defense UPDATE

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HEDONIC DAMAGES — DEATH CASES

By Robert A. Engbert, Burlington, Iowa

Robert A. Engberg is a partner in the law firm of Aspelmeier, Fisch, Power, Warner & Engbert in Burlington, Iowa and is a member of the Iowa Defense Counsel Association Board of Directors. He comments on claims of damages for loss of enjoyment of life in death cases.

Cases such as *Sherrod v. Berry,* 827 F.2d 195 (7th Cir. 1987), reversed on other grounds, 856 F.2d 802 (7 Cir. 1988), have been urged by plaintiffs' attorneys as support for the argument that post-death loss of enjoyment of life should be considered as a part of damages for wrongful death. *Sherrod* allowed damages for the hedonic value of a lost human life in a civil rights claim pursuant to 42 USCA Section 1983.

Iowa law does not recognize claims for post-death loss of enjoyment of life and such damages, if recovered at all, should be limited to one component of claims for pre-death mental pain and suffering. See Comments in Iowa Defense Counsel Association Report, Iowa Civil Jury Instructions 200.12, 200.24.

In Iowa, causes of action for wrongful death were unknown at common law. *Miller v. Wellman Dynamics Corp.,* 419 N.W.2d 380 (Iowa 1988). The authority for a personal representative to recover on a wrongful death claim in Iowa is entirely statutory. *Wilson v. Iowa Power & Light Co.,* 280 N.W.2d 372 (Iowa 1979). Iowa Code Section 611.20 provides the authority for a personal representative to bring a wrongful death action and is ". . . a survival statute, which keeps alive for the benefit of [the] estate the cause of action which the deceased prior to his death could have brought had he survived the injury, with recovery enlarged to include the wrongful death." *Wilson v. Iowa Power & Light Co.* 280 N.W.2d 372, 373 (Iowa 1979).

State court decisions from Connecticut as well as 42 USCA Section 1983 cases have been offered by those claiming the propriety of post-death loss of enjoyment of life damages in Iowa. It should be noted that the Connecticut statute on which claims for post-death loss of enjoyment of life have been allowed is arguably distinguishable from Iowa Code Section 611.20. The Iowa statute specifically limits the personal representative to bringing only those causes of action which the decedent could have brought had the decedent not died. The Connecticut statute contains language referring to recovery of "just damages" with respect to the types of recovery that may be had. See *Kiniry v. Danbury Hospital,* 183 Conn. 448, 439 A.2d 408 (1981). Unlike state wrongful death actions, the purpose of Section 1983 claims is aimed toward both compensating the victim and deterring future violations of civil rights. *Bell v. City of Milwaukee,* 746 F.2d 1205, 1239 (7th Cir. 1984). The Court in *Bell* recognized Wisconsin decisions precluding recovery of damages for loss of life itself but held that preclusion was inconsistent with the deterrence policy of a Section 1983 action. *Bell,* at pages 1236, 1240.

In Iowa there is no separate cognizable claim for loss of enjoyment of life damages. The Iowa Supreme Court has recognized that loss of enjoyment of life is only a factor to be considered in a broader future pain and suffering claim. *Poyzer v. McGraw,* 360 N.W.2d 748, 753 (Iowa 1985); *Mabrier v. A.M. Servicing Corp.,* 161 N.W.2d 180, 183 (Iowa 1968). In addition, Iowa Civil Jury Instruction 200.24 specifically terminates damages for loss of enjoyment of life at the time of death.

In Iowa, damages for pain and suffering of a decedent (of which loss of enjoyment of life is a part) may not be recovered if death or unconsciousness is instantaneous. *Lang v. City of Des Moines,* 294 N.W.2d 557, 562 (Iowa 1980). An unconscious person does not suffer pain. *Hurtig v. Bjork,* 138 N.W.2d 62, 65 (Iowa 1965).

There can be no recovery in Iowa on behalf of or for a non-existent person. *Schmidt v. Jenkins Truck Lines, Inc.,* 260 Iowa 556, 149 N.W.2d 789 (1967). Loss of enjoyment of life is personal to the individual and recovery for post-death loss of enjoyment of life would violate the reasoning expressed by *Schmidt.* The decedent's shortened life expectancy should be deemed relevant only in respect to the loss of value to the decedent's estate. *See* 200.15, Iowa Civil Jury Instructions.

Loss of enjoyment of life is defined in Iowa as being included within mental pain and suffering and, as a matter of law, the amount of damage for any such alleged pain and suffering ceases at the time of death.

Although this author is unaware of any Iowa Appellate decisions directly addressing the issue of post-death loss of enjoyment of life claims, such claims have been rejected at the District Court level, citing inconsistency with prior case law. See *Moehle v. Massner,* Des Moines County District Court Ruling of November 7, 1989, Law No. 3579-0989.

While offering an interesting subject of academic argument as to "what ought to be," claims for post-death loss of enjoyment of life should not be allowed in Iowa based upon this State's philosophical and statutory bases for wrongful death actions.□

MESSAGE FROM THE PRESIDENT

David L. Hammer

ANNUAL MEETING

Ed Seitzinger has announced the 1992 Annual Meeting dates are October 1, 2 and 3, Thursday through Saturday. He assures us that there are no football games which will cause you any painful conflict.

Jack Grier is preparing an interesting program, which for the first time will be held at the Embassy Suites Hotel, on the River, 101 East Locust Street, Des Moines, Iowa.

NEW ASSOCIATION TELEPHONE NUMBERS

For either input or requests for information on the brief bank and expert files contact Alan Fredregill at 712-255-8838, Fax 712-258-6714 or 701 Pierce St., Suite 200, P.O. Box 3086, Sioux City, Iowa 51102-3086.

For any other inquiry, please contact DeWayne Stroud, at 515-225-5608; Fax 515-225-5569, or write to 5400 University Ave., West Des Moines, IA 50265.

PROPOSED CHANGES - FEDERAL RULES

As you are undoubtedly aware, there are proposed changes in the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Your association has submitted its concern to the Committee on the Federal Rules of Practice and Procedure relating to proposed Rule 26(a)(1).

Of particular concern are the provisions of proposed Rule #26(a)(1), requiring immediate and voluntary disclosure of:

> "(A) The name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense identifying the subjects of the information;
>
> (B) Copy, or a description by category and location of, all documents, data, compilations, intangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense; . . ."

These disclosures must be made within 30 days after service of the answer. The Rule specifically states that a party "is not excused from disclosure because it has not fully completed its investigation of the case . . ."

Strong sanctions are proposed under Rule 37.

> (A) If a party fails to make a disclosure required by Rule #26(a), any other party may move to compel disclosure and for appropriate sanctions . . .
>
> (c) Failure to disclose; false or misleading disclosure; refusal to admit.
>
> (1) A party that without substantial justification fails to disclose information as required by Rule #26 (a) . . . shall not, unless such failure is harmless, be permitted to present substantive evidence at trial or on a motion under Rule #56 any evidence not so disclosed . . . In addition or in lieu thereof, the court, on motion after affording an opportunity to be heard, may impose other appropriate sanctions, which, in addition to requiring payment of reasonable expenses including attorney's fees caused by the failure, may preclude the party from conducting discovery and may include any of the actions authorized under [other subparagraphs]."

Proposed FRCP30 places limits on examination on depositions as well as the number of depositions.

The ad hoc Committee was composed of Tom Hanson and Chuck Miller, from either of which a copy of the letter stating our concerns may be obtained.

MEMBERSHIP CERTIFICATE

At your February 14th Director's meeting, it was determined to issue a certificate of membership to each member, suitable for framing. Bob Engberg is preparing the certificates.

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CASE NOTE SUMMARY

ANALYSIS OF *HILLRICHS v. AVCO CORP.*
Iowa Supreme Court (filed Nov. 20, 1991)

By Richard J. Sapp, Des Moines, IA

On November 20, 1991, the Iowa Supreme Court, sitting *en banc,* rendered its opinion in *Hillrichs v. Avco Corp.,* 478 N.W.2d 70 (Iowa 1991). *Hillrichs* can safely be regarded as one of the most significant product liability decisions ever handed down by the Iowa Supreme Court. In this case, the court recognized a new cause of action in favor of plaintiffs for "enhanced injury" on a basis identical to the crashworthiness doctrine as applied in automobile cases, but extended the doctrine to products other than vehicles. In *Hillrichs,* this liability was extended to apply to the design of a New Idea cornpicker manufactured by Avco.

Hillrichs is of great concern to product liability defendants. Permitting enhanced injury recovery and applying "crashworthiness" theories to design liability on products other than vehicles greatly increases a plaintiff's ability to obtain a jury award on design defect claims even in cases wherein the plaintiff is found 100 percent at fault for causing the accident itself and his/her initial injury. It is therefore appropriate to carefully analyze *Hillrichs* and evaluate how it should influence the preparation of the defense of products liability cases in Iowa.

Hillrichs involved a hand entanglement injury resulting from plaintiff Hillrichs reaching into a New Idea cornpicker. In addition to usual claims of design defects concerning guarding, plaintiff claimed that New Idea should have supplied an emergency shutoff device within reach of the entanglement point which could have allowed plaintiff to stop the machine once his arm became initially entangled. Plaintiff asked that the jury be instructed to apportion damages between the initial entanglement and any enhanced injury resulting from Hillrichs' inability to shut off the power once he was caught. The trial court refused to so instruct.

The jury returned a defense verdict, finding plaintiff Hillrichs 100 percent at fault for his accident. On appeal, the supreme court reversed, finding that even if Avco was not liable for defective or negligent design for the initial entanglement injury, the theory of enhanced injury should have been submitted to the jury such that liability could have been found for any enhanced injuries proven which would have been prevented by an accessible shutoff switch. *Hillrichs* at 74.

The adoption of the crashworthiness or "enhanced injury" theory in products liability is generally traced to the Eighth Circuit's decision in *Larsen v. General Motors Corp.,* 391 F.2d 495 (8th Cir. 1968). In *Larsen,* the Eighth Circuit held that an automobile manufacturer is under a duty to use reasonable care in the design of its vehicle so as "to avoid subjecting the user to an unreasonable risk of injury in the event of a collision." *Id.* at 502. Stated otherwise, the Eighth Circuit found that collisions are foreseeable and thus the manufacturer must use due care in the design so as to avoid any unreasonable risk of foreseeable injury in a collision and "minimize the injury producing effect of impacts." *Id.* The essential characteristic of "enhanced injury" theory is that it imposes liability for product design *which did not cause the accident itself.* Liability is imposed to the extent plaintiff's injuries are found to have been enhanced in the "second collision" of his/her body with the vehicle structure, which could have been prevented or lessened by an alternative safer design. Liability is limited to injury that exceeds the injury that probably would have occurred in the absence of the alleged defect. If the injury is not divisible in this manner, there is no "enhanced injury" and the doctrine should not be applied.

While never previously adopted by the Iowa Supreme Court, the doctrine had been recognized previously by the Iowa Court of Appeals in an accident involving a semi-truck tractor in *Wernimont v. International Harvester Corp.,* 309 N.W.2nd 137, 140 (Iowa App. 1981). Although the supreme court in *Hillrichs* stated that the theory "has been extended to products other than automobiles," all the cases it cited, with one exception, involved some type of vehicle. *Hillrichs* at 74, citing *Tafoya v. Sears Roebuck & Co.,* 884 F.2d 1330 (10th Cir. 1989), (riding lawnmower); *Rowe v. Deere & Co.,* 855 F.2d 151 (3d Cir. 1988) (tractor); *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.,* 652 F.2d 1165 (3d Cir. 1981) (front-end loader). With the exception of a very few reported decisions, *e.g., Farrell v. John Deere Co.,* 443 N.W.2d 50 (Wis. App. 1989) (involving a cornpicker), the application of enhanced injury theory is in fact usually limited to vehicular-type accidents, in which there is usually some demonstrable "second collision" within the physics of the accident itself. In *Hillrichs* the Iowa Supreme Court has applied enhanced injury liability to a farm implement which is not a vehicle and which, in an accident context, can be regarded as involving a "second collision" only under the most strained interpretation of the term and rationale of the crashworthiness cases.

The elements of enhanced injury liability reconized by the supreme court in *Hillrichs* were the same as adopted by the court of appeals in *Wernimont v. International Harvester, supra,* con-

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IN THE PIPELINE

By Kermit B. Anderson, Des Moines, Iowa

Listed below are cases presently in the appellate process working their way toward resolution by the Supreme Court or the Court of Appeals which may be of interest to civil defense counsel.

1. *Columbia Casualty vs. City of Des Moines,* No. 91-348. City was named insured in a special excess policy issued by Columbia Casualty. Policy has self-insured retained limit of $500,000. Tort claim against City and Co-Defendant was settled with City paying $100,000 and Co-Defendant $400,000. City then asked for futher contribution from Columbia arguing that its retained limit had been met by aggregating the sums paid by it and the Co-Defendant. The City was an "additional insured" under the terms of the Co-Defendant's liability policy. Columbia paid the additional sums to settle the claim and brought action against the City to recover the amounts paid. Trial court found for City on cross motions for summary judgment based upon undisputed facts. Columbia appeals.

Issue on Appeal: Is the City's self-insured retained limit under its excess policy satisfied by adding together amounts paid in settlement by it and a co-defendant on whose policy the City is an "additional insured"?

2. *Stroup v. Renaud,* No. 90-1850. Action by employee against his employer for personal injuries in the course of and arising out of his employment. Employer had failed to provide workers' compensation insurance and action was brought pursuant to Iowa Code Section 87.21. Under this provision, negligence of the employer and causation are presumed. The employer has the burden to rebut the presumption of negligence and cannot rely on common law defenses of contributory negligence or assumption of the risk. Trial to a jury resulted in a verdict for the defense. Plaintiff appeals.

Issue on Appeal: Is the defendant required to negate every fact that could support negligence in order to carry its burden of rebutting the presumption of negligence under Section 87.21?

3. *Guzman v. Des Moines Hotel Partners Limited Partnership,* No. 90-1862. Personal injury tort action brought against premises owner based upon errant water sprinkler aimed toward street. Spraying water was alleged to have obscured motorist's vision resulting in collision and damages. Jury trial resulted in verdict for the Plaintiff. Case submitted on nuisance theory. Although evidence supported negligence on the part of the Plaintiff, the court refused to consider nuisance as fault under Chapter 668 and therefore Plaintiff's negligence was not used to reduce damages. Defendant appeals.

Issue on Appeal: Can a personal injury action be based upon a nuisance theory and if so, is this "fault" for purposes of Chapter 668?

4. *Kenneth Fees vs. Mutual Fire and Automobile Company,* No. 91-919. Plaintiff sustained a fire loss. Negotiations with insurance company wherein Plaintiff was represented by counsel resulted in a settlement of the matter and a signing by Plaintiff of a full release. Nineteen months after the release was signed, the Plaintiff brought a bad faith action against his insurance company alleging bad faith and economic duress as a basis for voiding the release. The District court sustained the defendant insurer's motion for summary judgment. Plaintiff appeals.

Issue on Appeal: Whether the doctrine of economic duress applies to void the release signed by the Plaintiff where he was represented by counsel throughout settlement negotiations with his insurer.

Editors Note: On March 24 a divided panel ot the Court of Appeals reversed the District Court. The Court held that the record presents a genuine issue of material fact concerning the existence of economic duress. The defendant insurer is expected to seek further review with the Supreme Court.

5. *Amco Insurance Company vs. Haht, et al.,* No. 91-973. Plaintiff insurer brought declaratory judgment action against its insureds under a homeowner's policy. The insured's son had thrown a baseball that had struck and killed another youth. Action was commenced seeking damages for the youngster's death and coverage and defense were requested pursuant to the policy. Based upon statement of the insureds' son, a finding was made that the ball was probably thrown with the intent of hitting and hurting the deceased youth. The court concluded, however, that since the youngster who threw the ball did not intend serious injury, the exclusion relating to bodily injury expected or intended by the insured was inapplicable and coverage was found. The Court concluded that the term "hurt" did not under the circumstances rise to the level of "bodily injury." Insurer appeals.

Issue on Appeal: Does the policy exclusion relating to bodily injury which is expected or intended by the insured apply where serious injury was not intended although the insured acted with the purpose of hitting and hurting the decedent. Insurer relies heavily upon *Altena v. United Fire and Casualty,* 422 N.W.2d 485 (Iowa 1985), wherein the Court held that the exclusion will apply where the insured intended the act and intended to cause some kind of bodily injury.

Editor's Note: In a 4-2 en banc decision filed March 24th, the Court of Appeals affirmed the trial court. The majority distinguished Altena by observing that it involved criminal acts of the insured whereas the instant case involved a fortuitous happening which is the kind of event intended to be covered by insurance. A motion for

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STRUCTURED SETTLEMENT ANALYSIS

By Howard Bunch, Settlement Services, Ltd., Bettendorf, Iowa

As settlement annuity brokers, we assisted insurer claim departments and defense counsel in the settlement of difficult cases, by proposing a SETTLEMENT ANNUITY AND CASH BASED ON THE FACTUAL AND PRECEIVED NEEDS OF THE CLAIMANT. (Throughout this article we use the term claimant, though in some instances a lawsuit had been filed.) In the two cases outlined here, ongoing settlement discussions ranged over a wide area after the initial offer. The claimants wanted to see a variety of cash and annuity scenarios from diverse carriers, but AT CONCLUSION THE SETTLEMENT PACKAGE PLACED CLOSELY APPROXIMATED THE INITIAL OFFER.

We have attempted to structure annuities that fit the needs of the claimant. With our format of carefully examining the file for information upon which an appealing annuity offer can be presented, we have observed several reactions from the claimants:

1. they perceive that we are trying to help them get what they want;
2. we are paying attention to their demands, thus softening their hard feeling about the situation; and,
3. they become more willing to talk and then perhaps discuss a settlement.

The method to achieve this is to examine page-by-page the claim file. Though a file may become a foot thick, we have found it helpful to our insureds to study the file. (Of course, we respect our client's guidelines on which part of a file is available.)

CASE ONE

In case one, a young male lost his arm below the elbow. It had been reattached, but rehabilitation was less than promising. No diminishment in life expectancy occurred. Claimant's attorney had prepared a lifetime prosthetic placement, replacement, maintenance, and rehabilitation cost report that totaled over $513,000 to age 70. We analyzed this report and prepared an annuity with varied monthly, semiannual, annual, biannual, etc., payments that matched the expert witness schedule. The cost for this annuity was less than $165,000, because the larger payments were made life contingent and because many payments were well into the future. (Current caution is advised here, because annuity carriers have diminished their willingness to make large lump sum payments 40-60 years into the future. This section of the market will become even more interesting if the Treasury writes less or no 30-year bonds, as they are currently considering.)

Exhibit I shows representative sections of the "rehab" annuity that was constructed for this youth.

In this case the claimant's parents considered this initial offer, along with cash and other monthly income. We constructed other scenarios that the

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EXHIBIT I

Recommended Service	Frequency	Duration	Unit Cost	Lifetime Cost	Annuity Cost
Rehabilitation Fund:					
1) Prosthetic Replacement Age 25	Every 7 years	35 years	$20,000	$100,000	$22,854
2) Prosthetic Replacement Age 60	1	1	$60,000	$60,000	$2,629
3) Maintenance Fund Age 19	Annually	Lifetime	$2,000	$402,318	$42,625
				$562,318	$68,108

CASE NOTE SUMMARY Continued from page 3

sisting of three elements: (1) proof of an alternative safer design, practicable under the circumstances; (2) what injuries would have resulted had the alternative safer design been used; and (3) the extent of enhanced injuries attributable to the defective design. *Hillrichs* at 75. These elements constitute one very important aspect of enhanced injury liability adopted in this case. These elements stem from the case of *Huddell v. Levin,* 537 F.2d 726, 737-38 (3d Cir. 1976). Under *Huddell* and cases which follow its reasoning, proof of enhanced injury requires that a plaintiff prove "what injuries, if any, would have resulted if the alternative, safer design had been used," and "plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the design defect." *Huddell, supra* at 737-38. *See also Caiazzo v. Volkswagenwerk, A.G.,* 647 F.2d 241 (2d Cir. 1981). These cases should be contrasted with with the more relaxed elements adopted in a divergent line of authority represented by cases as *Fox v. Ford Motor Co.,* 575 F.2d 774 (10th Cir. 1978). Under such decisions, the courts require that the plaintiff only prove enhanced injury in the general context of proximate cause, such as by merely showing that the design defect was a "substantial factor" in producing damages over and above those which would probably have been caused by the original impact. In other words, the requirement that plaintiff prove what injuries would have been suffered in the original collision absent the defect and the degree to which the enhanced injuries exceeded those injuries is removed.

Significantly, the enhanced injury elements adopted in *Hillrichs* were quoted from the court of appeals' decision in *Wernimont,* which specifically quotes and sites to *Huddell v. Levin, supra.* Thus, the plaintiff under the now-adopted theory of enhanced injury liability in Iowa must prove not only an alternative safer design, but what injuries would have resulted had the alternative safer design been used and the extent of enhanced injuries attributable to the design. Plaintiff's evidence in *Hillrichs* in regard to enhanced injuries was skinny but deemed sufficient to generate a jury question. *See Hillrichs* at 75.

The immediate question one has when analyzing *Hillrichs* is whether a farm implement or traditional agricultural entanglement case properly fits within the context of a "second collision" crashworthiness case. As indicated, to classify such accidents on non-vehicular products in this manner requires a strained definition both of the terms and reasoning utilized in crashworthiness and enhanced injury cases. The cornpicker accident context is, however, particularly amenable to an enhanced injury analysis due to the nature of the physics of the accident and time required to produce the ultimate injury the plaintiff sustained. Application of this theory to non-vehicular products essentially requires defining any "accident" as a "first collision." The absurdity of this classification moves along a sliding scale depending on the nature of the product and physics of the injury involved. In most equipment injury cases, it would be difficult to apply enhanced injury liability due to the immediacy of the injury and the fact that design allegations are totally focused on the guarding or other features alleged to relate to the initial contact or entanglement.

It may be difficult for defendants to recognize anything positive in the supreme court's adoption of enhanced injury liability in *Hillrichs.* There are some points of the opinion which are of some benefit, however, and they are important in future attempts to limit liability under this newly-recognized cause of action and in products cases generally.

First, and perhaps most important, the supreme court held that the plaintiff's comparative fault will still be considered by the jury, not only with respect to the "initial" accident itself, but in the jury's assessment of the enhanced injury claim. *Hillrichs* at 76. With a jury such as the *Hillrichs* jury, which found the plaintiff 100 percent at fault for his accident, it would seem difficult for plaintiff's counsel to have successfully argued that plaintiff was less than 50 percent at fault for the entirety of the injury, as required under *Hillrichs.*

Second, the supreme court's comments in regard to the state of the art defense are favorable. Alternative designs such as safety shutoff switches are particularly amenable to state of the art and feasibility defenses when one considers the number of potential points of entanglement and accident scenarios on most machinery and agricultural equipment. The court in *Hillrichs* held that while defendant's state of the art defense had been submitted, it was impossible to determine, in the absence of a special interrogatory, whether the jury's verdict for the defendant was premised on state of the art. If it had been, the court's opinion strongly suggests that the state of the art defense would have been dispositive of all of the design defect issues, including the enhanced injury claim. *Hillrichs* at 76.

Thirdly, and of importance not only in enhanced injury cases but all product liability cases in Iowa, the supreme court has finally recognized that the standard for defective design is probably identical to a negligence standard. *Hillrichs* at 76, n. 2. The footnote in *Hillrichs* now supplies additional ammunition to support the claim that all allegations of defect predicated on design should be submitted under a negligence theory only.

Fourth, the adoption of the stricter of the two standards for the elements

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It takes 17 trees, 10 feet in diameter, to produce one ton of paper.

CASE NOTE SUMMARY Continued from page 6

of enhanced injury, following the *Huddell v. Levin* line of cases, is significant. Plaintiff must prove not only what the injury would have been absent the alleged design defect, but the degree to which excessive injury occurred due to the alleged defect.

The first response of defendants to *Hillrichs* in the future cases should be that *Hillrichs* is a very limited decision confined to its specific facts. The particular physics of a cornpicker entanglement accident are significantly more amenable to an enhanced injury analysis than most product liability equipment accidents. The supreme court itself recognized that the enhanced injury issue in *Hillrichs* was "close". *Id.* at 73. Second, to capitalize on the required comparison of the plaintiff's fault not only as a cause of the initial injury but as to the entirety of the injury, the defense must establish the plaintiff's degree of knowledge of the risk of the machine and recognition of the full extent of the injury that would result in the event of an entanglement.

Third, the limited product context to which *Hillrichs* arguably applies the enhanced injury liability should be emphasized. In most accident scenarios involving non-vehicular products, the defense should be able to make a good argument that there is in fact no "second collision," but the entirety of the harm stems from the initial accident itself, and thus enhanced injury or crashworthiness liability has absolutely no application.

Finally, the elements of enhanced injury followed by the *Hillrichs* court, as adopted in *Huddell v. Levin,* must be continually emphasized during the case. With this adoption of enhanced injury liability, plaintiffs may next likely attempt to persuade the court to relax the elements of the cause of action and adopt the more lenient elements of proof as enunciated in decisions such as *Fox v. Ford Motor Co., supra.*

Enhanced injury liability under *Hillrichs* obviously impacts on early case preparation and the initial investigation of the accident. That is, the defense of a potential enhanced injury and second collision basis of liability must be emphasized as the early case preparation and investigation occurs, especially in the deposition or statement of any claimant in any entanglement case which might lead to assertion of an enhanced injury claim.□

IN THE PIPELINE

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further review by the Supreme Court is expected from the insurer.

6. *Elliott v. Farm Bureau Mutual Insurance Company,* No. 92-07. Plaintiff was injured in a two-vehicle accident and filed suit against the driver of the other vehicle. Prior to trial, Plaintiff settled for the tortfeasor's $20,000 liability limits plus $70,500 of the tortfeasor's personal assets. Plaintiff then sought to recover from the underinsured motorist coverage of his policy issued by Farm Bureau. Policy limits were $25,000. Farm Bureau, relying on *Kapadia v. Preferred Risk,* 418 N.W.2d 848 (Iowa 1990) and Iowa Code §516A.4, argued that it was entitled to be reimbursed out of the personal assets of the tortfeasor. The parties stipulated that the plaintiffs damages exceeded both the settlement amount plus the limits of the underinsured motorist coverage. The Court found that Farm Bureau was not entitled to be reimbursed out of the personal assets of the tortfeasor unless the insured has first been made whole

Issue on Appeal: Is the right of reimbursement granted to an underinsured motorist carrier pursuant to §516A.4 contingent upon the insured first being made whole for his/her injuries?

7. *Dudley v. Ellis,* No. 90-1881. Co-employee gross negligence action brought pursuant to Iowa Code Section 85.20. Jury trial resulted in a substantial verdict and a finding of the co-employee 51% at fault (gross negligence) and the Plaintiff 49% at fault (ordinary negligence.) Both parties appeal.

Issue on Appeal: Does the three part test of Section 85.20 gross negligence embodied in Iowa Civil Jury Instruction 710.3 adequately instruct the jury on the concept of "wanton neglect"? Additionally, does comparative fault apply to Section 85.20 gross negligence actions and if so, does such fault include plaintiff's own ordinary negligence or is it limited to assumption of the risk? Plaintiff argues that the only applicable species of fault in such actions attributable to the plaintiff is assumption of the risk.

8. *Pepper v. Star Equipment Ltd.,* No. 90-1766. Plaintiff was injured while operating a front-end-skid loader designed, manufactured and sold by Owatonna Manufacturing Company, Inc. Plaintiff subsequently learned that Owatonna had filed bankruptcy so his Petition was amended to bring the retail dealer, Star Equipment, into the case. Star Equipment obtained a bankruptcy court order modifying the automatic stay to permit assertion of a claim against Owatonna for purpose of fault allocation. Star Equipment then moved to bring Owatonna into the case as a third party defendant which motion was granted. Plaintiff resisted the motion and interlocutory appeal was granted by the Iowa Supreme Court.

Issue on Appeal: May an insolvent product manufacturer be made a party and allocated a percentage of fault in a product liability action under Iowa Code Chapter 668? Plaintiff argues that Iowa Code Section 613.18(1)(b) precludes joinder of an insolvent product manufacturer.

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Paper mills which make new paper are the largest users of fuel oil in the United States.

MESSAGE FROM THE PRESIDENT Continued from page 2

LAW SCHOOL GIFTS & PROGRAM

Under the auspices of Ralph Gearhart, the Association will again present its annual trial program to both the Drake and Iowa Law Schools, on March 12 and 13, respectively. Your directors voted at the February 14 meeting to again grant $1,000 to each school, and Ralph will make the presentations on the occasion of the trial programs.

LEGISLATIVE PROGRAM

Herb Selby, Legislative Chair, will be discussing the legislative program in another part of *Defense Update.*

INSTRUCTIONS COMMITTEE

You should have received Part II of IDCA's Proposed Instructions prepared by Greg Barntsen and his committee. A copy has gone to all sitting Judges in Iowa, and Dick Sapp has prepared a list of all Judges who were appointed subsequent to the time when Part I was distributed, so that they may receive Part I.

The Instructions Committee will continue to monitor new cases which affect existing instructions, and it consists of Greg Lederer, Jaki Samuelson and Angela Simon, Chair.

DEFENSE UPDATE

Defense Update has become a valued benefit of belonging to the Association, and its unpaid editors are doing a splendid job of presenting issues and commentary. Its pages are open to all and your articles are encouraged. If the pay is nonexistent the glory is not. All submissions are welcome.

Your representatives have been meeting in a continuing process with officers of the ISBA and the plaintiff's bar to discuss the issues between us, narrowing them where that can be done, and seeking to find common fronts on matters concerning the litigation bar.

Your ideas regarding the good of the IDCA are welcomed by all the Directors and Officers. It is, after all, your Association and it is important that the organization be responsive to your needs.

David L. Hammer
President, IDCA

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9. *Grinnell Mutual Reinsurance Company v. Employers Mutual Casualty Company,* No. 91-1983. Personal injury claim was asserted against insured school district arising from accident in which a school bus was negligently set in motion by a school child. The school district's automobile insurer undertook defense and settled the claim. The general liability carrier denied coverage on the basis of its exclusion relating to damages arising out of the "ownership, maintenance, use, loading or unloading of any automobile owned or operated by the insured." Automobile carrier brought action against general liability carrier seeking prorata contribution on settlement and defense costs. Bench trial resulted in a finding of coverage and a judgment for the automobile carrier. General liability carrier appeals.

Issue on Appeal: Where the insured's school bus struck a school child causing bodily injuries, is coverage for claims of negligent supervision of the vehicle's passengers and negligence in establishing bus loading procedures excluded under the standard automobile exclusion of the insured's general liability policy.

10. *Allied Mutual Insurance Company v. Telford,* No. 91-1974. Declaratory judgment action was brought by automobile insurer against the son of its named insured who had sought underinsured motorist benefits. The policy provided such benefits to any person related to the named insured by blood, marriage or adoption "who is a resident of your household." Trial court gave ordinary meaning to this phrase and stated that it simply meant a family member who lives with the insured. The court found out from undisputed facts that the insured's son was no longer a resident of his parents' home at the time of the accident and therefore was not entitled to underinsured benefits. The evidence showed that he had enlisted in the military service after completion of high school and left the home to pursue a career in the military. He had gotten married and had two children. He supported himself and his family. He had been away from the home for four years at the time of the accident. Defendant had argued that he had never subjectively intended to relinquish his Iowa residency and had intended to return to his parents' home after his military career. Defendant appeals.

Issue on Appeal: How is the undefined policy phrase "resident of your household" to be interpreted and applied to the undisputed facts.□

STRUCTURED SETTLEMENTS Continued from page 5

parents and their attorney envisioned, and constructed a spreadsheet of these ideas among several of our largest carriers, but after two weeks of this maneuvering THE ORIGINAL ANNUITY WAS SETTLED ON. We think that the careful, exact, needs-oriented planning that went into the first offer contributed toward the settlement of this case, because the parents knew that, according to their own expert, the child's lifetime prosthetic needs were met. The parents were comfortable.

CASE TWO

Due to head trauma, the claimant allegedly suffered diminished mental capacity, reasoning, social skills, and living/coping abilities. Claimant's counsel and expert witness recommended varied kinds of counseling over the teenager's lifetime. Again, this "need" became apparent when the file was examined in detail, especially in conjunction with the mother's deposition. We offered an annuity that became payable as the psychological/social services were needed under the plan. For the most part, this annuity proposal was payable on a life-contingency basis only. There was no point in paying the annuity if the claimant was deceased. Since an age rate-up of 20 years was obtained from most carriers, we made all payments based on the contingency of life. The savings are minimal in the early years but substantial in the retirement years, as much as sixty-three (63) percent at age 65. Thus, a large future sum of $300,000 costs $6,754 less through the method of age rate-up. With several other annuity sums added in this manner, many thousands of dollars were saved for the defendant on this annuity.

What's important here is that the claimant-parents wanted available counseling for their daughter over her lifetime. Her parents were particularly concerned about help with living and coping skills, training, and ongoing reiteration of these items over a long period of time.

Exhibit II lists some of these procedures, around which an annuity was constructed.

As in case one, because of the size of the annuity, claimant's counsel wanted a spreadsheet of our seven largest carriers. After this procedure, and a look at several other packages, the basic original package was agreed to by all parties. In this particular case, the defendant was pleased by the size of the settlement, as it came well under limits and authority.

In conclusion, an "unexamined" file can cause frustration and delay when an annuity offer is made. Careful construction of the initial, single annuity offer can help settle the claim when the use of an annuity is appropriate.□

EXHIBIT II

Recommended Service	Frequency	Duration	Unit Cost	Lifetime Cost	Annuity Cost
Rehabilitation Fund:					
1) Counseling	5 hours per month	Lifetime	$90/hour	$384,800	$64,810
2) Job Coaching	250 total hours	To age 70	$20/hour	$5,000	$1,102
3) Neurological Monitoring	Once per year	45 years	$275/year	$12,375	$2,752
				$402,175	$68,664

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ASSOCIATION NEWS

BOARD ACTIVITIES

As a service to the membership an effort will be made to keep Iowa Defense Counsel members generally apprised of the activities of the Board of Directors and committees of the Iowa Defense Counsel. Many of the efforts of the Iowa Defense Counsel have historically been unnoticed by the members.

The following items were discussed at the Board meeting on February 14, 1992:

1. A report was given by Legislative Committee Chairman Herb Selby, and supplemented by our Legislative Representative, Kevin Kelly. Mr. Selby also reported that an effort is being initiated to have periodic meetings with other bar association groups--the Iowa Bar Association, Iowa Trial Lawyers Association and the Iowa Trial Academy. These groups hopefully will provide a united front on certain issues that are common to each. Presently, attention is being given to the Supreme Court budget request. It was indicated that the Bar Association will not take a position on "controversial issues," in which the lawyers of the State may disagree, unless specifically approved by the Board of Governors. It was decided that the Iowa Defense Counsel would formally oppose legislation imposing any sales tax on lawyers fees.

2. Dick Sapp reported concerning the jury instructions committee and Part II of the Task Force Report. Copies of the reports are being sent to Judges. A standing jury instruction committee is being formed. The initial committee will consist of Greg Lederer, Jaki Samuelson and Angela Simon.

3. Membership chairman, Bob Engberg identified eight new members. It was decided that all members will receive a certificate designating membership in the organization.

4. The "office" of the Defense Counsel, which has previously been maintained in Des Moines, will be terminated. There simply was a lack of need to maintain a separate office and telephone number. The "official number" of the Association will be DeWayne Stroud's office. Alan Fredregill will maintain the brief bank through his office in Sioux City.

5. The Association will continue with its annual contributions to both Drake and the University of Iowa law schools.

6. Support for the Association PAC is poor. An effort will be undertaken to generate additional support.

7. The Board commended the editors of the *Defense Update* for the outstand ing work on recent issues, and suggested that a summary of Board meeting actions be included in each issue.

LEGISLATIVE PROGRAM

The following is the legislative program of the Iowa Defense Counsel Association for the current legislative session.

Primary Issues

1. Protective Orders--this is the so-called "Sunshine in Litigation Act." The Iowa Defense Counsel is opposing the adoption of this bill, which would limit protective orders in product liability cases. Currently such orders are used to prevent the sharing of discovery to non-parties in such litigation.

2. Ex Parte Communications--to require plaintiffs to give defense counsel a patient waiver at the outset of the litigation to enable defense counsel to confer with treating physicians.

3. Consortium Claims--to impute comparative fault of the injured spouse to the spouse who is seeking consortium recovery.

4. Non-Use Of Seat Belts--to obtain repel of section §321.445(4). The repel of this section would eliminate the 5% rule and enable defense counsel greater use of the seat belt defense.

5. Punitive Damages--new statutory restrictions on the recovery of punitive damages, including bifurcation of trial.

Secondary Issues

1. Abolition of Joint And Several Liability--a defendant only pays his percentage of fault.

2. Collateral Source Rule Amendment--to adopt the dissenting opinion in *Schonberger v. Roberts,* 456 N.W.2d 201 (1990). The majority in that case limited the application of section §668.14.

3. Emotional Distress Limitations--to deny emotional distress recovery where there is no actual injury.

All of the above bills, with the exception of the protective order bill, are bills which are being promoted by the Iowa Defense Counsel. Further questions can be directed to Herb Selby, Newton, Iowa, Chairman of the Iowa Defense Counsel Legislative Committee.

IMPORTANT NUMBERS/OFFICES

1. **General Number**
   c/o DeWayne Stroud
   5400 University Avenue
   West Des Moines, IA 50265
   515/225-5608

2. **Brief Bank and Case Reports**
   c/o Alan Fredregill
   701 Pierce Street, Suite 200
   P.O. Box 3086
   Sioux City, IA 51102
   712/277-2373

WELCOME NEW MEMBERS

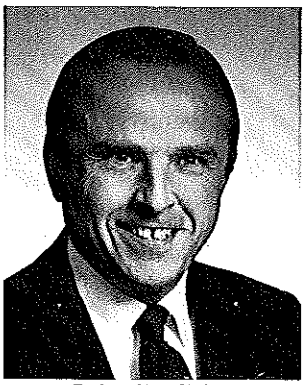
The Iowa Defense Counsel welcomes the following new members to the Association:

Scott A. Hindman, Sioux City
Michael J. Moreland, Ottumwa
David E. Linquist, Des Moines
Steven A. Stefani, Cedar Rapids
David Snodgrass, Des Moines
Jon K. Hoffmann, Des Moines
Kathleen A. Davoren, Des Moines
Carol Christinson, Des Moines

1991-92 OFFICERS

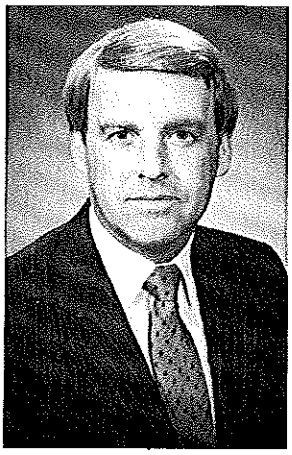
David L. Hammer
President

Dave is a partner in Hammer, Simon & Jensen, Dubuque, IA, graduating from the University of Iowa Law School. Dave has been and is an officer/member of a host of various organizations and bar associations, including current President of Iowa Defense Counsel Association. Dave also has written several books; he and his wife, Audrey, have three children and one grandchild.



John B. Grier
President-Elect

Jack is a partner in Cartwright, Druker & Ryden, Marshalltown, IA, and is a graduate of the University of Iowa Law School. While Jack was Assistant United States attorney and chief trial counsel for the Southern District of Iowa 1969-72, he also served as special assistant for the Southern District of California and the Western District of Arkansas on special assignments. Jack is a member of and active in numerous bar associations. Jack and his wife, Donnis, live in Marshalltown, and have three children.



Richard J. Sapp
Secretary

Dick is with Nyemaster, Goode, McLaughlin, Voights, West, Hansell & O'Brien, P.C., Des Moines, IA, and practices primarily in product liability and toxic chemical litigation. He is a graduate of Drake University and serves on committees of various Iowa bar associations, ABA and DRI. Dick has authored many articles and has given presentations at numerous seminars. Dick and his wife, Debbie, reside in West Des Moines, and enjoy a variety of outdoor activities, travel and scuba diving.

DeWayne E. Stroud
Treasurer

DeWayne is the Regional Claims Manager for Farm Bureau Mutual Insurance Company, Des Moines, IA. DeWayne is a graduate of the University of Northern Iowa and has been with Farm Bureau Mutual in the claims area for 30 years. DeWayne and his wife, Carol, live in Adel and have three children and one grandchild. DeWayne has been very active in the Adel Community. His favorite sport of many is golf.

FROM THE EDITORS

DID YOU NOTICE . . . . .

. . . . the reports that there will be one million lawyers in the United States by the year 2000? That may explain why one of the editors received an application from a recent law school graduate offering to be employed as a paralegal.

. . . . the ever increasing number of mail solicitations for legal reference books and newsletters? Perhaps we should sell a legal reference book directory listing all of the various offerings.

. . . . the various organizations which gather accident information are now reporting the effectiveness of air bags? It appears an air bag equipped vehicle greatly reduces your chances of death or serious injury in an accident.

. . . . the alarming report by North American RE that the U.S. General Accounting Office states that "39% of the 577,000 bridges in the U.S. are structurally or functionally deficient."

. . . . the claim that only 4% of Iowa's drivers are uninsured? It seems to be higher than 4% to some of us.

. . . . the article "Shallow Pockets" by Stephen Marsh in the March, 1992 issue of *For The Defense?* Everyone discusses "deep pockets" but the problem of "shallow pockets" is rarely addressed.

The Editors: Kenneth L. Allers, Jr., Cedar Rapids, Iowa; Kermit B. Anderson, Des Moines, Iowa; Michael W. Ellwanger, Sioux City, Iowa; James A. Pugh, West Des Moines, Iowa; Thomas J. Shields, Davenport, Iowa.

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