defense UPDATE

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SCHWENNEN V. ABELL: COMPARATIVE FAULT DOES NOT AFFECT SPOUSAL CONSORTIUM CLAIMS *OR* IN IOWA YOU CAN HAVE YOUR CAKE AND EAT IT TOO

By Richard J. Kirschman and Robert M. Kreamer, Des Moines, Iowa

INTRODUCTION

Prior to 1983, contributory fault principles governed Iowa tort claims. Contributory fault bars claims wherein the claimant's fault, regardless of the percentage, is a proximate cause of the injury. Judicial fiat, however, replaced Iowa's contributory fault system with more equitable comparative fault postulates. *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1983). Shortly thereafter, the legislature followed suit, adopting Iowa's comparative fault act. Iowa Code, Ch. 668 (1993).

Iowa's modified comparative fault scheme balanced the rights of claimants and tortfeasors. The new regime limited the financial responsibility of tortfeasors to their actual fault, constricting application of joint and several liability. Moreover, minimal contributory fault no longer extinguished a claimant's right to recover. On September 21, 1988, however, the supreme court ruled that comparative fault principles did not govern spousal consortium claims. *Schwennen v. Abell*, 430 N.W.2d 98 (Iowa 1988).

The Iowa Defense Counsel in recent years has lobbied for a change in the law which would require an amendment to Chapter 668. This article will provide some historical background and an analysis of the problems associated with the current law.

I. APPLICABILITY OF COMPARATIVE FAULT TO SPOUSAL CONSORTIUM CLAIMS: SCHWENNEN, ITS FOREBEARERS AND PROGENY

In Iowa, a deprived spouse's consortium claim encompasses both the sentimental (i.e. company, affection and counsel) and practical (i.e. services which contribute to and assist with all aspects of married life) facets of the marital relationship. *Madison v. Colby*, 348 N.W.2d 202, 204-05 (Iowa 1984). Fault of the injured spouse neither reduces nor bars recovery. The injured spouse must pursue the support and loss of income claim.

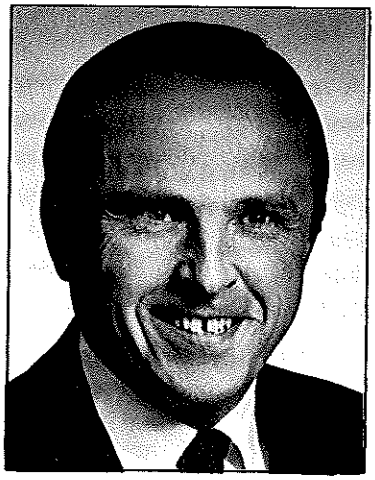
Madison, 348 N.W.2d at 209. This claim could easily be subject to reduction pursuant to Iowa's modified comparative fault scheme.

Initially, pursuant to Iowa law, a wife's contributory negligence barred an aggrieved husband's right to consortium. *Chicago. B. & O.R.R. Co. v. Honey*, 63 F. 39 (8th Cir. 1894). The gradual erosion of this principle is noted in *Handeland v. Brown*, 216 N.W.2d 574, 575-79 (Iowa 1974) (parent's consortium claim unaffected by negligent child's contributory negligence), and its complete demise recognized shortly thereafter, *Fuller v. Buhrow*, 292 N.W.2d 672 (Iowa 1980) (consortium claims are not derivative, therefore, deprived spouse's recovery is unaffected by the injured spouse's contributory fault). In a 6 to 3 decision, the *Fuller* court indicated that it was patently unfair to bar a faultless deprived spouse's consortium claim. In *Schwennen*, the supreme court reconsidered its *Fuller* decision pursuant to comparative fault principles. In another 6 to 3 decision, however, the court strictly adhered to its reasoning in *Fuller*.

The *Schwennen* court rejected the

Continued on page 6

MESSAGE FROM THE PRESIDENT

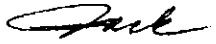


John B. Grier

What a year this has been to serve as President of your organization. Because of the efforts of so many of our members for a great number of years, we were recognized by the Defense Research Institute as the outstanding defense organization in the country. But more importantly, the Board of Directors has voted to change the structure of our organization to enable us to more effectively deal with the problems facing us now and in the future.

The major changes are to eliminate the past Presidents as voting members of our Board and to enlarge the Board so as to encourage participation by all of our members in the activities of our organization. We also hope to strengthen our committee system so that more of you will be able to participate in the day-to-day activities of the Iowa Defense Counsel Association. In formulating the plans for the future, we relied extensively on the input from our past Presidents and most importantly, from Dick Sapp and Greg Lederer who will lead our organization in the next two years. Each of them is committed to seeing that the organization becomes even more responsive to the wishes of our members than it has been in the past and each is committed to seeing that a larger number of our members participate in the activities of our association. These goals can only make our organization more effective as it deals with the problems facing the profession in the future. I hope that each of you will respond by becoming more active in our activities in the coming years. Your input is vital to making the Iowa Defense Counsel even more effective in its future endeavors.

During my administration, the work of so many people has made the organization run smoothly and perform consistent with the past standards that have been set for us. I wish to thank my Executive Committee, Dick Sapp, Greg Lederer and DeWayne Stroud, for their guidance, counsel and insight during the past year and the members of the Board of Directors for their valuable guidance and counsel over the year. For me, I have always considered the presidency of any organization to be simply an opportunity to serve on a temporary basis consistent with the standards and goals of the organization. However, to serve as President of the Iowa Defense Counsel Association is an opportunity to understand the outstanding achievement that has been made in the past years by our organization and understand more fully the outstanding lawyers that form our membership. It indeed has been a great pleasure to serve as your President. Thanks to all of you.



John B. Grier
President

THE COSTS OF SUBROGATION - WHO PAYS?

By Karla J Shea, Waterloo, Iowa

When an insured is injured, such as in a motor vehicle accident, his policy pays the medical bills and requires his cooperation in the insurer's attempt to recover those expenses from a responsible third party. Until recently, if the insured sued a third party, he repaid his insurer in full from the settlement or judgment. The right to collect has been recognized as equitable, contractual, and in some instances, statutory (e.g., Section 85.22, Code of Iowa-Subrogation in Workers Compensation).

With the advent of comparative fault, insured plaintiffs have claimed they have not been able to collect all of the medical expenses advanced in a settlement because of some fault attributable to them (*See, e.g., Ludwig v. Farm Bureau Mutual Insurance Co.*, 393 N.W.2d 143 (Iowa 1986). Attorneys who represent these plaintiffs ask their insurance companies not only to take a reduced amount, but also pay a fee for their services on the insurer's behalf .

In 1987, the Iowa Legislature recognized the right of the plaintiffs' attorneys to collect such a fee. The comparative fault statute was amended to provide:

> Chapter 668.5 Right of Contribution
> ***
> 3. Contractual or statutory rights of persons not enumerated in Section 668.2 for subrogation for losses recovered in proceedings pursuant to this Chapter shall not exceed that portion of the judgment or verdict specifically related to such losses, as shown by the itemization of the judgment or verdict returned under Section 668.3, subsection 8, and according to the findings made pursuant to Section 668.14, subsection 3, and such contractual or statutory subrogated persons shall be responsible for a pro-rata share of the legal and administrative expenses incurred in obtaining the judgment or verdict..
> * * * (Emphasis added)

Thus, an insurer who relies on the insured and his attorney to pursue its subrogation claim will find itself paying a contingent fee to the insured's attorney, who frequently has tried to whittle down the insurer's recovery. Additionally, the insurer may have to fight in court over its portion of the recovery. *Ludwig v. Farm Bureau Mutual Insurance Co.*, 393 N.W.2d 143 (Iowa 1986).

However, the Iowa Supreme Court has indicated this may only be true when the insurer relies on the insured and his attorney, and may not be true where the insured takes steps to protect its own claim. In *Principal Casualty Insurance Co. v. Norwood*, 463 N.W.2d 66 (Iowa 1990), the insurer had not participated in obtaining settlement proceeds beyond its filing of a notice of its subrogation lien with its insured and the tortfeasor. After settlement was reached, Principal requested the full amount of its subrogation interest. Norwoods, the insureds, resisted on the basis of Iowa Code §668.5. The court held that the subrogee was responsible to pay a pro-rata share of the "legal and administrative expenses incurred in obtaining a judgment or verdict against a third-party tortfeasor." There were no costs involved with the *Norwood* case, however, Norwood's attorney sought and received one-third of Principal's subrogation interest in attorney's fees.

In reaching its conclusion, the *Norwood* court stated "to hold otherwise would permit unjust enrichment of the insurance carrier at the expense of the injured insured." The court went on to state that the "insurer's prerogative" to hire its own counsel did not militate in its favor since in this case no counsel was hired. The court supports this reasoning by citing the Arkansas Supreme Court decision in *Washington Fire & Marine Insurance Co. v. Hammett*, 237 Ark. 954, 956, 377 S.W.2d 811, 813 (1964) where that court stated:

> The [insurers] real grievance lies in having to pay a fee to an attorney not of its own choice. Subrogation, however, is governed by equitable principals. If the [insurer] had employed its own attorney and had actively participated in the action against [the tortfeasor], it could not fairly have been compelled to contribute to [the insured's attorneys] fee. But when the insurance company has benefited from the work done by the insured's attorney, there is no inequity in requiring it to bear its fair share of collection expense. *Norwood* at 68.

No Iowa case has defined what level of participation is necessary in order that the insurer be released from its obligation to pay the plaintiff's attorney's fee. Collecting the medical pay advanced may be a small part of the litigation. Often, it is the plaintiffs' claims for pain and suffering, loss of body function, and loss of wages that force these cases to trial. In some cases, the

Continued on page 9

CASE NOTE SUMMARY

Chumbley v. Dreis & Krump Manufacturing Company:

Sole Proximate Cause and Use of the Employer's Fault to Escape Liability

By Thomas J. Shields, Davenport, Iowa

One of the great paradoxes created by the adoption of no-fault liability in Iowa, now codified under Chapter 668, is the continued immunity that employers enjoy by virtue of Chapter 85, and the Supreme Court of Iowa's refusal to permit employer liability to be considered when fault is compared.

Reading Section 668.1 on its face adds to this conundrum. The legislature defines fault as "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." Notwithstanding that definition, Iowa law does not allow a jury or a trier of fact to assess a percentage of fault under Chapter 668 to an employer. *Mermigis v. Servicemaster Industries, Inc.*, 437 N.W.2d 242-247 (Iowa 1989); *Speck v. Unit Handling Division. Litton Systems*, 366 N.W.2d 543, 548 (Iowa 1985).

So when the hapless defendant is faced with serious liability problems and a strong belief that plaintiff's employer, and perhaps his co-employees are at fault, what to do? Two theories come to mind: (1) a co-employee suit pursuant to Section 85.22; or (2) argue that the acts of the employer were the sole proximate cause.

We all know that co-employee suits are not favored in Iowa and, in fact, only a relatively small handful of those cases have ever been tried and won by a plaintiff, and even fewer have been affirmed by the Supreme Court of Iowa.

To the rescue comes *Chumbley v. Dreis & Krump Manufacturing Company*, No. 92-1273, decided on August __, 1993, by the Iowa Court of Appeals. Plaintiff has filed an application for further review by the Supreme Court of Iowa and as of the date of the publication, no decision had been made as to whether the Supreme Court was going to accept the plaintiff's application.

Because of the potential for further review, this case bears watching. The editors of *Defense Update* will keep you apprised of its outcome.

Anthony Chumbley was injured while working for Fairplay Scoreboard Company in Des Moines. He was operating a press brake manufactured by Dreis & Krump Manufacturing Company. This particular press brake was a multi-purpose machine and was able to put angle bends in sheet metal. The machine upon which Chumbley was injured was manufactured in 1967 by Dreis & Krump and sold to Fairplay. Fairplay specified that the ram of the press brake could be activated by either a foot treadle or an electric foot pedal, at the option of the operator. While dual palm controls were offered as an option, Fairplay elected not to equip the machine with such controls.

On the date of the injury the machine was equipped with hand tools which would prevent a worker from placing hands within the point of operation and also was equipped with an operator's cage. Despite the availability of these safety devices, they were not in use on the date of Chumbley's injury, and he had never been instructed as to their use.

These unfortunate events culminated with Chumbley being injured on his third night of employment with Fairplay. That day he was bending strips of metal that he had previously cut with a shear. Chumbley received some brief instructions from the lead man in the press brake department and then Chumbley watched him operate the machine for several minutes.

Other than those brief instructions and the observations that he made, Chumbley did not receive any other safety training on the machine; he was not given a copy of the operator's manual; he was not directed to a warning sign located on the front of the press brake; and he was not instructed on the use of feeding tools which would have prevented him from placing his hands within the pinch point.

After some apparent successful operation of the machine for about 40 minutes, the ram activated while Chumbley's left hand was in the pinch point and the fingers on that hand were severed.

Chumbley filed suit against Dreis & Krump alleging strict liability and negligence counts. The case went to trial on the negligence issues only; Chumbley dismissed the strict liability claim.

The jury returned a special verdict, finding that Dreis & Krump was at fault but that its fault was not a proximate cause of Chumbley's injuries. The court instructed the jury, over the plaintiff's objection, that it could consider the issue of sole proximate cause.

Continued on page 11

LEAD POISONING IN CHILDREN

By Mary B. Schleevogt, M.D. and Miles J. Belgrade, M.D.

PREFACE

Lead poisoning claims were first encountered on the East Coast but have steadily progressed westward. Thirty states have enacted legislation regarding lead poisoning. This primer is intended to broaden the defense counsel's understanding of the nature of the beast. The article was written in 1991 and the authors warn the reader that the lead screening tests and lead levels have changed and will continue to change as the medical community scrutinized the effects of lead in the human body.

INTRODUCTION

Lead is everywhere and yet it has no biologic value to humans—it is not known to occur naturally in our bodies. It exists in house dust, in the air, in our plumbing, and in the paint of our older houses. That lead is a health hazard is certain. It causes death at high levels and more subtle thinking problems at lower levels. Infants and children are most susceptible to lead poisoning because they ingest it from paint chips and from sucking on toys and fingers; and because lead exerts its toxic effect mainly on growth and development. The amount of lead in the blood that is considered safe is being continually revised lower as evidence mounts for the subtle adverse effects of lead. The greatest burden of lead abatement is in eliminating the risk of ingestion of lead containing paint chips in older housing. The soil around older houses is also contaminated, and future legislation will probably require extensive soil cleanup. This essay will review the facts about lead poisoning: sources of lead, absorption of lead and how it is toxic, lead levels and other measurements to determine lead poisoning, the clinical picture and spectrum of lead poisoning, and the treatment of lead poisoning.

SOURCES OF LEAD

Lead is an element which is present in the earth so it can be found in water, soil and vegetation. It is combined with metals to form alloys and with other substances like sand to make crystal. Man uses lead to make many things mostly for the industrialized world. The danger of lead occurs when it is leeched from ceramic glazes (especially with acidic foods and liquids) or from lead and lead-soldered pipes and ingested; when it is burned from lead-containing gasoline; when it is ingested from paint chips or house dust or inhaled from heat stripping of lead-based paint. Exposure is also higher near battery factories or other industrial sources of lead.

The contribution each of the above sources of lead has on the total exposure to lead depends on where you live; but in general, it is possible to divide the various sources of lead into low, intermediate, and high dose sources.[1]

Low dose sources. Food, air, and drinking water account for only about six micrograms per deciliter (mcg/dL) of lead concentrations in our blood. Municipal water supplies are being treated with baking soda in some areas to reduce the acidity of water and limit the amount of lead which can be leeched from pipes or from the lead-containing solder at pipe joints. Some cities are replacing all lead pipes.

Intermediate dose sources. In rural areas, soil contamination with lead is usually less than 200 parts per million (ppm). In urban areas, automotive exhaust makes soil contamination 3,000 ppm or more; and industrial sources like battery factories and lead smelters can drive the figure up above 100,000 ppm. For every 100 ppm over 500, the average child's blood lead level will increase by 1-2 mcg/dL.

High dose sources. The highest source of lead by far is the ingestion of lead-based paint chips by infants and toddlers. Virtually all cases of fatal lead poisoning in children are from this source. The soil around old houses is usually also contaminated enough to pose significant risk.

One other important source of lead is the transfer of maternal lead to the fetus across the placenta. Lead accumulates and is stored in the bones. During pregnancy, maternal bone minerals are released to supply the fetus with needed minerals. Lead is also released at this time and may interfere with fetal development.[2]

Continued on Page 13

SCHWENNEN V. ABELL *Continued from page 1*

notion that Iowa's switch to a comparative fault system provided an adequate basis for disturbing *Fuller*. Instead, the court implicitly ratified its previous rejection of the four standard grounds for applying comparative/contributory fault principles to a consortium action. First, pursuant to Iowa law, a deprived spouse's consortium action is wholly independent, rather than derivative, from the injured spouse's personal injury claim. The deprived spouse suffers a discrete injury, losing the benefits of the marital relationship. The supreme court refused to impinge upon the nonderivative action of an innocent party. Second, the court discovered no legitimate basis, legal or otherwise, for imputing the negligent spouse's fault to a guilt-free, deprived spouse. Third, the court found no historical support for the theory that the deprived spouse was merely the recipient or assignee of a portion of the injured spouse's personal injury claim. Finally, the court refused to apply comparative fault principles to the deprived spouse's claim merely because the vast majority of jurisdictions had adopted that practice.

Although less renowned, the *Schwennen* opinion contains two additional key pronouncements. First, the negligence of a *deprived* spouse will likely reduce or, if greater than fifty percent of the total fault, bar the consortium claim. *Schwennen*, 430 N.W.2d at 101 (indicating that prior law, which the court did not modify, would consider the negligence of a deprived spouse that contributed to the consortium loss). Second, although interspousal immunity had been abrogated, a deprived spouse has no legal basis to prosecute a consortium claim against an injured spouse. Spouses are not compelled to provide consortium. Consequently, injured spouses are not subject to third-party claims initiated by other potentially responsible tortfeasors. *Id.* at 102-03.

II. THE INJURED SPOUSE'S FAULT GENERALLY REDUCES OR ELIMINATES SPOUSAL CONSORTIUM AWARDS

Pursuant to its reaffirmation of *Fuller* in *Schwennen*, Iowa remained among the distinct minority of jurisdictions which refuse to apply comparative or contributory fault principles to reduce or eliminate a deprived spouse's consortium claim. To date, at least 45 states have specifically addressed this issue. Only five, including Iowa, have rejected the majority rule which is aptly stated by the Restatement (Second) of Torts.

> The plaintiff is barred from recovery for an invasion of his legally protected interest in the health or life of a third person which results from the harm or death of such third person, if the negligence of such third person would have barred his own recovery.

Restatement (Second) of Torts, § 494. The Restatement (Second) of Judgments contains a similar standard.

> When a loss resulting from injury to a person may be recovered by either the injured person or another person:
>
> (a) A judgment for or against the injured party has preclusive effects on any such other person's claim for the loss to the same extent as upon the injured person . . .
>
> When a person with a family relationship to one suffering personal injury has a claim for loss to himself resulting from the injury, the determination of issues in an action by the injured person to recover for his injuries is preclusive against the family member, unless the judgment was based on a defense that is unavailable against the family member in the second action.

Restatement (Second) of Judgments, § 48 (1982). Consequently, the distinct majority of jurisdictions and respected American Law Institute pronouncements unequivocally favor reduction or elimination of a deprived spouse's consortium claim when the injured spouse negligently contributed to the loss.

The majority position is premised upon four postulates which support application of comparative or contributory fault precepts to consortium claims. First, the deprived spouse's claim is derivative and, thus, subject to the same defenses as the injured spouse's personal injury claim. Second, the injured spouse's negligence is imputed to the deprived spouse. Third, the deprived spouse is assigned a portion of the injured spouse's claim and, thus, can stand in no better position in the eyes of the law. Finally, any recovery obtained by the deprived spouse merely supplements the family treasury, indirectly enabling the injured spouse to profit from his or her negligence.

Continued on Page 7

SCHWENNEN V. ABELL *Continued from page 6*

III. AN-INJURED SPOUSE'S CONTRIBUTORY FAULT SHOULD REDUCE OR BAR A SPOUSAL CONSORTIUM AWARD

Although the Iowa Supreme Court rejected the four prevalent rationales for utilizing an injured spouse's fault to reduce or eliminate consortium claims, two of those theories (derivative action and family treasury or family unity) provide viable, cogent policy bases to overturn the *Schwennen* decision. Furthermore, additional principles, not considered by the supreme court, provide substantial support for reversal. Accordingly, a persuasive, logical argument supports legislative action abrogating the *Schwennen* ruling.

A. Derivative Action

Thorough analysis of the legal premises which sanction consortium actions leads to the conclusion that loss of spousal consortium is a derivative or collateral claim. Recovery for lost consortium depends upon two prerequisites: (1) existence of the marital relationship and (2) compensable harm suffered by the injured spouse. Absent the marital relationship, the deprived spouse would not possess a legally protected interest in the health and capabilities of the injured spouse. Moreover, but for the injury, deprivation would not transpire. Consortium claims are inextricably linked to the marital relationship and injured spouse's impairment.

Moreover, consortium damages merely comprise a portion of the total recovery for injuries resulting from an underlying accident. The injured spouse suffers direct physical harm, while the deprived spouse sustains indirect injury. Both injuries, however, are premised upon the same negligent act. Similarly, both are predicated on a single harm, a physically debilitating loss sustained by the injured spouse. Accordingly, consortium recoveries constitute a single component, inescapably linked to the whole, of the entire claim resulting from an injury to the injured spouse.

B. Family Unity

Husbands and wives, although no longer subject to the legal fiction which treats them as a whole, essentially function as a single unit. A deprived spouse's right to recover for loss of love, affection, services and conjugal fellowship is based on this unity. Moreover, though not always the case, spouses generally function as a single economic unit. The failure to apply comparative fault to consortium actions unjustly supplements the family exchequer, as the injured spouse almost surely shares in the largess. In effect, enabling the injured spouse to benefit from his or her own negligence, contrary to settled legal principles.

Regardless of economic unity, the marital relationship constitutes a unit to which each spouse contributes and receives love, services and counsel. This unity provides the legal foundation for consortium claims. Reducing the deprived spouse's claim pursuant to the injured spouse's fault logically accompanies this unitary concept. First, the injured spouse's fault contributed to the occurrence of the underlying harm. Moreover, the accident may not have transpired or its results may have been less debilitating but for the injured spouse's negligence. Second, reductions premised on the injured spouse's negligence have the salutary effect of recognizing and enforcing the injured spouse's duty to avoid self-negligent injuries which harm the deprived spouse and marital unit. The injured spouse should not be permitted to shirk responsibilities with impunity. Finally, reducing the consortium award effectively apportions fault among responsible parties, the marital unit, of which the injured spouse is a component, and other tortfeasors.

C. Fairness and Equity

Equity is the polestar of Iowa's comparative fault system. Comparative fault limits a negligent party's liability to that percentage of the total loss that his or her fault bears to responsibility for the accident as a whole. Iowa consortium law contradicts this principle. Assume that Mr. A and Mr. Z are involved in an automobile accident. Fault for the accident is apportioned as follows: A 99% and Z 1%. Pursuant to Iowa law, Mrs. A could recover her entire consortium loss from Mr. Z, though he was only minimally at fault. Contrary to the principles undergirding comparative fault, Mr. Z's liability bears no relationship to his fault. This result is unjust, constitutes joint and several liability for Mr. Z although he is less than 50%

Continued on Page 8

SCHWENNEN V. ABELL *Continued from page 7*

at fault and wholly eviscerates the intent of comparative fault. Conversely, consideration of Mr. A's fault in his wife's consortium action relates Mr. Z's liability with his responsibility for the loss.

In addition to the fairness benefits, comparison of the injured spouse's fault in the deprived spouse's action also has logical appeal. The deprived spouse's loss may not have occurred or would have been reduced if not for the injured spouse's fault. Stated differently, when an injured spouse is partially responsible and, thus, contributes to the deprived spouse's loss, the liability of other responsible parties should be reduced concomitantly. Furthermore, in as much as the supreme court has ruled that an injured spouse is not subject to contribution actions, attribution of the injured spouse's fault is the only viable means to limit a negligent party's financial responsibility to the fault evidenced.

It is also interesting to note that a deprived spouse is not legally entitled to consortium. A spouse, injured or otherwise, has no legal obligation to provide love, affection, counsel or services. Therefore, a deprived spouse has no legal right or basis to pursue a consortium action against a mate: *Schwennen,* 430 N.W.2d at 100; *McIntosh*, 397 N.W.2d at 517-18. Consequently, the right which the supreme court refuses to burden with the contributory negligence of the injured spouse, is not a right to receive consortium, but rather, a right to have the injured spouse healthy, even though he or she contributed to the accident which caused harm, so that consortium *may* be provided.

IV. PROPOSAL

As Justice Holmes once opined, "Great cases like hard cases make bad law." *Northern Securities Co. v. U.S.*, 193 U.S. 197, 400 (1904) (dissenting opinion). *Schwennen* is no exception. Although faultless deprived spouses present a compelling opportunity to render justice through economic compensation, that justice should not come at the expense of fairness, equity and marginally negligent defendants. To rectify this unfair result, two alternatives are readily apparent. Deprived spouses may recover pursuant to either suggestion. Each, however, reduces a defendant's financial liability in proportion to the fault he or she bears for the underlying accident.

A. Modified Comparative Fault

Iowa tort claims are currently governed by a modified comparative fault system. Iowa Code, Ch. 668 (1993). Pursuant to modified comparative fault, a defendants financial liability is limited to the percentage of fault his or her conduct bears to the accident as a whole. If a defendant bears less than fifty percent of the total responsibility for an accident, joint and several liability does not apply. *Id.* at § 668.4. Similarly, contributory negligence which does not exceed fifty percent, will not bar a claimant's action. *Id.* at § 668.3.

A legislative enactment expressly applying the strictures of Chapter 668 to spousal consortium claims would rectify the inequities and unfairness created by *Schwennen.* First, it would render a tortfeasor's financial obligation commensurate with his or her negligence. Second, it would be consistent with Iowa's current modified comparative fault scheme. Third, injured spouses, who are undoubtedly part of the marital unit, would be precluded from benefiting from their own negligence. Fourth, as the consortium claim is unquestionably derived from the underlying injury, it produces a just and equitable result for both plaintiffs and defendants. Finally, treating the injured spouse's fault consistently for both the injured and deprived parties' claims is logically consistent. This solution, however, contravenes the supreme court's desire to compensate innocent deprived spouses whose claims would be barred if the injured spouse's negligence exceeds fifty percent of the total fault. Consequently, a pure comparative fault approach to consortium claims may be the best means to achieve a just result.

B. Pure Comparative Fault

Adoption of a pure comparative fault system for spousal consortium claims would ensure truly just, equitable results. Pure comparative fault is exactly what its name implies. Pursuant to pure comparative fault, defendants are only liable for that portion of a claim that their negligence bears to the accident as a whole. Moreover, consortium claims are not barred merely because the injured spouse was more than fifty percent responsible for the injury causing event.

The differences between pure and modified comparative fault are aptly demonstrated in the following example. Once again, assume that Mr. A and Mr. Z were involved in an automobile accident. This time,

Continued on Page 9

SCHWENNEN V. ABELL *Continued from page 8*

however, a jury determined that fault should be apportioned as follows: Mr. A 65% and Mr. Z 35%. The jury also determined that Mrs. A sustained a consortium loss of $50,000. Pursuant to Iowa's modified comparative fault system, if applied to spousal consortium claims, Mr. A's fault would bar his wife's claim. Conversely, under pure comparative fault, Mrs. A would be entitled to recover $17,500 as a result of Mr. Z's negligence. Moreover, Mr. Z would escape the suffocating burden of having to pay $50,000 for Mrs. A's lost consortium, a figure which bears absolutely no relationship to his responsibility for the accident.

CONCLUSION

In *Schwennen* and *Fuller*, the supreme court established a nonconforming rule, holding that it is improper to reduce a deprived spouse's consortium award merely because the injured spouse negligently contributed, regardless of how egregious the fault, to the underlying injury. The court's nonconformity, appears to have come at the expense of equity and marginally negligent defendants.

No change in the law will wholly rectify the problem discussed in this article to everyone's satisfaction. The *Schwennen* rule is unduly harsh to defendants, while modified comparative fault bars the deprived spouse's claim if the injured spouses bears more than fifty percent of the total fault. Accordingly, a pure comparative fault approach, which attempts to ameliorate the criticisms and effect a compromise, may provide the best path to true fairness. ❐

THE COSTS OF SUBROGATION - WHO PAYS? *continued from page 3*

medical expenses incurred could be stipulated by the parties. In that case, it would be unjust enrichment to force the insurer to pay pro-rata costs of trial when the issues concerning the insurer could easily be settled.

It is also beyond the dictates of equity that the insurer be forced to pay plaintiff's counsel to represent the insurer's interest when those interests may well be in conflict with those of plaintiff.

Insurance companies are now hiring counsel to intervene on their behalf. Counsel who intervenes on behalf of the insurer in the insured's case against the tortfeasor will likely find resistance from the plaintiff's counsel. Plaintiff's counsel may resent what he sees as the intervenor's attempt to take his attorney's fees.

The legislature and the courts have not addressed the ethical issues that confront plaintiff's attorney in this situation. If the insurer does not hire counsel to intervene on their behalf, plaintiff's attorney is being paid to represent a party with interests that may conflict with those of his client, the insured. If the insurer does hire counsel to intervene, plaintiff's attorneys may attempt to battle over attorney's fees, which is nonproductive for his client, the insured.

At least one court was not supportive of the intervenor's position. In *Krapfl v. Yearous v. Farm Bureau*, Linn County No. LA 20963, both the plaintiff insured and the defendant, tortfeasor objected at pre-trial hearing to the intervenor' s presence in the court case. The court ruled that intervention is an action in equity and to be tried to the court. The court ruled that the intervenor's case would be bifurcated from the original case and would be heard immediately after that case by the court. Although subrogation may well have an equitable basis, in the case of an insurance policy the cause of action is contractual. Further, this situation causes extreme hardship on the insurer as it is necessary for the insurer to present medical evidence that has previously been presented by plaintiff's counsel again before the court, or depend upon plaintiff's counsel's ability and discretion to set out the evidence needed to prove the insurer's case. The intervenor's counsel either spends needless money and time calling witnesses who have already testified in the case, or he allows himself to be put back into the position where plaintiff' s counsel is, in effect, representing the insurer and opens the insurer up for an argument that the insurer was unjustly enriched by the plaintiff's counsel's presentation of the insurer's case and the insurer must pay plaintiff's counsel for that unjust enrichment.

Hopefully, this decision by the court was an anomaly and will not become the trend. At least one Iowa District Court has recognized the

continued on page 10

THE COSTS OF SUBROGATION - WHO PAYS?

Continued from page 9

insurer's right to participate in the original case after intervention. That case has not yet gone to trial. The Court reserved the issue of whether the insurer would owe the insured's attorney a pro-rata share of legal fees and costs until the Court can make a determination at the end of the case of the extent of the intervenor's efforts in securing payment of the subrogation interest. Since the insured's efforts to collect his own damages will necessarily be duplicative in the areas of liability and possibly medical expenses with those of the insurer, it is unclear whether counsel intervening for the insurer will run the risk of incurring attorney's fees from the plaintiff's counsel for simply failing to duplicate discovery already done by plaintiff' s counsel. Although such duplication is not cost efficient, it may be necessary to do some limited discovery, including requests for production of documents and requests for admissions in order to later prove that the subrogation sums were gained by efforts of the intervenor's counsel, rather than the plaintiff's.

It will also be necessary for intervenor's counsel to ensure that he participates in negotiation for settlement with the defendant. If concessions are made in negotiation, it is necessary for intervenor's counsel to set out what, if any, concessions are to come from the insurer' s portion of the total recovery. Although it has been tried, it is doubtful that the plaintiff' s counsel can settle the intervenor's case after the intervention. However, failure to participate in these negotiations can open the intervenor up for a *Ludwig* claim.

In *Tenney v. American Family Mutual Insurance Co.*, 470 N.E.2d 6 (Ill. App. 1984), the insurer specifically notified the insured's counsel that counsel was not to collect the company's subrogation interest in medical expenses and that he would not be paid if he attempted to do so. The court held that in equity the court could not force an insurance company to pay for enrichment when the insurer was an unwilling recipient of the work. Illinois apparently had no statute like §668.5. This reasoning is certainly applicable in Iowa; however, the Illinois court based its reasoning in part upon the ability under Illinois law to file a subrogation suit against the tortfeasor separate from the suit filed by the insured.

Many problems remain to be resolved with the interpretation of Iowa Code §668.5 under the Norwood case. As of now, it appears apparent only that the insurer has a right to intervene to protect its subrogation interests. *See United Security Insurance Co. v. Johnson*, 278 NW2d 29, 31 (Iowa 1979). The extent of intervention necessary to avoid payment of costs and fees to the plaintiff' s attorney is an issue that will undoubtedly be addressed in the future by the Iowa Supreme Court. ❐

CASE NOTE *Continued from page 4*

Plaintiff moved for a new trial, which was denied, and appeal was filed.

The Iowa Court of Appeals affirmed the district court, the Honorable Donna L. Paulsen.

The instruction upon which plaintiff based his appeal stated as follows:

> The defendant claims the sole proximate cause of the plaintiff's damages was the conduct of the plaintiff's employer. Sole proximate cause means the only proximate cause. In order to prove this defense, the defendant must prove both of the following propositions:
>
> 1. The conduct of plaintiff's employer occurred.
> 2. The conduct of plaintiff's employer was the only proximate cause of plaintiff's damages.
>
> If the defendant has failed to prove either of these propositions, defendant has failed to prove the defense of sole proximate cause. If the defendant has proved both of these propositions, the defendant has proved the defense of sole proximate cause and you must find that the fault of the defendant, if any, was not a proximate cause of plaintiff's damages when you answer the special verdicts.

Plaintiff's bullet argument to the Court of Appeals was that the district court erred in giving the instruction set forth above because it allowed the jury to find that an employer's negligence can be the sole proximate cause of an injury in a product liability action.

Writing for the Court, Judge Maynard V. Hayden discussed the issue of sole proximate cause under Iowa law. Citing *Sponsler v. Clarke Electric Cooperative, Inc.*, 329 N.W.2d 663, 665 (Iowa 1983), Judge Hayden noted that sole proximate cause as a defense has long been recognized in Iowa. This was reaffirmed by the Supreme Court of Iowa in *Renze Hybrids, Inc. v. Shell Oil Company*, 418 N.W.2d 634, 641-642 (Iowa 1988).

In *Sponsler, Id.*, 329 N.W.2d at 665, the Supreme Court held the defense of sole proximate cause is available even when a third party alleged to be responsible for the injuries is not joined in the case. *See also Six v. Freshaur*, 231 N.W.2d 588, 593 (Iowa 1975).

Judge Hayden, noting that the Supreme Court of Iowa has established standards for the use of the sole proximate cause defense, stated, quoting *Sponsler, Id.*, 329 N.W.2d at 665:

> A plaintiff has the burden to prove the requisite causal connections between the defendant's alleged negligence and the injury, but when the defendant asserts that a third party's conduct or an independent event was the sole proximate cause of the accident, the defendant has the burden of proof on the defense. *McMaster v. Hutchins*, 255 Iowa 39, 43, 120 N.W.2d 509, 511 (1963).

Applying these standards to Dreis & Krump's allegations, the Court of Appeals found that it had carried its burden of proving this defense. Also noting that the jury instruction properly shifted the burden to the defendant, the Court noted, "Once the sole proximate cause defense is proven, defendant is insulated from liability because its fault, if any, cannot be a proximate cause of plaintiff's injuries. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 323-24 (Iowa 1992)." The *Johnson* case provided a driving force behind the Court of Appeals' opinion in *Chumbley*. Citing that case again, *Id.*, 481 N.W.2d at 323-324, Judge Hayden wrote:

> There can be more than one proximate cause of an injury or damages. (Citation omitted). However, there can be only one sole proximate cause. (Citation omitted). "Sole proximate cause is not a comparative fault defense because proof of sole proximate cause insulates a defendant from liability. In these circumstances, the fault of a defendant cannot be a proximate cause of plaintiff's injuries." (Citations omitted).

See also Klein v. City of Keokuk, 438 N.W.2d 22, 24 (Iowa App. 1989), which cited *Sponsler, supra*, 329 N.W.2d at 665.

As a last parting shot, *Chumbley* contended that a sole proximate cause defense was not available where the entity alleged to be at fault was immune from suit under workers compensation laws. The Court of Appeals, however, citing *Sponsler, Id.*, 329 N.W.2d at 665, which quoted *Six v. Freshaur, supra*, 231 N.W.2d at 593, held, "The defense is available even when a

continued on page 12

CASE NOTE

Continued from page 11

third party alleged to be responsible for the injury is not joined in the case." The Court of Appeals then declined to make an exception to the long-standing precedent regarding the sole proximate cause defense.

Going beyond the Court of Appeals' decision in *Chumbley*, it is appropriate to review other aspects of the law dealing with the issue of sole proximate cause. In *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 493 (Iowa 1985), the Supreme Court noted that defendant can argue that an unidentified third party is the sole proximate cause of a plaintiff's injuries. Expanding on that theory, the Court went on to hold that a defendant can also assert that an "act of God" is the sole proximate cause of a plaintiff's damages. *Lanz v. Pearson*, 475 N.W.2d 601, 603 (Iowa 1991); *Renze Hybrids Inc., supra*, 418 N.W.2d at 641; *Klein v. City of Keokuk, supra*, 438 N.W.2d at 23.

In addition, the sole proximate cause defense is also available to a defendant who can identify particular third parties who could be joined or impleaded, as well as against a co-defendant or a third-party defendant. *See Six v. Freshaur, supra*, 231 N.W.2d at 593.

The Court of Appeals' decision in *Chumbley* is distinguished by its categorical refusal to exclude employers as a class of parties to which sole proximate cause can be imputed.

The astute reader at this point may ask "So what?" The response to such an intemperate question is that in those appropriate cases, a defendant is not without the ability to shift fault and/or proximate cause notwithstanding statutory immunity under Chapter 85.

While certainly the employer is not going to have a percentage of fault entered against it, assuming that the employer is not a party by virtue of contractual obligations or breach of an independent duty, nonetheless, the defendant has the ability to argue the "empty chair" theory even more persuasively. It is one thing to be able to suggest to the jury that defendant B is no longer a party because settlement was achieved and the plaintiff has already received most, if not all of what he or she is entitled to receive by virtue of these greatly exaggerated injuries.

Utilizing the sole proximate cause argument, however, takes this issue to an even higher level because what is at stake is the ultimate issue before the trier of fact: causation.

While Dreis & Krump argued in the alternative, i.e., Chumbley's employer was the sole proximate cause or Chumbley himself was at fault for his own injuries, the jury found more persuasive the argument that the employer caused the injuries by its failure to properly train, warn, instruct and utilize appropriate safety equipment.

The fact that Dreis & Krump utilized these affirmative defenses in the alternative points out the pitfall in the use of the sole proximate cause defense. This is not an issue that can be alleged at will and tossed in as an afterthought. It is a defense that is available only where the evidence is so strong and pervasive concerning the employer's activities, or omissions. The defense can obviously backfire grossly if the defendant has weak facts concerning the employer's activities, and can fail even more miserably if the defendant's culpability is so patent that the argument labels the defendant as a "whiner".

Defendants frequently argue that plaintiffs blame everyone else but themselves for their own misfortunes. A defendant who unwisely lacks the facts to support the defense of sole proximate cause risks placing itself in the same class, suggesting to the jury that everyone else is at fault for the plaintiff's injuries, but not the defendant.

While advancing successfully the sole proximate cause issue, as was done in *Chumbley*, is not easy, it certainly lends itself to careful consideration when one looks at the standards set forth to successfully bring a co-employee suit. Alleging a gross and wanton neglect for the safety of another and proving that the co-employee knew that injury was probable are exceptionally tough hurdles.

The availability of the sole proximate cause defense, and directing it at the plaintiff's employer, has much more appeal and lends itself to a much cleaner trial.

It will be interesting to see how the Supreme Court of Iowa handles this case if it accepts further review. ❐

I want to thank Gene Krekel especially, and also H. Craig Miller, of Hirsch, Adams, Krekel, Putnam & Cahill for their input and use of their Appellee's Brief and Argument in the preparation of this case note. They successfully defended Dreis & Krump Manufacturing in the district court, and successfully defended their verdict before the Court of Appeals.

LEAD POISONING IN CHILDREN

Continued from page 5

ABSORPTION AND TOXICITY OF LEAD

In order for lead to be toxic it must enter the circulation. To do so, it must be ingested or inhaled. Several factors can increase the absorption of lead through the intestine: Nutritional deficiencies of other elements like iron, calcium and zinc make it easier for lead to get into the circulation. Also, children who routinely ingest non-food substances—a condition called *pica* can increase exposure enough to produce toxicity. The presence of sickle cell disease will also increase lead absorption. The largest contributing factor is probably iron deficiency (with or without anemia) because it is so common. Iron deficiency appears to increase absorption and also decrease the effectiveness of chelation therapy.

Why is lead toxic? Lead is taken up by red blood cells and stored in bones. Less than 10% remains in the blood or other tissues such as brain and kidney; more than 90% accumulates in the bones where it is relatively harmless. Lead attaches to proteins inside cells and denatures them. The cells die and the surrounding tissue becomes inflamed.[3] In adults, high concentrations of lead produce headaches, abdominal pain, anemia, kidney failure, loss of sensation in the hands and feet, memory loss and imbalance. In children, high lead levels (70 mcg/dL or more) cause confusion, stupor and sometimes death. As in adults, there can also be abdominal pain, anemia and kidney failure.

Low to intermediate levels of lead poisoning (25 - 50 mcg/dL) in children affects mainly mental functions with irreversible intellectual and behavioral impairment.[4,5,6] The studies just referenced and several others make a strong case for aggressive lead abatement programs. The subtle deficits in IQ, concentration, memory and school performance could not be attributed to socioeconomic status, parental IQ, etc.

LEAD LEVELS AND OTHER MEASURES OF LEAD POISONING

There are basically two measures that are used to define lead poisoning: the *blood lead level* and the *erythrocyte protoporphyrin* (EP) level. Since lead interferes with the production of a blood protein called heme, the proteins that are used to make heme accumulate in the presence of lead. One of these is protoporphyrin. EP is the protoporphyrin from red blood cells. Measuring the EP level is the useful screening test because it will be elevated in the presence of lead toxicity or iron deficiency. Since several things can make the EP levels rise, they are often checked together with the blood lead level to make a diagnosis of lead poisoning.

Lead poisoning in children is currently defined as a blood lead level of 25 mcg/dL or more together with an EP level of 35 mcg/dL or more. As evidence accumulates that even 10-15 mcg/dL may produce intellectual and behavioral abnormalities in children, the *legal limit* of lead in the blood is almost certain to drop. The current 25 mcg limit represents a change from 70 mcg in the 1950's to 35 mcg and then 30 mcg in the 1970's.

TREATMENT OF LEAD POISONING

There are three broad aspects to consider in solving the problem of lead poisoning: eliminating the environmental exposure to lead (lead abatement); screening children for toxic lead levels; and treating individual cases of lead poisoning.

There are numerous lead abatement programs throughout the country and the industrialized world. These programs are frequently backed by legislation which demands certain standards which are enforced by the Environmental Protection Agency (EPA). All new automobiles must utilize unleaded fuel only. House paint is no longer lead-based. Cities are lowering the maximum allowable lead content of drinking water by adding chemicals to the water which reduce acidity and by replacing lead pipes. Lead-based solder for plumbing is being phased out. The most difficult, costly, and most important form of lead abatement is the removal and proper disposal of lead-based paint from old houses. There is still no widespread program to fund or enforce this task.

Huge numbers of children are exposed to potentially toxic sources of lead; and yet screening for lead toxicity in children is extremely variable across the United States. It is estimated that of the 2,000,000 children living in old houses, 230,000 of them have blood levels greater than 30 mcg/dL. The EPA

Continued on page 14

LEAD POISONING IN CHILDREN

Continued from page 13

has estimated that 241,000 children under six years old have lead levels greater than 15 mcg/dL due to contaminated drinking water, and 11,000 of those have levels between 30 and 50 mcg/dL.[7] The Centers for Disease Control recommends at least yearly screening of all children in high risk settings or with predisposing factors like iron deficiency.

When a child is found to have toxic lead levels, it is essential to thoroughly investigate the environmental sources and eliminate them because, no matter how effective chelation therapy may be, the child is still at risk for re-exposure. In some states, like Massachusetts, there are strict laws that forbid returning the lead poisoned child back to the same environment until lead abatement, cleanup and reinspection have taken place. The physician must evaluate the child for signs of lead toxicity: mental changes, abdominal discomfort, and kidney failure; and assess for the presence of contributing factors like iron deficiency. X-rays of long bones like the fibula may show a *lead line* which implies several weeks or more of relatively high lead levels. A *lead mobilization test* may be administered to determine how readily lead will be removed or chelated with treatment and may help decide the length of chelation therapy.

Chelation therapy involves giving the child EDTA for three to five days and following the blood lead levels regularly. If iron deficiency is present, nutritional iron supplementation is needed. A neuropsychological evaluation should be performed in all school age children who have had lead poisoning so that appropriate expectations and plans for their education will be made.

SUMMARY

Lead poisoning in children is widespread in the industrialized world because the important sources of lead are peeling lead-based paint, house dust, automobile exhaust, and municipal drinking water. Even low levels of lead in the blood are likely responsible for intellectual and behavioral problems in children. The diagnosis is made by careful screening of at risk children and identification of a lead level of 25 mcg/dL or greater and an EP level of at least 35 mcg/dL. Treatment consists of removing the source of lead exposure, treating contributing factors like iron deficiency and chelating the lead with EDTA. The long-term solution to lead poisoning is to eliminate harmful lead exposures through vigorous lead abatement programs.

What would you do?

Suppose each morning your bank credited your account with $1,440 - with one condition:

Whatever part of the $1,440 you had failed to use during the day would be erased from your account, and no balance would be carried over.

You'd draw out *every* cent *every* day and use it to your best advantage. Right?

Well, you *do* have such a bank, and its name is **TIME.**

Every morning this bank credits you with 1,440 minutes. And it writes off forever whatever portion you have failed to invest to good purpose.

Author Unknown

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FROM THE EDITORS

We have now probably heard the last from the Supreme Court on the subject of punitive damages and the due process clause. This summer a fractured Court announced its decision in the case of *TXO Production Corp. v. Alliance Corp.*, ___ U.S. ___ (decided June 25, 1993). The *TXO* case, involving a punitive award 526 times greater then actual damages, was expected to clarify the Court's earlier decision in *Pacific Mutual Life v. Haslip*, 499 U.S. 1 (1991).

The judgement of the West Virginia Supreme Court upholding the punitive award was affirmed. Justice Stevens announced the decision of the Court in a plurality opinion joined by the Chief Justice and Justice Blackmun, author of the majority opinion in *Haslip*. Separate concurring opinions were written by Justice Kennedy and Justice Scalia, the latter of which was joined by Justice Thomas. Justice O'Conner wrote a lengthy dissent joined in by Justices White (a member of the *Haslip* majority) and Souter.

The plurality minimized the dramatic disparity in the jury's awards by considering the potential harm that could have resulted from the defendant's conduct in addition to the actual harm caused. The magnitude of such potential harm along with defendant's wealth and its pattern on deceitful conduct persuaded the plurality that the punitive award was not so "grossly excessive" as to offend substantive due process. Procedural due process arguments based upon the instructions to the jury and the quality of post-verdict judicial review were rejected rather summarily.

In earlier decisions, the Court seemed to signal a willingness to impose due process limits on punitive damage awards if given the right case. Articulating and applying such limits has, however, proved difficult and vexing in reality. The *TXO* decision does not foreclose future due process challenges, but the door is only slightly ajar. Justice Scalia's prediction in his concurring opinion is surely correct that the great majority of due process challenges to punitive awards can now be disposed of with the simple observation that "this is no worse than *TXO*." ❐

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