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A Remembrance of John Simonett: The Consummate Trial Lawyer and Consummate Gentleman

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**A REMEMBRANCE OF JOHN SIMONETT:
THE CONSUMMATE TRIAL LAWYER AND
THE CONSUMMATE GENTLEMAN**

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I. INTRODUCTION

I first met John Simonett in the 1960s in the courtroom of the Morrison County Courthouse in Little Falls, Minnesota. At the time, I was trying jury cases throughout central Minnesota and northern Minnesota as a young lawyer in the well-recognized greater Minnesota law firm of the time, Dell, Rosengren and Rufer. Roger Dell had become Chief Justice of the Minnesota Supreme Court in the 1950s after having built a very wide practice as a jury trial lawyer. That practice continued under his two outstanding partners, Chester Rosengren and Gerald Rufer. There were more cases to try in excess of thirty counties, which was the law firm’s territory of the time, than could easily be handled. So, I received a dose of experience in trying jury cases as a very young lawyer, the likes of which no longer exists. I frequently sued out subrogation claims in which an insurance company, running under the name of its insured to whom it had paid property damage, sought recovery from someone who was usually an uninsured opposing driver. I discovered that if I questioned the insured, in the process of explaining the insurance company’s right to sue in his name,

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whether or not the insured had been injured or had sustained damages in addition to those for which the insurance company had compensated him, the plaintiff's case was often enhanced as to scope and value. Such was the case that brought me to Little Falls to meet John Simonett who was defending an uninsured resident of the city of Little Falls. My memories of this trial and of the other events of which I speak herein are subject to the vicissitudes of half a century and not capable of editorial verification.

II. THE EARLY YEARS

I was young and brash, maybe pretty good at what I was doing, but not as good as I thought I was. I was, no doubt, arrogant. I did not know much about John Simonett at the time we first met. I did not realize his background as an outstanding law student, president of the *Minnesota Law Review*, and member of the Order of the Coif. I probably did not fully appreciate his partnership with Gordon Rosenmeier who was, at the time, the Minnesota Senate Majority Leader and a part of a troika that I will detour from the main route to describe because it is relevant.

Three men might be said to have run Minnesota government at this time. One was Gordon Rosenmeier, who was noted as the consummate maestro who conducted the then-conservative majority in the Minnesota Senate. He was known not only for what he did on the Senate floor, but also for conducting every evening, standing at one end of the bar at the St. Paul Hotel, the out-of-session dealings where plans were made and strategies were executed. The story has it that he was never without a glass of Scotch whiskey in his hand and that such never seemed to dampen his incisive wit and repartee. The second member of the troika was Roy Dunn, the Speaker of the House. He was from a town, appropriately named Dunvilla, after him, where there stood a log cabin, which he had brought there from its original site and in which he claimed to have been born. Dunvilla is located on one of the lakes of Otter Tail County about thirty miles from Fergus Falls, where Roger Dell, the third member of the troika and the Chief Justice of the Minnesota Supreme Court at the time, had officed and built his reputation.

I am sure that John Simonett understood the position of his senior partner, and I am also sure that John would not have commented thereon nor taken undue advantage of being an *aide-de-camp* to a member of that power structure.

John remembered our first case together over the years when we had become friends and often co-counsel in jury trials. He told me that when he had thanked the jury at the end of his summation and was undertaking to turn around and sit down at counsel table, I came shooting by him creating an actual breeze in my wake to tell the jury how wrong he was in what he had told them. I asked him why he did not “settle my hash,” as the saying at the time was, and he said, “Oh, I was just curious to see you go.” That adjective, “curious,” would have a bearing on my view of him until the day he died.

There were a number of other jury trials in which we represented opponents. After John became recognized by the insurance industry and began receiving designations as insurance defense counsel for their insureds who had been sued, we served as co-counsel representing, sometimes, the same defendant or co-defendants. I will speak of the case that brought about such early recognition by the defense community momentarily, but first, there was another context of our early association.

I, early on, became active in the Minnesota State and Seventh Judicial District Bar Associations and found that John was a faithful attendant at meetings of the District Bar Association, where we would meet at the much more frequent association meetings and social events than now occur. This gave both of us a broad acquaintance in terms of both geography and numbers of lawyers. The ten-county Seventh Judicial District extends around 200 miles from Stearns, Benton, and Morrison Counties in the southeast to Otter Tail, Clay, and Becker Counties in the northwest. The Seventh Judicial District Annual Bar Convention was a big deal. It rotated among not all ten of the county seats involved, but half or more of them. The convention would begin on Friday afternoon as lawyers (all men at the time) and their wives arrived. Our wives were very much a part of this social structure. There would be a dinner Friday evening and a cocktail hour in advance, during, and afterwards, usually. There would be meetings Saturday morning and golf or poker or some other such activity during the afternoon, and then there would be a dance Saturday evening at which, usually, the attendants did no good to their livers. In those days, trial lawyers, who knew each other from trying jury cases with and against each other, were almost all a part of the drinking scene. That occurred not only at Bar Association events, but usually at the end of every day of jury trial, possibly at some days of events leading

up to trial, and certainly after the jury went out to deliberate on the last day of trial.

Both John and I enjoyed these events, but John was more restrained than many others in his exuberance in participating in the liquid parts of the occasions. John was immensely popular at those events. His wit and charm in the courtroom held over to socializing. I came to know John's wife, Doris, and he to know my wife, Betty Joan. Our wives became friends, and as the years went by the four of us got together as often as we could. But, I am getting ahead of the story.

III. THE TURNING POINT OF A CAREER

The lawsuit in which I most memorably encountered John after the very first one, of which I have spoken, is a case reported under the caption of *Zylka v. Leikvoll*.¹ It is still cited and referred to in the legal literature.²

The case was tried in Little Falls. The trial judge was a very noted trial judge of the time, Charles W. Kennedy of Wadena. Judge Kennedy had been a very highly regarded and successful trial lawyer representing plaintiffs before ascending to the Bench. Some might have said that he could be accused of continuing to represent plaintiffs from the Bench. John Simonett would never say such a thing, but the thought passed through my mind as I worked on the appeal. I am going to defer to my co-author, Carrie Weber, to speak to some of the interesting details of this case in conjunction with what more I have to say about it. Carrie Weber is a third-year law student and assistant editor of the *William Mitchell Law Review*, who has been of immeasurable help to me in resurrecting some of the details of the *Zylka* case and another, which I will discuss shortly.

The *Zylka* case revolved around a complicated multi-car accident that occurred on a dark winter evening on U.S. Highway 10, a four-lane highway south of Little Falls near the city of Royalton.³ Leikvoll, the owner of a gas station, was using a wrecker to push a car owned by Traphagan.⁴ The two vehicles were stopped

1. 274 Minn. 435, 144 N.W.2d 358 (1966).

2. See *Domagala v. Rolland*, 805 N.W.2d 14, 26 (Minn. 2011) (citing *Zylka* as authority for "impos[ing] a duty of reasonable care to prevent foreseeable harm when the defendant's conduct creates a dangerous situation").

3. *Zylka*, 274 Minn. at 436, 144 N.W.2d at 361.

4. *Id.*

in the median crossover of Highway 10, waiting for passing traffic to clear before they crossed.⁵ Traphagan's vehicle was apparently sticking out some ways onto the highway and was struck by a vehicle driven by Bounds.⁶ Both vehicles ended up in the middle of the northbound lanes of the highway.⁷ At some point Zylka, who was Leikvoll's nephew and had been working at the gas station, heard the crash and came out to the highway on foot to help.⁸ There is disagreement about what happened next, but it is undisputed that there was some effort taken by all the parties to try and warn oncoming motorists of the obstacle in the road.⁹ This proved to be unsuccessful when a fourth car, driven by Cech, came upon the scene and struck Zylka, who was on the highway.¹⁰ Zylka lost a leg as a result and brought suit against Leikvoll, Traphagan, Bounds, and Cech. There were several cross-claims between the parties as well.¹¹

I was not involved in the district court trial of the case. My senior partner Gerald Rufer tried it, representing defendant Bounds. John Simonett represented plaintiff Zylka, and senior partners of two other well-recognized law firms of the time, Richard Quinlivan of Quinlivan, Quinlivan and Williams of St. Cloud; and Harry Carroll of Carroll, Cronan, Roth and Austin of Minneapolis appeared for Leikvoll and Traphagan, respectively. Cech was separately represented by another good and experienced trial lawyer, James Wackerbarth. My job was to write the Minnesota Supreme Court brief for our client, Bounds, and to argue the case at the Minnesota Supreme Court.

The jury found for the plaintiff, Zylka, and the verdict was in the neighborhood of \$125,000, which was a lot of money in 1966.¹² Each defendant was found to have acted negligently and to have proximately caused Zylka's injury.¹³

John's client, the plaintiff, certainly could have been found contributorily at fault to the point of receiving nothing. He ran across U.S. Highway 10 at night into a dangerous, complex

5. *Id.* at 436–38, 144 N.W.2d at 361.

6. *Id.* at 436, 144 N.W.2d at 361.

7. *Id.* at 438, 144 N.W.2d at 361.

8. *Id.* at 441, 144 N.W.2d at 363.

9. *See id.* at 439–40, 144 N.W.2d at 362.

10. *Id.* at 440–41, 144 N.W.2d at 363.

11. *Id.* at 441, 144 N.W.2d at 363.

12. *Id.* at 441–42, 144 N.W.2d at 363–64.

13. *Id.*

accident scene for no discernible reason. He claimed at trial that it was “to see if [he] could help any.”¹⁴ John was up against a bunch of very good lawyers who, at the time, had more jury trial experience than he did. One thing he certainly had going for him was Judge Kennedy on the Bench. Richard Quinlivan’s client certainly could have been exonerated by the jury, or the verdict against him could have been taken away either by the judge or the supreme court. His negligence was found not as a contributing cause of the original accident, but rather in not effectively warning oncoming traffic of the obstacle, despite the fact that he put the flashers on his wrecker and used a flare and flashlight to warn travelers.¹⁵ Judge Otis, dissenting in the supreme court decision, characterized the verdict against Leikvoll as an outrage, without using those words but saying thereof that “it is difficult to imagine any situation in which a driver involved without fault in an accident is safe in taking measures to warn oncoming vehicles.”¹⁶

Several of the other defendants had a defense, including my firm’s client, Bounds, on whose behalf I argued for a determination of superseding intervening cause insulation as a matter of law.¹⁷ Judge Kennedy also excluded a prior inconsistent statement of an important witness, an exclusion I felt was highly damaging to the defense of our client.¹⁸

The supreme court opinion sustained the jury verdict totally, in the face of trial work by a group of very good defendant lawyers

14. *Id.* at 441, 144 N.W.2d at 363.

15. *Id.* at 447–48, 144 N.W.2d at 367.

16. *Id.* at 450, 144 N.W.2d at 369.

17. *Id.* at 443, 144 N.W.2d at 364. The parties argued that Cech’s negligence in failing to slow for the accident scene after observing the flashing lights of the wrecker was not a foreseeable consequence stemming from the negligence that caused the first accident. The court was not persuaded by this argument, holding that “[t]he question of whether Cech’s negligence was a superseding cause because he should have seen the hazard ahead we believe is debatable under the view most favorable to him. Thus, we cannot say as a matter of law that the jury arrived at an unreasonable and unsupported conclusion.” *Id.* at 446, 144 N.W.2d at 366.

18. *Id.* at 448, 144 N.W.2d at 368. Verne Trask was a witness to both accidents and had provided a written statement a few days after the event. *See* Statement of Verne Trask at 900, *Zylka*, 274 Minn. 435, 144 N.W.2d 358 (Nos. 39460 to 39462) (on file with author). The statement placed Trask traveling northbound on Highway 10 right behind Bounds and placed Traphagan’s vehicle completely blocking Bounds’s lane of the highway. *Id.* However, at trial, Trask made different claims, and Bounds’s attorney was denied the opportunity to impeach his own witness with the prior statement. Brief of Respondent-Appellant Bounds at 61–62, *Zylka*, 274 Minn. 435, 144 N.W.2d 358 (Nos. 39460 to 39462).

and appellate lawyers, excluding myself.¹⁹ The Bench, bar, and insurance industry took note of this case and, not long after, John Simonett began getting insurance defense referrals, which became the center of his practice over the next fifteen years. What I believe was important to that favorable early outcome is hard to determine by reading the transcript. The same aura kept coming forth in other outcomes over the years. There was something about John that jurors related to. He had a striking physical appearance, voice, and demeanor. He was tall, with tousled hair and craggy features. Rather Lincolnesque, all told. He smoked a corncob pipe in those days. He exuded an aura of quiet firmness in the right, in the way that some noted ministers and other motivational speakers have.

It is interesting to note that the author of the majority opinion in the supreme court was Walter Rogosheske, who hailed from Little Falls and was well known to and by Gordon Rosenmeier and John Simonett. Justice Rogosheske was appointed to the district bench as one of the youngest judicial appointments of the time, after having first served in the Minnesota House of Representatives as one of the youngest legislators of his time. He rose from the district bench to the supreme court in short order and served there for many years. He was very popular with the trial bar. He thought the world of John.

IV. JOHN SIMONETT'S LAST JURY

After the good fortune of participating in John's very early jury trials, I was privileged to participate in John Simonett's last jury trial before he became a justice of the Minnesota Supreme Court. The trial was lengthy and involved an interesting fact situation. Trial commenced on July 22, 1980. The jury returned its verdict August 6, 1980, fifteen days later. The case was tried in Crow Wing County District Court in Brainerd, Minnesota.²⁰ The judge was Clinton Wyant, and my recollection is that there was a twelve-member jury. Here is the story.

On a July evening in 1977, three teenagers were amusing themselves on Cross Lake, one of the lakes in the White Fish Chain. The precise location of the salient events was at a channel between Cross Lake and a neighboring lake called Rush Lake. County Highway 16 crosses on a bridge between the lakes. The defendant,

19. *Zylka*, 274 Minn. at 449, 144 N.W.2d at 368.

20. *Horton by Horton v. Orbeth, Inc.*, 342 N.W.2d 112 (Minn. 1984).

Orbeth, Inc., locally known as Cross Lake Boat Works, was situated on County Highway 16 right at this spot. The form of the amusement of the three young men was to steal a boat and ride around in it until they got tired of it or it ran out of gas. Then they would abandon it and take another. They were not malicious thieves. They were borrowing the boats without permission. The plaintiff, John Horton, was a year or two older than his two colleagues who ended up as third-party defendants, brought into the litigation by Cross Lake Boat Works seeking contribution or indemnity. I represented third-party defendant Melchert and John Simonett represented third-party defendant Johnson. Melchert was a year or two younger than Horton and Johnson still another year or two younger than Melchert. These disparities of age became significant. Plaintiff Horton was skilled in hot-wiring or otherwise starting outboard motors.

The three had just become tired of their current stolen/borrowed boat. Plaintiff Horton was in what was to be the new boat, which the boys had moved away from its mooring, and plaintiff Horton was in it in the darkness beneath the bridge over the channel between the two lakes, working on getting the motor started. It was now in the wee hours of the morning. Plaintiff's two colleagues were in the old boat waiting for plaintiff in the new one to come pick them up. A third boat was arriving at the scene coming from Rush Lake and preparing to go through the channel under the bridge into Cross Lake. This boat was operated by the son of the owner of Cross Lake Boat Works. It was as sleek and powerful a boat as Cross Lake Boat Works had to display. The young man had borrowed it for the evening to attend a party on an island in Rush Lake. He was accompanied by several young ladies who were enjoying the very stylish ride. All had been at a party on the island where a libation called "purple passion" had been consumed.

As one approaches the channel from Rush Lake, there were signs in the water saying "5 mph—No Wake." It became quite clear that the young gentleman operating the sleek and powerful boat with his passengers aboard did not heed that sign. There was a tremendous, explosive collision under the bridge, followed by silence. A voice came from the powerboat asking if everything was all right. The two colleagues of the plaintiff who were sitting in the old boat well out of danger said that everything was fine. Everyone wished others good night and the two colleagues of the plaintiff

went to see where he was. He had not been knocked into the water but rather lay unconscious on the floor of the new boat. The youngest of the three announced that he had to go home and asked to be taken to shore. The middle of the three obliged him, went back and loaded the plaintiff into the old boat, or somehow or other got the plaintiff to his own parents' cottage where he told his parents what had happened and first responders were called. The outcome for the plaintiff was a severe closed-head injury and resultant brain damage.

Plaintiff Horton was represented by a very good trial lawyer of the time based in Brainerd, Carl Erickson. Cross Lake Boat Works was represented by Richard Quinlivan of St. Cloud, one of the very prominent defense lawyers of the time in greater Minnesota. I represented the middle of the three boat stealers, Melchert. John Simonett represented the youngest of the boat stealers, Johnson.

Judge Clint Wyant was well known to us. He was a very personable judge who had practiced law in Aitkin, Minnesota, thirty miles from Brainerd and about the same distance from this accident scene. Judge Wyant liked lawyers and was as accommodating to those who appeared before him as he could possibly manage to be, except in one regard. This was a time when everybody smoked, with the exception of Carl Erickson, myself, and John Simonett, except that John would find his corncob pipe in his pocket at the end of the day when he was not around the courthouse. Richard Quinlivan was probably a more than a pack a day man. I was with Richard a lot of times, and unless he was in a courtroom or a church, he had a cigarette going. There were recesses taken in trials in those days, where the lawyers and the judge would repair to the judge's chambers where many would have a cigarette. But here was the rub with Judge Wyant. When Judge Wyant was appointed to the Bench, an admiring client gave him a farewell gift. It was a stuffed badger. Judge Wyant liked his badger and took it with him to whatever chambers he was working out of so that he and those frequenting the chambers could admire it. Judge Wyant did not permit smoking in his chambers, as he did not wish his badger's pelt to become a repository for smoke. Thus, and during the frequent breaks in this fairly long trial, Richard Quinlivan had to stand in the court reporter's anteroom next to Judge Wyant's chambers, and whatever motion was being argued or other activities going on in the judge's chambers, Richard participated from the doorway, being careful to blow the smoke

back into the court reporter's anteroom rather than into the chambers where the badger sat.

Other than as regards the badger, Judge Wyant was accommodating. We decided, too much so. It appeared that when objections or requests or motions or other dealings with the court in the courtroom occurred in this contentious trial, Judge Wyant seemed to John and me to be keeping a very even count. If one lawyer made an objection and it was sustained, a different lawyer making an objection was likely to get his objection sustained also. We quickly realized not to make insignificant objections or requests, because we did not want to use up our turns.

During voir dire examination of the jury, John focused on a large robust middle-age man who said that he had nine children. John and I collaborated on exercising our challenges to the jurors. John said, "He looks like a jury foreman to me, and if he has nine kids, probably one or more of them have done something as bad or worse than our clients did." We more or less tried the case to that man and it turned out that he was, indeed, the jury foreman.

The trial was highly contentious. Richard Quinlivan and Carl Erickson were both extremely capable of being contentious and they were. It started out with the opening statements. Carl Erickson told the jury that he was humbled by the awesome experience he had of representing this grievously injured young man against the likes of John Simonett, whose appointment to the Minnesota Supreme Court had already been publicly announced, and myself, whom the profession knew was on the apostolic ladder of becoming president of the State Bar Association in another few years. Richard Quinlivan moved for a mistrial on the ground that the Erickson remarks had poisoned the minds of the jury against his client because he did not have equivalent future prospects. Judge Wyant denied the motion.

John was able to make enough references to the age of his client so that I seemed to see the client turning into a pre-teenager in short pants and white knee socks. Richard Quinlivan was a close friend of both John Simonett and myself. We each had as close a relationship with Richard and his wife, Anne, as we had with each other. That did not stop us from doing everything we thought appropriate to win the case for our clients. At the end of the day in court, we would repair to one of the restaurants in the Brainerd Lakes Area to retire and have casual conversation about what had happened during the day. Richard pointed out to us again and

again that we were all defendants and that he was seeing John and me in the process of committing treason to the defense bar by collaborating with the plaintiff. We denied that accusation. It did not go away at the end of the trial or even at the end of the supreme court proceedings. We faced the accusation from Richard every time we got together socially. We continued in our denials, with a trace of a smile on our faces. What collaboration there was certainly came naturally. After all, we represented fellow boat stealers, and it was Richard's client in his almost supersonic powerboat that created all of the force that produced the injury. At some stage in the trial, perhaps it was not until final argument, I did a demonstration of that force after having arranged some books on the plaintiff's counsel table. Carl Erickson did not mind sharing the table for that purpose. In the course of my speech, I thrust a book from one end of the table, like a very vigorous shuffleboard thrust, crashing into the books at the other end of the table or perhaps perched on the very edge of the table to the floor, making noise and disarray. That prompted another mistrial motion from Mr. Quinlivan, which was denied, as had various others been during the course of the trial.

Richard Quinlivan always enjoyed dealing with damages in jury trials. It was his belief that plaintiffs always overreached in their requests to the jury and in the proof that they attempted to enter on the record to support such overreaching. He was particularly good at microscopically reviewing medical records of a plaintiff who had a lot of prior medical history and finding things in that history that would explain the plaintiff's complaint at trial. That didn't work in this particular trial because the plaintiff was a high school boy who was without medical history. However, Carl Erickson was able to find an expert witness who proposed to offer the opinion that, based upon eighth-grade mechanical drawing classwork, he was destined to become an architect. Richard was sufficiently outraged at that claim to become quite vociferous both in cross-examination and summation.

John rose first to address the jury in summation. He might have had his left hand on his client's shoulder as the client sat at counsel table and John stood in his place addressing the jury. John began, "I am reminded of St. Paul's letter to the Corinthians, 'When I was a child I spake as a child.'" I thought I could see sympathy welling up in the eyes of the jurors for this poor child who had fallen under the bad influence of the much (two or three

years) older plaintiff. I followed John, the third-party defendants being last in everything else but first in final arguments. I began: “I am reminded of the story of the Good Samaritan who helped the suffering Christian at the roadside when others who more appropriately should have done so walked by.” My client, young Mr. Melchert was, of course, the one who had brought the unconscious plaintiff to his parents’ cottage to face what must have been the wrath of his parents in order to get the first responders to come and, no doubt, save the plaintiff’s life. When John and I finished our summations to the jury, we each repaired to the front row of the audience with our clients at our sides to listen to Richard Quinlivan, who, in the course of his arguments, was seen to approach us with pointed finger at our clients to ask how these co-conspirators with the plaintiff could seek to avoid responsibility for their nefarious and indeed illegal conduct.

Carl Erickson had not sued the third-party defendants, and he did not argue for their responsibility. How could he, without indicting his own client? He did talk about “purple passion” on the island and boats designed for coastal waters, or at least Lake Superior, roaring through a no-wake channel in the wee hours of the morning for the delight of their young-lady passengers, ending in the horrific crash, which was illustrated, but only in the mildest of ways, by the book crash from the counsel table that had thrown Mr. Quinlivan into such a rage during the trial.

It had been agreed by the three defense counsel that after the jury was out, our final dinner together during the trial would be at Kavanaugh’s Resort on Sylvan Lake, west of Brainerd. Richard had called to make the reservations. Kavanaugh’s was popular, and this was the middle of the summer. There were various proceedings that followed the departure of the jury to begin their deliberations and, in consequence of those proceedings, we were significantly late to arrive at Kavanaugh’s. The proprietor of Kavanaugh’s was a very impressive gentleman who had developed the resort and restaurant as a sort of retirement hobby-type venture after a very successful career in business. He looked like a very successful business executive: large and corpulent in the way of a characterization of a tycoon in *The New Yorker*. He was always present, greeting arrivals and making sure that everything was as perfect as he intended it always to be. He knew many of the arrivals from prior visits, including Richard Quinlivan. However, by the time we arrived, he had been holding a table for a long time in the

face of pressure to fill it, and he proceeded to deliver a lecture to Mr. Quinlivan, which Mr. Quinlivan very definitely was not in a mood to hear. That unsavory conclusion was also brought up to John and me on the frequent times we three were together in future years. Richard never forgot our capitulation to the plaintiff at the trial, and we never admitted that there had been any such. The remembrance never interfered with our appetites.

I was always glad that John had the experience of the boat-stealers trial as his final jury trial before going to the supreme court. It had many of the aspects of trials that he had enjoyed over the years, but perhaps at a magnified level. It was a good last time, and we reviewed it with and without our dear friend Richard Quinlivan on quite a few occasions. By way of epilogue, Carl Erickson had his son John with him during the trial. John Erickson was, at the time, a student, but later became a lawyer and to this day practices law in Brainerd. I spoke with John recently about this case. John Erickson remembered it well, and he told me about John Horton, who continues to live in the Brainerd area and continues to exhibit the disability of significant brain damage but is, to the extent possible, a functioning member of the community.

The jury verdict imposed 10% of the causal fault upon the plaintiff but only 8% each on the third-party defendants and 74% on defendant Orbeth (Cross Lake Boat Works).²¹ The efforts of Orbeth and its trial counsel to seek contribution from the third-party defendants at the trial court level failed, and the case was appealed to the supreme court. I argued the case on behalf of my client, and a young partner of Gordon Rosenmeier and John Simonett, who is now Judge Doug Anderson, argued for my client's colleague, the other third-party defendant. Kevin Spellacy of the Quinlivan firm argued for Orbeth. Richard Quinlivan did not appear. John Simonett, who, of course, recused himself, told me that he sat behind the curtain during the oral arguments to listen to what counsel had to say. In a decision that I thought to be brilliant, my law school classmate Justice M. Jeanne Coyne wrote an opinion affirming the trial court outcome, but the Chief Justice, Honorable Douglas K. Amdahl, and veteran and respected Associate Justice Larry Yetka dissented.²² I have always been concerned that there was some merit to the dissent, but my

21. *Horton*, 342 N.W.2d at 113.

22. *Id.* at 116, 120.

co-author, Carrie Weber, will take over at this point regarding the legal issues.

V. THE LAW OF *HORTON V. ORBETH*

The sole issue on appeal was which party should be responsible for which portion of the large amount of money damages awarded to the plaintiff.²³ At the time of the boat accident and trial, the applicable statute on damages in cases involving comparative fault was Minnesota Statutes section 604.01 (1976).²⁴ Section 604.01 stood for the well-established principle that a plaintiff could only recover damages for negligence resulting in death or injury if that plaintiff's own fault was not as great as the fault of the person against whom recovery was sought. Thus, because the jury found plaintiff Horton to be 10% at fault, both third-party defendants were absolved from liability, as the jury found them both only 8% at fault.²⁵ The statute further stated that any damages awarded to the plaintiff must be reduced in proportion to the amount of negligence attributable to that plaintiff, and "[w]hen there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award."²⁶ That left 90% of the damages to be paid by Cross Lake

23. See *id.* at 113.

24. *Id.* At the time, subdivision 1 of section 604.01 read:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

§ 604.01, subdiv. 1.

25. *Horton*, 342 N.W.2d at 114.

26. § 604.01, subdiv. 1.

Boat Works, which had been found 74% at fault for the plaintiff's injuries.²⁷

On appeal, Cross Lake Boat Works asserted that it was fundamentally unfair to be held responsible for all of the plaintiff's damages and argued that its liability should be reduced to the 74% of fault the jury attributed to it.²⁸ It further argued that, although the third-party defendants were found to be *less* negligent than the plaintiff, they still had been found to have *some* percentage of negligence and thus could properly be "jointly liable" for purposes of contributing the remaining 16% of the plaintiff's award.²⁹

The majority disagreed and found it was bound by the plain language of section 604.01 that required only defendants who were "jointly liable" to a plaintiff to be jointly and severally liable for the entire award.³⁰ The court concluded that because the jury found the third-party defendants less negligent than the plaintiff, neither of them could be "jointly liable" for contributing to Horton's damages as a matter of law.³¹ The court held that "[w]e have consistently refused to require a party to contribute to an award when the quality of his conduct did not justify imposing liability to the injured party."³² The holding did show some sympathy to Cross Lake Boat Works's position because, although it refused to take liberties with the legislatively created "modified comparative fault system which comprises liability and contribution," the majority sent a clear message to the legislature, stating: "It would, perhaps, have been more consistent had the legislature decreed that the damages be reduced in proportion to the aggregate fault of the plaintiff and all less-at-fault parties, from whom the plaintiff cannot recover, but that is not what the legislature did."³³

The dissent viewed the majority's holding as "overly formalistic" and an "excessively restrictive view of the purposes of contribution."³⁴ From the dissent's perspective, contribution was an equitable remedy, and thus the common liability requirement should have been construed flexibly to "achieve a fair allocation of damages when one tortfeasor has paid a disproportionate share of

27. *Horton*, 342 N.W.2d at 113.

28. *Id.* at 115.

29. *Id.* at 113.

30. *Id.* at 114.

31. *Id.*

32. *Id.*

33. *Id.* at 115–16.

34. *Id.* at 116 (Amdahl, J., dissenting).

an injured party's judgment."³⁵

Interestingly, although there have been some changes to the comparative fault statutes in Minnesota, the result would be the same today—Cross Lake Boat Works would pay the full 90% award to plaintiff Horton. Under current law, any defendant whose liability is found to be greater than the liability of the plaintiff, yet less than 50%, is only responsible for the percentage apportioned to it.³⁶ It is only when a defendant's fault is determined to be greater than 50% that joint and several liability for the entire award will come into effect.³⁷ The debate over the inequities of this system, clearly illustrated by the dissent, continues in the legal community today. However, the majority decision, cited as recently as the 35W bridge collapse litigation in 2010, remains good law.³⁸

VI. CONCLUSION

One of my earliest memories of John's personal life came when I learned that he was in St. Ansgar's Hospital in Little Falls, recovering from a fractured hip. I thought it was appropriate for me to drive over to Little Falls to visit him one evening shortly before Christmas. He had fractured the hip while out ice-skating at the community rink with his children a few days before. He was in traction and obviously in pain. My visit was intended to be a short one. As I walked into his room, I was followed by a group of children who were out Christmas caroling, bringing some cheer to hospital patients. As they began to sing, John joined in with them, singing perfect bass harmony, to their delight.

That has been a symbolic event in my memory. John harmonized with many people in all different walks of life, and he was always more interested in what he saw and heard around him than he was in himself.

I came to realize the vital importance to John of his family. His practice, including his trial work, was usually in Little Falls,

35. *Id.* at 118.

36. MINN. STAT. § 604.02 (2010). Subdivision 1 of section 604.02 states in pertinent part: "Joint liability. When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award: (1) a person whose fault is greater than 50 percent . . ." *Id.*

37. *Id.*

38. *In re Individual 35W Bridge Litig.*, 786 N.W.2d 890, 897 (Minn. Ct. App. 2010).

Morrison County, or in the surrounding counties so he could get home at supper time. It was important to John to have supper with the family. It would have been a great experience to sit in on the table conversation. However, when supper was over, John would go back to the office to work. He did such things as examine abstracts and write title opinions in the early days. If he was not in court, he would see clients on a “walk-in” basis during the day. These encounters, both with the abstracts and the people, provided grist for his early writing published in the *American Bar Association Journal* entitled, *The Common Law of Morrison County*,³⁹ in which he recounted his various clients’ advice to him as to what was “the law” and his learning of the “Morrison County Cabbage Contract,” which he liked to talk about in the years toward the end when he and I would make joint appearances speaking to legal groups of one kind or another. The “Cabbage Contract” went something along these lines:

I hereby deed to my son the family farm subject to the following conditions, which will run with the land and be a burden on the land until the deaths of both myself and my wife. We will live in the house forever and my son will maintain it for us. Every spring our son will till the garden for us so that we can plant the garden. He will stock the hen house with twenty hens and provide the services of one rooster. He will cut firewood for us to burn through the winter and will stack it in a water shedding pyramidal stack, and he will insure that we have twenty heads of cabbage to make sauerkraut to last through the winter.

It was the first IRA!!

When I was asked to say one of the eulogies at John’s funeral, I thought that there was nothing left to be said. It had all been said by so many people over the years and in the media and to one another at the time of his death. I thought that if John was looking down from heaven upon this funeral, he would be sharing my thought and would be beaming down his instruction, “Enough said; let’s go on.” I thought maybe he would appreciate the sentence of a hymn written by Saint Bernard of Clairvaux at the turn of the twelfth century: “What language shall I borrow to tell thee dearest friend?” What came back to me was a single word to characterize John, and one that had not been overused, but that

39. John E. Simonett, *The Common Law of Morrison County*, 49 A.B.A. J. 263 (1963).

had been in my mind for close to half a century. *John was curious.* He was curious about the law and about literature, music, theology, history, and geography. I remember him telling me that you could not imagine how good a fresh orange bought at a street market stall in Istanbul could be if you have not experienced that taste in that place. But more than anything else, he was curious about people. Like he had said to me about myself so many years before, he liked to watch and listen to people to see how they would go. There have not been very many men like him. I cannot think of another.

There are a couple of other words that also characterize John. He was modest, and he was humble. I thought about those words while preparing my eulogy. A stanza from Thomas Gray's *Elegy Written in a Country Churchyard* seemed appropriate:

The boast of heraldry, the pomp of power,
And all that beauty, all that wealth e'er gave,
Awaits alike the inevitable hour.

The paths of glory lead but to the grave.⁴⁰

John was glorified and heralded by many; but John did not walk the paths of glory—nor listen to the boasts of heraldry. He was not in quest of wealth or power. He watched out for us, the men and women in his life. He watched to see us go and helped us not to stumble and fall.

40. THOMAS GRAY, ELEGY WRITTEN IN A COUNTRY CHURCHYARD II. 33–36 (1751), available at <http://www.thomasgray.org/cgi-bin/display.cgi?text=elcc>.