defense UPDATE

The Iowa Defense Counsel Association Newsletter April, 1997 Vol. X , No. 2

GUARDING AGAINST THE IMPROPER USE OF "REBUTTAL" WITNESSES IN PROFESSIONAL NEGLIGENCE CASES

By Jack Hilmes and Kerry Finley, P.C., Des Moines, Iowa

As we all know, expert testimony is of critical importance in professional negligence cases. Without competent expert testimony regarding standard of care and causation, plaintiffs generally cannot even establish their prima facia case. *See, e.g., Oswald v. LeGrand,* 453 N.W.2d 634, 635 (Iowa 1990); *Daboll v. Hoden,* 222 N.W.2d 727, 734 (Iowa 1974); *Kennis v. Mercy Hospital Medical Center,* 491 N.W.2d 161, 165 (Iowa 1992).

The designation of expert witnesses in professional malpractice actions is governed by Iowa Code § 668.11. Pursuant to Iowa Code § 668.11 (and usually the Court's scheduling order), plaintiffs are required to certify to the Court and all parties the names, qualifications and purpose for calling expert witnesses within one hundred and eighty (180) days of the filing of the defendant's answer. Thus, for a professional to be allowed to testify as an expert witness in a malpractice action, plaintiffs must be able to demonstrate either substantial compliance with Iowa Code § 668.11 or good cause for their failure to comply substantially with the statute. *See Hantsbarger v. Coffin,* 501 N.W.2d 501, 504 (1993); *Cox v. Jones,* 470 N.W.2d 23 (Iowa 1991); *Donovan v. State,* 445 N.W.2d 763, 766 (Iowa 1989).

Iowa Code § 668.11 does not, however, apply to "rebuttal experts called with the approval of the court." Iowa Code § 668.11(3). Plaintiffs seeking to use additional experts who have not been timely designated therefore may attempt to cast such experts as "rebuttal" witnesses to avoid the potentially preclusive effect of Iowa Code § 668.11. The opinions offered by these witnesses may not actually be intended to rebut the opinions of the defendant's experts but rather to establish or bolster the plaintiffs' case in chief. Thus, a professional defendant may be confronted on the eve of trial with a previously undisclosed expert whose opinions, if presented, may greatly expand or enhance the plaintiffs' case.

In such situations, the defendant should consider the following options: (a) moving the Court to preclude the witness from testifying; (b) requesting an evidentiary hearing to determine whether the witness is, in fact, being called in rebuttal; and (c) requesting that the Court delay ruling on whether the witness will be allowed to testify until after the close of the defendant's presentation of evidence. Even if the Court merely delays its ruling, the plaintiffs will be forced to proceed without knowing whether their late designated expert will be allowed to testify. Moreover, an evidentiary hearing has the additional benefit of allowing defendants and their experts to learn the nature of the witness's proposed testimony before presenting their evidence.

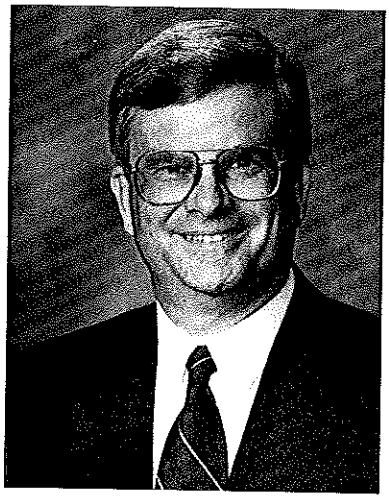
Rebuttal evidence is "that which explains, repels, controverts, or disproves evidence produced by the other side." *Solbrack v. Fosselman,* 204 N.W.2d 891, 895 (Iowa 1973). Often the proposed witness's opinions do not address opinions expressed by the defendant's experts, but merely corroborate or complement the views advanced by the plaintiffs and their experts. Factors to consider when determining whether an expert is a rebuttal expert include: (a) when was the witness first contacted or retained by the plaintiffs; (b) when did the plaintiffs become aware of the issues to be addressed by the witness; and (c) whether the witness's opinions could have been formed without having reviewed those of the defendant's experts.

The timing of the plaintiff's contacts with the witness may be important in demonstrating that the witness is not, in fact, a rebuttal witness. The testimony of the professional may have been secured long before he or she had an opportunity to review the opinions of the defendant's experts.

> Plaintiffs [urge reversal] because they were not allowed to call Dr. William Davis as a rebuttal witness at trial. They contended that one of the defendants' witnesses, Dr. Marengo-Rowe, changed his testi-

Continued on page 7

MESSAGE FROM THE PRESIDENT



Robert A. Engberg
President

The 1997 Legislative Agenda of the Iowa Defense Counsel Association appears to have, at least at the time this message is being sent to the printer, a good chance of success. Any success we enjoy will be due to the hard work of IDCA Secretary and Legislative Committee Chairperson Mark Tripp; Committee Members Jack Grier, Wendy Munyon, Dick Sapp, Mike Thrall, and Mike Weston; and Lobbyist Bob Kreamer. We can all be proud of the professional manner in which they have presented our agenda and the way in which they have responded to the challenges which have confronted those proposals.

Our Legislative Agenda is essentially the same as outlined in Mark Tripp's report published in the January 1996 edition of this newsletter and is consistent with the philosophy of the IDCA. This year's proposed legislation, as last year's, provides for consistent interest rates on judgments, whether pursuant to Iowa Code Chapter 535 or Chapter 668; statutory repeal of *Schwennen v. Abell* so as to reduce or bar a judgment for loss of consortium based on the fault assigned to the person whose death or injury gave rise to the consortium claim; repeal of joint and several liability in comparative fault actions; statutory modification of *Brant v. Bockholt* so as to reduce to present value awards for future non-economic damages; and provisions for obtaining medical records of plaintiffs. The IDCA has also reaffirmed its position with respect to its opposition to caps on damages and does not support proposals providing special benefits under the tort law for special interest groups.

The IDCA has not proposed large scale tort reform and has not been a sponsor of omnibus bills providing for legislation other than as set out in our limited agenda. For example, the IDCA's opposition to caps and to special rules for expert witnesses is sufficiently strong that our lobbyist has been instructed by our board to oppose any bills containing such provisions, even if those bills also contain legislation proposed or supported by our Association.

Although our proposed legislation was combined by legislators with other legislative proposals not sponsored by the IDCA, our agenda has not changed. We remain opposed to selective immunity for the benefit of limited special interests and our commitment to a level playing field for all litigants remains uncompromised. ❑

COMPARATIVE FAULT: "EFFECT" OF JURY'S ANSWERS SHOULD NOT BE RELEVANT TO THEIR DECISION

By Kevin M. Reynolds, Des Moines, Iowa

One troublesome aspect of the Iowa Comparative Fault Act reads as follows:

> 668.3(5) Comparative fault—effect—payment method.
>
> "If the claim is tried to a jury, the court shall give instructions and permit evidence and argument with respect to the effects of the answers to be returned to the interrogatories submitted under this section."

This provision affects two issues: (1) the "greater than 50% rule" in § 668.3(1), *i.e.,* plaintiff is barred if found to be more than 50% at fault; and (2) joint and several liability under § 668.4, *i.e.,* parties found to be 50% or more at fault are jointly and severally liable. If one defendant has joint and several liability with another, that party may be unfairly called upon to inequitably pick up the liability share of a judgment-proof co-defendant.

The origins of this provision can probably be traced to a compromise struck at the time of the Act's adoption in 1986. It is likely a result of lobbying efforts on the part of the plaintiff's bar, to provide a "salve" for those persons still smarting from the adoption of *modified* comparative *fault,* instead of pure comparative negligence. Perhaps more to the point, the legislators did not fully understand the impact of this provision.

This aspect of the Iowa Comparative Fault Act is insidious, contrary to law and should be changed. It invites jurors to engage in "frontier justice" and decide cases based on the "effect" of their decision, instead of the facts and evidence presented.

As many defense lawyers have surely experienced, juries are advised in the court's instructions that if they find the plaintiff more than 50% at fault, there is no recovery at all. *See, e.g.,* Iowa Uniform Civil Jury Instruction No. 400.3. In multiple defendant cases, the jury is told that if at least 50% of the fault rests with one party, that party can be called upon to pay the entire amount of the verdict. These instructions are often emphasized by plaintiff's counsel in summation, and for good reason. However, this method of determining factual disputes or the actual merits of controversies is flatly contrary to a legal system premised on the assumption that cases are decided based on the merits, which is the only true "justice."

With regard to the "more than 50% and you are barred" rule, the mere telling of the jury about this rule has a direct effect on their fault allocation. What happens in many cases is that the jury *first* decides if they want the particular plaintiff to recover. If so, they then "figure backwards," *i.e.,* fill in the respective percentages of fault so that the case "works out that way." In doing so, the jury is careful not to find a "deserving" plaintiff 50% or more at fault (irrespective of what the facts indicate) because, after all, if they do so, the plaintiff will not recover anything. Jurors are invited and encouraged to do this, since they are affirmatively told of the "effect" of their answers in the Court's charge. To add insult to injury, plaintiff's counsel hammers on this in summation, since the statute itself explicitly permits argument on this improper basis.

The same problem inheres in the joint and several liability section of the statute, § 668.4. Under the present law, the jury is told (and plaintiff's counsel can argue) that if one defendant is found to be at least 50%, then plaintiff can recover the entire amount of his or her damages from that defendant, based on joint and several liability. This relegates the important fact determination on fault to a mere subjective decision on the part of lay-person jurors founded upon the answer to the question: "[C]an plaintiff recover all of her damages from the other defendant?" If not, then the jury is encouraged to "stick it to" the "deep pocket" defendant who has the ability to pay. In this manner, "ability to pay" is given equal standing with the facts, *i.e.,* what is the correct allocation of fault based on the facts presented? All of this occurs regardless of what the intrinsic merit of the case show the proper allocation of fault to be.

Of course, this problem could be solved if joint and several liability were eliminated. With the advent of comparative fault, there is no longer any reasoned or principled justification for the existence of joint and several liability among concurrent tortfeasors. The "50% or more" joint and several liability rule is artificial and without a rational basis. Perhaps defense practitioners have avoided criticizing it for a fear for a return to common-law joint and several liability. In a comparative fault system, a party should be required to pay its fair share of the liability as determined by the jury, and no more. If one defendant is "judgment proof," that is no more the responsibility of the other defendant than it is the plaintiff's.

"Ability to pay" has never been a proper consideration in a fault determination in a compensatory damages case, nor should it ever be.

Continued on page 8

APPORTIONMENT OF PRIOR WORK INJURIES IN THE IOWA WORKERS' COMPENSATION ARENA - THE FULL RESPONSIBILITY RULE

By Joseph M. Barron, Des Moines, Iowa

An employee sustains a serious back injury, files a claim for workers' compensation benefits, and makes a recovery (by way of settlement or award) of 50% industrial disability. The employee later sustains another, less serious, injury working for the same employer. As a combined result of *both* these injuries, the employee has an industrial disability of 55%. How is the employee's entitlement to benefits for the second injury affected by his recovery for the previous injury? At first blush, the workers' compensation practitioner might assume that the pre-existing injury would constitute a defense, especially if the two injuries are similar, as in the case of successive back injuries. Would not the employer be at least entitled to an apportionment of the employee's ultimate industrial disability (55%) between that for which the employee has already been paid (50%) and that caused by the second injury (5%)?

In *Celotex Corp. v. Auten,* 541 N.W. 2d 252 (Iowa 1995), the Iowa Supreme Court recognized such an apportionment might make sense from the standpoint of logic and fairness. Nonetheless, the Court held no apportionment may be made to a previous injury that is work related. The claimant in *Auten* injured his neck in 1977 for which he was paid 25% industrial disability. In 1982 he tore his right bicep tendon and received a permanent partial impairment rating for his arm. In 1984, he settled this claim (and a review reopening claim for his prior injury) for $10,000 by way of a special case settlement. At this point he was under severe restrictions, had received various permanent partial impairment ratings, and had moved into the position of office janitor, the lightest job the employer had to offer.

In May, 1987, Auten was at work when he felt a tearing sensation in his right shoulder. He continued to work, underwent surgery in September, 1987, and returned to his usual job. He continued working for over a year until a bid for his position was made by another employee with more seniority. The Industrial Commissioner awarded Auten 100% permanent total disability benefits. Although the Commissioner found a considerable portion of Auten's disability was related to the prior injuries, he refused to apportion some part of the disability to those injuries relying on a pronouncement by the Iowa Supreme Court in *Varied Enterprises Inc. v. Summer,* 353 N.W.2d 407 (Iowa 1984). In *Varied Enterprises,* the Court limited apportionment to "those situations where a prior injury or illness unrelated to the employment independently produces some ascertainable portion of the ultimate disability. "

Before the Iowa Supreme Court, Celotex argued for apportionment because the industrial disability attributable to the prior injuries was ascertainable and, in fact, Celotex had paid Auten for that prior disability. The Iowa Supreme Court responded, "From a logic and fairness standpoint, Celotex's argument has some merit." The Court, however, went on to reaffirm the *Varied Enterprises* rule relying in large part on arguments made by Professor Larson such as:

> The fact that a man has once received compensation as for 50 percent of total disability does not mean that ever after he is in the eyes of compensation law but half a man, so that he can never again receive a compensation award going beyond the other 50 percent of total. After having received his prior payments, he may, in future years, be able to resume gainful employment. In the words of the Colorado court, he may have resumed employment as a "working unit." If so, there is no reason why a disability which would bring anyone else total permanent disability benefits should yield him only half as much.
>
> 2. Arthur Larson, *The Law of Workmen's Compensation* § 59.42 (g)(3), at 10-594-599 (citation omitted).

Of course, Larson's sentiments do not address the double recovery argument raised by Celotex. Without question Auten was being compensated twice for the pre-existing industrial disability. Nor did the Iowa Supreme Court in *Auten* really address this issue other than to admit this argument has some merit from the standpoint of fairness and logic. Rather, the Court pointed out those situations where employers do receive a credit for benefits previously paid *i.e.,* Second Injury Fund cases under Iowa Code § 85.64. The Court ultimately appears to have relied on the absence of legislation in Iowa allowing apportionment for successive work-related injuries.

It should be noted the Industrial Commissioner also rejected apportionment due to the fact Auten had a permanent total disability, entitling him to lifetime benefits. The Commissioner found there would be no way to make an apportionment out of a lifetime award. Although Celotex suggested several methods by which this might be accomplished, neither the Iowa Court of Appeals nor the Iowa Supreme Court addressed this issue.

Continued on page 9

CASE NOTE SUMMARY

By Thomas B. Read, Cedar Rapids, Iowa

Tropf v. American Family

In the April 1996 issue of the *Defense Update* my article asked the question, "Who is an 'insured' for uninsured/ underinsured (UM/UIM) coverage under a standard auto policy?" The named insured, of course, and his or her spouse and family members are insureds. But many insurance policies also insure persons who are "occupying" the covered auto as insureds for UM/UIM coverage. Typically, auto policies define the word "occupying" as "in, upon, getting in, on, out, or off."

Clearly, passengers in the car at the time of the accident are covered by the car's policy. My article a year ago looked at situations where persons were outside the car and not touching it when they were injured by another motorist and whether they could lay claim to the car's UM/UIM coverage. In many of the examples that I cited from cases, the person who is trying to get at the UM/UIM coverage was a stranger to the policyholder at the time of the accident and had never even been a passenger in the policyholder's car. Yet, depending upon the circumstances, sometimes UM/UIM coverage was granted to the stranger because he or she was deemed to be "occupying" the insured's vehicle at the time he or she was injured.

A few examples that illustrate the problem are in order. For instance, if a passenger gets out of a vehicle after a minor accident and while he is outside the vehicle inspecting damage he is hit by another vehicle, is he still "occupying" the car he was riding in at the time of the first accident? Is the driver of a vehicle involved in an accident who leaves to seek shelter after an accident still "occupying" while he seeks safety? Even without an accident, does a person still "occupy" a vehicle after he gets out of the vehicle but remains in its immediate vicinity? Is a person "occupying" the vehicle when he is only approaching the vehicle even if he has the intent to enter his vehicle and he is struck by another vehicle before he gets to his car? Is a person "occupying" a vehicle when he is injured while making a roadside repair of his disabled vehicle, such as changing a tire, jumping a battery, or pouring gas into the gas tank? Is a person "occupying" a vehicle when he is loading or unloading the vehicle but not in direct physical contact with the vehicle at the time of the accident?

Recently, the trend in the courts has been to follow the Rhode Island case of *General Accident Ins. Co. v. Oliver*, 574 A.2d 1240 (R.I. 1990) that listed the elements for determining whether a person is "occupying" a vehicle.

1. There is a causal relation or connection between the injury and the use of the insured vehicle;
2. The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be touching it;
3. The person must be vehicle-oriented rather than highway-oriented/sidewalk oriented at the time; and
4. The person must be engaged in a transaction essential to the use of the insured vehicle at the time.

The closest that the Iowa Supreme Court had come to addressing this situation until very recently was in a case where a person was injured while walking along a county road. He wasn't in close geographic proximity to the covered automobile at the time, and the Court quickly concluded that he was not occupying the covered auto at the time of the accident.

On the other hand, the Iowa Court in *Henderson v. Hawkeye Security Ins. Co.*, 106 N.W.2d (Iowa 1960) found coverage under the medical payments portion of a policy when the evidence was that the claimant was leaning against a car at the time she was struck.

In January, however, the Iowa Supreme Court decided *Tropf v. American Family Mutual Insurance Company*, No. 366/95-582. In this case, the policy defined the word "occupying" as "in, on, getting into or out of, *and in physical contact with.*"

In this case, the claimant had been in a two-vehicle accident and he had gotten out of the vehicle he had been driving to look at the damage. While he was outside the car, a third vehicle slid toward him and he was injured when he jumped out of the way of the approaching vehicle. The parties stipulated that the claimant was not in actual physical contact with the vehicle he had been driving when he was injured.

The Court noted that the usual definition of the word "occupying" in insurance policies is "in or upon or entering into or alighting from." The Court also noted, "The interpretation of this standard definition has given rise to repeated litigation concerning the scope of coverage." The Court cited an Ohio case that pointed out, "Determining when one is 'occupying' a vehicle is not as easy as it appears at first blush."

Continued on page 9

TWELVE YEARS UNDER COMPARATIVE FAULT ACT

By Kenneth L. Allers, Jr. Cedar Rapids, Iowa

The Following is a second excerpt from the booklet authored by Barry A. Lindahl and Les V. Reddick of Dubuque, and Chris Novak, University of Iowa College of Law, reviewing the history of comparative fault in Iowa. A complete copy of the booklet can be obtained from Les Reddick, Kane, Norby & Reddick, 2477 J. F. Kennedy Road, Suite 102, Dubuque, Iowa 52002; 319-582-7890

Sec. 89. - - Liability for Products - State of the Art Defense.

Iowa Code Section 668.12 provides:

Section 668.12 - Liability for Products - State of the Art Defense.

In any action brought pursuant to this chapter against an assembler, designer, supplier of specifications, distributor, manufacturer or seller for damages arising from an alleged defect in the design, testing, manufacturing, formulation, packaging, warning, or labeling of a product, a percentage of fault shall not be assigned to such persons if they plead and prove that the product conformed to the state of the art in existence at the time the product was designed, tested, manufactured, formulated, packaged, provided with a warning, or labeled. Nothing contained in this section shall diminish the duty of an assembler, designer, supplier of specifications, distributor, manufacturer or seller to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to so warn.

Sec. 90. - - Burden of Pleading and Proof.

The state of the art defense is an affirmative defense which the defendant must plead and prove. *Hughes v. Massey-Ferguson, Inc.*, 522 N.W.2d 294, 299 (Iowa 1994). The section is a complete defense in product defect cases. *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 920 (Iowa 1990).

Sec. 91. - -Strict Liability Application Only.

The courts have limited the section's applicability, as a complete defense, to strict liability causes of action. Plaintiffs may still use a state of the art defense in negligent failure to warn actions, however, the Court described the use of the defense this way:

> However, rather than establishing an absolute defense in negligent failure to warn cases, defendant's evidence would go to rebut the plaintiff's proof that the defendant breached a duty to exercise the degree of care a reasonable manufacturer would have used in light of generally recognized and prevailing scientific knowledge.

Olson v. Prosoco. Inc., 522 N.W.2d 284, 291 (Iowa 1994). The Court's rationale in *Prosoco* was that a failure to warn constitutes negligent conduct while § 668.12 focuses exclusively on product defects covered under strict liability causes of action. The Court's decision in *Hughes v. Massey-Ferguson Inc.*, 522 N.W.2d 294, 299 (Iowa 1994) reinforced the notion that the state of the art defense would no longer be available in negligent failure to warn cases.

Sec. 92. - - "State of the Art" Defined.

The statutory language of § 668.12 does not define "state of the art" - an issue the Court addressed in both the majority and concurring opinions in *Hughes v. Massey-Ferguson Inc.*, 522 N.W.2d 294, 299 (Iowa 1994). Industry custom is one factor the court may apply in determining state of the art. The Court has concluded, however, that the jury may consider industry custom as evidence of state of the art, but such evidence does not establish conclusively the state of the art defense. *Chown v. USM Corp.*, 297 N.W.2d 218 (Iowa 1980) and *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 98 (Iowa 1994). In *Chown*, the Court defined state of the art as what feasibly could have been done. The Court went on to define feasibly as a "product design that is practically, as well as technologically, sound." The defendant in *Hughes* cited industry custom, feasibility, approved scientific standards, and government regulations to support the state of the art defense. The Court found that this evidence was ample to support a state of the art instruction to the jury.

A lengthy concurring opinion in *Hughes* objected to the majority's broad definition of "state of the art." The opinion contended that by defining "state of the art" broadly, the Court may shift the burden of proof from the plaintiff to the defendant. The dissent would prefer to use the level of scientific and technical knowledge existing at the time the product was designed and manufactured as a narrower definition of state of the art.

Sec. 93. - - Subsequently Acquired Knowledge Exception.

The issue of whether a manufacturer knew, by means of subsequently acquired knowledge, that a product was unreasonably dangerous was at

Continued on page 10

GUARDING AGAINST THE IMPROPER USE OF "REBUTTAL WITNESSES . . .*Continued from page 1*

> mony at trial from that given in a pretrial deposition. The stated purpose of calling Dr. Davis was to rebut the testimony of Dr. Marengo-Rowe.
>
> However, plaintiffs first notified defendant that they wished to call Dr. Davis as a rebuttal witness at the close of their case in chief *before defendant had presented any evidence.* As defendant suggests, the timing of this request indicates that Dr. Davis was not a rebuttal witness, but a witness to be used to strengthen plaintiffs' case in chief. . . . Due to the timing of the request to use his testimony, and because we agree with the district court that defendants' expert, Dr. Marengo-Rowe, did not significantly change his trial testimony from that given in a pretrial deposition, we conclude that the district court acted within its discretion in refusing to allow the proposed evidence as rebuttal testimony.

Moore v. Vanderloo, 386 N.W.2d 108, 116 (Iowa 1986)(emphasis added).

Defense counsel also should examine the pleadings and the record to determine when the plaintiffs became aware of the issues sought to be addressed by proposed "rebuttal" witness. The Eighth Circuit has stated that holding back expert testimony under the auspices of "rebuttal" testimony allows a party to achieve an improper tactical advantage and that such testimony may be properly excluded. In *Skogen v. Dow Chemical Co.,* 375 F.2d 692 (8th Cir. 1967), plaintiffs brought suit against manufacturer, claiming that an insecticide had caused their son to be brain damaged. The defendant maintained that the alleged brain damage was caused by viral encephalitis. *Id.* at 697. When Plaintiffs sought to present additional expert testimony under the guise of rebuttal testimony at the close of defendant's case, the district court excluded the testimony on the grounds that Plaintiffs had been aware of the issues to be addressed by the expert prior to the presentation of the defense.

> The issues were known to plaintiffs when they presented their case in chief. In fact, proof that the [plaintiff] suffered from insect poisoning was a necessary element in their prima facie case. Likewise, the defense that the [plaintiff] did not suffer from insect poisoning was certainly anticipated by plaintiffs. They did not demonstrate to the trial court's satisfaction, nor have they to ours, why Dr. Quinby was not called in plaintiffs' case in chief. It is altogether possible that plaintiffs kept Dr. Quinby in reserve, hoping to achieve some tactical advantage by a dramatic final statement on the issue. We think under all the enumerated circumstances the trial court did not abuse its discretion in preventing plaintiffs from presenting [Dr. Quinby as a] rebuttal [witness]. . .

Id. at 706.

The plaintiffs may argue that the defendant will not be prejudiced by allowing the witness to testify. However, allowing plaintiffs to offer previously undisclosed expert testimony where the defendant has been given little to no information regarding such testimony is nearly always prejudicial to a professional defendant.

The Iowa Supreme Court has stated that one of the primary purposes of Iowa Code § 688.11 is to prevent speculation regarding the experts in professional negligence cases.

> In establishing a deadline by which both parties must have named their experts, the legislature obviously intended to provide an element of certainty in professional liability cases. As a result, speculation about the identity of experts and last minute dismissals are prevented when an expert cannot be found.

Cox, 470 N.W.2d at 25-26.

In cases involving complex medical or legal issues, the testimony of the plaintiffs' experts regarding standard of care and causation is of critical importance. Plaintiffs cannot generate a jury question without such expert testimony. Accordingly, plaintiffs must timely identify experts to allow the professional defendant to secure appropriate expert testimony and to determine the merits of the plaintiffs' case.

Although Iowa Code § 668.11 may at first appear to allow the clever plaintiff to designate additional experts on the eve of trial by casting them as "rebuttal" witnesses, a well prepared defendant should be able either to exclude such testimony, or, at least, ensure that it is not presented in the plaintiffs' case in chief and is limited in scope to those issues raised by the defendant's experts. ❑

COMPARATIVE FAULT: "EFFECT" OF JURY'S ANSWERS . . . *Continued from page 3*

See, e.g., § 668A.1(3) Code of Iowa (1996). Our system of justice is, in many ways, designed to counterbalance the effects of such externalities. However, as the Iowa Comparative Fault statute is presently worded, this kind of irrational consideration is affirmatively mandated. The jury instructions, the precise terms of which are mandated by statute, put the Court's "stamp of approval" on this injustice.

As a more logical alternative, the jury should be instructed to fill in the verdict forms (respective percentages of fault) based on the evidence presented and nothing else. No "effects of their verdict" should be rightly considered. Once a verdict is returned, the court can then apply the law and enter the appropriate verdict. If the jury has found the plaintiff to be more than 50% at fault, then a defense verdict should be entered. There is no reason for the jury to be told this; if they are, it will affect their fault finding, and that is not right. This change could result in more defense judgments. However, a strong case can be made that this was the intended effect of Iowa's *modified* comparative fault scheme in the first place. If the Iowa Legislature did not want plaintiffs to be barred from a recovery if found to be greater than 50% at fault, then they would have adopted a *pure* comparative fault scheme, but they did not. If the verdict is 50% or less, then the court can reduce the recovery in proportion to his or her share of fault, just like the court has always done. There is no need for the jury to be told this, either, although they will probably guess that their verdict will be used in this manner. If the jury has found one of two or more defendants to be 50% or more at fault, then joint and several liability under the present rule would apply. There is absolutely no justification for the jury to be aware of this. The reason they should not be told this is it could have an affect on their fault allocation, which should be based on *facts*, not "effects." Better yet, joint and several liability should be eliminated.

If the plaintiff's bar does not like the "more than 50% and you are barred" rule, then they should lobby the Iowa Legislature to change the rule and propose something better in its place. But to have a 50% rule and then tell the jury "oh, by the way, if you find the plaintiff more than 50% at fault he or she is barred from a recovery" is to unjustifiably skew the factual decision that the jury is likely to reach. The result is a system which is much more geared toward tort recoveries in personal injury lawsuits. The Legislature clearly intended that if a jury found a plaintiff more than 50% at fault, that plaintiff would be barred from a recovery. The only problem is that juries are not finding plaintiffs more than 50% at fault, and the reason they are not doing so is because they are told what the "effect" of their answers are. The present statute is too much akin to letting the jury decide based on "ability to pay" or other irrelevant, extraneous and unduly prejudicial factors.

A jury is supposed to enter a verdict based on the evidence. Courts should be sensitive about allowing lay-person juries to consider evidence that is irrelevant or is unduly prejudicial. This is why we have the rules of evidence. Jurors are susceptible to concerns about the "effect" of their verdict. This is no different than a jury considering extraneous matters before rendering their decision, and then premising the decision on the merits based primarily on the extraneous matters. This would be akin to, for example, the O.J. Simpson criminal jury considering that if they find O.J. guilty, there would be riots in L.A., and then making their innocence or guilt determination based on that supposed extraneous effect.

The "effect" of a civil jury's verdict (i.e., who gets what money, how much, and from whom) should be completely irrelevant to their determination of the respective shares of fault in the accident. If this were the case, justice as defined by a proper decision on the merits of the case would be easier to find. ❑

Good-By Tom . . . Welcome Pat!

Tom Shields has left our editorial board to assume his duties as Federal Magistrate. Although we will miss Tom's participation, we congratulate and wish him the best. Tom's spot has been assumed by Patrick L. Woodward of McDonald, Stonebraker & Cepican, P.C., Davenport, Iowa. Tom began his duties with this edition. We look forward to the contributions Pat will make.

APPORTIONMENT OF PRIOR WORK INJURIES . . . *Continued from page 4*

In *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258 (1995), a case decided the same day as *Auten*, the Iowa Supreme Court addressed a similar apportionment issue. Nelson injured his shoulder in 1988. He had a prior leg injury for which he had been awarded 30% permanent partial disability. The Industrial Commissioner ruled the employer was only liable for the industrial disability caused by the shoulder injury and awarded 18% industrial disability against the employer and 19% against the Second Injury Fund.

The Iowa Supreme Court applied the "full responsibility" rule set forth in *Auten* and held the employer was liable for all of claimant's industrial disability, including that caused by the prior leg injury. Any disability resulting from the leg injury after the occurrence of the shoulder injury was not to be considered in determining industrial disability on remand. The Court also ruled that Second Injury Fund liability was not triggered because the "second" injury, a shoulder injury, was not a scheduled injury under Iowa Code § 85.64.

The full responsibility rule, as set forth in *Auten* and *Nelson*, opens the door to double recoveries in any case involving successive work injuries. Consider, for example, an employee who sustains an injury resulting in 50% industrial disability which is paid by the employer. The employee later sustains a less severe injury and it is determined by the commissioner that the combined effect of the two injuries is an industrial disability of 60%. Under the *Auten/Nelson* full responsibility rule the employer would be required to pay the employee the full 60%, resulting in a total recovery of 110% industrial disability! It is difficult to justify such a recovery, particularly if the employee is still working.

Another practical difficulty relates to the employer's incentive to settle when the employee is still working for the same employer. Given that the employee may claim a subsequent injury and that the employer will not receive any credit for benefits previously paid, one has to ask what the employer has to gain by voluntarily settling a claim.

There is also a very real danger of claimants bringing their claims in a piecemeal fashion in order to take advantage of the full responsibility rule. For example, an employee with a carpal tunnel condition sustains a back injury. Would not the employee be wise to file a claim for the carpal tunnel injury first and then await resolution of that claim before filing a claim for the back injury? In this way the industrial disability in existence prior to the back injury would have to be considered in setting an award for the later claim. Presumably, the employee will again make a recovery for the same carpal tunnel condition!

It remains to be seen how the full responsibility rule will be applied by the Iowa Industrial Commissioner. Nonetheless, the *Auten* and *Nelson* decisions would justify an invitation to the Iowa legislature to consider the inequities inherent in the full responsibility rule and enact a logical method of apportionment. ❑

CASE NOTE SUMMARY *Continued from page 5*

Then the Court said:

"Courts have examined the relationship between the vehicle and the claimant, both as to geographical proximity and the orientation of the claimant's activities, to decide whether a particular claimant was 'occupying' the insured vehicle at the time of his or her injury. Physical contact is usually not required for coverage under the traditional definition. On the other hand when physical contact exists, Court's have invariably found coverage." (Citations omitted.)

Because of this, some insurers added a physical contact requirement to their definition of "occupying."

Under the policy language involved in the *Tropf* case, the Court said that the claimant must prove two things: That the claimant was "in, on, getting into or out of" the insured vehicle, and (2) that he or she was "in physical contact with the insured vehicle." That is, physical contact was mandatory for coverage under this policy language. Since Tropf was not in physical contact with his vehicle when he was injured, he did not quality as an insured under that vehicle's UM/UIM policy coverage.

This case is significant for two reasons. First, it appears that with the so-called standard definition of the word "occupying," the Court is going to follow the line of cases that broaden coverage and do not require physical contact with the insured vehicle as a prerequisite for finding coverage. Also, the case is significant in that it clearly allows insurers to draft language making physical contact a mandatory requirement for UM/UIM coverage. ❑

TWELVE YEARS UNDER COMPARATIVE FAULT ACT

Continued from page 6

the center of the litigation in *Fell v. Kewanee Farm Equipment Co.*, 457 N.W.2d 911, 920 (Iowa 1990). Under § 668.12, if a manufacturer produces a product which is state of the art, but later learns that specific defects create unreasonable danger to the owner/operator, the manufacturer has a duty to warn the owner/operator of the defect. Failure to provide this notice undermines a § 668.12 defense. Failure to instruct a jury on this failure to warn theory constitutes prejudicial error. A company memo suggesting the need for a redesign of a shield's fastener and an inquiry by a customer to the company served as adequate evidence in the *Fell* case to remand the case back to a jury to resolve the question about the company's knowledge of the unreasonably dangerous condition of the product.

Sec. 94. - - Submission of Defense by Special Verdict Form.

Procedurally, the Court has said that, "We believe it is preferable, in the absence of compelling reason not to do so, that issues involving the state of the art defense under § 668.12 be submitted by way of special verdict." The court granted even more leniency to a product manufacturer by urging that a verdict be submitted in an "even if" format. Specifically, even if a jury concludes a plaintiff established a design defect, the jury must find for the defendant-manufacturer if the jury finds the design consistent with the state of the art. *Hillrichs v. Avco. Corp.*, 478 N.W.2d 70, 76 (Iowa 1991).

Sec. 95. - Interest on Judgments.

Iowa Code Section 668.13 provides:

Section 668.13 - Interest on Judgments

Interest shall be allowed on all money due on judgments and decrees on actions brought pursuant to this chapter, subject to the following:

1. Interest, except interest awarded on future damages, shall accrue from the date of the commencement of the action.
2. If the interest rate is fixed by a contract on which the judgment or decree is rendered, the interest allowed shall be at the rate expressed in the contract, not exceeding the maximum rate permitted under section 535.2.
3. Interest shall be calculated as of the date of judgment at a rate equal to the coupon issue yield equivalent, as determined by the United States Secretary of the Treasury, of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The state court administrator shall distribute notice monthly of that rate and any changes to that rate to all district courts. ❑

Welcome New Members

Elected December, 1996:

Matthew B. Moore
Grinnell, Iowa

Edward G. Parker
West Des Moines, Iowa

Douglas M. Henry
Dubuque, Iowa

LeRoy C. Clabaugh
West Des Moines, Iowa

Elected February, 1997:

Steven E. Ort
New London, Iowa

R. Christopher Lampe
West Des Moines, Iowa

Michael J. Meloy
Davenport, Iowa

Janice M. Herfkens
Des Moines, Iowa

Coreen K. Bezdicek
Des Moines, Iowa

Bryan J. Arneson
Sioux City, Iowa

Elected April, 1997:

Stephen W. Spencer
Des Moines, Iowa

Matthew D. Allison
Algona, Iowa

E. J. Giovannetti
Des Moines, Iowa

Ken A. Winjum
West Des Moines, Iowa

Frederick T. Harris
Omaha, Nebraska

PRESSRELEASE

The Defense Research Institute, Inc. • Suite 500, 750 Lake Shore Drive • Chicago, Illinois 60611

For Immediate Release

Date: March 7, 1997
Contact: DRI Education Department
Phone: (312) 944-0575

1997 Annual DRI Young Lawyers Seminar

The Defense Research Institute will present its 1997 Annual DRI Young Lawyers Seminar on June 12-13, 1997 in Orlando Florida.

This year's theme is **"Advanced Litigation Strategies for the Younger Lawyer."**

Specific topics include:

- Jury Selection Strategies
- Practical Tips for Insurance Defense Attorneys: Courtroom and Boardroom
- Advanced Evidentiary Tips
- Reconstruction Evidence: Use and Prevention Strategies
- Panel Discussion on Malpractice Avoidance for Young Lawyers
- Integrating Alternative Dispute Resolution Into Your Overall Case Management Strategy
- Discovery in the 21st Century
- Effective Handling of the Economic Expert
- Defending Orthopedic Claims:Strategies from the Surgeon and the Attorney

A dynamic group of speakers will address current issues in these areas as they concern today's younger lawyer. Comprehensive written materials will be provided for later reference.

Insurance defense lawyers, as well as corporate and in-house counsel, from around the country routinely attend this annual seminar. All lawyers in attendance will have been in practice ten years or less.

DRI has secured reduced rates at the luxurious Buena Vista Palace Resort and Spa at Walt Disney World Village.

New DRI members admitted to practice five years or less automatically receive one certificate for full tuition at any DRI seminar. Use the certificate in Orlando. Also, everyone attending the 1997 Young Lawyers Seminar will receive a coupon for $100 off any DRI Seminar, which can be used by any attorney in the young lawyer's firm.

For more information, call the DRI Education Department at (312) 944-0575

FROM THE EDITORS

The hot button issue among trial lawyers this year is tort reform. The various bar groups in the state all employ lobbyists with the hope that they will educate legislators on various issues, keep their associations informed, and perhaps influence some legislation. Several of the bar groups have legislative agendas. Historically, the plaintiff's group (Iowa Trial Lawyers Association) and the Iowa Defense Counsel have basically neutralized one another, and there has not been much legislation passed. However, a concern is being expressed that this year the Iowa Defense Counsel may actually get some "defense oriented" legislation enacted.

As this editorial is going to print, House File 693 is being considered. This piece of legislation addresses the following topic

(1) interest on judgments;
(2) product liability;
(3) release of medical records;
(4) reduction of judgments to present value;
(5) recovery of consortium where the injured party/decedent was more than 50% at fault (*Schwennen v. Abell*); and
(6) joint and several liability.

Five of these six topics were addressed in legislative proposals by the Iowa Defense Counsel. The proposal on product liability was not generated by the Defense Counsel. The sixth proposal by the Defense Counsel (psychological testing material) is not in the House File.

Of the five proposals of the Defense Counsel that survived the funnel, four of the five have been changed, and it is possible that they may not be supported by the Defense Counsel in their present form. Only the proposal with reference to recovery of consortium where the injured party/decedent was more than 50% at fault appears to have retained the language proposed by the Iowa Defense Counsel.

Some have suggested that the Iowa Defense Counsel should abandon its legislative agenda because the adoption of these proposals would be bad for lawyers or bad for the legal system. We disagree. We believe that the Defense Counsel has taken a moderate approach and one that generally makes common sense. For example, it does not make sense that we should have two separate interest rates on judgments, one that floats based upon market conditions and one that does not. It does not make sense that the family of an injured person should recover 100% consortium damages, if the injured party was himself 99% at fault. Each of the legislative proposals of the Defense Counsel have been thoroughly thought out and discussed by the Board of Governors of this organization. These proposals are nothing new or radical. They have been backed by the Defense Counsel for a number of years.

On the other hand, the Defense Counsel has refused to support the idea of caps on damages. It has also refused to support unfair and unduly restrictive limits on expert testimony. These proposals have failed to come out of committee and will not be voted on this year.

Some have suggested that the tort system should be left to the exclusive domain of the Supreme Court. However, the Iowa Code contains numerous substantive and procedural provisions which impact directly on the tort system. If those laws can be improved and the system made more fair, then some change is definitely positive. It should also be noted that unlike our good friends in the plaintiff's bar, the Iowa Defense Counsel does not contribute significant sums of money to political campaigns with the hope of influencing legislation.

It is believed that the Iowa Defense Counsel takes a moderate and common sense approach to legislation and tort reform. It does appear that some of its efforts in the past may be bearing fruit this year.

Michael W. Ellwanger
Suite 300, Toy Building
Sioux City, Iowa 51101