defense UPDATE

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RES IPSA LOQUITUR IN IOWA: HOW TO KEEP THE LATIN FROM BECOMING "ALL GREEK"

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1. Introduction

Res ipsa loquitur, the Latin phrase for "the thing speaks for itself," has been a part of Iowa substantive law for over a century.[1] Most practitioners remember the beginnings of this doctrine from the law school case of *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. 1863), where a barrel of flour fell on the plaintiff who was walking next to the defendant's shop. In *Byrne*, it was easy to see how the injury was "caused by an instrumentality under the exclusive control of the defendant," and that "the occurrence [was] such that in the ordinary course of things would not happen if reasonable care had been used." *See, e.g. Novak Heating & Air Conditioning v. Carrier Corp.*, 622 N.W.2d 495 (Iowa 2001) (defining elements of *res ipsa*).

Courts have applied *res ipsa loquitur* to a wide range of events: falling from defendant's premises, falling elevators, collapsing buildings, and boiler explosions. As Prosser has noted, "there is an element of drama, and of the freakish and improbable in a good many of these cases." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 39, at 245 (5th ed. 1984).

However, in recent years *res ipsa loquitur* has been applied in cases where multiple or successive parties had "control" over an instrumentality, bending the words "exclusive control" to their far reaches. This concept has also been applied under circumstances where an "inference" of negligence would be dubious, at best.

One commentator has noted that *res ipsa loquitur* is:

> [s]ometimes invoked needlessly and inappropriately. If the trier can infer that the defendant was probably guilty of one of several specific acts of negligence but cannot be sure which act it was, *res ipsa* is not properly involved. . . Although the jury might not be sure which of these negligent [acts] occurred, if it can conclude that one of them did, then the case is merely one of ordinary circumstantial evidence. . . When courts speak of *res ipsa loquitur* in cases like this perhaps no harm is done, but they risk confusing the process of inferring specific negligent acts with the process of estimating the probability of unknown acts of negligence.

1 DAN B. DOBBS, THE LAW OF TORTS § 154, at 372-73 (2001) (footnote omitted).

Plaintiffs have alleged *res ipsa* as a separate and distinct theory of recovery, even though most courts recognize that it is nothing more than a rule of circumstantial evidence to be used in certain unusual negligence actions. Recent decisions by the Iowa Supreme Court, notably *Clinkscales v. Nelson Securities, Inc.*, 697 N.W.2d 836 (Iowa 2005) have permitted *res ipsa loquitur* to provide a basis for a plaintiff's recovery. Other decisions, such as *Conner v. Menards, Inc.*, 2005 Iowa Sup. *LEXIS* 142 (Iowa October 21, 2005) (publication not yet determined), have limited its application and even found "reversible error" where the theory is improperly used.

The purpose of this article is to trace the relevant history of *res ipsa* in Iowa, discuss current significant case law on this issue, and to provide defense practitioners with methods and

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[1]The first reported decision in Iowa discussing the elements of the doctrine of *res ipsa loquitur* is *Tuttle v. Chicago*, R. I. & P. Ry., 48 Iowa 236 (Iowa 1878). While accepting the burden shifting component of this doctrine as permissible, the *Tuttle* Court ultimately found the district court's instruction carried the burden shifting too far. *Tuttle*, 48 Iowa at 239-40. The trial court instructed:

> While the burden of proof is upon the plaintiff to show the negligence of the defendant, yet, if you find from the evidence that an unusual, extraordinary and dangerous accident occurred, to the injury of plaintiff, which would not have taken place, under ordinary circumstances, had the defendant and its employees at the time been exercising due care, prudence, skill and watchfulness; and if you further find that the cause of the accident was and is unknown to plaintiff, then it devolves upon defendant to satisfactorily explain the accident, and in the absence of such explanation, negligence will be presumed against it.

Id. at 240. Rather, the Court found that the defendant's proper burden was merely proof "that the coupler was of a proper kind, and was carefully managed." *Id*.

Inside This Issue

MESSAGE FROM THE PRESIDENT

Michael W. Thrall

The Importance of Judicial Independence

The recent Senate confirmation hearings and political turmoil surrounding the nominees to the United States Supreme Court provide a stark reminder of the importance of judicial independence. An independent, fair and impartial judiciary is one of the fundamental tenets of the United States and Iowa Constitutions. The judiciary's independence is essential to the delicate balance between the three branches of government. The judiciary's independence is essential to preserving our democracy. As Alexander Hamilton observed in 1788, "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[1]

The judiciary's independence is also essential if our judicial system is to continue to dispense "justice." Who among us would like to try a case, knowing that the judge hearing the case has already promised how he or she would decide the case before hearing the evidence or argument? Yet many in the process seem obsessed with securing just such a promise as a condition to confirmation. Neither political party is immune to criticism in this regard.

What is apparently lost to those participating in the Supreme Court nominating process is the effect this political wrangling has on the public's perception of our courts. An individual litigant's perception of the judicial process is often clouded by their personal struggle, and by the stake they have in the outcome of the case. The public is more disinterested and generally defers to the court's determination because they view our courts as being fair and unbiased. The courts, in other words, derive their credibility and strength from the public's perception that they are just. Will the public continue to perceive our courts as fair and just if the public believes politics has already mandated the outcome of a case? I fear the courts, as an institution, will be irrevocably damaged if our elected representatives continue to politicize the judicial selection process. I also fear that few truly qualified candidates will be willing to subject themselves to the rancor of this increasingly political process, and that the quality of our courts may decline in the long run as a result if it continues.

Iowans have largely escaped this fray on the state level. Safeguards put into place long ago removed a good part of the politics from this State's judicial selection process. There is nothing more disconcerting than to drive to a judicial proceeding in another state and to see the re-election sign of the presiding judge in the front yard of opposing counsel's office. Iowa voters distinguished themselves from these states when they approved a constitutional amendment in 1962 that eliminated the practice of selecting judges by popular vote and established a merit selection process in its place. The process has worked well, but is not immune to politics. We must, therefore, be vigilant to insure that judges continue to be selected based on their respective experience, legal skills, judicial temperament, knowledge, and other relevant qualifications. "Litmus tests" have no place in the selection of Iowa judges whether it be the nominee's political affiliation, the clients he or she tended to represent, or projections regarding how the nominee may rule on specific substantive issues.

As Iowans, we must jealously guard the independence of our judiciary and not take our judicial selection process for granted. On this issue, all trial lawyers have a real interest, and we must take an active and vocal role.

Michael W. Thrall

[1]Hamilton, Alexander, *The Federalist* No. 78, (1788), quoting, Montesquieu, *Spirit of Laws*, Vol. I, p. 181.

CAVEAT EMPTOR? - *JENSEN V. SATTLER* AND ITS EFFECT ON RESIDENTIAL REAL ESTATE SALES TRANSACTION CASES IN IOWA

By: Catherine E. Hult, Davenport, Iowa

Caveat emptor used to apply in sales transactions. This doctrine placed the onus on a buyer to perform a reasonable investigation and know what was being purchased. In Iowa, however, under a recent Iowa Supreme Court ruling, caveat emptor may have become a thing of the past for residential real estate transfers. Under Iowa Code §558A.2, a seller of residential real estate[1] is generally required to deliver a written disclosure statement to prospective buyers. This disclosure statement, typically a standard "check the box" form, is meant to put buyers on notice of any material problematic conditions.[2] In the standard Iowa real estate transaction for the sale of a residence, where a seller obtains a realtor, the realtor will provide the seller with the disclosure form required under Iowa Code §558A. In the past, the seller would then simply fill out this disclosure form to the best of his/her knowledge and this form would be given to prospective buyers.

Until the Iowa Supreme Court's recent decision in *Jensen v. Sattler*, 696 N.W.2d 582 (Iowa 2005), the Iowa courts had agreed that persons responsible for the §558A disclosure forms would be liable under §558A only for fraud in completion of the form, whether there was actual misrepresentation or a nondisclosure of a material condition. *See Arthur v. Brick*, 565 N.W.2d 623 (Iowa Ct. App. 1997), wherein the Iowa Court of Appeals held that to prevail in an action for nondisclosure under Chapter 558A, a plaintiff must prove the elements of fraud. *See also Sedgwick v. Bowers*, wherein the Iowa Supreme Court stated, "Our court of appeals has held that [the elements of fraud] are required under an action based on section 558A, and we agree." 681 N.W.2d 607, 611 (Iowa 2004)(citing *Arthur*, 565 N.W.2d at 625-26). In *Jensen*, however, the Supreme Court took a new look at the issue and determined that fraud was not required:

> The plain and unambiguous language of the statute[3] clearly indicates a seller can be liable for something less than a knowingly inaccurate disclosure, i.e., if the seller "fails to exercise ordinary care in obtaining the information" to be put on the disclosure form. The Act places a limited affirmative duty upon sellers insofar as they must "exercise ordinary care in obtaining the information."

Jensen, 696 N.W.2d 582, 587 (citing Iowa Code §558A.6(1); citing as *see also* Leonard A. Bernstein & George F. Magera, *Seller Disclosure Laws Gain Popularity*, 9 Loy. Consumer L. Rep. 43, 49 n. 57 (1997)(including Iowa's statute among those requiring "at least some affirmative investigation")).

In *Jensen*, the sellers (James and Julie Sattler) sold their upper-end home to Craig Jensen for $660,000 in 1997. 696 N.W.2d at 583. The Sattlers provided a §558A disclosure form which disclosed a crack in the basement that leaked "ONE TIME ONLY!" and a faulty master shower valve. *Id*. In 2001 Jensen claimed that there were other material problems involving the roof and attic, the electrical wiring in the foyer and improper drainage around the foundation, and he sued the Sattlers. *Id*. at 584. The Sattlers moved for summary judgment and the district court granted the motion in part, holding proof of fraud was required for a buyer to recover under the Iowa Real Estate Disclosure Act. Id. at 585. The Iowa Supreme Court reversed the district court on its holding that fraud was required, and held that §558A imposes liability for failing to exercise ordinary care in obtaining and disclosing the information in good faith. Id. at 586-87. The *Jensen* decision indicates sellers cannot merely rely on what they already know – they must in good faith make "a reasonable effort… to ascertain the information to be disclosed." *Id*. at 587 (citing Iowa Code §558A.3(2)(b)). The decision held the sellers could be liable for the problems with the property even though there was no proof the Sattlers had actual knowledge about the problems and Jensen himself did not discover them until three years after the sale. *Id*. at 583-584.

Jensen effectively overrules prior caselaw interpreting liability under Iowa Code §558A to require proof of fraud, and makes the completion of §558A disclosure forms a much more serious endeavor.[4] The full effect of *Jensen* remains unclear, but sellers no longer can

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[1] *See* Iowa Code §558A.1(4) defining a transfer covered under the disclosure requirements as one involving, "at least one but not more than four dwelling units…" with certain exceptions.

[2] *See* Iowa Admin. Code R. 193E-14.1(6) for a sample disclosure statement.

[3] Referring to Iowa Code §558A.6 which provides:
Liability under the chapter.
A person who violates this chapter shall be liable to a transferee for the amount of actual damages suffered by the transferee, but subject to the following limitations:
1. The transferor, or a broker or salesperson, shall not be liable under this chapter for the error, inaccuracy, or omission in information required in a disclosure statement, unless that person has actual knowledge of the inaccuracy, or fails to exercise ordinary care in obtaining the information.
2. The person submitting a report or opinion within the scope of the person's practice, profession, or expertise, as provided in section 558A.4, for purposes of satisfying the disclosure statement, shall not be liable under this chapter for any matter other than a matter within the person's practice, profession, or expertise, and which is required by the disclosure statement, unless the person failed to use care ordinary in the person's profession, practice, or area of expertise in preparing the information. Iowa Code Section 558A.6.

CRASHWORTHINESS AND COMPARATIVE FAULT: AN OPPORTUNITY TO LEVEL THE PLAYING FIELD FOR PRODUCT MANUFACTURERS

By: Jason J. O'Rourke, Lane & Waterman LLP, Davenport, IA and Rock Island, IL

For over a decade, attorneys defending "enhanced injury" or "crashworthiness" cases in Iowa have been handcuffed by precedent prohibiting the introduction of evidence of a plaintiff's fault in causing the accident at issue. This prohibition is contrary to precedent from a majority of the courts around the country and places product manufacturers at a distinct disadvantage when defending crashworthiness claims. For instance, under current precedent a jury would not be allowed to hear evidence that a plaintiff's intoxication caused the accident that ultimately gave rise to the crashworthiness claim. The Supreme Court's recent adoption of Sections 1 and 2 of the Restatement of the Law Torts Products Liability ("the Third Restatement") in *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002), may, however, signal a willingness by the Court to revisit this issue and level the playing field for product manufacturers by adopting other sections of the Third Restatement.

The Iowa Supreme Court first addressed the relevance of a plaintiff's comparative fault in an enhanced injury claim in *Hillrichs v. Avco Corp.*, 478 N.W.2d 70 (Iowa 1991). In that case, the plaintiff was injured when he attempted to unclog corn stalks from a running combine. On appeal following a defense verdict, plaintiff asserted that "any percentage of fault that might be assigned to him with respect to the initial entanglement in the machinery [could] not be assessed to him on the trial of his enhanced injury claim." 478 N.W.2d at 76. The Iowa Supreme Court disagreed, stating "the fault of the plaintiff, if any, in becoming entangled in the machinery would be a proximate cause of the enhanced injury as well as the initial injury." *Id.* The Court concluded that the jury should be so instructed at the retrial of the plaintiff's negligence claim.

Just over one year later, however, the Iowa Supreme Court did an about face. In *Reed v. Chrysler Corp.*, 494 N.W.2d 224 (Iowa 1992), the Court was faced with the issue of whether a driver and his passenger's intoxication could be considered as an element of comparative fault in a crashworthiness case where the passenger plaintiff sustained significant injuries after the driver crashed his Jeep while traveling at a high rate of speed. Because the crashworthiness doctrine "presupposes the occurrence of accidents" and "focuses alone on the enhancement of resulting injuries," the Court concluded that "any participation by the plaintiff in bringing the accident about is quite beside the point." 494 N.W. 2d at 230. Despite recognizing that it had indicated a contrary view in *Hillrichs*, the Court reversed itself and held that "a plaintiff's comparative fault should not be so assessed in a crashworthiness case unless it is shown to be a proximate cause of the *enhanced* injury. *Id.* (italics in original).

Four Justices dissented from the majority's holding in *Reed*. Writing for the dissent, Justice Carter correctly noted that Iowa Code chapter 668 governs personal injury actions and applies to strict liability and negligence claims. *Id.* at 231. Indeed, Justice Carter recognized that Iowa Code Section 668.3 requires fault to be compared in such cases. Quoting Iowa Code Section 668.1(2), Justice Carter wrote, "the legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault." *Id.* Thus "the question of whether a claimant's fault may be considered in enhanced injury litigation depends on whether that fault is a proximate cause of the injuries for which the claimant is seeking to recover." Id. Justice Carter concluded:

> . . . there is no logical reason to use different rules for fault comparison in enhanced injury claims than would be used in claims involving negligent failure to warn or negligent failure to install safety devices.
> Because under settled principles of proximate cause a claimant's fault that produces an injury-producing occurrence will also be a proximate caused of the enhanced injuries sustained, the usual rules for fault comparison should apply to the enhanced injury portion of the claim. Our recognition of that proposition in *Hillrichs*, 478 N.W.2d at 76, should not be abandoned.

Id. Justices McGiverin, Schultz and Snell joined Justice Carter in his dissent.

Despite being handcuffed by *Reed* for over a decade, the potential for change is on the horizon. Sections of the Third Restatement are being adopted by courts across the country, including the Iowa Supreme Court in *Wright*. One particular section defense counsel should be aware of is Section 16.

Section 16 of the Third Restatement establishes the standards to be applied when addressing a crashworthiness claim:

(a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.

(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect.

(c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product sellers is liable for all of the plaintiff's harm attributable to the defect and other causes.

(d) A seller of a defective product that is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and

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strategies for defending against these potentially troublesome claims.

2. Historical underpinnings of *res ipsa loquitur*

> We are all of the opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can a presumption of negligence arise from the facts of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous.
>
> The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

See Byrne, cited *supra*.

Its application in the product liability context can be traced to *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (Cal. 1944), where the court held, in an "exploding pop bottle case," that "all the requirements necessary to entitle plaintiff to rely on the doctrine of *res ipsa loquitur* to supply an inference of negligence are present." 150 P.2d at 440. This utilization of *res ipsa* was a precursor to strict liability in tort, and served to bridge the gap between requiring a plaintiff to prove a specific act of negligence in order to establish liability, and strict liability, or so-called "liability without fault." [Query: with the development of product liability law over the 50 years since *Escola*, with its own specialized rules liberalizing the right of recovery, why is there any need at all for *res ipsa* in a products case? This point is made by a review of *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321 (Iowa 1996) (holding bottler strictly liable for exploding pop bottle; *res ipsa* never addressed)].

The common-law of *res ipsa* was "codified" in black-letter law in the Restatement Second of Torts, Section 328D (1965), which provides:

> § 328 D. *Res ipsa loquitur*
>
> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
>
> (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.
>
> (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

Section 328D of the Restatement Second was first cited with approval by the Iowa Supreme Court in *Boyer v. Iowa High School Athletic Assoc.*, 260 Iowa 1061, 152 N.W. 293 (1967) (finding where spectator injured in collapse of bleachers at basketball game application of *res ipsa* was proper as defendant had "exclusive control" over the instrumentality, and circumstance would not happen in the absence of negligence). Subsequent cases have also made reference to the Restatement. *See Reasoner v. Pyland Constr. Co.*, 229 N.W.2d 269 (Iowa 1975) (finding *res ipsa* not proper because no exclusive control proven); *O'Neal v. Alpine Ctr.*, 2001 Iowa App. LEXIS 472 (Iowa App. July 18, 2001) (unpublished) (holding *res ipsa* proper in a premises liability suit); and *Perin v. Hayne*, 210 N.W.2d 609 (Iowa 1973) (holding *res ipsa* not proper in medical malpractice case where bad result was a potential complication of surgery).

Although Iowa cases have cited with approval various parts of the Restatement, the Iowa Supreme Court has not as yet adopted all parts of this section of the Restatement. The Court even noted in one decision that Iowa's common law development of *res ipsa* appears, in several respects, "at variance with the Restatement." *Reasnor v. Pyland Const. Co.*, et al., 229 N.W.2d 269, 273 (Iowa 1975). Therefore, while the practitioner may look to the notes and explanation of the Restatement for persuasive guidance – especially for an issue not previously addressed in Iowa – it is important to not rely upon the Restatement for the basic elements of this doctrine as developed in Iowa.

3. Current *res ipsa* law in Iowa

Any discussion of current *res ipsa* law in Iowa should start with a detailed review of the 2005 Iowa Supreme Court

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decisions of *Clinkscales* and *Conner*. These cases are quite instructive because in *Clinkscales*, *res ipsa* was permitted, yet in *Conner*, the application of *res ipsa loquitur* was determined to be error, and a six-figure plaintiff's award in a personal injury case was reversed.

In *Clinkscales v. Nelson Securities, Inc.*, 697 N.W.2d 836 (Iowa 2005), plaintiff, a marine, was at a Davenport bar when a fire broke out on a grill on the patio just outside the bar. The owner of the bar and another employee told the bar patrons to leave the bar. Plaintiff went outside to the bar's patio and asked whether anyone had shut off the gas to the grill. Plaintiff was told that the handle on the gas shut-off was too hot. At that point, plaintiff took off his shirt, wrapped it around one of his hands, and turned off the gas. No one asked plaintiff to do so. As plaintiff was turning the gas off, the grease fire flared up. Plaintiff was burned on his face, neck, chest, arms and legs. Plaintiff sued the bar and owners of the land for negligence under several specifications of negligence, and also pled *res ipsa loquitur* for good measure. [Query: what were the bar employees supposed to do? Physically "tackle" the plaintiff-marine as he strode confidently toward the grill?]

The trial court in *Clinkscales* granted the defense a summary judgment. As a part of that holding, the district court held that *res ipsa* was not applicable because grease fires can occur in the absence of negligence. The Iowa Court of Appeals affirmed the dismissal. On further review, the Iowa Supreme Court reversed, and the *res ipsa* portion of its decision was based on its finding that "grease fires do not just happen." *Id*. at 848. Notably, this holding was contrary to the fact findings of both the trial court and the Iowa Court of Appeals, that grease fires can happen (and often do occur) in the absence of negligence. *Clinkscales* included a vigorous dissent by Justices Streit, Cady and Ternus. The dissent pointed out that: (1) no exclusive control had been shown; and (2) grease fires are common and their mere existence should not lead to any inference of negligence. *Id*. at 848-50. [Query: how, as a practical matter, does a litigant go about proving a common-sense, general proposition such as "grease fires just happen?"]

A detailed review of Justice Streit's dissent in *Clinkscales* is "must reading" for any defense practitioner confronted with a *res ipsa* claim. Justice Streit introduced the subject by stating:

> I respectfully dissent. . . because I believe the majority wrongly permits Clinkscales to pursue a *res-ipsa-loquitur* theory. In doing so, the majority stretches that venerable doctrine far beyond its proper boundaries (emphasis added).

Justice Streit then discussed how the facts of the case would not permit *res ipsa* because "exclusive control" could not be shown: the grill was ordered from two local men, who built it from standard parts; the propane tanks were regularly switched out at a local filling station; the filling station also switched out components which connect the tanks to the supply hoses on the grill; and any one of these entities could have performed a negligent act which led to plaintiff's injuries. *Id*. at 849. Obviously, there was no "exclusive control" by any one person throughout the life of the grill. Thus, *Clinkscales* involved multiple successive "handlers" of the instrumentality in question.

Regarding the "exclusive control" element, Justice Streit concluded:

> Without proving the cause of the fire, Clinkscales has presented no evidence that would permit a jury to eliminate any of these equally potentially negligent parties. Therefore *res ipsa loquitur* is inapplicable, and the district court and court of appeals were correct to strike this theory from Clinkscale's pleadings.

Id. at 849. Stated otherwise, the jury would be required to speculate in order to conclude that any one party in the chain of custody was "negligent" at some point in time and caused the fire.

Justice Streit then considered the second requisite element of *res ipsa*, and concluded simply that "grease fires happen." Both the trial court and Iowa Court of Appeals had concluded this. To any defense lawyer who "moonlights" as a backyard cook during holiday celebrations with family away from the office, Justice Streit's common-sense observation would appear to be unassailable.

To conclude, Justice Streit's well-reasoned dissent in *Clinkscales*, joined in by Justices Cady and Ternus, give tort defendants cause for hope that in future cases, the required elements of *res ipsa loquitur* will be strictly enforced.

Defense practitioners can also point to *Conner v. Menard, Inc.*, 2005 Iowa Sup. LEXIS 142 (Iowa October 21, 2005) (publication not yet determined), where the appellate court found reversible error when the jury received a *res ipsa* charge on the facts and the case at trial resulted in a plaintiff's verdict. *Conner* is rare: in it a significant plaintiff's personal injury verdict was reversed, solely because the jury was instructed on *res ipsa loquitur* when it should not have been instructed on that theory. The plaintiff in *Conner* was injured at a Menards store when a bundle of insulation fell on her as she was helping her husband load their pickup in the lumberyard. Plaintiff sued for negligence based on a premises liability theory, and the jury found Conner 20 per cent at fault, and Menards 80 per cent at fault. Damages were assessed at $281,000, which were remitted by the trial court on post-trial motions to $150,000. Conner appealed the *remittitur* of damages, and Menards cross appealed based, in part, on alleged error in instructing the jury on both specific negligence and *res ipsa loquitur*.

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Justice Larson, writing for the majority in *Conner*, started his discussion of this issue by noting that "[o]ur cases have been very circumspect in their application of *res ipsa*." *Conner*, 2005 Iowa Sup. LEXIS 142 at *3. "For example, the doctrine does not apply if the instrumentality of injury is under the sequential, as opposed to simultaneous, control of more than one defendant." *Id*. (citing *Novak Heating & Air Conditioning v. Carrier Corp.*, 622 N.W.2d 495, 498-99 (Iowa 2001)). [Query: *Novak* so held, but is this correct? How can there be "exclusive control" over an instrumentality when two or more persons have simultaneous control over the situation? Why can't the "joint control" situation simply be handled by application of joint and several liability principles, e.g., *Summers v. Tice*?] "Also, control must be established in the defendant at the time of the negligent act, which is not necessarily the time of injury." *Id*. (citing *Weyerhauser Co. v. Thermogas Co.*, 620 N.W.2d 819, 832 (Iowa 2000)). "Notably, as pertinent to this case, the doctrine does not apply when there is direct evidence as to the precise cause of the injury and all of the facts and circumstances attending the occurrence." *Id*. (citing *Reilly v. Straub*, 282 N.W.2d 688, 694 (Iowa 1979)).

The defendant in *Conner* was successful in making the "two bites of the same apple" argument–that where there is evidence of a specific act of negligence, *res ipsa* is not appropriate. *Id*. at *8-*9. In *Conner*, a Menards employee was working in the immediate area and caused the object to fall, striking Plaintiff. This makes sense: if there is sufficient evidence of a specific act, then there is utterly no need for an "inference" of negligence. An inference is only needed if such specific evidence is lacking. In the NFL, this is known as the "piling on" penalty. The *Conner* Court held the trial court's instruction on *res ipsa* to be in error despite plaintiff's best efforts to characterize the situation as, in effect, "no harm, no foul" since the jury had also been charged on specific acts of negligence. *Id*. at *9. The *Conner* court found, however, that since the jury returned a general verdict, and special interrogatories were not given relative to specific versus general negligence, it was impossible to determine upon which claim the verdict was based. *Id*. Since the verdict might have been based on an erroneous charge of *res ipsa*, the Supreme Court had no alternative but to reverse the verdict and remand for a new trial. *Id*.

To conclude, *Conner* should be a part of every defense practitioner's "tool kit" on a going-forward basis, as it is an example of reversible error based on the erroneous application of *res ipsa loquitur*.

A. Cases that have permitted *res ipsa loquitur*

Beside *Clinkscales*, another important *res ipsa loquitur* case in Iowa was *Brewster v. U.S.*, 542 N.W.2d 524 (Iowa 1996). *Brewster* was a premises liability case against a VA hospital, where an automatic door allegedly malfunctioned and caused plaintiff's injury.[2] In *Brewster*, the Iowa Supreme Court, on a certified question of law from an Iowa federal court, held that *res ipsa loquitur* was submissible as against the landowner, a VA hospital, and would prevent the entry of summary judgment on the premises liability claim based on general negligence. This was so notwithstanding the absence of specific proof of a defect in the door which allegedly closed on plaintiff, striking her. In *Brewster*, there was no proof that the door had ever "malfunctioned" on any prior occasion. This result in essence renders premises liability strict liability, instead of liability based on fault (*i.e.*, negligence). This legal conundrum was never answered in *Brewster*.

Res ipsa has also been permitted in product liability cases in Iowa. *See, e.g.*, *McGuire v. Davidson Manuf. Corp.*, 258 F. Supp. 2d 945 (N. D. Iowa 2003) (case where allegedly defective ladder collapsed); and *Weyerhauser Co. v. Thermogas Co.*, 620 N.W.2d 819, 832 (Iowa 2000) (case where allegedly defective gas tank on a forklift exploded in a fire, causing a warehouse to burn down). In *McGuire*, the federal court held, in a case of first impression in Iowa, that the Iowa Comparative Fault Act "changed" the requirements of *res ipsa* in at least one respect: a plaintiff no longer is required to establish the lack of wrongful conduct on his or her part. This part of *McGuire*, however, is subject to debate: how can a party have the "exclusive control" required in order to allow *res ipsa* to apply, where the plaintiff in the particular case is also found to be at fault? A simple example will explain the problem. Suppose in a comparative fault case, the jury finds plaintiff 50% at fault, and defendant 50% at fault. In such a case, how can a plaintiff's verdict be based on *res ipsa*, if "exclusive control" over the instrumentality which led to the injury on the part of the defendant is required? Such a verdict would appear to be unsupportable based on *res ipsa loquitur*. [4] On the other hand, if the jury found the defendant to be 100% at fault, then a verdict based on *res ipsa* could stand, as the finding of 100% fault on the part of the defendant would directly refer to that party's "exclusive control."[5]

In *Weyerhauser*, the Court found that the trial court had committed error in refusing to instruct on *res ipsa loquitur*, even though *res ipsa* was not specifically pled in the petition. The Court curiously found that plaintiff's vague pleading, which did not identify a specific defect but rather generically alleged unidentified "defects," was an allegation of "general" negligence which meant that *res ipsa loquitur* was being pursued in the case. *Id*. at 831-2. Although this part of the holding is troubling, in the course of argument on a pretrial motion *in limine*, it became clear that plaintiff was relying on circumstantial evidence to prove a defect in the product at issue. This was because plaintiff's expert could not identify any specific defect in the "blown up" product. *Id*. at 832. From the defense point of view, *Weyerhauser*

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did make it clear that where both specific negligence and "general" (*i.e.*, *res ipsa loquitur*) negligence are submitted, if the jury finds for plaintiff on specific acts of negligence, then *res ipsa* should not be submitted. *Id*. at 831. The *Weyerhauser* holding is the same as the Iowa Supreme Court's recent holding in *Conner* as previously discussed and is an important point to keep in mind when fashioning jury instructions and verdict forms. Additionally, *Weyerhauser* further emphasized that if the defendant did not have exclusive control over the instrumentality of injury at the time of the accident, then plaintiff has the burden to prove, by a preponderance of the evidence, that: (1) there was no change in the condition of the instrumentality, and (2) no intervening act occurred which could have caused the event resulting in the injury. *Id*. at 832.[6]

There is no *per se* rule barring the application of *res ipsa* to medical malpractice actions. *See, e.g. Tappe v. Iowa Methodist Med. Center*, 477 N.W.2d 396, 400 (Iowa 1991) (observing that because *res ipsa* "creates an inference of negligence without specific proof, it traditionally has been applied sparingly, *particularly in medical malpractice cases*." (emphasis added)). This rule is very much akin to the concept that there is no *per se* rule requiring experts in product cases or medical malpractice actions. However, in the vast majority of cases, such technical experts will be the *sine qua non* of a submissible case.[7] In medical malpractice cases it depends on the facts of the case. *See, e.g., Wiles v. Myerly*, 210 N.W.2d 619 (Iowa 1973) (finding *res ipsa* properly applied where patient received a burn in surgery that was not a normal consequence of the surgery that was done); *Frost v. Des Moines Still College of Osteopathy & Surgery*, 248 Iowa 294, 79 N.W.2d 306 (1957) (holding a hospital liable under *res ipsa* for injury to an anesthetized patient; the patient could not identify the injury's cause and the hospital failed to show that its staff was under the control of the patient's doctor when the injury occurred).

B. Cases where *res ipsa* has been rejected

Defense counsel should recognize that *res ipsa* was originally meant to be a rule of quite limited application. The Iowa Supreme Court in *Conner* noted that "[o]ur cases have been very circumspect in their application of *res ipsa*." *Conner*, 2005 Iowa Supp. *LEXIS* 142 at *3. Yet, an unreasonable "watering down" of the historically strict elements of *res ipsa* can have the effect of allowing the "exceptions" to "swallow the rule." Besides *Conner*, there are a few other examples of where the court has found that *res ipsa* should not apply. A medical malpractice case which involves a complication that is a foreseeable risk of surgery is perhaps the best example of a situation where *res ipsa loquitur* cannot be used to create an "inference" of negligence: this is because the circumstance is not one which ordinarily occurs in the presence of negligence. *See, e.g., Tappe v. Iowa Methodist Medical Center*, 477 N.W.2d 396 (Iowa 1991) (trial court properly directed a verdict in the hospital's favor on a *res ipsa* claim in a medical malpractice action, because the risk of stroke was inherent in heart bypass surgery).

The mere fact that a fire has occurred in a dwelling does not raise a presumption of negligence under *res ipsa loquitur*. *Tedrow v. Des Moines Housing Corp.*, 249 Iowa 766, 87 N.W.2d 463 (1958).

A restaurant keeper was held to be not liable under *res ipsa loquitur* in a case where a patron died from swallowing a pork chop bone, as the bone was natural to the food and the decedent should have taken reasonable precaution. *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W.2d 366 (Iowa 1941).

4. *Res ipsa* and Section 3 of the Restatement of Torts (3d), Products Liability: the so-called "indeterminate product defect."

Section 3 of the Restatement Third is a direct parallel to common-law *res ipsa* and is entitled "[C]ircumstantial Evidence Supporting Inference of Product Defect." Although the Iowa Supreme Court has adopted the Restatement (3d) of Torts, Products Liability, Sections 1, 2 and 10, no case has yet discussed Section 3 of the Restatement Third. What is an "indeterminate defect?" How does it differ from the common-law of *res ipsa loquitur*? What is the likelihood that the Iowa Court would adopt Section 3 of the Restatement Third? How does it differ from the former strict liability, *e.g., Bredberg v. Pepsico*, cited *supra*? Have other jurisdictions applied Section 3?

Section 3 of the Restatement Third of Torts, Products Liability, provides:

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[2]The trial court in *Brewster* had previously dismissed Taylor Industries, the installer and assembler of the door from the case for lack of proof of a product defect. However, this "product liability" portion of the case was not the subject of the certified question. It is not clear from the opinion whether plaintiff in *Brewster* ever attempted to argue liability on the part of the product seller based on *res ipsa.*

[3]This aspect of *Brewster* is difficult to square with the recent case of *Benham v. King*, 700 N.W.2d 314 (Iowa 2005) (dentist did not breach duty to patient when dental chair collapsed due to a previously-unknown defect).

[4]Admittedly, the case might be submitted to the jury based on *res ipsa loquitur* as well as specific negligence, but this must be done in the alternative. In the authors' view, if the jury ultimately returned a verdict for plaintiff on *res ipsa* and allocated liability as between plaintiff and defendant, or among two or more defendants, this result could not be squared with the "exclusive control" element of *res ipsa*. The Iowa Supreme Court has never decided this issue.

[5]This is in keeping with the common-law principle that a plaintiff must establish his innocence in causing the injury in order to rely upon *res ipsa*. *See e.g. Mein v. Reed*, 278 N.W. 307 (Iowa 1938) (*res ipsa* could apply if jury could find that plaintiff's car was properly stopped in clear view and is thereafter hit from behind, because only then could jury find that defendant had complete control of the only instrumentality causing the accident).

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Supporting Inference of Product Defect.

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(a) was of a kind that ordinarily occurs as a result of product defect; and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

It appears that Section 3 of the Restatement Third should be viewed narrowly as a type of *res ipsa loquitur* that is limited to the product liability defect context. Substantively, there appears to be no difference as between the Iowa common-law of *res ipsa* as applied to a products case, and application of Section 3 of the Restatement Third. Common-law *res ipsa* is a species of negligence in general. *See, e.g., Conner*, cited and discussed *supra* (a premises liability case, where negligence rules govern); *Clinkscales*, cited and discussed *supra* (a gas grill fire case against the owner of the grill, the operator of a bar or restaurant, which would be guided by negligence principles).

What are the chances that the Iowa Supreme Court would adopt Restatement Third Section 3? The answer to this question may be more academic than practical, since Section 3 mirrors the common law of *res ipsa loquitur* in Iowa as applied in products liability cases. Although it is always difficult to predict what a court will do, or what fact situation it will be presented with, there is precedent for the Iowa Supreme Court's adoption of particular provisions of the Restatement Third of Torts, Products Liability, where Iowa has no existing law on the subject. *See, e.g., Wright v. Brooke Group*, 652 N.W.2d 159 (Iowa 2002) (adopted Sections 1 and 2 of the Restatement Third); *Lovick v. Wil-Rich*, 588 N.W. 2d 688 (Iowa 1999) (adopted Section 10 of the Restatement Third for post-sale duty to warn cases). Practically speaking, in order for a plaintiff to prevail in a products case, in most situations they must adduce proof, through the testimony of a qualified technical expert, of a product defect. Any plaintiff who must rely on an "inference" of product defect, in order to engender a jury issue, is treading on thin ice. Most good plaintiff's attorneys would not likely bank the success of a serious injury, expensive-to-prosecute products liability case on a mere "inference" of defect without solid expert witness support. Yet, there may be situations where "inference" of defect permitted in Section 3 is used in a products case.

One possible scenario would be this: assume that plaintiff's expert is excluded from testifying based on Iowa Rule of Evidence 5.702 or a "*Daubert*" type attack. Could plaintiff's attorney nevertheless avoid an adverse, case-dispositive summary judgment ruling by taking a "fall back" position of relying on common-law *res ipsa loquitur* or Section 3 of the Restatement Third? That is possible.[8] As a practical matter, Section 3 of the Restatement Third would likely apply in only a very few situations. The bottom line is that defense counsel should be aware that in any products liability case involving a *res ipsa* claim, the possibility exists that the Court might adopt Section 3 of the Restatement Third.

Has any other jurisdiction adopted Section 3 of the Restatement Third, and if so, how has it been applied? Section 3 was adopted by the court in *Myrlak v. Port Auth. of N.Y. and N.J.*, 723 A.2d 45, 56 (N.J. 1999). In *Myrlak*, an employee who sustained an injury when his chair collapsed at work, sued the chair manufacturer. *Id*. at 49. On appeal, although recognizing that *res ipsa loquitur* is generally not applicable in strict liability cases, the court adopted Section 3 of the Restatement Third in a situation where plaintiff could not prove a specific defect. *Id*. at 56-57.

5. A *res ipsa* "checklist" for defense counsel

In any case involving a *res ipsa loquitur* claim, defense counsel should carefully consider the following issues:

a. Is there "exclusive control" over the instrumentality or circumstances that caused the injury?
(If no exclusive control can be shown, then *res ipsa* does not apply. If the court denies your motion and submits the case to the jury, then argue to the jury the facts that show that your client did not have "exclusive control.")

b. At what point did your client have "exclusive control?"
(If your client did not have exclusive control at the time of the allegedly negligent act, then *res ipsa* does not apply.)

c. Was the control "joint" or "successive" control?
(If the control is "joint," then it cannot be "exclusive control." Defense counsel should argue that this situation is governed by joint and several liability principles. If it is "successive" control, it may apply, but only if the allegedly negligent "conduct" or "acts" occurred at the time the defendant had control. [Note:

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[6] *Weyerhauser* is somewhat at odds with *Conner* and *Novak*, in that the instrumentality at issue (a propane tank) had been in the custody of multiple, successive defendants before the explosion.

[7] It should be noted that *res ipsa* may not be enough to "rescue" a malpractice case where the plaintiff was tardy in disclosing experts pursuant to Section 668.11 of the Code of Iowa. *See, e.g., Miller v. Trimark Physicians Group, Inc.*, 2003 Iowa App. LEXIS 865) (unpublished decision, October 15, 2003) (*res ipsa* did not apply because expert testimony was also required to prove that the outcome would not have happened in the absence of negligence).

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this argument is contrary to language in *Conner* and *Novak*, which may be in error.])

d. Did defendant have exclusive control at the time of the accident or injury?
(If not, then plaintiff must show by a preponderance of the evidence that: 1) there was no change in the condition of the instrumentality, and 2) no intervening act occurred which could have caused the event resulting in the injury. *Weyerhauser*, 620 N.W.2d 819 at 832).

e. Were plaintiff's actions or conduct a potential cause of the accident or injury?
(If so, then *res ipsa* may not apply. In the historical case of *Byrne v. Boadle*, the plaintiff was merely minding his own business walking by when a barrel of flour fell out of the building and struck him. This type of fact scenario, or as in *Boyer*, where bleachers collapsed hurting a spectator, fits the *res ipsa* mold more readily. However, the federal district court decision of *McGuire* in Iowa holds to the contrary, and held that a plaintiff no longer needs to prove lack of wrongful conduct on his or her part, in order for *res ipsa loquitur* to be submitted. Yet, it is difficult, if not impossible, to "square" *McGuire's* holding with the requisite element of "exclusive control." Also note that McGuire's holding has not yet been approved by the Iowa Supreme Court and thus its analysis is not binding on Iowa courts.)

f. Is the event in question the type of thing that ordinarily happens in the absence of negligence?
(If not, then *res ipsa* does not apply. This may be a fighting issue; it was the focus of the dissent in *Clinkscales*. Also, many "bad outcomes" in medical malpractice cases are simply the result of foreseeable complications.)

g. Is there direct evidence as to the precise cause of the injury and all the facts and circumstances attending the occurrence appear?
(If there is, then *res ipsa* does not apply. *Reilly*, 282 N.W.2d at 694.)

h. Is plaintiff arguing several different alternatives as "specific" acts of negligence which led to the accident?
(If so, this is not a proper situation for the utilization of the *res ipsa* inference of negligence. Rather, this concern is addressed by the jury in their findings of fact when weighing circumstantial evidence as proof of a specific defect.)

i. Has plaintiff provided substantial evidence of both elements of *res ipsa loquitur*?
(If not, then the claim may not be submitted. *Brewster*, 542 N.W.2d at 529).

j. Is *res ipsa loquitur* being pursued in a product liability case, such that Section 3 of the Restatement Third of Torts, Products Liability, might apply?
(Section 3 of the Restatement Third only applies to products liability cases. If Section 3 applies, then focus the defense on the complete lack of expert witness proof which supports a defect in the product. On the other hand, if plaintiff also calls an expert to testify to a specific product defect, then Section 3 should not apply, since there is no need for an inference of defect in that situation.)

k. If both specific negligence and *res ipsa* are submitted to the jury, the jury instructions and verdict forms or interrogatories should be fashioned so that a "yes" answer on specific negligence requires the jury to "skip" the question regarding *res ipsa loquitur*.
(The same rule should obtain in a products liability case where the jury has found in favor of plaintiff on manufacturing, design, or warnings defect under Section 2 of the Restatement Third of Torts, Products Liability.)

l. Whether *res ipsa* applies or not, request the standard jury instruction to the effect that "the mere occurrence of an accident gives rise to no inference of negligence or fault." (*See* Iowa Uniform Civil Jury Instruction No. 700.8 (2004))

m. Does proximate cause exist between defendant's "exclusive control" over the instrumentality or the circumstances and the accident or injury at issue?
(Make sure that proximate cause exists between your client's "exclusive control" over the instrumentality or circumstances and the accident or injury at issue.)

n. Since *res ipsa* is a negligence concept, keep in mind that subsequent remedial measures are inadmissible pursuant to Iowa Rule of Evidence 5.407.

o. If plaintiff's expert(s) have been excluded, is expert evidence nevertheless required to establish the prima facie elements of *res ipsa*?
(If so, and if there is no such expert testimony, then *res ipsa* does not apply and cannot be used to get to the jury.)

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[8]In such a case, defense counsel may be able to take the position that, nevertheless, relevant and reliable expert witness testimony is still required to prove the *res ipsa* element of "this would not have happened in the absence of negligence." Expert testimony might also be needed on the "exclusive control" element. In this manner the mere use of *res ipsa* may not allow plaintiff to cross the "no expert" hurdle.

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> severally liable or severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

Thus, under the Third Restatement, a plaintiff pursuing a crashworthiness claim must prove that: (1) a product was defective under the standards set forth in Section 2 of the Third Restatement at the time of commercial sale or other distribution; (2) the defect was a substantial factor in increasing plaintiff's harm beyond that which would have occurred absent the defect.

The adoption of Section 16 in Iowa would provide a significant benefit for products manufacturers: allowing a plaintiff's comparative fault to be considered in assessing liability in an enhanced injury or crashworthiness case. Comment (f) to the Third Restatement relies on Section 17 of the Third Restatement and provides that:

> Plaintiff's fault is relevant in apportioning liability between the plaintiff and the product seller. The seriousness of the plaintiff's fault and the nature of the product defect are relevant in apportioning the appropriate percentages of responsibility between the plaintiff and the product seller. Accordingly, the contributory fault of the plaintiff in causing an accident that results in defect-related increased harm is relevant in apportioning responsibility between or among the parties, according to applicable apportionment law.

The time may be right for defense counsel to urge the Iowa Supreme Court to reexamine its holding in *Reed*.

In recent years, the Court has demonstrated a willingness to revisit and overrule prior precedent. See *McElroy v. ISU -- Another Example of the Iowa Supreme Court's Willingness to Reexamine Settled Law*, Thomas D. Waterman, The Iowa Defense Counsel Association Newsletter, Summer 2005, Vol. XIV, No. 2. Among the factors the Court will consider when deciding whether to overrule a prior decision are whether the Court was divided in its prior opinion, whether the opinion was based on flawed reasoning, and changes in the law. *McElroy v. State*, 703 N.W.2d 385, 393 (Iowa 2005). These factors all support overturning *Reed*.

As noted above, *Reed* was decided by a 5 to 4 margin just over one year after the Court had unanimously held that a plaintiff's comparative fault could be considered in an enhanced injury case. Three of the Justices that were on the Court at the time *Reed* was decided are still on the Court today: Chief Justice Lavorato, Justice Larson and Justice Carter. Justices Lavorato and Larson were in the majority in Reed, while Justice Carter authored the dissent. Given the strong dissent Justice Carter authored, one would expect that he would be in favor of adopting Section 16 of the Third Restatement. Thus, counsel advocating the adoption of that Section would need to obtain three other votes to reach the majority necessary for a change.

A strong argument could also be made that *Reed* was based on flawed reasoning and, particularly, that it is contrary to Iowa Code Chapter 668. As Justice Carter correctly noted in his dissent in *Reed*, Iowa Code Section 668.3 requires a plaintiff's fault to be compared in negligence and strict liability personal injury actions. Thus, the majority's decision in *Reed* is contrary to Iowa Code Chapter 668. The majority's decision also placed Iowa in the minority of courts across the country. The Third Restatement adopts the view of the majority of states that a plaintiff's comparative fault is relevant in a crashworthiness case. Moreover, Section 17 of the Third Restatement specifically identifies plaintiff's comparative fault as an affirmative defense. Put simply, there is no basis to continue to allow a plaintiff to avoid responsibility for his or her own actions that contributed to his or her injuries and enhanced injuries.

Although Section 16 is beneficial to products manufacturers seeking to use plaintiff's comparative fault as a defense, counsel should be aware that Section 16, when read as a whole, can be interpreted to shift the burden of proof to the defendant to show what portion of the plaintiff's injuries resulted from the product defect and what portion of the plaintiff would have sustained absent the alleged defect. Undoubtedly, plaintiff's attorneys will attempt to convince the courts to adopt this interpretation because it is to their benefit. When facing this argument, defense counsel must keep in mind that a plaintiff bears the initial burden under Subsection (a) of proving that the alleged defect was a "substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes."

Comment (a) to Section 16 notes that Subsections (b) and (c) do not apply until the plaintiff establishes increased harm. Moreover, Comment (b) specifically states that "the rule stated in Subsection (c) does not take effect until the plaintiff established under Subsection (a), by competent testimony, that the plaintiff's harm was increased as a result of the product defect." The Reporters Notes to Comment (d) are consistent with this view, noting that "Section 16(c) does not formally shift any burden of proof to the defendant." The same notes attempt to clarify the issue by asserting that the effect of Section 16(c):

> is that, if the plaintiff has established that the product defect increased harm over and above that which the plaintiff would have suffered had the product been non-defective, and if, at the close of the case, proof does not support a determination of the harm that would have resulted in the absence of the product defect, then the defendant is liable for all the harm suffered by the plaintiff.

With these facts in mind, counsel must carefully analyze the facts of each case and be certain to hold the plaintiff to his or her burden of proof to establish increased harm. Once a plaintiff does so, however, it becomes incumbent upon the defendant to segregate the injuries attributable to the product defect and those attributable to other causes. This places the defendant in a precarious

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p. If you are not successful in a dispositive motion with the court, do not forgot to persuasively argue the *res ipsa* elements to the jury.
(For example, if multiple successive persons have had control over the instrumentality which caused the injury, argue that there is no "exclusive control." If more than one entity has control over the instrumentality at the same time, argue that this prevents "exclusive control." Finally, as the dissent in *Clinkscales* makes clear, argue that what happened can, in fact, happen as a "mere accident" and in the absence of any negligent act.)

q. Did the jury ultimately render a verdict which allocated liability as between plaintiff and defendant or among more than one defendant?
(If so, and if the verdict is only based on *res ipsa*, you may be entitled to reversal of the judgment on post-trial motions as "exclusive" control has, *a fortiori*, not been proven.)

6. Conclusion

Res ipsa loquitur can be a nettlesome claim in certain cases. Although this argument often seems like an "afterthought" on plaintiff's counsel's part, and can sometimes be "piggybacked" onto other claims sounding in strict liability, negligence, or warranty, *res ipsa* needs to be carefully considered and skillfully defended. This may be especially true where plaintiff's expert witness testimony is weak or subject to exclusion. It is also likely that many courts do not have a full and correct understanding of this "rule of circumstantial evidence." A thorough understanding the law of *res ipsa* and dutiful insistence on its proper and limited application will go a long ways toward a successful defense of a *res ipsa loquitur* claim.

CAVEAT EMPTOR? - *JENSEN V. SATTLER* AND ITS EFFECT ON RESIDENTIAL REAL ESTATE SALES TRANSACTION CASES IN IOWA . . . *continued from page 3*

safely recite merely what they already know on a §558A disclosure form to comply with the law. The investigation required, the exercise of "ordinary care" and "good faith" to obtain and disclose information, is not a black and white standard, but rather is a fact-sensitive inquiry that can vary from case to case. What is clear is that sellers, attorneys and realtors need to be aware of this change in the law and take appropriate action. It would seem, at minimum, that sellers should now go beyond reporting merely what they already "know" when filling out the disclosure form and should actually inspect the property, as liability can be imposed for failing to disclose what they reasonably should have known. Realtors and attorneys should be on guard as well and make sure that their sellers are using "ordinary care" and "good faith" to find out about the condition of the property being sold and disclosing all relevant items on the disclosure form. The "ordinary care" and "good faith" requirement seems to lead toward a pre-sale home inspection obtained by the seller for purposes of the disclosure form, an added and possibly duplicative cost for a transaction where in general a careful buyer would have obtained an inspection of the home during the pre-closing period in any event.

The end result of *Jensen* is that sellers and their agents must now take action to protect the buyer. The obligation to inspect what is being transferred has itself been transferred. Sellers beware!

[4]Although the sellers in *Jensen* also owned the construction company which built the house, the Court did not distinguish *Jensen* from the prior decisions in *Sedgwick* and *Arthur* for that reason. Rather, the *Jensen* court distinguished *Sedgwick* on the basis that "the plaintiff in that case apparently did not bring a claim under the ordinary care prong of the statute," and distinguished *Arthur* as a "common law fraudulent misrepresentation claim, not a chapter 558A statutory nondisclosure claim." *Jensen*, 696 N.W.2d at 587. *Jensen* therefore does not appear to be limited to sellers who built the homes they sold.

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position of presenting its defense in alternative theories.

Initially, a product manufacturer must defend against the plaintiff's assertion that the product was defective. The product manufacturer must then turn around and argue that even if the product was defective the plaintiff's injuries were not increased because of the product defect. Finally, in order to avoid being held liable for 100% of the plaintiff's injuries, the defendant must establish which injuries were attributable to the alleged defective product versus which were attributable to other causes. While the Third Restatement may appear to create a dilemma for defendants, as a practical matter most crashworthiness cases already involve similar defense strategies. In these types of cases, defendants virtually always attempt to shift the vast majority of a plaintiff's injuries to causes unrelated to the alleged product defect.

On balance, adopting Sections 16 and 17 of the Third Restatement would level the playing field for defendants and bring Iowa in line with a majority of the states. Ultimately, allowing a plaintiff's fault to be considered in a crashworthiness case would be more fair for product manufacturers, especially in light of the fact that manufacturers could be held liable for 100% of a plaintiff's damages, regardless of the cause of the underlying accident. With this in mind, defense counsel handling an enhanced injury or crashworthiness case that has the right facts would be well advised to strongly consider asking the court to adopt Sections 16 and 17 of the Third Restatement.

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Transcript, Roberts hearing, day two, at page 52.

Judge Roberts also addressed the incoherence resulting from fragmented decisions when the high court does not speak with one voice through a unanimous decision. He noted that he would strive "to achieve consensus consistent with everyone's individual oath to uphold the constitution." Id., day three at page 27. He elaborated as follows:

> I do think, though, it's a responsibility of all of the justices, not just the chief justice, to try to work toward an opinion of the court.
>
> ****
>
> You don't, obviously, compromise strongly held views, but you do have to be open to the considered views of your colleagues. Particularly when it gets to a concurring opinion, I do think you do need to ask yourself, What benefit is this serving? Why is it necessary for me to state this separate reason? Can I go take another look at what the four of them think or the three of them think to see if I can subscribe to that or get them to modify it in a way that would allow me to subscribe to that?
>
> ***Because an important function of the Supreme Court is to provide guidance. As a lower court judge, I appreciate clear guidance from the Supreme Court.*** (Emphasis added).

Id.

A theme of humility pervaded Judge Roberts' answers. When asked about his judicial philosophy, he responded:

> I prefer to be known as a modest judge …. It means an appreciation that the role of the judge is limited; the judge is to decide the cases before them; they're not to legislate; they're not to execute the laws. Another part of the humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of *stare decisis.*

Id. day two at page 23. Judge Roberts further emphasized the value of collegiality on appellate courts, stating:

> Part of that modesty has to do with being open to the considered views of your colleagues on the bench. I would say that's one of the things I've learned the most in the past two years on the Court of Appeals: how valuable it is to function in a collegial way with your colleagues on the bench; other judges being open to your views; you being open to theirs.

Id.

Judge Roberts' humble approach to appellate judging resonates with those concerned that the judicial independence vital to our free society is increasingly undermined by widespread perceptions that "activist" judges are legislating rather than applying the law. Directly addressing such concerns, Judge Roberts states:

> When I became a lawyer, the proclamation they read for the graduates … referred to the law as the wise restraints that make men free.
>
> And judges are the same way. We don't turn a matter over to a judge because we want his view about what the best idea is, what the best solution is. It is because we want him or her to apply the law.
>
> They are constrained when they do that. They are constrained by the words that you choose to enact into a law -- in interpreting the law. They are constrained by the words of the Constitution. They are constrained by the precedents of other judges that become part of the rule of law that they must apply.

Id. at 48.

Iowans should be justifiably proud of the quality of our state's judiciary at all levels. The quality of judging elsewhere, however, affects public perception of the judiciary nationwide. Respect for the third branch of government will be enhanced through greater mindfulness of the apt observations of the new Chief Justice of the United States Supreme Court.

IDCA SCHEDULE OF EVENTS

2005-2006 Meeting Dates

December 2, 2005
IDCA Board Meeting
The Suites of 800 Locust
Des Moines, IA
10:45 a.m. Executive Committee
11:00 a.m. Board Meeting/Luncheon

February 2, 2006
IDCA Board Meeting
The Suites of 800 Locust
Des Moines, IA
10:45 a.m. Executive Committee
11:00 a.m. Board Meeting/Luncheon

April 7, 2006
IDCA Spring CLE Seminar
Des Moines Golf & Country Club
1600 Jordan Creek Parkway
West Des Moines, IA
8:30 a.m. – 4:30 p.m.
Topic TBA

April 7, 2006
IDCA Board Meeting
Des Moines Golf & Country Club
1600 Jordan Creek Parkway,
West Des Moines, IA
10:45 a.m. Executive Committee
11:00 a.m. Full Board Meeting/Luncheon

July 13-14, 2006
IDCA Board Meeting
The Suites of 800 Locust, Des Moines, IA
10:00 a.m. Board Meeting/Luncheon

September 27, 2006
IDCA Board Meeting
Des Moines Location TBA
10:45 a.m. Executive Committee
11:00 a.m. Full Board Meeting/Luncheon

September 27-29, 2006
42nd Annual Meeting & Seminar
Des Moines Location TBA

2005 ANNUAL

IDCA WELCOMES NEW MEMBERS

Hannah M. Rogers

Arthur Krimsky

Amanda T. Mestan

Eldwin A. Nichols

President-Elect/Program Chair Michael Thrall

2005-2006 IDCA Board of Directors

Mike Thrall presents Sharon Greer with the President's Plaque

Lifetime members Raymond R. Stefani & Leroy R. Voigts

Christine Conover (center) is presented with the "Eddie Award" by Sharon Greer (left) and Pam Nelson (right, daughter of Edward Seitzinger)

President Sharon Greer and Executive Director Bob Kreamer present Senator Stewart Iverson and Representative Chuck Gipp with the Public Service Award

MEETING & SEMINAR

IDCA would like to thank the following exhibitors for participating at the annual meeting and for sponsoring the welcome reception: Blackbox Visual Design, Capital Planning, Inc., IDEX, Inc., Minnesota Lawyers Mutual Inc. Co., Packer Engineering, Skogen Engineering Group, Inc. & Sweeney Court Reporting

Speakers at the 2005 Annual Meeting & Seminar

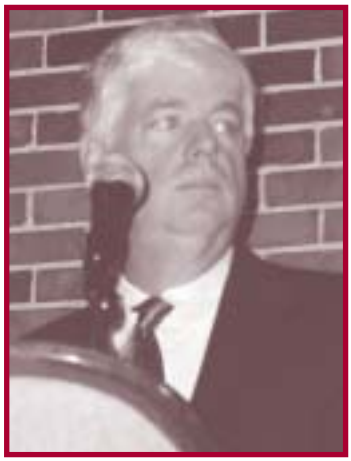
Attendees network at the Welcome Reception hosted by the IDCA Young Lawyers Committee

Skip Ames

J. Michael Weston

Rick Kraemer

Charles Harrington



Judge Wiggins

Brent Ruther

FROM THE EDITORS . . .

The role of the venerable doctrine of *stare decisis* in our judicial system was debated on a national stage this September during the Senate confirmation hearings of Chief Justice John G. Roberts, Jr. The nominee's colloquy with his Senate interrogators not only provides insight as to his approach to adjudication, but also freshly illuminates this timeless debate as courts of last resort, including our Iowa Supreme Court, continue to struggle with the circumstances under which settled case law should be overruled. Few had time to catch more than sound bites of the televised hearings, but a transcript of the four day proceeding is available online at **www.post-gazette.com/pg/05256/570627.stm**.

Under questioning by our own Senator Charles Grassley, Judge Roberts observed:

> You begin with a basic recognition of the value of precedent. No judge gets up every morning with a clean slate and says, Well, what should the constitution look like today? The approach is a more modest one, to begin with the precedents. ***Adherence to precedent promotes even-handedness, promotes fairness, promotes stability and predictability. And those are very important values in a legal system.***
>
> Those precedents become part of the rule of law that the judge must apply.
>
> At the same time, … *stare decisis* is not an inexorable command. If particular precedents have proven to be unworkable - they don't lead to predictable results; they're difficult to apply - that's one factor supporting reconsideration.
>
> If the bases of the precedent have been eroded … in the intervening years, [*ie*. by the overruling of other decisions] - that's another basis for reconsidering the precedent. At the same time, you always have to take into account the settled expectations that have grown up around the prior precedent. ***It is a jolt to the legal system to overrule a precedent*** and that has to be taken into account.
>
> ****
>
> ***The fundamental proposition is that it is not sufficient to view the prior case as wrongly decided.*** That's the opening of the process, not the end of the process. You have to decide whether it should be revisited in light of all these considerations. (Emphasis added)

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