defense UPDATE

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ENHANCED INJURY- EXPANSION OF *HILLRICHS*

By Thomas M. Zurek,
Des Moines, Iowa

On December 23, 1992, the Iowa Supreme Court, sitting en banc, rendered its opinion in *Reed v. Chrysler Corporation,* 494 N.W.2d 224 (Iowa 1922). *Reed* is a significant expansion of this Iowa Supreme Court's prior ruling in *Hillrichs v. Avco Corporation,* 478 N.W.2d 70 (Iowa 1991). In *Hillrichs,* the Iowa Supreme Court permitted recovery by plaintiffs for "enhanced injuries," by following a line of reasoning previously set out in automobile product liability "crashworthiness" cases. *Hillrichs* stands for the basic proposition that a manufacturer of any product is liable for enhanced injury when the product design caused an "enhanced" injury but was not necessarily the cause of the accident itself.

The fundamental concept of an enhanced injury claim is that a plaintiff has a distinct claim or cause of action for the exacerbation of an injury that occurs as a result of a design defect after the "initial" accident itself. Enhanced injury damages are those damages that a plaintiff suffers which could have been prevented or lessened by an alternative, safer design. Liability for the enhanced injury damage is calculated based upon the "enhancement" of the injury that comes as a result of the alleged defect.

The Iowa Supreme Court's expansion of the enhanced injury theories beyond automobile manufacturers is grounded in the fact that there is no fundamental difference between the duties imposed upon a manufacturer of an automobile or a manufacturer of any other type of machinery where there is a reasonable foreseeability of injury to plaintiffs. The court stated at page 74 in *Hillrichs:*

> "The enhanced injury theory as applied to automobile manufacturers has been widely recognized. See *Tafoya v. Sears, Roebuck & Co.,* 884 F.2d 1330, 1137-38 (10th Cir. 1989). Our court of appeals recognized the theory as applied to a semitruck tractor in *Wernimont v. International Harvestor Corp.,* 309 N.W.2d 137, 140 (Iowa App. 1981). The enhanced injury theory has been extended to products other than automobiles. *See, e.g., Tafoya v. Sears, Roebuck & Co.,* 884 F.2d 1330 (10th Cir. 1989) (riding lawnmower); *Roe v. Deere & Co.,* 855 F.2d 151 (3rd Cir. 1988) (agricultural tractor); *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.,* 652 F.2d 1165 (3d Cir. 1981) (front-end loader). In *Farrell v. John Deere Co.,* 151 Wis.2d 45, 443 N.W.2d 50, the court applied the enhanced injury theory to a claim involving entrapment in the husking bed of a corn picker."

The Iowa Supreme Court went on to determine that the enhanced injury claim was one that could be submitted to the jury based upon the negligence articulated by the plaintiff to the exclusion of the strict liability claims previously made. The court found that since the strict liability claims and the negligence claim made by the plaintiffs depend on virtually the same proof elements, the only claim that would be submitted to the jury would be the enhanced injury claim which was factually subsumed in the negligence claim. The court in *Hillrichs* determined that the comparative fault of a plaintiff, if any, in causing his original injury as a result of a product defect would be a proximate cause of the enhanced injury and the jury would he entitled to assess comparative fault percentages against the plaintiff. On the strength of that ruling the case was retried. The plaintiff subsequently received a substantial jury verdict in his favor based upon enhanced injury claims. The second *Hillrichs* case is presently on appeal to the Iowa Supreme Court.

In *Reed v. Chrysler Corporation* the Iowa Supreme Court backed away from its conclusion in *Hillrichs* related to the assessment of comparative fault. The court stated:

> The crashworthiness doctrine is a step removed from ordinary strict liability cases.

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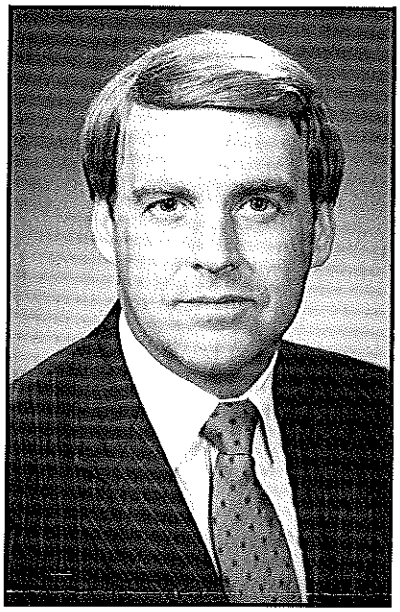
MESSAGE FROM THE PRESIDENT



Richard J. Sapp

A primary goal of our Association is the improvement of our civil justice system. As a Board member and officer, I have had the pleasure of frequently talking with the leaders of other trial organizations, both here and nationally, both plaintiffs' and defendants', and with members of the judiciary on litigation issues. One topic which frequently surfaces in these discussions is the persistent problem with respect to expert witnesses and advocative expert testimony which so dominates many cases. It is a problem that receives sporadic attention but too little reform.

While there are obviously certain kinds of cases and issues as to which expert testimony is essential for the jury to understand and properly resolve the facts, I would suggest that current abuses far outweigh the instances of legitimate use of such testimony. The "abuse" is the professional witness who derives his or her livelihood solely from testifying in lawsuits, not scientifically or objectively, but with a particularly intended result in mind. It involves testimony given in the manner of an advocate, encompassing innumerable and varied subjects in claimed fields of expertise with no meaningful boundaries, e.g., "product design", "industrial safety", or "economics and finance". Too often, the "expertise" is little more than prior work in prior lawsuits, not time spent in a laboratory or at the drawing board, or in peer-reviewed research, or at all in actual practice in the field of their "expertise", unless that field is defined as testifying in lawsuits. While there is much discussion of the cost of litigation focusing on lawyers who must represent our clients, there is too little on the several cottage industries which our civil justice system has spawned, perhaps the largest of which is, as one expert witness told me, "this expert testifying business."

Last month in this publication, David Hammer and Angela Simon eloquently described the evolution of expert testimony in Iowa and the major problems which now characterize it. All trial lawyers, plaintiffs' and defendants' alike, and their clients, are too often held hostage to the expense and "issue domination" of advocative expert witnesses in our trials. Much expert retention is sadly a defensive necessity. The number of subjects upon which experts are allowed to opine continues to multiply, with trial judges believing they are hamstrung in excluding expert testimony by the liberal parameters described in appellate decisions. In other words, we have a problem that everyone seems to recognize, but no one seems to be able to do anything about.

It is perhaps time for the Iowa Supreme Court to reexamine what it really means (and what the ramifications are) by its "long-standing policy of liberally admitting expert testimony." *See Bloomquist v. Wapej3*

llo County, 500 N.W.2d 1, 5 (Iowa 1993). Its decisions also continue to emphasize, however, the broad discretion afforded trial judges on issues of admissibility. This presumably and hopefully means that a trial judge, who, in the exercise of his or her sound discretion, excludes rather than admits questionable opinion testimony, may expect that their discretion will be similarly upheld. Even the drafters of the Federal Rules of Evidence, despite the broad parameters of Rules 702 - 704, cautioned against the admission of opinions which "merely tell the jury what result to reach, somewhat in the matter of the oath-helpers of an earlier day." F.R.C.P. 704, Notes of Advisory Committee.

Beyond case-by-case determinations of admissibility, are there broader remedies which should be tested? Do the rules concerning expert testimony need to be reexamined, such as requiring that expert testimony be

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SUPREME COURT RULES ON DOCTOR DEPOSITION FEES

By David A. McNeill, West Des Moines, Iowa

On December 22, 1993, the Iowa Supreme Court rendered its first decision on the issue of the reasonableness of compensation for expert witnesses. In *Pierce v. Nelson,* 509 N.W.2d 471 (Iowa 1993), the Iowa Supreme Court addressed issues which were first discussed in an editorial in the January 1992 issue of *Defense Update* and further defined in an article which appeared in the April 1993 issue of *Defense Update.*

In *Pierce*, the Iowa Supreme Court considered the reasonableness of the trial court's order requiring defendants to pay a fee of $500.00 per hour for the deposition of Dr. Rodney Johnson, one of Plaintiff's treating physicians. Initially, the Defendants offered to pay Dr. Johnson $250 per hour for a deposition. Before the doctor could respond, the Plaintiff filed a motion for a protective order. At the hearing on the motion for the protective order, the doctor did not appear and the Plaintiff put on no evidence supporting the reasonableness of the fee. Defendants, without objection from the Plaintiff, offered three pieces of evidence supporting their challenge to the fee:

1) a fee schedule from another of plaintiff's treating physicians showing a $250 per hour fee for deposition testimony;

2) an order in an unrelated lawsuit that set a surgeon's deposition fee at $250 per hour;

3) two studies published in the September 1991 issue of Medical Economics Journal showing the average gross income of an orthopedic surgeon to be $466,070 per year, or $253 per hour.

In spite of the absence of any evidence supporting the doctor's demanded fee of $500 per hour, the court determined that the fee was not "totally outrageous" and ordered the defendants to pay the fee if they wanted to depose the doctor. Defendants' interlocutory appeal was accepted by the Supreme Court and its decision reversing the trial court followed.

In finding the trial court abused its discretion in affirming the fee, the Supreme Court criticized the method by which the decision was reached. First, the trial court placed the burden of proof on the wrong party when it found the defendants had failed to prove the fee was "totally outrageous." Second, the court applied the wrong standard when it adopted a "totally outrageous" standard. Third, the court was criticized for relying primarily on her own personal experience with witness fees in reaching her decision. The Supreme Court also noted the absence of any substantive law to guide the court in determining the reasonableness of an expert witness deposition fee and adopted standards intending to clarify this issue in the future.

Noting the absence of guidelines for determining reasonable fees, the Supreme Court adopted seven factors which should be considered by the trial court in determining what each expert's reasonable fee should be. *Id.* at 474, *see also, Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493 495-96 (S.D. Iowa 1992). Perhaps more important than this substantive guidance, were certain principles which the Supreme Court indicated should be followed in applying the seven factors to a request for expert witness fees. First, the upper limit of the range of reasonable fees for a treating physician "should bear some reasonable relationship to the physician's customary hourly charge for patient care and consultation." *Pierce v. Nelson,* 509 N.W. at 474. Further, in this regard, a treating physician has the same obligation to give testimony as any other citizen. *Id.* Presumably, a doctor cannot refuse to provide deposition testimony if the deposing party refuses his fee demands. Second, the Supreme Court said the fee should "bear some rational relationship to time spent away from other professional duties." *Id.* at 475. In other words, if a deposition is scheduled when the doctor is performing services for which he charges $500 per hour, a reasonable fee will be higher than it would be if you depose him when he would otherwise have been providing services for which he charges $100 per hour. The deposing party, it would appear, has some control over the rate to be charged for the deposition by careful scheduling. The lowest rate might be on weekends or evenings when it does not interfere with the doctor's medical practice.

The Supreme Court decision in *Pierce v. Nelson* provides some guidance for determining a reasonable deposition fee for a treating physician. It does not answer all of the questions. There are still a number of procedural questions, such as whether the fee must be determined in advance of the deposition, which have not been determined by the Supreme Court. However, it is now clear that a treating physician's fee must bear some reasonable relationship to what the physician charges for practicing medicine, not testifying. □

AUDITOR LIABILITY TO NON-CLIENT THIRD PARTIES

CASE NOTE: *Bily v. Arthur Young and Co.*, 834 P.2d 745 (Cal. 1992) (*en banc*)

By Kermit B. Anderson, Des Moines, Iowa

The extent of a professional's duty to non-clients is a recurring issue in the defense of professional liability claims. Since *Ryan v. Kanne,* 170 N.W.2d 395 (Iowa 1969), the Iowa Supreme Court, at least in the context of accountant liability, has decided the issue under the Restatement formulation found in Section 552 of the Restatement (2d) of Torts. In *Bily v. Arthur Young and Co.,* 834 P.2d 745 (Cal. 1992), the California Supreme Court in a 5-2 *en banc* decision thoroughly examined the duty of an auditor to non-client third parties who claim to have detrimentally relied upon a negligently prepared audit report. The *Bily* case is certainly the country's leading authority on the issue and is important to Iowa practitioners for its complete discussion of the Restatement rule and for its analysis of whether a third party's negligence-based claim may be asserted on general negligence principles apart from the more restrictive tort of negligent misrepresentation. This latter issue has never been specifically addressed by the Iowa Supreme Court.

Bily involved a not uncommon scenario where investors in a company claimed to have relied upon the company's audited financial statements in making equity investments which later became worthless due to the company's insolvency. The auditor, Arthur Young and Company, had issued unqualified audit opinions on the company's financial statements and were sued by the Plaintiff investors. Expert opinion testimony was produced identifying numerous audit deficiencies amounting, in the expert's view, to gross professional negligence in the performance of the audit.

The trial court submitted Plaintiffs' claims to the jury on theories of fraud, negligent misrepresentation, and general negligence. With regard to negligence, the jury was instructed that an accountant owes a duty of care to those third parties who "reasonably and foreseeably rely" on an audited financial statement prepared by the accountant. The jury returned a substantial verdict for the Plaintiffs based upon negligence, but found for the Defendants on negligent misrepresentation and fraud. The verdict was affirmed by the California Court of Appeals. The California Supreme Court granted review "to consider whether and to what extent an accountant's duty of care in the preparation of an independent audit of a client's financial statements extends to persons other than the client." 834 P.2d at 746. In a lengthy and well-reasoned decision, the Court concluded that insofar as negligence-based claims are concerned, an auditor owes no general duty of care regarding the conduct of an audit to persons other than the client. An auditor may, however, be held liable for negligent misrepresentations in an audit report in accordance with the rule of Section 552 of the Restatement (2d) of Torts.

The Court initially reviewed in some detail the three approaches that have developed regarding the problem of auditor liability to third persons. Beginning with the seminal case of *Ultramares Corp. v. Touche,* 174 N.E. 441 (N.Y. 1931), New York and certain other jurisdictions have followed what is now most appropriately described as a privity of relationship rule. The strict privity of contract requirement announced in *Ultramares* was relaxed in *Credit Alliance v. Arthur Anderson and Co.,* 483 N.E.2d 110 (N.Y. 1985) where it was held that privity will be satisfied upon a showing of conduct "linking" the auditor to the third party in a manner evincing the accountant's understanding of the third party's reliance. The *Bily* Court noted that at least nine states by statute or case law appear to follow a privity or near privity rule.

At the other extreme, some courts and commentators have favored a "foreseeability" rule which imposes liability on much the same basis as for other types of tortfeasors. In *Rosenblum v. Adler,* 461 A.2d 138 (N.J. 1983), the New Jersey Supreme Court adopted such a foreseeability rule, imposing on the auditor a duty to "all those whom the auditor should reasonably foresee as recipients from the company of its audited financial statements for its proper business purposes provided that the recipients rely on the statements pursuant to those business purposes." 461 A.2d at 153. The *Bily* Court felt the foreseeability approach inadequately dealt with the prospect of unlimited auditor liability and observed that it has not attracted a substantial following. It has been explicitly rejected by at least four state Supreme Courts since *Rosenblum* and it has been the subject of substantial criticism by commentators. 834 P.2d at 575.

Finally, the *Bily* Court examined the Restatement rule under which a supplier of information is liable for negligence to a third party only if he or she intends to supply the information for

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IOWA HEALTH REFORM COUNCIL
A SUMMARY OF THE PROCESS AND RECOMMENDATIONS

By Cynthia C. Moser, Sioux City, Iowa

The state of Iowa has, in a very real sense, been in the forefront of developing its own response to the call for health reform. In 1990 the privately-led Iowa Leadership Consortium on Health Care (ILC) was convened by former Governor Robert D. Ray, President and CEO of Blue Cross and Blue Shield of Iowa. Based on the work of the ILC, the state of Iowa was one of 12 states receiving a grant from the Robert Wood Johnson Foundation to encourage state health reform initiatives. Governor Terry Branstad appointed the Iowa Health Reform Council in March of 1993 as the public successor to the ILC. The mission of the Council was to serve as an advisory body to assist state government in finding consensus-based health reform initiatives tailored to Iowa's unique problems and priorities.

The Council was composed of 61 Iowans including consumers, representatives of both parties and houses of the Legislature, health care providers, insurers, educators, business leaders, farmers, small business persons and one practicing lawyer.

At the Council's last meeting on December 15 and 16, 1993, final subcommittee reports were received and several motions relating to particularly prominent or potentially controversial recommendations were debated.

Summarized below are the main features of the Council's proposed Iowa Plan for health care reform:

1. **Medical Liability Reform:**
   Medical Liability reforms (primarily the imposition of a $250,000.00 cap on noneconomic damages and the reduction of the statute of limitations for minors) were endorsed by the Council as a means of reducing costs by reducing the practice of defensive medicine and the cost of medical liability insurance passed on to consumers by hospitals and physicians.
2. **Insurance Reform:**
   Everyone would be eligible for insurance which cannot be canceled or dropped. Previous claims, preexisting conditions and other problematic factors would no longer be used as considerations in pricing insurance coverage.
3. **Employer Conduit:**
   All employers will offer employees the chance to purchase insurance at more affordable group rates.
4. **Rural Access:**
   Rural health care will be protected and strengthened with financial incentives and support for rural practice.
5. **Affordability:**
   To make health care services more affordable, a consumer-driven, value-conscious market will be encouraged. On the buyer's side, reform will provide voluntary purchasing cooperatives and medical savings accounts. Buyers will continue to be able to purchase health insurance through traditional means. Providers may continue fee-for-service medicine. It will be up to the consumer to judge the cost and quality of the new options offered by health care reform against the traditional options.
6. **Report Cards:**
   New health care report cards will summarize cost, quality and consumer satisfaction to permit patients to make more informed choices in selecting a health insurance plan.
7. **Community-Based Purchasing Cooperatives:**
   Community-based purchasing cooperatives will offer individuals and the employees of small businesses the same annual choice of plans that many large businesses now provide.
8. **Expanded Standard Insurance Benefits:**
   Insurance benefits will be expanded to include more preventive services.
9. **Rural Quality Assurance:**
   Health plans will be required to provide the same quality of health care to rural Iowans as to urban Iowans.
10. **Statewide Health Accounting System and Expenditure Target:**
    Iowa will develop a statewide health accounting system to track the cost and quality of health care for Iowans. Iowa will establish an expenditure target, not as a fixed global budget or expenditure cap, but as a performance measure of reform.
11. **Tax Equity:**
    Self-employed small business persons and farmers will receive the same tax deduction as big business currently enjoys.
12. **Medical Savings Accounts:**
    Individuals will be given this tool to manage their own health care and to protect portability and affordability regardless of changes in circumstances. Contributions to MSAs will be tax deductible (just as insurance premiums) and interest will accrue tax free. Savings will be available for health care or long-term care. Iowa will seek federal tax-advantaged status for MSAs.

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ENHANCED INJURY- EXPANSION OF *HILLRICHS*

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The crashworthiness doctrine proceeds from the belief that a manufacturer has a duty to minimize the injurious effect of a crash, no matter how the crash was caused. *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968) (holding manufacturer liable for "so-called 'second collision' of the passenger with the interior part of the automobile" because accidents and enhanced injuries are foreseeable). *See* Harris, *Enhanced Injury Theory; An Analytic Framework,* 62 N.C. Law Rev. 643, 673-75 (1984).

The theory, which presupposes the occurrence of accidents precipitated for myriad reasons, focuses alone on the enhancement of resulting injuries. The rule does not pretend that the design defect had anything to do with causing the accident. It is enough if the design defect increased the damages. So any participation by the plaintiff in bringing the accident about is quite beside the point.

In adopting the crashworthiness doctrine in *Hillrichs,* we indicated a contrary view, stating that the plaintiff's comparative fault could be assessed against him in a claim for enhanced injuries. 478 N.W. at 76. On reconsideration, for the reasons just stated, we think a plaintiff's comparative fault should not be so assessed in a crashworthiness case unless it is shown to be a proximate cause of the *enhanced* injury.

Reed, 494 N.W.2d at 230.

Thus, the Iowa Supreme Court is allowing evidence of comparative fault to be submitted only to the extend that the comparative fault is shown to be a proximate cause of the actual enhanced injury.

On first review, the Iowa Supreme Court's conclusion concerning comparative fault in an enhanced case may seem to be a draconian result that significantly hampers a manufacturer's ability to defend itself in such a case. However, *Reed* particularly sets out the burdens imposed upon a plaintiff with regard to proof related to the enhanced injury claim. The Iowa Supreme Court has imposed the requirement that there is essentially a four part burden imposed upon a plaintiff to create liability for an enhanced injury based upon design defect. The court in *Reed* stated:

> "To prevail on a claim of crashworthiness a plaintiff at the threshold must establish the existence of a design defect. This showing must include proof that the product was unreasonably dangerous. *Wernimont*, 309 N.W.2d at 140 (citing *Chown v. USM Corp.*, 297 N.W.2d 218, 220 (1980). To prevail, after making the threshold showing, a plaintiff must then establish the following three elements:
>
> (1) proof of an alternative safer design, practicable under the circumstances; (2) what injuries would have resulted had the alternative safer design been used; and (3) the extent of enhanced injuries attributable to the defective design.

Wernimont, 309 N.W.2d at 140-41.

Reed, 494 N.W.2d at 226.

In a practical sense a plaintiff is forced to deal with the fundamental issue of whether a product is unreasonably dangerous before the plaintiff even begins to prove the three elements that the court has indicated must be proved to establish the enhanced injury claim. In terms of defense of an enhanced injury cased the attorney defending the manufacturer should focus attention on whether the product was unreasonably dangerous. It should be recognized that the state of the art defense is particularly helpful in focusing a jury's attention on whether not a product is unreasonably dangerous. From a plaintiff's standpoint the proof elements required to show that a product was unreasonably dangerous is very difficult. Experience teaches that enhanced injury claims are factually based on circumstances wherein a plaintiff is injured by some mechanism which initially causes injury and then compounds the injury by disallowing the plaintiff to remove himself from the machinery or instrument of injury. Defendants and plaintiffs would be wise to consider foreseeability of the enhanced injury in the circumstances described. Too often there is an inclination by both plaintiffs and defendants who are facing an enhanced injury claim to focus on the three elements of enhanced injury and ignore the threshold requirements which would he imposed on a plaintiff.

Hillrichs and *Reed* do in fact provide plaintiffs with significant ammunition for challenging manufacturers

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MESSAGE FROM THE PRESIDENT

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found to be "necessary" in order to help the finder of fact rather than simply "helpful"? Is an entirely different approach to expert testimony appropriate, such as court-appointed experts? Whatever the remedy, I suggest that the problem is large enough in our trial courts that careful study with a view toward meaningful reform should be undertaken. As always, the IDCA will assume a leadership role in addressing this or any other issues which substantially affect our courts, our clients, and our practices, as we seek a fairer and less costly system.

RICHARD J. SAPP
President

ENHANCED INJURY-EXPANSION OF *HILLRICHS*

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of products for design defects. Special care must be given to the impact of the *Hillrichs* case as related to the fact that *Hillrichs* expanded enhanced injury liability to non-automobile type cases. Any machine or product which can cause injury can by definition cause an enhanced injury if the mechanism of injury is not instantaneous. At the present time the lowa Supreme Court in *Hillrichs* and *Reed* has dealt only with the availability of enhanced injury dangers as related to manufacturers of products. Both cases deal with the concept of enhanced injury as a subset of product liability claims. A design defect is the core of both cases. The question for the future is the availability of enhanced injury claims to non-manufacturers. In *Hillrichs* the lowa Supreme Court clearly identifies that there is no practical difference from a proof standpoint between a strict liability case and a negligence case. *Hillrichs* at 75-76. The question can then be posed: Does the enhanced injury claim extend itself to torts involving non-product liability type matters or against defendants who are not manufacturers by definition? A review of the case law demonstrates that the issue has not been decided. However, it seems that one can certainly argue that the enhanced injury theory can be applied to non-manufacturing situations. In *Hillrichs,* the court stated at page 75,

> "We believe that the court of appeals' recognition of the enhanced injury doctrine in *Wernimont* was merely a correct application in a particular context of well-established elements of Iowa tort law that permit recovery of damages for injuries caused by the conduct of another that the law identifies as tortious. These principles mandate that an injured party's right of recovery extend to all injury or degree of injury that would have been prevented through the tortfeasor's exercise of the proper standard of care."

Hillrichs, 478 N.W.2d at 75.

There is no limitation in this language as to the type of tortfeasor who can be liable for enhanced injury damage.

For example, this could include a circumstance where a premises owner allows a business invitee to have access to the premises and while on the premises the business invitee is injured through contact with some instrumentality owned and operated by the premises owner. If the premises owner knew or should have known that there was a design defect in the instrumentality which caused the injury, the question becomes whether or not the enhanced injury theory can be applied against the premises owner under a premises liability theory. By argument a plaintiff could suggest that the *Hillrichs* case expands the enhanced injury theory beyond automobile cases to all situations where a tort has been committed. It is not a great leap to suggest that if a premises owner installs an instrumentality or machinery in its plant and a business invitee is injured the enhanced injury claim may be able to be asserted against a premises owner who is not a manufacturer.

The argument to expand the reach of enhanced injury claims is alluring. The plaintiff who successfully argues the expansion can, for the most part, eliminate comparative fault from his "worry list." A defendant facing the argued expansion can demonstrate that to this point the lowa Supreme Court has only applied the "enhanced injury" claim to products cases against manufacturers. Defendants may argue that a non-manufacturer should not be responsible for recognition of the defect in a design which gives rise to the enhanced injury claim. Regardless of the plaintiff's or defendant's argument it is clear that the issue will need to be addressed by vigilant counsel for both sides. ❑

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the benefit of one or more third parties in a specific transaction or type of transaction identified to the supplier. The Court observed that under this rule, an auditor retained to conduct an annual audit for no particular purpose generally undertakes no duty to third parties. *Id.* at 758. By the Court's reckoning, this approach is endorsed by a majority of jurisdictions and has for most courts been a satisfactory compromise between traditional privity and the "specter" of unlimited liability. *Id.* at 758-759.

The Court next analyzed the negligence-based theories of liability potentially available to third persons, that is, general negligence and negligent misrepresentation. A cause of action for negligence, the Court noted, requires the existence of a "duty" toward another which is a shorthand expression for those policy considerations leading the law to say that a particular plaintiff is entitled to protection. Three central policy concerns were identified by the Court as motivating its refusal to permit all merely foreseeable users of an audit report to sue the auditor on a theory of professional negligence: (1) exposure to negligence claims from merely foreseeable third parties poses potential liability far out of proportion to fault, (2) the generally more sophisticated class of plaintiffs in audit liability cases (business lenders, investors) who are not the equivalent of consumers of a manufactured product permits use of contract rather than tort liability to adjust and control the relevant risks, and (3) expanded liability to foreseeable users will not result in more accurate auditing and more efficient loss spreading but will probably cause increased expense and decreased availability of auditing services in some sectors of the economy. 847 P.2d at 761. For these reasons, the Court held that "an auditor's liability for general negligence in the conduct of an audit of its client's financial statements is confined to the client, i.e., the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory." *Id.* at 767.

If recovery for negligence is to be had by third persons, it must be pursued under a theory of negligent misrepresentation. Non-clients of the auditor are, the Court pointed out, connected with the audit only through receipt of and express reliance on the audit report. *Id.* at 772. The tort of negligent misrepresentation properly focuses the jury's attention upon the indispensable element of reliance which is only implicit and often attenuated as part of the causation evaluation in an ordinary negligence claim. "Because the audit report, not the audit itself, is the foundation of the third person's claim, negligent misrepresentation more precisely captures the gravamen of the cause of action and more clearly conveys the elements essential to a recovery." *Id.* Moreover, the Restatement formulation for negligent misrepresentation was felt to represent a "sensible and moderate" approach to the concern for unlimited auditor liability. Its "intent to benefit" language in subdivision (b) sets an objective standard which seeks to determine from the circumstances "whether a supplier has undertaken to inform and guide a third party with respect an identified transaction or type of transaction." *Id.* at 769-70. If so, liability is imposed on the supplier. If on the other hand, the supplier is merely aware of the ever present possibility that the information may be repeated to others and relied upon by them in unidentified transactions, the supplier bears no legal responsibility. *Id.*

The Restatement rule has been adopted and applied in Iowa to define the scope of an accountant's liability to non-client third parties. *Pahre v. Auditor of State,* 422 N.W.2d 178, 180 (Iowa 1988). The Court in *Pahre* like the *Bily* Court refused to recognize under the Restatement a duty to merely foreseeable parties. *Id.* No Iowa case, however, contains *Bily's* breadth of discussion concerning Restatement Section 552(b) and its requirement of knowledge not only of the identity of reliant parties, but also of the particular transaction that the auditor's services are designed to influence. Moreover, no Iowa case has addressed the specific question of whether a general negligence theory may also be available to third parties. *Pahre* can be argued as implicit authority that negligent misrepresentation is the sole means of recovery, but the *Bily* case stands firmly and persuasively for the proposition that where non-clients are concerned, recovery for audit negligence must be had under Section 552 or not at all. ❑

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*Board Welcomes New Member

The Board of Editors for the *Defense Update* welcomes Mark Brownlee of Fort Dodge as its newest member. The Board has expanded in size from five to six members.

IOWA HEALTH REFORM COUNCIL-
A SUMMERY OF THE PROCESS AND RECOMMENDATIONS

Continued from Page 5

13. **Medicare Reimbursement Reform to Eliminate the Anti-Rural Reimbursement Bias:** Iowa will seek Congressional reform of the federal Medicare program that currently underpays Iowa by over $200,000,000.00 annually. This single change could drastically close the financing gap to provide affordable coverage to the underinsured.

* * *

Postscript: On March 10, 1994, the Iowa Senate approved, by a 26-24 vote split along party lines, a health reform bill that commits the state to achieving universal access to health care services by 1998. The bill as passed deviates substantially from recommendations of the Iowa Health Reform Council, including the failure to provide tax incentives for physicians to locate in medically underserved areas and eliminating the $250,000.00 cap on noneconomic damages in medical malpractice suits.

*The author gratefully acknowledges the assistance of Daniel Pitts Winegarden, Project Director for the Iowa Health Council in preparing this article, significant portions of which were taken from the Health Reform Briefing prepared by Mr. Winegarden for the Iowa Legislature.

"No Kidding? I've been offered a job with that law firm when I get out too!"

NOTICE

The Iowa Defense Counsel Association has an Amicus Curiae Committee. If you are aware of an issue which you feel might merit the Defense Counsel's support, please contact President Richard Sapp (515-283-3100), or committee chair Jaki Samuelson (515-288-6041). We have recently filed one amicus brief, *Fees v. Mutual Fire*, 490 N.W.2d 55 (Iowa 1992), and hopefully provided some insight to the court which led to the favorable outcome on that case.

TWO HOURS, 43 MINUTES

If you work a typical eight-hour day, the Tax Foundation says it takes about two hours and 43 minutes of work to pay your federal, state, and local taxes.

FROM THE EDITORS

This past Sunday I was watching a news program on TV. Columnist Art Buchwald was slamming Bernard Nussbaum. He concluded by saying "of course, I hate all lawyers." The next evening there was a sitcom in which two persons were talking about lawyers. The first reiterated that he hated lawyers. The second, a psychiatrist, agreed, but stated that he loved them as patients - they have great insurance and they never get better.

Apparently this daily barrage is taking its toll. Polls reveal that many young attorneys are disenchanted or unhappy with the practice of law, at least in part because of the vision society has of them.

Is there anything one can do to deal with this problem? On a national scale, probably not. However, it is important that attorneys be able to maintain their own self-respect. This would involve a personal code of conduct, so that you know in your own heart that you are a good person performing a valuable service for your clients. Some suggestions: Be scrupulously honest in your relations with your clients and with other attorneys; make sure that the bills you are charging your clients bear reasonable relationship to the service being provided - some cases simply do not justify enormous legal fees, even though you may put in the time; avoid taking frivolous positions or using the concept of "zealous advocacy" to behave like a jerk; use your skills for the betterment of your community; do not allow the practice of law to interfere with your role as a spouse and parent.

Perhaps the above suggestions sound like preaching. However, it is important that we be able to "live in our own skins." Perhaps if we each develop an exemplary code of conduct, both personal and professional, the anti-lawyer messages may be a little less disturbing. In the process, perhaps society's vision of attorneys might be altered. ❑

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