defense UPDATE

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SOME SUGGESTED CHANGES IN IOWA LAW THAT COULD BENEFIT DEFENDANTS IN PRODUCT LIABILITY CASES

By: Kevin M. Reynolds, Des Moines, Iowa

Iowa product liability law is relatively well developed. Strict liability in tort, for example, was adopted more than a quarter century ago in 1970. Yet, Iowa law continues to evolve. Just because it is so well entrenched in many aspects, is not to say that the law could not be "fine tuned" in order to bring it more in line with established precedent. In many cases, changes in the law would directly inure to the benefit of defendants in products cases.

The purpose of this article is to discuss some of the "hot button" issues of Iowa product liability law, and to consider ways in which the law might be further developed by counsel defending a specific case.

1. THE LABELS OF "STRICT LIABILITY," "NEGLIGENCE," AND "WARRANTY" SHOULD BE DISCARDED, IN FAVOR OF MANUFACTURING DEFECT, DESIGN DEFECT, AND FAILURE TO WARN OR INSTRUCT.

The Iowa Supreme Court "abandoned" the Restatement of Torts, Second, Section 402A and the concept of "strict liability in tort" in *Wright v. Brooke Group, Inc.*, 652 N.W.2d 159, 169 (Iowa 2002). In its place, the Court adopted Section 2 of the Restatement Third of Torts, Products Liability (1997). *Id.* Section 2 of the Restatement Third organizes a product liability claim around three possible allegations: manufacturing defect or flaw (Section 2(a)); design defect (Section 2(b)); and failure to warn or instruct (Section 2(c)). After *Wright*, there is no reason why the old labels of "strict liability in tort," "negligence," and "warranty" should be used in the product liability setting. The *Wright* Court agreed with this when it stated:

We are convinced such a distinction [between strict liability and negligence in a design defect case] is illusory, just as we found no real difference between strict liability and negligence principles in failure to warn cases. . . Because the Products Restatement is consistent with our conclusion, we think it sets forth an intellectually sound set of legal principles for product defect cases. 652 N.W.2d at 167.

To continue to use these antiquated labels does nothing except to confuse trial court judges and litigants. The Iowa Uniform Civil Jury Instructions were revised appropriately last year in light of the *Wright* Court's adoption of the Third Restatement Section 2. *See* IUCJI 1000.1 (Manufacturing Defect); 1000.2 (Design Defect); 1000.3 (Inadequate Instructions or Warnings); and 1000.4 (Reasonable Alternative Design Requirement).

It should be recognized that a strong impediment to this proposed change is the extent to which the terms strict liability in tort, negligence and warranty permeate Iowa product liability precedent and statutory enactments prior to *Wright*. For example, the Iowa Comparative Fault Act refers to "strict tort liability" in Section 668.1(1), which defines what constitutes "fault." Iowa Code Section 613.18, the so-called "retailer immunity" statute, speaks in terms of "strict liability in tort or breach of implied warranty of merchantability." The Iowa statute of repose for products, Section 614.1(2A), refers to "strict liability in tort," "negligence," and "breach of an implied warranty." Iowa Rule of Evidence 5.407, regarding subsequent remedial measures, carves out an exception for cases based

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MESSAGE FROM THE PRESIDENT

Richard G. Santi

Dear Colleagues:

It is with sadness that I write my fourth and final letter to you as President of the IDCA. I have just learned of the unexpected and sudden death of Nan Ellwanger, the wife of Mike Ellwanger of Sioux City (President IDCA 2001-2002). For all those who knew Nan and know Mike and his family, words cannot express the sorrow which accompanies news of Nan's passing. Please keep Mike and his family in your thoughts and prayers as they cope with life's continuing challenges and rewards absent the loving presence of their beloved wife and mother.

Since this is my last President's letter, I want to share with you some of the recent happenings of interest to the IDCA. First, with the Iowa Supreme Court's decision invalidating the item veto power exercised by Governor Vilsack, it is still uncertain whether the legislature and the Governor will reach a compromise which will result in some modest tort reform. As to the extent of any actual tort reform, and how it may impact the defense bar and our clients, we will have to wait to see the details.

Second, at the summer Board meeting held on July 23 at the beautiful Tournament Club of Iowa facility in Polk City, we were honored to have Chief Justice Lavorato and Justice Cady join us for a round robin discussion concerning the problems facing the Iowa judiciary and what we as Iowa lawyers and members of the IDCA can do to help solve or alleviate some of the problems. In short, the Iowa judicial system is in a crises due to chronic and persistent underfunding by the legislature. This has adversely affected the morale of the trial judges and court staff, including the clerks of court. This underfunding threatens, and, unless remedied soon, will seriously impair the quality of our Iowa judicial system. The courthouse doors are now being closed one day a month under the most recent austerity program the Supreme Court has been forced to adopt due to this underfunding. Without financial relief, the problems are only going to get worse and permanent damage will be done. There should be no greater priority of the IDCA than ensuring the continuing excellence of the Iowa judicial system. We cannot afford to sit by and hope for the best since inaction is truly a recipe for disaster. What can you do? Contact your state legislators in writing and by a personal visit or phone call. Let him or her know of the concerns and your support for substantially increasing funding for the state judicial system. Also, talk to your clients, explain the situation, and ask them to contact their state legislators requesting increased funding for the Iowa court system. Lastly, but no less important, talk to your friends and relatives and explain to them the importance of a quality court system to every Iowan and the adverse ramifications which will result if appropriate funding is not restored. There is no doubt in my mind that if you, your clients, your friends and relatives contact their state senator and representative and express genuine support for increased funding of the judicial branch, such funding will occur.

As to the status of the project to revise the state rules governing *pro hac vice* admissions, the IDCA is consulting with representatives of the ISBA, ITLA, IATL and ABOTA in an effort to reach a consensus. I remain optimistic that we will eventually be successful in this endeavor and win the support of the district judges and the Supreme Court.

Next, I want to extend congratulations on behalf of the IDCA to Greg Lederer of Cedar Rapids who has been

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LOOKING THROUGH THE LENS OF THE JURY: JURY INSTRUCTION REFORM

By: Brian R. Wilson, Canton, Ohio

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The famous observer of America, Alexis de Tocqueville, wrote:

> The jury … may be regarded as a gratuitous public school, ever open, in which every juror learns his rights … and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties … I look upon the [jury] as one of the most efficacious means for the education of the people which society can employ.[1]

De Tocqueville never had to decipher pages of jury instructions on a Friday afternoon at the end of a week-long jury trial.

Jury instructions can be likened to a product assembly manual. They are the guide by which a jury constructs all the pieces (the evidence) in an attempt to assemble a just and fair decision. No doubt we have all experienced the frustrating process of assembling a product based on "easy instructions," only to be perplexed and frustrated by nonsensical instructions and leftover parts.

Similarly, the cardinal importance of jury instructions to a jury's decision-making process cannot be denied. We all have witnessed the frequent questions jurors ask about particular words or phrases contained in the instructions and their meanings. More often than not, a jury will read and reread the instructions when given a copy to take back to the jury room. Indeed, jury instructions are so fundamental to Ohio civil jurisprudence that jurors are deemed to have understood and followed the instructions given to them.[2]

The unfortunate reality, however, is that the judicial "presumption of understanding" accorded to jury instructions is often little more than legal fiction.

Over the last two decades, the perceived competence of civil juries has been scrutinized, criticized and even attacked. Criticism of juror intellectual capacity has led to a number of proposed reforms aimed at eliminating juries altogether, to replacing them with blue ribbon panels or special masters. Attacks on juries' collective integrity and the quality of their verdicts have also spawned clarion calls for reform. Legal reform issues aside, there is ample social science data that confusing or incomprehensible jury instructions impede juror decision-making.[3]

Ironically, perhaps what has gained more favor than replacing juries is helping them comprehend the legal rules that are supposed to govern their verdicts. Many states have been at the forefront of infusing their standard civil instructions with the much-needed oxygen of plain language. For instance, in 1995, Arizona enacted broad-based "jury reform," which included a plain English overhaul of civil jury instructions.[4] In fact, Arizona's Civil Jury Instruction Committee includes a linguistics professor to advise the committee on easy-to-use versions of standard instructions.

But perhaps no state has been a bigger trailblazer in creating juror-friendly instructions than Iowa. In 1986, the Special Committee on Uniform Court Instructions of the Iowa State Bar Association completed a plain-English redraft of the Iowa Civil Jury Instructions. The Iowa Supreme Court, on reviewing the redraft, aptly noted:

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1 *Democracy in America* 295-296.

2 *Pang v. Minch*, 53 Ohio St.3d 186(1990).

3 Strawn and Buchanan, "Jury Confusion: A Threat To Justice," 59 Judicature 478 (1976); R. Hastoe, S. Penrod, and N. Pennington, "Inside the Jury" (1983); Walter W. Steele Jr. and Elizabeth G. Thornburg, "Jury Instructions": A Persistent Failure to Communicate," 67 North Carolina L. Rev. 77 (1988); Elizabeth Chilton and Patricia Henley, "Jury Instructions": Helping Jurors Understand the Evidence and the Law, Public Law Research Institute (1996).
The authors noted research studies from Florida, California and Michigan involving mock juries that were presented with both ordinary "pattern instructions" and rewritten, plain-English instructions. According to the authors, juror comprehension dramatically increased with the rewritten instructions.

4 In 1996, California established a task force on jury reform that included a committee of lawyers, judges, linguistics professors and lay people to draft jury instructions that were understandable to jurors. *See* P. Tiersma, "The Rocky Road to Legal Reform: Improving the Language of Jury Instructions" (February 2001).

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on "strict liability in tort or breach of warranty." Technically speaking, after *Wright*, each of these references is outdated, is no longer useful and confuses the issues. Instead, a product case after *Wright* is either based on: 1) manufacturing defect; 2) design defect; or 3) failure to warn or instruct. Using these terms, that factually describe the type of claims being made, would greatly simplify Iowa product liability law. It would also make it clear that for each type of defect, a plaintiff has only one, and not multiple, claims. Iowa statutes should be amended to substitute the new terminology adopted in *Wright*, and meanwhile, the existing statutory language should be judicially construed as applying the same protections for defendants under the Restatement Third terminology as was provided for strict liability claims – the clear intent of the Legislature. As set forth in part 6 below, Iowa Rule 5.407 should be amended to conform to Federal Rule of Evidence 407 by deleting the strict liability exception for the inadmissibility of subsequent remedial measures.

2. THE IOWA COMPARATIVE FAULT STATUTE SHOULD BE CHANGED TO INSURE THAT EACH PARTY ONLY PAYS "ITS FAIR SHARE."

The Iowa Comparative Fault Statute, Chapter 668 of the Iowa Code, is a creature of the Iowa Legislature and dates to 1986. At least two aspects of that law should be changed, however, to bring a more common-sense approach to the liability scheme and make the statute more fair to product defendants.

A. The jury should not be told about the effect of their fault apportionment.

Under Iowa Code Section 668.3(5), in a comparative fault case tried to a jury, the court is bound to instruct the jury "and permit evidence and argument" with respect to the effects of the percentages so determined. As a practical matter, this means that the lay-person jury is told that if they find plaintiff more than fifty percent at fault, that plaintiff will not recover. The problem with telling the jury this is that it tends to unfairly "skew" the jury's fault finding in favor of plaintiffs and against defendants. This greatly waters down the "more than fifty percent and you are barred" rule in Iowa. It is respectfully submitted that if the jury were not told of the effect of their fault allocation, there would be many more cases where plaintiffs were found to be more than fifty percent at fault, and this would ultimately result in a defense judgment.

I feel this aspect of Iowa law should be changed, but since it is a part of the statute, it will have to be changed by the Legislature. Further, the plaintiff's attorney should not be allowed to argue the "effect" of their answers to the verdict interrogatories. The jury should simply be instructed, as the fact finder, to determine the percentage of fault assigned to each party. Once those answers are given, it should be up to the trial court to determine the appropriate judgment that is entered in the case, based on applicable law. If the jury determines that a plaintiff's fault is more than fifty percent, then the judge would enter a defense judgment. For findings of 50% or less, fault by Plaintiffs, the judge would reduce the judgment by like amount. In this manner, the jury's fault findings will not be improperly "poisoned" by the jury knowing the legal effect of their answers, and the trial court would fulfill its role by applying the law to the facts found by the jury.

B. Fault should be allocated to bankrupt parties.

In *Pepper v. Star Equipment Ltd.*, 484 N.W.2d 156, 158 (Iowa 1992) the Iowa Supreme Court held that fault cannot be allocated to a bankrupt party. This ruling was reaffirmed in *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994), when the Court held that the Manville asbestos trust was not a "party" for purposes of fault allocation. The effect of this court-imposed rule is to take the fault of bankrupt parties and to place it squarely onto the shoulders of less-culpable (or even non-culpable) defendants. The Court's majority in Pepper euphemistically called this "fault siphoning" when viewed from the plaintiff's standpoint. *Id.* However, from a solvent defendant's point of view, this is patently unfair. Justice Snell's well-reasoned dissent in *Pepper* makes sense. This court-imposed rule puts fault squarely on parties that did nothing wrong (other than to be unlucky enough to be sued in a case

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where one of their co-defendants was in bankruptcy). *Pepper* exalts the importance of the "collectibility" of damages over the apportionment of fault. *Id.* at 159. This result makes no sense given the overarching premise behind a comparative fault system: that each party should bear only its own fault, and not that of any other party.

Alternatively, if a defendant files for bankruptcy, the jury should be entitled to assess fault against that party, as if they were an absent or "prior-settled tortfeasor." *See* Iowa Code Section 668.2, 668.3(1) (2003). Further, I feel this harsh rule makes no sense in light of Iowa Code Section 613.18, (2003), the "retailer immunity" statute. This statute provides that a retail seller of a product may be held strictly liable in tort for a product defect, *if the manufacturer has been declared insolvent*. Actually, if an "insolvent" manufacturer has insurance to pay plaintiff's claim, there is no reason to invoke Section 613.18, although the statute provides for no such exception. In many products cases, both the retail seller and the manufacturer are joined as defendants. (This is done many times by plaintiff's counsel to "destroy" diversity and federal court jurisdiction). As noted, in many cases even a bankrupt manufacturer has an insurance policy against which the plaintiff can proceed. Where this is the case, there is a mechanism in the bankruptcy court whereby a party can ask that the bankruptcy "stay" be lifted, and plaintiff be allowed to proceed in litigation, to this extent. Section 613.18 can be also applied notwithstanding the jury's allocation of fault as against a bankrupt manufacturer. Although the retailer would technically have a contribution "action over" and against the manufacturer, based on its vicarious liability for the loss, to the extent it pays more than its "fair share" of allocated fault, that claim may be worthless if the manufacturer is without assets. But, in most cases, a retailer will have insurance against this liability, and this will be helpful to the small-business retailer in such a situation.

3. SECTION 668.14, THE STATUTORY ABROGATION OF THE COLLATERAL SOURCE RULE, SHOULD APPLY TO PERMIT EVIDENCE OF WORKER'S COMPENSATION PAYMENTS TO PLAINTIFF.

Iowa's common-law collateral source rule was abrogated by statute, Iowa Code Section 668.14, in comparative fault cases seeking damages for personal injury. The effect of this legislative mandate, however, was greatly curtailed by judicial fiat in *Schonberger v. Roberts*, 456 N.W.2d 201 (Iowa 1990). In *Schonberger*, the Court held that this statute, despite its language to the contrary, did not apply to worker's compensation payments. *Id.* at 203. I believe that the Iowa Legislature had welfare benefits or programs in mind when it allowed an exception for benefits paid pursuant to "a state or federal program." Worker's compensation insurance, provided to a private employer by a private insurance company, is no more a "state or federal program" than the Iowa Comparative Fault Act with regard to a tort case for personal injury.

Logically, *Schonberger*, a sharply divided 6-3 decision, cannot be supported by the language of the statute. The majority was concerned with a "double reduction" for the plaintiff. *Id.* at 202. In reality, if worker's compensation payments were deemed admissible, no such double deduction in fact, exists. This is because under the statute as written, the jury is also told that if there is a lien or subrogation interest for benefits paid, and if there is a recovery, that plaintiff can inform the jury that he or she has to pay that money back out of any proceeds obtained by judgment. I feel that the majority's concerns in Schonberger were false ones, and would have been answered by closer adherence to the statute. One can't help but recall the old law-school adage, that when interpreting a statute, the first rule is "read on." This point was well-made by the Chief Justice McGivern's dissent in *Schonberger*. *Id.* at 205-06. At any rate, I feel the majority decision itself constitutes an unconstitutional violation of the separation of powers doctrine.

The practical, strategic question after *Schonberger* is: will product liability defendants be "better off" if the jury is told of the worker's compensation payments, lien, and right to be paid back out of any judgment, or will they be *worse off?* A strong argument can be made that defendants might actually be *worse*

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off, and the jury might just "increase" plaintiffs' tort recovery by the amount of the worker's compensation benefits, knowing that these funds will not reach the plaintiff's "pockets."

4. "STATE-OF-THE-ART' SHOULD BE A DEFENSE TO A FAILURE TO WARN CLAIM, AS MANDATED BY THE EXPLICIT LANGUAGE OF SECTION 668.12.

Iowa's state-of-the-art defense in a products case is governed by statute. *See* Iowa Code §668.12. However, this statute was substantially (and unnecessarily, in the author's view) watered down by *Olson v. Prosoco, Inc.*, 522 N.W.2d 284 (Iowa 1994). *Olson* correctly held that "failure to warn" claims were exclusively governed by a negligence standard, and from that point forward no failure to warn based on strict liability in tort would be permitted. *Id.* at 289. Yet, in my judgement the Court erred when it unnecessarily found that "state-of-the-art" would not be a legal defense to an action based on failure to warn. *Id.* at 291. I feel the Court confused the "state-of-the-art" concept with industry custom and practice, a separate issue in a products case. Other cases have cleared up the confusion on these two concepts. *See, e.g., Hillrichs v. Avco Corp.*, 514 N.W.2d 94 (Iowa 1994)(state of the art is not the same as industry custom and practice).

In my opinion, the Court's holding in *Olson* cannot be squared with the express terms of the statute. I feel Section 668.12 *explicitly* applies as a defense to failure to warn and/or labeling claims. In my opinion, the Court's reasons for carving out this exception are not persuasive. Although a plaintiff might contend that a product's warnings are "unreasonable" or negligent, the manufacturer-defendant might well choose to defend by urging that its warnings were "state-of- the-art" as of the time they were created, and cannot be the basis of liability. This is what the Legislature intended when it included the terms "warning, or labeling of a product" expressly in the statute. Once again, to the extent the Court's holding in *Olson* removes these words from the statute, it is respectfully submitted that this holding is an unconstitutional violation of the separation of powers doctrine.

5. "BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY" SHOULD NOT BE ALLOWED TO "PIGGY-BACK" ONTO A DESIGN DEFECT CLAIM; THERE IS ONLY ONE DESIGN DEFECT CLAIM, AND THAT IS GOVERNED BY SECTION 2(B) OF THE RESTATEMENT THIRD.

Over thirty years ago, in *Hawkeye-Security Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672 (Iowa 1970), the Court correctly recognized that breach of implied warranty claims were duplicative of strict liability. The Court therein noted that unless there were undefined "unusual circumstances," both claims should not be submitted in the same case. *Id.* at 684-85. This is the correct view. More recently, however, the Court has actually retreated from this enlightened position, muddied the waters unnecessarily, and held that instructing on both claims in a design defect case was "not error." *Mercer v. Pittway*, 616 N.W.2d 602, 621 (Iowa 2000). *Mercer* was decided before the Court's adoption of the Restatement Third in *Wright*, however, and a strong argument can be made that this aspect of *Mercer* is no longer good law.

The practical problem with instructing on both claims is that an inconsistent jury verdict may result, necessitating a complete retrial of the case. Some savvy trial judges have tried to avoid this problem by setting the order of the jury verdict interrogatories, so that they ask about the warranty claim first, and the defect claim second. In other cases, the implied warranty claim can be avoided altogether by applying what is, in essence, a five-year "statute of repose" set forth in the Iowa Uniform Commercial Code, Section 554.2725 (2003), which states that the cause of action "accrues" at time of tender of delivery, *i.e.*, sale of the product. But this may not cure the problem. It is wise defense strategy to argue the potential for an inconsistent verdict to any court leaning toward instructing on both claims. Plaintiffs will sometimes stand down when this is done, fearing an issue on appeal or reversible error. What should be done if the jury finds there is no "defect" under strict liability, but finds a "breach" of the implied warranty of

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merchantability? Isn't it true that strict liability was designed to ameliorate the "harsh effects" of warranty claims (*e.g.*, privity rules)? How can there be a "breach" of warranty absent a "defect" in the product? Why is implied warranty even needed, if strict liability is submitted?

The Court should clear up this area of the law, and find that with regard to a design defect claim, there is only one claim, and that breach of implied warranty of merchantability should be relegated to contract, and not tort, claims. This approach is consistent with the Court's adoption of the Restatement (Third) of Torts, Products Liability, §2(b) as discussed in *Wright v. Brooke Group*, 652 N.W.2d 159, 181-82 (Iowa 2002).

6. "SUBSEQUENT REMEDIAL MEASURES" SHOULD NOT BE ADMISSIBLE IN A PRODUCTS CASE.

Iowa Rule of Evidence 5.407 (formerly Rule 407) governs the admissibility of "subsequent remedial measures." Iowa's rule, adopted in 1983, was based on the federal rule then in existence. The Iowa rule, however, contains an important "special rule" for product liability cases, as follows:

> This rule does not require the exclusion of evidence of subsequent remedial measures when offered in connection with a claim based on strict liability in tort or breach of warranty. . .

When adopted, this "products liability" exception was based on a distinct minority rule in federal circuit courts at the time, one of which was the Eighth Circuit. *See, e.g., Robbins v. Farmers Union Grain Terminal Association*, 522 F.2d 788 (8th Cir. 1977). This rule was based on a feeling, since disproven and discarded, that a manufacturer would have no disincentive toward changing a product's design if subsequent remedial measures were allowed to be introduced into product liability suits, which were typically based on strict liability in tort.

This minority federal view was eviscerated in 1997 when Federal Rule of Evidence 407 was amended to read in pertinent part as follows:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.
> (Emphasis added)

Iowa Rule of Evidence 5.407 should be amended to be consistent with the current federal rule and established practice. This would have the effect of applying the proscription against subsequent remedial measures to product liability cases. *See, e.g.*, "Amended Rule 407: the Good, the Bad, and the Ugly," Kevin M. Reynolds and Lori E. Iwan, For the Defense, October 1998.

Further, there is no reason why a subsequent remedial measure admissible under Iowa Rule 5.407 could not be found to be inadmissible when applying Iowa Rule of Evidence 5.403. In *McIntosh v. Best Western Steeplegate Inn*, 546 N.W.2d 595, 597-98 (Iowa 1996), which was not a products case but rather a slip and fall incident, the Court held that the application of ice melt to a sidewalk would be admissible in even a negligence case, to prove a prior defective "icy" condition, notwithstanding Rule 407's proscriptions against using such evidence in negligence cases. As if that were not troubling enough, McIntosh also held that Rule 403 is not applicable at all when Rule 407 is applied. *Id.* at 598. This result makes no sense. First, it is respectfully submitted that the Court's *McIntosh* analysis under Rule 407 was incorrect. Even so, this error was magnified when the Court went on to rule that Rule 403 could not used to deny the admissibility of a remedial measure found to be admissible under Rule 407. The rules of evidence are separate and distinct; even if a remedial measure is found to be admissible under application of rule 407, there is no reason why Rule 403 could not be applied to render that same evidence inadmissible under that Rule's separate standards. This is no different than finding that certain evidence is relevant and admissible, at the threshold, under Rules 401 and 402, yet is ultimately inadmissible under Rule 403, or under the hearsay rule.

In addition, this language no longer makes any sense when the holding of *Wright* is considered, which adopted Section 2(b) of the Restatement Third for design defect cases. 652 N.W.2d at 169.

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In any event, where appropriate, defense counsel should try to quesion this area of the law in any products case involving subsequent remedial measures.

7. "DAUBERT" SHOULD BE ADOPTED AS THE CONTROLLING RULE IN IOWA REGARDING THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE UNDER RULE 702.

Iowa's *Daubert* law is vague at best and somewhat in a state of flux. The Court's "iron grip" on the antiquated *Frye* rule cannot really be justified in this technological age of sophisticated products and complicated mechanism-of-injury issues which are present in most product cases. There is no good reason why it has to be that way. *Daubert* has been an integral part of federal jurisprudence for more than ten (10) years. In *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525 (Iowa 1999), the Iowa Supreme Court held that it was not adopting *Daubert*, yet the Court noted that *Daubert's* analysis and factors might be "helpful" in a particular, "complex" case. *Id.* at 533. Rather than fight the majority of courts that have adopted *Daubert* as the law on admissibility of expert witness testimony under Rule 702, the Iowa Court should embrace and adopt it. I invite litigants to use the *Daubert* analytical framework persuasively as a "helpful" guide in Iowa courts.

When *Leaf* is closely scrutinized, the Court's reasons for refusing to adopt *Daubert* are wanting. In my opinion, the Court refuses to adopt *Daubert* because "we are committed to a liberal view on the admissibility of expert testimony." 590 N.W.2d at 531. But this is nothing more than a tautology. While this conclusory statement may be an accurate description of how the Iowa Court approaches expert witness admissibility issues, this vague, essentially standardless "standard" gives litigants and trial judges virtually no guidance. This iteration of the rule is troublesome, in that it sounds too much as if the Iowa Court is ready, willing and able to fully embrace "junk science" to undergird expert witness opinion. The Court seems to me, to be saying, that if an expert's opinion is "bad" enough, then the jury can simply ferret that out with the assistance of good cross-examination by counsel. But this does nothing to lower the costs of litigation, promote early resolution of cases, and increase the efficiencies of the judicial system.

The *Leaf* Court also held that *Daubert*-type standards would apply only to "scientific" opinion evidence, and not "garden variety" expert witness opinion, such as mechanical engineering testimony, for example. 590 N.W.2d at 531. That narrow reading of Rule 702 was debunked, however, a few short months later by the United States Supreme Court in *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). *Kumho Tire* is a further indication that the Iowa Supreme Court's analysis of this issue is outside of the mainstream of established *Daubert* precedent.

Finally, Iowa Rule of Evidence 5.702 should be amended to conform with amended Federal Rule of Evidence 702. This amendment would strengthen the rules regarding expert opinion evidence, which can be so persuasive to a lay person jury, and serve as an additional impediment to "junk science" being put forth in Iowa courtrooms. Our state's court system, its judges and attorneys, and its citizens, demand and (indeed) are entitled to something better than what we presently have. The Iowa rule was initially based, word-for-word, on the federal rule, and there is no justification today for a different rule in Iowa state court, as opposed to federal courts sitting in Iowa. In fact, this rather stark difference in interpretation of Rule 702 is a primary reason why many product defendants seek removal of any case to federal court, if diversity of citizenship or another basis for federal court jurisdiction exists.

8. FAILURE TO WEAR A HELMET SHOULD BE ADMISSIBLE AS EVIDENCE OF NEGLIGENCE.

Under current Iowa law, if a motorcycle rider sustains a serious head injury in an accident, a product liability defendant may not argue that the failure to wear head protection was "negligence" chargeable to plaintiff. *Meyer v. City of Des Moines*, 475 N.W.2d 18, 190-91 (Iowa 1991). Any economist worth his or her "salt" would tell you that this unfortunate rule has the effect of providing a disincentive for motorcycle riders (or riders of mopeds, ATVs, bicycles, snowmobiles, roller skaters, skateboarders and the like) to

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wear helmets. *See, e.g.,* "The Armchair Economist: Econmics and Everday Experience," Stephen A. Landsburg (19__). It also shifts the consequences of a rather bad personal choice to the product defendant, who has no control over a particular plaintiff's decision to wear or not wear a helmet. In today's litigation climate, this situation needs to be rectified.

Meyer was decided over 20 years ago at a time when few, if any, motorcycle riders (or in that particular case, a moped operator) wore helmets. The "custom and practice" with regard to wearing helmets has changed, and more and more people have opted to wear them. Media publications and ads typically show riders wearing helmets. Although Iowa presently has no mandatory helmet law or statute, there is no inconsistency between the lack of a helmet law and allowing a jury to find, under the facts and circumstances, that a particular plaintiff, in a particular accident resulting in a particular injury, was negligent for failing to wear a helmet. There is no statute in Iowa mandating that the failure to use a helmet is *inadmissible* in the trial of a civil case. *See, e.g., Verburg v. Roadside Marine, Inc.*, Docket No. 464-00, Chittenden Superior Court (Vermont 2002)(defendant should not be prevented from urging that failure to wear a helmet is negligence based on Vermont's seat belt statute which disallows evidence of failure to wear a seatbelt). In many of these cases, a plaintiff's primary injury is a head injury that might have been reduced or altogether avoided by a helmet. Serious head injuries are often disabling and many times fatal. In such cases, it should be up to the jury to decide whether plaintiff could have reduced or eliminated his or her injury by wearing a helmet.

9. FAILURE TO USE A CHILD-SAFETY SEAT SHOULD BE ADMISSIBLE AS PROOF OF "NEGLIGENCE."

Iowa Code Section 321.446 is the child-restraint statute. Section 6 of that statute provides:

Failure to use a child restraint system, safety belts, or safety harnesses as required by this section does not constitute negligence nor is the failure admissible as evidence in a civil action.

This is statutory and would likely pass a constitutional challenge under the deferential "rational basis" test. However, this law should be amended by the Iowa Legislature to reflect the present-day reality regarding the public's acceptance and widespread use of child safety seats. The safety of our children should be a high priority. *See, e.g.*, Note, Liability for Nonuse of Child Restraints, 70 Iowa L. Rev. 945 (1985).

Further, in Iowa a parent can be cited for failing to properly restrain a child in a motor vehicle. This provides a clear lynchpin for arguing that in a civil case, the failure to restrain a child should constitute negligence per se. This statute, no doubt a testament to the successful lobbying efforts on the part of the plaintiff's personal injury bar, has the perverse effect of rewarding grossly negligent and reckless parents for not properly securing their children into car seats or seat belts in a motor vehicle. An extreme example might be a parent who allows his kids to ride in the open bed of a pick up. If there was even a minor "fender bender" type accident, the children could be ejected and severely injured. Serious and debilitating brain injuries might be ultimately determined to be the responsibility of the other driver (or the vehicle manufacturer) involved in an otherwise minor accident. Although this result is neither within the control nor reasonably foreseeable from the standpoint of the other driver, or of the vehicle seller, it is both from the negligent parent's point of view: this would clearly be a foreseeable and readily avoidable consequence of the parent's actions. Nevertheless, in the trial of a civil claim for injuries to the children, a defendant could not argue that the parent was "negligent" for allowing the kids to ride in the back of the pickup, exposing them to this sort of obvious consequence. As a result, a fundamental unfairness would be visited upon the court and the defendant. If most Iowa citizens understood this was how our civil tort system operated, they would revolt. Chapter 668, the Iowa Comparative Fault Act, was adopted with the intent of doing away with this type of unfairness. With this statutory proscription removed, even if some small percentage of fault were placed on the parent, this would not bar their recovery unless it was more than fifty percent of the total fault assessed in the

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SOME SUGGESTED CHANGES IN IOWA LAW THAT COULD BENEFIT DEFENDANTS IN PRODUCT LIABILITY CASES . . . *continued from page 9*

occurrence. In addition, the Court should make it clear that a parent's fault in violating the statute would not, in any event, be assessed against the innocent child victim, reducing his or her recovery.

10. FAILURE TO WEAR A SEAT BELT SHOULD BE ADMISSIBLE AS "FAULT" IN AN APPROPRIATE CASE, AND SHOULD NOT BE LIMITED TO REDUCING A PLAINTIFF'S DAMAGES ONLY 5%.

Iowa Code Section 321.445 is the Iowa seat belt statute. That law contains the following provision:

> In a cause of action arising on or after July 1, 1986, brought to recover damages arising out of the ownership or operation of a motor vehicle, the failure to wear a safety belt or safety harness in violation of this section shall not be considered evidence of comparative fault under section 668.3, subsection 1. However, except as provided in section 321.446, subsection 6, the failure to wear a safety belt or safety harness in violation of this section may be admitted to mitigate damages, but only under the following circumstances:
>
> (1) Parties seeking to introduce evidence of the failure to wear a safety belt or safety harness in violations of this section must first introduce substantial evidence that the failure to wear a safety belt or safety harness contributed to the injury or injuries claimed by the plaintiff.
>
> (2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery by an amount not to exceed five percent of the damages awarded after any reductions for comparative fault.

Limiting any reduction due to plaintiff's fault to no more than "five percent" makes this statute arbitrary and capricious, likely not capable of surviving a serious constitutional attack. Although the constitutionality of this statute was upheld several years ago in *Duntz v. Zeimet*, 478 N.W.2d 635, 637 (Iowa 1991), however, that case did not involve a crashworthiness case, or a crashworthiness case with an allegation of a defective restraint system. Under a rational basis test, some distinction is probably possible, is between those who use seat belts and those who do not. There is no real question that mandating a maximum reduction of five percent, no matter what the facts of the case are, is *arbitrary* and *capricious*. In my opinion, the practical effect on a motor vehicle manufacturer is to deny them the right to prove what caused plaintiff's injuries. The five percent limit is so ridiculously low as to make it economically infeasible for a motor vehicle manufacturer to even raise or argue the lack of a seat belt in defense. This provision is counterintuitive and undermines the Iowa seat belt law, which requires occupants to buckle up. Iowa's seat belt law is a primary statute, which means that a law enforcement officer can stop a citizen and write up a ticket based on the seat belt violation alone.

In recent years, published data regarding seat belt usage in Iowa reports use above eighty percent. There is nothing inherently wrong with allowing a jury to consider whether failure to use a seatbelt, in a particular case, constitutes negligence which is causally related to the injuries alleged. Allowing the jury to consider use or non-use of a seat belt, without any artificial limitations protecting negligent plaintiffs, is consistent with the Iowa Comparative Fault Act, where the jury apportions fault among the parties. It is also consistent with the normal rule that a tortfeasor's violation of a mandatory safety regulation constitutes negligence per se. As a result, the present iteration of this statute should be attacked vigorously in an appropriate case in an attempt to have it stricken as unconstitutionally violative of due process and equal protection under both the state and federal constitutions.

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SOME SUGGESTED CHANGES IN IOWA LAW THAT COULD BENEFIT DEFENDANTS IN PRODUCT LIABILITY CASES . . . *continued from page 10*

11. A TORTFEASOR'S FAULT IN CAUSING AN ACCIDENT IS A PROXIMATE CAUSE OF A SO-CALLED "ENHANCED" INJURY.

Iowa crashworthiness law is in a distinct minority that does not permit any evidence of a tortfeasor's fault in causing the accident to be admitted during the trial of the "enhanced injury" case. This rule, established in the controversial and fragmented (four dissenters) decision in *Reed v. Chrysler*, 494 N.W.2d 224 (Iowa 1992), flies in the face of common sense, is contrary to the Restatement (Third) of Torts, Section 16, and is adverse to the majority rule on this issue in this country. Under *Reed*, a driver or plaintiff could be "high" on cocaine and cause his vehicle to leave the roadway; yet, in the trial of a "crashworthiness" or "enhanced injury" claim against the vehicle manufacturer, the driver's or plaintiff's drug usage which caused the accident in the first place would be held to be irrelevant, inadmissible, and kept from the jury! This is not an outlandish example; the actual plaintiff in *Reed* was intoxicated on alcohol, and the Court held that such evidence was inadmissible. *Id.* at 230. This "error" resulted in the reversal of a defense judgment, and a remand for a new trial. Given the Iowa Supreme Court's adoption of the Restatement (Third) of Torts, Products Liability, Sections 1 and 2, when presented with an appropriate case, the Court should also reverse the holding in the *Reed* case and adopt Section 16 of the Third Restatement.

A more recent example of the havoc that can be created by the present rule can be found in *Weyerhauser Co. v. Thermogas Co.*, 620 N.W.2d 819 (Iowa 2000). There the Court, in a en banc decision, held that the cause of a plant fire would not be "relevant" to a product liability claim against a supplier of propane, where it was claimed that a propane tank exploded "prematurely" in a fire. The fire in *Weyerhauser* was caused when an employee driving a fork lift truck left the parking brake engaged, overheating the lift and causing the fire. The owner of the plant (and the employer of the forklift's driver) sued the supplier of the propane tank which fueled the lift, among others. The plant owner alleged that its $5 million dollar property loss was caused by the "defective" tank. (Note: most tanks containing flammable fluid under pressure will explode when exposed externally to heat.) The jury at trial employed common sense and found Weyerhauser 70% at fault for the loss, and a defense judgment was entered. This result was reversed on appeal and the case remanded for a new trial. Upon retrial, the jury was instructed that the cause of the fire would not be "relevant" to a determination of the defect claims. It is respectfully submitted that this result defies common sense. Obviously, the driver's abuse of the forklift should be considered in any effort to lay blame or responsibility for any losses occasioned as a result of the fire. Under established Iowa law regarding proximate cause, the forklift driver's fault in causing the fire at the outset is a "substantial factor" in causing the damages.

12. IN IOWA, ONLY INTENTIONAL ACTS CAN RESULT IN A PUNITIVE DAMAGE AWARD.

In Iowa, punitive damage claims are governed by exclusively by statute. *See* Iowa Code §668A.1. The Iowa Legislature passed this statute in 1986. It was intended to be a part of a "tort reform" package, but this fact has been lost on many litigants and courts alike. *See* Commission to study liability and liability insurance concerns; 86 Acts, ch. 1211, §44. This effort was further buttressed by an amendment to the statute in 1987, which added a heightened burden of proof of "clear, convincing and satisfactory preponderance of the evidence." *See* 87 Acts, ch 157, §11, SF 482; Section 668A.1(a). When viewed in this context, I believe it is clear that the Legislature intended to make punitive damages more difficult to obtain, not easier, as compared to the prior "common law" of punitive damages.

Nevertheless, the Iowa Supreme Court continues to cite, in support of punitive damage awards, common law that existed prior to Chapter 668A and indeed, in many cases, this prior common law is not consistent with the punitive damage statute. This prior common law of punitive damages has been superseded and "preempted," if you will, by Chapter 668A's standards and burden of proof. *See* Iowa Uniform Civil Jury Instructions Nos. 210.1, 210.2, 210.3, and 210.4. In so doing, the Court ignores the language

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SOME SUGGESTED CHANGES IN IOWA LAW THAT COULD BENEFIT DEFENDANTS IN PRODUCT LIABILITY CASES . . . *continued from page 11*

of the statute, which requires proof of an intentional act before the award of punitive damages are proper. The practical effect of this jurisprudence has been an overall "watering down" of the very high threshold that was specifically and purposefully set by the Iowa Legislature for the recovery of punitive damages.

Section 668A.1 of the Iowa Code (2003) states in pertinent part as follows:

In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willfull and wanton disregard for the rights or safety of another. . .

(emphasis added)

Notably, the statute requires both *willful* and *wanton* conduct. "Willful" is a synonym for "intentional." Yet, I feel the Court has skirted this issue by citing outdated case law prior to the adoption of Chapter 668A to support an award of punitive damages. *See, e.g., McClure v. Walgreen Co.*, 613 N.W.2d 225,231 (Iowa 2002)(punitive damages are appropriate only when actual or legal malice is shown; "actual malice" is characterized by such factors as personal spite, hatred, or ill will, while "legal malice" is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights). Another way in which this high standard has been circumvented is by interpreting the term "willful" in the statute to mean only an "intent to act." *Id.* at 230.

Defense counsel should urge the trial court, and preserve their record on appeal, that in every case involving a claim for punitive damages, that intentional conduct, as required by the statute, must be shown. A recent case in Wisconsin, with a similar punitive damage statute, has so held. *See Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 Wis. App. LEXIS 908, September 30, 2003 ("willful" conduct required by Wisconsin punitive damage statute required "intentional" conduct, and since there was no evidence of any intentional conduct, punitive damage judgment was reversed).

At least one other aspect of punitive damages should be kept in mind in a products case. This flows from the recent United States Supreme Court decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).[1] The *Campbell* decision supports limiting punitive damages to a "one-to-one" ratio of compensatory damages to punitive damages in most cases where substantial compensatory damages are awarded. 123 S.Ct. at 1524 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.") Many defense counsel overlook this helpful "one-to-one" ratio limitation argument, quoting instead the *Campbell* Court's oft-cited admonition that, "In practice, few awards exceeding a single-digit ratio [*e.g.* 9-1] between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* The Iowa Bar Association Board of Governors at this writing has not yet approved a post-*Campbell* update to Iowa Uniform Civil Jury Instruction 210.1, and practitioners are warned that the existing version of that punitive damages instruction is defective in light of *Campbell*.

CONCLUSION

In the trial of virtually every products case, there are multiple opportunities to shape Iowa product liability law for the future. Defense counsel should keep an open mind for opportunities to improve Iowa law. This paper discusses just a few examples of issues that may be "ripe" for reconsideration (and hopefully, change) by the Iowa Supreme Court or by the Iowa Legislature. Keep these issues in mind, along with any others you may think of, to give your client the best chance of success and to restore "common sense" to Iowa product liability law.

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[1] See Tom Waterman's article, "New Assistance for Defending Punitive Damage Claims in Iowa – the 'marching orders' of *State Farm Mutual Automobile Insurance Company v. Campbell*," September 2003 DEFENSE UPDATE

LOOKING THROUGH THE LENS OF THE JURY: JURY INSTRUCTION REFORM . . . *continued from page 12*

It is readily apparent that juries will better understand legal principles explained by the instructions under the Plain English Redraft. The quality of justice will be improved. The bench, the bar, and, especially, the public, will benefit from the Committee's work in producing the Plain English Redraft.

The committee noted that "the purpose of jury instructions is to give the law to the jury in a language they can understand," and surmised that the best way to do this was "to write jury instructions in plain English." To help achieve this goal, it hired a linguist to help translate "legalese" into plain English.

The general guidelines for drafting jury instructions followed by the Iowa Committee are that "each instruction shall be: an accurate statement of the law; as brief and concise as practicable; understandable to the average juror; and neutral, unslanted and free of argument."

The specific guidelines for drafting plain-English jury instructions are as follows:

1. Use plain English, simple, short and concrete words.
2. Make it look and sound like talk.
3. Use short sentences.
4. Use short paragraphs.
5. Omit unnecessary words.
6. Use active voice rather than passive.
7. Avoid negative forms, and especially double negatives.
8. Use personal pronouns, "I" for the Judge and "you" for the jury.
9. Whenever possible, leave out the words "as to," "determine," "facilitate," "herein," "hereof," "however," "if any," "therefrom," "theretofore," "thereof," "otherwise," "require," "that," "the," "whether" and "which."
10. Replace "locate" with "find"; "prior to" with "before"; "sufficient" with "enough"; "in the event that" with "if."
11. Put prepositions at the end whenever it sounds right to do so.
12. Use sex neutral language: eliminate the pronoun; repeat the noun; use a synonym for the noun; change the pronoun to "the," "a," "this" and the like; use "one"; use "it"; use the imperative; reword; and use the passive (the last resort).
13. Where appropriate for clarity and ease of understanding, use lay language in place of exact case or statutory language so long as an accurate statement of the law is maintained.

Comparing apples to apples (without the worms)

Contrast Ohio's medical negligence instruction to Iowa's plain-English instructions. The standard "nonspecialist" medical negligence charge is based on the seminal case of *Bruni v. Tatsumi*, 46 Ohio St.2d 127(1976):

> The existence of a physician-patient relationship imposes on the physician the duty to act as would a physician of ordinary skill, care and diligence under like or similar conditions or circumstances. The standard of care is to do those things which such a physician would do and refrain from doing those things which such a physician would not do. If you find by the greater weight of the evidence that defendant failed to use that standard of care, then you may find he was negligent.

Compare the 87-word *Bruni* charge to Iowa's 28-word charge:

> A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances. A violation of this duty is negligence.

Iowa's standard charge is not materially different in substance from Ohio's Bruni charge. But, linguistically speaking, the difference between Iowa's instruction and Ohio's is the difference between lightning and a lightning bug. What *is* different is that the Iowa charge is free of repetition and excess verbiage. Trimmed of its grammatical fat, it provides a shining example of a plain-English instruction that is understandable, yet legally accurate.

The "specialist" charge is equally pristine and streamlined and is substantively no different than Ohio's specialist charge. Below is Ohio's version:

> A specialist is a physician who holds himself out as specially trained, skilled and qualified in a particular branch of medicine. The standard of care for a physician in the practice of specialty is that of a reasonable specialist practicing medicine in that same specialty, regardless of where he/she practices. A

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LOOKING THROUGH THE LENS OF THE JURY: JURY INSTRUCTION REFORM . . . *continued from page 13*

> specialist in any one branch has the same standard of care as all other physicians in that branch. If you find by the greater weight of the evidence that defendant failed to use that standard of care, then you may find that he/she was negligent.

Now Iowa's specialist charge:

> Physicians who hold themselves out as specialists must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner. A violation of this duty is negligence.
>
> Again, it would be difficult to argue that the Iowa specialist charge is substantively different from Ohio's.

Iowa's overhaul of its civil instructions was not limited to medical negligence issues. Every civil instruction was simplified. For example, the instruction on preponderance of the evidence provides:

> Whenever a party must prove something they must do so by the preponderance of the evidence.
>
> Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or another.

Compare Ohio's preponderance instructions:

> Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may, or may not, be identical with (quantity) (the greater number of witnesses).
>
> In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence, regardless of who produced it.
>
> If the weight of the evidence is equally balanced, or if you are unable to determine which side of an issue has the preponderance, the party who has the burden of proof has not established such issue by a preponderance of the evidence.

Although both are acceptable, the brevity and clarity of Iowa's charge clearly distinguishes it as more understandable and easy to use.[5]

In essence, Iowa performed major surgery on its pattern jury instructions, and the result is obvious: Plain English can exist in perfect harmony with legal accuracy.

States adopting plain-English instructions have recognized an unintended consequence that has plagued traditional use of "pattern" jury instructions: The laudable goal of legal accuracy has inflicted collateral damage to the syntax, grammar and in the end, basic comprehension of instructions. This is understandable. Historically, the labor of pattern jury instruction committees has been devoted, for good reason, ensuring that instructions are legally accurate for purposes of both trial fairness and appellate review. This approach has proven to be a mixed bag, however:

> The primary goals of pattern jury instructions are to increase the legal accuracy of instructions and thereby avoid reversals, eliminate argumentative language, save time, and, finally, improve juror comprehension and instructions. Pattern instruction committees have been, for the most part, successful in achieving some of these goals, particularly a reduction in the number of appeals or reversals based on inaccurate instructions. They have generally failed, however, in their efforts to improve juror comprehension.
>
> There are several reasons for this failure. Pattern instructions are often taken directly from the language of Appellate Court opinions or statutes, written for legal audiences rather than lay jurors. Even instructions drafted with juror comprehension in mind still contain complicated legal terminology, due to the fact that committees are made up of lawyers and judges who often do not realize that certain language is

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[5] The California Task Force opted to avoid the term "preponderance" altogether and proposed informing the jury to decide an issue as "more likely than not." Tiersma, The Rocky Road, at 33.

LOOKING THROUGH THE LENS OF THE JURY: JURY INSTRUCTION REFORM . . . *continued from page 14*

> confusing and unfamiliar to those outside the legal profession ….[6]

In a 1965 speech that can only be considered visionary in retrospect, Federal District Judge Edward J. Devitt recognized these shortcomings:

> Instructions should be phrased in clear, concise language applicable to the case. Sometimes counsel will quote verbatim from an Appellate Court decision dwelling on a point involved in the trial and urge it as a proposed instruction. Appellate Court opinions are written for a purpose different from that for which jury instructions are designed. The point of law may be controlling, but not the language. It is the legal principle, not the words expressing it, which is pertinent and which will be helpful to the jury. Legal points from decided cases should be couched in language appropriate to the facts and to the parties in the lawsuit.
>
> The use of legal terminology in instructions should be avoided as much as possible …. To the extent possible, we should use that which Chief Judge Alfred Murrah calls the 'common speech of man.'[7]

A few examples illustrate the tug and pull between drafting legally accurate instructions and making them understandable to lay persons. Consider the term "ordinary negligence," a term lawyers and judges would use freely without thinking twice about its import. Is all negligence "ordinary"? What if a jury considers the negligence to be "extraordinary"? Is extraordinary negligence counted as negligence? Is this term confusing or unnecessary? Apparently the North Dakota State Pattern Jury Committee believed so, for it moved to excise the term "ordinary" from its working definition of negligence after debating the issue.[8] While the committee should be commended for removing this confusion, it is akin to killing one termite when a more potent insecticide is called for.

Similarly, what is meant by the phrase "physician of ordinary skill" in the standard Ohio medical negligence charge? What if the defendant physician possesses "extraordinary" skill in his or her profession? Can he or she never be negligent if, the "standard of care" refers simply to physicians of "ordinary" skill? Could the instruction be interpreted in this manner by a group of strangers who hear these words for the first time?

Consider also the phrase "standard of care." During trial, expert after expert is paraded in front of the jury to give an opinion as to whether the defendant "fell below the standard of care" in treating the plaintiff. Yet, amazingly, the phrase "fell below the standard of care" appears nowhere in Ohio's Pattern Jury Instructions—another potential source of confusion for lay people who are not accustomed to these types of words.

The reality is that jurors may well have difficulty understanding these concepts, and "unfortunately, judges sometimes assume that the words are part of ordinary speech when in fact they are technical terms with a legal meaning unknown to the lay public."[9]

If lawyers and judges can debate and pick apart the meaning and relevance of these terms of art, how can a jury be expected to understand and correctly apply such unfamiliar phrases? The larger point here is that jury instructions form the intersection between law and facts. The premise of the plain English language reform movement is that legally accurate instructions do not make for a safe intersection merely because they are legally accurate.

Conclusion

Serious consideration should be given to adopting Iowa's plain language instructions to the extent they comport with Ohio law. Admittedly, this is no small undertaking. Any proposed revisions should ideally include a linguist who can advise on plain-English phraseology. But the good news is that much of this fertile ground has been already plowed by other states.

In no way should adopting plain-language instructions be considered a dismantling of present instructions.

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[6] Chilton and Henley, *supra* at 14-15.
[7] Speech delivered at the 10th Circuit Judicial Conference on July 9, 1965.
[8] North Dakota Pattern Jury Instruction Commission, October 2000 meeting minutes.
[9] Tiersma, The Rocky Road, at 32. He notes that legal homonyms such as "brief," "burglary," "mayhem," "complaint," "aggravation" and others are "potentially dangerous because a lay person may think he knows what it means, whereas in reality the term may mean something quite different in the law." *Id*.

LOOKING THROUGH THE LENS OF THE JURY: JURY INSTRUCTION REFORM . . . *continued from page 15*

Rather, plain language revisions should be considered as fortifying the sound foundation of previous pattern instruction committees by adopting an easy-to-use version of previous instructions.

But the time has come for change in Ohio. How many times have we as lawyers been told, lectured or even scolded to "keep it simple," "be brief," or "get to the point" when examining witnesses, giving final arguments or writing appellate briefs? Shouldn't the same considerations of simplicity, brevity and clarity apply with equal force to jury instructions?

It is a little known fact that buried in Volume One of "Ohio Jury Instructions" is Section 1.83, which discusses the necessity of using "direct and simple english" in jury instructions. It even quotes a Supreme Court of Ohio opinion discussing the importance of well-crafted, understandable instructions:

It must be remembered that juries are composed of ordinary men on the street, not trained grammarians, and that fine distinctions in the meaning of words or phrases are not ordinarily recognized by the average layman. Thus, in considering the propriety of any instruction, the meaning of the words used in the instruction must be thought of in their common meaning to the layman and not what such words mean to the grammarian or the trained legal mind.[10]

It is time we took this admonition to heart. Because in the final analysis, the jury is the ultimate audience of the instructions written and edited by the judge and counsel. And unless we provide them with understandable tools to construct justice, it is analogous to a movie that is lauded by the critics but bombs at the box office.

Brian R. Wilson is a lawyer with the Okey Law Firm in Canton, Ohio.

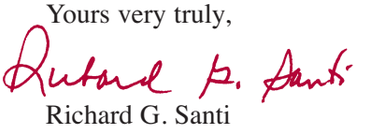
[10] *Bahm v. Pittsburgh and Lake Erie R. Co.* 6 Ohio St.2d 192, 194(1996).

MESSAGE FROM THE PRESIDENT . . . *continued from page 2*

elected president-elect of the International Association of Defense Counsel.

Lastly, it has been my pleasure and honor to have served as your president this past year. The IDCA is a great organization with great people and great programs. I want to thank our Executive Director, Bob Kreamer and especially our Associate Director, Julie Garrison, for all the hard work and able assistance provided over this past year. Sharon Greer will take over as your new president at the September annual meeting. Sharon has put together a great program for this year's meeting which you will not want to miss. I hope and expect to see you there.

Yours very truly,



Richard G. Santi
President

IOWA DEFENSE COUNSEL ASSOCIATION 40TH ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 22, 2004

10:00 a.m. **Registration Open/Exhibits Open**

11:00 a.m. **Board of Directors Meeting/Luncheon**

12:50-1:00 p.m. **Welcome and Opening Remarks**
Richard G. Santi, IDCA President

1:00-1:30 p.m. **Responding to a White Collar Crime Investigation**
Mark E. Weinhardt
Belin, Lamson, McCormick, Zumbach, Flynn, P.C.
Des Moines, Iowa

1:30-2:00 p.m. **The Ethics of E-mail**
N. Tre Critelli
Nicholas Critelli, P.C.
Des Moines, Iowa

2:00-2:30 p.m. **An Accident Reconstruction Primer**
Dan Lofgren
Lofgren & Associates
Princeton, Minnesota

2:30-3:15 p.m. **Appellate Case Review #1**
(Negligence, Torts & Indemnity)
Troy A. Howell
Lane & Waterman
Davenport, Iowa

3:15-3:30 p.m. **Break/Exhibits Open**

3:30-4:30 p.m. **Lawyer's Guide to the Grievance Commission**
Joel TS Greer
Cartwright, Druker & Ryden
Marshalltown, Iowa

4:30-5:00 p.m. **Medical Subrogation and the "Make Whole" Doctrine**
Michael W. Ellwanger
Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser
Sioux City, Iowa

5:15-7:30 p.m. **Welcome Reception Hosted by the Young Lawyer's Committee**
Featuring the Rich Webster All Lawyer Band

THURSDAY, SEPTEMBER 23, 2004

7:30 a.m. **Registration Open/Exhibits Open**

8:00-8:30 a.m. **Continental Breakfast/Exhibits Open**

8:30-8:45 a.m. **Legislative Update: Issues Impacting the IDCA**
Robert M. Kreamer
IDCA Executive Director & Lobbyist
Des Moines, Iowa

8:45-9:30 a.m. **Workers' Compensation Update**
Peter M. Sand
Gislason & Hunter, L.L.P.
Des Moines, Iowa

9:30-10:00 a.m. **Employment Law Update**
Frank Harty
Nyemaster, Goode, Voights, West, Hansell & O'Brien, P.C.
Des Moines, Iowa

10:00-10:30 a.m. **Mediation: Common Mistakes**
Paul Thune
Thune Law Firm
Des Moines, Iowa

10:30-10:45 a.m. **BREAK/Exhibits Open**

10:45-11:30 a.m. **Using the Internet to Evaluate Damages**
Richard K. Traub
Traub, Eglin, Lieberman, & Straus
Edison, New Jersey

11:30-12:00 p.m. **Oral Arguments and Update from the Court of Appeals**
Honorable Larry J. Eisenhauer
Iowa Court of Appeals
Des Moines, Iowa

12:00-12:30 p.m. **Luncheon/Exhibits Open**

12:30-12:40 p.m. **Annual Meeting of IDCA**

12:40-1:00 p.m. **Report of the Federal District Court**
Honorable Ronald E. Longstaff
U.S. District Court for the Southern District of Iowa
Des Moines, Iowa

1:00-2:00 p.m. **Federal Case Law Update**
Honorable Ross A. Walters
U.S. District Court for the Southern District of Iowa
Des Moines, Iowa

2:00-2:45 p.m. **Appellate Case Review #2**
(Civil Procedure, Court Jurisdiction & Trial, Evidence, Insurance, Judgment, Limitations of Actions)
Megan M. Althoff Wolfe
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, Iowa

2:45-3:00 p.m. **DRI and the Benefit to the Defense Bar**
Gregory M. Lederer
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids, Iowa

This year's IDCA Annual Meeting & Seminar offers up to the minute information from the bench and from the finest defense lawyers in the country. Some of the highlights of the seminar include: Ethics of E-mail, Appellate Updates, Medical Subrogation and the "Make Whole" Doctrine, Workers' Compensation Update, Employment Law Update, Using the Internet to Evaluate Damages, Defending the Environmental Claim, Mold Litigation, Closing Arguments – Demonstration, Model Rules Update, and much more. You will leave Des Moines and this seminar with fond memories, new ideas, strategies and contacts to assist you in meeting your professional goals **– guaranteed!**

3:00-3:15 p.m. **BREAK/Exhibits Open**

3:15-3:45 p.m. **Assessment of the Psychological Injury**
Michael John Taylor, M.D.
Des Moines, Iowa

3:45-4:30 p.m. **Defending the Environmental Claim**
Steven J. Pace
Shuttleworth & Ingersoll, P.L.C.
Cedar Rapids, Iowa

4:30-5:30 p.m. **Board of Directors Meeting**

4:30 p.m. **Hospitality Room Open**

6:30 - 9:30 p.m. **Reception/Dinner/Banquet - The Embassy Club**
(801 Grand, Des Moines)
(*The Embassy Club is attached via skywalk to the Des Moines Marriott Downtown)*

FRIDAY, SEPTEMBER 24, 2004

7:30 a.m. **Registration Open/Exhibits Open**

7:00-8:00 a.m. **Continental Breakfast/Exhibits Open**

8:00-8:30 a.m. **A Review of Mold Litigation**
Kristin Borchert
Grinnell Mutual Insurance Company
Grinnell, Iowa

8:30-9:30 a.m. **Closing Arguments - Demonstration Introduction:**
Marion Beatty
Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C.
Decorah, Iowa
Demonstration:
Michael Gill
Hale, Skemp, Hanson, Skemp & Sleik
LaCrosse, Wisconsin

9:30-10:00 a.m. **30 Years of Motion Practice**
Honorable Michael J. Moon
Second Judicial District
Marshalltown, Iowa

10:00-10:30 a.m. **Innocent Co-Insured Doctrine**
Ted J. Wallace
American Family Insurance
Davenport, Iowa

10:30-10:45 a.m. **BREAK/Exhibits Open**

10:45-11:30 a.m. **Appellate Case Review #3**
(Employment, Commercial, Constitutional, Contracts, Damages & Government)
Gretchen Witte Kraemer
Whitfield & Eddy, P.L.C.
Des Moines, Iowa

11:30-12:00 p.m. **Model Rules Update**
Justice Michael J. Streit
Iowa Supreme Court
Des Moines, Iowa
David Brown
Hansen, McClintock & Riley
Des Moines, Iowa

12:00-12:30 p.m. **Luncheon/Exhibits Open**

12:30-1:00 p.m. **Report from the Iowa Supreme Court**
Honorable Louis A. Lavorato
Iowa Supreme Court
Des Moines, Iowa

1:00-1:30 p.m. **Jury Selection: Planning & Flexibility**
Gerald Goddard
Cray,Goddard, Miller & Taylor, L.L.P.
Burlington, Iowa

1:30-2:30 p.m. **Panel Presentation: Mistakes You Make Moderator:**
Joel J. Yunek
Laird, Heiny, McManigal, Winga, Duffy & Stambaugh
Mason City, Iowa
Participants:
Bruce Braley
Dutton, Braun, Staack & Hellman, P.L.C.
Waterloo, Iowa
Tim Semelroth
Riccolo & Baker, P.C.
Cedar Rapids, Iowa
Neven Mullholland
Johnson, Erb, Bice, Kramer, Good & Mulholland, P.C.
Fort Dodge, Iowa
Jean Pendleton
Pendleton Law Firm, P.C.
Des Moines, Iowa

2:30 - 2:40 p.m. **Closing Remarks/Adjourn**

Mark Your Calendars!

2005 Annual Meeting & Seminar
September 21-23, 2005
Hotel Fort Des Moines
Des Moines, Iowa

IDCA CALENDAR OF EVENTS

September 22, 2004

Iowa Defense Counsel Association Board Meeting
11:00 a.m.
Marriott Des Moines Downtown
Des Moines, IA

September 23, 2004

Iowa Defense Counsel Association Board Meeting
4:30 p.m.
Marriott Des Moines Downtown
Des Moines, IA

September 22-24, 2004

Iowa Defense Counsel Association Annual Meeting & Seminar
Marriott Des Moines Downtown
Des Moines, IA

WELCOME NEW MEMBERS

Barry G. Vermeer

Kurt S. Peterson

IOWA DEFENSE COUNSEL ASSOCIATION 40TH ANNUAL MEETING & SEMINAR

Hotel Accommodations

IDCA has a block of rooms reserved at the Des Moines Marriott Downtown for the evenings of September 21-23, 2004.

Room rates are $101.00 Single/Double/Triple/Quadruple.

Call 1-800-514-4681 or 515-245-5500 for reservations.

To be guaranteed the IDCA conference room rate, call before August 31, 2004.

Des Moines Marriott Downtown

700 Grand Avenue
Des Moines, IA 50309
(515) 245-5500 (main phone)
(800) 514-4681 (reservations)
(515) 245-5567 (fax)

Registering for the Conference:

Registrations may be faxed to IDCA at (515) 243-2049 or mailed to: IDCA, 431 East Locust Street, Suite 300, Des Moines, Iowa 50309. Call Julie Garrison at (515) 244-2847 or e-mail to staff@iowadefensecounsel.org for more information.

Conference Cancellation/ Refund Policy

1. If written cancellation is received by September 17, 2004, a full refund will be received.
2. No refunds will be received after September 17, 2004. Seminar materials will be forwarded to registrant.
3. NO REFUND for No-Shows but seminar materials will be forwarded.

Additional Information

Attire for the conference is business-casual. If you are planning on attending the Banquet at The Embassy Club appropriate business attire is required.

September 22-24, 2004
Des Moines Marriott Downtown
700 Grand Avenue • Des Moines, IA

Name: _____

Badge Name: _____

Company/Firm: _____

Mailing Address: _____

City, State Zip: _____

Telephone: _____ Fax: _____

Email: _____

Spouse/Guest Badge Name (Wednesday Reception/Thursday Banquet Only): _____

Special Needs Requests (vegetarian meals, wheel chair access, etc.):

_____

NOTE: *Full registration for members & non-members includes: Meals, sessions, educational handouts, receptions and banquet. Each person attending the convention must be registered and paid in full prior to the convention. Please pre-register to assist us with an accurate count.*

REGISTRATION FEES:

	IDCA Member	*Non-Member*
Registrant:	$295	$395
Seminar Materials Only:	$75	$100

Wednesday Welcome Reception
Hosted by the Young Lawyers Committee
Registrant: Yes ❑ No ❑ **Spouse/Guest:** Yes ❑ No ❑

Thursday Noon Luncheon
Registrant: Yes ❑ No ❑

Thursday Night Annual Banquet
(The Embassy Club, 801 Grand, Des Moines, IA)
Registrant: Yes ❑ No ❑ **Spouse/Guest:** Yes ❑ No ❑

Friday Noon Luncheon
Registrant: Yes ❑ No ❑

FROM THE EDITORS . . .

THOUGHTS ON PASSING

I wish to echo President Santi's sentiments on the sudden tragic passing of Nan Ellwanger. In addition to his service as past president to our association, Mike Ellwanger is currently serving on the Board of Editors of this publication. The entire Board wishes to express our condolences to Mike and his family.

John Greer, one of our association's long time members, passed away recently. As a Board of Editors we wish to express our condolences to his family, partners and friends. John was truly a credit to our association and profession.

Francis Fitzgibbons, another long time member of our association, passed away since our last issue was published. We also wish to express our sincere condolences to his family, partners and friends. We will miss him.

Dave Brown, one of our members, lost his wife after her courageous battle with cancer. Our Board and Association wishes to pass along our heart felt condolences.

After looking back on these losses, I feel we should consider how we express our condolences regarding such loss. Please consider the following suggestions:

- We could offer to fund the organization which they were all directly or indirectly connected in their memory;
- We should offer our sincere condolences to their survivors when we see them or by mail;
- We could nominate members to carry on in the tradition of those members we have lost;

Most importantly we should follow some very important principles in our personal and professional lives:

- Always treat those persons in our profession with respect;
- Deal with all legal issues in a competent, professional manner in the tradition of our members;
- Attempt to treat our loved ones as if it will be the last time we will ever see them; and
- Finally, dedicate more of ourselves to this organization or any other of our choosing to honor yourself and the memory of those we have lost.

Iowa Defense Counsel Association
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Fax: (515) 243-2049
E-mail: staff@iowadefensecounsel.org
Website: www.iowadefensecounsel.org

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