TORT REFORM—A DELAYED REACTION

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Until recently there was a spirited, if not well-intentioned, debate over whether or not there existed a legitimate "insurance crisis." Some interested parties argued that what appeared to be an "insurance crisis" was actually some self-serving manipulation by the insurance industry in order to create a more lucrative market. In light of the actual history of the insurance industry since those contentions were made, however, it now seems abundantly clear that a legitimate crisis did and does exist. Those who continue to argue about the existence of the crisis are indeed like the proverbial drowning person who remarked that he was "not much interested in water." Insurance companies do not go out of existence to prove a point nor do viable companies cease to write coverage in certain areas simply to make a political statement. The questions remaining then are what is the cause of the crisis and what responsible efforts may be taken to ameliorate the problem.

A more objective view of the current situation will reveal that the current "crisis" is a present trauma caused by delayed recognition of certain forces at work in the legal system rather than the immediate result of current events. The perceived "insurance" crisis is, in that sense, simply a secondary response to what is in the first instance a severe "legal" crisis. That is to say that the legal system itself has constructed a certain set of expectations concerning reparation throughout the years as legal impediments to recovery have been restricted and matters which were formerly recognized as defenses have been abandoned. The legitimate question now being asked by the American public is whether the public itself can afford to reimburse accident victims on the basis, and in the manner, now permitted by the current legal system.

As one can see from the foregoing observations, there is a legitimate "insurance crisis" in the sense that insurance rates have risen dramatically in the past few years because of high tort awards and litigation expenses. The results of those factors in turn are that as the costs of goods and services produced increase proportionately, many businesses cannot obtain insurance for the activities which they wish to conduct. Consequently, businesses tend to avoid riskier or less predictable business endeavors and engage only in those activities that can be adequately insured. The loss to American industry and business through the elimination of jobs and through

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discouragement of innovation is indeed immeasurable. The public itself is thus deprived of potential services, scientific inquiry and technology because no serious entrepreneur wishes to pioneer in such fields of potential liability. In turn, the unwillingness or inability of business to venture into such uncharted seas decreases capital investment and American innovation and enhances the opportunities for foreign producers who are not subject to the same legal constraints.

To label such a dilemma an "insurance crisis," however, is to seriously misinterpret the scope of the problem. As is evident, the essential role of the insurance industry is simply to spread the risk of loss or injury with respect to the activities insured against. The insurance industry then operates within the context of a legal system which defines the "risk" which needs to be spread among the ultimate consumers. The insurance industry itself can operate within the context of any legal definition of "risk" which society wishes to accept. As a simplistic example, if society wished to abandon all statutory and common law rules concerning tort reparation and simply adopt the rule that every hundredth injured person to file a claim will be paid one million times the claimant's damages or "out of pocket expenses," that rule would certainly be workable for the insurance industry. In fact, it would be quite predictable and much easier to underwrite than the current complex system. It is not the insurance companies, then, that have a vested interest in tort reparations law, but rather society itself. The current dilemma, then, is whether our defined "risk" includes more than that for which the public itself is willing to pay.

Legal scholars have observed for many decades that there are certain fluctuations in tort law which might be likened to the swing of a pendulum (as is also true of other major areas of American law). In the 1960's, 1970's and early 1980's, our legal system gradually but consistently modified existing rules of law or abandoned traditional common law concepts of liability based upon "fault" in order to permit more frequent or more liberal compensation of injured parties. This occurred both through legislative enactment and judicial decision. The widespread adoption of "strict liability in tort" is perhaps the most dramatic and pervasive example of that trend. It should be observed, however, that the adoption of strict liability in tort was based upon social policy rather than any perceived legal necessity. That is, the rule of law was generated by and promoted upon the thought that all consumers (through the cost of manufactured goods) could better afford to absorb the loss of injury than could any particular injured party. This was felt to ameliorate some of the harsh consequences of the traditional fault-based liability which attempted to analyze the conduct of the specific parties involved (be it injured party or manufacturing defendant). While the concept of strict liability in tort remains technically a product liability principle, the underlying social policy has been broadened and adapted to many other areas of the law.

As observed above, the legislative branches of the various governments

also became involved in attempting to advance the same social principles. The legislative history of most states, for example, in recent decades would include the steady erosion of defenses, the abolition of immunities (sovereign, parental, interspousal, etc.) and the codification of more and more duties.

At the same time that the foregoing social purposes were being implemented by less restrictive legal principles permitting more recovery, the definition and expectations of the "judicial" system also underwent substantial, although gradual, change. As larger and larger recoveries were permitted on a more frequent basis, naturally more and more claimants availed themselves of the system's use in order to "claim" their due. The public was quick to recognize its new "rights" and to petition the judicial system for the remuneration which it had been promised. In the process, the courts were relegated to playing the role of "case management" technicians and were expected to have less and less to do with the determination of legal rights and responsibilities. That trend has progressed at present to the point where the judicial system itself is almost expected by the public to do nothing in order to cure the abuses perceived as present. For example, summary judgments, which once served the purpose of shortening unnecessary or unwarranted litigation, are now almost unheard of. The current perception seems to be that the only "real" law is "appellate" law. Thus, the trial courts frequently serve only as technical "referees" to produce jury verdicts which are, in turn, never themselves reviewed. The trial court proceedings, of course, may be reviewed for "legal errors" but there is no effective review of the jury process. The concept of remittitur once used to cure jury abuses is, for all intents and purposes, extinct and the reversal of cases for excessive jury verdicts is almost an historical curiosity. Thus, the public could understandably conclude that the judicial system itself contains no curative mechanism for abuses of the jury system.

Aside from those observers who may question the original validity of using judicial processes to effectuate desired social cures, there are now a number of legal scholars as well as concerned citizens who simply believe that the "rights of injured parties," as collectively defined under our current system, are more generous and indeed, in some cases, more "rewarding" than the public itself intends to fund.

What has been said in general of the legal system in America can also be said more specifically of the tort law now extant in the state of Iowa. Without attempting to trace the substantive law changes over an extended period of time, it could be observed, for example, that the following changes have been permitted either by statutory modification or judicial interpretation since 1980 alone:

1) Absolute parental immunity has been abolished.[1]

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1. Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983); Turner v. Turner, 304 N.W.2d

2) The surviving parents have a claim under Iowa Rule of Civil Procedure 8 for deprivation of an unborn child's companionship, society and services.[2]

3) Interspousal immunity has been abolished.[3]

4) Punitive damages for intentional torts were declared to be covered under a standard insurance policy.[4]

5) Punitive damages were found to be covered under a general liability policy for unintentional torts.[5] Even in a death claim a plaintiff is permitted to assert a claim for punitive damages based upon reckless and gross negligence and coverage was found under an insurance policy.[6]

6) The zone of impact rule has been expanded and certain bystanders permitted to recover for emotional distress.[7]

7) Punitive damage claims have been held to survive the death of a plaintiff.[8]

8) Punitive damages have been held to lie for intentional interference with business relationships.[9]

9) The bystander liability test adopted in *Barnhill*[10] has been extended to strict liability and warranty suits.[11]

10) Minors are found to have an independent claim for loss of society and companionship from injuries to the parent.[12]

11) In worker's compensation cases the "discovery rule" is applied so that the running of the statute of limitations begins only after the claimant knows of the injury and the probable compensability.[13]

12) The tort of "emotional distress" was expanded beyond the concept of "intentional infliction." Now a reckless disregard of the probability of causing emotional distress is the basis of a cause of action.[14]

13) Pure comparative negligence was adopted by the supreme court.[15]

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786 (Iowa 1981).

2. Craig v. IMT Ins. Co., 407 N.W.2d 584 (Iowa 1987).

3. Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979).

4. City of Cedar Rapids v. Northwestern Nat'l Ins. Co., 304 N.W.2d 228 (Iowa 1981).

5. Skyline Harvestor Sys. v. Centennial Ins. Co., 331 N.W.2d 106 (Iowa 1983).

6. Croxen v. United States Chem. Corp., 558 F. Supp. 6 (N.D. Iowa 1982).

7. Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981).

8. Briner v. Hyslop, 337 N.W.2d 858 (Iowa 1983); Berenger v. Frink, 314 N.W.2d 388 (Iowa 1982).

9. Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982).

10. *See supra* note 7.

11. Walker v. Clark Equip. Co., 320 N.W.2d 561 (Iowa 1982).

12. Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981). The *Moes* decision was later modified considerably in Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R., 335 N.W.2d 148 (Iowa 1983).

13. Orr v. Lewis Cent. School Dist., 298 N.W.2d 256 (Iowa 1980).

14. Randa v. U.S. Homes, Inc., 325 N.W.2d 905 (Iowa 1982).

15. Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982). *See also* Thompson v. Stearns Chem. Corp., 345 N.W.2d 131 (Iowa 1984) (affirming *Goetzman*, but denying its applicability to

14) Misuse of a product is no longer held to be an affirmative defense in products liability actions and an instruction of assumption of risk is declared fatally defective.[16]

15) Iowa's guest statute was repealed by judicial decision.[17]

16) Pre-judgment interest was adopted by statute in Iowa[18] and is supplemented liberally by case law that allows pre-judgment interest in a variety of different types of situations.[19] In wrongful death cases, pre-judgment interest is assessed from the date of death.[20]

17) Not only are punitive damages declared to survive the death of the plaintiff,[21] but they may be claimed by an estate administrator. The estate can collect for the surviving spouse's loss of the decedent's consortium. This is limited in time by the lesser of the two spousal life expectancies. Iowa also allows recovery for loss of parental consortium on behalf of *all* surviving children (for their adult as well as minor life periods).[22]

18) Following *Audubon-Exira* it is allowable to instruct a jury to "disregard the fact of remarriage when considering the issue of damages."[23]

19) Breach of an "implied covenant of good faith" has been adopted[24] as a viable cause of action following the California rule in *Gruenberg v. Aetna Insurance Co.*[25]

20) Punitive damages are permitted *even though there is no award for actual or compensatory damages*, providing that actual damages have in fact been shown.[26]

21) Punitive damages covered under an insurance policy were also expanded to the breach of a fiduciary relationship where there is no actual malice but where "legal malice" is presumed.[27]

22) The statute of limitations for bringing a bad faith claim against an insurer was expanded to five years from the date of the judgment against

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contribution against an employer). This concept, of course, was later modified by statutory changes to Chapter 668 of the Code of Iowa.

16. Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980).

17. Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980).

18. Iowa Code § 535.3 (1982).

19. Vorthman v. Keith E. Myers Enter., 296 N.W.2d 772 (Iowa 1980).

20. Wetz v. Thorpe, 215 N.W.2d 350 (Iowa 1974). *See also* Kuper v. Chicago & N.W. Transp. Co., 290 N.W.2d 903, 910 (Iowa 1980) (interest is allowable from date of accident with respect to claims for liquidated property damages).

21. Berenger v. Frink, 314 N.W.2d 388 (Iowa 1982).

22. Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R., 335 N.W.2d 148 (Iowa 1983).

23. This rule derives from the supreme court's decision in Groesbeck v. Napier, 275 N.W.2d 388 (Iowa 1979).

24. Rodgers v. Pennsylvania Life Ins. Co., 539 F. Supp. 879 (S.D. Iowa 1982).

25. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

26. Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982).

27. Pringle Tax Serv. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979); Poulsen v. Russell, 300 N.W.2d 289 (Iowa 1981); *see also* Northrup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973).

the insured, rather than from the date of the bad faith act or breach of the duty to defend.[28]

23) Joint and several liability in Iowa found not to be affected by comparative negligence or comparative fault.[29]

24) Comparative, but not equal, contribution was adopted in Iowa.[30]

25) Adoption of social host liability for the acts of intoxicated guests.[31]

26) Adoption of a broad "bad faith doctrine."[32]

27) Iowa adopted a liberal "uninsured motorist" definition based on statutory language interpretation contrary to the uninsured motorist contractual definition.[33]

28) Negligent, in addition to intentional, infliction of *emotional distress* was recognized as a viable cause of action.[34]

29) The statutory notice requirement with respect to claims against municipalities was found to be unconstitutional.[35]

Several studies conducted on a national basis have illustrated that the public, in fact, believes that there is a "crisis" with respect to our system of compensating injured parties. Most of the polls show that the public perceives a need for reform and that the public has little faith in the legal system itself to correct the perceived deficiencies. It is also important to observe that most of the public in responding to these polls perceives lawyers as a major part of the current problem rather than a part of the potential solution. In fact, several polls indicate that lawyers—representing both plaintiffs and defendants—are perceived to be the largest beneficiaries of the current ineffective system. The public's most frequently expressed concerns are that litigation takes too long and costs too much with too little of the expenditure going to pay the injured parties themselves.

To bring these conclusions even closer to home, one need only look at the results of a study conducted during 1985 by a national research firm with respect to tort cases in the Iowa courts. The responses to that study showed that sixty-seven percent of those polled were aware of a "crisis" in the product liability area. Fifty-six percent of the respondents indicated that a change in the tort system was needed, whereas only twenty percent felt that the current system was working well. Forty-two percent of the respondents perceived the lawyers as the favored group as compared to twenty-eight percent who felt that the injured parties were the major benefi-

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28. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457 (Iowa 1984).

29. Rozevink v. Faris, 342 N.W.2d 845 (Iowa 1983) (later modified by Iowa Code § 668.4 (1987)).

30. Franke v. Junko, 366 N.W.2d 536 (Iowa 1985).

31. Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985) (later abrogated by statute, IOWA CODE § 123.49 (1987)).

32. Loudon v. State Farm Mut. Auto. Ins. Co., 360 N.W.2d 575 (Iowa Ct. App. 1984).

33. American States Ins. Co. v. Tollari, 362 N.W.2d 519 (Iowa 1985).

34. Oberreuter v. Orion Indus., 342 N.W.2d 492 (Iowa 1984).

35. Miller v. Boone County Hosp., 394 N.W.2d 776 (Iowa 1986).

ciaries of the system and only four percent who perceived the public as particularly "favored." One of the more shocking findings included the fact that eighty-six percent of those responding felt that any necessary change would have to come from legislation (which seems to bespeak a lack of faith in the legal system itself to correct the current inequities). It is also interesting to note that eighty-seven percent of the respondents expressed the belief that medical care currently being provided had actually worsened as a result of the current tort system.

It is apparent that the judicial system, lawyers and judges alike, and the legislative bodies responsible for tort law have a serious crisis in terms of public confidence. If they are to preserve or rebuild the public's belief that injured parties and those responsible for injury are being treated fairly and efficiently, immediate action is imperative. This article will not attempt to persuade the readers of the efficacy of any of the specific proposed reforms. It is apparent, however, that any body of law, in order to engender public respect, must offer fair treatment both to injured parties and to those allegedly responsible for injury. The proper treatment of the parties allegedly responsible—the defendants, if you will—would obviously require a workable, understandable and predictable body of law that provides not only for fair damages but for treatment which is predictable, and thus insurable at a reasonable cost. While some commentators may have more extreme suggestions, most legal writers would observe that the American system of compensation of injured parties is still the fairest and noblest system in the world. Consequently, responsible reform should preserve the recognized elements of that system and should strive to reduce or eliminate those areas of recovery which, at the present time, are believed to allow unfair, extensive or double recovery to injured parties.

Obviously each commentator or each special interest group may have its own set of priorities with respect to the necessary reforms. Many insurance industry and defense counsel observers, however, feel that the following modifications of existing tort law warrant serious consideration:

1) Elimination of the doctrine of joint and several liability. In most states, under current law, a defendant can be held responsible for the entire damage suffered by a party even though that defendant's contribution to the harm may be found to be minimal. Some states, such as Iowa, have modified rules concerning joint and several liability, but no real justification exists for the concept at the outset.

2) Elimination of the "collateral source rule." There are tremendous duplications of benefits under our current system when parties are allowed to recover losses that, in fact, have already been paid for by other sources.

3) Substantial reduction of the permissible areas of recovery for punitive damages. While the Iowa Legislature in 1987 made some minor adjustments to the area of punitive damages, there are still several aspects of this overall problem which need seriously to be addressed. Because of their avowed independence from the concept of "actual" damages, punitive dam-

ages have furnished a fruitful field for jury abuse and have turned otherwise fairly predictable cases into legal as well as journalistic folklore.

4) Restoration of some sense of propriety to the area of products liability. While society may be reluctant indeed to return entirely to a "fault-based" system, many of the abuses attendant to the current strict liability system should be addressed and corrected. For example, a reasonable statute of repose could bring an end to claims for injuries arising out of goods and articles manufactured years or perhaps decades in the past.

5) Eliminate pre-judgment interest. Here again the 1987 Iowa Legislature made some minor adjustments by requiring jury verdicts to differentiate between past and future elements of damage. Pre-judgment interest will presumably no longer be charged on damages not yet incurred. The interest rate was also attached to a "sliding scale" by the 1987 changes. Still, substantial difficulty is presented by the whole concept of pre-judgment interest, inasmuch as it permits increased recovery for claims long before they are even legally established and also encourages the filing of premature lawsuits.

6) Elimination of actions for the gross negligence of co-employees. The injuries of employees, of course, are limited under Chapter 85, Code of Iowa, to claims for worker's compensation. Injured workers are presumed to benefit from the payment of prescribed and mandated sums for specific injuries. The employer's normal defenses in such situations are statutorily eliminated and the injured party has a right to recovery so long as the injury arose "out of and in the course of the employment." The current exception to those rules, however, is provided by § 85.22, Code of Iowa, which also permits direct tort actions against co-employees if their conduct amounts to "gross negligence." This exception not only thwarts the original intent of the worker's compensation statute but also frequently eliminates all proposed benefits of the legislation. Litigation is frequently simply redirected from the employer as such to the officers and employees of the employer by means of the "gross negligence" claims. Thus, excessive litigation could be avoided and the original intention of the worker's compensation statute carried out more completely if all claims of the injured employee were treated in a similar fashion.

7) Adoption of legislation intended to eliminate double recovery and nuisance or "collusive" lawsuits. This would include reinstatement of parental and spousal immunity to prevent the almost inescapable collusion that currently exists with respect to such claims, elimination of consortium rights of divorced spouses, and the elimination of causes of action for emotional injury to bystanders. These causes of action are believed by many members of the defense bar to represent "abusive or excessive" recovery and to detract from the actual function of the legal system in dealing with real and cognizable claims.

Certainly none of the foregoing suggested "reforms" comprises any radical change in the plaintiff's right to have his case fairly heard or to recover

for legitimate, observable injuries. It is believed, however, that these changes would help restore credibility and predictability to the tort system. Such changes would encourage the public, which has now recognized our current dilemma, to perceive the judicial system as a viable option for compensation of injuries. Such a result is not only desirable, but absolutely essential if the current system is to continue to function. Surely a system which has come so far on its ingenuity and ability to adjust will be able to make these corrections in order to maintain its own viability.