TORTS—A Plaintiff's Failure to Reasonably Attempt to Follow a Physician's Advice to Lose Weight May Be Considered an Unreasonable Failure to Mitigate Damages and Therefore May Be Assessed as Fault Under the Iowa Comparative Fault Act—*Tanberg v. Ackerman Investment Co.*, 473 N.W.2d 193 (Iowa 1991).

I. INTRODUCTION

Bruce Tanberg ("Tanberg"), a guest at a motel owned and operated by Ackerman Investment Company ("Ackerman"), fell while stepping out of a whirlpool bathtub and injured his back.[1] The injury subjected Tanberg to continual pain.[2] At the time of the accident, Tanberg weighed 309 pounds and stood five feet eleven inches tall.[3] Following the accident, three physicians advised Tanberg to lose weight to reduce the pain.[4] One specifically recommended Tanberg lose thirty to forty pounds, and referred him to a dietician so he could be placed on a special diet.[5] Although none of the physicians could say losing weight would definitely—or even probably—reduce Tanberg's back pain, all agreed losing weight might reduce the pain by easing the pressure on his spine.[6] Tanberg did not, however, follow his prescribed diet faithfully.[7] As a result, he failed to lose weight as his physicians directed.[8]

Tanberg later brought a negligence action against Ackerman to recover damages for the injuries he sustained in the fall, including damages for his continual pain.[9] In its answer, Ackerman asserted the affirmative defense of failure to mitigate damages.[10] Specifically,

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1. Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193, 194 (Iowa 1991). The specific facts of Tanberg's mishap are as follows: The whirlpool bathtub was normally controlled by both an automatic timer and a manual shut-off switch located across the room from the tub. Agreed Statement of the Case at 1, Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193 (Iowa 1991) (No. 89-1893). The automatic timer was not working at the time of the accident. *Id.* After Tanberg finished his bath, he drained the water, but did not turn off the whirlpool jets. *Id.* The water level fell below the jet nozzles, and the jets sprayed water across the room. *Id.* Tanberg crossed the room to turn off the jets manually, slipped on the standing water, and fell on his back. *Id.*

2. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 194.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* Tanberg claimed Ackerman was negligent in renting the room when the automatic timer was broken and in failing to warn Tanberg it was dangerous to leave the whirlpool jets on when the water level was below the jet nozzles. Agreed Statement of the Case at 1-2, Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193 (Iowa 1991) (No. 89-1893).

10. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 194. Ackerman's answer also asserted that "[Tanberg] was at fault in causing the accident." *Id.* Specifically, Ackerman claimed Tanberg failed to maintain a proper lookout and moved too quickly for the existing

Ackerman claimed Tanberg unreasonably failed to follow his physicians' advice to lose weight, and further claimed this failure was fault that should be assessed against Tanberg's recovery.[11] The case went to trial under the Iowa Comparative Fault Act ("Act"),[12] which bars a plaintiff's recovery for negligence when his percentage of fault in bringing about his damages is greater than fifty percent, and diminishes the plaintiff's recovery by an amount proportional to his percentage of fault when it is less than or equal to fifty percent.[13]

After both parties rested, the trial judge submitted proposed jury instructions to the parties.[14] Several instructions detailed theories under which Tanberg could be found at fault.[15] Among these was Instruction Nineteen, which stated:

> Evidence has been introduced that damages could have been reduced to some extent if [Tanberg] had followed his doctor's advice and lost weight. An injured person has no duty to undergo serious or speculative medical treatment, but, if by slight expense and by slight inconvenience, a person exercising ordinary care could have reduced the damages, he has a duty to do so.[16]

At trial, Tanberg objected to Instruction Nineteen on two grounds. First, he argued a mitigation instruction is proper only when the condition to be mitigated was caused by the defendant's negligence.[17] Because his excess weight was not caused by Ackerman's negligence, Tanberg

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wet condition of the floor. Agreed Statement of the Case at 2, Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193 (Iowa 1991) (No. 89-1893).

11. *See* Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 194.

12. *Id.* The Iowa Comparative Fault Act is contained in IOWA CODE § 668.1-.15 (1991). This case proceeded under the 1987 version of the Act. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 194. The only difference between the 1991 and 1987 versions is the addition of §§ 668.13-.15, which relate to interest on judgments, evidence of previous payment or future right of payment, and damages resulting from sexual abuse. *Compare* IOWA CODE §§ 668.1-.15 (1991) *with* IOWA CODE §§ 668.1-.12 (1987). These sections have no bearing on the issues raised by this case.

13. IOWA CODE § 668.3(1) (1991).

14. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 194.

15. *Id.*

16. *Id.* at 195. This instruction is reproduced in IOWA STATE BAR ASS'N, IOWA CIVIL JURY INSTRUCTIONS § 400.7 (1992). Authority for the instruction is found in Shewry v. Heuer, 121 N.W.2d 529, 533-34 (Iowa 1963); Updegraff v. City of Ottumwa, 226 N.W. 928, 931 (Iowa 1929); White v. Chicago & N.W. Ry. Co., 124 N.W. 309, 311 (Iowa 1910); Bailey v. City of Centerville, 78 N.W. 831, 832 (Iowa 1899); and Welter v. Humboldt County, 461 N.W.2d 335, 340 (Iowa Ct. App. 1990). In addition to Instruction Nineteen, the trial judge gave instructions on Tanberg's duty to maintain a proper lookout and duty to move at a speed reasonable for existing circumstances. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 194.

17. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 195.

reasoned, it was not subject to mitigation.[18] Second, Tanberg argued forcing him to lose weight to mitigate damages violated the "eggshell plaintiff" rule—the rule that the defendant takes the plaintiff as he finds him, and cannot complain if the plaintiff suffers from a condition that makes him more susceptible to injury than a normal person.[19]

The trial court gave Instruction Nineteen despite Tanberg's objections.[20] The jury found Ackerman only thirty percent at fault and assessed the remaining seventy percent to Tanberg.[21] Because Tanberg's percentage of fault was greater than fifty percent, the Iowa Comparative Fault Act required the trial court enter judgment for Ackerman.[22]

On appeal, Tanberg challenged only the submission of Instruction Nineteen.[23] The Iowa Court of Appeals apparently recognized an inherent difficulty in weight loss: It found that, as a matter of law, "an overweight person unable to follow his or her doctor's instructions to lose weight has not breached [the duty to use ordinary care in following the doctor's advice]."[24] Consequently, the court of appeals held the trial court erred when it gave Instruction Nineteen.[25] On review, the Iowa Supreme Court limited the issue to whether "a failure to follow medical advice to lose weight" could be

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18. *Id.* The Iowa Supreme Court never addressed this argument. *See id.* at 193-96. The court could hardly be blamed for failing to take this argument seriously. Tanberg overlooked the fact Ackerman did not ask him to mitigate his overweight condition. Rather, Ackerman asked him to use weight loss to mitigate his back pain, which allegedly was caused by Ackerman's negligence. *See id.* at 195.

19. *Id.* This rule originated in the English case of Dulieu v. White & Sons [1910] 2 K.B. 669. Glanville Williams, *The Risk Principle*, 77 L.Q. REV. 179, 193 (1961). It appears in Iowa case law in Becker v. D&E Distrib. Co., 247 N.W.2d 727, 730 (Iowa 1976) (citing McBroom v. State, 226 N.W.2d 41, 45-46 (Iowa 1975)). The *Becker* court added a technical gloss to the rule by holding:

> [M]ere existence of a prior non-disabling, asymptomatic, latent condition is not a defense. A tort-feasor whose act, superimposed upon such condition, results in an injury may be liable in damages for the full disability. In these cases the injury, and not the dormant condition, is deemed to be the proximate cause of the pain and disability.

Id. at 731 (citations omitted); *see also* Koeller v. Reynolds, 344 N.W.2d 556, 559 (Iowa Ct. App. 1983) (citing Becker v. D&E Distrib. Co., 247 N.W.2d at 730-31). For additional authority for the eggshell plaintiff rule, see RESTATEMENT (SECOND) OF TORTS § 461 (1965).

20. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 194-95.

21. *Id.* at 195.

22. *Id.* See *supra* text accompanying note 13 for a description of the effect of a plaintiff's fault on his recovery under the Iowa Comparative Fault Act.

23. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 195.

24. Tanberg v. Ackerman Inv. Co., No. 89-1893, slip op. at 4 (Iowa Ct. App. Feb. 26, 1991), *vacated*, 473 N.W.2d 193. The court of appeals offered no explanation for their conclusion. *See id.* Their choice of the word "unable," however, seems to indicate the court considered finding an effective diet that works and abiding by it so inherently difficult a claimant could not be faulted for failing to do so.

25. *Id.*

considered fault under the Iowa Comparative Fault Act.[26] The Iowa Supreme Court *held*, vacated and affirmed.[27] A plaintiff's failure to reasonably attempt to follow a physician's advice to lose weight can be considered a failure to mitigate damages, and therefore may be assessed as fault under the Iowa Comparative Fault Act. *Tanberg v. Ackerman Investment Co.*, 473 N.W.2d 193 (Iowa 1991).

II. THE OPINION

A. *Statutory Construction of the Iowa Comparative Fault Act*

The Iowa Supreme Court did not address Tanberg's claim that treating weight loss as a mitigative procedure would violate the eggshell plaintiff rule, or the court of appeals' concern that the inherent difficulty attendant in weight loss made it an inappropriate mitigative procedure.[28] For the supreme court the question at hand was simply one of statutory construction of the Iowa Comparative Fault Act.[29] Section 668.1(1) of the Act states: "As used in this [Act], 'fault' means one or more acts or omissions that are in any measure negligent or reckless . . . or that subject a person to strict tort liability. The term also includes . . . unreasonable failure to avoid an injury or to mitigate damages."[30] With this section as its guide, the supreme court had little difficulty concluding a failure to follow medical advice to lose weight could be considered a failure to mitigate

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26. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 195. Tanberg made the following arguments against Instruction Nineteen in his brief to the Iowa Supreme Court: (1) Requiring Tanberg to lose weight gained before the fall violated the eggshell plaintiff rule, (2) the instruction was improper because Ackerman failed to meet its burden of proof by establishing to a reasonable degree of medical certainty that losing weight would have mitigated Tanberg's damages, and (3) the instruction was improper because the evidence established Tanberg's weight loss could only be accomplished through great inconvenience. Plaintiff's-Appellant's Brief and Argument at 4-5, Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193 (No. 89-1893). Tanberg also argued he could not reasonably be expected to lose weight immediately, and the trial court therefore erred by failing to instruct the jury that there was a certain amount of time after the accident in which he could not be expected to mitigate his damages. *See id.* at 10. The supreme court found most of these assignments of error were not properly preserved by plaintiff's oral objection at trial, but did agree "[Tanberg] minimally preserved error on the questions of whether weight loss is encompassed within the term 'mitigation of damages' under Iowa Code [§] 668.1(1)." Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 195.

27. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 194.

28. *See id.* at 193-96.

29. *See id.* at 195.

30. IOWA CODE § 668.1(1) (1991). Interestingly, the court felt compelled to reinforce the obvious conclusion that this section establishes a failure to mitigate damages as fault for purposes of the Iowa Comparative Fault Act. *See* Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 195. Accordingly, the court cited *Miller v. Eichhorn*, which held an unreasonable failure to mitigate damages may be considered fault under § 668.1(1) of the Act. *Id.* at 195-96 (citing Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa Ct. App. 1988)).

damages. The court merely noted that "nothing in section 668.1(1) suggests . . . weight loss should be treated differently from any other opportunity to mitigate damages," and therefore held the trial court did not err when it gave Instruction Nineteen.[31]

B. *Guidelines for Future Application*

Having summarily disposed of the principal issue, the court concluded by setting some guidelines for future courts confronted with the issue of weight loss as a mitigative procedure. First, the court emphasized that even if a plaintiff fails to lose weight as advised, the defendant is not automatically entitled to a mitigation instruction.[32] Rather, the defendant is entitled to the instruction only if he can show substantial evidence that (1) losing weight would mitigate the plaintiff's damages and (2) it is reasonable under the circumstances to require the plaintiff to lose weight.[33]

Second, and most importantly, the court established that even if a mitigation instruction is given and the jury finds the plaintiff does have a duty to mitigate through weight loss, he does not actually have to lose weight to avoid being assessed fault.[34] Rather, the plaintiff must only make a reasonable attempt to lose weight.[35] If the plaintiff made a reasonable attempt, then his failure to actually lose weight may not be considered a failure to mitigate and may not be assessed as fault.[36] On the other hand, if the plaintiff did not make a reasonable attempt, the jury may find he unreasonably failed to mitigate his damages, and may assess that failure as fault that will reduce or bar his recovery.[37]

To illustrate this concept, the court pointed to Tanberg's testimony. At trial, Tanberg stated he was "not 'as faithful in following his diets as he should have been.'"[38] The supreme court held this evidence would permit a jury to conclude Tanberg had unreasonably failed to mitigate his damages.[39]

On its face, this conclusion seems to indicate that any time a plaintiff falls off his diet, a jury may justifiably conclude the plaintiff did not make

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31. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 195-96.

32. *Id.* at 196.

33. *Id.* The court supported this rule by noting its earlier decision in Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988) (holding legal theories submitted to a jury must be supported by pleadings and substantial evidence), and by drawing a comparison with its decision in Shewry v. Heuer, 121 N.W.2d 529, 533 (Iowa 1963) (holding failure-to-mitigate instructions may be submitted to jury only to extent they have been pleaded or proved by defendant, or grow out of plaintiff's testimony).

34. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 196.

35. *Id.*

36. *See id.*

37. *See id.*

38. *Id.*

39. *Id.*

a reasonable attempt. However, a review of the cases the court cited to support this conclusion—*Fuches v. S.E.S. Co.*[40] and *Miller v. Eichhorn*[41]—indicates otherwise. In each case, the issue was not whether the jury justifiably concluded the plaintiff failed to mitigate his damages. Rather, the issue was whether the trial court properly submitted the mitigation instruction based on the particular evidence before it.[42] In both cases there was evidence the plaintiffs failed to undertake recommended medical procedures that would mitigate their damages.[43] This evidence was deemed sufficient to warrant submitting the failure-to-mitigate instruction to the jury.[44] The *Tanberg* court's conclusion, therefore, does not grant a jury blanket authority to find that any plaintiff who has strayed from his diet failed to make a reasonable attempt. Rather, the conclusion only indicates that evidence the plaintiff strayed will be sufficient to bring the question of reasonable attempt before the jury. Therefore, the court did not preclude the possibility a jury may justifiably conclude the plaintiff made a reasonable attempt even though he did not faithfully follow the diet.[45]

Finally, the court noted "[its] decision [was] in accord with other jurisdictions that . . . review each case to determine if failure to lose weight

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40. Fuches v. S.E.S. Co., 459 N.W.2d 642 (Iowa Ct. App. 1990). In *Fuches*, the plaintiff fell off a scaffold and injured his arm. *Id.* at 643. The defendant introduced evidence that the plaintiff failed to undergo surgery that would have restored normal strength and function to the shoulder. *Id.* at 644. The surgery required several days of hospitalization, three weeks of immobilization, and several months of therapy. *Id.* at 643-44. The surgery would also inflict acute pain and a risk of complications. *Id.* The trial court submitted the failure-to-mitigate instruction to the jury. *Id.* at 643. Plaintiff challenged the instruction on appeal. *Id.* The Iowa Court of Appeals found the evidence sufficient to warrant submitting to the jury the instruction: "Whether [a] plaintiff has acted reasonably in minimizing or mitigating [his] damages and whether or not the treatment suggested was reasonable should be determined by the trier of fact." *Id.* at 644 (citations omitted).

41. Miller v. Eichhorn, 426 N.W.2d 641 (Iowa Ct. App. 1988). In *Miller*, a plaintiff injured in a car accident appealed the submission of the failure-to-mitigate instruction to the jury. *Id.* at 643. The Iowa Court of Appeals held a doctor's testimony that additional treatments would have helped the plaintiff's condition was sufficient to support submission of the failure-to-mitigate instruction. *Id.*

42. *See* Fuches v. S.E.S. Co., 459 N.W.2d at 643; Miller v. Eichhorn, 426 N.W.2d at 643.

43. *See* Fuches v. S.E.S. Co., 459 N.W.2d at 643-44; Miller v. Eichhorn, 426 N.W.2d at 643.

44. *See* Fuches v. S.E.S. Co., 459 N.W.2d at 644; Miller v. Eichhorn, 426 N.W.2d at 643.

45. It seems apparent a plaintiff suffering from a documented eating disorder or a plaintiff following an extremely restrictive diet might stray from the diet and still be found to have made a reasonable attempt to lose weight. In fact, if common experience is the guide, it is completely plausible that any reasonable attempt to lose weight might include an occasional departure from the diet's regimen. *Accord* Close v. State, 456 N.Y.S.2d 437, 439 (N.Y. App. Div. 1982) (holding plaintiff made good faith effort to lose weight despite fact she was unable to stay on diet). See also *infra* text accompanying note 80 for a discussion of the recidivism rate of weight loss programs.

should be treated as a mitigating factor."[46] This raises the inference that whether a plaintiff will have a duty to attempt to lose weight will depend heavily on the facts of the particular case. The court did not explore those factors that might properly lead a jury to conclude a plaintiff has a duty to mitigate his damages through weight loss, or has failed to make a reasonable attempt.[47] A review of the cases the court interpreted as supporting the case-by-case approach, however, reveals a number of factors that a jury may consder. Among these are the probability (according to expert medical testimony) that weight loss would actually mitigate damages,[48] the extent to which the plaintiff faithfully followed the prescribed weight loss plan,[49] the amount of medical supervision the plaintiff was given in devising and implementing the plan,[50] and the extent the plaintiff's injuries caused him to

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46. Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 196. The court noted the following jurisdictions "considered a person's failure to lose weight a mitigating factor when weight loss will lessen damages": Kratzer v. Capital Marine Supply, 645 F.2d 477 (5th Cir. 1981); Muller v. Lykes Bros. Steamship Co., 337 F. Supp. 700 (E.D. La. 1972); Anglin v. Grisamore, 386 S.E.2d 52 (Ga. Ct. App. 1989); Butler v. Anderson, 295 S.E.2d 216 (Ga. Ct. App. 1982); Close v. State, 456 N.Y.S.2d 437 (N.Y. App. Div. 1982); Armellini Express Lines v. Ansley, 605 S.W.2d 297 (Tex. Civ. App. 1980). The Iowa Supreme Court also acknowledged Allen v. Devereaux, 426 P.2d 659 (Ariz. Ct. App. 1967), which held requiring a plaintiff to lose weight gained before the injury to mitigate the injury violates the eggshell plaintiff rule. *Id.* at 662.

Of these cases, only three directly held a failure to lose weight as directed did or could constitute an unreasonable failure to mitigate damages. *See* Muller v. Lykes Bros. Steamship Co., 337 F. Supp at 706; Butler v. Anderson, 295 S.E.2d at 217; Aisole v. Dean, 574 So.2d 1248, 1253-54 (La. 1991). The remainder (with the exception of *Anglin*) in fact refused to consider the particular weight loss failure at issue a failure to mitigate damages or held submission of a failure to mitigate instruction improper based on the particular weight loss failure at issue. *See* Kratzer v. Capital Marine Supply, 645 F.2d at 483; Close v. State, 456 N.Y.S.2d at 439; Armellini Express Lines v. Ansley, 605 S.W.2d at 309. Their consideration of the particular facts that made each weight loss failure an inappropriate mitigative procedure in that instance, however, implies these courts would consider a failure to lose weight a failure to mitigate under the proper circumstances.

The Iowa Supreme Court's citation of *Anglin* is somewhat curious. In *Anglin*, the plaintiff had the size of her stomach surgically reduced to promote weight loss. Anglin v. Grisamore, 386 S.E.2d at 53. The plaintiff was supposed to restrict her diet after the operation to ensure the procedure's success. *Id.* The plaintiff was unable to do so, and failed to lose weight. *Id.* The plaintiff brought a malpractice action, charging her doctor failed to conduct a screening before the surgery to determine whether the plaintiff had the mental fortitude to restrict her diet. *Id.* The issue was not whether the plaintiff's failure to lose weight was a failure to mitigate damages. Rather, the issue was whether the liability for plaintiff's failure to lose weight should be attributed to the doctor's failure to screen the plaintiff or the plaintiff's failure to adequately judge her own ability to adhere to the dietary restrictions before undergoing the operation. *Id.* The Iowa Supreme Court therefore erred when it characterized *Anglin* as supporting the proposition that weight loss is a proper mitigative procedure.

47. *See* Tanberg v. Ackerman Inv. Co., 473 N.W.2d at 196.

48. *See* Kratzer v. Capital Marine Supply, 645 F.2d at 484; Armellini Express Lines v. Ansley, 605 S.W.2d at 309.

49. *See* Armellini Express Lines v. Ansley, 605 S.W.2d at 309.

50. *See* Kratzer v. Capital Marine Supply, 645 F.2d at 484. The *Kratzer* court implied a plaintiff's duty to follow medical advice to lose weight is stronger when the plaintiff has been

lead a more sedentary lifestyle that makes weight loss more difficult.[51] These factors suggest the presence of eating disorders or other pre-existing mental or physical conditions that make weight loss more difficult could be important factors as well.[52]

III. SOME CRITICISMS

A. *Dancing Around the Issue: The Iowa Sidestep*

This case raises important questions concerning the eggshell plaintiff rule and the medical and societal status we accord overweight individuals. Unfortunately, these issues were never addressed. The supreme court effectively sidestepped them by holding they were controlled by section 668.1(1) of the Iowa Comparative Fault Act.[53] As noted earlier, the court relied entirely on the fact that section 668.1(1) did not suggest weight loss should be treated differently than other opportunities to mitigate damages.[54] This observation is correct, but is significant only if the section purports to define the failure-to-mitigate doctrine. It does not. The section's

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placed on a professionally administered diet than when the plaintiff is "glibly" told to lose some weight. *Id.* See *infra* note 62 for further discussion of the necessity of professional weight loss management.

51. *See* Close v. State, 456 N.Y.S.2d 437, 439 (N.Y. App. Div. 1982).

52. The eating disorder linked to obesity is compulsive overeating. *See* DONALD A. WILLIAMSON, ASSESSMENT OF EATING DISORDERS 5 (1990). "Recent research . . . suggest[s] . . . 20% to 40% of obese patients have significant problems with compulsive binge eating. While compulsive binging is also found in normal weight individuals, existing research suggests it is much more prevalent in obese populations." *Id.* (citations omitted).

A study of 50 compulsive overeaters revealed the following: The typical compulsive overeater is about 60% overweight and is female. *Id.* at 6. Binge frequencies of the group ranged

> from every day to once or twice per week. Generally the binges were very large and consisted of carbohydrates and junk food. Typical binges were (a) a gallon of ice cream, (b) a dozen doughnuts, (c) several hamburgers, or (d) boxes or bags of cookies or chips. Most of these binges occurred in secrecy and were scheduled, such as in the afternoon after school or work. Often, family or friends believed that the individual was dieting [because] they typically professed to be on a diet and publicly followed the diet. . . .
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> [C]ompulsive overeaters . . . have secondary problems. . . . In particular, a majority of these patients are depressed and are often diagnosed as dysthymic. Personality disorders such as dependent, avoidant, and passive-aggressive are also often diagnosed. Thus, these cases generally have problems of eating as well as other clinical problems [that] interact to produce chronic obesity and unhappiness.

Id. at 6-7. See *infra* note 61 for further discussion of mental conditions that contribute to obesity.

53. *See supra* text accompanying notes 28-31.

54. *See supra* text accompanying note 31.

entire purpose is to define *fault*.[55] It does so by providing a laundry list of common-law theories of negligence and contributory negligence that may be considered fault.[56] Nowhere in the section, or in any part of the Iowa Comparative Fault Act, are these doctrines qualified, described, or defined.[57] The section consequently provides no definition of fault unless the theories listed are given their common-law definitions. Therefore, it is unsatisfactory for the court to rely on the fact that nothing in section 668.1(1) indicates weight loss should be treated differently from other opportunities to mitigate; the section says nothing about it because the legislature expected the courts to address such issues.[58]

B. *Medical and Societal Concerns*

The court's failure to address the medical and societal concerns attendant treating weight loss as a valid mitigative procedure is particularly unfortunate. Although the medical community has undertaken considerable efforts to understand and remedy obesity,[59] there are still

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55. *See* IOWA CODE § 668.1(1) (1991).

56. *See id.*

57. *See id.* §§ 668.1-.15.

58. This proposition is supported by the Iowa Comparative Fault Act's legislative history. A review of the different versions the legislature considered reveals a great deal of attention was paid to which common-law theories of negligence and contributory negligence would be included within the definition of fault. *See* H.F. 2487, 70th G.A., 2d Sess., 1984 Iowa Acts 1293. It appears, however, no attention was given to the definitions accorded those theories. *See id.*

Arguably, it is unlikely the Iowa Supreme Court will be able to continue treating § 668.1(1) as a definitional section for the doctrines it uses to define fault. If the court does, it will be forced to accept every interpretation of those doctrines—no matter how ridiculous—on the grounds the section says nothing to the contrary.

59. This Case Note evaluates the issues raised by this case as they relate to medically defined obesity, for the health risks associated with excess weight become significant at the point the medical community considers a person obese. *See* WILLIAMSON, *supra* note 52, at 52. The medical community considers a person obese when "he exceeds his ideal body weight by more than 20[%]." Barbara Lukert, *Biology of Obesity*, *in* PSYCHOLOGICAL ASPECTS OF OBESITY 1, 1 (Benjamin B. Wolman ed., 1982); WILLIAMSON, *supra* note 52, at 52. The difficulty is determining when this level has been reached. Comparing an individual's weight to standard height and weight charts listing the average weights of males and females at varying heights overestimates the fat content of people who are very muscular or have large skeletons. Rachel Schemmel, *Assessment of Obesity*, *in* NUTRITION, PHYSIOLOGY, AND OBESITY 1, 3 (Rachel Schemmel ed., 1980). Further, skeleton size is difficult to estimate and adjust for in overweight individuals. *Id.* at 7. Calculations based on measurements of specific gravity or density, in which body fat measurements are based on the amount of water the individual displaces, are more accurate, but are impractical in the field. *Id.* at 11. Perhaps the best method for measuring body fat is tricep skinfold measurement, in which the skin hanging from the tricep when the arm is held in the air is measured and compared to a table of average measurements based on age and sex. *Id.* at 12, 15. This method is accurate enough for clinical purposes, yet simple enough for field use. *Id.* at 12.

A "quick rule of thumb is the so-called magic 36. If [an individual's] waist dimension in inches subtracted from [his] height in inches is less than 36, the individual is probably

many people for whom the medical community has no answers—either as to why they are obese or how they can escape their obesity.[60] Certainly, the rule that an obese plaintiff must make only a reasonable attempt to lose weight[61] alleviates many medical concerns, but it does not address the societal concerns.

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overweight." Judith Rodin, *Obesity: Why the Losing Battle?*, *in* PSYCHOLOGICAL ASPECTS OF OBESITY 30, 33 (Benjamin B. Wolman ed., 1982).

60. *See* Albert Stunkard, *The Social Environment and the Control of Obesity*, *in* OBESITY 438, 440-41 (Albert J. Stunkard ed., 1980). Early weight control experts believed obesity was caused by a lack of self-discipline and control, and therefore considered the obesity to be the person's own fault. Consider, for example, a 1948 book on weight control written by a licensed physician. Entitled in part "Danger! Curves Ahead!," the book is dedicated to "those . . . courageous souls who have seen the error of their ways and by courage, persistence, and self-discipline have cast off their burdensome pounds and found for themselves new and happier lives." MIRIAM LINCOLN, DANGER! CURVES AHEAD! HOW TO PREVENT AND CORRECT OVERWEIGHT at v (1948).

Contemporary weight loss experts reject this position. Years of study reveal a wide and interlocking array of factors contributing to obesity. Genetics, environmental influences (such as a dysfunctional family), and basal metabolism (the internal "thermostat" that regulates the amount of energy needed to keep a person going) have all been identified as factors contributing to obesity. WILLIAMSON, *supra* note 52, at 2-3, 16 (1990). Nutritional influences, affective disorders that increase food consumption or decrease activity levels, and personality disorders have also been associated with the onset and maintenance of obesity. WILLIAMSON, *supra* note 52, at 15-16. Specifically, depression, anxiety, obsessive-compulsive habits, interpersonal sensitivity (excessive concern over the opinions of others perceived to be directed at the individual), substance abuse problems, and stress have all been identified as factors that exacerbate and are themselves exacerbated by obesity. WILLIAMSON, *supra* note 52, at 80-98.

61. *See supra* text accompanying notes 34-37. This rule may alleviate medical concerns, but it does not eliminate them. Given the variety of physical, sociological, and psychological causes of obesity, as well as their interlocking nature, *see supra* note 61, it is probable an inadequate clinical assessment of the obese plaintiff will result in an unwarranted charge of unreasonable attempt. *See* WILLIAMSON, supra note 61, at 133-34. Furthermore, the likelihood a regular physician will provide an inadequate clinical assessment is high because "doctors and other professionals serving [the obese] stigmatize and negatively stereotype [them]," and are generally apathetic in their attempts to help them. *See* Natalie Allon, *The Stigma of Overweight in Everyday Life*, *in* PSYCHOLOGICAL ASPECTS OF OBESITY 130, 156-57 (Benjamin B. Wolman ed., 1982). It is, therefore, in the obese plaintiff's interest to seek assistance from a weight loss specialist. Finding a qualified and reputable weight loss specialist, however, can be treacherous.

> [I]n many respects . . . the commercial marketing of weight loss procedures falls outside the jurisdiction of the Food and Drug Administration. Drugs and medical devices must go through a very careful testing procedure to be proven safe and effective before they can be sold. For weight loss, on the other hand, the picture is very different. Anyone can buy a franchise, become a 'counselor,' and sell weight loss services. The weight loss industry is big business. . . . [P]eople are making millions of dollars selling weight loss programs [that] lack data documenting their safety and effectiveness.

David G. Schlundt & Dawn K. Wilson, *The Use of Clinical Trials in Obesity Research*, *in* 1 ADVANCES IN EATING DISORDERS 141, 170 (William G. Johnson ed., 1987).

Obesity is not just a nagging medical condition. Rather, it is a physical characteristic that defines the obese plaintiff as a person. For the obese, the difference between fat and thin is the difference between tall and short, or brown-eyed and blue-eyed. It is a part of *who they are*.[62] For the obese, the knowledge that they must make only a reasonable attempt is the knowledge that society finds them abnormal and undesirable. This is not solace, but a slap in the face. The court's failure to at least address these issues indicates a profound lack of sensitivity to the concerns of the overweight among us.[63]

C. *The Eggshell Plaintiff Rule*

The court's failure to address the eggshell plaintiff rule may not be unfortunate, but it is confusing. Does this failure indicate an outright rejection of the rule, or merely a qualification? An outright rejection is improbable. Despite the court's willingness to avoid some of the issues this case presented, it is hard to believe the court would discard such a firmly entrenched doctrine without expressly stating so. The court did, however, find the correction of a pre-existing condition that made Tanberg more susceptible to injury to be a valid mitigative procedure.[64] This indicates the

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62. "Obese people, like the physically handicapped, wear their 'problem' for all to see at all times, and yet unlike those groups, are held responsible for their condition." Allon, *supra* note 62, at 131.

63. Although the court's insensitivity is inexcusable, it is not unexpected because society as a whole can be insensitive to the overweight. Many consider obese individuals physically, mentally, and emotionally impaired, and view them as "'bad'" or "'immoral.'" Allon, *supra* note 62, at 131. These views stem from the unwarranted yet widely held belief that "the fat person could lose weight if he really wanted to; he doesn't because he's lacking in motivation and discipline." Allon, *supra* note 62, at 131. See *supra* note 61 for a discussion of the overweight person's fault in creating his condition.

> The impact of these attitudes on the overweight is significant. One researcher noted: [M]any fat persons are full of self-disparagement and self-hatred. They are trebly disadvantaged: (1) because they are discriminated against, (2) because they are made to feel that they deserve such discrimination, and (3) because they come to accept their treatment as just. . . . They are the victims of prejudice, similar to various ethnic and racial minorities. However, [members of these groups] . . . frequently find people who accept and esteem them, while there is usually no group to whom the obese . . . can readily turn to find such a welcome, often including rejecting family members.

Id. at 133 (citations omitted).

There are some support groups for obese people. For instance, both the National Association to Aid Fat Americans and the Fat Liberation Front help obese people "resist the social pressures to reduce, and . . . [help obese people] maintain a positive self-image." Miriam A. Schwartz, *Expansionary America Tightens Its Belt: Social Scientific Perspectives on Obesity*, *in* OBESITY AND THE FAMILY 49, 57 (David J. Kallen & Marvin B. Sussman eds., 1984). In view of the widespread biases against the obese, however, the support groups like these provide can only be seen as minimal.

64. *See supra* text accompanying notes 28-31.

decision had *some* impact on the rule. The most plausible description of that impact is this: In the standard case in which the condition is permanent or correction of the condition will not mitigate the injuries incurred, the example set by this case will not apply. The tortfeasor will take the plaintiff as he finds him, and no issues of mitigation through correction of the condition will apply. In the more rare instances in which the condition itself may be corrected and correction of the condition will mitigate the injury, a different result will ensue. Although the tortfeasor will still take the plaintiff as he finds him at the time of the injury, the plaintiff may be required to correct the condition later if doing so would reasonably mitigate the plaintiff's damages.[65]

Although not an outright rejection of the eggshell plaintiff rule, some may find this qualification a practical rejection. There is a sense that not penalizing the plaintiff for suffering from a condition at the time of the injury, but penalizing the plaintiff for not correcting the condition after the injury, is merely giving with one hand and taking with the other. This view overlooks, however, the different roles the eggshell plaintiff rule and the failure-to-mitigate doctrine play.

The role of the eggshell plaintiff rule is to preserve the plaintiff's cause of action.[66] Without it, a tortfeasor could argue successfully that because a normal person would not have suffered all or part of the plaintiff's injuries, the plaintiff has not asserted an essential element of a negligence claim—damage proximately caused by the tortfeasor's negligence—and thus has no cause of action for those injuries.[67] In comparison, the role of the failure-to-mitigate doctrine is to determine what damages are recoverable *once the cause of action has been established*.[68] Therefore,

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65. This result is suggested by *Aisole v. Dean*. The *Aisole* court held weight loss was a valid mitigative technique and suggested the eggshell plaintiff rule and the failure-to-mitigate doctrine should be read together: "Although a tortfeasor takes his victim as he finds him at the time of the injury, after that time the victim has an affirmative duty to make every reasonable effort to mitigate damages." Aisole v. Dean, 574 So. 2d at 1254.

66. *See infra* note 68.

67. Discussion of the eggshell plaintiff rule invariably centers on the extent of the damages for which the plaintiff may recover. *See, e.g.*, 22 AM. JUR. 2D *Damages* § 282 (1988). Historically, however, the rule has been part of the class of rules pertaining to proximate cause and is, therefore, a rule affecting the plaintiff's cause of action. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 290-92 (5th ed. 1984); *see also* Becker v. D&E Distrib. Co., 247 N.W.2d 727, 731 (Iowa 1976) (tying a more technical version of the rule to the question of proximate cause). *But see* Glanville Williams, *The Risk Principle*, 77 L.Q. Rev. 179, 195 (1961) (arguing the eggshell plaintiff rule answers "the question of extent of liability" rather than "the question of initial negligence").

68. One legal encyclopedia notes:

> Mitigation of damages is an equtiable doctrine, and means a reduction in the amount of damages, not by proof of facts which are a bar to a part of plaintiff's cause of action, . . . but rather by proof of facts which show that plaintiff's conceded cause of action does not entitle him to so large an amount as [he otherwise would be entitled to recover].

requiring the plaintiff to correct his condition to mitigate his damages is not a practical violation of the eggshell plaintiff rule. If the litigation has reached a point where damages are being quantified, the eggshell plaintiff rule has already played its role.

This distinction is arguably less persuasive in Iowa, for under Iowa's comparative fault system, a failure to mitigate may not just reduce the plaintiff's recovery, but may preclude it completely.[69] The response to this point, however, is the same: If the litigation has reached a point where fault is being quantified, the eggshell plaintiff rule has already played its role. At least in regard to this issue, the Iowa Supreme Court's poor approach has done no harm.

IV. CONCLUSION: HOPE FOR THE OVERWEIGHT PLAINTIFF?

The prevalence of obesity[70] suggests this case will play a prominent role in future tort cases involving physical injury. Despite this, things are perhaps not as bad as they look for overweight plaintiffs. Four factors brighten their future.

First, weight loss cannot be accomplished overnight. Rather, it occurs over a fairly long period of time.[71] This suggests there is a period during which no plaintiff could reasonably be expected to mitigate his damages through weight loss.

Second, weight loss requires a permanent change in lifestyle. To be successful, most plaintiffs will have to change both their eating and exercise habits,[72] and may have to address a number of psychological disorders as well.[73] In addition, the change in lifestyle cannot be abandoned once the weight is lost—the weight will stay off only if some form of the diet regimen is maintained.[74] The failure-to-mitigate doctrine

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25 C.J.S. *Damages* § 96 (1966); *see also* 22 AM. JUR. 2D *Damages* § 492 (1988) (admitting the phrase "mitigation of damages" is broad enough to encompass an attack on the plaintiff's cause of action, but noting most courts use the term "in connection with those facts which tend to show that the conceded or assumed cause of action does not entitle the plaintiff to as large an amount of damages as would otherwise be recoverable").

69. *See supra* text accompanying notes 12-13.

70. "Roughly 30% of the population is at least 20% above desirable weight . . . ." Robert W. Jeffrey & Jean L. Forster, *Obesity as a Public Health Problem*, *in* 1 ADVANCES IN EATING DISORDERS 253, 255 (William G. Johnson ed., 1987).

71. *See* Elizabeth Munves, *Managing the Diet*, *in* OBESITY 262, 273 (Albert J. Stunkard ed., 1980).

72. *See* Michael G. Perri, *Maintenance Strategies for the Management of Obesity*, *in* 1 ADVANCES IN EATING DISORDERS 177, 191 (William G. Johnson ed., 1987).

73. *See supra* note 61.

74. "Similar to the diabetic or hypertensive patient, obese individuals may never be 'cured' of their 'disease.' Rather they must be resigned to keeping their condition 'under control' through active efforts at self-management for the rest of their lives." Perri, *supra* note

does not require a plaintiff to undertake a mitigative procedure that results in more than slight inconvenience to the plaintiff.[75] Therefore, overweight plaintiffs that properly document this permanent change in lifestyle may avoid the duty to mitigate by arguing their inconvenience will be more than slight.

Third, the tortfeasor must bring substantial evidence to establish that losing weight would actually mitigate the plaintiff's damages.[76] If the testimony of Tanberg's physicians is indicative of the medical community's ability to predict the mitigative effect weight loss has on traumatic injury, it is probable most tortfeasors will be unable to meet their initial burdens of proof.[77] Additionally, a plaintiff does not have to undergo a mitigative procedure that is speculative.[78] The clinical history of medically supervised weight loss reveals a trail of inadequate losses that cannot be maintained—a recidivism rate of ninety-five percent has been termed "conservatively placed."[79] Even if the tortfeasor proves losing weight would actually mitigate the plaintiff's condition, he may have difficulty proving any method prescribed will result in permanent weight loss.

Fourth and finally, the overweight plaintiff that actually does mitigate his condition by losing weight has not eliminated his entire source of recovery. A tort victim is generally allowed to recover for past and future

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73, at 191. See *infra* note 80 and accompanying text for a discussion of the difficulty in maintaining a lifelong program.

75. *See supra* authorities cited in note 16.

76. *See supra* text accompanying note 33.

77. *See supra* text accompanying note 6. There is a documented relationship between obesity and heart disease, cancer, high blood pressure, and diabetes. *See* Jeffrey & Forster, *supra* note 71, at 255; Kelly D. Brownell & Albert J. Stunkard, *Physical Activity in the Development and Control of Obesity*, *in* OBESITY 300, 306-07 (Albert J. Stunkard ed., 1980). The obese person's risk of contracting these diseases, however, may not be as high as the layperson would expect. Although many people assume obese individuals are at a high risk of contracting heart disease, overall death rates due to heart disease are only 20% higher for obese people. Jeffrey & Forster, *supra* note 71, at 255.

78. *See supra* authorities cited in note 16.

79. Schwartz, *supra* note 64, at 59; *see also* Allon, *supra* note 62, at 161; Olaf Mickelsen, *Prevention and Treatment of Obesity*, *in* NUTRITION, PHYSIOLOGY, AND OBESITY 167, 176 (Rachel Schemmel ed., 1980); Perri, *supra* note 73, at 177. "[B]ehavior therapy has been shown to be the treatment of choice for mild and moderate obesity" when compared with traditional diet strategies such as nutritional counseling or drug treatment, yet its results are mediocre. Perri, *supra* note 73, at 177. "Weight losses accomplished during [behavior therapy] are usually modest . . . and few participants attain goal or desired weights. After treatment, clients gradually abandon behavioral techniques, and by the time of long-term follow-up sessions, many have regained much of the weight they lost in treatment." *Id.* (citations omitted).

This high recidivism rate poses another concern: an obese plaintiff that enjoys initial success may bypass some or all of his opportunity to collect damages only to discover after the statute of limitations has run that his diet program was a failure and his damages have recurred.

medical expenses[80] and past and future physical and mental pain and suffering, which may include loss of enjoyment of life.[81] Therefore, a plaintiff that lost weight to mitigate should be allowed to recover past and future costs associated with losing weight, including his reduced ability to enjoy life due to the loss of his previous lifestyle.[82]

Tanberg raised most of these issues on appeal.[83] The court refused to consider them, however, because they were not properly preserved at trial.[84] As new cases arise, many of these issues will come properly before the court. So too will questions concerning the impact this case has had on the eggshell plaintiff rule. We can only hope the Iowa Supreme Court will step forward to adequately assess and dispose of these issues when they arise.

Mark Lowe

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80. *See* Zach v. Morningstar, 142 N.W.2d 440, 444 (Iowa 1966) (stating that "[a]s a general rule, recovery may be had for the medical attendance for nursing that is reasonably certain to be necessary in the future"); DeMoss v. Brown Cab Co., 254 N.W. 17, 18 (Iowa 1934) (holding jury award that did not compensate plaintiff for reasonable value of necessary medical and surgical services incurred was inadequate).

81. *See* Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985) ("recogniz[ing] loss of enjoyment of life as a factor to be considered as a part of future pain and suffering"); Schnebly v. Baker, 217 N.W.2d 708, 725 (Iowa 1974) (stating that " '[p]ain and suffering' is of course an item of damages in itself").

82. Given researchers' conclusions that effective weight loss programs require frequent contacts with weight loss therapists over a long period of time, the transactional costs of weight loss can be high. *See* Perri, *supra* note 73, at 191. There is, however, a danger in asserting this aspect of recovery. The tortfeasor may respond that the weight loss has actually benefited the plaintiff by increasing his lifespan and granting him an ability to accomplish tasks his excess weight prevented him from accomplishing before. See *supra* note 78 for a discussion of the positive correlation between weight loss and diabetes, heart disease, and high blood pressure.

The availability of this type of recovery, however, is consistent with the conclusion that treating weight loss as a mitigative procedure does not violate the eggshell plaintiff rule. If the eggshell plaintiff rule was not still intact, the tortfeasor would not be liable for the plaintiff's mitigation costs because he would not be liable for the plaintiff's "abnormal" injuries.

83. *See supra* note 26.

84. *See supra* note 26.