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The Restatement Third: Expanding Tort Liability in Iowa?

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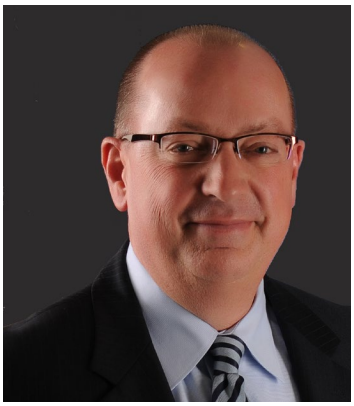

Kevin M. Reynolds

I. INTRODUCTION

In 2009, the Iowa Supreme Court decided *Thompson v. Kaczinski,* 774 N.W.2d 829 (Iowa 2009) and adopted important sections of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm (Proposed Final Draft No. 1, 2005). In doing so, the Court fundamentally changed the duty and causation analysis in every negligence-based tort case that involves personal injury damages, psychological injury or emotional distress, or property damage. A wide variety of cases have been affected by the Court's adoption of the Restatement (Third): asbestos (*Van Fossen*); fire and property damage insurance subrogation (*Royal Indemnity*); negligent misrepresentation (*Nationwide Agribusiness*); construction accidents (*McCormick*); sports injuries (*Brokaw and Feld*); premises liability (*Hoyt*); transportation (*Hill*); school district liability (*Brokaw and Mitchell*); legal malpractice (*Miranda*); medical malpractice (*Asher)*; and pharmaceutical drug products liability (*Huck*). The breadth of civil litigation matters affected by the Restatement (Third) of Torts is matched only by the types of cases governed by the Iowa Comparative Fault Act, Chapter 688 of the Iowa Code.

The five years that have passed since *Thompson* and its adoption of the Restatement Third has seen a potential expansion of civil liability in Iowa. This article will trace that expansion and provide suggestions for defense lawyers in confronting the challenges presented by this development.

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WHAT'S INSIDE

IDCA President's Letter

As we wrap up IDCA's 50th Anniversary celebration, I am honored to step up the President's podium. Following in the footsteps of Jim Craig, Bruce Walker, Greg Barnsten and the other leaders who have occupied this chair over the past 50 years is a humbling prospect.

I am without adequate words to express thanks to Jim Craig for his dedicated, enthusiastic leadership of IDCA. Jim was the driving force behind IDCA's successes over the past year which will have long-lasting benefit to our members. Initiatives include: offering the Skills Academy for 2nd and 3rd year law students and young lawyers, hosting district socials for our members, offering outstanding CLE via webinars and the Annual Meeting, continuing with strong committee activity. Other initiatives include giving our young members a greater voice through an additional board position, recognition in Defense Update, creating the Rising Star Awards, and an improved young lawyers committee. You will continue to see the results of Jim's tireless efforts for IDCA and I will value his counsel in the coming year.

Many thanks to Bruce Walker and Ben Weston as well. Their terms on the Board of Directors are complete, but their hard work will continue to influence IDCA. Thank you, Bruce Walker, for your strong leadership of IDCA and for helping IDCA to work with our sister groups to find common ground. Ben Weston fulfilled an important role on the Board as Young Lawyer Representative and worked tirelessly organizing our webinars. We will miss them both.

The past 50 years have been meaningful to our members. We want the next 50 years to be even better. Along those lines, IDCA will continue offering and developing valuable member benefits, including:

- Unveiling our new interactive website to provide members with valuable information.
- Promoting strong and effective legislative activity.
- Supporting amicus opportunities.
- Strengthening and engaging our committees.
- Supporting the judicial branch in conjunction with other bar groups.
- Strengthening Bruce Walker's jury verdict data initiative.
- Serving as a valuable resource to young lawyers with our Skills Academy and other initiatives.
- Expanding IDCA socials throughout the state.
- Offering outstanding CLE and substantive information through our Annual Meeting, webinars and Defense Update.
- Developing our Women in the Law group to support IDCA's outstanding women attorneys.

Finally, my sincere thanks to each of you, our members. You are the reason we publish the Defense Update, host an Annual Meeting, and conduct our other activities. We are here to benefit you. Please contact me or any of our Officers and Board members with your comments, suggestions and yes, your criticisms. In the next year I look forward to working with all of you and the IDCA Board of Directors to build on IDCA's successes.

Christine Conover
IDCA President

Christine L. Conover

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II.THOMPSON: A PERSON HAS A DUTY TO "TETHER" THEIR DISMANTLED TRAMPOLINE TO THE GROUND.

The Defendants in *Thompson* disassembled a trampoline and left the pieces, including the mat, in their yard. "Intending to dispose of them at a later time, Kaczinski and Lockwood [the Defendants] *did not secure the parts in place.*" *Id.* at 831 (emphasis added). A "severe thunderstorm" blew the mat onto an adjacent gravel road. The Plaintiff, a minister traveling in his car from one church to another, encountered the trampoline on the road, swerved to avoid it, and ended up rolling his vehicle in the ditch, causing injury. The minister and his wife sued the owners of the trampoline for "negligence" and asserted that this negligence proximately caused their damages.

The Defendants moved for summary judgment, arguing that they "owed no duty under the circumstances because the risk of the trampoline's displacement from their yard to the surface of the road was not foreseeable." *Id.* at 832. The trial court granted dismissal, and also dismissed the case for the reason there was no proximate cause as a matter of law, since the bizarre chain of events leading up to the injury were not foreseeable.

The minister and his wife would have none of this, so they appealed and the Iowa Court of Appeals, applying well-entrenched law and finding no error, affirmed the dismissal on both grounds. Inexplicably, this seemingly "garden variety" negligence case garnered the attention of the Iowa Supreme Court, which granted further review. Upon further review both the Iowa Court of Appeals and the trial court were reversed, and the case was remanded for a jury trial on the merits. In the course of doing so tort law in Iowa was forever changed.

In *Thompson*, the Iowa Supreme Court, in an opinion authored by Justice Hecht, adopted seminal sections of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm (Proposed Final Draft No. 1, 2005). *Id.* at 834. The court held that foreseeability was not a factor for a court to consider on the issue of duty, and was more appropriately suited for consideration on the "breach of duty" question. The court held that defendant's duty in *Thompson* based on negligence would be *presumed,* and that all persons whose conduct may cause harm have a "duty" to exercise reasonable care with regard to all other persons in the world. The Court adopted the Restatement (Third) *sua sponte*, without the issue having been briefed or raised by either of the parties in *Thompson*. The Court stated: "We find the drafters' clarification of the duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it." *Id.* at 835. The Court did so at a time when the Restatement had not yet been published in final form by the American Law Institute (ALI). *Id.,* at 834, fn. 1.

The source of the Court's "default" duty rule was Section 7 of the Restatement (Third). Section 7 provides:

> Section 7. Duty
>
> (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.

These provisions seem innocuous at first blush. But upon closer analysis, Section 7 is problematic for defendants because: 1) it finds that a "duty to exercise reasonable care" will nearly always exist as a default; 2) it provides that only in "exceptional cases" will a court limit or negate the ever-present duty; and 3) it puts the burden of proof *on the defendant to disprove* the existence of a legal duty (i.e., prove a negative), instead of placing the burden on the plaintiff where it belongs.

Under the prior law, in every tort case a plaintiff was required to prove the *prima facie* elements of duty, breach of duty, proximate cause and damages. After *Thompson,* this is no longer hornbook law. Under Section 7 of the Restatement (Third) (and now well-entrenched in Iowa tort law by virtue of numerous subsequent decisions over the past five years), a plaintiff is not required to prove a duty at all. Foreseeability is no longer a part of the duty equation. The existence of a duty, instead, is presumed. "Duty" is the default. Duty exists absent an "exceptional case." *Id.* at 835. If a defendant cannot prove an "exceptional case," then the duty will always prevail. This is a major change in Iowa tort law and one that does not inure to the benefit of defendants.

The practical effect of this development is clear. There will now be few, if any, motions to dismiss granted based on "no duty" grounds. The absence of a legal duty has been a common (if not the *only*) basis for the dismissal of negligence-based tort cases involving weird or bizarre fact scenarios (like *Thompson,* for example), based on the absence of foreseeability. Since issues of negligence and causation are ordinarily jury issues, the absence of duty (which has always been a legal determination, and remains so after *Thompson*) was the primary argument for dismissal. Although duty remains a legal issue for the court to decide, the duty will always exist, absent a vague and amorphous "exceptional case." With fewer dismissal motions granted at the early pleadings stage, more and more defendants will be forced to run the gauntlet of all-too-often overbroad and far-ranging (as well as expensive) discovery. There will also be fewer grants of summary judgment motions, since a

party must show an entitlement to judgment as a matter of law as one of the requirements. *See* Iowa R. Civ. P. 1.981(3); Fed. R. Civ. P. 56(a). Summary dismissals granted by trial courts will be under increasing attack on appeal, as we have witnessed first-hand ever since *Thompson* was decided. More defendants will be forced to settle spurious liability cases, rather than risk the unpredictability of trial, especially where serious injuries or potentially large damages are involved. These post-*Thompson* effects do not bode well for defendants.

As the trial court in *Thompson* had also granted a dismissal based on the lack of proximate cause as a matter of law, the Court didn't stop at changing the duty analysis; it also revamped the law of proximate cause. The Court adopted Sections 6, 26 and 29 of the Restatement (Third), which provide as follows:

> Section 6. Liability for Negligence Causing Physical Harm
>
> 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.
>
> Section 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 Section 27.
>
> Section 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 tortuous.

The *Thompson* court found that Defendants could be held liable for negligence in allowing the mat of their disassembled trampoline to be blown by a severe thunderstorm off of the ground onto an adjacent gravel road, where it allegedly caused an accident. The *Thompson* opinion noted (and this apparently was important) that the defendants had left the trampoline *untethered* after taking it apart (emphasis added). *Id.* at 839. After *Thompson*, a person disassembling a trampoline (or virtually anything else capable of being displaced by a severe thunderstorm's winds) now *has a legal duty to lash it down to the ground*, lest it be blown into someone's way causing some bizarre accident. It is respectfully submitted that Iowa tort law has seldom been stretched to such limits.

A concurrence by Justice Cady in *Thompson* noted that if the facts were different, *e.g.,* patio or deck furniture had been blown away, or if a recycling bin had been blown into the road on garbage collection day, the result might have been different, as public policy considerations might well modify the general duty rule. Justice Cady's remarks are welcome and make sense. However, it can be difficult to predict, with any degree of accuracy, when, where and under what circumstances the court will find an "exceptional case" mandating that the duty be modified or eliminated under the "articulated, countervailing principle or policy" exception. Indeed, this has proven to be difficult in cases decided after *Thompson.*

The Iowa Court of Appeals in *Thompson* had affirmed the grant of summary judgment and the dismissal by the trial court, based on no duty and no proximate cause. The foreseeability test of duty and proximate cause was the established law and the trial court and the Court of Appeals applied that law. This would be only the first time in a line of cases after *Thompson*, where the analysis and decision of Iowa trial courts and the Iowa Court of Appeals would prove to be at odds with the Iowa Supreme Court based on the Restatement (Third).

III. VAN FOSSEN: A PROPERTY OWNER HAS NO CONTROL OVER ASBESTOS EXPOSURE TO THE SPOUSE OF A SUBCONTRACTOR'S EMPLOYEE.

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009) also used the "new" Restatement (Third) analysis and was decided the same day as *Thompson*. In *Van Fossen*, in an opinion also authored by Justice Hecht, the Court held that an employer owed no duty to the spouse of an employee of a subcontractor who was exposed to asbestos. The spouse had developed mesothelioma by laundering the clothing of her husband, who was exposed to asbestos on a work site at a powerplant.

Van Fossen's holding was based on two grounds. First, the Court found that the employer of a subcontractor has very limited, if any, *control* over the work and safety of employees of subcontractors. The employee's employer, the subcontractor, has the control in this situation. This "control" theory was an "articulated, countervailing principle or policy" that modified or negated the usual, "default" duty of due care under Section 7(b) of the Restatement (Third). Second, this specific fact scenario (a wife of a worker exposed to asbestos gets sick from laundering her husband's clothing) had been confronted by other courts in asbestos cases in other jurisdictions, and the clear majority rule was that the jobsite owner or general contractor owed no duty.

Although the trial court's dismissal of the case was affirmed in *Van Fossen,* the "control rule" that was shoe-horned into the "articulated, countervailing, principle or policy" exception would have been difficult to predict. The fact that other courts had denied liability in this situation may have played a bigger role in the decision. The dismissal of the case in *Van Fossen* was decided the same day as *Thompson* and also used as the "new" Restatement (Third) analysis.

The "control" argument as an exception to the regular duty rule was used by the Court in a later case, *McCormick*, discussed below, in affirming the dismissal of that case as well.

IV. ROYAL INDEMNITY: NO SCOPE OF LIABILITY OR NO CAUSE IN FACT?

Royal Indemnity Co. v. Factory Mutual Insurance Co., 786 N.W.2d 839 (Iowa 2010) was the first case after *Thompson* to be decided purportedly based on the new "scope of liability" element of causation. In *Royal Indemnity* the Iowa Supreme Court, in an opinion by Justice Baker, reversed a $39.5 million plaintiff's verdict in an insurance subrogation case for property damage arising out of a warehouse fire. Plaintiff claimed that the defendant's negligent inspection of the premises for Deere, prior to Deere moving into the facility, caused a subsequent property loss due to fire. Although the case was tried before the Restatement (Third) had been adopted, the Restatement analysis was applied to the issues on appeal. The application of the "scope of liability" element to the facts in this case was less than obvious, however.

Royal Indemnity analyzed scope of liability from two perspectives. First, the Court noted that "[u]nder the Restatement (Third) analysis, to impose liability, something FM [the defendant who did the inspection] did or did not do must have increased the risk to Deere's product." *Id.* at 851. Second, the Court analyzed ". . . whether merely moving in increased the risk or created the harm that destroyed Deere's product." *Id.* at 851. Deere claimed that had it known the true facts, it would not have moved into the building. The Court found that what happened was not within the scope of FM's liability because FM charged just a few thousand dollars for the inspection, and it did not make sense that it was undertaking potential liability in the tens of millions of dollars in the event of a later fire. The Court found that in both contexts, the plaintiff's case failed because there was no evidence to demonstrate that FM "increased the risk of loss" to Deere. *Id.* at 853. This much is true: because the cause of the fire was never determined, it was impossible to determine whether anything the inspection company did or did not do increased the risk to Deere.

Although the Court based its holding on "scope of liability," this was a bit odd. Obviously Deere was trying to avoid the risk of loss to its product inventory by hiring FM to do an insurance or risk-based inspection of the warehouse. The company doing the inspection knew this as well. In this sense, the type of harm that eventually occurred (i.e., a fire due to a substandard building) would seem to have clearly been within the scope of FM's liability. Was the type of harm sought to be avoided a fire that could damage Deere's property? Quite obviously it was. In this sense, scope of liability was not really at issue in *Royal Indemnity.*

Instead, a compelling argument can be made that the "scope of liability" element (which is the *second* element in the causation analysis) did not even need to be reached. This illustrates some confusion on the part of the Court itself in applying its new Restatement (Third) analysis. In *Royal Insurance* there was no evidence to prove the cause of the fire, and there was also no evidence to explain why the water pressure in the extinguishing system was so low, causing it not to work. Thus, the "but-for," or cause-in-fact element of causation, which is the threshold or first element of causation, could not be proven, and plaintiff's case failed. The Court cited this as an additional reason to support the dismissal. But because cause-in-fact is the first element of causation under the Restatement (Third), the case was at an end there, and there was no need to even make the "scope of liability" inquiry.

The plaintiff in *Royal Indemnity* also pled an alternative breach of contract claim based on the same facts. Plaintiff argued that had FM not breached its contract to do a detailed inspection, Deere would not have been damaged. The Court in *Royal Indemnity* held that the Restatement (Third) analysis would *not* apply to a breach of contract claim. Thus, the Court maintained the distinction between contract and tort. The Court further found that the damages that occurred (tens of millions of dollars in damage as a result of the fire) were not damages within the "reasonable contemplation of the contracting parties" (which is the measure of damages in a breach of contract case) and thus, the verdict could not be salvaged by using an alternative, breach of contract theory. *Id.* at 849.

Some may cite to *Royal Indemnity* (just like *Van Fossen*) as an example of a Restatement (Third) case where the *defendant* prevailed on a legal issue, and thus, *Thompson* and its progeny are not so "one-sided," pro-plaintiff or pro-recovery. However, the same result would have happened under the old proximate cause law, because it also used the "but-for," or cause-in-fact, element of causation. Defense counsel should not "assume" that cause-in-fact is always present. In an appropriate case, the absence of cause-in-fact can be a case dispositive defense. *See, e.g., Alfano v. BRP Inc.*, 2010 U.S. Dist. LEXIS 64182 (E. D. Cal. 2010)(because plaintiff did not read a warning that was provided, there could be no proximate cause).

V. NATIONWIDE AGRIBUSINESS: THE RESTATEMENT THIRD APPLIES TO NEGLIGENT MISREPRESENTATION CLAIMS.

In *Nationwide Agribusiness v. Structural Restoration, Inc.*, 2010 U.S. Dist. LEXIS 36305, at *36 (S. D. Iowa 2010), a federal district court sitting in Iowa applied *Thompson*'s analysis to a negligent misrepresentation claim. In *Nationwide* the collapse of a tank was found to be "among the range of harms that [the defendant] risked" when it sent an inspection report to the plaintiff. Although this decision is not binding on Iowa courts, it provides persuasive precedent. Practice pointer: if a negligent misrepresentation case

does not involve physical injury (personal injury or property damage) or emotional harm (*e.g.*, emotional distress or psychological injury), then the Restatement (Third) analysis (by its own terms) would not apply.

An important issue yet to be determined is whether the Restatement (Third's) "default" duty approach will be extended to other fact situations where claims for "negligent misrepresentation" might be made. "Negligent misrepresentation" claims have often been stretched by plaintiffs to avoid the more onerous elements of fraud or intentional misrepresentation claims, such as "scienter" and "intent to deceive." This is also done to avoid the "clear and convincing," heightened evidence standard applied to fraud claims. Thus far the negligent misrepresentation tort has been circumscribed and carefully limited to situations w*here the defendant was in the business of giving advice,* although there appears to be a trend to expand the types of cases where this claim can be stated. When defending such a claim, defense counsel should focus on either the nature of the damages claimed, or on Section 7(b) of the Restatement, which provides that the duty may be limited or negated by an "articulated, countervailing principle or policy." The well-entrenched element of being "in the business of giving advice" should constitute an "articulated, countervailing principle or policy," such that the duty is limited or negated altogether. Whether this "in the business of giving advice" limitation on negligent misrepresentation claims will continue to be required by the Iowa Supreme Court remains to be seen.

VI. BROKAW: THE COURT APPLIES THE RESTATEMENT (THIRD) BUT THE RESULT IN THE CASE IS BASED ON LACK OF FORESEEABILITY.

The next case to discuss the Restatement (Third) involved a suit against a school district for injuries received by a player in a basketball game due to an assault by another player. In *Brokaw v. Winfield-Mt. Union Comm. Sch. Dist.,* 788 N.W.2d 386 (Iowa 2010), plaintiff alleged that coaches of an opposing team were negligent in failing to control a player, who punched the plaintiff in the course of a game, causing injury. There was evidence that the assaultive player had a "short fuse," but there was no evidence that he had ever assaulted another player in a game. In the trial court, the defendant filed a motion for summary judgment, which was granted. On appeal, the Iowa Supreme Court affirmed the dismissal. The Court, in an opinion by Justice Baker, held that there was no liability as a matter of law, since the school district "did not know, nor in the exercise of reasonable care should have known, that [McSorely] was likely to commit a battery against an opposing player." *Brokaw,* at 393-94. Although "foreseeability" was removed from the duty inquiry in *Thompson*, *Brokaw* makes it clear that it remains an important factor, if not the factor, on the "breach of duty" and "causation" elements of a tort claim under the Restatement (Third). *Brokaw* was also unusual in that the trial court found that the defendant had not breached its duty as a matter of law, and this finding was affirmed on appeal.

Although *Brokaw* resulted in a dismissal, like *Van Fossen* and *Royal Indemnity*, one can expect that cases of this type, alleging broad and generic claims of negligence against solvent parties or target defendants, based on claims that someone failed to control the actions of another person, will be on the uptick. This later proved to be true in *Hoyt*, discussed below.

VII. FELD: THE COURT RETAINS THE "CONTACT SPORTS" EXCEPTION, BUT JUST BARELY.

In *Feld v. Borkowski,* 790 N.W.2d 72 (Iowa 2010) a softball player was seriously injured when he was struck by a flying bat. The defendant had just hit a high fly ball in foul territory to the left of third base. Plaintiff was playing first base. After the foul ball was hit, somehow the bat left the defendant-batter's hands and helicoptered over to first base, where it struck plaintiff in the forehead, causing a serious eye injury. The defendant in *Feld* filed a motion for summary judgment based on the "contact sports" rule. Under that rule, if a participant is injured in a "contact sport," then in order to recover, reckless or intentional conduct must be shown. The trial court in *Feld* granted a summary dismissal, and plaintiff appealed. The Iowa Court of Appeals applied existing law and affirmed the dismissal. On further review, however, the Iowa Supreme Court reversed, finding that a jury issue on "recklessness" had been created by the affidavit of a plaintiff's expert, the baseball coach at Creighton University.

The aspect of *Feld* that is most relevant to the Restatement (Third) (and is the most troubling to defendants) was a special concurrence by Justice Appel, joined by Justices Hecht and Wiggins. In that concurrence, Justice Appel in a very well-written opinion, advocated that in future cases, there was no need for a "contact sports" exception at all. Justice Appel reasoned that in sports injury cases, the rule of decision should be based on a negligence "under the circumstances" rule, or by judging the duty and breach thereof by taking into account "all of the circumstances." The Restatement (Third) and its analysis presents an opportunity to rid the law of a patchwork quilt of special rules and exceptions. Although this analysis has some appeal, it disregards Section 7(b)'s express limits on liability, based on an "articulated, countervailing principle or policy." If a person's conduct, no matter the situation, is to be adjudged in every case by a basic negligence standard "under the circumstances then and there existing," then there is no reason to have Section 7(b) with its potential limits on duty and liability.

From a defendant's point of view, we should not so easily consider throwing out well-entrenched, historical and common-sense based legal doctrines. The fact that certain doctrines have existed for

decades in the law, and have withstood the test of time speaks volumes to the rational and workable nature of the rule and its utility. Justice Wiggins would have taken Justice Appel's position one step further; although neither of the parties in *Feld* had raised or briefed the issue, he would have given the contact sports rule "a proper burial" *sua sponte*. *Id*. at 82.

To change the rule of decision in cases involving injury between sports participants to a basic negligence standard, instead of the heightened standard of reckless or intentional conduct, would expand tort liability in Iowa. Only a few courts in other jurisdictions have adopted such a rule. Suppose a professional hockey player sued another player for "negligence" in the manner in which the defendant hip-checked the plaintiff. The court should not have to entertain suits between football or basketball players. "Negligence" in making a tackle or in committing a foul is not a properly justiciable matter. The courts should not be the final arbiters and referees of our sports matches. When a soccer player gets a "red card," the court should not be called upon to decide whether that is negligence per se, or merely proof of negligence. The potential problems are enormous and few courts have gone this far. Yet, three members of the Iowa Supreme Court appear to be ready to use the Restatement (Third's) analysis to apply a basic negligence standard to sports injuries, if squarely presented with the issue.

Instead, Section 7(b) of the Restatement (Third), the exception to the general duty rule, should be applied. The "contact sports" exception is a classic example of an "articulated, countervailing principle or policy" that should be used to modify or limit the regular duty rule. The contact sports exception limits the duty between contact sports participants. Although *Feld* retained the contact sports rule, it did so only by the margin of one justice's vote in the Iowa Supreme Court.

VIII. HILL: A SCHOOL BUS COMPANY IN IOWA IS HELD CIVILLY LIABLE FOR THE MURDER OF A 13-YEAR OLD GIRL IN ILLINOIS.

Hill v. Damm, 804 N.W.2d 95 (Iowa Ct. App. 2011) was a pure "scope of liability" case. In *Hill,* a 13-year old girl was having an affair with an older man. Her mother found out about it. The girl rode a bus to school, and the bus was operated by a private company, First Student, the defendant. The girl's mother made arrangements with First Student to drop the girl off at a bus stop close to her home, so she could watch her get off the bus and arrive at home safe, and stay away from the older man. Another bus stop, further away, was close to a car dealership operated by the man. There was evidence that the older man was sexually abusing the girl.

One day the girl intentionally got off at the wrong stop. She did this so she could be with the man who worked at the car dealership. On that day a substitute driver was driving her bus. The driver knew there was a problem and called into the office. The driver was told that the girl was not to be let off at the other bus stop. Despite the efforts of the bus company and its driver, the girl forcefully got off at the wrong stop and later met up with the man. Eventually the young girl was taken to Illinois by another man hired by her boyfriend and murdered.

At the close of Plaintiff's case, the bus company moved for a directed verdict, based on no "scope of liability." The bus company argued that the harm or risk to the girl was that she would be sexually abused by the car dealer, not that she would be kidnapped by another guy, taken to Illinois and murdered. The trial court granted the directed verdict and dismissed the case. Plaintiff appealed and the Iowa Court of Appeals, in an opinion written by Judge Doyle, reversed and remanded for trial. The court held that by applying "the appropriate level of generality" to the scope of liability issue, the plaintiff had generated a jury issue on "scope of liability." *Id.* at 100.

From a defense viewpoint, a better example of no "scope of liability" would be difficult to find than the *Hill* case. "Scope of liability" labels the legal cause element sought to be proven, but in reality, lacks any workable definition. Where does liability start and where does it stop? What exactly defines the parameters of the "scope?" What happened in *Hill* is no more foreseeable than the kid dropping the loaded shotgun on his toe, or eating the broken jar of peanut butter, which are two examples in the Restatement (Third) of injuries falling *outside* the scope of liability. Surely the appellate court wasn't saying that it was foreseeable that the girl in *Hill* would be kidnapped by another man, taken to Illinois and murdered, simply because the bus company was unable to physically stop her from intentionally getting off at the wrong bus stop. Apparently the bus driver was negligent for failing to leave the driver's seat with a bus full of kids and chase the girl, physically tackling her. Being sexually abused by an older man is one thing; being kidnapped, taken out of state and murdered by a hired hit man is another thing entirely. Applying this type of "generality" would mean that the bus company (or any other caretaker of children) would be liable for any and all personal injury or untoward occurrence, no matter how bizarre, unforeseen or unpredictable. Yet, it is clear that "personal injury" is not an appropriate level of generality, because if that were the case, then "scope of liability" would lose all meaning and provide no limit whatsoever to liability.

The Court of Appeal's decision in *Hill* confirms that which is feared by many defendants: that the "scope of liability" element will provide very little practical limitation to tort liability. Indeed, the Reporters for the Restatement warned that "[O]rdinarily, the plaintiff's harm is self-evidently within the defendant's scope of liability and *requires no further attention*." *See* Restatement (Third) of Torts, § 29, comment

a, p. 493 (2010)(emphasis added). Thus, after *Thompson*, in nearly every case both the existence of a legal duty and the former proximate or "legal cause" element are presumed, and as a practical matter do not need to be proven by plaintiff. This should be a concern to defendants and defense counsel.

IX. MCCORMICK: THE DEFENDANT DIDN'T INCREASE THE RISK OF HARM; OR DID IT?

In *McCormick v. Nikkel & Associates, Inc.,* 819 N.W.2d 368 (Iowa 2012), an employee of a subcontractor was electrocuted while working inside a cabinet called a "switchgear." Before the accident, an electrical firm, Defendant Nikkel, had been given the job of installing the switchgear and certain devices (called fault interrupters) inside the switchgear. At the time that Nikkel was on premises to do the work, the fault interrupters had not yet arrived. Nikkel was told by the plant owner that it could leave the job site and someone else would do the work. Before it left, Nikkel energized power to the cabinet (as it had to do, since otherwise, power to the entire plant would be interrupted) and locked it with a special tool. Later, when the fault interrupters arrived, workmen were used to install them inside the cabinet. The cabinet (which had high-voltage warning signs pasted all over it) was opened, using the special tool, and plaintiff was electrocuted.

Defendant in *McCormick* filed a motion for summary judgment, and argued that it had no duty under the facts, since the building owner had taken control of the project and had turned the switchgears over to other subcontractors to finish. This was akin to the "control" issue discussed in *Van Fossen*. The trial court granted dismissal and plaintiff appealed. On appeal, the Iowa Supreme Court, with Justice Mansfield authoring the opinion, affirmed the trial court and dismissed the case.

The troubling aspect of *McCormick* is a lengthy, well-reasoned dissent authored by Justice Hecht and joined by Justices Wiggins and Appel. The dissent argued that Nikkel had increased the risk of harm within the meaning of the Restatement (Third) *by turning on the power to the cabinet prior to leaving the job site.* Had the power *not* been turned on, there would have been no risk of the harm of electrocution to plaintiff. The logic of this argument is unassailable.

A weakness of the Restatement (Third) analysis exemplified by *McCormick* is that when the risk of harm is analyzed, the case could have easily been decided the other way. The majority felt that since the cabinet was locked, a special tool was required to open it, warning signs were pasted all over the box and the general contractor had sent Nikkel home, Nikkel no longer had "control" over the situation, and thus, had no duty and consequent liability. But when, where and under what circumstances this *control* issue will be used by the Court to limit or modify a duty under a negligence theory, is anyone's guess. The dissent pointed out that when Nikkel turned the power on to cabinet, it obviously had "control" over it at that point. The dissent noted that Nikkel could have easily left the work site with the power turned "off" to the cabinet. But by leaving the power "on," it increased the risk to Plaintiff.

The close 4-3 split and the "two-sides-of-the-same-coin" analysis in *McCormick* illustrates once again the unpredictable nature of determining when and under what circumstances an "exceptional case" will be found, where the Court concludes that the defendant has no duty.

X. HOYT: "YOU WERE NEGLIGENT FOR NOT CALLING THE POLICE ON ME."

In *Hoyt v. Gutterz Bowl & Lounge, LLC,* 829 N.W.2d 772 (Iowa 2013), two guys got into a fight in the parking lot of a bar. But this was not a dram shop claim; instead, plaintiff sued the establishment for "garden variety" negligence. Plaintiff more specifically claimed that the bartender was negligent for failing to call the police, and that this negligence caused an injury to plaintiff.

Hoyt involved a strange set of facts. Before the altercation in the parking lot, Plaintiff was inside the bar, verbally harassing another guy. Plaintiff became so obnoxious that eventually the bartender physically escorted him out of the bar, into the parking lot, and to his car. A short time later the guy that was being harassed inside the bar, left the establishment. Once outside, he ran into the guy that had been kicked out and had been harassing him. There was an altercation and plaintiff, the verbal abuser inside the bar, suffered a compound fracture of his ankle. He then sued the bar and alleged that it owed a duty of due care under the Restatement (Third), it was negligent, and such negligence caused his injury.

The defendant-bar in *Hoyt* filed a motion for summary judgment, arguing that it had no duty to Plaintiff; that it had not breached any duty to Plaintiff as a matter of law; and that Plaintiff could not prove that what happened in the parking lot was within the "scope of liability." The trial court granted the motion and dismissed the case.

The Iowa Court of Appeals split 2-1 and in an opinion written by Judge Tabor, reversed the trial court and remanded for trial. On further review, the Iowa Supreme Court, in another 4-3 split decision, affirmed the Court of Appeals, and remanded to the district court for trial. Both appellate courts found that although the injured plaintiff was the "bad actor" inside the bar, that applying the "appropriate level of generality," the scope of liability element had been shown, or at the very least, a jury issue had been made out on that issue.

The practical effect of *Hoyt* is that a premises owner has a duty to call the police when someone is acting badly, because the bad actor may later sustain an injury at the hands of a third person. The bad

actor effectively claims that "you had a duty to protect me from injury caused by my own conduct." A premises owner can, under some circumstances, be liable for an injury caused to a patron by a third person, but liability has never extended this far. Even under the Restatement (Third), it is hard to see how the bar's conduct, in not calling the police, created a risk of harm to plaintiff, as required by Section 7(a). Although *Hoyt* was settled before trial, it is likely that an Iowa jury would have found the "bad actor" more than 50% at fault in a negligence action against the landowner, when the bad actor had caused the commotion in the first place. Under the Iowa Comparative Fault Act, Chapter 668 of the Iowa Code, if it did so then plaintiff would be barred from any recovery.

XI. MITCHELL: A SCHOOL HAS A DUTY TO PREVENT AN ASSAULT THAT OCCURS OFF CAMPUS AND AFTER SCHOOL HOURS.

Mitchell v. Cedar Rapids Comm. Sch. Dist., 832 N.W.2d 689 (Iowa 2013) is an important Restatement Third case. In *Mitchell* a school district was held liable based on negligence for a sexual assault committed by a special needs student on another special needs student, off campus and after school hours. *Mitchell* also presented some important "failure to preserve error" issues, which underscore the importance of being conversant with the Restatement (Third) and its analysis. A plaintiff's verdict in *Mitchell* was sustained by the Court's use of the Restatement (Third) analysis.

In *Mitchell,* a female special needs student, age 13 with an IQ of 67, skipped the last two periods of school. The student had been seen at a prior point in time with an older special needs student, kissing in the hallway. Although her absence on the day in question was reported to the school's computer system, neither the parent of the girl nor the police were notified by any school personnel.

The girl left campus early with the older boy. While they were walking to the boy's house, they bumped into a friend with a car. They hitched a ride with the friend and went to the boy's house. No one was home, so they went to another friend's house. At that location there was a garage, where the girl was sexually assaulted. The girl's mother, who found out about this at a later point in time, sued the school district for negligence.

At trial the defendant school district moved for a directed verdict at the close of plaintiff's evidence. In submitting requested jury instructions, defense counsel had conceded the existence of a duty, given the presumption of a duty under the Restatement (Third). The sole basis for the directed verdict at that time was "no scope of liability." The directed verdict motion was overruled. Later, the defense moved for a directed verdict at the close of all the evidence. The basis was "no scope of liability," plus, the defense counsel added that there was "no duty." This motion was overruled. The jury returned a plaintiff's verdict for $500,000, with 30% liability placed on the boy, and 70% placed on the school district. A motion for JNOV was filed but was also overruled. The school district appealed and argued: 1) no duty; 2) no breach of duty as a matter of law; 3) no cause in fact; and 4) no scope of liability. The Iowa Supreme Court denied all of these arguments and affirmed the plaintiff's verdict.

The majority opinion in *Mitchell* was authored by Justice Hecht. The Court found that the defendant had not preserved error on any argument except the "no scope of liability" argument, and that scope of liability had been proven in the case. With regard to the "no duty" and "no breach of duty as a matter of law" arguments, those were presented to the court for the first time in the JNOV motion, thus, error was not preserved. *Id.* at 697-8. And with regard to no proof of cause in fact, that argument, also, was first presented on appeal and thus, defendant did not preserve error. *Id.* at 698.

A primary finding in *Mitchell* was that error was not preserved on several arguments based on the Restatement (Third). The failure to preserve error may have been a result of a misunderstanding of the Restatement (Third) elements and analysis. *Mitchell* illustrates how important it is to understand the various elements and issues in the Restatement's analysis. Regarding preservation of error, here are the primary "takeaways" from *Mitchell:*

PRESERVATION OF ERROR CHECKLIST

1. Make sure all arguments are made at all junctures: in the directed verdict motion at the close of plaintiff's case; in the directed verdict motion at the close of all the evidence; and in the motion for JNOV post-verdict.

2. It is not necessary to make a directed verdict motion at the conclusion of plaintiff's case in order to preserve error, as long as those arguments are made in the directed verdict motion at the conclusion of all the evidence, and in the JNOV motion. *Royal Indemnity,* at 845.

3. Give the directed verdict motions some careful thought before trial. A lunch break during trial is not enough time to sit down and write out your directed verdict motions.

4. If you don't make the arguments in the directed verdict motions, then you will not be able to make the same arguments in the JNOV.

5. Be as specific as possible when stating the arguments. Do not try to preserve error by stating "defendant moves for a directed verdict on all issues." This is not specific enough and preserves nothing.

6. Do not concede "duty" because the Restatement (Third) establishes it as a "default." Instead, keep in mind that there are

exceptions where the duty does not exist or is modified, where there is "an articulated, countervailing, principle or policy.

7. Don't be afraid to argue that breach of duty has not been established as a matter of law. Restatement (Third) cases (e.g., *Brokaw*) have upheld dismissals on this basis.

8. On causation, do not forget to preserve error on the lack of cause in fact, if applicable.

9. Do not forget to preserve error on lack of "scope of liability" if applicable.

10. Preserving error on lack of cause in fact does not preserve error on scope of liability, and vice-versa.

11. If you are confronted with a situation that involves bizarre facts and lack of foreseeability, this is relevant to:

a. No breach of duty as a matter of law; and

b. No scope of liability as a matter of law.

Justices Waterman and Mansfield filed a strident dissent in *Mitchell*. Both would have held that error was preserved on all issues, and would have employed a "bright line rule" of liability, finding that there was no legal duty to protect a student off campus and after school hours. According to the dissent, the "no duty" argument would have been a winner in this case, since what had happened occurred off campus and after school hours. This would be an example of an "articulated, countervailing principle or policy" that would modify (or in this case) negate the ordinary duty to exercise reasonable care. With respect to the "cause in fact" argument, query whether the mother (or even the police) could have found the kids in time to stop the assault, given their circuitous route.

Chief Justice Cady filed a concurrence in *Mitchell*. Justice Cady noted that the reason that a duty was found in this case, was that the school had committed an act of negligence *during school hours and on campus,* i.e., the failure to follow up on the documented skipping of the last two periods, and that this had led to the assault. *Id.* at 705.

Mitchell is troublesome for school districts since it can be read to stand for the proposition that a school has a legal duty to protect a student from an attack occurring after school hours and off campus. *Mitchell*, however, should be limited to its specific facts. Based on Justice Cady's concurrence, that is too broad of a reading; instead, the focus should be on the act of negligence that occurred at school, *i.e.,* the failure to follow up on the special-needs student's absences from class.

Mitchell should be required reading for any defense counsel dealing with the Restatement (Third), since it illustrates that you can be met with a "failure to preserve error" argument on appeal if you don't select the right arguments in the trial court, and make the right dismissal motions at the right times.

XII. MIRANDA: A LEGAL MALPRACTICE PLAINTIFF CAN RECOVER FOR EMOTIONAL DISTRESS IN THE ABSENCE OF A PHYSICAL INJURY.

In *Miranda v. Said,* 836 N.W.2d 8 (Iowa 2013), a case of first impression, the Court held that a plaintiff can sue for emotional distress in the absence of physical injury in a legal malpractice case. Prior to *Miranda*, a plaintiff could sue for emotional distress damages (without accompanying physical injury) in only a limited number of situations. In extending potential recovery, the court cited to *Thompson v. Kaczinski* and the Court's adoption of the Restatement (Third) in footnote 13. The trial court had granted to defendant a directed verdict regarding the claims for emotional distress and punitive damages. *Miranda* extended recovery of emotional distress damages, without any proof of physical injury, to legal malpractice cases, and this extension of the law was based, at least in part, on *Thompson* and the Restatement (Third).

XIII. ASHER: MEDICAL MALPRACTICE CASES USE THE NEW CAUSATION INSTRUCTIONS UNDER THE RESTATEMENT (THIRD).

Asher v. OB-GYN Specialists, P.C., 846 N.W.2d 492 (Iowa 2014), was a birth injury, medical malpractice case. At trial the court submitted causation by using the old uniform jury instructions on proximate cause. The jury found in favor of plaintiff. The defendant appealed, arguing that reversible error had occurred when the trial court used the legally incorrect proximate cause instructions. The Iowa Supreme Court, in an opinion by Justice Appel, found that legal error had occurred, but since the "old" causation instructions actually presented a "higher" burden for plaintiff to overcome based on the facts of the case, it was harmless error. Thus, the plaintiff's verdict was affirmed.

Asher is important for two reasons. First, a medical malpractice case is, in essence, a tort case premised on a theory of negligence, and for that reason, the Restatement (Third) and its analysis applies. Second, *Asher* engaged in a detailed analysis, spanning several pages of the opinion, comparing the old "proximate cause" standard in Iowa, with the new, "causation" approach of the Restatement (Third). The Court also noted that even though the old "proximate cause" standard presented a higher burden for plaintiff to overcome in *Asher,* that this would not always be the case. There could be situations where the newer "causation" standard would be more difficult to prove. Since *Asher* presents a detailed analysis of both causation standards, it is an important case, especially if you have a situation where you are trying to figure out the differences between the former iteration of "proximate cause" and "scope of liability."

XIV. HUCK: THE DISSENT USES THE RESTATEMENT (THIRD) TO ARGUE THAT A PATIENT WHO INGESTS A GENERIC DRUG COULD SUE THE BRAND MANUFACTURER FOR DEFECTIVE DESIGN AND FAILURE TO WARN, EVEN THOUGH THE PATIENT NEVER TOOK THE BRAND DRUG.

A recent case that discusses the Restatement (Third) is *Huck v. Wyeth,* 850 N.W.2d 353 (Iowa 2014), a pharmaceutical drug products liability case. In *Huck*, a 4-3 court held, in an opinion authored by Justice Waterman, that brand defendants would have no liability to a plaintiff based on failure to warn or design defect, where the plaintiff had only ingested the generic form of the drug (Reglan). The court found that under *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 69 (Iowa 1986), "the plaintiff in a products liability action bears the burden of proving the defendant manufactured or supplied the product that caused the injury." The Court also held that the generic manufacturer's duty to warn was not preempted under federal law, where the generic manufacturer had neglected to update its warnings by adding a warning that the brand name manufacturer had later added, relating to the harm suffered by plaintiff (a neurological condition called "tardive dyskinesia"). Since the generic manufacturer had supplied the drug ingested by plaintiff, it could be held liable in negligence for failure to warn, and there was no federal preemption applicable to that specific claim.

The important aspect of *Huck* for defense counsel is presented by the dissenting opinion authored by Justice Hecht, again joined by Justices Wiggins and Appel. The dissent argues in detail and with considerable logic, over the course of 21 pages, that under the Restatement (Third) analysis, a brand defendant *could be held liable for defective design and failure to warn*, even to a plaintiff who had only taken the generic form of the medication. This is because it is the brand defendant that designed the drug in the first place, and drafted the specific language of the warning, which the generic equivalent must follow, to the letter, under federal regulations. This is concerning to product defendants because Iowa product liability law has never gone so far as to impose liability on a defendant who did not make or supply the product involved in the injury.

Huck also contains a special concurrence by Chief Justice Cady. The concurrence noted that if Congress was not so active in this area, with regard to preemption and other issues, that he could go with the position of the dissenters. Justice Cady noted:

> I agree with much of the dissent on the claims against the brand defendant, but decline at this time to conclude the public policy considerations that ultimately drive the decision in this case, on balance, support the imposition of a duty of care as suggested in Justice Hecht's opinion.

Huck, 850 N.W.2d 353, 381-82 (Cady, C.J., concurring specially).

Since *Huck* was a 4-3 decision, if Justice Cady would agree with the dissenters in a future case, then products liability for defective design or failure to warn, in the absence of manufacture, assembly, sale or supply of the product, would be possible.

XV. UNINTELLIGIBLE JURY INSTRUCTIONS?

The jury instructions committee of the Iowa State Bar Association (ISBA) has published jury instructions to be used for the causation elements in negligence cases. Although the "but for" or cause in fact element has been retained, the "scope of liability" instruction is more problematic. The new instruction provides as follows:

> *700.3A. 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 that harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

Whether (and to what extent) a lay person juror can read, understand and apply this jury instruction in any meaningful way to the facts of a given case is anyone's guess. Lawyers and even judges have had difficulty in applying the "scope of liability" element of causation. In *Hill,* Judge Doyle of the Iowa Court of Appeals aptly stated:

> We do not read the Restatement as requiring the splitting of hairs employed by the trial court here. However, these Restatement provisions seem as clear as mud to us and other courts. *See, e.g., United States v. Monzel,* 746 F. Supp.2d 76, 86 n. 16 (D.D.C. 2010)("Despite the well-established reputation of the ALI, the Court has strong concerns about whether the second prong of its causation analysis, which addresses the scope of liability, is going to be any easier or clearer for judges, who must write appropriate instructions on causation, or for jurors, who must apply them.").

Hill, 804 N.W.2d at 103.

To many the "old" proximate cause instruction seemed more "plain English" and understandable. It provided as follows:

> *700.3 PROXIMATE CAUSE – DEFINED.*
>
> The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the

damage would not have happened except for the conduct.

"Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

An argument can be made that a jury will need more guidance on the scope of liability inquiry than simply Jury Instruction No. 700.3A. The following instructions were first set forth in an article in Defense Update, Summer of 2012, Vol. XIV, No. 3, entitled *"The Restatement (Third), Duty, Breach of Duty and "Scope of Liability,"* Thomas B. Read and Kevin M. Reynolds. Defense counsel should consider requesting the following, additional instructions:

INSTRUCTION NO. 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 defendant]. To establish that the Defendant was negligent, the Plaintiff must establish that it was foreseeable to [the defendant] at the time he/she acted that [the plaintiff] would be harmed by [the conduct of the defendant].

Authority:

Restatement (Third) of Torts: Liab. for Physical and Emotional 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. Kaczinski, 774 N.W.2d 829 (Iowa 2009)

INSTRUCTION NO. 2

Scope of liability

You must decide whether the claimed harm to plaintiff is within the defendant's liability. The plaintiffs' claimed harm is within the scope of defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid.

In determining whether the harm arises from the same general types of danger that the defendant should have taken 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) of Torts: Liab. for Physical and Emotional Harm §29 (2010)

Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)

Iowa Uniform Civil Jury Instruction 700.3A (modified)

The jury instruction committee of the ISBA has not drafted a new uniform instruction on breach of duty. As a result, defense counsel should consider requesting the following instruction, which is quoted from the Restatement (Third):

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 reduce or eliminate the harm.

Authority:

Section 3, Restatement (Third) of Torts, Liability for Physical and Emotional Harm (2010).

XVI. AN IDEOLOGICAL DIVIDE?

Thompson and its progeny reveal an ideological divide among Iowa courts, both trial and appellate, and even within the Iowa Supreme Court itself. In several instances Iowa appellate courts have disagreed with Iowa trial court judges on Restatement (Third) issues. *See, e.g., Thompson* (the trial court's summary judgment for defendant was overturned by the Iowa Supreme Court); *Royal Indemnity* (the jury's $39.5 million verdict for plaintiff was reversed on appeal by the Iowa Supreme Court); *McCormick* (dismissal in trial court in favor of defendant reversed by Iowa Court of Appeals); *Feld* (the trial court's grant of summary judgment for defendant was reversed on appeal by the Iowa Supreme Court); *Hill* (a directed verdict for defendant at trial was reversed on appeal by the Iowa Court of Appeals); *Hoyt* (the trial court's summary judgment for defendant was reversed on appeal by both the Iowa Court of Appeals and the Iowa Supreme Court); and *Miranda* (directed verdict

by trial on emotional distress and punitive damages reversed, based in part on Section 7 of the Restatement Third).

In several Restatement (Third) cases, the Iowa Supreme Court has disagreed with the decision of the Iowa Court of Appeals. *See, e.g., Thompson* (dismissal in trial court affirmed by Court of Appeals, but reversed by the Iowa Supreme Court); *McCormick* (dismissal in trial court reversed by Iowa Court of Appeals; on further review, Supreme Court reverses Court of Appeals and reinstates dismissal); *Feld* (summary judgment granted in trial court upheld by Iowa Court Appeals; dismissal reversed on further review by Iowa Supreme Court); and *Huck* (summary judgment granted to defendants in trial court affirmed by Court of Appeals, but reversed as to the generic defendants on appeal to the Supreme Court).

In addition, several Restatement (Third) cases reflect a doctrinal divide among members of the Iowa Supreme Court. *See, e.g., Feld* (Justice Appel, joined by Justices Wiggins and Hecht, argues in a concurring opinion that the "contact sports" exception should be done away with); *McCormick* (Justice Mansfield, joined by Justices Waterman, Cady and Zager, affirm the summary dismissal below; Justice Hecht (joined by Justices Wiggins and Appel) dissent); *Hoyt* (another 4-3 decision; majority opinion, reversing grant of summary judgment, authored by Justice Hecht, and joined by Justices Wiggins and Appel; strong dissent authored by Justice Waterman and joined by Justices Mansfield and Chief Justice Cady); *Mitchell* (authored by Justice Hecht; strong dissent by Justice Waterman, joined by Justice Mansfield; special concurrence by Chief Justice Cady); and *Huck* (decision authored by Justice Waterman; strong and lengthy dissent by Justice Hecht, joined by Justices Wiggins and Appel; concurrence by Chief Justice Cady, noting he could go with the dissenters given the right facts). Justices Waterman and Mansfield, and to a lesser extent Cady and Zager, seem to support a more measured and conservative approach to the Restatement (Third). Justices Hecht, Wiggins and Appel, on the other hand, tend to apply the Restatement in a more liberal and expansive fashion.

Whether you agree or disagree with the reasoning behind these decisions, one thing is clear: when the appellate courts differ from the trial courts; when the Iowa Supreme Court differs from the Iowa Court of Appeals; and when members of the Iowa Supreme Court often split 4-3 and issue lengthy and strident dissenting opinions, the predictability of the law suffers. This should be a concern to defense lawyers in Iowa.

XVII. CONCLUSION.

Based on the sheer number of case decided since *Thompson* discussing the Restatement (Third) and its various issues, this law and its analysis is here to stay. Defense counsel would be well advised to watch developments closely and to be prepared to make the arguments that will give their clients the best chance at success in defending any tort action.

Treating Doctors and Daubert: Their Time has Come

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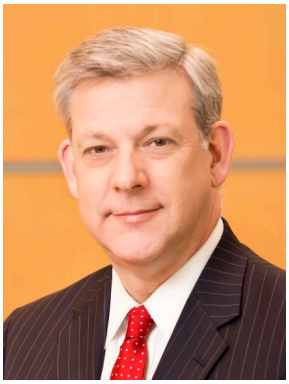


Thomas H. Walton

It is past due time to rigorously apply *Daubert* factors to the opinions of treating doctors. In *Ranes*, the Iowa Supreme Court applied *Daubert* factors to uphold a trial court's exclusion of a retained expert toxicologist given the complex, scientific nature of the issues involved. However, the Iowa courts of appeal have yet to apply *Daubert* factors to exclude the testimony of a treating health professional. Courts need to dig deeper in their analysis of a treater's expert opinions.

In *Ranes v. Adams Laboratories*, 778 N.W.2d 677 (2010), the Iowa Supreme Court upheld for the first time a trial court's exclusion of an expert opinion based upon application of the *Daubert* analysis. The *Ranes* court upheld the exclusion of the opinion of a retained toxicologist that plaintiff's complex neurological condition was caused by his ingestion of phenylpropanolamine, an ingredient of a decongestant. Given the case involved complex issues of causation and a complicated neurological condition, the Court considered the use of the *Daubert* analysis to be appropriate. In *Ranes,* the Court initially signaled the *Daubert* analysis should be used only in "difficult scientific cases," but should not be applied in cases involving "general medical issues."[1] Of course, when an issue may be considered an issue of "general medicine" as opposed to a "difficult scientific issue," is not clear. However, most issues of causation involving physical or mental injuries are quite complex when closely examined.

Since *Ranes,* neither the Iowa Supreme Court nor Iowa Court of Appeals has applied *Daubert* to uphold the exclusion of the opinions of a treating health care professional. However, the Iowa Court of Appeals, when presented with the possibility, has shown a reluctance to exclude the opinions of treating doctors in two decisions.

In *Frank v. Gits Mfg.,* 2010 WL 2079689 (Iowa Ct. App. May 26, 2010), which involved a workers' compensation claim, the employer moved to exclude the opinion of the claimant's treating physician that her chronic constrictive bronchitis was caused by exposure to welding fumes and coolants. The Deputy Commissioner concluded the treating physician's causation opinions were reliable because he was a board-certified pulmonologist, he had more knowledge of the plaintiff's conditions given his clinical treatment of her, and there was a temporal relationship between the onset of the claimant's symptoms and her exposure to workplace fumes. The Deputy Commissioner also observed the treating physician was not able to identify any other possible causes of her problems, indicating some type of differential diagnosis method.

On appeal, the Court assumed, without deciding, the case presented an issue to which the *Daubert* analysis should be applied pursuant to *Ranes.*[2] The treating pulmonologist in *Frank* did not identify "the exact chemical or irritant or mix of such substances" in the workplace that caused the claimant's condition.[3] The Court observed that the treating physician testified to the "'known associations'" between "neuroendocrine cell hyperplasia and bronchiolitis obliterans."[4] The Court also noted the treating physician's opinion, itself, established the requirement of specific causation. Therefore, the Court held the treating doctor's opinion was scientifically reliable.

A good argument can be made that the analysis in *Frank* is flawed. First, the treating physician's inability to reliably identify and quantify the claimant's exposure to the workplace toxins should have been fatal to his opinion. An indispensible prerequisite to any differential diagnosis must be some reasonable basis to first "rule in" a particular toxin as a possible cause of the plaintiff's condition. If a treating physician cannot reliably identify the toxin involved, he cannot even begin to determine if the toxin could have caused the plaintiff's condition. Second, a temporal relationship between symptoms and exposure is not, alone, sufficient to reliably establish specific causation. Third, there was no indication the treating physician identified and ruled out as part of a proper differential diagnosis the many other possible causes for the claimant's condition, which had been identified by the employer's experts. Contrary to the Court's reasoning, an expert's failure to identify other possible causes and to rule them out is a basis for exclusion, not admissibility. Fourth, the Court followed circular logic to conclude the specific causation requirement could be met by the treating doctor's opinion, itself. The proper inquiry is whether the expert's opinion of specific causation was arrived at in the scientifically-reliable manner.

Finally, it can be argued that the Court in *Frank* fumbled the general causation question. There must be reliable scientific evidence that the toxin to which the plaintiff claims exposure is capable of causing the plaintiff's condition. A surgical biopsy of the claimant's lungs showed neuroendocrine hyperplasia and tumorlets. This is a progressive physical condition that results in fibrosis of the lungs. According to the Court, the treating physician apparently relied

upon "several sources" (not disclosed in the Court's opinion) that established a "'known association'" between "'neuroendrocine cell hyperplasia and bronchiolitis obliterans.'"[5]

The Court's analysis is subject to question here for several reasons. First, the same treating physician acknowledged there was a "'lack of reports in the literature linking metal working fluid exposure and bronchiolitis obliterans.'"[6] This indicates the "several sources" relied upon him for his causation opinion apparently did not support a connection between the specific alleged injury-causing agent and the claimant's condition. Then the Court stopped short of a full analysis of the general causation inquiry. It appeared the Court only required there be support for the opinion that the physical changes in the claimant's lungs (i.e., neuroendrocine cell hyperplasia) could cause bronchiolitis. While that is *one* link in the general causation inquiry, it is not the entire chain. The other equally crucial link—not considered by the Court—is whether the toxins to which the claimant was exposed (whatever those were) were capable of causing the physical changes in her lungs in the first place.

Similarly, in *Mercy Hosp.-Iowa City v. Goodner,* 2013 WL 104888 (Iowa Ct. App. Jan. 9, 2013), which involved another workers' compensation appeal, the claimant's doctor alleged she developed chronic fatigue syndrome as a result of exposure to a patient with mononucleosis. The employer's expert physician testified the claimant's condition could not have developed as a result of her exposure to mononucleosis. The employer-hospital also asserted no peer-reviewed studies established a causal link between chronic fatigue syndrome and mononucleosis, the diagnosis of mononucleosis was not confirmed by an independent standard test,[7] and claimant's symptoms appeared sooner than the established incubation period for mononucleosis after exposure.

The Iowa Court of Appeals rejected the employer's arguments. The Court stated published studies were not required to establish general causation, cited general legal principles applicable to evidentiary standards and the admission of evidence in agency proceedings, and stated the Deputy had articulated on the record the opinions of plaintiff's expert doctor and concluded the greater weight of the evidence established a causal connection between claimant's workplace exposure and her chronic fatigue syndrome. While the employer specifically asked the court to apply a *Daubert* analysis to the Deputy's decision, the Iowa Court of Appeals merely considered whether there was substantial evidence supporting the deputy's decision, without any reasoned application of the *Daubert* analysis. The Court summarized the opinions of the claimant's treatment physician "based on their knowledge and experience. . . ."[8] and pronounced that good enough.

The *Goodner* opinion is disappointing for its refusal to apply *Daubert*. For example, regarding the lack of any published peer-reviewed studies to support a causal link between mononucleosis and chronic fatigue syndrome, the lack of such publications is a definite strike against a finding of a reliable general causation opinion. But the Court did not decided the case on the issue. Further, on appeal of the *Daubert* challenge, the issue is not, as the Court seemed to think, whether the lower tribunal articulated the correct evidentiary standard or explained the reasons for its opinion. The issue is whether the lower court applied *Daubert* correctly. Was its reliance upon the treater's opinion supported by an adequate showing the opinion was scientifically reliable? The Court in *Goodner* adopted a far too passive approach to the *Daubert* issue.

While a Deputy Commissioner is the trier-of-fact in compensation claims, he must still perform a gatekeeper function, even for himself, and apply *Daubert* to discount unreliable opinions offered by treating physicians. The fact-finder must not give more weight to a questionable opinion of a treating doctor than it deserves. *Daubert* should guide that judgment. Even in a bench trial, the requirements of *Daubert* must still be met.[9]

Recently, in *Junk v. Obrecht*, 2013 WL 4769433 (Sept. 5, 2013), the Iowa Court of Appeals upheld a trial court's exclusion of expert testimony pursuant to the *Daubert* analysis. Its job was made easier by the federal court's prior exclusion of the same testimony prior to remand to state court. In *Junk*, plaintiffs alleged their son was exposed in vitro to the chemical chlorpyrrifos that resulted in physical neurological and psychological problems. The Court upheld the trial court's exclusion of the proffered expert opinion that the plaintiffs' son had been exposed to a sufficient concentration of the chemical to cause injury.

The central issue on appeal in *Junk* involved the question of specific causation—whether plaintiffs' son had been exposed to a sufficient concentration of the chemical to cause the alleged injuries. Because plaintiffs' expert was not able to collect data regarding the plaintiff's actual exposure, he was not able to estimate by modeling the actual toxic exposure level. Instead, he attempted to compare the exposure circumstances reported in other cases of the household use of chlorpyrofos to the circumstances of the plaintiff's particular exposure. Citing the Eighth Circuit's decision,[10] the *Junk* Court concluded the expert's comparative analysis was not sufficiently reliable given differences between these other cases and the specific factual circumstances of the exposure at issue.

While the *Junk* decision is a hopeful sign, at this point, the Iowa Court of Appeals, at least, appears reluctant to apply *Daubert* with rigor to the opinions of treating doctors. It should not be. There is an established and growing body of law supporting the exclusion of the unreliable opinions of treating doctors.

For example, in *Turner v. Iowa Fire Equip. Co.*, 29 F.3d 1202 (8th Cir. 2000), the Court upheld exclusion of the opinion of plaintiff's treating physician that her exposure to baking soda caused hyperactive airway disorder. "The treating physician's expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians hired solely for the purposes of litigation."[11] The Court recognized a reliable differential diagnosis may satisfy *Daubert*. The Court noted, however, the treating physician's differential diagnosis had been performed for the purpose of identifying plaintiff's *condition*, not its *cause*.[12] The treating physician had not attempted to consider all possible causes or to exclude each possible cause until only one remained, or to consider which of two or more non-excludable causes was the more likely to have caused the condition.

The *Turner* Court noted the medical community's understanding of a "differential diagnosis" is a process followed by physicians for the purpose of identifying a patient's *condition* based upon a systematic comparison of symptoms of possible conditions. This type of differential diagnosis does not involve the identification of alternative *causes* for a condition.[13] As another court has observed, "[T]he ability to diagnose medical conditions is not remotely the same . . . as the ability to deduce, delineate and describe, in a scientifically reliable manner, the causes of those medical conditions."[14] When a treating doctor claims to have done a differential diagnosis, it is important to determine if that process included an identification of cause, not just a condition.

The Eighth Circuit in *Bland v. Verizon Wireless,* 538 F.3d 893 (2008), also upheld the exclusion of the opinion of plaintiff's treating physician that plaintiff's exposure to freon caused exercised-induced asthma. Recall, the claimant in *Frank* also alleged pulmonary injury due to exposure to a cooling agent. In contrast to the Iowa Court of Appeals in *Frank,* however, the Court in *Bland* applied *Daubert* rigorously and upheld the exclusion of the treating physician's causation opinion, in part, because the cause of exercise-induced asthma is unknown.[15] The Court stated: "Where the cause of the condition is unknown in the majority of cases [a doctor] cannot properly conclude, based on a differential diagnosis, that [plaintiff's] exposure to freon was 'the most probable cause' of [plaintiff's] exercised-induced asthma."[16] This is true because it is not logically possible to rule out unknown causes. To conduct a proper differential diagnosis, the Court also imposed upon plaintiff's treating physician the duty to conduct an investigation of the other environments to which plaintiff had been exposed to identify other possible causes of plaintiff's condition, which her doctor failed to do.

Unlike the Iowa Court of Appeals in *Frank*, the Eighth Circuit in *Bland* thought it particularly important the treating physician was not able to identify with reasonable certainty the concentration of freon to which the plaintiff had been exposed. Citing the *Reference Manual on Scientific Evidence,* the Court noted: "'Critical to the determination of causation is characterizing exposure.'"[17] Finally, again contrary to *Frank,* the Court noted that, absent a reliably-established connection between an exposure and particular medical condition, a temporal connection between exposure and onset of symptoms is not alone sufficient to reliably establish causation.[18]

When finally required to review the application of *Daubert* to the opinions of a treating physician, the Iowa Supreme Court should look to the reasoning in *Turner* and *Bland*, rather than *Frank* and *Goodner*, for guidance. Many courts from other jurisdictions have done so and excluded the unreliable opinions of treating physicians under *Daubert*.[19]

Workers' compensation cases should be no exception to *Daubert*. In such cases, the Deputy Commissioner and Iowa courts could consider decisions like *Cellars v. Nextex N.E., LLC,* 895 F. Supp.2d 734 (E.D. Va. 2012), a workers' compensation case in which the court excluded the proffered expert testimony of plaintiff's treating physician under *Daubert*. The employees claimed they suffered injuries due to exposure to freon used in a cooler in the workplace. Sound familiar? One claimant's treating physicians opined the leaking freon caused headaches, fatigue, dizziness, nausea, sore throat, chest pain and epigastric pain. Another claimant's physician testified her neck and back pain, body tremors and other neurological symptoms were caused by exposure to freon. The court concluded the treating physicians lacked adequate scientific knowledge of the level of exposure to freon needed to cause claimants' conditions as well as sufficient information about each claimant's actual level of exposure.[20] Because the treating physicians did not consider the extent of the claimant's exposure to freon, their opinions as to "specific causation . . . are speculative at best."[21] The court also held the treating physicians' differential diagnosis did not support admission of their opinions because they lacked sufficient scientific knowledge to rule in exposure to freon as the cause of the employees' injuries.[22] The court further noted the treating physicians had not adequately investigated other potential causes, including possible exposures to other chemicals in the workplace or at home.

Cases involving injury causation issues arising from multiple accidents also present complex issues justifying the application of *Daubert* to the opinions of treating physicians. For example, in *Monroe v. United States*, 2014 WL 1315242 (M.D. Ga. March 31, 2014), the issue was the cause of the plaintiff's spinal injuries. She had been involved in an earlier collision. While walking home from that collision, she was struck by the defendant. Her treating physician testified that her spinal injuries were caused by the second accident, not the first. First, the court recognized that the

causation issues presented were complex.[23] The court excluded the expert testimony of plaintiff's treating physician as to causation as unreliable because he did not know the important facts about his patient's first accident. The court rejected his opinion as unreliable that the plaintiff likely did not suffer her spinal injuries in the first accident because she was an occupant of a car that crashed into a tree, as opposed to a pedestrian struck from behind by an automobile on the roadway. The court found the treating physician's opinion was unreliable his opinion because he "failed to learn the key facts that could show the amount of force imparted to plaintiff in either collision."[24] The court noted that the doctor did not know the speed of either vehicle upon impact, the type and size of the vehicles involved, the amount of damage sustained by either vehicle or the location and angle of impact of each collision.[25] The court was critical of the expert use of a "'average motor accident versus an average [pedestrian] strike'" as the basis for his opinions.[26]

The court noted the treating physician had relied primarily upon the evidence that the plaintiff had been able to exit her vehicle after the first accident and was able to walk. The doctor explained that in his "clinical experience", people suffering from the type of spinal injury incurred by plaintiff are not able to walk. The court rejected this as a sufficiently reliable basis for his opinion. Significantly, the court noted that the doctor "failed to quantify or qualify his experience or explain how the experience leads to his conclusion."[27] There was no evidence on the record regarding how many patients he had treated with the same type of injury as plaintiff or how many of his patients had this injury after crashing into a tree versus being struck by a car while walking down a roadway.[28] "An appeal to extensive experience alone cannot constitute a reliable methodology." [29]

The court went on to comment about other unreliable aspects of the doctor's opinion. For example, the court noted that deciding which of two possible accidents caused an injury "requires more research than just what a neurosurgeon does in treating a patient."[30] The court was also critical of the doctor's failure to consider and review all possible relevant information, including investigating the circumstances of the accidents and looking at medical records describing plaintiff's other physical injuries. "[H]e did not look at the available data, despite the relevance of that data to his opinion. Because of his failure to do so, his opinion fails" the test requiring that the expert "be as careful in rendering opinion as he is in his regular professional work."[31]

Claims of alleged mental injuries also provide good cases to test the reliability of a treating physician's causation opinion. Courts have recognized that the causation of mental illnesses present complex medical questions. *Ferris v. Pennsylvania Fed'n Broth. of Maint. Way Emps.,* 153 F. Supp.2d, 1376, 745 (E.D. Pa. 1991) (finding treating physician testifying as lay witness could not testify to diagnosis of plaintiff's alleged mental conditions because, given the complex nature of mental conditions, "any proffered testimony on these subjects must meet the requirements of Rule 702 and the *Daubert* line of cases"). In *Nemeth v. Citizens Financial Group*, 2012 WL 3278968 (E.D. Mich. 2012), the court excluded the testimony of the plaintiff's treating social worker as unreliable under the *Daubert* analysis. The social worker diagnosed the plaintiff with post traumatic stress syndrome as a result of workplace harassment and a 7-hour investigation interview. First, the social workers' qualifications to diagnose plaintiff were called into question during her deposition. She was unable to explain the meaning of several psychiatric terms or conditions. She was not familiar with the accepted definition of the essential features of PTSD.[32] Further, the court held that there was not sufficient evidence that the plaintiff had experienced the type of "stressor" required to develop PTSD.[33]

Even seemingly run-of-the-mill neck and back injury cases may be appropriate for application of a *Daubert* analysis. For example, in *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009), plaintiff's treating physician opined an automobile accident caused the pain in the plaintiff's left knee, neck and back. However, the court excluded the testimony pursuant to *Daubert*. It concluded the opinion was unreliable because it was based solely upon the plaintiff's self-report that her injuries were caused by the accident; her doctor failed to adequately investigate the plaintiff's relevant medical history (including injuries sustained in prior accidents), and he failed to consider and rule out alternative explanations for the plaintiff's pain, including osteoarthritis. The court also considered the doctor's failure to address the plaintiff's obesity as a cause of her complaints to be fatal to his opinions. In very strong terms, the court concluded the treating doctor's opinions were "driven by willful blindness to plausible, perhaps even probable, alternative explanations for his patient's symptoms and injuries. By selectively ignoring the facts that would hinder the patient's status as a litigant, [the doctor] reveals himself as the infamous 'hired gun' expert." [34]

Finally, the last refuge of a treating physician espousing a scientifically unreliable opinion is typically testimony to the effect that "based upon my clinical judgment" or "based upon my years of experience treating similar patients" the plaintiff's injury was caused by the defendant's conduct. However, this is simply another way of saying "it is so because I say so", but that, alone, is not sufficient to pass *Daubert*. "Nothing in *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. The court may conclude that there is simply too great of an analytical gap between the data and the opinion proffered."[35] Without good explanations and sound science, courts cannot assess the reliability of a treating doctor's opinions, even if she has relevant "experience" and even if

she "says so".[36]

[1] 728 N.W.2d at 686. In so holding, the *Ranes* court relied upon its earlier decision in *Johnson v. Knoxville Cmty. Sch. Dist.,* 570 N.W.2d 633 (Iowa 1997), in an attempt to limit the application to *Daubert* to cases involving "a somewhat novel scientific procedure characteristic of 'scientific knowledge'", as compared to methodologies "based on practical experience and acquired knowledge." *Id*. at 686. Subsequent to the court's decision in *Johnson*, however, the United States Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), rejected the faulty and false distinction between admissibility of "scientific knowledge" and other "specialized knowledge" under Rule 702. The court in *Kumho* held that a court's general gate-keeping obligation outlined in *Daubert* applied to all expert testimony, not only "scientific testimony." "The whole point of *Kumho* . . . was that the distinction between 'scientific knowledge' (at issue in *Daubert*) and 'technical or other specialized knowledge' (at issue in *Kumho*) is fuzzy at best." *Roberts v. Bennett Enter., Inc.,* 2007 WL 1726595, *3 (E.D. Mich. 2007). One of the cases principally relied upon by the Iowa Supreme Court in Johnson—*McKendall v. Crown Control Corp.,* 122 F.3d 803 (9th Cir. 1997)— for the proposition that *Daubert* did not have application to testimony based on "specialized skill or technical knowledge" was recognized by the Ninth Circuit as "no longer good law after *Kumho Tire*." *U.S. v. Hankey*, 2003 F.3d 1160, 1169 (9th Cir. 2000).

[2] Workers' compensation proceedings are bench trials. Courts have recognized that "the importance of the trial court's gatekeeper role is significantly diminished in bench trials . . . because, there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence." *Whitehouse Hotel, Ltd. P'ship v. C.I.R.,* 16 F.3d 321, 330 (5th Cir. 2010). However, this is no reason for the decision-maker in bench trials not to rigorously apply the Daubert factors to test the reliability of offered testimony. *Metavante Corp. v. Emigrant Savings Bank,* 619 F.3d 748, 760 (7th Cir. 2010) (reliability and relevancy requirements for expert testimony set forth in *Daubert* apply at bench trials).

[3] *Id.* at *4.

[4] *Id.* at *6.

[5] *Id.* at *6.

[6] *Id.* at *4.

[7] The claimant, a licensed doctor, performed a mononucleosis spot test on herself and claimed that the results came back positive. However, none of her treating physicians conducted their own independent test for the infection.

[8] *Id.* at *13.

[9] *Atty. Gen. of Oklahoma v. Tyson Foods,* 565 F.3d 769, 779 (10th Cir. 2009).

[10] 628 F.3d 439, 448-49 (8th Cir. 2010).

[11] *Id.* at *1207.

[12] *Id.* at *1208.

[13] *Id.* at *1208.

[14] *Wynacht v. Beckman Instruments, Inc.,* 113 F. Supp. 2d 1205, 1209 (E.D. Tenn. 2000).

[15] *Id.* at *897

[16] *Id.*

[17] *Id.* at *898.

[18] *Id.* at *898.

[19] *Williams v. MastBiosurgery USA, Inc.,* 644 F.3d 1312, 1317-18 (11th Cir. 2011) (opinions excluded because "when a treating physician's testimony is based on a hypothesis, not the experience of treating the patient, it crosses the line from lay expert testimony, and it must comply with the requirements of Rule 702 and the strictures of Daubert."); *Gass v. Marriott Hotel Svcs., Inc.,* 558 F.3d 419, 426 (6th Cir. 2009) (causation opinions of treating physician in toxic exposure case excluded under *Daubert*); *Montoya v. Sheldon,* 286 F.R.D. 602 (D. Mex. 2012) (court applied *Daubert* to a treating doctor's opinion regarding the cause of the plaintiff's mental disorder because the diagnosis of medical depression and anxiety disorders are "complex injuries beyond a knowledge of a lay person."); *Davis v. Novartis Pharm. Corp.,* 857 F. Supp. 2d 267, 280 (E.D.N.Y. 2012) (treating physician's opinions as to causation subject to same standards of scientific reliability that govern expert opinions of physicians hired solely for purposes of litigation); *Hahn v. Minnesota Beef Indus., Inc.,* 2002 WL 32658476, *3 (D. Minn. May 29, 2002) ("Depression and anxiety disorder are complex injuries, requiring expert (as opposed to lay) testimony regarding diagnosis and causation."); A*shford v. Wal-Mart Stores,* 2012 WL 6690896 (S.D. Miss. Dec. 21, 2012) (court excluded the treating neurosurgeon's opinion regarding the claimant's unemployability); *Nemeth v. Citizen's Fin. Group,* 2012 WL 3278968, *6 (E.D. Mich. Aug. 10, 2012) (court excluded plaintiff's treating social worker from testifying that plaintiff suffered from PTSD as a result of her termination from employment); *Nemeth v. Citizen's Fin. Group,* 2012 WL 3278968, *6 (E.D. Mich. Aug. 10, 2012) (court excluded plaintiff's treating social worker from testifying that plaintiff suffered from PTSD as a result of her termination from employment); *Lujan v. Exide Tech.*, 2012 WL 380270 (D. Kan. Feb. 6, 2012) (court excluded opinions of treating physician that plaintiff was incapable of performing job functions as unreliable because based upon misleading videotape of others performing functions and for lack of specific knowledge regarding weight of objects required to be lifted); *Lee v. Nat'l R.R. Passenger Corp.,* 2012 WL 92363 (S.D. Miss. Jan. 11, 2012) (court excluded opinion of plaintiff's treating social worker that accident caused PTSD, stating that it was "unmoved by the fact that [she] has treated and continues to treat a number of patients suffering from PTSD"); *McCann v. Illinois Cent. R.R. Co.,* 711 F. Supp. 2d 861, 868 (S.D. Ill. 2010) (in workers' compensation case, court excluded treating physician's opinion that the plaintiff's neck pain and disc rupture was a repetitive type injury from working as a railroad engineer, in part, because his opinion was rendered without knowledge of plaintiff's medical history, which included neck pain after riding motorcycle); *Riley v. Union Pac. R.R. Co.*, 2010 WL 1945656 (E.D. Ok. May 11, 2010) (court excluded opinion of treating physician regarding the effects of locomotive vibration upon the plaintiff's neck, low back and left shoulder conditions because the doctor possessed no specialized knowledge of the vibration caused by locomotives, he had not measured vibration forces associated with locomotives, and he had not identified any specific study supporting his opinion); *McCrevy v. Ryan*, 2009 WL 4730728 (S.D. Ala. Dec. 4, 2009) (court excluded treating physician's opinion that automobile accident caused plaintiff's fibromyalgia); *Rhoads v. Hanco, Int'l,* 2003 WL 25685521, *3 (D. Wyo. Jan. 24, 2003) (upheld exclusion of opinions of plaintiff's treating physician that plaintiff's injury due to exposure to a high voltage electrical surge); *Ferris v. Pennsylvania Fed'n*, 153 F. Supp. 2d 736, 745 (E.D. Pa. 2001) (medical conditions of depression and anxiety disorder are "complex injuries" requiring reliable expert testimony to establish causation.).

[20] *Id.* at 739.

[21] *Id.* at 741.

[22] *Id.* at 742.

[23] *Id.* at *4.

[24] *Id.* at *5.

[25] *Id.* at *5.

[26] *Id.*

[27] *Id.* at *6.

[28] *Id.*

[29] *Id.*

[30] *Id.* at *7.

[31] *Id.* at *8.

[32] *Id.* at *6.

[33] *Id.* at 6-7.

[34] *Id.* at 595.

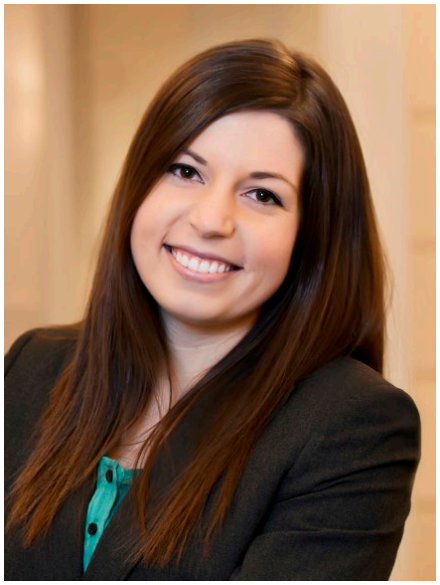
[35] *General Elec. Co. v. Joiner,* 522 U.S. 136 (1997); *see also Bryte v. American Household, Inc.,* 429 F.3d 469, 477 (4th Cir. 2005) ("It is clear that such possibilities have not been

excluded in any methodical or reliable fashion. And we are not obliged to credit [the expert's] say-so supporting his own reliability by way of excluding other causes."); (expert's "opinions are based largely on his experience, but he makes no effort to explain how his conclusions were reached, why the conclusions have a factual basis, or how his experience is reliably applied."); *Allgood v. General Motors Corp.,* 2006 WL 2669337*3 (S.D. Ind. 2006) ("The court must determine that the data supports an admissible expert's opinion by more than merely the say-so of the expert. . . . The testimony cannot simply be 'subjective belief or unsupported speculation.'"); *Lippe v. Bairno Corp.,* 288 Bankr. 678, 689 (S.D.N.Y. 2003) (expert's "opinions are based largely on his experience, but he makes no effort to explain how his conclusions were reached, why the conclusions have a factual basis, or how his experience is reliably applied."); *Pappas v. Sony Electronics, Inc.,* 136 F. Supp. 2d 413, 422 (W.D. Penn. 2000) ("[B]efore the gates to the courtroom will be opened in this Circuit, a proposed expert must do more than simply say "let me in (because I say so).").

[36] In *Ho v. Michelin North America,* 520 Fed. Appx. 658, 663 (10th Cir. 2013), the court upheld exclusion of expert opinion under *Daubert* where opinion based on "'generalized experience'" because expert did not explain how "experience rendered his particular opinions in this case reliable." *See also In re Motor Fuel Temp. Sales Practice Litigation,* 2012 WL 645997 #2 (D. Kan. 2012) ("A witness relying solely or primarily on experience must give a sufficient explanation of how the experience leads to the conclusion reached.")

YOUNG LAWYER PROFILE

In every issue of Defense Update, we will highlight a young lawyer. This month, we get to know Katie L. Graham, Nyemaster Goode, P.C., Des Moines.



Katie Graham is a trial attorney at Nyemaster Goode, P.C., where she is a member of the firm's Litigation and Labor and Employment Departments. Katie's practice focuses on issues that affect the restaurant and hospitality industry. She has first-chaired a jury trial involving violations of USERRA and retaliation, has tried a case involving claims of race discrimination in employment, and has prosecuted over 40 bench trials on behalf of a municipality. Katie also volunteers in cases involving adoptions and termination of parental rights.

Katie was born and raised in Waterloo. She graduated from the University of Iowa in 2006 with a degree in Journalism and Mass Communication and earned her law degree from Drake University in 2011. While in law school, Katie was a student intern at the US Attorney's Office for the Southern District of Iowa.

Katie sits on the IDCA Board of Directors, co-chairs the IDCA's Young Lawyers Committee, is a member of the Central Iowa Steering Committee for Iowa Women Lead Change, co-chairs Winefest Des Moines Grand Cru and the Des Moines Area Music Coalition's Backstage Ball committee, and has coached several high school mock trial teams.

Katie enjoys traveling, photography, spending time with friends, family, and her dog and cat, Effie and Lucy. Katie looks forward to recruiting new IDCA members. Feel free to contact her at mailto:kgraham@nyemaster.com for more information about IDCA's Young Lawyers Committee.

IDCA Welcomes 21 New Members!

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50th Anniversary Celebration Dinner at Jasper Winery

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50th Anniversary Wine Bottles and Glasses

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Past Presidents Lunch

Law Offices of Hopkins & Huebner, P.C.
Thursday Morning Break

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Thursday Morning Break

UFG Insurance
Friday Afternoon Break

AND THE AWARD GOES TO...

The IDCA 50th Anniversary Celebration was held on Thursday, September 18, at Jasper Winery in Des Moines. It was a picture-perfect evening, with a gorgeous fall evening and vineyard serving as our backdrop. Go to IDCA's Facebook page for a visual recap of the night, or go to www.alexandersphoto.com if you wish to order any professional grade photos. Once on Alexander's Photo, click **Order Photos** and then **Order Event Photos** under Alexander Event Photos. Click **IDCA 2014.**

PAST PRESIDENTS HONORED

The evening started out with a video of the history of the IDCA. Following, IDCA President Jim Craig recognized all past presidents of the association. Those in attendance received a gift of appreciation from the organization.

(L to R): Bruce L. Walker, 2012 – 2013; Gregory G. Barntsen, 2011 – 2012; Stephen J. Powell, 2010 – 2011; Michael W. Thrall, 2005 – 2006; Sharon Greer, 2004 – 2005; J. Michael Weston, 2002 – 2003; Marion L. Beatty, 2000 – 2001; Robert A. Engberg, 1996 – 1997; Robert G. Allbee, 1972 – 1973; Gregory M. Lederer, 1994 – 1995; and Marvin F. Heidman, 1979 – 1980.

OUTGOING BOARD HONORS

Jim Craig thanked outgoing Board member, Ben Weston, for four years of service on the Board of Directors as the Young Lawyer representative.

Following, incoming President Christine Conover, and DRI President and IDCA Past President, Ben Weston, thanked Jim Craig for his service as the IDCA President.

RISING STAR AWARDS

New this year is the Rising Star Award, giving recognition to young lawyers who have been actively engaged in the association. The inaugural Rising Star Awards recipients included:

Clay Baker, Aspelmeier, Fisch, Power, Engberg & Helling, PLC, in Burlington, nominated by the IDCA Defense Update Board of Editors.

Megan Dimmitt, Lederer Weston Craig PLC, in Cedar Rapids, nominated by Kami Holmes for her dedication to the Membership Committee and participation in the IDCA Skills Academy.

John Lande, Dickinson, Mackaman, Tyler & Hagen, Des Moines, nominated by the IDCA Executive Committee for his faithfulness in organizing and presenting the Case Law Updates at the Annual Meeting & Seminar for the past three years.

Ben Weston, Lederer Weston Craig PLC, in West Des Moines, for serving as the Young Lawyer Representative on the Board of Directors for the past four years, and leading the Webinar Task Force for two years.

EDDIE AWARD

In 1988, IDCA president Patrick Roby proposed to the board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and its first president and for his continuous and complete dedication to the IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, which was dubbed "The Eddie Award."

Edward Seitzinger was an attorney with Farm Bureau and besides his family and work, IDCA was his life. This award is presented annually to the board member who contributed most to the IDCA during the year. It is considered IDCA's most prestigious award.

The very deserving recipient of the Eddie Award for 2014 is Kami L. Holmes, Grinnell Mutual Reinsurance Company, in Grinnell. Holmes has been steadfast in her support of and contribution to the IDCA. Holmes as served on the IDCA Board of Directors since 2011. In that time, she also has served on the Legislative, CLE, and Young Lawyer's committees and, most recently, is serving as the Chair of the Membership and Marketing Committee. She is actively involved in DRI, both as an author and committee volunteer, and often attends DRI meetings on behalf of IDCA. This past year Holmes spearheaded the First Annual Skills Seminar at the University of Iowa and Drake University, an event held by the IDCA and Iowa Association for Justice. Due to the overwhelming success of this event, she is already leading the charge for next year's events at each school.

Congratulations, Kami! IDCA is honored to have you as a member of this organization!

MERITORIUS SERVICE AWARD

The Meritorious Service Award is bestowed upon IDCA members whose longstanding commitment and service to the Iowa Defense Counsel Association has helped to preserve and further the civil trial system in the State of Iowa.

This year, IDCA is pleased to bestow this award upon David L. Phipps, Whitfield & Eddy, PLC in Des Moines, and Marion L. Beatty, Miller Pearson Gloe Burns Beatty & Cowie PC in Decorah, IA.

IDCA Schedule of Events

December 15, 2014

IDCA FREE ETHICS WEBINAR

Noon – 1:00 p.m.

Ethical Applications of Modern Legal Technology, Presented by Todd C. Scott, Minnesota Lawyers Mutual Insurance Company.

February 27, 2015

TRIAL PRACTICE ACADEMY

University of Iowa College of Law
Iowa City, IA

Watch your Inbox for meeting details.

March 6, 2015

TRIAL PRACTICE ACADEMY

Drake University
Des Moines, IA

Watch your Inbox for meeting details.

September 15–17, 2015

51ST ANNUAL MEETING & SEMINAR

Stoney Creek Hotel & Conference Center
Johnston, IA