ranties of reasonably good workmanship and reasonable fitness if the court could read a contract to build into the total agreement of the parties. It would seem incongruous if Iowa would not extend implied warranties to sales of new, completed houses in that the vendee draws no distinction between the purported arrangement existent in *Busker* and the purchase of a newly completed house. Concerning the distinction drawn by some courts between contracts to buy and contracts to build, the Court of Appeals of Kentucky in *Crawley v. Terhune*[36] has stated:

> Because the caveat emptor rule is completely unrealistic and inequitable as applied in the case of the ordinarily inexperienced buyer of a new house from the professional builder-seller, and because a contract by the builder to sell a new house is not much distinguishable from a contract to build a house for another, we are disposed to adopt the minority view to the extent of holding that in the sale of a new dwelling by the builder there is an implied warranty that in its major structural features the dwelling was constructed in a workmanlike manner and using suitable materials.[37]

If the Iowa supreme court's attitude, evidenced in *Mease v. Fox*,[38] as to the existence of an implied warranty of habitability in leases is any indication of its willingness to form the law to meet modern exigencies, it is very likely in the future that the court will find implied warranties in sales of new houses, and thereby discard caveat emptor as a doctrine applicable to other times and situations. "The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected . . . ."[39]

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36. 437 S.W.2d 743 (Ky. 1969).
37. *Id.* at 745. *See also* Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 627, 180 N.W.2d 503, 506 (Ct. App. 1970).
38. 200 N.W.2d 791 (Iowa 1972).
39. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

TORTS—AN INSURER IS UNDER AN IMPLIED-IN-LAW DUTY OF GOOD FAITH AND FAIR DEALING IN THE SETTLEMENT OF CLAIMS BY THE INSURED, THE BREACH OF WHICH MAY CONSTITUTE THE ELEMENT OF OUTRAGEOUS CONDUCT IN A PRIMA FACIE CASE FOR THE TORT OF INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS. *Amsden v. Grinnell Mutual Reinsurance Co.* (Iowa 1972).

Plaintiff brought an action for intentional infliction of severe emotional distress by the defendant insurers, alleging that they demonstrated bad faith in failing and refusing to pay plaintiff's fire loss claim. The state fire marshall concluded that the fire which destroyed plaintiff's business building and its contents was set by an arsonist. Plaintiff was among those investigated, but was later exculpated. The claim was paid within sixty days after plaintiff determined the extent of the loss, and plaintiff and defendants agreed as to the value of the loss. The trial court directed a verdict in favor of the defendant insurers. *Held*, affirmed. The petition stated a cause of action for intentional infliction of severe emotional distress, but the plaintiff failed to prove it. *Amsden v. Grinnell Mutual Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972).

In Iowa,[1] compensation for mental distress has suffered a confused development.[2] Originally, no recovery could be had for intentional infliction of severe emotional distress unaccompanied by another tort.[3] This exception to the maxim that "for every wrong there must be a remedy" was blamed alternately on Lord Wensleydale's frequently quoted comment,[4] the fact that mental distress was too speculative to be equated with any dollar value,[5] that the proximate cause of mental distress could not be sufficiently established,[6] or fear that the court would be reduced to a forum for the determination of what is to be considered bad manners.[7]

In early case law the Iowa court allowed compensation for mental distress or

1. The scope of this case note is limited primarily to Iowa law. For a discussion of the status of the tort of intentional infliction of severe emotional distress in other jurisdictions, see W. PROSSER, TORTS § 12 (4th ed. 1964); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

2. Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932).

3. Collins v. City of Council Bluffs, 35 Iowa 432 (1872); Lynch v. Knight, 9 H.L. 577, 11 Eng. Rep. 854 (1861).

4. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

5. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). In *Collins v. City of Council Bluffs*, 35 Iowa 432, 436 (1872) the court stated: "The party injured by such a casualty should have compensation for the injury. Not such a speculative amount as would be equivalent for the bodily pain and mental anguish. . . . [P]ain and mental anguish can have no adequate compensation in dollars and cents."

6. Lee v. City of Burlington, 113 Iowa 356, 85 N.W. 618 (1901); Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899). In *Lee* the opinion stated: "If there had been any physical injury to the horse . . . there would undoubtedly be liability. But where death results from fright alone the defendant is not liable in damages. . . . [O]ne could hardly anticipate such results. . . . [T]he law will not consider it the proximate result. . . ." 113 Iowa 356, 357, 85 N.W. 618, 619 (1901).

7. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

mental pain in the form of damages awarded for some other tort involving physical impact.[8] Initially, it was merely one component to be weighed by the trier of fact in assessing the appropriate dollar value of damages arising from the physical impact.[9] Later in *McKinley v. Chicago & Northwestern Railroad Co.*,[10] the Iowa supreme court held that not only was mental distress compensable as it was incident to physical pain but it was also compensable as it arose from the nature and character of the tort itself. Once this distinction had been made, the next logical step in extending the rule was taken in *Parkhurst v. Masteller*,[11] where recovery was allowed when there was no physical impact. This decision was followed by others which allowed recovery for mental distress accompanying other torts without physical impact.[12]

The first appearance of mental distress as a sufficient cause of action without being attached to another intentional tort was in a divergent line of cases where a special duty was owed to the plaintiff by the defendant.[13] In Iowa these cases were confined to customer actions against the railroad or telegraph company,[14] but in other jurisdictions this line included actions against innkeepers and common carriers in general.[15] In Iowa these actions could be maintained in circumstances where (1) there was merely negligent conduct on the part of the defendant,[16] (2) the conduct was not necessarily outrageous,[17] and (3) there was no physical manifestation of the mental distress.[18]

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8. Collins v. City of Council Bluffs, 35 Iowa 432 (1872); Hendrickson v. Kingsbury, 21 Iowa 379 (1866). In the *Collins* opinion, the court stated that "while physical and mental suffering caused by an injury are proper to be considered in determining the amount of damages, yet they are not to be compensated for in the ordinary meaning of that word, but they stand as lights around the injury, in the focal rays of which we see more intensely and clearly the full measure and extent of the injury itself." 35 Iowa 432, 436 (1872).

9. Collins v. City of Council Bluffs, 35 Iowa 432 (1872); Lucas v. Flinn, 35 Iowa 9 (1872).

Mental pain and anguish arising from physical injury are now considered a separate subject for compensation. Ferguson v. Davis County, 57 Iowa 601, 10 N.W. 906 (1881); Reddin v. Gates, 52 Iowa 210, 2 N.W. 1079 (1879); Muldowney v. Illinois Cent. Ry., 36 Iowa 462 (1873).

10. 44 Iowa 314 (1876).

11. 57 Iowa 474, 10 N.W. 864 (1881).

12. Hrnicek v. Chicago, M. & St. P. Ry., 187 Iowa 1145, 175 N.W. 30 (1919) (assault); Krehbiel v. Henkle, 152 Iowa 604, 129 N.W. 945 (1911) (unlawful entry of a dwelling house); Young v. Gormley, 120 Iowa 372, 94 N.W. 922 (1903) (false arrest); Flam v. Lee, 116 Iowa 289, 90 N.W. 70 (1902) (malicious prosecution); Yount v. Carney, 91 Iowa 559, 60 N.W. 114 (1894) (false arrest); Robinson v. Craver, 88 Iowa 381, 55 N.W. 492 (1893) (breach of contract to marry).

13. Bernstein v. Western Union Tel. Co., 169 Iowa 115, 151 N.W. 108 (1915); Albrook v. Western Union Tel. Co., 169 Iowa 412, 150 N.W. 75 (1914); Coine v. Chicago & N.W.R.R., 123 Iowa 458, 99 N.W. 134 (1904); Hurlburt v. Western Union Tel. Co., 123 Iowa 295, 98 N.W. 794 (1904); Cowan v. Western Union Tel. Co., 122 Iowa 379, 98 N.W. 281 (1904); Curtis v. Sioux City & H.P. Ry., 87 Iowa 622, 54 N.W. 339 (1893); Shepard v. Chicago, R.I. & P. Ry., 77 Iowa 54, 41 N.W. 564 (1889).

14. *See* authorities cited in note 13, *supra.*

15. For discussion see W. PROSSER, TORTS § 12 (4th ed. 1964).

16. In *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N.W. 1 (1895), the leading Iowa case, the telegraph company negligently failed to deliver a message announcing the death of the plaintiff's mother.

17. In *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N.W. 281 (1904), the defendant was accused of no more than incorrectly signing the plaintiff's name. This was enough to support a judgment for the plaintiff.

18. In *Hurlburt v. Western Union Tel. Co.*, 123 Iowa 295, 98 N.W. 794 (1904), the

The fact that there existed a special duty arising from the relationship of the plaintiff and the defendant apparently eliminated the need for these three elements.[19] The Iowa court usually noted that these actions sounded both in tort and in contract, and that recovery might be had on either ground.[20]

Outside of these special circumstances, *Watson v. Dilts*[21] was the first case in which the Supreme Court of Iowa allowed a recovery for intentional infliction of severe emotional distress without depending upon another tort to provide the cause of action. There was no physical impact and there was no other tort actionable by the plaintiff. The defendant had wrongfully entered the plaintiff's farmhouse and appeared to be in an encounter with her husband. Plaintiff alleged physical manifestations amounting to "threatened neurosis, or paralysis" and the suffering of "great mental and physical pain for nearly six weeks."[22] The court held that she could maintain an action for intentional infliction of severe emotional distress independent of any other tort. The fact that the defendant's conduct was unlawful and intentional was noted and relied upon by the Iowa court in distinguishing *Kramer v. Ricksmeier*[23] and *Zabron v. Cunard Steamship Co.*[24] In the first case no recovery was had as the telephone call alleged to have induced the mental distress was not in itself wrongful. In *Zabron* the plaintiff was refused recovery on the grounds that the conduct of the defendant was negligent and not intentional. *Holdorf v. Holdorf*[25] clarified the requirement that the defendant's act be willful, not merely negligent, and that there be some physical manifestation of the mental distress.

Intentional infliction of severe emotional distress emerged as a fully independent tort in *Barnett v. Collection Service Co.*[26] The court stated that the earlier cases could not be reconciled, but that "the rule seems to be well established that, where the act is willful or malicious, as distinguished from being merely negligent, recovery may be had for mental pain, though no physical injury results."[27] Whether the rule was actually well established at that time has been questioned.[28] The case was one in which a collection agency had harassed a widow with two children for the payment of a $28.75 debt to a coal

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plaintiff's name was merely misspelled, and there was no allegation of any physical manifestations of emotional distress.

19. *See* note 13, *supra.* None of the exemplary cases required any of these three elements as requisite to recovery.

20. Bernstein v. Western Union Tel. Co., 169 Iowa 115, 151 N.W. 108 (1915); Cowan v. Western Union Tel. Co., 122 Iowa 379, 98 N.W. 281 (1904). In *Cowan,* the court pointed out that, "[i]n an action upon contract it is usually laid down that no damages can be recovered save those which may reasonably be supposed to have been contemplated by the parties as the probable result of a breach of the agreement. . . . Recovery in tort is not thus limited." 122 Iowa 379, 386, 98 N.W. 281, 283 (1904).

21. 116 Iowa 249, 89 N.W. 1068 (1902).

22. *Id.* at 250, 89 N.W. at 1069.

23. 159 Iowa 48, 139 N.W. 1091 (1913).

24. 151 Iowa 345, 131 N.W. 18 (1911).

25. 185 Iowa 838, 169 N.W. 737 (1918).

26. 214 Iowa 1303, 242 N.W. 25 (1932).

27. *Id.* at 1312, 242 N.W. at 28.

28. 46 HARV. L. REV. 164 (1932).

company. There was no other tort to which the damages could attach, nor was there any physical manifestation of the mental distress.

Thus the tort of intentional infliction of severe emotional distress was clearly described by *Barnett* and was ready for further application. In *Blakeley v. Shortal's Estate*[29] the scope of the tort was enlarged by defining *willful* as that which is merely voluntary or intentional.[30] In this rather gruesome case, the deceased cut his own throat with a skinning knife while in the plaintiff's kitchen. The plaintiff returned to her home to find the corpse lying in a pool of blood. The court ruled that the act was willful.

In *Curnutt v. Wolf*[31] the court referred to the new tort as it was described in the *Restatement of Torts*.[32] The defendant offered to write a good letter of recommendation to the plaintiff's new employer, if the plaintiff would halt an action to enforce an employment contract involving the defendant. The tacit threat that the defendant might write a disparaging letter was sufficient to upset the plaintiff and to afford him a judgment.

In *Amsden*, the supreme court initiated its analysis by quoting Professor Prosser's appraisal of the present status of the tort of intentional infliction of severe emotional distress.[33] The court then adopted the reasoning in two cases in which successful actions were brought against insurance companies based upon intentional infliction of severe emotional distress: *Eckenrode v. Life of America Insurance Co.*[34] and *Fletcher v. Western National Life Insurance Co.*[35] Although these cases formed the foundation of the supreme court's opinion, neither was an Iowa case. In both cases the plaintiffs were forced to settle valid claims made to insurers for far less than was patently due to them. The defendant insurance companies in each instance had created the illusion that the insurer was not obligated to pay the claim. In both decisions the United States Court of Appeals for the Seventh Circuit and the California Court of Appeals for the Fourth District, respectively, relied upon earlier decisions which found a general duty not to intentionally inflict severe emotional distress on another. The federal court relied on *Knierim v. Izzo*[36] and the California court relied on *State Rubbish Collectors Association v. Silizonff*.[37] These two cases were similar to the Iowa cases in recognizing a general duty not to inflict severe emotional distress on another.[38]

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29. 236 Iowa 787, 20 N.W.2d 28 (1945).
30. In *Blakeley v. Shortal's Estate*, 236 Iowa 787, 792, 20 N.W.2d 28, 31 (1945), the court stated: "A willful wrong may be committed without any intention to injure anyone."
31. 244 Iowa 683, 57 N.W.2d 915 (1953).
32. RESTATEMENT OF TORTS § 46 (Supp. 1948).
33. Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252, 253 (Iowa 1972).
34. 470 F.2d 1 (7th Cir. 1972).
35. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).
36. 22 Ill. 2d 73, 174 N.E.2d 157 (1961). In *Knierim* the defendant intentionally caused severe emotional distress to the plaintiff by threatening to murder the plaintiff's husband. The threat did not prove to be an idle one.
37. 38 Cal. 2d 330, 240 P.2d 282 (1952). In *State Rubbish Collectors* the defendants threatened to beat up the plaintiff and put him out of business if he refused to pay them for a trash collection account.
38. Justice Traynor cited *Barnett* in support of his assertion that "there is a growing

The reason for the Iowa court's decision to rely on cases from the seventh circuit and California courts rather than apply the appropriate Iowa cases was not made clear in the opinion.

Part of the language adopted from *Fletcher* was to the effect that the duty of an insurance company not to inflict severe emotional distress on their clients would be more easily breached by misconduct than would the general duty imposed on a stranger.[39] The insurance company has a general duty of good faith and fair dealing with its insured,[40] which one stranger does not owe to another.

Precisely what behavior is considered sufficient to support an action for this tort in Iowa has not been abundantly clear. A telephone call communicating a threat to not write a letter commending a former employee has been held sufficient.[41] The Iowa supreme court may have reached beyond the Iowa case law in order to demonstrate preference for the *Restatement's* standard of outrageous conduct,[42] rather than the vaguely defined Iowa standard. Under the *Restatement* definition as adopted by the seventh circuit and California courts, the outrageous and extraordinary nature of the wrongful conduct can be the result of the relationship between the parties.[43] This makes the rule more flexible and more easily adapted to the insurance situation. The relationship between the insurance company and the insured can be part of the basis for determining that the wrongful conduct of the insurer is sufficiently intolerable to constitute the outrageous conduct element of a prima facie case for intentional infliction of severe emotional distress.[44]

With *Amsden* the Supreme Court of Iowa announced adoption of the more lucid *Restatement* description of the tort:

> (1) Outrageous conduct by the defendant;
> (2) The defendant's intention of causing, or reckless disregard of the probability of causing emotional distress;
> (3) The plaintiff's suffering severe emotional distress; and
> (4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct.[45]

In applying the new criteria to the circumstances of the *Amsden* case, the supreme court tersely concluded that, "the facts presented in the appeal be-

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body of case law supporting this position." *Id.* at 337, 240 P.2d at 285. In addition, the Illinois court cited *Curnutt* in support of its decision in *Knierim v. Izzo*, 22 Ill. 2d 73, 84, 174 N.E.2d 157, 163 (1961).

39. Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252, 255 (Iowa 1972).

40. Henke v. Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168 (1959). *Henke* was cited in *Amsden* as Iowa authority for the implied-in-law duty of good faith and fair dealing owed by an insurer to the insured recognized by the California court.

41. Curnutt v. Wolf, 244 Iowa 683, 57 N.W.2d 915 (1953).

42. RESTATEMENT (SECOND) OF TORTS § 46, comment d at 72 (1965).

43. Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); F. HARPER & F. JAMES, THE LAW OF TORTS § 9; RESTATEMENT (SECOND) OF TORTS § 46, comment e at 74 (1965). As the court noted in *Alcorn*, the fact that the plaintiff was an employee should afford him a greater degree of protection from outrageous conduct than if he were a stranger to the defendants.

44. Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78, 95 (1970).

45. Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252, 255 (Iowa 1972).

fore us do not even begin to approach outrageous conduct."[46] The plaintiff's claim of bad faith and intentional harassment was based on an allegedly cunctative settlement. Evidence showed that the delay was due to the state fire marshall's investigation and the inability to immediately determine the extent of the loss.

The Supreme Court of Iowa stated that both *Eckenrode* and *Fletcher* were examples of what factual situations would be considered to demonstrate outrageous conduct.[47]

In *Eckenrode* the defendant insurance company owed $5000.00 to the plaintiff as the beneficiary of her husband's life insurance policy. The duty to pay was indisputable. The impecunious widow had several small children to support. She was forced to borrow money for funeral expenses and to live on the charity of relatives. The defendant refused prompt payment and suggested that the widow could expedite the settlement by compromising her claim. The implication was that she might never receive payment.

In *Fletcher* similar economic coercion and bullying tactics were employed. The insurance company had issued a policy to the plaintiff which included coverage for both accidents and sickness. The policy provided for payment of $150.00 per month, limited to thirty years for disabling accidents or two years for sickness. The plaintiff was injured in an accident that occurred while he attempted to lift a 361-pound bale of scrap rubber. Medical reports showed that the plaintiff's disabled condition was caused by the accident. The insurance company first insisted that the claim would be honored only under the sickness provision of the policy. The claims supervisor arrived at the absurd, but advantageous, conclusion that the plaintiff had a mild form of glanders contracted from a horse.[48] The plaintiff was later refused any payment whatsoever, and was badgered with the threat that he would be forced to reimburse the insurance company for all payments made to him.

It was this type of situation in which the Iowa supreme court suggested that it would find the required outrageous conduct on the part of insurance companies. By agreeing that both *Eckenrode* and *Fletcher* showed the requisite outrageous conduct for a prima facie case of intentional infliction of severe emotional distress, and that *Amsden* did not, the court has supplied workable fact parameters for the tort; but the spectrum of behavior that falls between these extreme cases is broad, and remains undefined. However, *Amsden* does delineate the tort of intentional infliction of severe emotional distress with a new clarity, and the supreme court has indicated its willingness to see it implemented in actions against insurance companies which indulge in unacceptable claim settlement techniques.

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46. *Id.* at 255.
47. *Id.* at 254.
48. Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 387, 89 Cal. Rptr. 78, 84 (1970).

TORTS—CALIFORNIA GUEST STATUTE UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION—*Brown v. Merlo* (Calif. 1973).

Plaintiff was injured while riding in a jeep operated by the defendant when the jeep crossed the centerline of the highway and collided with an embankment. Plaintiff brought an action to recover damages alleging both willful misconduct and negligence. Defendant propounded a series of interrogatories to ascertain the ground upon which the plaintiff sought to exempt himself from the bar of the California guest statute.[1] Plaintiff responded that his cause of action in negligence was predicated on the contention that the guest statute unconstitutionally denied the equal protection of the law. The trial court sustained the defendant's motion for summary judgment on the cause of action in negligence, but allowed the allegation of willful misconduct to go to the jury, which found for the defendant. Plaintiff appealed from the summary judgment against his cause of action in negligence contending that the guest statute unconstitutionally denied protection which he would have been entitled to as a paying passenger. The Supreme Court of California *held*, reversed and remanded, five justices concurring. The classifications created by the guest statute do not bear a substantial and rational relation to the purpose of the statute and therefore deny the equal protection of the law. *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

Justice Tobriner, for a unanimous court, found that the equal protection guarantees of the fourteenth amendment and the California constitution[2] included a substantive requirement of rationality manifestly absent in the operational effect of the guest statute. An analysis of the decisions defining the scope of the equal protection guarantee will reveal that the *Brown* decision breaks new ground in a fertile field.[3]

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1. CAL. VEHICLE CODE ANN. § 17158 (West 1971) reads:
No persons riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

2. However, the substantive bases of the court's reasoning do not seem to manifest reliance on the equal protection provision of the California Constitution vis-a-vis that of the fourteenth amendment of the United States Constitution.

3. The Iowa guest statute has recently been declared unconstitutional in an opinion rendered in an Iowa District Court. Putney v. Piper, Law No. 2798 (Polk Co., filed Aug. 1, 1973).
Relying heavily on *Brown v. Merlo*, the court concluded:
[t]he classifications which the Iowa guest statute establishes in determining which categories of passengers are permitted and which are denied recovery for negligently inflicted injuries from the owner or operation of a motor vehicle are lacking in a reasonable or substantial relationship to the purpose of such legislation and for that reason render the statute unconstitutional as a violation of the equal protection guarantees of both the Iowa and the United States Constitutions.