.

Critical comments from the bench and bar alike, both plaintiff and defense, have chastised his assertions; and with some validity.

At the same time, however, Iowa's experience may provide support for Rubendall's seemingly outlandish claims. Year after year, statistics here demonstrate that more than 90% of all civil cases filed in the state's district courts are settled. The most astonishing statistic of all is that there are *fewer than 400 civil jury trials held in the entire state* in most years! That means that the average county in Iowa conducts only 4 civil jury trials per year, and each of our own members averages only one.

This despite the fact that we see in many counties a backlog of cases such that suits filed today can't possibly receive a trial assignment for over 1 year. Statistically, however, we know full well that nearly all of those prior assignments will never pick a jury, and the court room will sit idle for all but a handful of days each year.

In the February 1991 sequel to his article, Rubendall reported that he had just been hammered with a $2 million verdict where he "hadn't offered a dime." Had he therefore rethought his position on settlements? No way.

"[S]ettlements undermine the civil jury system and those who operate within it: the judges, the jurors, lawyers and parties," rails Rubendall after losing the big one. The parties? Even his own, who lost? Yes, "this client knew the risks," he says.

Few of us could be so philosophical after a loss of that magnitude. Fewer still would be the understanding clients, or the lawyers bold enough to trumpet that loss in a national legal publication.

Some say that the court system provides an outlet for aggression between members of society who might otherwise choose a more direct and violent method to resolve disputes. Yet some litigants are mentally ill, and the trial of a case may itself exacerbate that illness. In fact, the stress of a trial can be more powerful than the fear of death. I know of two plaintiffs who chose suicide following unsuccessful trials. An unreasonable refusal to settle those cases likely cost two lives. No doubt there have been others.

They say that if you don't get beaten every once-in-awhile, you aren't trying enough cases. Maybe that was Rubendall's real message. Perhaps there was another consideration, however. In his words:

> The lawyers, of course, gained from the trial. We did our jobs and will (likely) be paid for our efforts.

Is the lesson to be learned then, that as defense lawyers, we should fight down our client's last dollar? That position will endear us to no one.

After all is said and done, Rubendall did finally concede some common sense in his first article:

> Obviously, a posture of no settlements under any circumstances does not make sense. Many claims, even though small in merit, should nevertheless be settled for the cost of defending them or something less.

As lawyers, we must pursue the best interests of our clients. Contumacious refusal to even consider a reasonable settlement, in the final analysis, is simply not ethical.

ASSOCIATION RECEIVES AWARD FROM DRI

The 24th DRI National Conference of Defense Bar Leaders was held in Williamsburg, Virginia on March 14-16, 1991. Attending were David L. Hammer, Eugene Marlett, Edward F. Seitzinger, David L. Phipps, Herbert S. Selby and your president. Our Association was once again presented with the Exceptional Performance Citation Award. This award acknowledges the efforts of state associations and their presidents and is given only upon attainment of criteria DRI deems essential to a strong association. Our Association continues to be a model for an active defense organization.□

CASE NOTE SUMMARY

WORKERS' COMPENSATION BAD FAITH — DOES IT EXIST?

Kiner vs. Reliance Insurance Company, **analyzed by Craig A. Levien, Davenport, Iowa**

I. Introduction

Sending a second message of warning to workers' compensation carriers in Iowa, the Supreme Court, on November 21, 1990, decided the case of *Kiner vs. Reliance Insurance Company,* 463 N.W.2d 9 (Iowa 1990). This case restated an earlier holding by the Court that a district court has jurisdiction to hear a workers' compensation bad faith claim and that the exclusive remedy doctrine did not require that such claims be brought only before the Iowa Industrial Commissioner. *See also Tallman vs. Hansen,* 427 N.W.2d 868 (Iowa 1988).

However, as occurred in first party bad faith claims, *see Dolan vs. Aid,*431 N.W.2d 790 (Iowa 1983), the Supreme Court has not ruled on the validity of a workers' compensation bad faith claim. The Court, in *Kiner* and *Tallman,* held that a district court has jurisdiction to a hear a workers' compensation bad faith claim, but did not expressly rule on whether a bad faith failure to pay workers' compensation claim is recognized in Iowa, *see* Footnote 2, 463 N.W.2d 9, 12.

If the Court consistently applies the analysis of first party bad faith claims applied in *Dolan* to workers' compen-- ,sation bad faith claims, the validity of such claims is very doubtful. However, the Court retains the prerogative to expand bad faith concepts in Iowa to include workers' compensation claims and the answer will remain unknown until directly addressed by the Court.

II. *Kiner vs. Reliance Insurance Company*

Ronald Kiner fell in 1970 and injured his back. Reliance Insurance Company, as the workers' compensation carrier, paid him permanent partial disability benefits. Between 1972 and 1980, Kiner took medication for back problems related to the injury and Reliance paid for these medications. In December of 1980, Kiner stopped using the medications, but his pain persisted. In November of 1981, and twice afterwards, he obtained a one week supply of a prescription for pain medication. He submitted these bills to Reliance, which refused payment on the grounds that Kiner had a drug dependency problem. Reliance eventually paid the workers' compensation benefits and Kiner filed an action for bad fatih failure to pay workers' compensation benefits.

At trial to a jury, Kiner was awarded $75,000.00 in actual damages and $550,000.00 in punitive damages on the bad faith claim. A collateral slander claim was also successful. Reliance filed a Motion for New Trial on all issues in the bad faith case and the trial court, finding the $550,000.00 punitive damage to be excessive, awarded a new trial on all issues in the bad faith case. Reliance cross appealed, claiming the court erred in submitting the bad faith claim.

In Reliance's appeal, they argued that the Court lacked subject matter jurisdiction because the Industrial Commissinoner has (1) exclusive jurisdiction over workers' compensation issues and (2) the merits of the workers' compensation claim were fairly debatable as a matter of law.

The Supreme Court restated its holding in *Tallman* and held that a petition alleging bad faith handling of a workers' compensation claim is not within the exclusive jurisdiction of the Industrial Commissioner.

The Court also held that a reasonable fact finder could find that Reliance failed to "exercise an honest and informed judgement" on Kiner's claim, and, thus, could conclude that its denial was not fairly debatable. The court held the issue was, therefore, one for the jury, and not for the Court as a matter of law.

Reliance also complained that the trial court's instruction incorrectly stated the elements of a bad faith claim. The Court disagreed with Reliance's argument that the Plaintiff must show actual knowledge that its action was in bad faith. The Supreme Court held that it was sufficient to show that an insured denied the claim knowing, or having reason to know, that its denial is without basis. Such an instruction, the Court held, correctly states the law.

One may wonder how a question can still exist whether the Supreme Court will recognize the validity of workers' compensation bad faith claim when it has ruled that the district court has jurisdiction, that a fact question is generated for a jury and has approved a jury instruction. The answer lies in Footnote 2 of the opinion.

In Footnote 2, the Court specifically points out that Reliance did not question whether an action for bad faith failure to pay a workers' compensation claim is recognized in Iowa. The viability of the claim itself was not raised or addressed in *Tallman* and it was not raised, or passed upon, in *Kiner,* 463 N.W.2d 9, 12.

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THE USE OF PHOTOGRAPHS IN CLAIM INVESTIGATION

By Kenneth L. Allers, Jr. Cedar Rapids, Iowa

In my role as a claims manager for an insurance company, I have been privileged to work with many fine defense attorneys in the State of Iowa. This article is the direct result of that work and represents the suggestions, comments and the pet peeves of several defense attorneys in this state. To these people I thank them for these ideas and hope this makes their life a bit easier.

Photographs in the investigator's or adjuster's files seem to have become second class citizens. The care and detail of obtaining the photographs seem to be lacking in several instances. There are six areas which are of most concern.

DID WE FORGET THE SECOND IMPACT? Although the file shows photographs which clearly demonstrates the damage to the outside of the vehicle, the file is devoid of any photographs showing the interior of the vehicle. The doctor's report may describe a violent impact between the plaintiff and the interior of the vehicle, but there are no photographs to prove or disprove this. It is the injury that is caused by "the second impact" in a collision that the defense attorney must handle. Yet it is overlooked by many investigators. Photographs of the damaged interior is as revealing as photographs of the exterior. Of equal importance is the photograph showing a lack of impact to the interior, more specifically the dash and steering wheel. On any injury claim, it should be routine for the vehicle to be photographed on the outside and inside.

OH, IT'S MY INSURANCE AGENT! How frustrating to have an exellent photograph showing a damaged vehicle which the defense attorney would like to display to the jury and it contains an unidenified person in the background. Unfortunately, it is revealed that the person in the photograph is the defendent's insurance agent. Just as frustrating is the photograph of a damaged car in Lyon County with a second vehicle sitting in the background. This vehicle has an open briefcase sitting on its hood and the license plates clearly read Polk County. Easily deduced by the jury is the fact that the vehicle belongs to an insurance adjuster. All photographs should be kept devoid of any reference of an insurance company investigation. The less the jury hears or thinks about insurance the better off the defense attorney will be in trial.

YOU TOOK HOW MANY? Upon receiving the fire loss file, the attorney is full of hope that a full investigation will allow a quick and easy understanding of what happened. Soon thereafter the attorney is hindered and disappointed by the photographs. The frustration of trying to examine a fire scene when the investigator took exactly one photograph per room can be overwhelming. A fire scene is subject to rapid change. An investigator cannot remember every detail in the room. The only way to preserve that memory is to photograph as much as possible. Yet, far too often, the photograph showing one quarter of the room is all that you have to document a file. Efforts to cut costs in the handling of the file should not center on photographs. The importance of photographs cannot be understated. They preserve, document, and chronicle a fire scene as no human can. Photographs do not change their stories and they do not forget.

WHERE ARE THE NEGATIVES? You have a photograph that is going to clearly demonstrate to the jury a point you would like to make. However, it is a standard photograph but not large enough for the entire jury to view at once. Obviously, the photograph must be enlarged. You contact the adjuster or the investigator and ask for the negative. You are informed that the negatives are sitting along with ten thousand other negatives in a file cabinet in the back of the office. They will look for the negatives, but no promises are made. Negatives should be protected and deposited in the file for safekeeping and easy retrieval.

WHO WROTE ON THE PHOTOGRAPH? The photographs are important and will be shown to the jury but a problem exists: the photos have writing on the back which clearly indicates that an insurance company is involved. The negatives are nowhere to be found. This dilemma could have been prevented if the photographs had been kept neat, clean and free of all writing. The photographs should be placed in a file as to the documentation and identification of them. However, actual writing on the photographs can lead to future problems.

WHAT HAPPENED TO THIS PHOTOGRAPH? The photographs are great, but they have been *permanently* attached to an insurance company photo sheet. To remove the photos will probably damage or destroy them. The negatives cannot be found. The defense attorney has encountered another hurdle which frustrates and sidetracks everyone's efforts. Photographs can be one of the most valuable pieces of evidence to give to a jury and they should be treated with great care. They should be placed in a file for safe keeping which does not involve the destruction of the photograph itself.

In sum, these points indicate a lack of awareness by the investigator and/or adjuster as to the purpose of photographs. They are not in the file to prove the investigator did the job. They are there to preserve evidence. Evidence that may be presented to a jury. The photographs and the negatives should be obtained and stored with the thought that they will ultimately be presented to a jury. A defendant deserves everyone's best efforts to obtain a favorable result. These efforts should include photographs.□

RECENT INSURANCE CASES

By John B. Grier, Marshalltown, Iowa

SUPREME COURT HOLDS FOR INSURANCE COMPANIES

On March 20, 1991, the Iowa Supreme Court issued two decisions of significant interest to defense counsel. The first case reaffirms the Court's holding that there is no cause of action for the alleged bad faith refusal of an insurance company to negotiate a claim with a tort victim. The second case explains the Court's decision in *Leuchtenmacher vs. Farm Bureau Mutual Insurance Company,* 461 N.W. 2d 291 (Iowa 1990) and holds that it is an abuse of discretion not to sever the trial of an underinsured motorist claim from the underlying tort action.

Bates vs. Allied Mutual Insurance Company
Case No. 89—1805
Decision of Iowa Supreme Court
Filed March 20, 1991

In this case, Allied Mutual's insured and a passenger in the insured's vehicle were involved in an accident with the claimant in which the insured and the insured's passenger both claimed they had a green light and the claimant had a red light. Allied Mutual had $20,000 of liability insurance coverage. On the first day of trial, the insured and the insured's passenger both admitted that they had lied about the light and it was red, rather that green. Based on the new testimony of the insured and his passenger, Allied initially settled the case for $16,500 without disclosing the previous perjured testimony of its insured and the insured's passenger. Upon Plaintiff's counsel's learning of the perjured testimony, the settlement was rescinded and the policy limits were paid. The claimant then brought an action against Allied alleging (1) bad faith; (2) unfair trade practices based on a violation of Chapter 507B of the Code; (3) fraud; and (4) intentional infliction of emotional distress. The Trial Court granted summary judgment. The Supreme Court affirmed the Trial Court's grant of summary judgment. The Court discusses at length the four bases for Plaintiff's claims. The opinion reaffirms the Court's decision in *Long vs. McAllister,* 319 N.W.2d 256 (Iowa 1982) on the basis that a tort victim, as a third-party claimant, cannot compel a tortfeasor's insurer to negotiate and settle a claim in good faith any more than that tort victim could compel the tortfeasor himself to do so. Thus, as a matter of law, there cannot be a viable claim for bad faith.

Chapter 507B of the Code regulates trade practices in the insurance business and sets forth in §507B.4 unfair methods of competition and unfair and deceptive acts or practices, including "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." Claimant asserted that the insurance company violated this provision of §507B of the Code. The Court held that a violation of Chapter 507B of the Code does not create a private cause of action.

The Court also affirmed the Trial Court in holding that there was not factual basis for a fraud claim, nor was there sufficient allegations of emotional distress to support a claim for the intentional infliction of emotional distress. This case is of particular interest because it holds that no private causes of action created by virtue of 507B of the Code and reaffirms the Court's previous holding that a party who has no contractual relationship with the insurance company cannot have a claim for alleged bad faith.

Handley vs. Farm Bureau Mutual Insurance Company and Roiger
Case No. 89—1791
Decision of Iowa Supreme Court
Filed March 20, 1991

The Plaintiff in this action filed a wrongful death action against a driver of a vehicle with which the deceased had collided. The deceased's vehicle was insured by Farm Bureau Mutual Insurance Company for underinsured motorist coverage. Based on the language of Iowa Supreme Court in *Leuchtenmacher vs. Farm Bureau Mutual Insurance Company,* 461 N.W.2d 291 (Iowa 1990), which holds that a judgment against the tortfeasor need not be obtained before a claim for underinsured motorist coverage can be asserted, Plaintiff joined the underlying tort action with its underinsured motorist claim so that both the alleged tortfeasor and the insurance company were party Defendants. In the Trial Court, Farm Bureau moved to sever the underinsured claim from the underlying tort action. The Trial Court denied the motion for severance. Permission to take an interlocutory appeal was granted. On appeal, the Iowa Supreme Court held that it was an abuse of discretion for the Trial Court to refuse to sever the underinsured claim from the underlying tort action. The Court reaffirmed the *Leuchtenmacher* decision and held that the underinsured motorist claim was not premature. The Plaintiffs were not required to obtain a judgment against the underlying tortfeasor before pro-

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THE DEFENSE OF CATASTROPHIC DAMAGES Continued from Page 1

realized that damages were part of the case and that they would not hold it against the defendant or consider it an admission of liability simply to contest that aspect of the case. Furthermore, when this case was actually tried a defense verdict was obtained, even though the defendant vigorously contested various aspects of the plaintiff's damage claim and put on several expert witnesses in an attempt to mitigate damages.

THE LIFE CARE PLAN

(PART ONE)

Hand in hand with the growth and complexity of various theories of recovery, attorneys defending cases have witnessed a growth in the various methods of proof of economic damages from experts retained by plaintiffs. Perhaps the most challenging damage witness to arrive of late in the litigation arena is the life care planner.

The growth of trauma centers, rehabilitation hospitals and neonatal intensive care units have dramatically increased those persons who have survived birth and trauma related injuries. A life care plan is a comprehensive document tailored to the indivdual special needs of severely handicapped and traumatized persons. As expected, the life care planner retained by the plaintiff as a forensic expert often times can place many, many zeroes in a prayer or demand. The obvious obligation of defense counsel in these cases is to aggressively attack the underlying necessity for many of the components of the life care plan which is essential in achieving a reasonable and impartial result in the litigation.

Commonly, in catastrophic injury cases, plaintiffs proffer the testimony of a life care planner who prepares an itemized life care plan which includes the life long needs of the individual in terms of medical care, therapeutic treatment, support services, home adaptations/renovations, equipment, and supply needs. Additionally, the frequency, duration, contracted price, and reference to specific health care providers and vendors located within plaintiff's geographical living environment are also included in the plan.

At first blush, such a plan seems to be nearly unassailable. However, as is true in most aspects of litigation, it is essential to carefully scrutinize both the nature of the witness as well as the life care plan itself to determine the fairness and necessity of its ingredients.

Most life care planners are rehabilitation specialists. Ideally, the rehabilitation specialist selected to testify concerning the life care needs of a brain injured or severly traumatized person should have direct "hands on" experience in the case in question. Normally, a background in rehabilitation counseling, rehabilitaiton nursing, or a related field makes up the pedigree of this expert witness. However, in most cases, the expert retained by the plaintiff has no "hands on" experience with the specific plaintiff involved. The life care planner is generally hired specifically for litigation and has not been involved in the day to day planning needs of the plaintiff patient.

It is important to review the prior testimonial experience of the life care planner. There are several well known plaintiffs' experts making the circuit around the country who are well known for running up exorbitant damage figures and who, not surprisingly, testify only for the plaintiff. An excellent source of information for cross examination of these plaintiffs' experts is through the expert witness service of the Defense Research Institute. That organization keeps depositions and pleadings involving experts, including life care planners, from many cases throughout the country.

The typical life care plan includes the basic day to day needs of the injured plaintiff. Typically, the life care planner reviews the medical records then calls vendors in plaintiff's geographic locale to determine what those costs are presently.

One area to closely examine in defending the exorbitant figures of life care planners is to determine if in fact any health care professional has ever prescribed the treatment the life care planner includes in the life care plan. Surprisingly, in many instances, plaintiffs' life care planners include "cadillac" care programs, many needs of which are not essential to the plaintiffs' well being. A factual dispute generally arises over whether the expenses will actually be incurred and what the cost will be.

Iowa has long held that recovery may be had for the expense of medical attendance and nursing care which is reasonably certain to be necessary in the future. *Zach v. Morningstar,* 258 Iowa 1365, 142 N.W.2d 440 (1966). However, an estimate of the costs must be given by one or more qualified witnesses as a predicate for an award of future medical expenses. *Shover v. Iowa Lutheran Hospital,* 252 Iowa 706, 107 N.W.2d 85, (1961), *Luse v. Sioux City,* 253 Iowa 3501, 112 N.W.2d 314 (1961). Certainly an issue can and should be developed whether the life care planner has the requisite expertise to give opinions concerning future medical care. Absent testimony from a treating medical doctor this type of foundational testimony may well be an essential prerequisite to admission of the testimony of a life care planner, who is not a medical doctor, into evidence as it relates to future

medical expenses. In *Hysell v. Iowa Public Serv. Co.,* 559 F.2d 468 (8th Cir. 1977), the court held that future attendant care was a compensable item of damage but required *medical testimony* that the individual required constant care. In *Sieren v. Stoutner,* 162 N.W.2d 396 (Iowa 1968) the court permitted compensation for future medical expenses but only when the attending physician laid the requisite foundation concerning the cost of future medicals and they were reasonable and necessary expenses.

Thus the liability of the life care planner to testify concerning future costs may come down to the issue of whether the life care planner can give a medical opinion as to the reasonable and necessary costs of these future expenses.

In the event the plaintiff is able to put forth the proper foundation and get into evidence the future medical expenses and the cost of the life care plan, defense counsel should have ready an arsenal of items to cross examine the life care planner. These include reference to available collateral sources of aid.

Numerous state and federal programs provide an array of services for disabled people, particularly children and adults who suffer traumantic injuries. These publicly supported programs can help a disabled person obtain his maximum level of independent living and vocational achievement at greatly reduced costs to defendants. Included in these acts are the federal Development Disability Assistance and Bill of Rights Act, which mandates that every state have a developmental services program to provide and coordinate services for individuals with developmental disabilities. 42 U.S.C. §§6000-6085.

The Federal Rehabilitation Act of 1973 requires every state to have a vocational rehabilitation program to provide and coordinate services for persons with vocational handicaps which prevent them from working. 29 U.S.C. §701-797i. Physical restoration services, training, equipment, and supplies needed for a job, and job placement services are examples of services which can be provided through the state vocational rehabilitation program.

Perhaps most important in reducing damages in cases of profoundly impaired children is the Education For All Handicap Children Act (EAHCA), which requires every state to provide special education related services to those children who need them to benefit from their education program.

Under the EAHCA, states all must provide each handicapped child between the ages of 3 and 21 with specially designed instruction at no cost to the child's parents or guardians. This special instruction can include room and board, residential institutions, and transportation to developmental, medical and corrective services. Because the state must pay for these services, EAHCA is a useful tool to the defense in efforts to reduce damages. These services are available regardless.

The EAHCA provides special education-related services at no cost to parents and guardians. The services encompassed within the Act can include supportive services such as speech pathology and audiology, psychological therapy and counseling, physical and occupational therapy, recreation, and medical examinations. Related services may also include a child's room and board in a residential institution, psychological and medical services to assist the child in benefiting for special education. Every school district must identify all the handicapped children in need of special services and provide an education idividually tailored to meet the unique needs of each child. Each child must be provided with a individualized educational program specially designed for that child. The State or School District providing services to a handicapped child under EAHCA cannot seek reimbursement from the child regardless of the child's ability to pay.

In a medical malpractice case collateral sources of payment are clearly admissible under §147.136, Code Of Iowa. However, even in non-medical malpractice cases evidence that the child's needs can be met at a lesser cost than proposed by the life care planner should be admissible.

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CASE REPORT FORM

Included in this issue is a Case Report form which you are encouraged to complete and return to the Association office. Your Association is seeking to build a case bank to assist members in defending civil cases. This service could prove invaluable to any attorney defending a case involving issues faced by another attorney in a similar case. The success of this endeavor, however, depends wholly upon input from members. Please take a minute to complete the form as to any cases you feel would be helpful to other defense counsel. Tear out page at perforation and make extra copies of the form as necessary.

CASE NOTE SUMMARY

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A similar situation existed between 1982 and 1988 when it was unknown in Iowa if a first party bad faith claim existed. Until *Dolan vs. Aid*, the Supreme Court consistently held that the cases presented did not require the court to adopt or reject the tort of bad faith in first party situations. Finally, in 1988, the Supreme Court held that such claims were valid.

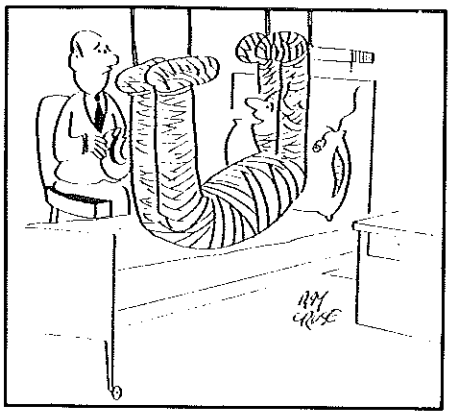
An identical situation has now presented itself in workers' compensation bad faith cases. Therefore, in determining if bad a faith claim exists in workers' compensation claims, the analysis applied by the Supreme Court in *Dolan* must be applied to workers' compensation claims.

III. *Dolan vs. Aid* Principles Applied to Workers' Compensation Claims

The Iowa Supreme Court justified recognizing first party bad faith claims because a special relationship exists between an insurer and an insured and the insured's remedies were inadequate against the insurer for wrongful conduct, *Dolan vs. Aid,* 431 N.W.2d 790, 792. There is no special contractual relationship between an employee and a workers' compensation insurance carrier and there is a statutory remedy for an insurer's wrongful conduct.

A workers' compensation bad faith claim is not a first party claim. The workers' compensation insurance contract is one between an insurance company and an employer requiring the insurance carrier to pay all liability of an employer under a State Workers' Compensation Act. The employee is not the purchaser of the policy and is a third party to the contract. The insurance carrier has a duty to the employer to only pay those claims where the injured employee has met his burden of proving entitlement to benefits under the act. This duty owed by the insurance carrier to the employer is as great, or greater, as its duty to pay benefits to the injured worker. This inherent conflict between employer and claimant cannot be equated with the relationship of an insured claimant directly against his first party insurance carrier.

In *Dolan*, the Court focused most heavily on whether a remedy was available to the affected insured. The Court held that the Unfair Claim Practice Act would deter bad faith conduct, but would not provide any compensation to an aggrieved insured. *See Seeman vs. Liberty Mutual Insurance Companies,* 322 N.W.2d 35 (Iowa 1988). The Iowa legislature, in its wisdom, has directly addressed this problem and provided the injured worker with a remedy against an insurance carrier for unreasonable delay or denial of payment. Iowa Code Section 86.13 provides that the Industrial Commissioner shall award benefits in addition to those benefits payable up to 50% of the amount of the benefit that was unreasonably delayed or denied. Such a statutory remedy does not exist in first party claims and was the primary reason the Court recognized the tort of bad faith in Iowa.



"Don't feel bad Boss, your faulty ladder has at least lowered my cancer risk — I've quit smoking!"

In summary, the Iowa Supreme Court, in *Dolan*, recognized first party bad faith claims because of the relationship between an insured and insurer and because no other remedy was available. Neither of these reasons can be applied to workers' compensation bad faith claims. In following the analysis of *Dolan*, the Supreme Court should reject workers' compensation bad fatih claims.

In Footnote 2 of *Kiner*, the Supreme Court cites Larson's Workers' Compensation Treatise. At the end of the section on bad faith claims and workers' compensation, Professor Larson, with favor, notes that a majority of Courts take the view that where a statute provides an administrative penalty, the remedy for delay or denial of the payments shall remain within the system in form of some kind of penalty. He writes that even if the penalties do not fully compensate the Plaintiff, it does not, in the overall nature of the compensation concept, make them invalid. "At most, it may be cause to apply the legislature for a more suitable penalty level." 2A. Larson's Workers' Compensation Section 68.34 (c), at 13-145, 146.

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IOWA DEFENSE COUNSEL ASSOCIATION

520 - 35th Street, Des Moines, Iowa 50312
515-274-5918

CASE REPORT

Date_____

The success of this endeavor is wholly dependent upon your completion of this report and its conveyance to our offices for installation in the IDCA Case Bank. Please complete in as brief detail as possible - and don't forget to mention topics upon which you have prepared briefs - no matter how slight.

1. CASE NAME, JURISDICTION AND NUMBER:

2. PLAINTIFF'S ATTORNEYS:

   DEFENDANT'S ATTORNEYS:

3. TYPE OF OCCURRENCE:
   (i.e., Product Liability, Premises Liability, Negligence, Civil Rights, Business Tort, Contract, Other)

4. NATURE OF INJURY OR DAMAGE:

5. VERDICT AMOUNT:_____; SETTLEMENT AMOUNT:_____

   JUDGE:_____; JURY:_____

   COMPARATIVE FAULT PERCENTAGES:

   APPROXIMATE SPECIALS OR ECONOMIC LOSS:

6. EXPERTS USED:
   (Address and Telephone) (Were reports or depositions retained?)

   PLAINTIFF:
   - LIABILITY
   - DAMAGES

   DEFENDANT:
   - LIABILITY
   - DAMAGES

7. SUBJECTS BRIEFED:
(Briefs Retained?_____)

8. FACTS:
(Briefly)

9. PLAINTIFF'S THEORY OF THE CASE:
(Briefly)

10. AFFIRMATIVE DEFENSE RAISED/COUNTERCLAIMS, CROSS-PETITIONS:

11. TOPIC OF ANY UNIQUE JURY INSTRUCTIONS USED:
(Instructions retained?_____)

12. SPECIAL COMMENTS:

13. NAME, ADDRESS, TELEPHONE NUMBER OF PERSON REPORTING:

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ceeding with an underinsured motorist claim. The Court, relying on Iowa Rule of Civil Procedure 186 on separate trials, recognized that the issue of severability is a matter of Trial Court discretion and can only be disturbed on appeal if that discretion has been abused. The case is somewhat unique, in that partial summary judgment has been entered by the Trial Court on the issue of liability. The Court held, however, that because the amount of insurance would be admissible in connection with the underinsured claim and not admissible in the underlying tort action, that the subject of insurance could result in a larger verdict against the tortfeasor and hence, the Trial Court abused its discretion in not granting separate trials.□

CASE NOTE SUMMARY

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IV. Conclusion

The tort of bad faith against an insurance carrier is a lightning rod of controversy. A chance to sue an insurance carrier for punitive damages brings glee to plaintiff's attorneys and dismay to defense counsel. The Iowa Supreme Court, in a carefully reasoned decision in *Dolan,* found that a first party bad faith claim should be permitted in Iowa because of the special relationship between an insured and insurance carrier and because no other adequate remedy existed. The special relationship does not apply to an employee and his employer's insurance company, and, also, the Iowa legislature has provided a statutory remedy in case of abuse. If the remedy is insufficient, it should be addressed by the legislature and not the civil tort system. The Iowa Supreme Court should tread carefully in the area where the legislature has already spoken.□

Which motion do I file now???

CATASTROPHIC DAMAGES

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A final response to the plaintiff's life care plan is for the defendant to hire one of its own. Certain medical care providers are known as "developmental pediatricians." Some of these have expressed a willingness to testify in cases such as this and take serious issue with the plaintiff's expert. The problem with these defense experts is that the plaintiff can usually make substantial inroads in cross-examination getting the defense expert to admit that there is a very substantial disability and that the injured party does, in fact, require a tremendous amount of care.

In the case referred to at the beginning of this article, the plaintiff used Robert Voogt, a rehabilitation specialist from New Orleans. The defendants used Dr. Susan Farrell, a developmental pediatrician from Kansas City, Missouri. It was felt that Dr. Voogt was substantially undermined by the fact that he was not a doctor, that he had no hands-on experience with the injured plaintiff, and that he had virtually made a career out of testifying and making presentations to plaintiff's trial groups around the country. Although Dr. Farrell was very credible and took serious issue with the projections of Dr. Voogt, she was subject to some objective cross-examination regarding the condition of the child and the childs extensive needs.□

"Why did you leave your last job?" asked the manager. "Illiness", said the applicant. "What kind of illiness?" "I don't know," the man said. "They just said they were sick of me!"

FROM THE EDITORS

After a hopeful journey into the constitutional realm, the issue of punitive damages seems to have returned empty handed. On March 4, 1991, the U.S. Supreme Court announced its decision in *Pacific Mutual Life v. Haslip* rejecting the latest broad-based constitutional challenge to the imposition of punitive damages.

Expectations were first aroused when the Supreme Court accepted *Bankers Life v. Crenshaw,* 486 U.S. 71 (1988) for review. This case involved a punitive damage verdict of some $1.6 million on a first party bad faith claim yielding actual damages of $20,000. Constitutional arguments were advanced but ultimately not considered since they had not been pressed and passed upon below. These issues were left for another day.

Next came *Browning-Ferris v. Kelco,* —,U.S.— (1989) a case involving actual damages of slightly over $50,000 and a punitive verdict of $6 million. The defense argued such disparity was a clear violation of the excessive fines clause of the Eighth Amendment. Not so, declared the Court. The Eighth Amendment has no application to punitive awards in civil cases between private parties. But the constitutional debate was unfinished. Court members seemed to express concern over the due process implications of large punitive awards. Again, however, the issue was not deemed to be properly before the Court.

Now we have the Court's decision in the *Pacific Mutual* case. This was the case many thought might fundamentally alter on due process grounds the manner in which punitive awards are rendered. It was not to be. The common law approach of initial jury determination coupled with review by trial and appellate courts does not *per se* offend due process. Moreover, significant juror discretion will be tolerated where exercised within reasonable constraints and subjected to meaningful and adequate post verdict review.

Punitive damages have survived the broad constitutional test. But the local examination remains. Query whether Iowa law imposes sufficient standards for evaluation of punitive awards as did the Alabama scheme approved in *Pacific Mutual.* This is a valid question worthy of close consideration by defense counsel. It is also an issue that will surely be heard again.□

Kermit B. Anderson
1800 Financial Center
Seventh & Walnut
Des Moines, Iowa 50309-3911