defense UPDATE

The Iowa Defense Counsel Association Newsletter January, 1993 Vol. VI, No. 1

FINE TUNING OF CHAPTER 668 CONTINUES

By Thomas J. Shields, Davenport, Iowa

When Chapter 668, Code of Iowa, was adopted in 1984, bringing the modified comparative fault doctrine to Iowa, few lawyers felt that the act was either perfect or static. Legislative enactments have modified the statute; appellate decisions have wrought interesting applications of the comparative fault doctrine.

Inevitably, some of the provisions of Chapter 668 appear to conflict with other statutory provisions. One such conflict has arisen between the provisions of Section 535.3 and Section 668.13. Both those sections deal with statutory interest rates that are to be applied to judgments. In the case of Section 535.3, a flat 10% simple interest rate is applied to all judgments from the date of the filling. Section 668.13, however, contains a dichotomy, and requires interest to be applied separately on judgments awarded for past injuries, as opposed to those judgments awarding damages for future injuries. Further, in cases of personal injury, Section 668.13 mandates an interest rate "equal to the coupon issue yield equivalent, as determined by the United States Secretary of the Treasury, of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment."

On its face Section 668.13 provides that interest " shall be allowed on all money due on judgments and decrees on actions brought pursuant to this chapter. . . "

However, Section 535.3 states in part that, "Interest shall be allowed on all money due on judgments and decrees of courts at the rate of 10% per year, unless a judgment rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract. . . "

So what happens when an action for personal injuries or death is brought ostensibly pursuant to Chapter 668, the defendant admits fault, and judgment is rendered thereon in favor of the plaintiff? Going one step further, assume that the judgment that is rendered is for both past and future damages. Under that scenario, does Section 535.3 control the rate of interest or does Section 668.13 provide the statutory guidance?

That particular issue arose in *Waterloo Savings Bank v. Austin, et al,* decided by the Iowa Court of Appeals August 27, 1992, No. 2-265/91-1981.[1] The genesis for *Waterloo Savings Bank v. Austin* came when Todd Gary and Henderson Brown were killed in a truck-car accident. The Austins were the owner and driver, respectively, of the vehicle causing the deaths of Gary and Brown.

The bank as administrator of the estates of the decedents brought an action for wrongful death claiming that the negligence or fault of the Austins was a proximate cause of the wrongful deaths.

Prior to trial the Austins admitted liability and the case was submitted to the jury on the issue of damages only.

The verdict that was returned totaled $80,513.90; of which $40,250.70 was awarded to the Estate of Gary and $40,263.20 was awarded to the Estate of Brown. Of that total amount, $70,000.00 was awarded to the estates for future damages.

Upon entry of judgment, the trial court awarded interest pursuant to Section 535.3 at 10% from the date of the filing of the petition, August 10, 1990.

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[1] Application by the plaintiffs-appellees for further review was accepted by the Supreme Court of Iowa and the case was argued before the Court on December 14, 1992. As of the date of publication, no decision has been rendered.

MESSAGE FROM THE PRESIDENT

John B. Grier

At long last the election is over. Hopefully, lawyer bashing will no longer be in vogue and we can concentrate on the problems facing society and the profession, rather than the number of lawyers. It was frightening to hear some of our political leaders proclaim that there were too many trial lawyers, as though if our numbers were reduced, the problems of society would be solved.

Those of you who failed to attend our Annual Meeting missed an outstanding array of speakers on topics currently facing the defense bar. The speakers' papers and presentations upheld the long tradition of excellent continuing education programs at our Annual Meeting. In fact, this tradition started long before the mandatory requirements of CLE.

Our organization has embarked on an ambitious program for the year, including the following:

1. LEGISLATIVE ACTION. We have hired Robert M. Kreamer of Des Moines, to act as our lobbyist and to carry out our legislative program for the 1993 session of the Iowa Legislature. The program was developed by our Legislative Committee and then presented to the Board at our December meeting for approval and some refinements. The program as approved includes the following:

a. work to insure that the Legislature does not take away the necessary protection afforded to litigants by the use of Protective Orders;

b. support for a Bill amending our interest statutes to make interest both for past and future damages run from a common starting point, preferably the date of judgment;

c. support for legislation that would allow defense counsel to visit with medical providers on an ex parte basis;

d. support for legislation that would overrule the holding of the Iowa Supreme Court in *Schwennen v. Abell*, 430 N.W.2d 98 (Iowa 1988);

e. legislation that would declare that the nonuse of seat belts and other protective devices constitutes negligence;

f. legislation that would place greater penalties on a party for failure to accept an offer to confess judgment in an amount more than ultimately recovered;

2. SUMMARY TRIAL PROGRAM. Each year the organization through a committee headed by Ralph Gearhart puts on a summary trial program for the Iowa and Drake Law Schools. It has also been our tradition to make a financial contribution to each of the trial advocacy programs at the law schools.

3. THE *DEFENSE UPDATE*. Our newsletter will continue to be published on a quarterly basis under the capable leadership of our Board of Editors.

4. COLLEGE OF TRIAL PRACTICE. The second annual College of Trial Practice will be held April 1, 2 & 3, 1993.

5. AMICUS CURIAE. During the past year we filed an amicus curiae brief with the Supreme Court and are in the process of forming a formal committee to review cases and make recommendations for further filings with the Iowa Supreme Court.

6. FEDERAL RULES CHANGES. A new project for the year is to study in some depth the radical changes that have been recommended in the Federal Rules of Civil Procedure. These Rules ultimately will impact all of our practices and we have started the process to inform our membership of the proposals that appear ready to be submitted to Congress.

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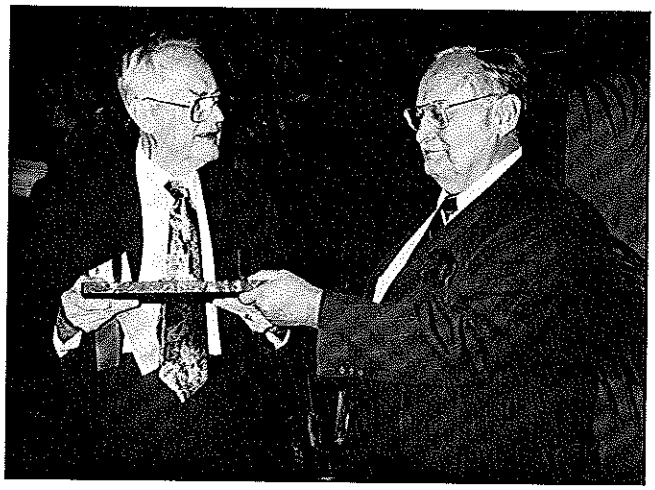
"And Now With Purpose Full and Clear We Turn to Meet Another Year" Robert Browning

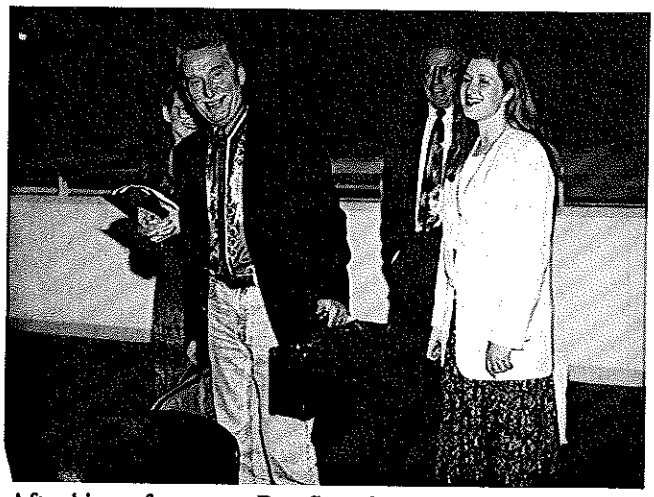
1992 ANNUAL MEETING HIGHLIGHTS

Herb Selby receives the 1991-1992 "Eddie Award" from President Dave Hammer



Edward F. Seitzinger receives the first *Special Edition* of the "Eddie Award" from President David Hammer

Thursday's "Evening with Doc Severinsen" was quite enjoyable - including the reception held in his honor

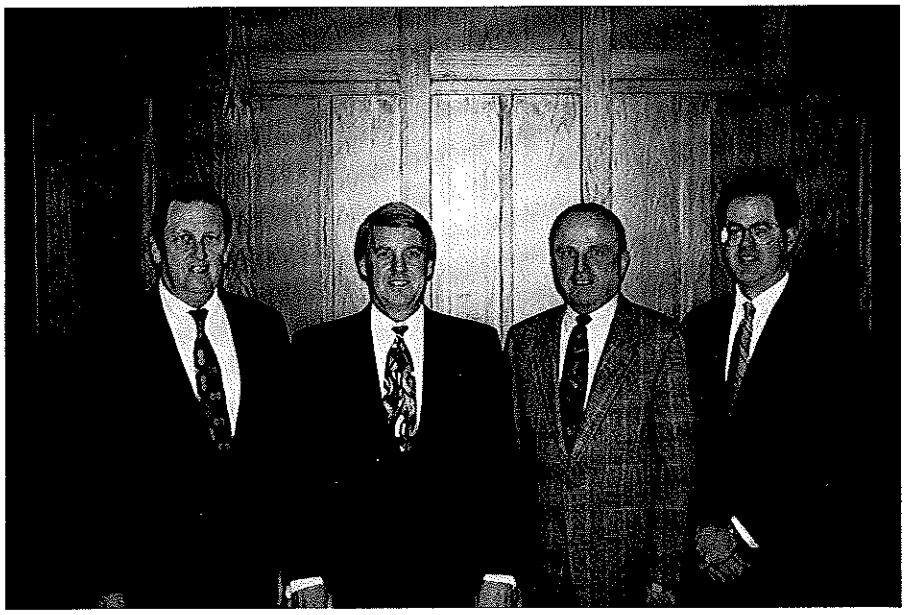


After his performance, Doc Severinsen stopped by our reception to say hello

Winners in the "wild and crazy" jacket contest (l to r) 1st Place Edward F. Seitzinger; 2nd Place Arnold Van Etten; 3rd Place Ray Stefani

Mr. & Mrs Gerald Seidl obtained Doc's Signature, via a dental pick, on daughter Becki's trumpet

1992-1993 OFFICERS and EDITORS



IDCA Officers (l to r) DeWayne Stroud, Treasurer; Richard J. Sapp, President-Elect; John B. Grier, President; Gregory M. Lederer, Secretary

Defense Update Editors (l to r) Kenneth L. Allers, Jr.; Ketmit B. Anderson; James A. Pugh; Michael W. Ellwanger; Thomas J. Shields (*not shown*)

ASSOCIATION NEWS

Since the last issue of the *Defense Update*, there have been two Board meetings. The first was in conjunction with the Annual Meeting in October of 1992, and the second was on December 4, 1992.

The following pertinent matters were addressed at these meetings:

1. The Annual Meeting in 1993 will be Wednesday, Thursday and Friday, October 6, 7 and 8.
2. The initial presentation will be on Wednesday at 1:00 p.m. The Annual Banquet will be Thursday evening.
3. Our new lobbyist is Robert M. Kreamer of the law firm of Whitfield & Eddy, Des Moines, Iowa.
4. Legislative agenda--Jack Grier covered most of these items in his President's letter herein.
5. Discussed the "principles of cooperation" that is being worked on between the ISBA and the Iowa Medical Society. Although we do not oppose these principles, we favor a more exacting expression of rights and responsibilities.
6. Membership--the Association had 403 members at the conclusion of 1992. New members that were approved at the Board meetings are as follows;

Dennis Jerde, Des Moines
Becky S. Knutson, Des Moines
C. T. Newsum, Des Moines
Patricia A. Shoff, Des Moines
Deborah M. Tharnish, Des Moines
Stanley J. Thompson, Des Moines
Mark Godwin, Des Moines
Daniel B. Shuck, Sioux City
Patricia L. Vogel, Des Moines
Lisa A. Simoneta, Des Moines
Timothy A. Clausen, Sioux City
Rustin T. Davenport, Mason City
Ann Fitzgibbons, West Des Moines
Karla J. Shea, Waterloo
Angeline M. Wise, Mount Pleasent
James G. Sawtelle, Mason City
Linda L. Williams, West Des Moines
Robert M. Kreamer, Des Moines
William L. Dooley, Jr., Minneapolis, MN
C. W. Garberson, Carroll (elevated to inactive status)
Donald C. Byers, Newton (elevated to inactive status)

"I've had a few arguments with people," comedian Buddy Hackett once confessed, "but I never carry a grudge. You know why?? While you're carrying that grudge - they're out dancing!"

FINE TUNING OF CHAPTER 668 CONTINUES

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In the district court case, *Vaughn, et al v. Crawford County Memorial Hospital, et al*, Law No. 30441, Iowa District Court for Crawford County, Judge Dewie J. Gaul entered an order denying a motion for summary judgment on August 31, 1992. One of the issues before Judge Gual was the failure of the plaintiffs to designate expert witnesses pursuant to Section 668.11. That section governs the disclosure of expert witnesses in liability cases involving licensed professionals, such as the instant case.

Plaintiffs filed their suit after plaintiff Sherri Vaughn fainted, and fell hitting her head on the floor of the hospital causing injuries. Ms. Vaughn had gone to defendant hospital for emergency care for her nine-year-old son, and she was asked by defendant doctor to come back to the area where her son was being treated. At that time, and without warning to herself or the doctor, she fainted.

In denying defendant's motions for summary judgment on the expert witness issue, Judge Gaul noted that no allegation was made in either answer of the defendants that the plaintiffs were at fault. He also noted that plaintiffs had alleged in one of their fault allegations that defendant doctor was an agent for the defendant hospital and therefore, under that allegation, there would be no comparative fault involved, since the hospital's fault and the doctor's fault would be the same action and the hospital would be liable only because of its agent's act. The judge ruled that no designation of an expert would be necessary because no comparative fault was involved.

It would appear that Judge Gual's analysis comes full circle to the arguments advanced in *Waterloo Savings Bank v. Austin* above, and the importance of the analysis provided by the Supreme Court of Iowa in *Johnson v. Junkmann*, 395 N.W.2d 862 (Iowa 1986). The issue of whether the comparative fault doctrine pursuant to Chapter 668 is to be applied to a case bears close watching. Clearly, it would appear that defense attorneys would be wise to assert in all answers comparative fault, where legitimately available within the ambit of Rule 80, Iowa Rules of Civil Procedure, so that at least through the discovery and the pretrial motion stage, a defendant is not deprived of the ability to pursue appropriate pretrial motions. ☐

ANNOUNCING
THE 1993 IDCA ANNUAL MEETING OCTOBER 6, 7 & 8

EMBASSY SUITES
101 East Locust Street
Des Moines, Iowa

PLEASE NOTE - The Annual Meeting days have been changed. The meeting will begin on Wednesday, October 6, and will end at noon Friday October 8. The Annual Banquet will be Thursday evening instead of Friday. This change should enable you to attend entire meeting this year - *mark your calendars today!*

Whether you are changing firms or moving your entire office, be sure to contact DeWayne Stroud with your new address and/or telephone number:

DeWayne Stroud
5400 University Avenue
West Des Moines, Iowa 50266
515 - 225 - 5608

FINE TUNING OF CHAPTER 668 CONTINUES

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Again citing *Johnson v. Junkmann*, 395 N.W.2d at 867, Judge Habhab noted:

> The statute defines the term "fault" broadly to encompass many types of tort claims, including those that involve "one or more acts or omissions that are in any measure negligent or, reckless. " Iowa Code § 668.1 [1985]. A "party" on the other hand, is defined in the statute as: (1) a claimant (i.e., plaintiff); (2) a person named as a defendant; (3) a person who has been released from liability by the claimant; or (4) a third-party defendant.

Taking that analysis to the next logical conclusion, Judge Habhab then found that an automobile negligence action such as the one before the Court falls within the definition of "fault" and "party."

Notwithstanding his statutory and case law analysis, Judge Habhab nonetheless urged the majority to limit the holding to the factual setting before the Court "because a number of instances exist, such as intentional torts and fraud, where the tortious conduct of the adverse party does not fall within the scope of Chapter 668." *See Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171 (Iowa 1990), intentional tort and fraud; *Slager v. HWA Corp.*, 435 N.W.2d 349, 352 (Iowa 1989), dram shop action.

The Supreme Court's decision on the application for further review will be closely read in light of the analysis performed by the Court of Appeals, especially Judge Habhab's special concurrence.

Two other cases deserve mention in this overview of the continued refinement of Chapter 668. Neither case was published. One is from the Court of Appeals, and one is a ruling in district court case. They both have importance to the defense attorney.

The first case is *West, et al v. Nichols*, decided by the Iowa Court of Appeals on August 27, 1991, No. 1-228/90-1593.[2] In this case, as with *Waterloo Savings Bank v. Austin*, liability was admitted. However, defendant also alleged that plaintiff Joseph West had failed to mitigate his damages because he had not undergone a knee replacement surgery which would have improved his future employability.

Notwithstanding the claim of failure to mitigate damages, the jury found the defendant 100% at fault and awarded plaintiff Joseph West $15,000 in damages, $10,000 of which was for future damages. His wife's claim for consortium was denied.

Not surprisingly, the plaintiffs appealed; dissatisfied with the amount of their recovery. Their contention on appeal was that their case was prejudiced because the trial court submitted the issue of failure to mitigate damages and also because the case was submitted pursuant to Chapter 668, under comparative fault. The Court of Appeals rejected the plaintiffs' arguments finding that questions of contributory negligence are questions for the jury, and where the issue of failure to mitigate damages is submitted to the jury the case automatically becomes one of comparative fault. See *Miller v. Eichorn*, 426 N.W.2d 641, 643 (Iowa Ct. App. 1988). The Court also noted that it is the burden of the defendant to show substantial evidence that the plaintiff's injuries could have been mitigated and that requiring plaintiff to undergo such treatment was reasonable under the circumstances. The Court went on to note that in light of the verdict, finding the defendant 100% at fault, it was not persuaded by the plaintiff's argument that he was prejudiced by the submission of the mitigation issues under comparative fault.

The Court of Appeals also rejected plaintiff's assignment of error based upon the trial court's introduction of collateral source evidence pursuant to Section 668.14(1). The evidence was properly admitted because the source of such collateral payments was neither the plaintiff's immediate family or a federal program.

Judge Schlegel filed a dissent in that case, which is noteworthy because he felt the evidence offered by the defendant did not support a showing that the plaintiff had failed to mitigate his damages. One of plaintiff's own doctors testified that he recommended that the plaintiff forego knee replacement surgery for some period of time so that the plaintiff would have a better chance of the knee replacement "lasting his lifetime." Despite Judge Schlegel's dissent, the Supreme Court refused to review the case.

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[2] This case was not published, and the application for further review was denied by the Supreme Court of Iowa.

FINE TUNING OF CHAPTER 668 CONTINUES

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Subsequent to the entry of the judgment the defendants filed a motion to modify the judgment, arguing that the interest should have been calculated on the future damages pursuant to Section 668.13. That motion was denied and the defendants appealed.

The primary issue presented to the Court of Appeals was whether Section 668.13 was applicable because the only negligence alleged was that as against the defendant driver, which was admitted, and therefore there was no alleged negligence of more than one person which would not trigger the application of 668.13.

The Court of Appeals analyzed this narrow question and resolved it in favor of the defendants.

The Court, citing *Cowen v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990), noted, "A negligence claim for damages resulting from injury to a person is now brought under the provisions of Chapter 668 of the Iowa Code; liability in tort-comparative fault." Further citing and quoting from *Johnson v. Junkmann*, 395 N.W.2d 862,867-868 (Iowa 1986), the Court found:

> ...Nothing in the language of this Act suggests its applicability is triggered only upon a finding or allegation of plaintiff's contributory fault. Rather, the precise and unambiguous language of the Act will be given its plain meaning.
>
> * * *
>
> ...A plaintiff does not have the burden of pleading and proving the plaintiff's freedom from contributory fault. If a defendant relies upon contributory fault of a plaintiff to diminish the amount to be awarded as compensatory damages, the defendant has the burden of pleading and proving fault of the plaintiff if any, and that it was a proximate cause of the injury or damage.
>
> * * *
>
> ...nothing in that section or in the enactment as a whole gives an indication the failure of any party to raise the issue of contributory fault will itself insulate the claim from the operation of the Comparative Fault Act. (Emphasis added).

In making this analysis, the Court of Appeals tacitly accepted the analysis of the Supreme Court in *Johnson v. Junkmann*, 395 N.W.2d at 868, which compared Section 619.17, Code of Iowa, with the relative provisions of Chapter 668. That section governs allegations of contributory fault and the burden of proof thereon.

The Court of Appeals noted,"We agree with defendants' argument, there is no valid distinction between a torts case alleging the negligence of one person or entity and a torts case alleging the negligence of more than one person and/or more than one entity." In so finding, the Court rejected the plaintiffs' argument that in order for Chapter 668 to apply in the instant case, negligence or fault of more than one party had to be at issue.

In the special concurrence to the decision in *Waterloo Savings Bank v. Austin*, Judge Habhab concurred in the result only, but reminded his colleagues that they failed to discuss a pertinent quote from *Johnson v. Junkmann*, 395 N.W.2d at 867, which held

> The key to determining the applicability of these statutory provisions is the phrase "a claim involving the fault of more than one party. "[Iowa Code] § 668.3(2) [1985] (emphasis added) (citation omitted). If a claim involves the fault of more than one party, the statute applies. If not, the statute is not applicable.

Judge Habhab went on to note that there was no assertion of negligence against any other party or parties other than the defendant driver, notwithstanding the confession of liability.

Judge Habhab's special concurrence deserves special scrutiny. While agreeing with the bank's position that Chapter 668 should not have been applied in the case because there was only the fault of the defendant driver alleged, he noted that there were other provisions in Chapter 668 that would bring the claim of the plaintiff into the comparative fault statute, "even though there was but one party alleged at fault." He then goes on to cite Section 668.1(1) which provides that one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability triggers the applicability of the statute.

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MESSAGE FROM THE PRESIDENT Continued from page 2

7. UNIFORM JURY INSTRUCTIONS. We will continue with our committee to monitor developments in the Uniform Civil Jury Instructions in the State of Iowa, and to update the Iowa Defense Counsel's proposals and changes to the Uniform Instructions.

8. ANNUAL MEETING - CONTINUING EDUCATION. The dates for the Annual Meeting to be held in Des Moines have been selected. In 1993, the Annual Meeting will be held on Wednesday, Thursday and Friday, October 6, 7, and 8. The planning of an outstanding continuing legal education program is already underway.

9. CONFERENCE 2000 AND BEYOND. In 1993, the Iowa State Bar Association is planning a lawyer 2000 program which is designed to research and make recommendations as to the practice of law in Iowa, in the 21st century. Our organization, recognizing the importance of this program, has made a financial contribution to the program and will have a member of our group as a part of the committee appointed by the President of the Bar Association to carry out this significant task.

10. RULES COMMITTEE OF THE LITIGATION SECTION OF THE BAR COMMITTEE. This committee of the litigation section of the Bar Association appears to be engaged in a wide-ranging review of the Rule governing practice in the State of Iowa. Your organization has put into place a committee to monitor the recommendations of this group, which could have a major impact on the practice of law.

11. ROUNDTABLE DISCUSSIONS. The Presidents and the Presidents-Elect of the Iowa State Bar Association, the Iowa Academy of Trial Lawyers, the Iowa Trial Lawyers Association, and your Defense Counsel meet quarterly to discuss problems of common interest to the trial bar in hopes of fostering good relationships between the groups. In the past we have found that the program is indeed helpful and we will continue to participate in the roundtable discussions.

12. DRI PROGRAMS. Our participation in Defense Research Institute and the support that organization provides to the various defense organizations throughout the country is critical to the continued success of our organization. We encourage all of our members to join DRI, individually, as we think it is the group that can have a significant impact for the defense bar on a national level.

If any of you should have any questions or want to participate in any of these programs of the Iowa Defense Counsel, please give me a call or drop me a note. I am truly looking forward to serving as your President in this interesting and challenging year.

JOHN B. GRIER, President

AFFIRMATIVE DEFENSES IN THE "OLD DAYS" Continued from page 4

the benefits anticipated by the said Dockery from his relations with the plaintiff, then and in that event this defendant shows that there has been a complete failure of consideration in that there was not contact as agreed.

That in any event, it is a matter of judicial knowledge that the business in which plaintiff was engaged entails certain ordinary risks one of the least of which is the risk of being shocked, and in this connection it is shown that the plaintiff held herself out as an expert in her art, while the said Dockery was to any observant eye a man fresh from the sod and reared to the manners of the pioneer countryside, a man entirely untrained to innovations or perpendicular postures and therefore completely unable to anticipate plaintiff's newfangled hip and knee movements from a cushioned chair, or to warn plaintiff of the probable consequences thereof, and that plaintiff assumed the risk of her injuries, if any.

IV. And now, becoming actor herein only in the event the Court should hold that the said Dockery represented this defendant corporation in the transaction in question, which will never be admitted, this defendant shows as against plaintiff that its agent Dockery did pay to the said plaintiff one dollar of United States currency and received no value therefor as agreed by plaintiff, and that said dollar has never been returned to its owner, and that under all the facts hereinabove alleged, it is entitled to recover said sum of money. " ❐

Reprinted from *res gestae*, the Indiana Bar Association newsletter.

SETTLEMENT - SUBROGATION CHECKLIST Continued from page 6

FOOTNOTES

1. Iowa Code § 668.7; *Britt-Tech v. American Magnetics*, 463 N.W.2d 26 (Iowa 1990).
2. *Verne R. Houghton Ins. v. Orr Drywall*, 470 N.W.2d 39 (Iowa 1991); *Sweet v. Allstate Ins. Co.*, 471 N.W.2d 798 (Iowa 1991).
3. Iowa Code § 249A.6.
4. Iowa Code § 633.574
5. Iowa Code § 668.5(2).
6. Iowa Code § 668.5(2).
7. Reimers v. Honeywell, Inc., 457 N.W.2d 336 (Iowa 1990).
8. *Bales v. Warren County*, 478 N.W.2d 398 (Iowa 1991).
9. *Ludwig v. Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143. RE: Medicaid: *Scott v. State ex rel. D. of Human Serv.*, 438 N.W.2d 834 (Iowa 1989); *Callas v. City of Ottumwa* , 477 N.W.2d 371 (Iowa 1991).
10. Iowa Code § 85.22; *American Mutual Liability Ins. Co. v. State Automobile Ins. Assn.*, 246 Iowa 1294, 72 N.W.2d 88 (1955); *Rich v. Dyna Technology, Inc.*, 204 N.W.2d 867 (Iowa 1973).
11. *Fisher v. Keller Industries*, Inc., 485 N.W.2d 626 (Iowa 1992).
12. *Fisher v. Keller Industries*, Inc., 485 N.W.2d 626 (Iowa 1992).
13. *Verne R. Houghton Ins. v. Orr Drywall*, 470 N.W.2d 39 (Iowa 1991).
14. *Verne R. Houghton Ins. v. Orr Drywall*, 470 N.W.2d 39 (Iowa 1991).
15. *Wright v. Scott*, 410 N.W.2d 247 (Iowa 1987), *Stetzel v. Dickenson*, 174 N.W.2d 438 (Iowa 1970), *Auto. Ins. Co.*, 490 N.W.2d 55 (Iowa 1992).
16. *Fees v. Mutual Fire and Auto. Ins. Co.*, 490 N.W.2d 55 (Iowa 1992).
17. I.C.J.I. Chapter 800.
18. I.C.J.I. Chapter 810.
19. I.C.J.I. Chapter 2000.
20. I.C.J.I. Chapter 1410.
21. *Neubauer v. Hostetter*, 485 N.W.2d 87 (Iowa 1992).
22. *Bales v. Warren County*, 478 N.W.2d 398 (Iowa 1991); *Fisher v. Keller Industries, Inc.*, 485 N.W.2d 626 (Iowa 1992).
23. *City of Ames v. Ratliff*, 471 N.W.2d 803 (Iowa 1991); *Principal Cas. Ins. Co. v. Norwood*, 463 N.W.2d 66 (Iowa 1990).
24. *Ferris v. Anderson*, 255 N.W.2d 135 (Iowa 1977); *Lewis v. Kennison*, 278 N.W.2d 12 (Iowa 1979); *Barnhouse v. Hawkeye State Bank*, 406 N.W.2d 181 (Iowa 1987).
25. Iowa Code § 85.22(1); *Fisher v. Keller Industries, Inc.*, 485 N.W.2d 626 (Iowa1992)
26. Iowa Code § 85.22(1); *Farris v. General Growth Development Corp.*, 381 N.W.2d 625 (Iowa 1986); *Fisher v. Keller Industries, Inc.*, 485 N.W.2d 626 (Iowa 1992).
27. *Mata v. Clarion Farmers Elevator Co-op*, 380 N.W.2d 425 (Iowa 1986).
28. Iowa Code § 85.22(2); *Farris v. General Growth Development Corp.*, 354 N.W.2d 251 (Iowa App. 1985); *Farris v. General Growth Development Corp.*, 381 N.W.2d 625 (Iowa 1986).
29. *Rich v. Dyna Technology Inc.*, 204 N.W.2d 867 (Iowa 1973).
30. *Bertrand v. Sioux City Grain Exchange*, 419 N.W.2d 402 (Iowa 1988).

IN THE PIPELINE Continued from page 3

policy. The Court found the exclusion involved here not to be addressed to the insured's act as in *Altena*, but rather to the injuries specifically intended by the insured. Justice Snell wrote a lengthy dissent arguing that the result in this case cannot be reconciled with the principles adopted by the Court in *Altena* and found in similar cases from surrounding jurisdictions.

6. *Pepper v. Star Equipment Ltd.*, 484 N.W.2d 156 (Iowa 1992). This case was also featured in the April 1992 issue of *Defense Update*. The issue involved whether an insolvent manufacturer may be impleaded as a third party Defendant for fault apportionment purposes where the manufacturer is protected against a personal judgment by Federal Bankruptcy laws. The Supreme Court held the manufacturer may not be impleaded since the Plaintiff has no protection against fault siphoning. The Court stated that its ruling was based upon the same reasons that exist for not considering fault of phantom or non-joined parties. Justice Snell dissented finding nothing in Chapter 668 to suggest that a "party" for purposes of fault apportionment is limited to solvent parties. Furthermore, Justice Snell felt that Section 613.18 had no effect where fault is based on negligence.

7. *Cummings v. Schafer*, ___N.W.2d___(filed November 25, 1992). The appeal in this case was discussed in the October 1992 issue of *Defense Update*. The trial court had entered verdicts against the Defendant of over $1.3 million in compensatory damages and $250,000.00 in punitive damages. The issues on appeal primarily focused upon the sufficiency of the evidence to support the trial court's punitive and compensatory damage awards to the Plaintiffs. The Supreme Court found that the trial Court's remarks in its written opinion gave strong indications that the trial Court developed a severe dislike for the Defendant and was moved by sympathy and empathy for the Plaintiffs. This caused the Court to seriously question whether the lower court was able to evaluate the testimony regarding damages in a calm and dispassionate manner as expected from the Court when sitting as trier of fact. Since the trial court's remarks violated the "appearance of impartiality" Defendant was entitled to a new trial. The Court also adopted the rule prevailing in other jurisdictions that parents are not entitled to recover punitive damages under Rule 8 in actions premised upon injury to their minor children. ❐

SETTLEMENT - SUBROGATION CHECKLIST Continued from page 5

b. If the employee is making the third party claim, the workers' compensation carrier has the rights of indemnity (not subrogation) therefore there is no reduction for comparative fault of the employee - claimant.[11]

c. Unless the workers' compensation insurer has filed suit on behalf of its employee, the workers' compensation carrier is only entitled to recover to the extent of payments made. Thus claimant will want a quick settlement.[12]

B. SETTLING FIRST PARTY CLAIMS

1. The insurer, its agents and employees should be released.[13]

2. A release of claims under the policy will not necessarily prevent a bad faith claim. You can request a release of "claims relating to the processing and payment" of the claim. However, if claimant objects you should not refuse to pay the contractural claim unless claimant also releases the bad faith claim.[14]

C. BE CAREFUL WHAT YOU SAY OR DO

1. Intention of the parties controls the interpretation of releases. Sometimes you should add language to releases explaining reasons and intentions. Releases can be set aside for mutual mistake,[15] duress, and economic duress.[16] Tort actions can be brought for negligent misrepresentations,[17] fraud,[18] intentional infliction of emotional distress,[19] and bad faith relating to processing and payment.[20]

D. ENFORCING SUBROGATION RIGHTS

1. If a tenant negligently causes a fire loss, the owner's insurer can make a subrogation claim against the tenant unless it is waived in the lease.[21]

2. Subrogation claims are subject to a reduction for comparative fault.[22]

3. Contractual and statutory subrogation claims are subject to reduction for pro rata share of legal and administrative expenses.[23]

4. If payments have been made to claimant pursuant to insurance furnished by the insured against whom claims being made, you are probably entitled to either subrogation or equitable set-off.[24]

E. RIGHTS TO RECOVER WORKERS' COMPENSATION PAYMENTS

1. If your insured-employee has sued a third party:

a. File a lien within 30 days of learning of the lawsuit.[25]

b. You are entitled to indemnity (not reduced by any fault of the employee) for what you have paid out at the time of any recovery by the claimant-employee, plus interest, less attorney fees and litigation expanses.[26]

c. Consider whether to intervene.[27]

2. If you think your claimant has a good enough claim against a third party, give a 30 day notice to the employee to bring suit or you will do so on his behalf.

a. If you sue on behalf of the employee, you are entitled to recover what you have paid, plus interest, plus the present value of future payments for which you are liable, less any reduction for comparative fault of the employee.[28]

3. A special case settlement is not considered to be a payment of workers' compensation benefits, therefore it would probably not be a basis for a workers' compensation subrogation claim.[29]

4. In a death case, the compensation carrier has a claim for only the portion of the payments made to the spouse.[30]

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SETTLEMENT - SUBROGATION CHECKLIST

By Philip J. Willson, Council Bluffs, Iowa

A. SETTLING THIRD PARTY CLAIM

1. Only persons who are specifically named will be released. A designation including "employers," "partners" or "officers" would probably be sufficient, but might require an evidentiary hearing to determine the members of the class. A phrase such as "any other person" will not be given any effect.[1]

2. Identify the claims that are being settled. Indicate whether any claims are being reserved. If the settlement amount is anywhere near policy limits include a statement as to whether claimant will be making UIM claims.[2]

3. Are there any hospital, medical or attorney liens? If so, make certain they are being paid. Medicaid (Title XIX Medical Assistance, ADC or SSI Disability) claims, administered by the Department of Human Services, have added protection.[3] To get information and printouts on payments call Jim Evans (515) 282-8787. Legal aspects are handled by Assistant Attorney General Stephen Robinson (515) 281-8330.

4. If there are minor claimants, how will the proceeds be allocated? If the payment to the minor plus other money and property of the minor exceed $4,000.00 a conservatorship is needed.[4]

5. If you plan to make a contribution claim:

   a You must show that you obtained a release of the party against whom you are making a contribution claim.[5]

   b. You should set out in the release sufficient facts and contentions to show that the amount being paid is reasonable.[6]

   c. Since contribution is not allowed for punitive damages, include a statement in the release that because of insufficient evidence none of the consideration for the release represents payment of punitive damages.[7]

6. Subogation claims are subject to reduction for comparative fault. See D(2). If there is a large medical or subrogation claim and the claimant will not make sufficient reduction for comparative fault, you may consider settling all claims except the medical or subrogation claim and agree to idemnify the claimant against those claims. If so, the release should indicate the gross amount of claimant's damages and the percentage of reduction for comparative fault and the reasons for reduction. The attorney for the personal injury claimant will not be entitled to attorney fees on the reserved claim.[8] The subrogation claimant is not likely to be able to make as good a case for liability as the claimant would have.

   a. A reasonable allocation in settlement documents of amounts paid on subrogation claims is probably binding on the subrogation claimants. Allocation may be contested - especially by Medicaid.[9]

   b. Therefore, where there are large subrogation claims and a basis for comparative fault, you have three alternatives;

      (1) Ask claimant to negotiate a compromise of the subrogation claims.

      (2) Allocate a percentage reduction in the release and explain why.

      (3) Settle all but the subrogation claims; and indemnify claimant against them.

7. If claimant was in course of employment on A/D:

   a. A settlement with claimant is not effective unless a written memo of settlement showing consent of the workers' compensation insurer is filed with the Industrial Commissioner. If not, you will be liable for any added workers' compensation collected by claimant.[10]

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AFFIRMATIVE DEFENSES IN THE "OLD DAYS"

The Board of Editors may soon take a position in opposition to notice pleading of affirmative defenses. The following answer, filed in an Indiana case in the 1930's suggests the literary and other benefits of more detailed pleadings.

"I. Defendant demurs generally to the allegations in plaintiff's petition contained and says the same are not sufficient in law to constitute a cause of action against it and of this it prays judgment of the Court.

II. For further answer, if necessary, this defendant denies all and singular the allegations in said petition contained, and demands strict proof thereof.

III. Answering further, if need there be, this defendant railroad company would reveal to the Court that in truth and fact the plaintiff, Mrs. Hattie Beatty, for several nights prior to the occasion of which she now complains had strolled by the signal tower in question and on each occasion persistently propositioned this defendant's employee at said tower, one Dockery, to engage with her in an ancient and popular past time.

That the said Dockery is an old and trusted employee, a man of over sixty winters, with snow in his hair but with summer in his heart; that the faint odor of Hoyt's perfume touched his delicate nostrils and the full red painted lips of this modern young Aphrodite brought back youthful dreams to his aging head. Although the season was fall time, the sap began to rise in his erotic soul as in romantic springtimes of yore. It was on the unlucky night of Friday the 13th of September A.D. 1934, that the said Dockery finally succumbed to plaintiff's feminine allurements, the price being one dollar paid in advance. That this defendant railroad company had not equipped its said signal tower for such passionate purposes and had, in fact, instructed its said employee to admit no visitors thereto, but that unknown to the defendant, the said Dockery permitted the plaintiff to come into the crowded quarters of said tower to indulge with him in an indoor session of Spanish athletics; that while she reclined upon a cushioned chair and unfolded her female charms to his approach, her bare knee did touch an open electric switch upon the wall of said tower, thereby creating electrical contact quite different from the contact for which she was prepared; that either from shocked surprise at the seemingly remarkable amative powers of the said Dockery or for other reasons unknown to this defendant, the said plaintiff sank to the floor of said tower in an apparent swoon, leaving the said Dockery unrewarded and bewildered, with raiment disarranged, and struggling desperately to operate his signals for a fast train which he discovered at that moment approaching unexpectedly upon the defendant's tracks.

That as to this defendant, the transaction in question was ultra vires and completely outside the scope of employment of the said Dockery, and clearly without benefit to this defendant corporation, except for the publicity that might possibly attend this proof to the world of exemplary manner in which Katy Railroad cares for and preserves the virility of its aging employees.

That should it be held, however, that the said Dockery was on the occasion in question acting for this defendant railroad company, which is, as the court has often heard plaintiff's counsel charge, a heartless and bloodless corporation, a poor creature of the statute "without pride of ancestry or hope of posterity," and physically incapable of becoming enraptured in the ethereal paroxysms of love, then and in that event only, this defendant pleads that the plaintiff was guilty of contributory negligence in the following respects:

That the said Dockery urged the plaintiff to remove herself from the cushioned chair to the floor of the tower in order that his engagement might be fulfilled in the customary way, but that plaintiff proclaimed her proficiency and maintained her ability to handle the entire situation from her position in the chair, and that she remained in said chair contrary to Dockery's urgent solicitations and entreaties and received the electric shock as a direct and proximate result of her insistence upon departing from well recognized precedent; that plaintiff was negligent in failing to pursue her activities horizontally from the floor in the time-honored, accepted, and orthodox style, and that her failure to do so proximately contributed to cause her injuries, if any.

That should it be held that the said Dockery was acting for this defendant railroad corporation and that by some manner of judicial reasoning unknown to it this defendant should be held to have enjoyed vicariously

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IN THE PIPELINE

By Kermit B. Anderson, Des Moines, Iowa

This column has profiled cases on appeal which contain issues of interest to the Civil Defense Bar. Many of these cases have now been decided. Set forth below is a short summary of the Court's decision from selected cases discussed in previous columns.

1. *Duntz v. Zeimet*, 478 N.W.2d 635 (Iowa 1991). The appeal in this case was featured in the July, 1991 issue of *Defense Update* and involved the constitutionality of Iowa's seatbelt statute, Section 321.445(4). This section provides that a party's failure to wear a safety belt is not evidence of comparative fault but may be considered to reduce the party's recovery by no more than five percent. In a four to one decision, the Supreme Court upheld the statute and rejected the appellant's arguments that it deprived him of his right to trial by jury and of the equal protection of the laws. In dissent, Justice Larsen felt that the arbitrary five percent limitation imposed by the statute infringed a Defendant's right to a trial on the mitigation issue.

2. *Bingham v. Marshall and Huschart Machinery*, 485 N.W.2d 78 (Iowa 1992). The appeal in this case examined Iowa Code §613.18 and was discussed in the October, 1991 issue of *Defense Update*. The Supreme Court was asked to construe aspects of Iowa Code § 613.18 which imposes limits on strict liability and implied warranty claims against non-manufacturers. The appellant argued that Section 613.18(1)(a) does not give the seller a complete exemption from suit, rather proof of the manufacturer's insolvency was necessary. The Court held that the immunity protection of 613.18(1)(a) implies no such requirement. The Court also held that where evidence Rule 407 does not expressly apply, evidence of subsequent remedial measures is excludable under Rule 403 where its probative value is substantially outweighed by the danger of unfair prejudice.

3.*Guzman v. Des Moines Hotel Partners*, 489 N.W.2d 7 (Iowa 1992) The appeal in this case was featured in the April, 1992 issue of *Defense Update*. The Supreme Court held that the doctrine of nuisance will not alone support a separate theory of tort recovery. Rather, nuisance was merely a condition created, if at all, through the Defendant's negligence. Thus, Plaintiff's case submitted on a nuisance theory should have been submitted as a matter of negligence and the Plaintiff's fault should have been taken into account in the final damage award.

4. *Fees v. Mutual Fire and Auto Ins. Co.*, 490 N.W. 2d 55 (Iowa 1992). This case was featured in the April 1992 issue of *Defense Update*. At issue was whether the Release and Settlement of the Plaintiff / insured's fire claims were the result of economic duress. Evidence showed that Plaintiffs were represented by counsel throughout the settlement of their claim, the amount paid in settlement was within $2,500.00 of their initial demand, and this action was brought 19 months after signing the Release. A divided panel of the Court of Appeals reversed the District Court's grant of summary judgment to the Defendant / insurer. The Supreme Court reversed the Court of Appeals and held that the Plaintiff / insured had failed to show a material fact issue as to all elements of economic duress and found that the Release was valid and constituted a complete defense to the Plaintiff's claim.

5 . *AMCO Insurance Co. vs. Haht*, 490 N.W.2d 843 (Iowa1992). This appeal was discussed in the April 1992 issue of *Defense Update* and involved a declaratory judgment action brought by an insurer against its insureds under a homeowner's policy. The insureds requested coverage for their son who had thrown a baseball that struck and killed another youth. The insurer took the position that coverage did not apply on the basis of an exclusion in the policy relating to bodily injury expected or intended by the insured. The trial court concluded that the insured's son intended to "hurt" the decedent but that this did not rise to the level of "bodily injury" for the purposes of the policy exclusion.

The Court of Appeals in a 4 to 2 *en banc* decision affirmed the trial court. Upon further review, a majority of the Supreme Court affirmed the District Court and the Court of Appeals rejecting the insurer's argument that *Altena v. United Fire and Casualty Co.*, 422 N.W.2d 485 (Iowa 1988) governed the outcome. In *Altena*, the Court held the exclusion will apply where the insured intended the act and intended to cause some kind of bodily injury although perhaps of a different character or magnitude than the actual injury. The Supreme Court distinguished *Altena* by observing that an 11 year old boy lacks the same capacity to formulate an intent to injure that is possessed by an adult. The Court also found a distinction in the wording of the

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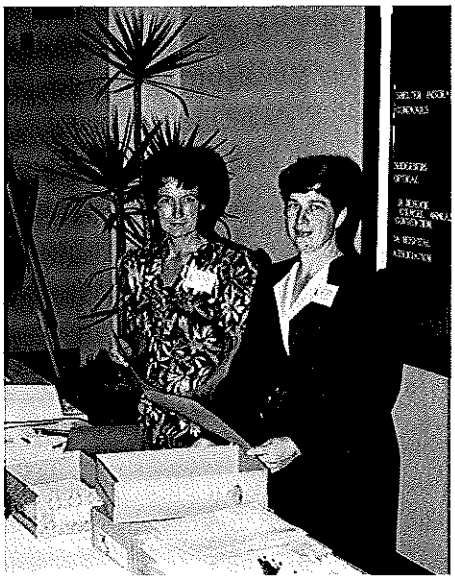
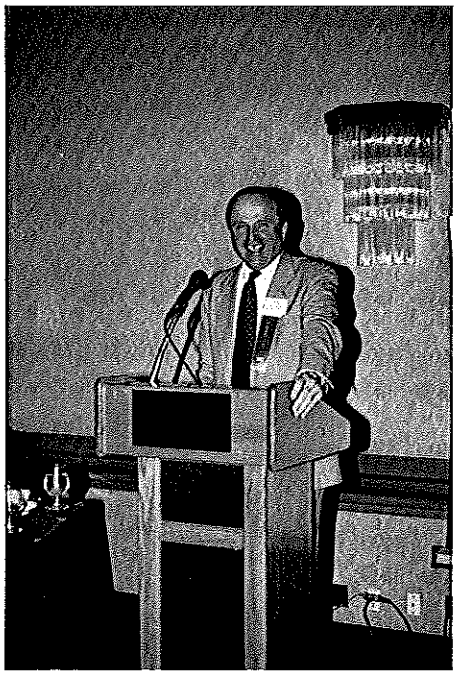
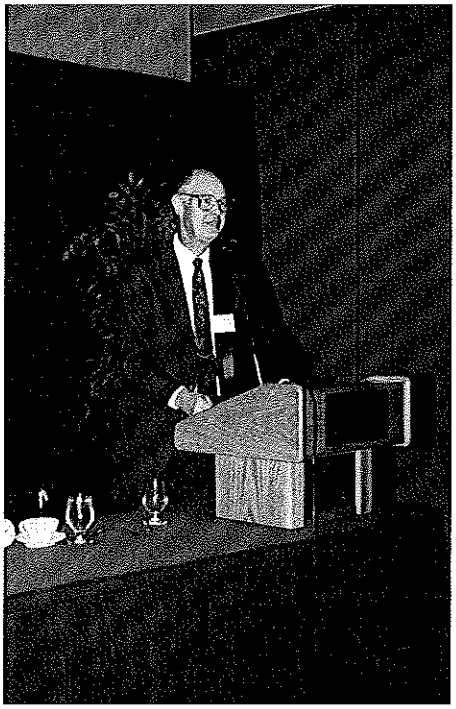
1992 ANNUAL MEETING HIGHLIGHTS



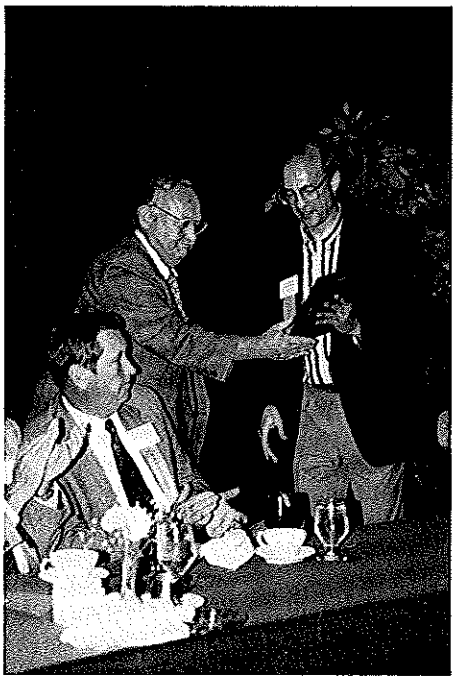
The two Gingers (Plummer & Tribby respectively) "man" the registration desk



President-Elect Jack Grier keeps the meeting on schedule



Chief Justice McGivern speaks at Thursday's luncheon



Dave Phipps presents the DRI Exceptional Performance Award to President Dave Hammer

FROM THE EDITORS

At the annual meeting of the Iowa Defense Counsel, one of the subjects was the intentional acts exclusion in insurance policies, and the continued viability of such exclusions. There was some concern expressed about the recent decision in *Boles v. State Farm* No. 344/91-1463, slip op. (Iowa Sup. Ct. Nov. 25, 1992). In the *Boles* case, the Court held that there was a fact issue as to whether or not there was coverage, where the insured had struck the plaintiff in the face with his fist and a drinking glass. The Court found that there could possibly be coverage based upon the insured's contention that the striking of the plaintiff was a mere "reflex action." The following language from *Smorch v. Auto Club Group Ins. Co.* 445 N.W.2d 192 (Ct. App. Mich. 1989), is perhaps a superior approach to be taken by our Courts in cases of this nature:

> The complaint filed against plaintiff alleges a "negligent assault and battery." There is no duty to defend or provide coverage where the complaint is a transparent attempt to trigger insurance coverage by characterizing allegations of tortious conduct under the guise of "negligent" activities (citations omitted). Assault and battery are intentional acts (citations omitted).

It has long been the policy of the Courts in most jurisdictions that one should not be permitted to acquire insurance for intentional and malicious acts, and we would hope that this well conceived policy would continue to be law in this state.

President Grier has commented upon the legislative program for 1992, in his letter to the membership which is included in this issue. It should also be noted that our organization supports amendments to Section 535.3, which provide for a floating rate of interest, and also an amendment to Section 668.13, to eliminate the "laundry list" of damages which is mandated by different treatment for future damages. Also of interest is our position on House file 140, relating to consortium claims under comparative fault (there is no reduction for comparative fault under *Schwennen v. Abell*, 430 N.W.2d 98 (Iowa 1988). The organization may also be looking into House File 80, regarding collateral source law; House File 146 on the elimination of emotional distress damages in contract case; and the abolition of joint and several liability for a party found more than 50% at fault under Chapter 668.

It will be interesting to see how these various issues will be addressed in light of the different complexion of the House of Representatives, as well as our new lobbyist. We will report back in further issues.

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