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What Iowa Defense Attorneys Need to Know About Medical Malpractice Tort Reform and Its Potential Impact on Hospitals

By Sarah T. Oberg Ramirez, Lane & Waterman LLP

Sarah T. Oberg Ramirez

Iowa Governor Kim Reynolds signed new legislation into law impacting damage awards in medical malpractice cases on February 16, 2023. The legislation caps noneconomic damages, which include damages arising from pain, suffering, and other nonpecuniary damages, to $1 million against healthcare providers and $2 million against hospitals. Strong arguments have been made for and against the legislation, and constitutional challenges to the legislation are anticipated. In navigating this new legislative landscape, hospitals, with their defense counsel, must reassess their risk as plaintiffs are now more likely to name hospitals as defendants to increase their recoverable damages from $1 million to $2 million. Initially, this article summarizes the noneconomic damages caps and how they will impact medical malpractice claims moving forward. Following that discussion, this article outlines arguments both for and against the legislation. It also evaluates how hospitals may be held vicariously liable not only for the negligence of their employees but also for the negligence of their independent contractors. Lastly, the article recommends actions Iowa hospitals can take now to reduce their exposure to claims based on the vicarious liability theory of apparent agency.

Continued on page 4

WHAT'S INSIDE

IDCA President's Letter

Sam Anderson
IDCA President

Greetings.

Today I am addressing the issue of collaboration. "Collaboration" is defined by my old Webster's *New* World Dictionary as "to work together." My ancient Black's Dictionary defines it as "The act of working together in a joint project." The Oxford Languages dictionary source used by Google defines it as "the action of working with someone to produce or create something." Synonyms include cooperation, teamwork, joint effort, alliance, and association, among others.

Interestingly, the second definition in dictionaries has a more conspiratorial, traitorous meaning of "cooperating with the enemy." We have all been witness to how much the plaintiffs' bar has been successful in their collaboration with each other. It seems we are always reacting to what they come up with collaboratively. Why does it seem that defense counsels are not as effective at collaboration? We may collaborate with our law partners, but we have historically done a poor job of collaborating with each other as a defense bar at large. Why is that, I wonder?

We often see the plaintiffs' bar as the enemy. As a result, do we perceive collaboration as a more conspiratorial affair rather than a cooperative effort to achieve a common goal? Do we strive to be so uniquely good at what we do that we fear sharing our trial "secrets"? Do we feel we could lose business if we share ideas with defense counsel from other firms? Are we too afraid of criticism for asking questions? Do we fear our inquiries might be perceived as naïve or silly? Are we so married to the billable hour that we do not want to waste our time seeking help from others? Or worse, are we so married to the billable hour that we do not want to take the time to help our defense brethren? Regardless of the reason we do not collaborate, I cannot believe it is a good one.

A little-known lyricist, Harry Nilsson, is the person whom I believe penned the words, "One is the loneliest number that you'll ever do," made famous by Three Dog Night back in 1968. I know that reference makes me sound old, but hey, you have all heard that song, no matter how old you are, right? That is a love-lost song, but in the practice of law, the phrase rings true. Interestingly, when I Googled that phrase, I found a reference to a math geek question about what was the loneliest number and found a reference to a "golden ratio" that I do not understand. I became a lawyer, so I would not have to understand such things. The explanation for why this ratio was so lonely, however, made sense. It was argued to be the loneliest number because it was the farthest away from any rational number. Being a lone wolf is simply not rational in either math or the practice of law.

Luckily, we have a great organization in the Iowa Defense Counsel Association (note the word association) to help us not walk our legal path alone. As an organization, we have been working hard at promoting collaboration among defense counsel. It is an ongoing and continual quest. As an association, for example, we are working on improving our IDCA forum and settlement database. These can be wonderful resources, but they can only get better if people use them and contribute to them.

Becoming involved is an even better way to become collaborative and use the association. If you refer back to my first president's letter, you will see the number of committees working to help the defense bar become better through collaboration. These committees are working hard to achieve goals on behalf of the defense bar. We can always use more input! We can always use *your* input! Becoming involved with the organization allows you to collaborate with other outstanding people to help improve our defense practice. Getting to work with and know each other is the best way to feel comfortable reaching out to one another to work together and help each other. Involvement in the IDCA will expand your legal network with people who will become your lifelong friends and colleagues. It is always easier and more fun to phone a friend.

If you are not yet involved but want help from a member anywhere in the state, the website has a list of our members. There is no better way to get personal help than with a phone call. I know from experience that from top to bottom and young to old, this organization has great people and great legal minds from all across the state who are willing to help.

Like any business or organization, the more you put into it, the more you will get out of it. I believe the IDCA is worth your valuable time. I believe fellow members of the IDCA are worth your time. I believe you are worth *their* time as well.

Together we can make the defense bar stronger, make our work better, improve your service to your clients, and, best yet, make it a ton more enjoyable. Collaboration is invigorating, fulfilling, and fun! If you want to become more involved but are unsure how, please do not hesitate to contact me or any other board member. We will be happy to help you get plugged in. Remember, collaboration is a good thing. We are all stronger together!

Sam Anderson

New Member Profile

Grace E. Mangieri

Grace Mangieri joined Lane & Waterman in 2019. Her trial law practice primarily consists of professional malpractice, commercial litigation, and product liability defense. Prior to joining Lane & Waterman, Grace practiced in Chicago for several years serving as toxic tort National Coordinating Counsel for a leading product manufacturer.

She also has experience defending a wide array of corporate and individual clients in a range of matters. These include premises liability, product liability, white-collar investigations, environmental litigation involving the Environmental Protection Agency, and regulatory compliance in both U.S. state and federal courts.

Grace currently serves on the Board of Managers for the Rock Island County Bar Association and Scott County's Barristers Ball Committee.

In her free time, Grace enjoys spending time with her twin boys and traveling.

Continued from Page 1

TORT REFORM LEGISLATION ENACTS CAPS ON MEDICAL MALPRACTICE PLAINTIFFS' DAMAGES

On February 16, 2023, Iowa Governor Kim Reynolds signed House File 161 into law, a bill further limiting noneconomic damages in medical malpractice cases by amending an existing tort reform statute. The amended law caps noneconomic damages at $1 million, or $2 million, if the action includes a hospital as a defendant. A section of the amended law reads as follows, with the language added by HF 161 underlined for reference:

> [T]he total amount recoverable in any civil action for noneconomic damages for personal injury or death, whether in tort, contract, or otherwise, against a health care provider for any occurrence resulting in injury or death of a patient regardless of the number of plaintiffs, derivative claims, theories of liability, or defendants in the civil action, shall not exceed two hundred fifty thousand dollars unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, loss of pregnancy, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained, in which case the amount recoverable shall not exceed one million dollars, or two million dollars if the civil action includes a hospital as defined [herein].[1]

The law defines noneconomic damages as damages arising from pain, suffering, inconvenience, physical impairment, mental anguish, emotional pain and suffering, loss of chance, loss of consortium, and any other nonpecuniary damages. Noneconomic damages do not include any loss of dependent care, including the loss of childcare.[2]

The law took effect immediately upon signature by Governor Reynolds and applies to actions that accrue on or after the effective date. In other words, the new limitation on damages only applies to incidents that caused damages on or after February 16, 2023.

Before HF 161, Iowa law already capped noneconomic damages against healthcare providers at $250,000, with the exception that juries could award more than $250,000 if they found a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, or death so warranted. The prior law did not, however, contain a cap on damages awarded under said exception.

SUPPORT FOR AND OPPOSITION TO THE LEGISLATION

In a press release dated February 16, 2023, Governor Reynolds' office stated the legislation "balances the needs of injured patients with the needs of all Iowans to have access to quality health care."[3] Describing the legislation as "commonsense medical malpractice reform," Governor Reynolds maintained, "[p]rotecting our health care system from out-of-control verdicts promotes access to care in communities across our state and better positions us to recruit the best and brightest physicians to Iowa."[4]

Supporters of the law applaud Governor Reynolds for identifying tort reform as a legislative priority. Supporters argue large verdicts against healthcare providers and institutions detrimentally impact the healthcare system by forcing healthcare institutions faced with such verdicts to close their doors, file for bankruptcy, or face increasing malpractice insurance premiums.[5] To show the necessity of the law, supporters often cite a March 2022 jury verdict in which the jury awarded plaintiffs $97.4 million, more than $43 million of which was awarded for noneconomic damages, the largest medical malpractice judgment in Iowa's history.[6]

In response, reform opponents emphasize verdicts this size are incredibly rare. Over the last five years, the total number of lawsuits filed in Iowa has averaged 666,000 per year.[7] Of these, medical malpractice filings constitute a small percentage; medical malpractice filings from 2017 through 2022 averaged 160 per year.[8] Approximately 8% of the 160 medical malpractice filings, or 13 cases per year, advanced through a jury trial.[9] Given this relatively small sum, opponents contend HF 161 is unjustified.

In advocating against the bill, opponents argue medical professionals already receive adequate protection from malpractice claims, rendering HF 161 meritless.[10] For instance, in addition to the pre-existing $250,000 legislative cap on noneconomic damages prior to HF 161, Iowa law (1) prohibits medical malpractice plaintiffs from recovering economic losses that have been replaced or indemnified by insurers (i.e., the collateral source rule),[11] (2) prohibits medical malpractice plaintiffs from admitting any evidence of statements by healthcare facilities or providers expressing sorrow, sympathy, compassion, or other benevolence to plaintiffs to prove breach of the standard of care (i.e., a so-called "apology law"),[12] and (3) requires medical malpractice plaintiffs to certify the name of a supportive expert within 60 days of the defendant's answer to avoid dismissal.[13]

Further, opponents argue caps on noneconomic damages unfairly prejudice plaintiffs harmed by medical malpractice, impose arbitrary limits on damages, fail to consider the facts of individual

cases, and violate plaintiffs' constitutional rights. Constitutional challenges to the legislation are likely forthcoming on several potential grounds, including that the legislation allegedly violates the right to jury trial, separation of powers, due process, and equal protection.[14] Currently, 30 states limit the damages awarded to plaintiffs in some way. Several state courts have struck down similar statutorily enacted medical malpractice damage caps on constitutional grounds, including Alabama, Georgia, Florida, Illinois, Kansas, New Hampshire, Oklahoma, and Washington. However, in many other states, similar damages caps have not faced constitutional challenges.

LEGISLATION WILL POTENTIALLY INCREASE SUITS IN WHICH HOSPITALS ARE NAMED DEFENDANTS

Hospitals generally support medical malpractice tort reform efforts, as such legislation reduces financial risk for hospitals related to malpractice litigation. Not only are plaintiffs able to recover less in damages, but plaintiffs may be disincentivized from bringing medical malpractice claims. Plaintiffs may find the smaller, capped awards do not justify the costs, risks, and other burdens associated with litigation. However, to the extent plaintiffs pursue litigation in spite of the limits imposed by HF 161, hospitals now may be more likely to be named defendants.

Because HF 161 doubles the cap for noneconomic damages from $1 million to $2 million if the civil action includes a hospital, plaintiffs will be motivated to name hospitals as defendants in actions against healthcare providers, perhaps even if on tenuous grounds, to double their potential damage awards.

Plaintiffs may allege hospitals are vicariously liable for the negligence of their healthcare providers under either the doctrine of *respondeat superior* or the doctrine of apparent authority.[15] Where the healthcare providers in question are employees of the hospital, *respondeat superior* applies, and the hospital will be held liable for the negligent actions of its employees within the scope of their employment. Where the healthcare providers in question are independent contractors, plaintiffs may argue an independent contractor exercised authority as an apparent agent of the hospital.

Iowa courts have previously examined whether independent contractor medical professionals may be deemed apparent agents of the hospitals in which they provide treatment. Although there presently is not a pattern jury instruction addressing apparent agency, the Iowa Supreme Court has adopted the following definition of liability based on apparent agency:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.[16]

The existence of apparent authority is determined by the principal's—not the agent's—actions.[17] Whether apparent authority exists is generally a question of fact for the jury.[18]

The Iowa Supreme Court first suggested a hospital may be vicariously liable for the negligence of its emergency-room caregivers, even if they are independent contractors, in the 2003 case *Wolbers v. The Finley Hospital*.[19] In *Wolbers*, the plaintiff-decedent underwent a carotid endarterectomy, after which the plaintiff-decedent suffered a stroke.[20] The plaintiff-decedent was later transferred to a regular nursing unit, where he began experiencing difficulty breathing.[21] An emergency-room physician, Dr. Webb, attempted to open the plaintiff-decedent's air passages by intubation but failed.[22] Dr. Webb was an employee of the hospital. [23] The hospital argued it could not be vicariously liable for Dr. Webb's medical judgments because it had no right to control them.[24] The Court disagreed, holding the district court properly allowed the jury to find the hospital vicariously liable for Dr. Webb's actions.[25] Citing precedent from other jurisdictions,[26] the Court reasoned a hospital's absolute duty to provide competent medical care to emergency-room patients cannot be delegated.[27] "Thus, a hospital may be vicariously liable for the negligence of its emergency-room caregivers, even if they are designated as independent contractors. This liability arises from an ostensible agency, in that an emergency-room patient looks to the hospital for care and not to the individual physician—the patient goes to the emergency room for services and accepts those services from whichever physician is assigned his or her case."[28] The Court added "this nondelegable duty" extends to both "outpatients entering the hospital emergency room" as well as "inpatients relying on emergency response in the absence of their chosen physician."[29]

In 2006, the Iowa Court of Appeals broadened the application of the apparent agency doctrine to *non-emergency room* situations.[30] In *Vivone v. Broadlawns Medical Center*, the plaintiff-patient sought non-emergency care at Broadlawns for gallbladder issues.[31] He scheduled a non-emergency surgery to have both his gallbladder and a small cyst on his forehead removed.[32] The cyst removal was performed by Dr. Phan, a fifth-year medical resident.[33] Dr. Phan was not Broadlawns' employee, but rather, was an employee of Iowa Methodist Medical Center.[34] After surgery, the plaintiff noticed swelling on his forehead, prompting two follow-up visits with Dr. Phan.[35] Within two weeks, the plaintiff contracted tissue necrosis (or dead tissue) on his forehead, resulting in permanent disfigurement.[36] Broadlawns argued it could not be held responsible for the actions of a non-employee surgical resident.[37] However, the Court of Appeals found the district court properly submitted the issue of apparent

authority against the medical center to the jury despite Dr. Phan's non-employee status.[38] Although the plaintiff had not sought emergency care, the Court held his situation was sufficiently similar to *Wolbers*.[39] As in *Wolbers,* the patient sought treatment from Broadlawns rather than a particular doctor, and the patient "had no control over the physician treating him; he received services from whichever physician was assigned to his case."[40]

In addition, the Court of Appeals found the district court had properly submitted to the jury the issues of (1) whether Dr. Phan was an employee of Broadlawns and (2) whether Dr. Phan was a "borrowed servant."[41] Despite acknowledging Dr. Phan was actually an employee resident of Iowa Methodist, the Court held the jury was properly allowed to consider whether Dr. Phan was also an employee of Broadlawns at the time he treated the plaintiff.[42] The question of whether an act is within the scope of employment is ordinarily a jury question.[43] The jury must weigh several factors, including (1) the right of selection, (2) responsibility for payment of wages, (3) the right to discharge, (4) the right to control the work, and (5) the benefit of the work.[44] With regard to the question of whether Dr. Phan was Broadlawns' "borrowed servant," the Court noted, "[t]he employer who temporarily borrows and exercises control over another's employee assumes liability in *respondeat superior* for the activities of the borrowed employee."[45]

Two years after *Vivone*, the Iowa Supreme Court decided *Wilkins v. Marshalltown Medical and Surgical Center*, wherein the plaintiff-patient, later substituted by his surviving wife, asserted medical negligence claims for failure to timely diagnose his prostate cancer after many visits to defendant's emergency department.[46] The plaintiff alleged the defendant medical center was vicariously liable for the negligence of its non-employee emergency-room physicians.[47] The plaintiff appealed the District Court's grant of summary judgment on his medical negligence claim.[48] On appeal, the Iowa Supreme Court held "the mere fact that the emergency room doctors were not [center] employees [was] not dispositive."[49] "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants."[50] The Court determined even though the emergency room doctors were not employees of the center, and even though the record did not demonstrate the center expressly held out the emergency room doctors as employees, the plaintiff "put forth circumstantial evidence from which an agency relationship [could] be inferred."[51]

For example, the Court noted the center "held itself out to the public as maintaining a 24-hour emergency room."[52] The Court emphasized its previous observation in *Wolbers* "that an emergency-room patient looks to the hospital for care, and not to the individual physician—the patient goes to the emergency room for services, and accepts those services from whichever physician is assigned his or her case."[53] The Court further reasoned the center "did not take any affirmative steps to combat the natural assumption that the emergency room doctors were hospital employees" and that the "patients were billed for emergency room services by [the center] and not by [the clinic that employed the doctors]."[54] Based on these facts, the Court concluded, "a reasonable jury could . . . find [the center] is vicariously liable for the negligence of the emergency room doctors on a theory of apparent authority or ostensible agency."[55]

In sum, whether a hospital may be held liable for the negligent acts of an independent contractor physician is not clearly defined in the small number of Iowa appellate decisions. What is clear is that the decision will turn on the specific facts of each case. Until Iowa law has had more opportunity to fully develop the doctrine of apparent agency, it would be prudent to expand any research into jurisdictions outside of Iowa where a more robust body of case law exists.

STEPS IOWA HOSPITALS CAN TAKE NOW TO REDUCE RISK RELATED TO APPARENT AGENCY OF INDEPENDENT CONTRACTORS

Given the increased risk that hospitals will be named defendants in medical malpractice lawsuits moving forward, hospitals that hire independent contractors should consider implementing practices and policies that clearly distinguish these independent contractors from employees to combat the appearance of an agency relationship to the extent possible.

Hospitals' greatest risk likely lies in emergency departments or other departments in which patients are assigned any available physician. Where patients seek care from a hospital generally, rather than a specific physician, and patients lack any control over which physician treats them, Iowa courts will be unlikely to dismiss a case or grant summary judgment in favor of the hospital on the grounds that no apparent agency exists. Rather, courts will deem the existence of an agency relationship a question for the jury.

It is critical that hospitals remember it is their actions—not the independent physician's—that determine whether an apparent agency relationship exists.[56] To establish an apparent agency relationship, the hospital must represent that an independent contractor is its agent (i.e., employee) and thereby lead patients to justifiably rely on that representation. Arguably, the more affirmative, clear steps a hospital takes to establish an independent contractor is not an employee, the more a

hospital can demonstrate a patient was not justified in his or her assumption that a treating physician was a hospital employee.

Accordingly, hospitals may consider the following:

- Requiring independent contractors to wear distinct coats and badges identifying them as non-employees.[57]
- Requiring patients to sign admission and consent forms in which they acknowledge treating medical professionals may be independent contractors and not employees, presenting this provision as conspicuously as possible (e.g., by capitalizing or boldfacing the provision), and requiring patients to initial the provision. Preferably, said forms should identify the specific independent professional(s) treating each patient by name; further, language indicating the hospital is not the provider of care, but rather that the care is provided by a professional who is an independent contractor and not subject to the control and supervision of the hospital may prove helpful.[58]
- Removing independent contractors from hospital websites and marketing materials, or alternatively, specifically identifying medical professionals as independent contractors or listing their true employer on said materials. Be wary of website pages listing particular medical professionals as "on staff" or as "our provider" at the hospital if the professional is an independent contractor.
- Avoiding exclusivity provisions in hiring contracts with independent contractors that prohibit the independent contractor from practicing anywhere but the hospital.[59]
- Requiring that any forms, questionnaires, or business cards used by independent medical professionals or provided by medical professionals to patients bear the logo or letterhead of the independent professional or his or her true employer and not the logo or letterhead of the hospital.[60]
- Reviewing billing processes to assess how patients are being billed for services provided by independent contractors (e.g., (1) whether the bill is issued by the hospital, the entity/agency with whom the independent contractor is affiliated, or the independent contractor directly, (2) whether, if the bill is issued by the hospital, the bill identifies the treating independent contractor as an independent contractor in any way, (3) whether, if the bill is issued by the hospital, the bill requests that payment be remitted to the hospital or the independent contractor directly, (4) whether, if issued by the independent contractor, the bill bears the logo or letterhead of the hospital).
- Reviewing any contractual agreements with independent contractor providers to ensure there is a strong hold-harmless and indemnification provision that specifically includes claims against the hospital based on apparent agency claims arising from the provider's alleged negligent treatment.
- Evaluating which independent contractor providers need in-hospital offices and where offices are provided, implementing policies that demonstrate the independent contractors are not hospital employees. For instance, to the extent practicable, where independent contractor providers have an office outside the hospital, perhaps within their private practice, these providers should conduct patient consultations and appointments that do not require hospital equipment or personnel within their private practice. Where independent contractor providers have offices inside the hospital, the offices should contain signage bearing their employer's or private practice's name.[61]

While none of these measures, either individually or in combination, are guaranteed to overcome a finding of apparent agency, defense counsel for hospitals should adequately advise hospitals of all preventative measures available to them and must be prepared to argue that, given the measures taken by their client, (1) the hospital never held out the independent contractors in question as the hospital's agents, and (2) even if the hospital had in some way, the patient could not, based on the totality of the circumstances, justifiably rely on the hospital's actions or omissions to assume an agency relationship existed.

CONCLUSION

While it is not certain what the impact of this newly enacted tort reform legislation may be, it could potentially reduce the number of medical malpractice claims filed in the State of Iowa, as plaintiffs are limited to recover $1 million against health care providers or $2 million where a hospital is a defendant, regardless of the total number of defendants. Despite this likely decrease overall, hospitals must be prepared to be named as defendants in many, if not most, medical malpractice cases moving forward as plaintiffs attempt to double their recoverable noneconomic damages. Similarly, Iowa defense counsel for hospitals should be prepared to litigate the merits of apparent agency claims, as plaintiffs are likely to attempt to hold hospitals liable not only for the actions of their employees but of their independent contractors as well.

1 Iowa Code § 147.136A(2) (2023).

2 *Id.* § 147.136A(1)(b).

3 Press Release, Office of the Governor of Iowa, Gov. Reynolds Signs Medical Malpractice Tort Reform Bill Into Law (Feb. 16, 2023), https://governor.iowa.gov/press-release/2023-02-16/gov-reynolds-signs-medical-malpractice-tort-reform-bill-law.

4 *Id.*

5 *See, e.g.*, News Release, The Iowa Medical Society, Tort Reform is Essential for Rural Healthcare Access (Feb. 6, 2023), https://www.iowamedical.org/news/13089997.

6 *S.K. v. Mercy Hospital*, Case No. 06521-LACV081421, 2022 WL 1406514 (Iowa Dist. March 21, 2022).

7 Fiscal Note, Iowa Legislative Services Agency: Fiscal Services Division, HF 161–Medical Malpractice, Noneconomic Damages–Doc. ID 1368413 (Feb. 7, 2023), https://www.legis.iowa.gov/docs/publications/FN/1368413.pdf.

8 *Id.*

9 *Id.*

10 *See, e.g.*, Iowa State Bar Association: Legislative Counsel, Protection for Physicians (2023).

11 Iowa Code § 147.136 (2011).

12 Iowa Code § 622.31 (2006).

13 Iowa Code § 668.11 (1986).

14 *See, e.g.*, Hon. Henry Hamilton III, *President's Letter*, The Iowa Lawyer, March 2023, V. 83, N. 2 at 5.

15 Apparent agency is also sometimes referred to as "ostensible agency." The more recent trend in Iowa case law is to use the term "apparent agency," so that term will be used in this article. If conducting research on this issue, however, it is advised to use both terms.

16 *Wilkins v. Marshalltown Med. and Surgical Ctr.*, 758 N.W.2d 232, 236 (Iowa 2008) (quoting Restatement (Second) of Agency § 267 (1958)).

17 *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 847 (Iowa 1989).

18 *Id.*

19 *Wolbers v. The Finley Hosp.*, 673 N.W.2d 728, 734 (Iowa 2003).

20 *Id.* at 731.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 733.

25 *Id.* at 734.

26 40A Am.Jur.2d *Hospitals & Asylums* § 48, at 460 (1999); *Stipp v. Kim*, 874 F.Supp. 663, 665 (E.D.Pa. 1995); *Simmons v. St. Clair Mem'l Hosp.*, 332 Pa. Super. 444, 481 (1984).

27 *Wolbers*, 673 N.W.2d at 734.

28 *Id.*

29 *Id.*

30 *Vivone v. Broadlawns Med. Ctr.*, 728 N.W.2d 223 (Table), *4 (Iowa App. 2006).

31 *Id.* at *1.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at *3.

38 *Id.* at *4.

39 *Id.*

40 *Id.*; *see Wolbers*, 673 N.W.2d at 734.

41 *Id.* at *3-*4.

42 *Id.* at *3.

43 *Id.*, citing *Riniker v. Wilson*, 623 N.W.2d 220, 231 (Iowa Ct.App. 2000).

44 *Id.* at *3, citing *Caterpillar Tractor Co. v. Shook*, 313 N.W.2d 503, 505 (Iowa 1981).

45 *Id.* at *3, citing *Bride v. Heckart*, 556 N.W.2d 449, 453 (Iowa 1996).

46 *Wilkins*, 758 N.W.2d at 233–34.

47 *Id.* at 234–35.

48 *Id.* at 235.

49 *Id.* at 237.

50 *Id.* at 236-37, citing Restatement (Second) of Torts § 429 (1965).

51 *Id.* at 237.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 847 (Iowa 1989).

57 *See, e.g.*, *Valles v. Mueting*, No. LACV169198, 2018 WL 6515391, at *4-*5 (Iowa Dist. 2018).

58 *See, e.g.*, *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999).

59 *See, e.g.*, *Dragotta v. Southampton Hosp.*, 39 A.D.3d 697 (N.Y. 2007).

60 *Id.*

61 *See, e.g., Delegatto v. Advocate Health and Hosp.*, 191 N.E.3d 606, 608, 610, 617-18 (Ill. App. 1st Dis. 2021) (where the Court noted that, (1) for all purposes other than the patient's surgery, the patient was seen at the doctor's private practice and not at the hospital, (2) appointments were made by calling the doctor's private practice and not the hospital, and (3) his in-hospital office featured his private practice's name on the doorway, informational materials, and the doctor's business cards).

Plaintiff v. Defendant: What Does the "v" Mean to You?

By John C. Trimble
Lewis Wagner Attorneys, LLP; Partner


John C. Trimble

Hello all. In recent years, it has been my practice to have my first column of the new year be about New Year's resolutions. In a manner of speaking, this column will also be about a resolution for the new year, but it is more of a *challenge* than a resolution.

As we enter 2023, we are living in a world that is more polarized than most of us can remember. Citizens are polarized in their political, cultural, social, and religious beliefs. On the extreme fringes, people not only disagree with persons who have differing views . . . they hate them. Many view persons of differing views as enemies. The hatred has manifested in rage, bullying, name-calling, social media attacks, and, in some instances, physical violence and death.

I have friends and acquaintances in the bar and the judiciary who have expressed concern that the polarization of our society has begun to spill over into how lawyers and their clients behave in litigation. They are seeing increasing examples of parties demonizing one another, game playing, bullying, lack of cooperation, intellectual dishonesty, and lack of candor to the court. The flood of pro se litigants is also a symptom of the erosion of trust in lawyers and the system.

Everyone involved in litigation has seen instances of clients who hate each other. Family lawyers see it every day. Hate and mistrust is often an element of probate litigation and disputes over failed business relationships. Occasionally we see it in personal injury litigation after a particularly heinous act of negligence or recklessness.

The question I have for all of us is simple: Do we, as lawyers, have to embrace and embody the hate that our client has for the opposing party? The short answer should be "No."

We know that the "v" in a case caption between a plaintiff and a defendant stands for "versus." All dictionary definitions of "versus" define it as "against" or "in opposition to" another person or entity. So, by the very nature of what we do, we are against someone else. That doesn't mean that we have to view them as an enemy and treat them as such. It does not mean that we lawyers have to embrace our client's hatred and give in to the client's demands that we grind the other side into the ground. As the saying goes, "You can be adverse without being adversarial."

I have many reasons to encourage lawyers to rise above the polarizing hatred that our clients may have for an opponent. First, hate is corrosive. It is not good for your health. Law practice is stressful enough without allowing hate to raise your blood pressure and rob you of sleep at night. Furthermore, hate is unpleasant, and who wants to do a job that you dislike because it is no fun? Unfortunately, lawyers who practice law by embracing the hate of their clients end up isolated because they gain a reputation for their behavior.

Another reason to rise above our client's animus is the good of our profession. Our profession and the judiciary are suffering from diminishing respect and trust. Every time that a lawyer wallows in the mud with an opponent, the public loses confidence in us.

Hate is also expensive. Lawyers who engage in vindictive discovery and motion practices simply cost their clients more money. In the long run, our client relationships suffer if legal bills and expenses are escalated by vitriolic behavior.

My challenge to everyone (including myself) in 2023 is to resolve to practice law as a problem solver. We may not be able to cure the polarization that is occurring in the world, but we do not have to exacerbate it. Consider standing up to the client who wants you to do things that do not advance the dispute to a resolution.

If you view every matter that comes your way as a problem to be solved and take a problem solver's approach to it, you, your client, and our profession will all be better for it.

#WillYouBeThere?

"This article first appeared in the Indiana Lawyer newspaper on February 1, 2023, in the column Eye on the Profession authored by John Trimble. John is a past president of the Defense Trial Counsel of Indiana, the Indianapolis Bar Association, and the Association of Attorney Mediators, and is a regular writer and columnist on issues affecting the legal profession and the judiciary."

The Pool of Defense Jurors Is Drying Up

By Nick Polavin, Ph.D.
IMS Consulting & Expert Services; Senior Jury Consultant


Nick Polavin, Ph.D.

Due to political and social shifts, corporate defendants are starting jury selection with more adversaries in the jury pool than ever before. Since the pandemic, we personally noticed a shift in jurors' opinions during our jury research and jury selections—the pool of defense-friendly jurors has been shrinking. To back up our anecdotal experiences with hard data, we conducted multiple nationwide studies within the last year to examine what might be changing for jurors. We uncovered two major shifts that have hurt corporate defendants: the rise of "safety-ism" and the spread of conspiracy-mindedness.

THE RISE OF SAFETY-ISM

Over the past two to three decades our society has seen a slow development toward a prevailing mindset wherein tolerance for risk has been almost completely eliminated, while safety expectations have skyrocketed. Whether it involves a product, driving, a workplace, or premises, many people now expect 100% safety 100% of the time.

Psychological research has kept up with this trend, noting that the very concept of *risk* has changed over time. In broad terms, where risk used to be a calculation of the potential benefits versus the harm,[1] risk then became a more nebulous *feeling* and the varying levels of that feeling we were willing to tolerate.[2] More recently, risk seems to have changed again, now akin to a *threat*. And for many, there is no acceptable level regardless of the cost. This change embodies the rise of safety-ism.

This transformation has created not only an avoidance of physical harm but of emotional discomfort as well. And to address it, people have created environments that allow for that avoidance—ways for people to avoid being offended, having their feelings hurt, or even having their views challenged. If people don't want to risk getting upset by hearing information that conflicts with their worldview, they can tune into whichever cable news station most aligns with their views. And even if one network doesn't completely align with someone's thinking, they can go to a variety of websites or countless social media pages to pick and choose which information they want to read but also which information they want to avoid. With more avenues to escape potentially controversial ideas and counterarguments, many find themselves in self-validating feedback loops. When a new idea enters that zone, it can be perceived as a threat and attacked without fair consideration.

It is understandable that we seek to avoid discomfort, and there are many arguments to be made about the causes, effects, and merits of various cultural shifts that far exceed the scope of this discussion. But, when we narrow our focus to the current jury pool and how it might perceive business safety practices, decisions, and regulations both past and present, this existing trend toward a society more preoccupied with physical and emotional safety has troubling, measurable impacts on corporate defendants at trial.

SAFETY-ISM AND JURORS

One helpful lens through which we may try to categorize the changes we've witnessed in the jury pool comes from the authors who first coined the term "safety-ism," Greg Lukianoff and Jonathan Haidt, Ph.D.[3] According to Lukianoff and Haidt, safety-ism is characterized by three thought fallacies:

1. *What doesn't kill you makes you weaker.* Those engaging in safety-ism believe that any physical and emotional harm, no matter how small, is damaging to us and should be avoided.

2. *Always trust your feelings.* Safety-ists put their feelings first over rational thought and science. They no longer grant the benefit of the doubt in the face of a comment or action that offends them (e.g., recognize that it may not have been intentional) and do not update their opinions in the face of contradicting data—relying instead on what feels right to them, even if that means ignoring valid arguments and data.

3. *Life is a battle between good people and evil people.* Safety-ism promotes tribalism, such that "if you're not with me, you're against me" is the dominant mindset.

So how have these thought fallacies affected litigation? Jurors with a strong safety-ism mentality believe there is no acceptable level of risk. We have heard jurors in mock deliberations state, "If it happens once, it has happened one too many times." These jurors also engage in hindsight bias, believing that because something

happened, it was foreseeable. The result of these mindsets is the conclusion that the defendant company needed additional safeguards, no matter the cost, to eliminate risks. Today's jurors, with their heightened safety concerns, are being tasked with judging companies' actions from 10, 20, or even 50 years ago; we can see why most do not live up to their modern concept of "reasonable."

Furthermore, when jurors deem it acceptable to rely on their feelings or gut reactions to serve as information, they circumvent the very foundations of our law- and evidence-based justice system. Even if the defense has more scientifically sound evidence, safety-ist jurors are able to discount it internally and favor their feelings of sympathy for the plaintiff, their corporate distrust, and their fear that they or someone they know may be harmed. Instructions from judges—e.g., that jurors do not give in and that they only change their stance if they truly believe it—can further bolster this issue. That is, the plaintiff-leaning jurors will continue to rely on their feelings/gut reaction even as defense jurors try to counter them with evidence.

Finally, increased tribalism has had two separate effects on jurors: 1) a worldview that categorizes everything into good versus evil tends to position a sympathetic plaintiff as the good party and a for-profit corporation as the evil party, and 2) jurors who are reinforced by those that agree with their position and who demonize alternative perspectives reject counterarguments or compromises, which may help to explain the uptick in hung juries we have seen.

OUR STUDY RESULTS

Two hundred jury-eligible respondents completed our online study examining the rise of safety-ism, concern for harm, and opinions about company safety precautions. The results were alarming—the vast majority bought into the exceedingly high safety standards that we asked about. For instance, 92% of respondents agreed, "Companies should take every possible measure to ensure their products are 100% safe." Regarding warnings, 83% agreed that products and pharmaceuticals should warn about every possible risk or side effect, no matter how small. Moreover, 69% percent of respondents indicated that they would stop using a product if they read it *might* cause cancer—in fact, 66% said that they already had stopped using a product due to health and safety risks. Attitudes like these paint a grim picture for defendants in product liability, mass tort, trucking, and other personal injury cases.

In order to aid clients' jury selections, we analyzed the data to determine what characteristics these safety-ist jurors shared. The following emerged as the strongest factors:

- Higher education
- Urban residents
- Main news source was social media, podcasts, and the Internet
- Registered Democrats (particularly those further from the center on the political spectrum)
- Strongly believe in scientific conclusions
- More likely to have been COVID vaccinated

THE SPREAD OF CONSPIRACY BELIEFS

Another troubling change we had observed during post-pandemic mock trials was that Republican jurors seemed to be finding for the plaintiff much more often than in years past. Given that Republican jurors were traditionally more likely to support the defense, why were some Republicans now switching sides? Some commonalities we quickly noticed among these jurors are that they had very positive opinions of former President Trump and also believed in certain recent conspiracy theories—namely, that the COVID vaccine was not safe or effective and that the results of the 2020 presidential election were fraudulent. Despite the federal government and its agencies touting the safety of the COVID-19 vaccines and repeated confirmations that the election results were valid, a portion of Republicans staunchly disagreed.

We hypothesized that perhaps these changes in juror behavior were in some way related to the growing prevalence of various conspiracy theories. For example, in November of 2022, 40% of Americans maintained the belief that the 2020 election was stolen.[4] A solid majority (61%) of Republicans, in fact, asserted that Joe Biden's victory in the presidential election was not legitimate.[5] Our own research, meanwhile, demonstrated that Republicans were more likely than other groups to hold unverified beliefs about COVID-19. Specifically, they tended to believe that COVID-19 originated in a biological warfare lab, that the COVID-19 vaccine has caused significant health issues that are not being reported to the public, and that the data on COVID-19 deaths had been falsified to exaggerate the severity of the pandemic. These connections suggested that there was something different about the decision-making process of those who can hold (or even act upon) a belief with little to no supporting evidence—and, for our purposes, one that might affect their verdict decisions.

Another related study bolstered our hypothesis. It revealed that people who buy into a conspiracy belief now are much more likely to buy into conspiracy beliefs in the future.[6] In other words, holding a belief with minimal evidence makes someone more likely to buy into additional beliefs with minimal evidence.

CONSPIRACIES IN A CASE

With data showing that a substantial portion of Americans are willing to hold beliefs despite a lack of corroborating evidence, we believed that civil defendants had ample cause for alarm. Defendants rely on jurors to uphold the plaintiff's burden of proof, a burden that might be increasingly meaningless among jurors prone to accepting unfounded beliefs.

As a result, it became important to think through what potential conspiracies a juror could see in a case or how a plaintiff attorney could use conspiracist arguments. Based on mock trial research and post-trial juror interviews, we identified a number of circumstances that seemed to cause jurors to engage in conspiracy thinking:

- When the defendant relies on the approval or regulations of the Environmental Protection Agency (EPA), Food and Drug Administration (FDA), or Occupational Safety and Health Administration (OSHA), be it a permissible exposure limit or an approved product.
- When the International Agency for Research on Cancer (IARC) classifies something as a "possible" or "probable" human carcinogen, but the EPA or FDA has stated there is no conclusive evidence that the substance causes cancer in humans.
- When a study of questionable reliability (e.g., with an improper control group, test method, or analysis) shows a link between exposure to a chemical and cancer/injury, despite numerous studies finding no significant results.
- When studies have shown that exposure to extreme amounts of a chemical can cause cancer in animals, despite no epidemiological data showing such a link in humans.
- When the defendant is missing documents regarding health and safety information.

Common arguments we have heard jurors make include that government organizations are bought out by corporations and, therefore, product approvals or safety standards cannot be trusted or that a single study suggesting a link between a product and a disease is likely the only study that the defendant was not able to pay off. Likewise, if there are missing company documents, jurors can assume the worst, speculating that the defendant intentionally "lost" them as part of a cover-up.

OUR STUDY RESULTS

To test our hypothesis, we administered two studies regarding conspiracy beliefs to nationwide samples online. Participants read a fictional product liability lawsuit in which the plaintiff alleged that a medication caused her cancer. The lawsuit summary contained some of the facts, as mentioned earlier that jurors tend to see conspiracies in: the medication was FDA approved, and while the substance was classified by IARC as a "probable human carcinogen" based on animal testing that used extreme doses, human-based (i.e., epidemiological) research had demonstrated no link to cancer. Respondents then chose a verdict and answered a lengthy questionnaire containing many variables that typically impact verdict decisions.

The results were even more shocking than anticipated—a belief in conspiracies was the single strongest predictor of verdicts. The effect of conspiracy-mindedness was even stronger in determining a plaintiff verdict than one's sympathy for the plaintiff or ability to engage in rational thought (as opposed to emotional reasoning).

Analyzing the data by political orientation, the results showed that the most liberal jurors were still the strongest plaintiff supporters. However, the strongest conservative jurors also were significantly more likely to find the plaintiff. The strongest defense jurors were moderate Republicans, followed by moderate Democrats. That is to say, if the facts or circumstances of a given case invite conspiracies, some Republicans may be especially bad for defendants, while some Democrats may be good. Therefore, it will be important when evaluating jurors to determine not only their political leaning but the strength of that leaning as well.

Furthermore, due to the notable effect of conspiracy-mindedness shown in our studies but the difficulty of eliciting such information in voir dire, we identified a variety of associated variables that can be used to identify jurors most likely to engage in conspiracy thinking:

- Lack of trust in government and government agencies (e.g., FDA, EPA)
- Anti-corporate attitudes
- Low education
- Willingness to believe they can rely on their gut instinct/ intuition to tell them if a fact is true or not
- Very positive views of Trump in comparison to more moderate Republicans
- No COVID-19 vaccination
- Lack of trust in scientists
- Low income
- High religiosity
- Respect for authority

- Ingroup loyalty (i.e., the extent to which someone believes it is important to be loyal to the groups with which they identify or are involved)

CONCLUSION

As a final investigation, we compared our data on safety-ism and conspiracy-mindedness to determine if there was any relationship between the two mentalities. What we found was that there was a significant *negative* relationship—high safety-ism jurors tended not to hold conspiracy beliefs, and jurors with conspiracy beliefs tended to be low in safety-ism. In other words, the unfortunate reality is that these studies identified two *distinct* groups of jurors who are particularly bad for defendants—one on the left side of the political spectrum (i.e., safety-ists) and one on the right side (i.e., conspiracy thinkers).

So, while moderate Republicans tend to be the best for defendants and liberal Democrats tend to be the worst, the next-riskiest group of jurors is less defined. Factors like whether jurors could see a conspiracy in the defendant's actions or whether the defendant's safety regulations allow for any risk at all may be of outsized consequence in corporate defendants' jury selection decisions. In the face of shifts like those we've identified, traditional wisdom must make way for new realities—and defense counsel may soon familiarize itself with the bizarre feeling of striking certain strong Republican jurors.

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Case Law Update

By Zack A. Martin
Heidman Law Firm, PLLC


Zack A. Martin

EST. OF BUTTERFIELD BY BUTTERFIELD V. CHAUTAUQUA GUEST HOME, INC.,— N.W.2D—, 2023 WL 2542481 (IOWA 2023)

WHY IT MATTERS

The majority of the Iowa Supreme Court found that there is ambiguity in the certificate of merit statute and that a certificate of merit is not required in cases where expert testimony is needed only on the issue of causation. Plaintiffs may use this holding to argue that a certificate of merit is not required in a given medical malpractice case because breach of the standard of care by the defendant-physician is so obvious that expert testimony is only needed to establish causation.

FACTUAL & PROCEDURAL BACKGROUND

The estate of a nursing home resident filed a medical malpractice suit, alleging negligence against the defendant nursing home on various theories of liability. The estate did not file a certificate of merit in support of its claims. The defendant filed a motion to dismiss pursuant to Iowa Code section 147.140, which requires a certificate of merit whenever expert testimony "is necessary to establish a prima facie case." The district court granted the motion to dismiss, and the Court of Appeals affirmed.

HOLDING

The Supreme Court remanded to the district court for determination of which of the plaintiff's claims required expert testimony to establish standard of care and breach. For claims where expert testimony is only required on the issue of causation, the majority held that a certificate of merit is not required. This holding reversed the holding of the Court of Appeals in this case and the Court of Appeals' holding in *Schmitt v. Floyd Valley Healthcare*, 2021 WL 3077022 (Iowa Ct. App. 2021).

ANALYSIS

The Supreme Court began by addressing principles of statutory interpretation. The Court noted that the first step is determining whether the statute is ambiguous. The Court found that ambiguity exists in the context of the certificate of merit statute. The statute provides that the certificate of merit requirement is triggered whenever expert testimony is required to establish a plaintiff's "*prima facie case*." The contents of the certificate of merit need not address *causation* and must address only "the issue of *standard of care* and an alleged *breach* of the standard of care."

The ambiguity, according to the majority, was in the difference between cases where a certificate of merit is required—those where expert testimony is needed to establish a *prima facie case* (i.e., standard of care, breach, *and* causation)—and the contents of a certificate of merit, which must only address standard of care and breach. To resolve the ambiguity, the Court turned to legislative history. The Court noted that prior versions of Iowa Code section 147.140 had included the requirement that the contents of the certificate of merit address standard of care, breach, *and* causation.

From the removal of the word "causation," the Court inferred that the legislature did not intend the certificate of merit requirement to reach the issue of causation. The Court rejected the defendant's position that the plain language of section 147.140 requires a certificate of merit where expert testimony is needed solely on causation, despite causation certainly being an element of a plaintiff's "prima facie case." The majority concluded that "it makes no sense to require a party to hire an expert just to fill out a certificate of merit when no expert is necessary for [standard of care and breach]." The Court remanded to the district court for determination of whether expert testimony is necessary to establish standard of care and breach.

Justice May, joined by Justice McDermott, filed an opinion concurring in part and dissenting in part. The dissent would have found that Iowa Code section 147.140 is unambiguous and applies whenever expert testimony is needed to establish a *prima facie case* (i.e., standard of care, breach, *and* causation). The 'ambiguity' found by the majority was instead an "asymmetry" between the statute's trigger conditions—a certificate is required whenever expert testimony is needed to establish a prima facie case—and the statute's content requirements—the elements of a prima facie case the certificate needs to address. Justice May noted that removal of the causation language from section 147.140 was from the content

requirements, and the "prima facie case" triggering language was left undisturbed during the drafting process.

KIRLIN V. MONASTER, 984 N.W.2D 412 (IOWA 2023)

WHY IT MATTERS

In another certificate of merit case, the Court held that a plaintiff who voluntarily dismisses pursuant to Rule 1.943 after the defendant files a motion to dismiss pursuant to Iowa Code section 147.140 is not bound by any previously served certificate of merit when refiling their action. This is a further consequence of the escape route provided by Rule 1.943 when a plaintiff is faced with a motion to dismiss for noncompliance with the certificate of merit requirement. This case accompanied *Ronnfeldt v. Shelby Cnty. Chris A. Myrtue Mem'l Hosp.*, 984 N.W.2d 418 (Iowa 2023), a case we covered in the Winter 2023 Case Law Update.

FACTUAL & PROCEDURAL BACKGROUND

The plaintiffs filed suit against the defendant physicians, including a board-certified family medicine physician. The certificate of merit offered by plaintiffs was from a board-certified neurosurgeon. The family medicine physician challenged the certificate on the basis that the expert was not board-certified in family medicine. Plaintiffs then voluntarily dismissed and refiled a new petition. With the new petition, plaintiffs served a new certificate of merit, this time from a board-certified family medicine physician. The defendant physician claimed that the deficient certificate of merit in the first case entitled him to dismissal of the refiled action. The district court agreed and granted the defendant's motion based on the deficient certificate of merit filed in the first case.

HOLDING

The Supreme Court reversed, noting that the result in *Ronnfeldt* resolved this appeal. The district court erred when it granted summary judgment based on the certificate of merit provided in the dismissed case.

ANALYSIS

A Rule 1.943 dismissal is dispositive of a case without any further action of the court. Conversely, a motion to dismiss pursuant to Iowa Code section 147.140 must be determined, on the merits, by the court. A Defendants' motion to dismiss pursuant to section 147.140 became moot upon plaintiffs' voluntary dismissal. When the plaintiff refiles, section 147.140 applies to the refiled action. Plaintiffs cannot rely on their prior certificate of merit in support of the refiled action. Similarly, defendants cannot rely on it to defeat a refiled action.

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