defense UPDATE

The Iowa Defense Counsel Association Newsletter July, 1991 Vol. IV, No. 3

LEGISLATURE CHANGES LAW

THE GENERAL ASSEMBLY DRASTICALLY CHANGES THE LAW GOVERNING UNINSURED & UNDERINSURED MOTORIST COVERAGE

By John B. Grier, Marshalltown, Iowa

We have reported in previous issues the current status of uninsured and underinsured motorist coverage under the decisions of the Iowa Supreme Court. We last devoted time to this subject matter in the *DEFENSE UPDATE Vol. IV,* No. 1, January, 1991, in which we reported the current status of "full compensation" under the underinsured motorist coverage. Basically, before the recent legislation passed in the last session of the General Assembly, the Iowa Court condemned the use of antistacking provisions in underinsurance motorist coverage. In that article we reported that the general rule adopted by the Iowa Supreme Court seems to be that "the Court will strictly review exclusions which purport to limit or reduce UIM coverage below the policy limits but if UM coverage is in issue, the Court will take a narrow view and only ensure minimum compensation to the victims of uninsured motorists."

In *Hernandez v. Farmers Insurance Company,* 460 N.W.2d 842 (Iowa 1990), Hernandez sought to recover underinsured motorist coverage under three different policies. His own policy had a $25,000 underinsured motorist limit and two separate and distinct policies issued to his mother, under which he qualified as an insured, had underinsured motorist limits of $100,000 each, which, if stacking was allowed, would result in underinsurance motorist coverage of $225,000. The Court held that the other insurance clause contained in the mother's policies was void as against public policy, relying on the proposition that underinsured motorist coverage had as its principal purpose to provide "full compensation" to the victim and thus, anti-stacking provisions would frustrate that public purpose. Thus, until the actions of the General Assembly, the status of the anti-stacking provisions of underinsurance motorist coverage was that such provisions would be held void as against public policy, unless the policy (1) involved a prohibition against intra-policy stacking, *Tri-State Insurance Company of Minnesota v. DeGooyer,* 379 N.W.2d 16 (Iowa 1985); or (2) the owned-but-not-insured exclusion, *Kluiter v. State Farm Mutual Auto Insurance Co.,* 417 N.W.2d 74 (Iowa 1987) (If the vehicle involved in the accident is owned by the claimant and insured by him, anti-stacking provisions will prevent application of underinsured motorist coverage provided for other vehicles owned by the claimant.)

In the last session of the Iowa Legislature, House File 634 provided in §1002 the following amendment to §516A.2, Code of 1991:

1. Except with respect to a policy containing both underinsured motor vehicle coverage and uninsured or hit-and-run motor vehicle coverage, nothing contained in this chapter shall be construed as requiring forms of coverage provided pursuant hereto, whether alone or in combination with similar coverage afforded under other automobile liability or motor vehicle liability policies, to afford limits in excess of those that would be afforded had the insured thereunder been involved in an accident with a motorist who was insured under a policy of liability insurance with the minimum limits for bodily injury or death prescribed in subsection 10 of section 321A.1. Such forms of coverage may include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits.

   To the extent that Hernandez v. Farmers Insurance Company, 460 N.W.2d 842 (Iowa 1990), provided for interpolicy stacking of uninsured or underinsured coverages in contravention of specific contract or policy language, the general assembly declares such decision abrogated and declares that the enforcement of the antistacking provisions contained in a motor vehicle insurance policy does not frustrate the protection given to an insured under section 516A.1.

2. *Pursuant to chapter 17A, the commissioner of insurance shall, by January 1, 1992, adopt rules to assure the availability, within the state, of motor vehicle insurance policies, riders, endorsements, or other similar forms of coverage, the terms of which shall provide for*

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MESSAGE FROM THE PRESIDENT

Alan E. Fredregill
PRESIDENT

ANNUAL MEETING
OCTOBER 24-26, 1991

Make plans now to attend the Association's annual meeting and seminar which will be held Thursday through Saturday morning, October 24-26, 1991, at the University Park Holiday Inn in West Des Moines, Iowa. Seminar chair and President-Elect David Hammer has an outstanding lineup of speakers for an "Old Masters Course in the Defense of Civil Lawsuits."

Past presidents of our Association will be featured, including Don Kersten, Claire Carlson, Tom Hanson, Ken Keith, Phil Willson, Pat Roby, Dave Phipps, Ray Stefani, Sr., Craig Warner, Bob Allbee, Bob Waterman, Sr., Lanny Elgar, Herb Selby, Ed Seitzinger, Marv Heidman, Roy Voigts, Harold Grigg and Ralph Gearhart. Also making presentations will be our lobbyist Kevin Kelly, Norm Bastemeyer on ethics, the Honorable Peter Van Metre, Chief Justice Arthur McGivern, and plaintiff's lawyer Tom Riley.

Brad Price and Jaki Samuelson will present the annual workers' compensation update, and all-time favorite Greg Lederer has once again consented to do the appellate review. Preparations are underway for a delightful *Italian Fare* Thursday evening, and Friday evening's banquet will be highlighted with a presentation by a renowned public speaker from Gulfport, Mississippi, attorney Boyce Holleman. Following up on the *"let's kill all the lawyers"* quote from Shakespeare's *Henry VI,* Holleman's address is entitled, *"Four Hundred Years Later, the Bashing Still Goes On!"*

This event is perennially the best value in continuing legal education in this State, and this year's program will be no exception. Approval has been received for 17½ hours of CLE credit, including 2 hours for ethics and 6 hours for United States District Court.

JURY INSTRUCTIONS, PART II, SOON TO BE PUBLISHED

At the April 26 Board meeting conditional approval was granted to Part II of the Iowa Defense Counsel report on the Iowa Civil Jury Instructions. After some minor changes, publication will occur this summer. Each member, as well as every Iowa district court and federal court judge, will receive a complimentary copy. Director Greg Barntsen chaired the committee, which included John Gray, Jerry Spaeth, Roger Stone, Bob Sudmeier, Curt Hewett, Mark Brownlee, Eric Sloter, Rick Stefani and Patrick Woodward.

COLLEGE OF TRIAL PRACTICE PLANS NEARING COMPLETION

Plans for the first annual Iowa Defense Counsel Association College of Trial Practice are nearing completion, reports seminar chair and past president Dave Phipps of Des Moines. The event will be held in the fall over a Friday-Saturday format. Designed to teach newer defense lawyers the skills necessary to win in the Iowa court system, each phase of a trial will be examined in depth by an experienced faculty. Students will have hands-on sessions, with a strong emphasis on learning by doing. The cost will be nominal, especially in comparison to national trial academies. Twenty-four slots will be available. See insert this issue.

COLORADO SEMINAR FOR DEFENSE LAWYERS

Carol Welch, DRI regional representative from Denver, announced plans at the National Conference of Defense Bar Leaders held in March at Williamsburg, Virginia, that the mid-continent DRI region would sponsor a ski seminar during the 1991/92 ski season at one of the leading Colorado ski resorts. Watch for more news from DRI.

CASE REPORTS

Thanks to the following 15 members who have made 32 contributions to the IDCA case report system:

Craig Warner, David L. Phipps, Timothy J. Walker, John C. Gray, Robert Sudmeier, David Rashid, Emmanuel Bikakis, Gregory G. Barntsen, John M. French, Richard J. Sapp, Lyle W. Ditmars, Scott J. Rogers, Minor Barnes, Ronald J. Shea, Robert J. Blink.

BOARD MEETING

The next meeting of the Board of Directors will not occur until 7:00 a.m., Thursday morning October 24, which is immediately prior to the start of our annual meeting and seminar. Please tell a board member if you have any business requiring board action.

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THE DEFENSE OF CATASTROPHIC DAMAGES

(Second of Three Part Series)

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

The plaintiff in a case claiming catastrophic damages will attempt to establish a huge claim by proving (1) the plaintiff has a normal life expectancy, and (2) the per annum cost of caring for the plaintiff over that life expectancy. In the previous issue attention was given to the so-called "life care plan," which is the means by which the plaintiff establishes the per annum cost to the injured party. Attention can also be given to the first part of the equation--the life expectancy of the plaintiff. As noted in the previous issue, this is a very sensitive matter and must be handled with extreme care. The jury must be advised during voir dire that one of the elements of the plaintiff's case is damages and that the mere fact that damages is going to be addressed by the defendant is not an admission of liability. Furthermore, the jurors should be advised that the plaintiff is going to prove damages by attempting to establish life expectancy. However, in cases like this it is quite likely that the individual does not have a normal life expectancy. The jurors must be advised that the only reason that the defendants are going into this is because it is part of the plaintiff's claim, that the defendants do not feel that it is accurate, and therefore the defendants are going to bring in some additional evidence on this issue. Mention might also be made that this is probably going to be hard for the relatives to hear, and possibly hard on the jurors, but that it is defense counsel's obligation to bring evidence to bear on the subject if they disagree with the plaintiff's position, and it was the obligation of the jurors to hear the evidence objectively and without passion or sympathy.

LIFE EXPECTANCY

In the obstetrical malpractice case which was identified in the previous issue, the primary witness on life expectancy was Richard K. Eyman, Ph.D. Dr. Eyman is employed by the University of California, Riverside. His office is located at the Lanterman Developmental Center, a large facility for handicapped and brain injured individuals in Pomona, California. Dr. Eyman, along with three other individuals (including two MD's), published an article on the subject in the *New England Journal of Medicine*, "Life Expectancy Of Profoundly Handicapped People With Mental Retardation," Richard K. Eyman, Ph.D., Herbert J. Grossman, M.D., Robert H. Chaney, M.D., Thomas L. Call, M.A., Vol. 323, pp. 584-589, August 30, 1990.

In this particular case, not only did Dr. Eyman testify about life expectancy, but the developmental pediatrician and the neurologist who were witnesses also offered testimony that, in their opinion, the plaintiff would have a substantially reduced life expectancy. Dr. Eyman's testimony was offered by videotaped deposition.

This study is somewhat of a landmark in that most studies on the mortality of mentally retarded people have appeared in journals devoted to mental retardation rather than medical journals. Although the primary focus of Dr. Eyman's studies relate to children, the principles contained therein should be applicable to most adults who have suffered severe brain injuries. Dr. Eyman notes that many professionals believe that good medical care will result in normal life expectancy for persons with profound handicaps. However, this study reveals that their prognosis is poor, being less than 20 years of age at death in most cases.

This study is based upon approximately 100,000 individuals with developmental disabilities who received services from the State of California during the years 1984-1987. Various risk factors were identified. These risk factors determined the life expectancy of the persons involved. The primary factors were (1) cognitive functioning, (2) mobility, (3) toileting skills, and (4) feeding ability. The primary factor was mobility. The second most important factor was ability to feed oneself. Individuals with nonmobility, who relied upon tube feeding, had a life expectancy of only four to five years past their present age. A nonmobile person who could feed himself would have an average life expectancy of approximately eight more years. A person who was mobile (although still nonambulatory) and could take food if fed by others had an increase in life expectancy to about 23 years.

Obviously, the potential damage award in a case involving an injured plaintiff with a life expectancy of five years verses a life expectancy of sixty years is enormous.

The plaintiff in the instant case had a number of different responses. First, he attempted to have his "life care planner" testify as to normal life expectancy. However, the Judge sustained objections on the grounds that he was not a medical doctor and could not offer opinions regarding medical issues. The life care planner (Robert Voogt) also attempted to testify that with "Cadillac care" these children could live a normal life expectancy. However, Dr. Eyman vigorously defended the quality of the care that these children received in California. Dr. Eyman also notes in his article:

> The prognosis for most of these children and adults is very poor unless the critical skills associated with increased survival can be achieved. However, given the extent of brain damage in most of these people, change in skill level is unlikely and a relatively early death is probable.

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CASE NOTE SUMMARY

Is The War Against Punitive Damages A Lost Cause?

By Angela Althoff Swanson, West Des Moines, Iowa

In the long standing war pitting tort reformers against the plaintiffs' bar and other special interest groups, the battles have been hard fought. The recent United States Supreme Court's decision in the *Pacific Mutual* case has been heralded by many as the last stand of punitive damage opponents. The misinformed media and others claim that *Pacific Mutual* holds that punitive damages are constitutional and will be upheld in the future. Quite to the contrary, one only has to read the decision to see that the fight has not been lost. In fact, the *Pacific Mutual* case is full of new ammunition for the battles ahead. *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S.Ct. 1032 (1991).

Pacific Mutual involved an Alabama insurance agent who accepted premiums for group policies and kept the money for himself. Unfortunately for the group members, their health insurance benefits were cancelled leaving them with medical bills, no insurance, bill collectors and bad credit. The damage award on the fraud, breach of contract and bad faith claims, totaled over one million dollars, which included a punitive damage award of more than four times what the plaintiff claimed as compensatory damages. *Id.* at 1036-37.

In *Pacific Mutual,* the Court first held that the common-law method for assessing punitive damages is not *per se* unconstitutional. The Court then went on to say that despite the long history of assessing punitive damages, it was not willing to hold that their imposition is never unconstitutional. The Court voiced its concern "about punitive damages that 'run wild'." The Court then concluded that a fact specific approach for the determination of punitive damages is necessary under the Due Process Clause. *Id.* at 1043.

The Court in *Pacific Mutual* first examined the jury instructions the Alabama state trial court judge gave to the jury. While giving the jury discretion they did confine their discretion to deterrence and retribution. Further, the instructions told the jury the punishment nature and purpose of punitive damages and explained that their imposition was not compulsory. The Court found that the discretion allowed under Alabama law is no greater than in many other areas such as "reasonable care", "the best interest of the child" and "due diligence." *Id.* at 1044.

The Court next examined the post-trial procedures for scrutinizing punitive awards established by the Supreme Court of Alabama in *Hammond v. City of Gadsden, 493 So.2d 1374 (Ala 1986).* The *Hammond* test requires trial courts to state on the record the reason for interfering or refusing to interfere with jury verdict on the grounds of excessiveness. *Id.* The trial court can appropriately consider "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties". *Id.* at 1379. The Supreme Court held that the *Hammond* test ensures meaningful and adequate review by Alabama trial courts. *Pacific Mutual* at 1044.

The Court then examined the Alabama Supreme Court's additional check on the jury or trial court's discretion which involves a comparative analysis and application of detailed substantive standards. The review focuses on ensuring that the award 'does not exceed an amount that will accomplish society's goals of punishment and deterrence.' *Id.* at 1045. Another factor in Alabama's favor was its recent elaboration and refinement of the *Hammond* test by setting out seven criteria to use in assessing whether the award is reasonably related to the goals of deterrence and retribution. the criteria are:

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;

(b) the degree of reprehensibility of the defendant's conduct, the duration of the conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

(c) the profitability to the defendants of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss;

(d) the 'financial position' of the defendant;

(e) all the costs of litigation;

(f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and

(g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 1045. The Supreme Court concluded that the Alabama standards provide sufficiently definite and meaningful constraint of the discretion of the fact finders in awarding punitive damages, in that they are "guided by more than the defendant's net worth." *Id.* The Court

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No one can make you feel inferior without your consent.

IN THE PIPELINE

Appeal to Address Seat Belt Allocation of Damages

by David L. Leitner, Des Moines, Iowa

Under Chapter 668 of the Iowa Code, the negligent behavior of any participant in an automobile collision is a matter for the jury to weigh in determining the allocation of fault in the award of damages. Under §321.445, the Code, however, the discretion of the jury is limited in one area. Under that Code section, a party's failure to wear a seatbelt may be considered by the jury in reaching its verdict, but not in the allocation of fault or the determination of damages.

Iowa Code §321.445 makes it a public offense for a front seat passenger not to wear a seatbelt while motoring on the State's roads. In the event of an accident, the jury is allowed to consider the failure to wear a seatbelt but only to diminish damages otherwise recoverable, and then by no more than five per cent. The Constitutionality of that provision is currently pending before the Iowa Supreme Court in the case of *Duntz v. Ziemet,* 91-198.

Mr. Duntz made a left turn across the path of an oncoming vehicle. Ms. Ziemet in the oncoming vehicle, was driving at an exceedingly high rate of speed. As Mr. Duntz was clearing the intersection, he was broadsided by Ms. Ziemet. Ms. Ziemet's injuries consisted principally of a seriously broken nose and a resulting minor scar. She admitted that she was not wearing her seatbelt. Her facial injuries occurred as her face struck the windshield, according to her own testimony.

Upon trial of the matter, the jury allocated fault fifty percent to Mr. Duntz and fifty percent to Ms. Ziemet. The jury further determined that there was substantial evidence of a causal connection between Ms. Ziemet's failure to wear her seatbelt and her injuries. For this, they reduced her award by the statutory maximum of five percent. Prior to trial a Motion to Adjucicate Law Points was filed and ruled upon. The Motion challenged the constitutionality of the portion of the Iowa Code that limited the jury's ability to find fault for failure to wear a seatbelt. The Court overruled the Motion. Over objection, the Court gave the stock jury instruction on seatbelt usage.

On appeal there are three issues. First is the question of whether §321.445 deprives the litigant of his right to a trial by jury. The Iowa Constitution provides that the right to a trial by jury shall be held inviolate. The rule has always been that all issues of fact are to be determined by a jury where one is properly demanded, as in this case. The argument being urged before the Supreme Court is that §321.445 remains the province of the jury by legislatively determining, in advance, that no more than five percent of one's injuries could be caused by failure to wear a seatbelt. Relying on cases overturning statutory damage caps in medical malpractice actions, it is urged that issues of causal fault are solely within the province of the jury and any legislative intrusion or predetermination as to maximums and minimums violates the Constitutional right to a jury trial in civil matters.

The second issue presented to the Court is whether §321.445 violates the Equal Protection Clauses of the United States and State Constitutions. Ordinarily, violation of a state statute is considered negligence *per se.* That is not the case in the seatbelt arena, however. Indeed, a strict reading of the statute could lead one to the conclusion that failure to wear a seatbelt is expressly made not negligent. The statute, after all, does provide that the seatbelt issue can be used only to reduce damages, not to eliminate recovery.

The seatbelt statute also creates the anomalous circumstance of permitting the jury to allocate more than one hundred percent fault. In order to reduce damages for failure to wear a seatbelt, the jury must make a determination that there was a causal connection between the failure to wear the seatbelt and the injury sustained. Ordinarily, under Ch.668, this would be considered comparative fault. In this case, the jury determined that the parties were each fifty percent at fault in causing the accident, and that Ms. Ziemet was an additional five percent at fault in causing her injuries. In fact, the Court permitted the jury to determine one hundred and five percent fault. If Ms. Ziemet was fifty-five percent at fault in causing her injuries, she should have been barred from recovery. But, because of the special classification set up in §321.445, the Code, she was permitted to recover damages despite having been more than fifty percent at fault.

The statute creates, in effect, two classes of citizens: those whose negligence contributes to their damages in any way other than failure to wear a seatbelt, and those whose negligence contributes to the damages by failure to wear a seatbelt. One searches in vain for a rational basis for this statute. The Supreme Court has previously determined that the purpose of this statute is to encourage the wearing of seatbelts. One can encourage the wearing of a seatbelt through a system of fines, which the statute does. One can also encourage the wearing of seatbelts by making failure to wear seatbelts an element of fault, which the statute does. One cannot, however, encourage the wearing of seatbelts by making the potential fault allocable to that failure so small as to make it meaningless or by permitting recovery to a seatbelt law violator despite more than fifty percent causal fault.

The third issue in this case is a procedural one. The action was filed and Ms. Ziemet was defended by an

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ARTICLE OF INTEREST

Legal Assistants and Accident Reconstruction

by Gerald T. Sullivan, Cedar Rapids, Iowa

Legal assistants are becoming a vital part of many law firms. The following article is part of a presentation made to the Iowa Association of Legal Assistants at their spring seminar in 1991. The presentation was made by Attorney Gerald Sullivan of Cedar Rapids. We are grateful to Mr. Sullivan for his permission to reprint this article.

THE RECONSTRUCTION OF THE ACCIDENT AND THE ACCIDENT SCENE

Part of the follow-up to the DOT report on the more detailed reports, is the recreation of how the accident happened. It goes without saying that you must determine all the dynamic facts that led to the collision. The thing that many investigators forget in the process is that the problem is not just finding out what happened, but how to best portray what happened to a jury. As you uncover fact after fact, you must, in each instance, determine who will testify to the fact and what exhibit can be used to illustrate the fact to the jury. This is where your ingenuity and creativity must surface. It may be that you will need an expert reconstruction specialist. You may need computer generated visual aid. The seriousness of the case and economics will do much to determine these things. In the routine cases it will probably be up to you and the lawyer to reconstruct the accident and the scene.

If you can locate "at the scene" photos or video, you are on your way. Photographs, maps, sketches, and physical evidence itself are the normal tools. What you do with them is really the key. The case itself will tell you how far to go. I've seen overkill that turns jurors off. You don't need elaborate drawings and large matted pictures for a fender bender/non-permanent soft tissue injury case. You might well need such things in a more serious case.

You will probably need a set of photos showing the approaches and sight distances each driver had at the time of the accident. I realize it is an imperfect world and sometimes you have to settle for what you can get. To the extent possible, photos should be taken at the same time of day as the accident. They should be taken at the same time of year so that vegetation and road conditions are most similar to those existing at the time. The weather conditions should be the same. The camera should be held at the eye level each driver would have had at the time.

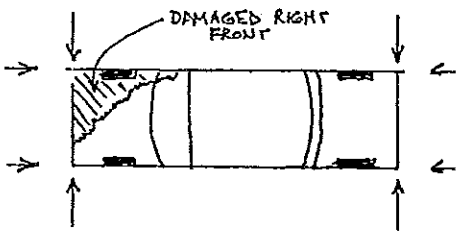
Now before you run out and start snapping pictures think of who can testify to these pictures and possibly testify to the technical photographic methods being used. If you know a good professional photographer consider hiring him or her. Consider also having your client or a witness accompany you to the site. By all means you need to be there to supervise.

It may well be that you can take the pictures, but have some idea of what witness is going to testify about them. If it is a friendly witness, think seriously about having them with you. They can then state exactly where the photographer was standing when the picture was taken. Usually this involves measurements. You can't testify! Someone else has to read the tape or take the paces. Someone else has to tell the jury the distances between telephone poles or between the painted lines on the highway. Someone else has to identify the cracks in the pavement. Someone else needs to compare the pictures taken on the accident day or night to those taken at a later time.

One of the most important matters in an accident case may well be the establishment of the point of impact. Often you are going to rely on one of the investigating officers for the evidence that leads a jury to conclude where the point of impact was. Go out to the scene with the officer. Try to carefully win him or her over to your side. If there is a condition favorable to your side, subtly point it out to them. Better yet, suggest it in such a way as they think it is their idea.

If it is very long after the accident you probably won't have debris that will be useful, but there still might be marks or gouges that can be identified and possibly related to the accident. Try to determine what caused the mark or the gouge — i.e. which tire or which part of the vehicle. Get a witness to identify these things and reason with you about them.

Another important thing to do is photograph the vehicles themselves. I really wonder if enough photos can be taken of these vehicles. It seems that when you are getting near trial you start to focus on things that didn't have much significance in the early stages. It seems you are always looking for one more picture to show better the point you want to illustrate. It seems like overkill but film is relatively cheap. I think it is important to include photographs that are taken along all four sides of the damaged cars. These photos should be taken from each direction along the planes of where the surfaces were before the accident, e.g.



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LEGISLATURE CHANGES LAW

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endorsements, or other similar forms of coverage, the terms of which shall provide for the stacking of uninsured and underinsured coverages with any similar coverage which may be available to an insured.

3. *It is the intent of the general assembly that when more than one motor vehicle insurance policy is purchased by or on behalf of an injured insured and which provides uninsured, underinsured, or hit-and-run motor vehicle coverage to an insured injured in an accident, the injured insured is entitled to recover up to an amount equal to the highest single limit for uninsured, underinsured, or hit-and-run motor vehicle coverage under any one of the above described motor vehicle insurance policies insuring the injured person which amount shall be paid by the insurers according to any priority of coverage provisions contained in the policies insuring the injured person.*

6. Page 12, by inserting after line 29, the following:

"Sec.____. Section 1002 of this Act applies to all causes of action accruing on or after July 1, 1991, and to those accruing before July 1, 1991, which are filed on or after September 15, 1991.

This Bill was signed into law by Governor Branstad on May 28, 1991. With this legislation, it is clear that *Hernandez v. Farmers Insurance Company* no longer will be applicable as the law of Iowa to those causes of action accruing on or after July 1, 1991, and will not apply to actions which accrue before July 1, 1991, unless a lawsuit is filed on or before September 14, 1991.

The legislation deals specifically with *Hernandez v. Farmers Insurance Company,* but does not specifically refer to *Veach v. Farmers Insurance Company.* However, with the language of the statute, as amended, the most likely construction of the new legislation by the Courts should be that likewise *Veach v. Farmers Insurance Company* has been overturned by this new legislation. It no longer appears that the distinction between uninsured motorist coverage and underinsured motorist coverage previously employed by the Iowa Supreme Court to void policy provisions as against public policy will be viable. The law continues its changes. □

MESSAGE FROM THE PRESIDENT

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WELCOME TO NEW MEMBERS

The Association is pleased to announce the addition of 23 new members since the last annual meeting. We welcome the following:

Mark J. Wiedenfeld, Des Moines, Mark A. Woollums, Davenport, John C. Gray, Sioux City, Bruce A. Kittle, Cedar Falls, Joel S. Hjelmaas, West Des Moines, Lori L. Koop, West Des Moines, Randall Carrigan, West Des Moines, William Nicholson, Cedar Rapids, Joseph C. Creen, Davenport, John M. Burns, Omaha, Leonard T. Strand, Cedar Rapids, Thomas R. Pospisil, Des Moines, Timothy S. Eckley, Des Moines, P. D. Furlong, Sioux City, Timothy M. Braun, Rock Island, John A. Barry, Cedar Rapids, Steven C. Lussier, Des Moines, David J. W. Proctor, Des Moines, Sean W. McPartland, Cedar Rapids, Matthew J. Nagle, Cedar Rapids, Denice Mondt, Algona, Donna L. Paulsen, Des Moines, Eric M. Knoernschild, Muscatine.

If you know someone who practices defense law, let them know about the Iowa Defense Counsel Association. Applications are available from any board member, including officers, directors and past presidents. The Iowa Defense Counsel Association is nationally recognized for its service to the defense bar. □

IN THE PIPELINE

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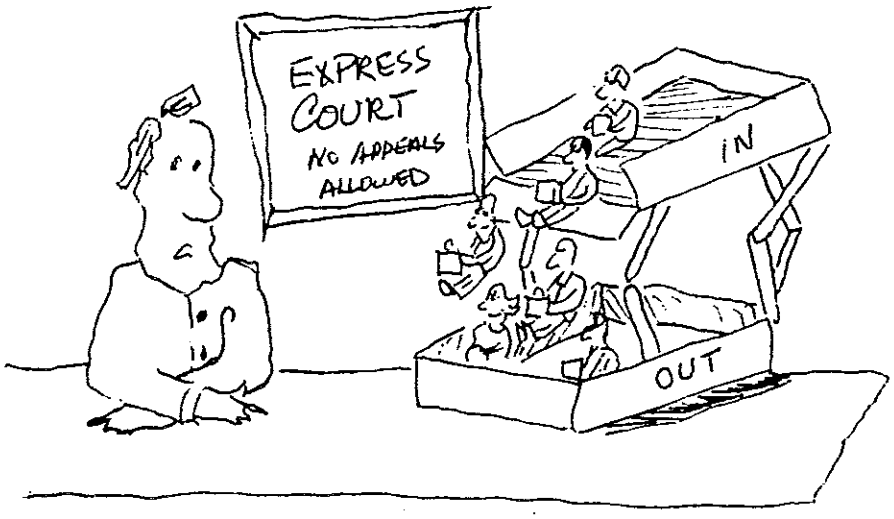
carrier. She filed a counterclaim through an attorney of her own choosing. Despite objection, the Trial Court permitted both attorneys for Ms. Ziemet to make opening statements and to make final argument. The Court did not limit these attorneys in the scope of their argument and permitted them each to argue much the same points. Duntz contends that this lent undo emphasis to Ms. Ziemet's factual contentions and was prejudical.

Briefs have been submitted on both sides in this case and scheduling of oral argument is anticipated in the next few months. □



CASE NOTE SUMMARY Continued from Page 4

favorably compared Alabama's standards to the specific standards adopted legislatively in Ohio and Montana. Id. at 1046 citing *Ohio Rev. Code Ann. Section 2307.80(B) (Supp.1989); Mont. Code Ann. Section 27-1-221 (1989).*

While upholding Alabama's common-law punitive damages standards and comparing them to Ohio and Montana punitive damages legislation, the Court distinguished these approved methods from the Vermont and Mississippi schemes about which the Court has previously expressed concern. *Pacific Mutual* at 1045 n.10. In Vermont, a punitive award will be set aside or modified only if "manifestly and grossly excessive." *Id.* In Mississippi, only if "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." *Id.*

It is therefore necessary to look at Iowa's or any other state's system for reviewing punitive awards to determine if a due process challenge would have merit. We must ask whether Iowa falls in the Alabama, Ohio, Montana category or the Mississippi and Vermont category?

Iowa has both statutory law and common law on the issue of punitive damages. *Iowa Code* Section 668A (1991), requires the use of special interrogatories at the trial as to whether willful and wanton disregard by defendant occurred and whether the conduct was directed specifically toward the claimant. Based on the responses, funds awarded are either paid wholly to claimant and/or apportioned partially to a civil reparations trust. Section 668A further limits when evidence of wealth may be introduced into evidence. Section 668A does not address what specific standards are to be applied by the fact finder in determining whether and to what extent punitive damages should be awarded.

In *Pacific Mutual,* the Court examined the jury instructions as part of its due process analysis. A comparison of Iowa's uniform civil jury instructions regarding punitive damages and the Alabama instruction approved by the Supreme Court shows Iowa's instructions fall short. The recent revision of Iowa's uniform civil jury instructions deleted three areas. First, deleted was the statement that "the law permits but does not require a jury to allow punitive damages in certain cases..." Second, the new instruction omits the statement that the jury should be guided by its "careful and well-considered judgment." Third, deleted is the requirement that punitive damages must be reasonably proportionate to the actual damages. *Iowa Civil Jury Instructions 1987.* In contrast, the Iowa Supreme has long held that punitive damages must be reasonably related to actual damages either shown or awarded. *Ryan v. Arneson,* 422 N.W.2d 491, 496 (Iowa 1988). The *Iowa Defense Counsel Report on Civil Jury Instructions* (1990) suggests that the uniform punitive damage instructions be modified by defense counsel to include a correct statement as to the requirement of a proportionate relationship between actual damages and the punitive award. In addition to that modification, the *Pacific Mutual* case supports arguments by defense counsel for proposed instructions to include not only the three statements previously contained in the uniform instructions, but also specific factors such as the seven criteria set forth above which are used in Alabama and were endorsed by the Supreme Court in *Pacific Mutual.* A refusal by a trial court to include such specific factors would form the basis for a due process challenge to a punitive damage award.

In the absence of any statutory factors for punitive damage awards in Iowa, we must examine the common law as did the Supreme Court in *Pacific Mutual.* Iowa case law does not include any real delineation of specific factors for the jury, fact finder, or appellate court to consider in determining whether to award or uphold punitive damages and if so, in what amount. *Ryan* at 496; *Pringle Tax Service, Inc. v. Knoblauch,* 282 N.W.2d 151, 153-54 (Iowa 1979). The Supreme Court in *Ryan* after reviewing recent cases stated, "...our primary focus in review of a punitive damage award is the relationship between the punitive award and the wrongful conduct of the offending party." Ryan at 496. The Court further held that "[I]n determining whether punitive damages are so excessive that they demonstrate passion and prejudice on the part of the jury, we will consider whether the punitive damage award is reasonably related to the malicious conduct of the defendant which resulted in actual injury or damage to the plaintiff." *Id.* Such a broad non-specific standard closely resembles those used in Vermont and Mississippi which the Supreme Court in *Pacific Mutual* mentioned with disfavor. The Supreme Courts of some of our surrounding states have provided specific factors to guide in the award and review of punitive damage awards. *See, e. g., Groseth Intern., v. Tenneco Inc.,* 440 N.W.2d 276, 278 (S.D. 1989); *Wilson v. City of Eagan,* 297 N.W.2d 146, 151 (Minn. 1980). Other states have, like Iowa, provided little guidance for the award and review of punitive damage awards. *See, e.g., Wangen v. Ford Motor Co.,* 294 N.W.2d 437, 458-59 (Wisc. 1980); *Stoner v. Nash Finch, Inc.,* 446 N.W.2d 747, 755-57 (N.D. 1989).

While punitive damages remain available to plaintiffs, the U.S. Supreme Court has offered guidance in an attempt to prevent juries running wild with their awards going unchecked. With *Pacific Mutual,* defendants can work to ensure that specific objective standards are given to juries and appellate courts. To give up the fight against punitive damages awards now would be wholly premature. By proposing tailored jury instructions on punitive damages at trials and appealing when a trial court refuses to use them, we can work toward an approach to punitive damages in line with the Due Process

CASE NOTE

Continued from Page 8

Clause. By ensuring that specific safeguards are used, we can, at least, offer our clients some hope that they will not be made to pay large awards without at least some serious scrutiny by our judicial system. □

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— ATTENTION —

SEASONED AUTHORS, FAMOUS or STRUGGLING WRITERS, HONORABLE JUDGES and KNOWLEDGEABLE ATTORNEYS - if you would like to submit an article to be included in a future issue of the *Defense Update,* please contact one of the Co-Editors listed on back page.

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THE DEFENSE OF CATASTROPHIC DAMAGES

Continued from Page 3

LEGAL ISSUES

As noted earlier, an issue may arise concerning the qualifications required for a witness to testify concerning life expectancy. Recovery may be had for expenses 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 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,* 112 N.W. 2d 314 (1961).

In *Hysell v. Iowa Public Service Company,* 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 of an attendant. 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 the future medicals and that they were necessary.

CONCLUSION

The effort of defendants to establish reduced life expectancy does seem somewhat morbid and perhaps even cruel. On the other hand, a multimillion dollar verdict based upon normal life expectancy is founded on a premise which is simply untrue. Consequently, defense counsel should not be apologetic about going into these areas, provided that the case is developed very carefully and defense counsel is not seen as being callous or insensitive to the plaintiff's plight. □

ARTICLE OF INTEREST

Continued from Page 6

This itself is a minimum of eight photographs. Such pictures allow you to see how much deflection was caused by impact. Often reconstructionists use such photos to make calculations as to how much speed was absorbed in the impact.

Another useful tool in trying to reconstruct the accident is the knowledge of how far a car travels in feet per second when the estimates of speed are miles per hour. The formula is "x" miles per hour times 5280 feet divided by 60 minutes and then divided by 60 seconds. For example:

$$\frac{60 \text{ mph} \times 5280' \quad 316800}{60 \text{ min} \times 60 \text{ sec} \quad 3600} = 88 \text{ ft/sec}$$

The rule of thumb is that feet per second is one and one half the miles per hour. Above the rule of thumb would give you 90 ft/sec. Try it. What about 25mph? By rule of thumb, 37½ ft/sec. By formula:

$$\frac{25\text{mph} \times 5280' \quad 132000}{60 \text{ min} \times 60 \text{ sec} \quad 3600} = 36.66 \text{ ft/sec}$$

These computations are important when trying to reconstruct the accident and in interviewing drivers and witnesses.

Obviously there are many more considerations involved in reconstructing the scene and the accident itself. Every case has to be analyzed. Just remember you must present your analysis clearly and convincingly to a jury. □

HAVE YOU MOVED?

Pleasse submit any change of address or telephone number to:

Gene Marlett
5400 University Avenue
West Des Moines, IA 50265
515-225-5600

"What is your age?" asked the magistrate. "Remember, you're under oath."

"Twenty-one years and some months," the lady answered.

"How many months?"

"One-hundred and eight!"

ANNUAL MEETING PROGRAM
OCTOBER 24, 25, & 26, 1991

The Old Masters Course In The Defense Of Civil Lawsuits
By Past Presidents Of The IDCA

THURSDAY, OCTOBER 24

8:00-8:30 a.m. **Registration**
8:30-8:45 a.m. **Welcome by Alan Fredregill,** President, Iowa Defense Counsel Assn.
8:45-9:00 a.m. **Robert J. Federman,** President, FICC
9:00-10:00 a.m. **Ethics** - Norman Bastemeyer
10:00-10:15 a.m. **Mid-morning Break**

Discovery: Federal and State

10:15-11:00 a.m. **Discovery as a Weapon and a Response** Part I - Don Kersten
11:00-11:30 a.m. **Discovery as a Weapon and a Response** Part II - Claire Carlson
11:30-12:15 p.m. **The Failure to Let The Plaintiff Discover:** Legal and Ethical Consequences - Tom Hanson

Experts

12:15-1:45 p.m. **Luncheon**
Observations of a Sitting Judge -Honorable Peter van Metre

Other Pre-Trial Matters

1:45-2:30 p.m. **Motion Practice** -Ken Keith
2:30-3:15 p.m. **The Effect of Comparative Fault on the Trial** - Phil Willson
3:15-3:30 p.m. **Mid-afternoon Break**
3:30-4:15 p.m. **The Selection, Care & Feeding of Experts and Their Dismemberment** - Pat Roby
4:15-5:00 p.m. **The Settlement Alternative -- Some Peculiar Problems:** What Happens When Your Carrier Will Not Accept Your Advice or When Your Client and Carrier Disagree - Dave Phipps
6:00 p.m. **Aperitivi** (Cocktails)
7:00 p.m. **Italian Fest**

FRIDAY, OCTOBER 25

The Trial

8:30-9:15 a.m. **Jury Selection, Method and Ethics** -Ray Stefani, Sr.
9:15-10:00 a.m. **Opening Statement** - Craig Warner
10:00-10:15 a.m. **Mid-Morning Break**
10:15-11:15 a.m. **Testimonial Objections and Cross-Exam** -Bob Allbee
11:15-12:00 **The Art of Summation** -
Bob Waterman, Sr.
12:00-1:30 p.m. **Luncheon**
Remarks by the Honorable Arthur A. McGiverin, Chief Justice, Iowa Supreme Court
1:30-2:20 p.m. **Summations in the case of the administrator of the Estate of Humpty Dumpty, Plaintiff, vs. the owners of the wall, and certain medical doctors, d/b/a All the King's Men, Defendants.** The facts as stated are:

Humpty Dumpty sat on a wall.
Humpty Dumpty had a great fall.
All the King's horses,
And all the King's men,
Couldn't put Humpty together again.

Suit was brought against the landowner and the treating doctors. The gravamen against the owner is that, although on private property, the wall was attractive to children, was dangerously high and unprotected and had no warning signs. The claim against the doctors is that they failed to exercise the requisite standard of care. The parties defendant have each affirmatively raised the issue of comparative fault of decedent Dumpty.

1:30-1:45 p.m. **For the Plaintiff** - Tom Riley
1:45-2:00 p.m. **For the Defendant Landowner** - Pat Roby
2:00-2:15 p.m. **For the Defendant Doctors** - Ken Keith
2:15-2:20 p.m. **For the Plaintiff** - Tom Riley

Support Staff: Who Will Succor The Defense Attorney?

2:20-2:45 p.m. **Effective Use of Your Own Staff, Wordsmiths and Forensic Psychologists** - Lanny Elgar
2:45-3:00 p.m. **Mid-afternoon Break**
3:00-4:00 p.m. **What Defense Organizations Can Do To Help The Defense —**
Edward F. Seitzinger - IDCA Founding President
Karl Tippett - ADTA President
David Beck - IADC President
Bob Monnin - DRI President

The Future

4:00-5:00 p.m. **Symposium on the Near-Term Future:** What Those Defense Lawyers Under 40 May Expect During Their Practices -Herb Selby, Ed Seitzinger, Marv Heidman, Harold Grigg, Roy Voights and Ralph Gearhart, Moderator
6:00 p.m. **Reception**
7:00 p.m. **Annual Banquet**

SATURDAY, OCTOBER 26

9:00-9:15 a.m. **Worker's Compensation Update - Part I** - Brad Price
9:15-9:30 a.m. **Worker's Compensation Update - Part II** - Jaki Samuelson
9:30-10:15 a.m. **Case Update** - Greg Lederer
10:15-10:30 a.m. **Mid-morning Break**
10:30-11:00 a.m. **Case Update, Continued** - Greg Lederer
11:00-11:30 a.m. **Legislative Report** - E. Kevin Kelly and Herb Selby
11:30-12:00 **Annual Meeting and Election of Officers**

A N N O U N C I N G

The First

IOWA DEFENSE COUNSEL ASSOCIATION

COLLEGE OF TRIAL PRACTICE

August 22, 23, 24, 1991

University Park Holiday Inn
University at 50th Street
West Des Moines, Iowa 50265

The Iowa Defense Counsel Association has announced the formation of a **College of Trial Practice** which will be an annual event consisting of a two and one-half day trial practice school for beginning or experienced lawyers who would like to learn or improve litigation skills. The founding administrative staff is David L. Phipps, Chancellor, Eugene B. Marlett, Registrar, and Edward F. Seitzinger, Dean of Student Affairs. The faculty, at present, includes Robert G. Allbee, Alan E. Fredregill, Robert J. Blink, Thomas A. Finley, Carol A. H. Freeman, Kasey W. Kincaid, Patrick M. Roby, Mark L. Tripp and Philip J. Willson.

The College, this year, will accept the first 24 applicants only and will cover each phase of the trial process.

There will be lots of practical "hands on" practice of trial skills with professional critique and videotaped review of performances. The College will culminate in each participant joining in a full mock trial performance.

Costs will be **$400.00 per person** which includes training, most meals, a Friday night banquet and the videotape review. Please fill in the College registration form attached and send it in immediately to secure your place in the College. Hotel accommodations are extra and must be made directly with the University Park Holiday Inn, West Des Moines, Iowa; registration form also attached for your convenience.

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FROM THE EDITORS

Mark your calendars NOW for the 1991 Annual Meeting, and remember there are only **24** available slots for the first College of Trial Practice — send your registration in today!

IOWA DEFENSE COUNSEL ASSOCIATION
FIRST
COLLEGE OF TRIAL PRACTICE

August 22, 23, & 24, 1991

University Park Holiday Inn
West Des Moines, Iowa

Registration Form Enclosed

IOWA DEFENSE COUNSEL ASSOCIATION

1991 ANNUAL MEETING

October 24, 25, & 26, 1991

University Park Holiday Inn
West Des Moines, Iowa

Registration Material to Follow Shortly

Kenneth L. Allers, Jr.
P.O. Box 1597
Cedar Rapids, Iowa 52406