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The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"

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The Iowa Supreme Court adopted important sections of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm in Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009). As a part of that change, the duty and causation analysis that would apply to every tort case alleging physical or emotional harm was significantly changed. The purpose of this article is to explore the relationship between duty and causation, to examine Iowa cases decided since Thompson, and to highlight strategic considerations for defense counsel.

Thompson v. Kaczinski.

In Thompson, plaintiff, a motorist, swerved to avoid components of a trampoline that were sitting in the road. The trampoline's owner had previously disassembled it and left it laying on the owner's lawn that was adjacent to the road. A few weeks later a windstorm blew the trampoline onto the road. The plaintiff motorist veered into a ditch and had an accident. The motorist alleged that the trampoline owner had been negligent.

Defendant filed a motion for summary judgment, and alleged that there was no legal duty under the facts, since the occurrence was "unforeseeable." The trial court granted summary judgment for defendant, and found that, as a matter of law, that it was "unforeseeable" that a thunderstorm would cause high winds that would, in turn, cause the trampoline to be blown out of the yard and onto the road. Therefore, the trial court concluded, the defendants owed no duty to the plaintiff motorist.

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The Iowa Supreme Court reversed. In doing so the Court adopted certain sections of the Restatement of Torts (Third), Liability for Physical and Emotional Harm. In addition to changing the duty analysis, the Court discarded the terms "proximate cause" and "substantial factor," and substituted a new test, "scope of liability"[1] to provide a limitation on an actor's liability. As a result, defense counsel must adapt to the new duty and causation analysis, and develop arguments to deal with these changes to present their client's defense to the jury.

The reshaping of the fundamental tort analysis by Thompson goes beyond the change from the "proximate cause" terminology to "scope of liability." In order to understand how Iowa law has changed, a review of Thompson's holding with respect to the elements of "duty" and "breach of duty" is necessary.

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1. In Thompson by discarding the terminology "proximate cause" in physical and emotional harm cases, the Court has ignored language set forth in Chapter 668 of the Iowa Code, a statutory enactment of the Iowa Legislature. That statute provides that:["T]he legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault." I.C.A. § 668.1(2).

WHAT'S INSIDE

I. DUTY.

The bedrock foundation of any tort claim based on negligence is the existence of a duty. The Court in *Thompson* adopted Section 7 of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm. That Section provides the test for when a duty will arise:

> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
>
> (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

In any negligence case, the first questions are, did the defendant owe a duty[2] to the plaintiff and if so, what is the nature of the duty? Once a duty has been shown, as well as a breach of duty, then the analysis turns to the issue of legal causation. If any one of these elements is not proven, then liability is not established.

Although separate, the duty analysis is closely related to the causation analysis. Probably the most famous case that discusses this interrelationship was the time-honored case of *Palsgraf v. Long Island Ry. Co.*[3] In 1924 Helen Palsgraf stood on the platform of a Long Island Railroad railway station waiting for her train. On the same platform many feet away a man carrying a package tried to board a train that was moving. The man appeared unsteady and about to fall. A railroad guard tried to assist the man to board the train by pushing him from behind. This caused the man to drop the package which, unknown to all but the man himself, contained fireworks. The fireworks exploded when they hit the rails. The explosion caused some scales near where Helen was standing to fall. One of the scales fell on Helen causing her injuries.

The majority of the New York Court of Appeals held the Railroad was not liable to Helen because the guard did not breach a duty *to her*. "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all." "If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, *with reference to her*, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, *with reference to some one else*." (Emphasis added.) "What the plaintiff must show is 'a wrong' *to herself*; i.e., a violation of her own right, and not merely a wrong *to some one else* . . . ." "The law of causation, remote or proximate, is thus foreign to the case before us." (Emphasis added.)

The dissent in *Palsgraf* took a different approach, arguing that the result turned on proximate cause, not negligence. "Is [negligence] a relative concept – the breach of some duty owing to a particular person or to particular persons?" "Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. *The act itself is wrongful*." (Emphasis added.) "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone." "Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain." "But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former."

The *Palsgraf* majority held the security guard owed no duty to Helen when he negligently pushed the man with the package. The dissent argued that negligence is negligence regardless of who or how someone is injured. The limitation on a person's liability is that the negligence must be the "proximate cause" of the damages.

Under the former Restatement 2nd approach "the conduct of the actor [had to be] negligent with respect to the other, *or a class of persons within which he is included*." REST 2d TORTS § 281. (emphasis added). Negligence was defined as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." REST 2d TORTS § 282. The Restatement 2nd focused on the actor's relationship to individuals or classes of persons in determining to whom a duty was owed. Risk was considered, but only in connection with determining to whom a duty was owed and whether that duty was breached. The actor had a duty only to those individuals or classes of individuals as to whom the actor's conduct created a "recognizable risk of harm." If, for some reason, the actor's conduct harmed someone who the actor could not reasonably anticipate would be injured, the actor was not liable to that person because he owed no duty to that person. REST 2d TORTS § 281, comment c. This is essentially the majority's analysis in *Palsgraf*.

An Iowa example of the prior duty analysis is *Bain v. Gillispie*, 357 N.W.2d 47 (Iowa App. 1984). In *Bain*, referee Jim Bain called a notorious foul at the end of the Iowa-Purdue basketball game in 1982. Many people felt that because of the foul call Iowa lost the game, thereby squelching its share of the conference title and ending it's post-season tournament possibilities. Gillispie owned a novelty shop in Iowa City that sold t-shirts with Bain's caricature on it with a noose around his neck. Bain sued for an injunction and damages. Gillispie counter-claimed alleging referee malpractice and claiming damages for loss of sales of Hawk-eye memorabilia since Iowa's season didn't continue. Bain moved for summary judgment on the counter-claim. The court analyzed the duty issue in Gillispie's counter-claim:

> Turning first to the negligence claim, the Gillespies argue that there was an issue of material fact of whether their damages were the *reasonably foreseeable consequence* of Bain's action. A prerequisite to establishing a claim of negligence is the existence of a duty. Negligence is the

2 The word "duty" is used here to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause. REST 2d TORTS § 4.

3 Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

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breach of legal duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks. It has been defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. *The standard established by the law is foreseeability of harm or probability of injury.* "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; *it is risk to another or to others within the range of apprehension.*" Justice Cardozo in *Palsgraf v. Long Island Ry. Co.,* 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). The law's standard is one of reasonable foresight, not prophetic vision. *Bain* at 49 (citations omitted, emphasis added)

It is beyond credulity that Bain, while refereeing a game, must make his calls at all times perceiving that a wrong call will injure Gillispies' business or one similarly situated and subject him to liability. The range of apprehension, while imaginable, does not extend to Gillispies' business interests. Referees are in the business of applying rules for the carrying out of athletic contests, not in the work of creating a marketplace for others. In this instance, the trial court properly ruled that Bain owed no duty. Gillispies have cited no authority, nor have we found any, which recognizes an independent tort for "referee malpractice." Absent corruption or bad faith, which is not alleged, we hold no such tort exists. As the trial court properly reasoned:

> This is a case where the undisputed facts are of such a nature that a rational fact finder could only reach one conclusion – *no foreseeability*, no duty, no liability. Heaven knows what uncharted morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling. If there is a liability to a merchandiser like the Gillispies, why not to the thousands upon thousands of Iowa fans who bleed Hawkeye black and gold every time the whistle blows? It is bad enough when Iowa loses without transforming a loss into a litigation field day for "Monday Morning Quarterbacks." There is no tortious doctrine of athletic official's malpractice that would give credence to Gillispie's counterclaim.

Bain v. Gillispie, 357 N.W.2d 47, 49-50 (Iowa App.1984).

Prior to *Thompson*, courts looked to see if there was a foreseeability of harm to the defendant because of the relationship of the plaintiff to the defendant. If so, then the defendant owed a duty of care to the plaintiff. Before *Thompson* the Court used three factors in deciding if a duty existed: (1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations. "Our previous decisions have characterized the proposition that the relationship giving rise to a duty of care must be premised on the foreseeability of harm to the injured person as 'a fundamental rule of negligence law.' *Sankey v. Richenberger, 456 N.W.2d 206, 209-10 (Iowa 1990)*. The factors have not been viewed as three distinct and necessary elements, but rather as considerations employed in a balancing process." *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009). "In the end, whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm." *J.A.H.*, 589 N.W.2d at 258 (cited by *Thompson*).

The problem with this approach, as noted by *Thompson*, is that the "foreseeability" inquiry is fact intensive and subjective, and is an issue peculiarly suited for a jury's determination. This is at odds with the view that whether or not a duty exists is uniquely a law issue for the court. There was a "cognitive dissonance" with the concept that duty is a law determination, but yet the underlying duty analysis was based on "foreseeability," a factual matter.

The Restatement 3rd PEH § 7 eliminates "foreseeability" of harm as one of the factors in the duty analysis. Rather, "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." REST 3d TORTS §7(a). Although this simplifies the duty analysis, it arguably establishes the existence of a duty in a wider variety of circumstances and situations, and this should be a concern to defendants. It no longer matters whether the physical harm to a particular person or class of people is foreseeable. Simply put, if the actor's conduct creates a risk of physical harm, the actor *must* exercise reasonable care. Although the concept of "foreseeability" has been removed from the duty analysis, it has not disappeared; it now plays a key role in the "breach of duty" element and will be considered by the trier of fact.

McCormick v. Nikkel, 2012 WL 1900113 (Iowa May 25, 2012) illustrates the first issue in determining if the actor owed a duty. Did the actor's conduct create a risk of physical harm? If the answer to this question is "no," then the actor owed no duty. If the answer to this question is "yes," then the actor had a duty to exercise reasonable care.

In *McCormick*, Little Sioux Corn Processors expanded its ethanol plant in 2006. Little Sioux bought the electrical equipment and hired Schoon to install it. In turn, Schoon hired Nikkel to actually hook up the wires in the metal cabinets where the equipment to control the flow of electricity in the system was located.

Nikkel was also supposed to install "fault indicators" inside the metal cabinets but, unfortunately, the holes in the mounting brackets were too small. Although Nikkel offered to do the extra work of drilling out the holes to make them the right size, Little Sioux declined the offer to save money, deciding to do that work itself. Little Sioux said it would also install the mounting brackets in the cabinets. Having finished all the hook up work it could do at the time Nikkel left the jobsite.

When Nikkel left it turned on the electricity. The cabinets were closed and in a safe condition. They were bolted shut with penta-

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head bolts that could only be removed by a special penta-head socket wrench. Little Sioux had bought such a wrench along with the electrical equipment. After Nikkel left Little Sioux had exclusive access to and control over the cabinets and the equipment inside them. The cabinets also had high voltage warning signs on them.

In *McCormick* there was a critical issue of fact as to whether Nikkel told Little Sioux it had turned on the electricity. A Nikkel employee, Buford Peterson, said he energized the line in the presence of Russell Konwinski, who was Little Sioux's maintenance manager, and another Little Sioux employee. But, Konwinski denied he was present for this. Konwinski also said, "I had asked Buford Peterson to tell when the power would be turned on but I was not told by him before November 13, 2006 [the day of the accident], that it was on."

About a week after the lines were energized, Little Sioux's employees were doing the job of opening the boxes, removing the mounting brackets, drilling out the holes and re-installing the brackets inside the cabinets when one of them was electrocuted. The employee sued Nikkel, alleging it had control of the cabinet *when the line was energized* and it failed to warn him the equipment was energized.

The Court held the defendant owed no duty to the plaintiff because Nikkel didn't create a "risk of physical harm" when it energized the line that was then contained in a locked and secure box. There was nothing wrong with Nikkel's work when it left. Nikkel created no danger by energizing power lines that were safely in a locked box.[4]

The Restatement 3rd provides that , "[A]n actor's conduct creates a risk when the actor's conduct or course of conduct results in greater risk to another than the other would have faced absent the conduct. REST 3d TORTS-PEH § 7 Comment o. "The risk arose [in the *McCormick* case] *only* when Little Sioux used the penta-head wrench to gain access to the switch gear and allowed an untrained worker (McCormick) to work on it without first turning the power off." *McCormick* footnote 4 (emphasis added).

The dissent in *McCormick* argued that, "The existence of Nikkel's duty turns on whether it created a risk of injury *when it energized the switchgear boxes before leaving the work site without notifying Konwinski* – not on whether it connected the wires to the switchgears badly." (Emphasis added.)

> This duty of a contractor to exercise reasonable care is not, as the majority opinion suggests, one that arises only when the contractor does bad or defective work. The duty arises instead whenever a risk of injury to others arises from the contractor's work without regard to whether the work is performed badly. This principle explains why a motorist owes a duty of care to others while driving (not just when driving badly), and it explains why a surgeon owes a duty of care while performing surgery (not just when operating badly). The question of whether the driver or the surgeon has failed to use reasonable care under the circumstances addresses not whether a duty was owed in the first place, but whether that duty was breached."

This is similar to the approach of the dissent in *Palsgraf*: "The proposition is this: Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." *Palsgraf*, 248 N.Y. 339, at 350; 1662 N.E. 99, at 103. This duty rule is an exact parallel to Section 7 of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm, adopted by the Iowa Court in *Thompson*. The dissent in McCormick would have found that Nickle owed McCormick a duty. "Accordingly, even if Nikkel did not owe to McCormick any special duties as a possessor of land, or as a contractor temporarily in control of the construction site, it still owed a general duty of reasonable care under section 7 of the Restatement (Third) because it created a risk of severe injury or death by energizing the switchgears and failing to notify Konwinski as requested. McCormick at *11.

The dissent in *McCormick* concluded that a fact issue was generated as to whether Nikkel *breached* the duty of reasonable care.

> Whether Nikkel exercised reasonable care under the circumstances by locking the cabinet, relying on warnings posted on the cabinet, and expecting Little Sioux employees to follow mandatory OSHA and company safety policies, are matters related to foreseeability, breach of duty, and scope of liability – all issues properly reserved for a jury's assessment. Accordingly, I would reverse and remand for trial." *McCormick* at 13.

Thus, the dissent in *McCormick* would have found a duty on the part of Nikkel as a matter of law, but would have left the determination of whether that duty was breached to the jury.

REST 3d TORTS §7(b), also adopted by *Thompson*, sets forth a narrow exception to the general duty rule. That exception provides that there can be particular classes of cases in which an "articulated countervailing principle or policy warrants denying or limiting liability." In these so-called "exceptional cases" a court may do one of two things. A court may decide that 1) the defendant has no duty at all to the plaintiff, or 2) the ordinary duty of reasonable care requires modification.

Duty remains a mechanism for limiting liability only when policy matters are considered and the court can fashion a duty/no duty determination for an entire class of cases. "Whether a duty arises out of a given relationship is a matter of law for the court's determination." *Thompson* at 834. For example, under established Iowa law a social host does not have a duty to the public not to serve a social guest to the point of intoxication. *See, e.g., Brenneman v. Stuelke*, 654 N.W.2d 507 (Iowa 2002).

Whether a court finds an exception to the general duty rule involves consideration of public policy issues. These are matters of

4 Within the duty analysis, who decides whether an actor's conduct creates a risk? The Restatement 3rd §37, comment c suggests the jury makes this decision. "[T]he fact finder would have to determine whether an actor's conduct created a risk of harm as a predicate for determining whether a duty exists under § 7 or whether a duty, if any, must be found in this Chapter." REST 3d TORTS-PEH § 37 Comment c.

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general applicability and involve the drawing of bright lines of when an actor may or may not be liable. They are decisions for a court based upon the undisputed facts of a case.

Reasons of policy and principle justifying a departure from the general duty to exercise reasonable care do not depend on the foreseeability of harm based on the specific facts of a case. *Id."* *Thompson* at 835 citing Restatement (Third) § 7 cont. j. In other words, an actor's conduct might well create a risk of physical harm but, for policy reasons, the actor will not be held liable to the injured person or will be held to a different measure of conduct than reasonable care.

McCormick v. Nikkel supra, also discussed application of this exception to the general duty rule. The *McCormick* Court found such an "exceptional case" and, in addition to finding no duty because Nikkel did not create a risk of physical harm, also held Nikkel owed no duty to the plaintiff based upon Restatement (Third) §7(b). The Court noted that, historically, liability follows control. The Court characterized this as the "control rule." The reason for the rule is the person who controls the work site is in the best position to assess the risks and to take safety precautions. Thus, when a landowner hires an independent contractor and turns complete control of the project over to the contractor, the landowner is not liable for an injury to an employee of the independent contractor. A property owner owes no duty to the employee of an independent contractor if the owner does not retained any control. The Court pointed out that, "This law [the "control rule"] is of long standing in Iowa." The Court observed that the *McCormick* case presented the "flip side" of the landowner/independent contractor coin because in *McCormick*, an employee of the *landowner*, Little Sioux, sought recovery from the *independent contractor*, Nikkel.

The Court said the "control rule" is an "articulated countervailing principle or policy" that allows a court under Restatement (Third) §7(b) to "modify or eliminate" the ordinary duty stated in §7(a). "Simply put, the cases involving parties that turn over control of premises to another party are 'a category of cases' where 'an articulated countervailing principle or policy' applies." When Nikkel left the jobsite and turned control of the equipment back to Little Sioux the electrical equipment was safe and secure. Little Sioux had complete control of the cabinets *when the accident happened*. "[W]e conclude that the control principle means Nikkel, the subcontractor, owed no general duty to McCormick, the employee of the property owner that had reassumed control of the equipment and the site." The Court distinguished other owner-contractor cases where the contractor performed bad or defective work. In a "bad work" case, the negligence happens at the time the "bad work" is done. But, in a "failure to warn" case like *McCormick* the failure happens continuously over time. As such, situations can arise where later parties may be in a better position to warn potential victims. Thus, the duty to warn fits well for the "control principle." The Court drew an analogy to Restatement (Third) of Torts: Prods. Liab. § 5, at 130 (1998) which eliminated the liability of suppliers of component part who don't have anything to do with the design or manufacture of the final product and whose component isn't defective. Such a supplier has, in effect, simply given up control of the part to the assembler who is in the best position to warn the public about the dangers of the final product which is probably made up of many different component parts supplied by many different suppliers.

The Court admitted in a footnote in *McCormick*, though, that, "[O]f course, review of specific facts may be necessary to determine that there has been a complete transfer of control and that the claim does not involve defective work performed by the contractor. Nonetheless, we are still dealing with a "category of cases." *Id.* at fn. 5.

Thus, the Court held Nikkel owed no duty to McCormick both because no duty arose under §7(a) since Nikkel did not create a risk of physical harm by energizing electrical equipment inside secure cabinets and because a contractor "turning control of the premises over to someone else" is a category of cases where as a policy (or precedent) matter no duty should apply under §7(b).

The dissent in *McCormick* took a different approach, parallel to the dissent in *Palsgraf*. "[T]he majority's analysis of the general duty question demonstrates a fundamental misunderstanding of the distinction between duty and scope of liability and results in a conflation of the two issues." The dissent argued that the case did not present "a category of cases where 'an articulated countervailing principle or policy' applies."

> I find no articulated countervailing principle or policy that warrants denying or limiting the liability of electrical contractors as a class of actors for risks of injury created by their own acts or omissions at a construction site. Although Nikkel did not control the construction site or the particular task performed by McCormick at the time of his injury, the McCormicks contend Nikkel owed a general duty to exercise reasonable care *when it energized the switchgears* and failed to inform Konwinski despite having been asked to do so. (Emphasis added.)

The dissent took the position that a situation where "a subcontractor that properly performs electrical work on a jobsite, then locks up the work and transfers control to the property owner [does not owe] a duty to an employee of the owner electrocuted six days later when the owner fails to de-energize the work site in contravention of various warnings and regulations" is not a clear, bright-line rule of law that would apply to a particular class of cases.

The dissent pointed out that the majority admitted there can be fact issues in some cases concerning how much control was actually transferred and whether the contractor performed "bad work." As such, the dissent argued, " . . . the majority effectively concedes that the existence of a duty will turn on fact questions in particular cases. On this point, the majority confuses its duty analysis with the analysis of scope of liability. 'When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability." Restatement (Third) § 7 cmt. *a,* at 78." *McCormick* at 13.

Instead of finding no duty, another approach a Court could take under §7(b) is to modify the "reasonable care" standard. The "reasonable care" standard is the "default" standard. [See also DAN B. DOBBS, THE LAW OF TORTS § 227, at 578 (2000)

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("Among strangers ... the default rule is that everyone owes a duty of reasonable care to others to avoid physical harms.") (footnote omitted); REST 3d TORTS-PEH § 7]. For certain classification of cases this "reasonable care" standard has been modified in Iowa. For example, a physician "must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances."[5] A lawyer "must use the degree of skill, care and learning ordinarily possessed and exercised by other attorneys in similar circumstances." And a beer and liquor licensee had it's duty changed by the Dram Shop Act such that it must not sell and serve an alcoholic beverage to a customer who it knows or should know is or would become intoxicated.

II. BREACH OF DUTY

After a "duty" is established, the next element of any negligence case is "was there a breach of duty?" *Thompson v. Kaczinski* addresses this element as well. Notably, the fundamental "duty," "breach of duty" and "causation" analysis has been retained.

The "breach of duty" element is where the fact finder becomes involved in the process. Whether a legal duty is breached under the circumstances of the particular case is an issue of fact for the fact finder to determine.

Section 3 of the Restatement (Third), which was adopted by the Court in *Thompson*, defines "negligence:"

> § 3. Negligence
>
> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

The Restatement 2nd defined negligence as "conduct which falls below the standard established by law for the protection of others against *unreasonable* risk of harm." (emphasis added.).[6] To be an unreasonable risk, the magnitude of the risk had to outweigh the utility of the act . The Restatement 2nd gave factors that the fact finder could use to determine the utility[7] of the actor's conduct and the magnitude of the risk.[8]

The breadth of the risks created by the actor's conduct was interpreted broadly. All normal and ordinary hazards were included as being within the scope of the risk created by the actor's conduct.

The conduct of the actor was always compared to the hypothetical conduct of the mythical "reasonable man" who, by definition, always exercised reasonable care. "The standard of conduct to which [the actor] must conform to avoid being negligent is that of a reasonable man under like circumstances."[9]

The Restatement Third provides a list of three factors to consider in determining whether the actor has exercised reasonable care:

1. The foreseeable likelihood that his conduct will result in harm,
2. The foreseeable severity of any harm that may ensue, and
3. The burden of precautions to eliminate or reduce the risk[10] of harm.[11]

Defense counsel can use these factors to develop arguments on why a defendant has exercised reasonable care in a particular case.

It is noteworthy that the term "foreseeable" that was dropped from the "duty" element in the Restatement Second, now reappears in the Restatement (Third) as a matter for the finder of fact to decide when determining whether the defendant breached the relevant duty. This is consistent with the analysis that foreseeability is fact intensive and is uniquely a jury issue.

"The assessment of the foreseeability of a risk is allocated by the Restatement (Third) to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care." *Thompson* at 835. "A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination." *Id.*" *Thompson* at 835. "Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small

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5 Thus, the modified duty applicable to medical professionals, which employs customary rather than reasonable care, reflects concerns that a lay jury will not understand what constitutes reasonable care in the complex setting of providing medical care and the special expertise possessed by professionals. REST 3d TORTS-PEH §7.

6 In the Restatement2d, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others. REST 2d TORTS § 282.

7 (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct. REST 2d TORTS §292.

8 (a) the social value which the law attaches to the interests which are imperiled;
(b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;
(c) the extent of the harm likely to be caused to the interests imperiled;
(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm. REST 2d TORTS §293.

9 REST 2d TORTS §283.

10 Blacks Law Dictionary defines "risk" as, "The uncertainty of a result, happening, or loss; the chance of injury, damage, or loss; esp., the existence and extent of the possibility of harm." Black's Law Dictionary (9th ed. 2009).

11 When you are defending, in an appropriate case, make sure you present evidence of the burden of precautions to eliminate or reduce the risk of harm.

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changes in the facts may make a dramatic change in how much risk is foreseeable . . . . [C]ourts should leave such determinations to juries unless no reasonable person could differ on the matter."

Restatement (Third) of Tort: Liab. for Physical Harm, § 7, cmt. j, at 97-98.

This is the essence of the risk concept of the Restatement 3rd. It is the "risk-benefit test" or "cost-benefit test" for negligence. It is a balancing approach. "Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages." Restatement Third § 3, comment e. The disadvantage of the actor's conduct is the magnitude of the risk, which is a combination of the foreseeable likelihood of harm and the severity of the harm. The advantage to the actor is not having to change his conduct so as to take precautions against the harm. Those precautions might involve financial burdens. They might involve time burdens. They might involve extra work. They might involve simple inconvenience. Do the disadvantages outweigh the advantages in a particular situation? If the answer is "yes," then the actor has breached his duty. If the answer is "no," the actor hasn't breached his duty. The trier of fact makes this decision, most typically the jury.

If the foreseeability of harm is small and whatever harm might happen is not severe and the burden to eliminate or reduce whatever little harm might happen is great, a fact finder could conclude the defendant did not breach its duty and, therefore, did not act negligently. But, where the foreseeability of harm is great and the harm that could happen is severe and it would not have taken much for the defendant to have taken precautions to eliminate or reduce the risk, a fact finder could conclude the defendant breached its duty and, therefore, did act negligently. As always, there are an infinite number of gray areas between these extremes.

If the Court decides the defendant owed a duty to plaintiff and that duty was reasonable or ordinary care *and* the jury decides the defendant did not act like a reasonable person under the circumstances, then the jury will find the defendant was negligent.

III. CAUSATION

The final element of every negligence case is causation. Causation remains as an element to be proven by plaintiff, but the analysis was significantly changed by *Thompson v. Kaczinski* and its adoption of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm. The "proximate cause" terminology which has been a part of the lexicon in negligence cases in Iowa for over a hundred and fifty years has now been abandoned where a physical or emotional injury is claimed. This element is now referred to merely as "causation." In addition, the "substantial factor" test of proximate cause has been eliminated and has been replaced by "scope of liability."

Under the Restatement Third causation is broken down into two elements – factual cause and scope of liability.

> § 26. Factual Cause
>
> Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.

The Restatement 3rd defines *factual* cause as harm that "would not have occurred absent the conduct." Restatement 3d §26. This is the classic "but for" test of causation and on this test the Restatement 3d is consistent with prior law.

The *legal* cause element of causation is now termed "scope of liability."

> § 29. Limitations On Liability For Tortious Conduct
>
> An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.

Not only was *Thompson* a sea change of Iowa law with respect to duty, it also announced a new calculus for the determination of the *prima facie* element of causation in every tort case claiming physical or emotional injury. "An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm *within the scope of liability*, unless the court determines that the ordinary duty of reasonable care is inapplicable." Restatement 3d §6, Liability For Negligence Causing Physical Harm.

Legal causation obviously requires something more than mere "but for" cause. Otherwise liability would be limitless. There must be reasonable limits to an actor's liability. Just because an actor is negligent doesn't mean the actor should be liable for all harms caused to all people over time for the endless chain of events the tortious conduct put into motion. The Restatement 2nd limited the actor's liability to those persons to whom the actor owed a legal duty, like the majority in *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928). Under Iowa law before *Thompson*, the rule was that an actor's conduct was the proximate or legal cause of harm to another if (1) his conduct was a "substantial factor" in bringing about the harm and (2) there was no other rule relieving the actor of liability because of the manner in which his negligence resulted in the harm. *City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11, 18 (Iowa 2000).

The Restatement 3rd provides that the way in which to limit an actor's liability for tortious conduct is through the standard of "scope of liability" rather than by limiting an actor's duty. This approach was the approach taken by the dissent in *Palsgraf*. An actor is liable for only "those harms that result from the risks that made the actor's conduct tortious." Restatement 3rd §29.

The issue of "scope of liability" will not be present in most cases. In fact, most tort cases involving negligence resulting in physical or emotional harm will not warrant an instruction on scope of liability. In most cases the fighting issues will be whether the defendant breached a duty of reasonable care to the plaintiff and whether the defendant's breach was a factual cause of the plaintiff's medical problems and other damages. "Scope of liability" may become an issue in cases involving odd or unusual facts or quirky circumstances, the "chain of causation" cases or the "one-in-a-million" happenstance. As discussed supra, *McCormick* was one such example.

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The reporters for the Restatement 3rd wrote that most of the cases where scope of liability is an issue involve persons who are within the scope of *some* harm, but who have been injured from a risk that wasn't one of the risks that made the actor's conduct tortious in the first place. A rule that says there is no duty to an "unforeseeable plaintiff" doesn't work well. As the authors of the Restatement 3rd wrote, "Although pronouncements of no duty to unforeseeable plaintiffs have some appeal, there is awkwardness in stating that the actor had a duty not to cause a certain range of harm, but had no duty to avoid causing the type of harm that actually occurred. In short, an unforeseeable-plaintiff rule is not very helpful in addressing most scope-of-liability issues." Another problem with an "unforeseeable plaintiff" rule is that it, once again, mixes what is typically thought to be a jury issue, foreseeability, with the determination of duty, which is a legal issue for the court to decide.

Another issue involves the proper breadth of the scope of liability. "Physical harm" means the physical impairment of the human body ("bodily harm") or of real property or tangible personal property ("property damage"). REST 3d TORTS-PEH § 4. "Risk is explained in § 3, Comment *e*, as consisting of harm occurring with some probability. The magnitude of the risk is the severity of the harm discounted by the probability that it will occur. For purposes of negligence, which requires foreseeability, risk is evaluated by reference to the foreseeable (if indefinite) probability of harm of a foreseeable severity." REST 3d TORTS-PEH § 29, comment d.

Before the jury reaches the issue of scope of liability, it has already found that the defendant has breached its duty. The jury has found that, on balance, the disadvantages of the defendant's conduct, or the magnitude of the risk, outweighs the advantages of not having to take precautions against the harm. What the jury needs to ask itself at this point is, "What are the harms that could have come about by the defendant's conduct? What are the harms that the defendant risked by acting the way he did? Are those one of the harms that could have been foreseeable when the defendant acted? Is it a harm that the defendant should have bothered to take precautions to eliminate or reduce the risk of coming about?" "If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm." REST 3d TORTS-PEH § 29, comment d.

"To apply this rule requires consideration, at an appropriate level of generality . . . of: (a) the risks that made the actor's conduct tortious, and (b) whether the harm for which recovery is sought was a result of any of those risks." REST 3d TORTS-PEH § 29, comment d. But, what is an "appropriate level of generality?" On the one hand, broadly speaking, the risk is of personal injury or property damage. But, personal injury or property damage is involved in all cases that arise under the Restatement Third. To characterize the risk this broadly would provide no limit on the scope of the defendant's liability.

The breadth of "scope of liability" under the Restatement 3d analysis was the primary issue in *Hill v. Damm*, 804 N.W.2d 95 (Iowa App. 2011). In *Hill*, discussed in more detail *infra*, a directed verdict for defendant was reversed on the basis of the general nature of the harm under the scope of liability analysis. At trial the court felt that the risk of harm was that the plaintiff, a school bus-riding, teenage girl who was engaged in an affair with an older man, would be sexually assaulted; in actuality her murder was arranged by the abuser. The Iowa Court of Appeals in *Hill* found that the nature of the harm was physical harm to the Plaintiff, and not just that she was likely to be sexually assaulted or abused.

With respect to the general nature of the risk of harm under the Restatement (Third) analysis of scope of liability, the reporters noted:

> The risk standard is defined with respect to risks of harm, while the "type of harm" can be described at varying levels of generality. It can also be described by including some degree of detail about how the harm occurred. In both Illustrations 2 and 3, the risk of harm might have been described generally as a risk of personal injury. Alternatively, it might have been described more specifically—as cuts, bruises, and internal injuries resulting from concussive forces that propelled metal into Alan in Illustration 2, or as a broken toe due to the force of a dropped shotgun that fell onto the toe in Illustration 3. Illustration 2 employs the general characterization, while Illustration 3 employs a narrower characterization, closer to the one provided in this Comment.

REST 3d TORTS-PEH § 29.

For the proper breadth of the scope of liability the Reporters employ a "reasonableness" test: is the harm that occurred one that logically follows from the risks created by the tortuous conduct? Some harms may result from tortuous conduct, but do not subject the actor to liability. Comment d of the Restatement (Third) discusses this issue:

> *Thus, the jury should be told that, in deciding whether the plaintiff's harm is within the scope of liability, it should go back to the reasons for finding the defendant engaged in negligent or other tortious conduct.* If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm. When defendants move for a determination that the plaintiff's harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining that conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.
>
> The standard imposed by this Section is often referred to as the requirement that the harm be "within the scope of the risk," or some similar phrase, for liability to be imposed. For the sake of convenience, this limitation on liability is referred to in the remainder of this Chapter as the "risk standard."

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REST 3d TORTS-PEH § 29.

The manner in which the harm happened can be important in determining whether the harm was within the risks created by the conduct. This necessarily includes an examination into the circumstances surrounding the way in which harm came about, as well as the type of harm.

> Some aspects of the manner in which the harm occurs are relevant to a determination of the scope of an actor's liability … Mechanisms are important so long as they bear, in a general and reasonable way, on the risks that were created by the tortious conduct in the circumstances that existed at the time. (Restatement (Third) Torts, § 29, comment o).

In an unusual or bizarre set of circumstances, the result flowing from the tortious conduct may not fall within the scope of liability. However, the Restatement (Third) warns us that simply because a foreseeable harm came about in an unusual fashion does not insulate the actor from liability. In other words, an unusual mechanism of injury does not *per se* remove a particular harm from an actor's scope of liability. But in a particular case it can be something for the jury to consider in deciding if the harm was within the scope of liability.

"Repetition of defendant's conduct" is another test under the Restatement (Third) that can be used in the scope of liability analysis. That is, is the same harm likely to happen to another victim if the tortfeasor repeats his act? If not, then the result of the actor's conduct should not fall within the "scope of liability."

Several Iowa cases subsequent to *Thompson* have discussed the concept of "scope of liability." A quick review of these cases is instructive.

a. *Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839 (Iowa 2010).*

Royal Indem. Co. is an important decision, since the appellate court reversed a $39 million plaintiff's verdict based on the absence of the "scope of liability" element alone. The case arose out of a warehouse fire that destroyed new product inventory being stored by Deere & Co. After the insurance companies paid the losses, a property damage subrogation action was filed against Factory Mutual (FM). The suit claimed that FM's negligent inspection of the premises either resulted in the subsequent fire, or allowed the building's extinguishing system to be so faulty as to be incapable of putting out or limiting the fire damage.

In *Royal Indem. Co.*, the Iowa Supreme Court reversed the plaintiff's verdict and dismissed the case. It did so because plaintiffs failed to prove that FM's conduct "increased the risk of loss" to Deere's product. *Id.* at 853. There was a failure of proof because plaintiffs could not prove what the cause of the fire was, and could not prove why the fire suppression system did not work. Although the decision was based on the absence of the "scope of liability" element of the causation analysis, it could be argued that the result would have been same under prior law, i.e., that if there was no proof of what the cause of the fire was, then "proximate cause" was absent as a matter of law. It is also interesting to note that the case could have been decided based on the absence of *cause in fact* or "but for" cause as well, under either the prior "proximate cause" analysis or the new Restatement Third analysis. *Royal Indem. Co.* is a good illustration of how the various factors and elements of causation overlap. As a result, defense counsel needs to be ready to spot these issues and make all relevant alternative arguments.

b. *Brokaw v. Winfield-Mt. Union Community School Dist.*, 788 N.W.2d 386 (Iowa 2010).

In *Brokaw*, plaintiff and the defendant were high school basketball players. In a high school basketball game McSorley struck Brokaw. McSorley got a technical foul and was ejected from the game. Brokaw sued McSorley alleging the intentional tort of assault and battery. He also sued McSorley's school district for negligent failure to control McSorley's conduct. There was evidence at trial that McSorley was an intense player who had a "short fuse" but there was no evidence he was an assaultive-type of player.

In evaluating the school district's liability, the Supreme Court analyzed the duty element using Thompson's Restatement Third approach. It started with the "default" duty – the duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. Then the Court asked, "is this an exceptional cases where the general duty of reasonable care won't apply?" The Court turned to the definition of an "exceptional case." "An exceptional case is one in which 'an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.'" *Thompson* at 835. The Court noted that the School District wasn't arguing that coaches as a class have no duty to control the actions of their players. The Court could find no "countervailing principle or policy" to eliminate or modify the "default" duty. Thus, the Court concluded that the general duty to exercise reasonable care applied.

Next, the Court addressed the issue of whether the School District breached its duty. The Court turned to the Restatement Third of Torts §19 – Conduct that is Negligent Because of the Prospect of Improper Conduct by The Plaintiff or a Third Party. *Brokaw* dealt with the situation where a third person (the basketball player), not the defendant (the school district), committed the improper act. The Court applied Restatement (Third) §19.

> The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.

"This section imposes liability where the actions of the defendant "increase the likelihood that the plaintiff will be injured on account of the misconduct of a third party." *Id.* §19 cmt. *e*, at 218;" *Brokaw* at 391.

The court noted the Restatement Third acknowledged "that in this situation, there is not a clean delineation between negligence and scope of liability. Restatement (Third) § 19 cmt. *c*, at 216-17 ("[T] he issues of defendant negligence and scope of liability often tend to converge.")." *Brokaw* at 392.

As a review, §3 of the Restatement set for the three primary factors for a *fact finder* to consider in deciding whether a person breached a duty:

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1. The foreseeable likelihood that the person's conduct will result in harm,
2. The foreseeable severity of any harm that may ensue, and,
3. The burden of precautions to eliminate or reduce the risk of harm.

Brokaw quoted a comment from the Restatement 3d which tailored these three factors to the situation where a third party, not the defendant, commits the injurious act.

> This Section is to a large extent a special case of § 3, and findings of defendant negligence under this Section hence largely depend on consideration of the primary negligence factors set forth in § 3. One factor is the foreseeable likelihood of improper conduct on the part of the plaintiff or a third party. A second factor is the severity of the injury that can result if a harmful episode occurs. The third factor concerns the burden of precautions available to the defendant that would protect against the prospect of improper conduct by the plaintiff or a third party …

Restatement (Third) § 19 cmt. *d*, at 217.

The Court noted that the Restatement 3rd cautioned against requiring excessive precautions for the somewhat foreseeable improper conduct of third parties. The Court adopted the language from a footnote to Section 19 for the standard. "The risk is sufficiently foreseeable to provide a basis for liability when "the actor [has] sufficient knowledge of the *immediate circumstances* or the *general character of the third party* to foresee that party's misconduct." *Brokaw* at 393-94 citing Restatement (Third) §19 cmts. g, h, at 220.

In the context of a sporting event, the court observed that there is the ever-present danger that an athlete could pop off suddenly and strike an opposing player. But, it is only when the "immediate circumstances or the general character of the player" should alert the coach that an assault is foreseeable that the coach needs to take action and bench the player.

"The plaintiffs seek to frame the issue as whether WMU could reasonably foresee that McSorley *could* act in an unsportsmanlike manner sufficient to potentially cause injury to another, while the trial court framed the issue as whether WMU could foresee that McSorley *would* intentionally strike another player in a violent fashion. *Brokaw* at 393. "Consistent with both the Restatement (Third) and *Godar,* the district court posed the proper question in determining whether a breach of duty occurred, i.e., whether the harm that occurred here-McSorley's intentional battery-was a foreseeable risk under the circumstances. *Brokaw* at 393.

"The question of whether WMU breached its duty of care turns on WMU's knowledge of McSorley's *general character* or the nature of the *immediate circumstances*, a question of fact. Restatement (Third) § 8, at 103. *Brokaw* at 393.

As to McSorley's general character, there was some evidence McSorley was an intense player who had a temper. But there was other evidence that he had never fouled out of a game, wasn't a discipline problem and didn't have a reputation as an aggressive player. The "evidence does not necessarily mandate a factual finding as a matter of law that based on knowledge of McSorley's general character it was foreseeable he was likely to commit battery on other players." *Brokaw* at 394.

As for the "immediate circumstances" prong Brokaw claims McSorley took a swing at another player in the game and committed an undercutting foul. The trial Court, after viewing the video tape of the game found both these claims unsubstantiated. Thus, the trial court found there were no "immediate circumstances" that would impose liability on the school district.

"On these factual issues, the district court determined that "WMU officials did not know, nor in the exercise of ordinary care should have known, that [McSorley] was likely to commit a battery against an opposing player." *Brokaw* at 393-94.

c. Langwith v. American Nat. General Ins. Co., 793 N.W.2d 215 (Iowa 2010).

In *Langwith*, the issue was the extent of the duty owed by an insurance agent to his client. In *Langwith* there was a loss, and the insured subsequently filed an action against his agent alleging that the agent did not procure for him the proper type or amount of insurance. The case illustrates how a court can modify the general duty of reasonable care.

Before *Langwith* an insurance agent had a duty to use reasonable care in procuring the insurance that the insured asked for. But if, and only if, the insurance agent held himself out as an insurance specialist or consultant and received additional compensation for doing so could the agent be held to this greater duty. *Langwith* changed this. It held that if there was an agreement between the agent and the insured to render services beyond the general duty to obtain the coverage requested then the agent has a duty to perform with the skill and knowledge normally possessed by insurance agents under like circumstances

The Iowa Legislature subsequently abrogated the *Langwith* rule by passing Iowa Code §522B.11 which reverted the agent's duty back to the prior, *Sandbulte* standard. Since the substantive rule of law established by Langwith was later abrogated by a statute enacted by the Iowa Legislature, its legal authority with respect to the Restatement (Third) could be questioned.

d. Hill v. Damm, 804 N.W.2d 95 (Iowa App. 2011).

In *Hill*, a thirteen year old eighth grade girl intentionally got on the wrong school bus after school one day. After she was discovered on the wrong bus she insisted on being let off at the wrong stop which was near the place of business of an older man, David Damm, with whom she had been having an affair. Her parents had recently had her bus route changed so as to drop her off close to home so she could be watched after she got off the bus. There was evidence that some employees of the bus company, First Student, knew that the older man presented a danger to the thirteen year old. When the girl arrived at the man's place of business, she was taken to Illinois by prearrangement with the man's friend and murdered.

The trial court granted First Student's motion for directed verdict

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on the grounds that her murder-for-hire was outside the scope of the bus company's liability. The bus company argued that no one foresaw a risk that the girl would be murdered. The girl's estate argued that there was a foreseeable risk that the girl would be harmed in some fashion by the molestation that was likely to happen. The Court of Appeals reversed, holding a jury question was generated.

> The question we must decide is: At what level of generality should the type of harm in this case be described? The plaintiffs argue, "If the risk is understood to be physical harm to Donnisha … then it is clear that everyone, including the bus company, was aware of the danger of physical harm to Donnisha." First Student counters that the identifiable risk at the time of the allegedly tortious conduct on the part of First Student was that David Damm would make contact with and sexually abuse Donnisha, not that he would hire a third party to kidnap Donnisha, take her across state lines, and have her murdered.
>
> We think this is a question that should have been submitted to and decided by the jury. Comment i to section 29 provides, "No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes of this Section . . . . " Many cases will pose straightforward or manageable determinations of whether the type of harm that occurred was one of those risked by the tortious conduct. Yet in others, there will be contending plausible characterizations that lead to different outcomes and require the drawing of an evaluative and somewhat arbitrary line. Those cases are left to the community judgment and common sense provided by the jury. Id. § 29 cmt. i, at 504–05 (emphasis added).

The lesson from the *Hill* case is where scope of liability is an issue, unless it is an exceptional case where causation is absent as a matter of law, the court will most likely have a jury decide it.

e. Hoyt v. Gutterz Bowl & Lounge, LLC, 2011 Iowa App. LEXIS 1276 (2011)(unpublished).

In *Hoyt*, a bar patron was assaulted by another customer in the bar's parking lot. The patron had been escorted out of the bar for verbally assaulting the customer who later attacked him the parking lot. Although the trial court granted summary judgment for the defendant-lounge, on appeal the court found that reasonable minds could differ as to whether the owner exercised reasonable care to protect the patron from the customer, and whether the harm that occurred fell within the owner's scope of liability.

The scope of liability was in issue because the person who had been verbally abusive in the bar towards another, was the victim of the assault by the other person outside the lounge. Applying the "appropriate level of generality" with which to describe the harm, as it did in *Hill*, the court concluded that a jury issue was created, and that the case should be reversed and remanded for trial.

IV. JURY INSTRUCTIONS.

A. Uniform instructions.

The jury instruction committee of the Iowa State Bar Association has drafted a new, uniform jury instruction which address the causation and scope of liability analysis adopted by *Thompson*. Those instructions provide as follows:

> 700.3 A Scope of Liability – Defined.
>
> You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiff's claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps [or other tort obligation] to avoid.
>
> Consider whether repetition of defendant's conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

B. Additional instructions.

A reasoned argument can be made that a jury will need more guidance on the scope of liability inquiry than simply Jury Instruction No. 700.3A. You may want to consider requesting these instructions.

> Instruction 1
> Knowledge
>
> To establish that the defendant was negligent, it is not sufficient that there was a likelihood that [the plaintiff] would be harmed by [the conduct of the defendant]. To establish that the Defendant was negligent, the Plaintiff must establish that it was foreseeable to [the defendant] at the time he acted that [the plaintiff] would be harmed by [the conduct of the defendant].
>
> Authority: Restatement (Third) Torts: Liab. Physical Harm §3 (2010) (To establish the actor's negligence, it is not enough that there be a likelihood of harm. The likelihood must be foreseeable to the actor at the time of the actor's conduct.)
>
> *Thompson v. Kaczynski*, 774 N.W.2d 829 (Iowa 2009)
>
> Instruction 2
> Scope Of Liability — Defined
>
> You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiffs' claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid.

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In determining whether the harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid, you may consider the following:

a) The risk that the defendant was seeking to avoid,
b) The manner in which the injury came about, and
c) Whether the type of injury was different from the injury that was contemplated or foreseen by anyone.

Consider whether repetition of defendant's conduct makes it more likely harm of the type the plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

Authority:

Restatement (Third) Torts: Liab. Physical Harm §29 (2010)
Thompson v. Kaczynski, 774 N.W.2d 829 (Iowa 2009)
Iowa Uniform Civil Jury Instruction 700.3A (modified)

The jury instruction committee has not drafted a new uniform instruction on the issue of breach of duty. Until the committee does, defense counsel might want to consider requesting this instruction, which is simply a quote from the Restatement 3d:

Ordinary Care - Common Law Negligence – Defined

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

V. PRACTICE POINTERS FOR DEFENSE COUNSEL.

First and foremost, defense counsel should study *Thompson v. Kaczinski*, its progeny, and the Restatement (Third) in order to learn the new analysis and lexicon. Any petition or complaint that alleges "proximate cause" in a case governed by the Restatement (Third) is subject to an Iowa R. Civ. P. 1.421(1)(f) or Fed. R. Civ. P.12(b)(6) motion for "failure to state a claim upon which any relief can be granted." The terms "proximate cause" and "substantial factor" are no longer used. Any time a defendant's conduct creates a risk of physical or emotional harm, a duty to exercise reasonable care will exist, unless special circumstances exist. "Duty" is a question of law for the court. "Breach of duty" is a fact question for the jury. "Foreseeability" is no longer a part of the "duty" inquiry, but it is an integral part of the "breach of duty" calculus.

Defense counsel should develop ways in which to argue to the jury the differences between risk of harm and severity of harm, and how these factors, when coupled with the probability of occurrence and the burden of precautions, can tip the liability balance. The concept of "risk" can be understood as: 1) the severity of harm; multiplied by: 2) the probability of its occurrence. It is clear that a breach of duty will likely be found where both the severity of harm and probability of occurrence are significant. However, defense counsel should understand there can be situations where the risk of harm is great, but the probability is low; or other cases in which the risk of harm is low and the probability of occurrence is great. In either situation, defense counsel should argue, and a jury would be justified, in concluding that *no breach of duty occurred.*

Defense counsel should also add to this analysis a careful consideration about "the burden of precautions to reduce the severity of harm or probability of occurrence." Theoretically, the risk of harm and probability of occurrence could both be moderate or high, but if the burden of precautions is too burdensome or impossible, then the defendant should not be held liable. The Restatement (Third) supports a good-faith argument by defendant's counsel along these lines.

VI. APPLICABILITY OF THE RESTATEMENT (THIRD) ANALYSIS.

Certain tort cases may not employ the "scope of liability" analysis set forth in the Restatement (Third) of Torts, Liability for Physical and Emotional Harm. One example would be a dram shop action. Another example might be a fraud claim. One example is the recent case of Dier v. Peters, 815 N.W.2d 1(Iowa 2012). In a case of first impression, Dier recognized a cause of action for paternity fraud. In analyzing the historical elements of a fraud claim, the court utilized the standard proximate cause analysis. "Scope of liability" in the causation sense was not discussed or examined. Even though "fraud" is typically considered to be a tort (as opposed to contract) claim, the scope of liability formula adopted in *Thompson* was not employed. Since the damages sued for there (financial support for the child) did not constitute *"physical or emotional harm."*

Some open questions in cases continuing to use the former proximate cause analysis include: do those cases still use the "substantial factor" test of proximate cause? Don't the problems that previously existed with the use of proximate cause in tort cases for physical and emotional harm, continue to exist in other tort cases that continue to use the proximate cause terminology, irrespective of the nature of the damages? Why should those cases be treated differently? And finally and perhaps most importantly, since the uniform civil jury instructions have now been changed, what should the trial court (and the parties) use as standard jury instructions in those cases that use the "old" proximate cause analysis?

VII. CONCLUSION

Only a studious understanding of *Thompson* and the Restatement (Third) of Torts, Liability for Physical and Emotional Harm, with all of their variations and intricacies, and subsequent Iowa cases on these subjects will allow defense counsel to fully and properly defend his or her client in a negligence or other tort case involving physical or emotional harm.

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IOWA DEFENSE COUNSEL ASSOCIATION

A message from the president ...

Greg Barntsen

As my last letter to you as President of the Iowa Defense Council Association, I want to inform you of the activities that have been accomplished to further the mission of the Association. In recent months, our Association has joined together with the Property Casualty Insurers of America, the Iowa Insurance Institute and the Iowa Self Insurers Association to resist a Petition for Declaratory Order filed by the Workers' Compensation Core Group who has petitioned the Iowa Workers' Compensation Commissioner for a ruling that defendants be required to produce surveillance tapes and reports of the claimant's activities when they are conducted solely in anticipation of litigation. It is the Iowa Association for Justice Workers' Compensation Core Group's position that those materials are required to be disclosed under Iowa Code §85.27(2) because they concern the employee's physical or mental condition relative to the claim. The IDCA and the other organizations strongly disagree with this position and have indicated that if the Iowa Workers' Compensation Commissioner rules in favor of the workers' compensation group, they are going against A well-established Supreme Court Rules and case law. The issues have been well briefed by both parties but a decision has not been rendered. Through the IDCA's association with the Iowa Insurance Institute on this matter, it has been determined that it would be beneficial to both organizations to meet and discuss how the two organizations might interact and coordinate their activities in the future.

Members of the IDCA have written an amicus Brief in the case of **Ackelson v. Manley Toy Direct, LLC** that is pending before the Iowa Supreme Court. The Brief resists the plaintiff's claim that the Court should interpret the Iowa Civil Rights Act to allow punitive damages contrary to the wording of the act and stare decisis. I want to thank Megan R. Dimitt, Brenda K. Wallrichs, and James P. Craig of Lederer Weston Craig PLC for their hard work in preparing this Brief. This is another example of how the IDCA is able to serve its members and accomplish the mission and goals of this organization.

Bruce Walker, Vice President of the IDCA, has been an active participant in the ISBA's Fair and Impartial Courts Committee which is being led by Bob Waterman. That Committee has been considering what actions should be taken to support Iowa's selection of judges and the Iowa judicial system to keep it free of outside influence or political intimidation. The Committee has been active in promoting civics education in Iowa's classrooms and responding to misinformation and attacks on the Iowa Judiciary with letters to newspapers, TV and radio interviews and speaking to bar and public groups.

IDCA committees have been diligently working to consider ways to increase bar membership and improve the services we provide to our members. We are looking into making a listserv available to our members next year. Our recently formed committees will be putting together webinars so our Association can provide you with excellent continuing legal education. The Annual Meeting Committee has worked very hard this year and has put together an excellent program to be presented September 13 and 14, 2012. I encourage you all to attend.

I have enjoyed my tenure as President of the IDCA. It has been a privilege to serve in that capacity this year and I believe this organization will continue to provide its membership with excellent leadership in order to better serve its members.

IDCA Post-Session Legislative Report

By IDCA Lobbyists Scott Sundstrom and Brad Epperly, Nyemaster Goode, Des Moines, IA

The second session of the 84th Iowa General Assembly convened on January 9, 2012, (the Iowa Constitution requires the legislature to convene on the second Monday of January of each year). The legislature adjourned sine die on May 9, for a total of 122 days, which was 22 days after legislators' per diem expired. Taken together with the previous session, which lasted 172 days, the 84th General Assembly was one of the longest in memory.

Control of the legislature remained the same in 2012 as it was in 2011. Republicans controlled the House by a 60 to 40 margin. Democrats maintained a slim 26 to 24 majority in the Senate. Although the number of Democrats in the Senate did not change, one Senate seat did change hands. Swati Dandekar (D-Marion) resigned her seat last fall to take a position as a Utilities Board Commissioner. Her resignation triggered a special election in her Senate district. The special election was closely watched because a Republican pick-up would mean that the Senate would have moved from Democratic control to a 25-25 tie. Democrat Liz Mathis won a very hotly contested and expensive election, thus maintaining the Democrats' control of the Senate.

In 2012 we monitored the following legislative activity for the Iowa Defense Counsel Association (IDCA):

- 1,202 bills and study bills (study bills are prospective committee bills)
- 98 resolutions
- 779 amendments (amendments can be as simple as changing a single word or number or can be the equivalent of lengthy complicated bills in themselves)

This year we registered on 63 bills, study bills and resolutions on behalf of the IDCA.

The governor has 30 days after the legislature adjourned sine die (i.e., until June 8, 2012) to approve or veto legislation sent to him in the last three days before adjournment or sent to him after the legislature adjourns. If the Governor does not approve or disapprove a bill within the 30-day period after the legislature has adjourned it is a "pocket veto" and the bill does not become law. Budget bills are subject to item vetoes, meaning the Governor has the power to veto parts of those bills and allow other parts to become law. This report will state whether each bill included in it has been enacted. Unless otherwise noted, enacted bills take effect on July 1, 2012.

Bills that were not finally acted upon during the 2012 session do not carry over and are not eligible for consideration during the 2013 legislative session. The first session of the 85th Iowa General Assembly will convene on January 14, 2012.

Scott Sundstrom

Brad Epperly

Judicial Branch Funding

This year, IDCA worked in conjunction with other lawyer groups (the Iowa State Bar Association, the Iowa Association for Justice, and local bar associations), judges, court reporters, and others to seek full funding for Iowa's judicial branch. The goal was to seek a modest $10 million increase in funding for Iowa's court system. Funding the court system at the same level as last year (a "staus quo budget") would not be adequate to fund built-in costs, such as mandated salary increases, and would result in further service cuts by an already overburdened court system. A significant part of the joint effort for full court funding, known informally as "Full Court Press," involved lawyers, judges, and clients meeting with their local legislators to educate lawmakers about the importance of adequate funding of Iowa's court system.

The Full Court Press effort was successful in securing a $5.6 million increase for the judicial branch budget. While the courts did not receive the full $166.4 million requested (i.e., a $163.3 million operating budget plus a $3.1 million witness and jury fee budget), the judicial branch appropriations bill, House File 2338, provided a total of $162 million (i.e., a $158.9 million operating budget plus a $3.1 million witness and jury fee budget). The judicial branch appropriations bills was signed into law by Gov. Branstad on May 25.

The judicial branch also received an additional $4 million in the Rebuild Iowa Infrastructure bill, Senate File 2316, for continued development of the EDMS electronic filing system. Gov. Branstad signed that bill into law on June 7.

Policy Issues

Retaliation for Reporting Child Abuse. Senate File 2225 was signed into law by Gov. Branstad on March 30. The bill enacts new Iowa Code section 232.73A, which prohibits an employer from retaliating against an employee who reports suspected child abuse. The prohibition on retaliation includes termination, failure to promote, or failure to "provide an advantage in a position of employment." The new prohibition is enforceable by a civil action. A successful aggrieved employee may receive reinstatement, back pay, and attorney fees.

Not surprisingly given the split control of the House (Republican) and Senate (Democratic), very little substantive policy legislation affecting the judicial system was enacted this session. Here are a few bills of note this session that received attention, but were not enacted:

Seat Belts: The IDCA had one affirmative legislative proposal this year. House Study Bill Seat 575 would have removed the arbitrary five percent limit on mitigating damages when a plaintiff fails to wear a seatbelt. The bill received a subcommittee hearing in the House, but faced strong opposition from both the Iowa Association for Justice and the Iowa State Bar Association. It did not advance. Attempts to amend that bill onto other bills were not successful either.

Trespassing: House File 2367 would have put into statute the duties a landowner owes to a trespasser. Although the bill generally codified the current common law duties, it deviated in some significant ways that could favor plaintiffs, particularly in "attractive nuisance" cases involving minors. Consequently, the IDCA opposed the bill after it was amended on the House floor. The bill was not taken up in the Senate.

Statute of Repose for Building Defect Claims: The Master Builders of Iowa and the Iowa Chapter of the American Institute of Architects sought legislation this session to shorten the statute of repose for building defect claims. Iowa currently has a 15-year statute of repose, which is among the longest in the nation. House File 2307 proposed to change the statute of repose to ten years (an earlier version of the bill had eight years). The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association. It was approved by the House Commerce Committee, but was not debated on the House floor.

Civil Procedure: Both the House and Senate Judiciary Committees approved bills that made several changes to procedure in civil cases (House File 2425 and Senate File 2305, respectively). The bills included a hodge-podge of changes, some of which were defense-friendly, others of which were plaintiff-friendly. There was not great enthusiasm for either bill by any interested party. Neither bill was taken up for debate on the floor of either chamber. One concept discussed in the House bill, a simplified procedure for small-dollar civil cases, is of interest to the IDCA and is a recommendation of the recently released Iowa Civil Justice Reform Task Force appointed by the Iowa Supreme Court (the report is available at http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf). This issue may receive significant discussion during the 2013 legislative session.

Statute of Limitations for Claims Alleging Sexual Abuse of Minors: Senate File 2295 modifies the statute of limitations for civil and criminal actions relating to the sexual abuse of minors. The bill would extend the time to file a claim that occurred when the injured person was a minor from one year after the attainment of majority to ten years after the attainment of majority. The bill also provides that a civil action for damages relating to sexual abuse that occurred when the injured party was a child under fourteen years of age, shall be brought within ten years from the time of the discovery of both the injury and the causal relationship between the injury and the sexual abuse. Current law specifies such an action shall be brought within four years of the time of discovery of both the injury and the causal relationship between the injury and the sexual abuse. The bill passed the Senate and was approved by the House Judiciary Committee. It was never brought up for debate in the House.

Juror Identification. House File 2097 would have required attorneys to refer to jurors only by numbers assigned to the jurors and would have prohibited referring to jurors by their names during voir dire and trial. The bill was filed by Rep. Mary Wolfe (D-Clinton), an attorney. A subcommittee meeting was held on the bill, where objections were voiced by attorney groups and the media. The bill did not advance.

Unemployment Discrimination. In response to the economic downturn, bills were filed in both the House and Senate that would have prohibited discrimination based on a person's "status as unemployed." The Senate bill, Senate File 2259, was approved by the Senate Judiciary Committee. The bill provided that its provisions would be enforced by the Attorney General and included monetary penalties for violations. Not surprisingly, the business community opposed the bill. It was not debated.

Stand Your Ground. Iowa law currently provides that a person may use deadly force to protect him- or herself but only in limited circumstances. Deadly force currently is authorized only where an alternative course of action entails a risk of life or safety, or the life or safety of a third party, or requires a person to abandon or retreat from one's residence or place of business or employment. House File 2115 would have modified the situations in which a person is authorized to use deadly force. The bill would have allowed the use of deadly force, if it is reasonable to believe such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, even if an alternative course of action is available if the alternative entails a risk to life or safety, or the life or safety of a third party. The bill further provided that a person may be wrong in the estimation of the danger or the force necessary to repel the danger as long as there is a reasonable basis for the belief and the person acts reasonably in the response to that belief. The bill also changed the duty to retreat by stating that a person who is not engaged in an illegal activity has no duty to retreat from any place where the person is lawfully present before using force. The House passed the bill, but it died in the Senate Judiciary Committee.

CONCLUSION

The discussions of bills in this legislative report are general summaries only. For those bills which were enacted, the enrolled bills themselves should be referred to for specifics. Enrolled bills can be found the General Assembly's website: www.legis.iowa.gov

Bills enacted become effective July 1, 2012 unless otherwise indicated.

In the interest of brevity we have focused on the most significant issues considered by the Legislature in 2012 which were of particular interest to the IDCA's members.

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IMEs and Justice for All: City of Davenport v. Newcomb

By Jessica L. Fiocchi, Betty, Neuman & McMahon, P.L.C, Davenport, IA

In April, the Iowa Court of Appeals decided on the controversial issue of requiring employees to submit to independent medical examinations ("IMEs") at the request of employers in cases where employers deny liability.[12] Rather than agreeing with the agency and district court decisions and limiting the ability of employers to require employee's to attend IMEs only with an accepted claim, the *Newcomb* Court determined that an employer who has denied a claim may still request the employee to attend an IME.[13] Based upon the rules of statutory interpretation as followed in Iowa, as well as relevant case law and public policy, the Iowa Court of Appeals has remained consistent with other Iowa law and instilled equity and fairness with its decision.

I. Iowa Code § 85.39

Iowa Code Section 85.39 provides, in relevant part:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of suspension.[14]

Iowa case law provides that "[w]hen the text of a statute is plain and its meaning clear, the court should not search for meaning beyond the express terms of the statute or resort to rules of construction."[15] In looking at Section 85.39, the text of the statute appears, at first glance, to be plain and clear. After an employee is injured, the employer may require the employee to submit to an IME. The statute contains no plain language requiring that a claim be accepted prior to the examination.

Jessica L. Fiocchi

However, when put into the context of a workers' compensation claim, the language "[a]fter an injury" becomes less clear.[16] Does this mean after an employee claims an injury? Is it limited to a situation where an employer admits that an injury occurred or admits liability? Where the text of a statute is ambiguous or unclear, statutes should be interpreted using "a logical, sensible construction which gives harmonious meaning to related sections and accomplishes the legislative purpose."[17] Looking to the legislative purpose of Section 85.39, the Iowa Supreme Court stated that the statute is "to require an employee to appear for 'examination' at the instance of the employer, doubtless for the purpose of enabling the employer to ascertain the extent and character of the injury."[18] Prior to the IME, an employer cannot be certain of the degree of the injuries actually suffered by the employee and, as such, the employer is not necessarily in a position to accept liability. Therefore, if the purpose of the statute is to allow for the determination of causation, and thus compensability, or the extent of harm, it only makes sense that an employer should be able to request an employee to submit to an IME when the claim has not been accepted.

II. Iowa Case Law

Iowa case law has ruled differently in other related areas of the law, requiring accepted liability for reimbursement for medical examinations and control of claimant's medical care.[19] However, these situations are different from that of the employer directing the employee to attend an IME. For example, as discussed in the *McSpadden* decision, the portion of Section 85.39 dealing with reimbursement for medical examinations was originally contained in Section 85.34, which deals with permanent partial disability compensation and presumes that the right to compensation has already been determined, and was moved to Section 85.39 only to make the information easier to find in the statute.[20] Further, an examination requested by the employee following the employer's IME does not serve the same purpose of allowing an employer to determine the nature and extent of the injury for the first time. For the reimbursement of an employee-requested examination to be required under Section 85.39, "an evaluation of permanent disability" must have already been made by a physician retained

12 City of Davenport v. Newcomb, No. 2-032/11-1035, 2012 WL 1246316 (Iowa Ct. App. 2012).

13 Id. at *10.

14 IOWA CODE § 85.39.

15 Henriksen v. Younglove Constr., 540 N.W.2d 254, 258 (Iowa 1995).

16 IOWA CODE § 85.39.

17 McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

18 Daugherty v. Scandia Coal Co., 219 N.W. 65 (Iowa 1928) (discussing IOWA CODE § 1399, the 1924 version of IOWA CODE § 85.39).

19 See, e.g. McSpadden, 288 N.W.2d at 194 (holding that claimant cannot be reimbursed for medical examination until liability is established); Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 565 (Iowa 2006) (stating that an employer no longer has the right to control medical care of claimant if liability is denied).

20 McSpadden, 288 N.W.2d at 194.

by the employer. At this point then, the employer has already had the opportunity to determine the extent of the injury. Therefore, the fact that acceptance of a claim is a prerequisite for the requirement to reimbursement for an employee-requested examination is not inconsistent with the *Newcomb* decision.

Similarly, in the case of an employer's right to control the claimant's medical treatment, the purpose of medical treatment is not to determine the extent of the injury, but to treat whatever injury exists.[21] If the employer is choosing the medical care to treat an injury, this implies that the employer is admitting that an injury is indeed present, rather than attempting to find out whether a compensable work injury occurred, or the nature and extent of the injury. Therefore, while the purpose of Section 85.39 would be frustrated if employers were required to accept a claim, the same is not true of right to control treatment. This is also consistent with the *Newcomb* decision.

III. Comparison with Other State Law

The interpretation of Section 85.39 by the *Newcomb* court is consistent with that of similar statutes in other states. One example of this is Illinois, in which the courts have interpreted 820 ILCS 305/12, a statute very similar to Section 85.39. That statute states:

> An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee, either within or without the State of Illinois, for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act.[22]

While the Illinois version of the statute includes the language "employee entitled to receive disability payments," indicating that perhaps acceptance of a claim is required, the Illinois Supreme Court indicated otherwise. In *R. D. Masonry v. Industrial Commissioner*, the court held that "whether [the employee] is entitled to [benefits] is not dependent on whether the employer acknowledges liability by making payments" and the "legislature did not intend that an employer who denies liability and declines to make payments in a workers' compensation case be precluded from availing itself of the independent medical examination provision of Section 12."[23]

In Missouri, the IME statute provides that "after an employee has received an injury" he must "submit to reasonable medical examination at the request of the employer."[24] One claimant even argued that he was not required to submit to an IME because his employer had admitted the injury.[25] The court denied this was the case, and ruled the claimant was required to submit to the examination under the statute.

IV. Public Policy

As mentioned by the *Newcomb* court, requiring that an employer accept a claim before requiring an employee to submit to an IME would violate substantial justice, in that it would lead to situations in which the employer would be unable to obtain an independent evaluation of the claim of injury before determining whether to accept or deny liability.[26] Aside from disregarding the intent of the legislature in passing this statute, this would lead to unfair trials with an unequal opportunity for the employer to obtain and present unbiased evidence.[27] The *Newcomb* decision is one example of this, as the deputy commissioner stated that the claimant's evidence was "more convincing" than that of employer, who did not present the opinion of a specialist because the deputy commissioner had denied an IME by the specialist.[28] Allowing employers to request employees to submit to IMEs, which are paid for by the employer, prevents this inequity and allows for a more just workers' compensation system.

V. Iowa Rule of Civil Procedure 1.515

Iowa Rule of Civil Procedure 1.515 also provides for physical examinations of parties "when the mental or physical condition . . . is in controversy" and "for good cause shown."[29] In the *Newcomb* decision, the deputy commissioner indicated that the employer's first motion for an IME was denied because the employer failed to show good cause for the evaluation.[31] The deputy commissioner did not state that the physical condition of the claimant was not in controversy. This supports the notion that the purpose of the physical examination of the claimant is to shed light on the extent of the injury and determine whether, and to what degree, the employer should accept or deny the claim. Rule 1.515, like Section 85.39, contains no language requiring the employer to have admitted the injury prior to the examination. In fact, the commissioner has taken the stance that examinations under Rule 1.515 do not require acceptance of the claim to take place. Section 85.39 should be no different, as they serve the same general purpose.

VI. Conclusion

Based upon the language of Section 85.39 and the rules of statutory construction, IMEs are not intended to be limited to claims in which liability has been accepted. This is supported by comparison with similar statutes in other states, Rule 1.515, as well as by consideration of public policy and the interest of a fair and impartial court system. The Iowa Court of Appeals was correct in its decision that Section 85.39 applies to denied claims as well as accepted claims, and has supported the interest of the Iowa Court System in providing a just forum for all.

21 IOWA CODE § 85.27(4).

22 820 ILCS 305/12.

23 R. D. Masonry v. Indus. Comm'n, 830 N.E.2d 584, 589-90 (2005) (discussing that by filing a claim for his injury, claimant was asserting that he was entitled to compensation and thus falls under the IME statute).

24 MO. ANN. STAT. § 287.210(1).

25 State ex rel. Taylor v. Meiners, 309 S.W.3d 392,

26 City of Davenport v. Newcomb, No. 2-032/11-1035, 2012 WL 1246316, at *10 (Iowa Ct. App. 2012) (citing Ragan v. Petersen, 569 N.W.2d 390, 394 (Iowa Ct. App. 1997)).

27 Id.

28 Newcomb, 2012 WL 1246316, at *10.

29 IOWA R. CIV. P. 1.515.

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IDCA Upcoming Events

CLE Webinar *Topic and registration to be announced.*	**Dec. 6, 2012** Noon – 1:00 p.m.
49th Annual Meeting & Seminar	**Sept. 19–20, 2013** 8:00 a.m. – 5:00 p.m.
50th Annual Meeting & Seminar	**Sept. 18–19, 2014** 8:00 a.m. – 5:00 p.m.

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