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## Sufficiency of Circumstantial Evidence in Nebraska Civil Cases: What Is the Test? *Danielsen v. Richards Manufacturing Co.*, 206 Neb. 676, 294 N.W.2d 858 (1980)

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## Sufficiency of Circumstantial Evidence in Nebraska Civil Cases: What *Is* the Test?

*Danielsen v. Richards Manufacturing Co.*, 206 Neb. 676, 294 N.W.2d 858 (1980).

### I. INTRODUCTION

Evidence is not evidence is not evidence. Evidence may be direct, tending to prove or disprove an ultimate fact in issue,<sup>1</sup> or it may be circumstantial, tending to prove or disprove a fact which, while not itself in issue, by inference tends to prove or disprove an ultimate fact in issue.<sup>2</sup> Because inference is an imperfect process<sup>3</sup>

1. See 1 J. WIGMORE, EVIDENCE § 24 (3d ed. 1940); James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 219 (1961), reprinted in F. JAMES, CIVIL PROCEDURE (1965). Whether evidence is direct is really a two-part analysis:

When evidence of a fact is in the form of testimony by a purported observer of that fact, we call the evidence direct, *as to that fact*. And where that fact in turn is one of the propositions which a party is trying to establish as his side of an ultimate issue made by the pleadings in the case, or in any other way permitted by the relevant procedural rules, then the evidence is direct evidence *in that case*.

James, *supra*, at 219 (emphasis supplied).

Evidence has been said to be direct when the inference of the truth of the fact to be proved depends only upon the truthfulness of the witness. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 338, at 789 (2d ed. 1972).

2. McCormick described this as "a weighing of probabilities as to matters other than merely the truthfulness of the witness." C. MCCORMICK, *supra* note 1, § 338, at 789. James implied that the distinction between direct and circumstantial evidence is artificial because all proof requires some process of inference before it can justify a decision. James, *supra* note 1, at 219. He was resigned to making the distinction, however, because it is customary to do so. See *id.* McCormick's distinction, therefore, is useful: based on the types of inference necessary, it accommodates custom to reality.
3. If one draws an inference from an observed fact, one runs the risk of error. Inference, by definition, is interpretive. It is "the act of passing from one or more propositions, statements, or judgments *considered* as true to another the truth of which is *believed* to follow from that of the former." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1158 (16th ed. 1971) (emphasis supplied). The margin of error increases when more than one inference is re-

the use of circumstantial evidence in jury trials is accompanied by difficulties which do not plague the use of direct evidence.<sup>4</sup>

Direct evidence nearly always is sufficient to carry a case to the jury. The jury needs only to evaluate the witness's credibility to determine the ultimate facts in issue.<sup>5</sup> This does not hold true for circumstantial evidence. In cases involving the use of circumstantial evidence, a critical preliminary inquiry for the judge is whether evidence sufficient for jury deliberation has been presented.<sup>6</sup>

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quired to be drawn from a particular item of evidence. Recognizing this, courts have adopted rules against piling inference upon inference. See C. McCORMICK, *supra* note 1, § 338, at 291 n.39. See also Annot., 5 A.L.R.3d 100 (1966); note 66 *infra*.

4. This is true although direct and circumstantial evidence are equally probative of any given issue. The United States Supreme Court has said that "direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). See also Burns, *Weighing Circumstantial Evidence*, 2 S.D. L. REV. 36, 36 (1957).

In *Michalic*, a seaman on a Great Lakes vessel sued for injuries he suffered when a wrench which apparently malfunctioned fell on his foot. The Supreme Court, reversing both the district and appellate courts, held that evidence as to the fact that the wrench slipped was sufficient to make the inference of the wrench's unseaworthiness a jury issue, even though there was no evidence in the record of the wrench's deficiency other than the fact of slippage. 364 U.S. at 330-31. Apparently, in federal court, evidence is sufficient if the accident *may* have happened as the plaintiff claimed. This test certainly is less stringent than any test employed in Nebraska. See notes 10-14 & accompanying text *infra*. For more information on the federal test, see Feldman, *The Difference Between the Pennsylvania and Federal Test of Sufficiency of Circumstantial Evidence of Negligence and the Choice of Law in Federal Diversity Cases*, 72 DICK. L. REV. 409 (1968).

5. C. McCORMICK, *supra* note 1, § 338, at 789-90; James, *supra* note 1, at 220. This assumes that the proffered direct testimony is reasonable. Direct evidence may be held insufficient to get to the jury where the witness's testimony is palpably incredible. See, for example, the classic case of *Scott v. Hansen*, 228 Iowa 37, 289 N.W. 710 (1940), in which the Iowa Supreme Court disregarded testimony that a 1200-pound cow literally flew some thirty feet after being struck by the defendant's car.

Statutory or constitutional law sometimes imposes additional requirements: in cases of treason or perjury, for example, corroboration is necessary. James, *supra* note 1, at 221.

The jurisdictions agree that even where the plaintiff relies on direct evidence, he must produce more than a scintilla if he desires to reach the jury. 9 J. WIGMORE, *supra* note 1, § 2494; Long, *Judicial Control Over the Sufficiency of Evidence in Jury Trials*, 4 WASH. L. REV. 117, 120-24 (1929). Nebraska has adopted this position. See *Langemeier, Inc. v. Pendgraft*, 178 Neb. 250, 132 N.W.2d 880 (1965). That quantity of evidence which is more than a scintilla is not necessarily an extensive amount of evidence. For practical purposes, any credible direct testimony renders the issue sufficient to be given to the jury. C. McCORMICK, *supra* note 1, § 338, at 790.

6. At one time, the issue was said to be one for the jury. Long, *supra* note 5, at 121. This no longer holds true.

Circumstantial evidence is sufficient when it enables the jury to make reasonable inferences about the ultimate facts in issue; it must be more than mere conjecture, speculation, or guess.<sup>7</sup> If the evidence is insufficient, the plaintiff loses on the defendant's motion for a directed verdict. If the evidence is sufficient, the judge gives the case to the jury. Sufficiency of the evidence, therefore, is the judge-determined "burden of production" element of the burden of proof. The other element, the so-called "burden of persuasion," is jury-determined.<sup>8</sup> The test of sufficiency employed, however, may strip the jury of its powers and duties, effectively denying the substantive right to a jury trial while retaining its form.<sup>9</sup> The higher the standard imposed, the more difficult it is for the plaintiff to carry the burden of production, and the more likely the judge is to snatch the case from the jury. Thus, if the jury is to remain a viable component of our system of dispute resolution, the measure of the sufficiency of circumstantial evidence must not be set too high.

In Nebraska, it is not clear just how strong an inference must be

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In every jury trial, at the conclusion of the plaintiff's evidence, when properly raised by motion, there is a preliminary question for the court to decide, not whether there is literally no evidence, but whether there is *any* evidence upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed.

Bohling v. Farm Bureau Ins. Co., 191 Neb. 141, 143, 214 N.W.2d 381, 383 (1974) (emphasis supplied). *Accord*, Barkalow Bros. Co. v. Floor-Brite, Inc., 188 Neb. 568, 198 N.W.2d 329 (1972). This language on its face supports imposition of the lesser standard for determining sufficiency. See notes 10-14 & accompanying text *infra*. Apparently, in Nebraska the sufficiency of the evidence is assumed unless a party by motion brings the issue to the judge's attention. The proper motion to use is a motion for a directed verdict. EVIDENCE 1-35 (D. Dow & J. North ed. 1966) (a publication of the Nebraska State Bar Association). In resolving the issue, the judge is to look to what a reasonable jury would infer rather than to his own, subjective evaluation. *Id.* at 1-1, 1-28 (quoting 9 J. WIGMORE, *supra* note 1, § 2487).

7. The United States Supreme Court articulated this distinction in *Galloway v. United States*, 319 U.S. 372 (1943). The vague and indefinite nature of the test has been criticized. See, e.g., McBaine, *Trial Practice—Directed Verdicts—Federal Rule*, 31 CALIF. L. REV. 454 (1943); Note, *Evidence—Directed Verdicts—Inferences from Circumstantial Evidence*, 34 NEB. L. REV. 102 (1955). Nebraska adheres to this formulation. "Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something more . . ." *Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 255, 142 N.W.2d 309, 314 (1966).
8. The bifurcated nature of the burden of proof has been recognized since 1890. Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45 (1890), remains the quintessential exposition. The components of the burden of proof also have been called sufficiency in law and sufficiency in fact. McBain, *supra* note 7, at 461 n.15. This terminology underscores the notion that production is a matter of law for the judge and that persuasion is a matter of fact for the jury.
9. See notes 70-74 & accompanying text *infra*.

before the jury will be allowed to deliberate. A recent Nebraska decision, *Danielsen v. Richards Manufacturing Co.*,<sup>10</sup> which involved a suit for injuries suffered because of an allegedly defective surgical instrument, prolongs the confusion. The Nebraska Supreme Court apparently affirmed its traditional holding<sup>11</sup> that circumstantial evidence is not sufficient to reach the jury unless "the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is *the only one* that can fairly and reasonably be drawn therefrom."<sup>12</sup> Unfortunately, the court equated this "only reasonable inference" standard with an inference "reasonably probable, not merely possible."<sup>13</sup> The terms, however, are not synonymous. "Only reasonable inference" amounts to "beyond a reasonable doubt," while "reasonably probable" equals "by a preponderance of the evidence presented."<sup>14</sup> Use of the former standard obviously will keep more

10. 206 Neb. 676, 294 N.W.2d 858 (1980). For a detailed explanation of the facts, see notes 17-54 & accompanying text *infra*. Also at issue on appeal were questions about certain expert testimony presented at trial. On expert witnesses and expert testimony in general, see C. McCORMICK, *supra* note 1, §§ 13-18, and cases cited therein; 7 J. WIGMORE, *supra* note 1, §§ 1923, 1925, and cases cited therein. These issues generally are beyond the scope of this Note. *But see* note 33 *infra*.
11. Many Nebraska cases on the subject have stated the rule as it is quoted in the text. *See, e.g.*, *Sherman v. Travelers Indem. Co.*, 193 Neb. 104, 225 N.W.2d 547 (1975); *Barkalow Bros. Co. v. Floor-Brite, Inc.*, 188 Neb. 568, 198 N.W.2d 329 (1972); *Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966); *Estate of Bingaman*, 155 Neb. 24, 50 N.W.2d 523 (1951); *Jones v. Union Pac. R.R. Co.*, 141 Neb. 112, 2 N.W.2d 624 (1942); *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 262 N.W. 445 (1935).
12. 206 Neb. at 681, 294 N.W.2d at 861 (quoting *Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 255, 142 N.W.2d 309, 319 (1966)) (emphasis supplied). *Danielsen* is not the first Nebraska case equating the two tests. *See generally* notes 75-91 & accompanying text *infra*.
13. 206 Neb. at 681, 294 N.W.2d at 861. Louisiana and Georgia apparently are the only other jurisdictions currently equating the two phrases. *See Patterson & Downing, The Burden of Proof in a Civil Circumstantial Evidence Case: More Probable Than Not?*, 23 LA. B.J. 263 (1976). *Compare Cuna Mut. Ins. Soc. v. Turner*, 138 Ga. App. 205, 225 S.E.2d 765 (1976) (a reasonable mind *would* draw the conclusion from the circumstances proved), *with Underwood v. Lowery*, 133 Ga. App. 629, 212 S.E.2d 5 (1974) (certainty only to a reasonable degree required).
14. If more than one reasonable inference is available, it is axiomatic that a reasonable doubt exists. *See* 21 U. PRR. L. REV. 561, 562 (1959). "Probable" means "more likely than not," which usually means more than one-half. A preponderance is but more than one-half, although many jurors think it means something much more than that. Winter, *The Jury and The Risk of Non-Persuasion*, 5 L. & Soc'y REV. 335, 337 (1971). Winter suggests that this misconception results from the exposure given by the media to criminal cases and from lack of exposure to the differences in civil cases. *Id.* at 338. Equating "probable" and "preponderance" however, is not automatic: "the jury might be more convinced that the evidence of one side is nearer the

cases from the jury than would use of the latter standard; the former standard requires more of the plaintiff than does the latter.<sup>15</sup> The historical trend, in civil cases, has favored use of the latter, less imposing standard.<sup>16</sup> Which standard actually is applied in Nebraska must be determined by looking beyond the supreme court's language to its practice.

## II. THE FACTS OF *DANIELSEN*

On September 5, 1976, a licensed practical nurse injured her back while performing her duties at Saint Joseph Hospital in Omaha, Nebraska.<sup>17</sup> When discomfort from this injury continued, the nurse sought treatment at Saint Joseph's on October 14.<sup>18</sup> Surgery was performed on October 28 by a hospital staff orthopedic surgeon.<sup>19</sup> During this operation, called a partial hemilaminectomy,<sup>20</sup> the surgeon used a pituitary rongeur<sup>21</sup> to remove tissue from near the patient's spinal cord. The movable jaw of the rongeur broke off during this procedure and became lodged in the

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truth than that of the other side and yet not feel that the evidence satisfied them as to the right to recover." *McDonald v. Union Pac. R.R. Co.*, 109 Utah 493, 497, 167 P.2d 685, 689 (1946).

15. The inference sought to be proved is proved beyond a reasonable doubt if "it is proved not only to be more probable than its contradictory but to be much more probable than its contradictory." Adler & Michael, *The Trial of an Issue of Fact I*, 34 COLUM. L. REV. 1224, 1256 (1934).
16. B. JONES, *THE LAW OF EVIDENCE* § 29:6 (6th ed. 1972). See, e.g., *Console v. Nickou*, 156 Conn. 268, 240 A.2d 895 (1968); *Wiley v. United Fire & Cas. Co.*, 220 N.W.2d 635 (Iowa 1974); *Arterburn v. St. Joseph Hosp. & Rehabilitation Center*, 220 Kan. 57, 551 P.2d 886 (1976); *Martelle v. Thompson*, 283 Minn. 279, 167 N.W.2d 376 (1969); *Pennsylvania Glass Sand Corp. v. Ozment*, 434 P.2d 893 (Okla. 1967); *Pulaski Highway Express, Inc. v. Terminal Transport Co.*, 493 S.W.2d 103 (Tenn. App. 1972).
17. Brief for Appellee at 2, *Danielsen v. Richards Mfg. Co.*, 206 Neb. 676, 294 N.W.2d 858 (1980).
18. See Petition ¶ 5 (filed Sept. 14, 1977).
19. Brief for Appellee at 2.
20. A partial hemi-laminectomy is the removal of one-half of one or more laminae of the vertebrae. See *STEDMAN'S MEDICAL DICTIONARY* 714, 868 (21st ed. 1966) (unabridged lawyers' ed.). The laminae of the vertebrae are "dorsal, plate-like parts of the vertebra[e] which meet to form part of the vertebral arch over the spinal cord." VI *ENCYCLOPAEDIA BRITANNICA MICROPAEDIA* 10 (15th ed. 1974). The operation performed on the nurse, Mrs. Dorothy H. Danielsen, was performed on the intervertebral disc space of Mrs. Danielsen's fourth and fifth lumbar vertebrae. Brief for Appellant at 8. Apparently, the operation is designed to relieve pressure on the spinal cord, thereby easing the patient's pain. Mrs. Danielsen contended in her petition that a total laminectomy was performed. Petition, *supra* note 18, ¶ 5. No explanation for the discrepancy has been found.
21. A rongeur is "a strong biting forceps for gouging away bone." *STEDMAN'S MEDICAL DICTIONARY*, *supra* note 20, at 1403. The rongeur used on Mrs. Danielsen was a seven-inch straight-bite rongeur. Brief for Appellee at 5.

patient's fourth lumbar vertebra. Despite efforts which prolonged the surgery, the surgeon could not remove it at that time.<sup>22</sup> After the surgery, the nurse continued therapy and medication as an out-patient,<sup>23</sup> but her pain did not abate. In March 1978, a second surgery was performed to remove scar tissue from the nerve root in hopes of easing her pain. During this operation, the mental fragment was—unexpectedly—extracted.<sup>24</sup>

On September 14, 1977, the nurse filed a petition in the District Court for Douglas County, Nebraska, alleging that the rongeur was defective in manufacture and that as a result of its breaking she suffered severe and permanent physical injuries.<sup>25</sup> The named defendants were an importer/wholesaler of surgical instruments,<sup>26</sup> a distributor/supplier of surgical instruments,<sup>27</sup> and the hospital.<sup>28</sup>

The plaintiff based her claims against the importer and the distributor upon theories of strict product liability, implied warranty of fitness for a particular purpose, and negligence.<sup>29</sup> She claimed

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22. Petition, *supra* note 18, ¶ 5; Brief for Appellee at 3. Mrs. Danielsen knew that the fragment had not been removed. In her brief to the supreme court, she complained of the recurring nightmares she had suffered as a result. Brief for Appellee at 3.
  23. Brief for Appellee at 3-4. Therapy included use of a nerve stimulator, which blocked out pain impulses before they reached the brain. Medication included codeine pills for pain and injections of Novocain and Cortisone. *Id.*
  24. *Id.* at 4. The scar tissue built up as a result of the prolonged retraction of the nerve root during the unsuccessful attempts in the first operation to remove the metal shard. *Id.* at 3.
  25. Petition, *supra* note 18, ¶¶ 7-8.
  26. The importer, Misdorn-Frank Corporation, allegedly purchased the rongeur from an unknown manufacturer in Germany. Petition, *supra* note 18, ¶ 5; Brief for Appellee at 3. Both the defendant distributor and the other supplier purchased all their supplies from Misdorn-Frank; Misdorn-Frank could not deny that it imported the rongeur in question. *Id.* at 7-8. The manufacturer later was revealed to be the Carl Martin Co. Brief for Appellant at 15.
  27. The distributor, Richards Manufacturing Co., maintained at trial that it did not sell the rongeur in question. Whether the evidence presented established that it had sold the broken rongeur was the primary issue on appeal. See notes 37-49 & accompanying text *infra*.
  28. The plaintiff asserted a workmen's compensation claim against the hospital. Petition, *supra* note 18, ¶ 10.
  29. Petition, *supra* note 18, ¶¶ 9(a)-9(c). The hospital moved for partial summary judgment, seeking to be dismissed as a party for all purposes except subrogation on the workmen's compensation claim. Motion for Partial Summary Judgment (filed Apr. 10, 1978). The trial court denied the motion, stating it was unnecessary to force employees of the various hospitals around the city to seek out strange hospitals or doctors, or otherwise to forego their causes of action. The court held that Saint Joseph's and Mrs. Danielsen had dual status as master and servant and as hospital and patient. Order (entered June 7, 1978). The hospital renewed its motion in February 1979. Motion of Summary Judgment (filed Feb. 14, 1979). After a hearing, the court granted the motion. Order (entered Mar. 21, 1979).

that the importer sold the rongeur to the distributor, which then resold it to the clinic of which the operating surgeon was a member.<sup>30</sup> At the time of the petitioner's injury, the hospital required its surgeons to supply their own instruments.<sup>31</sup> The hospital marked the instruments for identification and stored and cared for them.<sup>32</sup>

The major issues at trial were causation and liability: what caused the rongeur to shatter, and did the defendant distributor sell that particular rongeur to the clinic?

Plaintiff's expert witness<sup>33</sup> testified that the metal in the shattered rongeur was unusually hard and brittle, indicating defective tempering in manufacture.<sup>34</sup> He also testified that microscopic examination of the rongeur's fractured jaw revealed two distinct modes of fracture: one was a pre-existing crack, emanating from the pivot pinhole of the movable jaw; the other extended over the remaining surface.<sup>35</sup> The defendant distributor's expert witness agreed that there were two modes of fracture, but disagreed as to the extent and cause of each type.<sup>36</sup> From the force of this testi-

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30. In its answer to Mrs. Daniels' complaint, Richards Manufacturing neither admitted nor denied that it had sold the rongeur in question. See Answer of Richards Manufacturing Co. ¶ 3 (filed December 28, 1977). It suggested that the rongeur had not been properly used and maintained. *Id.* ¶ 5. At trial, however, it spent almost as much time trying to prove by circumstantial evidence that it had not sold the rongeur as it spent trying to prove by expert testimony that improper care was the cause of the rongeur's fracturing. See Brief for Appellant at 9-39.

31. Brief for Appellant at 10.

32. *Id.*

33. The subjects of expert witnesses and expert testimony generally are beyond the scope of this Note. For information on expert testimony, see generally Gray & Hammond, *Opinion and Expert Testimony*, 49 MISS. L.J. 1 (1978); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952); McDonald, *Opinion Evidence*, 16 OSGOOD HALL L.J. 321 (1978); Philo & Atkinson, *Products Liability: The Expert Witness*, 14 TRIAL 37 (Nov. 1978); Voorhis, *Expert Opinion Evidence*, 13 N.Y.L.F. 651 (1967); Young, *Opinions and Expert Testimony*, 6 CAL. U.L. REV. 579 (1977).

In *Danielsen*, the Nebraska Supreme Court held that there was no exact standard for fixing the qualifications of an expert witness, that the trial court had wide discretion in determining whether a witness had been qualified as being an expert, and that where an expert testified concerning the information that was the basis of his opinion, and was subject to cross-examination on the matter, the trial court would not ordinarily abuse its discretion by allowing the opinion testimony. 206 Neb. at 684-87, 294 N.W.2d at 862-63. These holdings reflect the general practice. See generally C. McCORMICK, *supra* note 1, §§ 13-15.

34. 206 Neb. at 683, 294 N.W.2d at 862; Brief for Appellee at 15.

35. 206 Neb. at 682, 294 N.W.2d at 861; Brief for Appellee at 13-14.

36. Brief for Appellant at 31-32. The petitioner's expert said that the pre-existing crack extended over 62% of the total fracture surface and that the final fracture covered the remaining 38%. Brief for Appellee at 13. The defendant's



mony, it was clear that someone was liable; the problem was establishing who.

The defendant distributor maintained that it had not sold the defective rongeur and thus could not be held liable for failure to discover the defect. The plaintiff claimed that the distributor had sold the rongeur, but in proving this was forced to rely solely on circumstantial evidence. No one, not even the operating surgeon, could identify with certainty the broken rongeur as the one purchased from the defendant distributor.<sup>37</sup>

The clinic's records showed that it has purchased only two seven-inch straight-bite rongeurs in 1972,<sup>38</sup> one from the defendant distributor and the other from a supplier not a party to the action.<sup>39</sup> To overcome the inference that it was as likely as not that the defendant distributor had sold the rongeur, the plaintiff suggested that the correlation between the date engraved on the broken rongeur and the date of the invoice from the defendant's sole 1972 sale to the clinic identified the broken rongeur as the one sold by the defendant.<sup>40</sup> The defendant rebutted this inference by showing that the hospital's engraving procedure was neither systematic nor uniform: some of the instruments were not dated at all.<sup>41</sup>

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expert said that the original fracture covered but 30% of the fracture surface and that the final fracture covered the remaining 70%. Brief for Appellant at 32. Petitioner's expert was of the opinion that the improper tempering of the steel and the presence of certain machine markings normally polished out of the metal surface caused the rongeur to fracture. Brief for Appellant at 13-15. This testimony obviously bolsters the petitioner's theory of liability. The defendant's expert testified that the very extent of the final fracture (as he saw it) plus the presence of certain corrosive residues (identified by him as being dried blood) along the fracture surface established improper use and maintenance as the cause of the breakage. Brief for Appellant at 35-36. All this says much more about the potential uses and abuses of expert testimony than it says about just what did cause the rongeur to fracture.

37. Brief for Appellant at 10.

38. The broken rongeur was of this type. See note 21 *supra*. Cross-examination of the operating surgeon revealed the information from the clinic's records. Brief for Appellant at 11. Identification of the fractured rongeur as one of the two purchased in 1972 was based on comparison of the date etched on the rongeur with the date of the defendant distributor's invoice for its 1972 sale of a pituitary rongeur to the clinic. *Id.* at 13. See note 40 *infra*.

39. Both the defendant distributor and the other supplier bought their instruments from the importer, Misdom-Frank. Brief for Appellee at 7-8. See note 26 *supra*. The defendant importer's liability, therefore, seems relatively well-established.

40. On the rongeur handle was etched "12-20-72." *Danielsen v. Richards Mfg. Co.*, 206 Neb. at 679, 294 N.W.2d at 860. The invoice from the defendant distributor was dated December 12, 1972, and it described a 7-inch straight-bite rongeur as the item sold. *Id.* at 680, 294 N.W.2d at 860.

41. The rongeur offered in evidence by the petitioner as the rongeur sold to the

The plaintiff also showed that the broken rongeur bore no distributor trademarks. Omission of such markings was the defendant's practice in 1972;<sup>42</sup> the other supplier, however, invariably stamped its trademark on the instruments it sold.<sup>43</sup> The defendant established that certain markings on the broken rongeur were inconsistent with its own practice, consistent with the other supplier's practice, and otherwise inexplicable.<sup>44</sup>

At the close of all of the evidence, the defendant distributor moved for a directed verdict.<sup>45</sup> Even considering the plaintiff's evidence in its most favorable light,<sup>46</sup> it fell short of the "reasonable probability" test, as well as the more stringent "only reasonable inference" test. However, the trial court denied the motion and sent the case to the jury,<sup>47</sup> implicitly ruling that the evidence was sufficient to raise a jury question.

The jury deliberated for two days but could not reach a verdict.<sup>48</sup> The trial court then declared a mistrial from which the defendant distributor appealed.<sup>49</sup> The Nebraska Supreme Court affirmed.<sup>50</sup> The court dismissed the appellant's contentions that

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clinic in 1972 by the other supplier was not dated at all. Brief for Appellant at 12. Petitioner contended that this other rongeur was the other 1972 rongeur because it was the only such straight-bite rongeur stamped with the non-party supplier's trademark. *See id.* at 11-12. The invoice from the other supplier's sale was dated in September 1972.

The hospital's engraving procedure was more a service to the surgeons than a systematic identification system. It was up to the surgeons to initiate the marking procedure, and the markings were made to their specifications. *See id.* at 11.

42. Brief for Appellee at 7.

43. *Id.* at 6. Other testimony, however, was to the effect that the other supplier had sold instruments not bearing its trademark. Brief for Appellant at 20.

44. Stamped on the handle of the broken rongeur was "015." Brief for Appellant at 21. The same "015" appeared in a similar location on the handle of the other rongeur. *Id.* This "015" was consistent with the other supplier's vendor identification code, *id.* at 20-21, and was not consistent with the defendant distributor's practice, *id.* at 18. The supreme court made no mention of this evidence in its opinion.

45. 206 Neb. at 678, 294 N.W.2d at 859.

46. Considering the plaintiff's evidence in its most favorable light is standard Nebraska practice, when the defendant has moved for a directed verdict. *See, for example, the holding in Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 255, 142 N.W.2d 309, 314 (1966). Even here, however, the plaintiff is supposed to fail if several opposing, but equally reasonable, inferences can be drawn from the facts. *Id.* Again, equipoise is not enough for the plaintiff to prove his case. *See note 62 infra. Daniels* may implicitly have changed this. *See notes 97-102 & accompanying text infra.*

47. 206 Neb. at 678, 294 N.W.2d at 859.

48. Reply Brief for Appellant at 2-3.

49. 206 Neb. at 678, 294 N.W.2d at 859.

50. *Danielsen v. Richards Mfg. Co.*, 206 Neb. 676, 294 N.W.2d 858 (1980).

the evidence was insufficient<sup>51</sup> and reiterated its language equating the "only reasonable inference" test with the "reasonable probability" test.<sup>52</sup> It then distinguished the cases on which the appellant sought to rely:<sup>53</sup> "We have closely examined the cases cited by [appellant]. The differences in the nature of the foundational evidence in the cases cited and that in the case before us are evident. We will not discuss them."<sup>54</sup>

### III. ANALYSIS

Discussion of the cases may not have been necessary, but it would have proved useful in determining the court's exact holding in *Danielsen*. An analysis of the Nebraska decisions is included in this Note.<sup>55</sup> First, however, an understanding of the development of tests of sufficiency of circumstantial evidence is necessary.

#### A. Development of Tests of Sufficiency

##### 1. *In General: Distinguishing Civil from Criminal Cases*

The trial system preserves order in society by providing a means of orderly dispute resolution.<sup>56</sup> Dispute resolution is orderly because it focuses on reaching results acceptable to both the litigants and the spectators. Acceptability of these results depends not necessarily upon trust in the correctness of the verdict in any given case, but rather upon trust in the propriety of the processes by which that verdict is reached.<sup>57</sup>

These processes, the rules of evidence and procedure, are not monolithic: various societal goals, policies, and beliefs require various methods of implementation and protection. For example, so-

51. The court also rejected the appellant's charges that the trial court abused its discretion in passing on the qualifications of the petitioner's expert witness. *Id.* at 685, 294 N.W.2d at 862. See note 33 *supra*.

52. 206 Neb. at 681, 294 N.W.2d at 861.

53. See notes 92-96 & accompanying text *infra*.

54. 206 Neb. at 681, 294 N.W.2d at 861.

55. The cases cited in *Danielsen* are discussed at notes 93-95 & accompanying text *infra*.

56. See Winter, *supra* note 14, at 335-36.

57. *Id.*

[T]he goal of our adjudicatory system is not solely reaching 'the' correct decision; as important as being correct is ensuring that 'a' settlement is in fact reached with reasonable dispatch . . . This sacrifice of truth in the name of dispute settlement is not as harsh as it seems, however, for a legal system which permitted civil disputes to go on endlessly—as they would if moral certainty, for example, were the standard—would satisfy no one except those who revel in chaos.

*Id.* at 336-37. Endless litigation is even more disfavored than a personally unpleasant verdict; even if one dislikes a decision, one is disposed to accept it, or to change it through legislation.

ciety cherishes a person's life and freedom more highly than it cherishes a person's money.<sup>58</sup> Because life and freedom are at stake in criminal trials, while economic interests are at stake in civil trials, a higher burden of persuasion is required in criminal than in civil trials.<sup>59</sup> The burden acts as a shield, preserving the status quo (life, freedom, or economic interest) until the interest in preserving the status quo is overcome by the evidence.<sup>60</sup>

Persuasion is the final process in dispute resolution and is accomplished through the use of items of evidence. This evidence must be produced, and produced in appropriate form<sup>61</sup> to make persuasion possible on rational grounds. Sufficiency, then, is the penultimate standard in dispute resolution. The failure to produce sufficient evidence precludes the opportunity to persuade.<sup>62</sup> Should not the same social policies which justify different burdens of persuasion also justify different burdens of production?

At one time, it was maintained that they did not. The "only reasonable inference" test of sufficiency<sup>63</sup> was employed in criminal

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58. The due process clause of the United States Constitution, for example, ranks property third, behind both life and liberty. U.S. CONST. amend. XIV.

59. See Winter, *supra* note 14, at 337. Tests of the sufficiency of circumstantial evidence in criminal cases generally is beyond the scope of this Note. Logically, the burden of production should reflect the higher burden of persuasion involved. See McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955). In Nebraska, when circumstantial evidence is relied on in a criminal trial, the inferences must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. *State v. Klutts*, 204 Neb. 616, 284 N.W.2d 415 (1979). See note 78 *infra*.

60. See notes 62 & 67 *infra*.

61. Sufficiency of the evidence depends upon the quality of the evidence presented, not upon the quantity of the evidence presented. EVIDENCE, *supra* note 6, at 1-3; J. MAGUIRE, COMMON SENSE AND COMMON LAW 180 (1947).

62. Those who wish to change the status quo must show why they should be allowed. The plaintiff therefore is given three tasks at trial: 1) to present admissible evidence; 2) to present sufficient evidence; and 3) to present convincing evidence (*i.e.*, he must persuade). These tasks are imposed successively. 1 J. WIGMORE, *supra* note 1, § 12. Falling short at any point along the way stops the process. It is up to the plaintiff to overcome the inertia of the system: if he fails to accomplish any of his three tasks, he has failed to overcome that inertia, and he loses (usually on a motion for a directed verdict).

The trial is a weeding out process: each task should require somewhat more effort than the task before it. See notes 67, 98-102 & accompanying text *infra*. If the tests do not progress in this fashion, a plaintiff who has failed to overcome the inertia of the system remains in court. This unnecessarily prolongs litigation and for that reason is an undesirable result.

63. Unless otherwise indicated, the discussion centers on cases involving solely circumstantial evidence. Direct evidence, by its nature, usually is sufficient to reach the jury. See note 5 *supra*. In cases where direct and circumstantial evidence are mixed, the circumstantial evidence rides in on the coattails of the direct evidence. The presence of the direct evidence is sufficient to send

and civil cases alike. As Judge Learned Hand concluded, the distinction between "the evidence which would satisfy reasonable men and the evidence which would satisfy reasonable men beyond a reasonable doubt . . . is too thin for day to day use."<sup>64</sup> However, the distinction is made routinely for purposes of persuasion. That production precedes persuasion should not warrant giving it different treatment.<sup>65</sup> Certainly, where an ultimate issue is determined solely by inference from circumstantial evidence, caution is required. Inference is an imperfect process,<sup>66</sup> and the judge has duties to prevent verdicts based on conjecture, speculation, or guess and to dispense justice properly on the merits of the litigation.<sup>67</sup>

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it all to the jury. Nebraska follows this approach. *Howell v. Robinson Iron & Metal Co.*, 173 Neb. 445, 113 N.W.2d 584 (1962); *Halsey v. Merchants Motor Freight Co.*, 160 Neb. 732, 71 N.W.2d 311 (1955).

64. *Feinberg v. United States*, 140 F.2d 592, 594 (2d Cir. 1944), *overruled*, *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972). *Feinberg* involved a criminal prosecution for mail fraud in connection with a corporate acquisition. The defendants did not deny that there may have been enough evidence to support a verdict holding them liable in a civil action, but argued that there was not enough to support a criminal conviction. Hand said the test of sufficiency was the same for both civil and criminal cases and affirmed the convictions. The test of sufficiency Hand employed was commensurate with the civil "reasonable preponderance" test. The quarrel is not with that, but rather with his insistence that there is only one standard. See *McNaughton*, *supra* note 59, at 1389-91.
65. Different treatment for purposes of being able to show that there is more than one test of sufficiency, that is. It does warrant different treatment for purposes of the total trial process. See note 62 *supra* & note 67 *infra*. It warrants more lenient treatment than does persuasion. See notes 70-74 & accompanying text *infra*.
66. Relatively greater numbers of inferences are required to be drawn from circumstantial evidence than from direct evidence. See C. McCORMICK, *supra* note 1, § 338. Therefore, while circumstantial and direct evidence are equally probative, see note 4 *supra*, circumstantial evidence is more volatile and is handled with more care than is direct evidence.
67. If verdicts could be based on speculation or guess, trust in the process of decision would abate. Courts therefore will not allow juries to return verdicts plainly contrary to the evidence; thus the existence of such devices to control the jury as the directed verdict and the judgment notwithstanding the verdict. For more information on controlling the jury, see *James*, *supra* note 1; *Long*, *supra* note 5.

Wigmore argued that there were three possible areas into which an item of evidence could fall: it could be so unpersuasive that no one reasonably could believe it; it could be so persuasive that no one reasonably could help but believe it; it could be more persuasive than the former, but less than the latter. 9 J. WIGMORE, *supra* note 1, § 2487. During the production process, any party always could present evidence and move into a different such area. The area occupied at the close of evidence would determine whether the case would go to the jury. Occupation of either of the first two areas would call for a directed verdict. *Id.* *McNaughton* modified Wigmore's approach by showing that evidence falls within a range of probabilities and that the location of this range within the range of all possibilities will determine whether the

Experience,<sup>68</sup> however, has demonstrated that in the civil arena<sup>69</sup> the "only reasonable inference" test is overcautious.

Use of the "only reasonable inference" test of sufficiency in a civil case, where the burden of persuasion is by a preponderance of the evidence,<sup>70</sup> thwarts the normal trial process. Raising the burden of production effectively raises the burden of persuasion.<sup>71</sup> If a party relying on circumstantial evidence must prove that the inference to be drawn from that evidence is the *only* reasonable inference, merely to gain jury deliberation,<sup>72</sup> he already has exceeded the standard he must meet to persuade the jury that he is entitled to a favorable verdict. Indeed, if a party relying solely on circumstantial evidence can establish only one reasonable inference from that evidence, that party is entitled to a directed verdict—the jury need not deliberate at all. "[A] verdict will normally be directed where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion."<sup>73</sup>

Under the only reasonable inference test, a party who fails to establish the inference sought to be proved as the only reasonable inference has not presented sufficient evidence, and thus fails to reach the jury. The vast majority of jurisdictions avoid this conundrum by holding that in civil cases, if the inference sought to be proved reasonably preponderates, there is sufficient evidence for reasoned jury deliberation.<sup>74</sup>

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case goes to the jury. *McNaughton*, *supra* note 59, at 1384-89. How much the middle area, the "sufficient-to-go-to-the-jury" area, will encompass is measured by the test of sufficiency employed. Once again, the higher the test, the smaller the number of cases which will obtain jury resolution. *See* notes 70-74 & accompanying text *infra*.

68. *See, e.g.*, cases cited in note 16 *supra*. *See also* *McNaughton*, *supra* note 59, at 1389-91.

69. Use of the "only reasonable inference" test in criminal cases is justified because it reflects the presumption of innocence. *B. JONES*, *supra* note 16, § 29:6.

70. "For a court to instruct that a greater degree than a preponderance of the evidence was necessary [to meet the burden of persuasion] would be the commission of error." *Sowle v. Sowle*, 115 Neb. 795, 800, 215 N.W. 122, 126 (1927).

71. *See* notes 62 & 67 *supra*.

72. This clearly penalizes the party forced to rely on circumstantial evidence, as opposed to the party who is able to use direct evidence. A party relying on direct evidence does not need to establish its likelihood—that question is left to the jury. *See* note 5 *supra*.

73. 5A MOORE'S FEDERAL PRACTICE ¶ 50.02[1] (2d ed. 1976).

74. *See, e.g.*, cases cited in note 16 *supra*.

## 2. In Nebraska

Nebraska courts long applied the "only reasonable inference" test vigorously, refusing to let cases reach the jury unless the inference sought to be proved produced "moral certainty and conviction."<sup>75</sup> However, a plaintiff relying on circumstantial evidence in a civil case never had to disprove other possible inferences.<sup>76</sup> In *Howell v. Robinson Iron & Metal Co.*,<sup>77</sup> the supreme court recited the "only reasonable inference" test and then said: "In order to sustain his burden [of production] . . . a plaintiff is not bound to exclude the possibility that the accident might have happened in some other way."<sup>78</sup> This language is not necessarily inconsistent with the "only reasonable inference" test, as the only *reasonable* inference is not the same as the *only* inference. Very few, if any, items of circumstantial evidence are susceptible of only one inference,<sup>79</sup> but not all inferences carry the same degree of reasonableness.<sup>80</sup>

By the late 1970s, the supreme court had relaxed its application of the "only reasonable inference" test. At times, the court explicitly equated the "only reasonable inference" test with the "reasonable preponderance" test. In *Barkalow Brothers v. Floor-Brite, Inc.*,<sup>81</sup> the plaintiff claimed that the defendant's employee was negligent in performing his janitorial duties, causing a fire which damaged the plaintiff's building. The plaintiff sought to show, by

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75. *Tongue v. Perrigo*, 130 Neb. 564, 568, 265 N.W. 737, 739 (1936). A father's testimony about the unusual hours kept by one of his daughters and about that daughter's confession of her love for the defendant, a married man, were held not sufficient to allow a jury to conclude that the daughter and the defendant had had sexual relations. The evidence would in all probability fail even under the lesser "reasonable probabilities" test. The supreme court apparently has abandoned the "moral certainty" language; it never has been expressly repudiated, however.

76. *Howell v. Robinson Iron & Metal Co.*, 173 Neb. 445, 113 N.W.2d 584 (1962). The plaintiff had hired the defendant to cut some scrap iron. A fire somehow started in the warehouse where the cutting had been done. Plaintiff contended the fire had been caused by the defendant's employees' negligence. The trial court directed a verdict for the defendant and refused to grant a new trial. The plaintiff appealed. The supreme court found for the plaintiff/appellant, finding direct evidence to support three of the plaintiff/appellant's ten allegations. This finding was sufficient to take the case to the jury; a new trial was ordered. See note 63 *supra*.

77. 173 Neb. 445, 113 N.W.2d 584 (1962).

78. *Id.* at 451, 113 N.W.2d at 590. This is to be contrasted with the Nebraska criminal rule, which imposes an affirmative duty to exclude all other reasonable hypotheses. *State v. Klutts*, 204 Neb. 616, 284 N.W.2d 415 (1979). See note 59 *supra*.

79. See C. McCORMICK, *supra* note 1, § 338, at 789.

80. This is similar to the distinction between a "preponderance" and a "probability." See note 14 *supra*.

81. 188 Neb. 568, 198 N.W.2d 329 (1972).

tenuous circumstantial evidence, that the defendant's employee dumped a lighted cigarette into a fabric collector bag which was then stored in the room where the fire began. The defendant suggested that the careful dumping of the bag before storage, even assuming the existence of a lighted cigarette, made the plaintiff's argument suspect. The defendant also suggested that faulty wiring was at least as likely a cause of the fire as was the mythical cigarette.<sup>82</sup> The supreme court agreed with the defendant, stating that the plaintiff

may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such a nature and [are] so related to each other that the conclusion reached by the jury is *the only one* that can fairly and reasonably be drawn therefrom. Or, *to phrase it differently*, the evidence must be sufficient to make the theory of causation *reasonable* and not merely possible.<sup>83</sup>

The court said, in effect, that "the only one" and "reasonable" were merely different ways to describe the same test. As has been noted, however,<sup>84</sup> the terms are not synonymous. Given the evidence presented, the *Floor-Brite* finding in favor of the defendant would have been proper under either test.

At times the court has omitted the "only one" language. In *Hosford v. Doherty*,<sup>85</sup> for example, the court observed that items of circumstantial evidence, to require submission of the case to the jury, must be of such a character and so related to each other that "a conclusion fairly and reasonably arises that the cause of action has been proved."<sup>86</sup> In *Hosford*, the plaintiff had taken his van to the defendant for a tune-up. The van later began to backfire, and plaintiff returned the van for further work. The defendant's mechanic asked a fellow employee to road test the van. The mechanic had removed the van's cowl cover and air cleaner cover, but did not replace them before the test. During the test, the van caught fire. Plaintiff contended that the backfiring caused the fire and produced expert testimony to the effect that the cowl cover and air cleaner cover would have retarded the fire, had they been in place. The mechanic knew the van had been backfiring, and the record showed he also recognized that flames could come through the uncovered carburetor. The supreme court held this evidence sufficient to present a jury question on the issue of the defendant's

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82. *Id.* at 574-75, 198 N.W.2d at 335-36.

83. *Id.* at 575-76, 198 N.W.2d at 336 (emphasis supplied). "[T]o phrase it differently" is one of the great understatements of Nebraska judicial history.

84. See note 14 & accompanying text *supra*.

85. 198 Neb. 211, 252 N.W.2d 154 (1977).

86. *Id.* at 215, 252 N.W.2d at 156 (emphasis supplied).



negligence.<sup>87</sup> This certainly is the correct result under a "reasonable preponderance" test.

It is difficult to assess the current validity of the "only reasonable inference" test in Nebraska; the results in all the prior cases are explainable on other grounds. First, in a number of cases, the supreme court has found *no* evidence to sustain the plaintiff's contention;<sup>88</sup> hence the plaintiff would have lost even if the "reasonable preponderance" test had been applied. Second, in some cases evidence presented by the plaintiff actually favored the defendant's version of the facts.<sup>89</sup> Finally, many of the cases involved a mixture of circumstantial and direct evidence;<sup>90</sup> they went to the jury based on the strength of the direct evidence,<sup>91</sup> not because of a judicial relaxation of the "only reasonable inference" test. Even so, the fact that the Nebraska Supreme Court has equated the "only reasonable inference" with an inference "reasonably probable, not merely possible," suggests that the court (though not in the most coherent fashion) is moving away from a rigid application of the ostensible rule. *Danielsen v. Richards Manufacturing Co.* is a logical culmination of this liberalization.

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87. *Id.* at 214-15, 252 N.W.2d at 154-56.

88. *Bohling v. Farm Bureau Ins. Co.*, 191 Neb. 141, 214 N.W.2d 381 (1974) (decedent observed slumped over the wheel of his truck as it veered off the road; no evidence to show he died of other than natural causes); *So Soo Feed & Supply Co. v. Morgan*, 192 Neb. 277, 220 N.W.2d 25 (1974) (grain drying bin caught fire; no evidence as to cause other than vague allegations); *Haynes v. County of Custer*, 186 Neb. 740, 186 N.W.2d 483 (1971) (allegedly deteriorated bridge caused accident; nothing in evidence other than mere allegation as to time and cause of the bridge's collapse); *Norcross v. Gingery*, 181 Neb. 782, 150 N.W.2d 919 (1967) (plaintiff alleged that he was a partner for 23 years with the defendant's husband and that as such he was entitled to partition of the partnership's land; as there were no written records or accountings during the entire 23 years, the court held there was no partnership); *Bowers v. Maire*, 179 Neb. 239, 137 N.W.2d 796 (1965) (auto accident; no evidence as to weight and speed of vehicles, hence insufficient to establish fault).

89. This can occur either by the plaintiff's presentation of evidence favorable to the defendant, or by the improbability of the plaintiff's version of the facts. *Sherman v. Travelers Indem. Co.*, 193 Neb. 104, 225 N.W.2d 547 (1975) (wall on plaintiff's building collapsed; plaintiff sued under windstorm clause of insurance contract; one of plaintiff's own witnesses testified that it was possible for natural winds or elements acting daily on the structure to cause its fall); *J.R. Watkins Co. v. Wiley*, 184 Neb. 144, 165 N.W.2d 585 (1969) (plaintiff sued defendant's employer on a surety contract; the employer claimed that an unidentified stranger represented the paper as a character recommendation, and no connection between this stranger and the plaintiff was shown).

90. *See, e.g., Halliday v. Raymond*, 147 Neb. 179, 22 N.W.2d 614 (1946) (auto-pedestrian accident; both parties testified as to their actions; question of contributory negligence sent to the jury on the strength of the direct evidence).

91. *Id.* *See* note 63 *supra*.

**B. *Danielsen***

The Nebraska Supreme Court correctly distinguished the foundational evidence in *Danielsen* from the foundational evidence in the cases relied upon by the appellant.<sup>92</sup> In *Barkalow Brothers v. Floor-Brite, Inc.*,<sup>93</sup> there was no evidence supporting the plaintiff's claim, as the plaintiff simply assumed the existence of some of the circumstances necessary to establish its case. In *Popken v. Farmers Mutual Home Insurance Co.*,<sup>94</sup> the evidence favored the defendant's explanation for the deaths of the plaintiff's cattle. In *So Soo Feed & Supply Co. v. Morgan*,<sup>95</sup> the record was "devoid as to any explanation as to what . . . could [have] cause[d] the fire."<sup>96</sup> In *Danielsen*, by contrast, there was a good deal of evidence favoring each party's contentions.

The *Danielsen* decision clearly repudiates use of the "only reasonable inference" test in Nebraska. Unfortunately, it also implicitly repudiates use of the "reasonably probable" test. More unfortunately, the court has not rejected the language of the older decisions. There was, in this case, evidence favoring the plaintiff's contention. However, this evidence was counterbalanced by evidence favoring the defendant distributor's contention. There was nothing in the evidence to justify a choice between these conten-

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92. For appellant's discussion of the cases, see Brief for Appellant at 41-45.

93. 188 Neb. 568, 198 N.W.2d 329 (1972). See notes 81-83 & accompanying text *supra*.

94. 180 Neb. 250, 142 N.W.2d 309 (1966). In *Popken*, the plaintiff's cattle drowned when a severe wind and rainstorm caused flash flooding. The plaintiff sued on an insurance policy covering "loss or damage by fire and lightning, tornado and windstorm." *Id.* at 251, 142 N.W.2d at 310. The policy did not cover loss by drowning.

Plaintiff's fenced pasture had high ground in the center and was bisected by a creek. The cattle were seen on the upstream low ground five minutes before the storm hit. After the storm, four cattle were on the high ground, and forty were scattered more than a mile downstream. Twenty-three of these were drowned.

Plaintiff claimed that the four on the high ground showed that all the cattle had worked back to high ground before the storm, and it was the storm which drove them into the flooded area. If the storm had done this, it would have been held to have been the cause of the loss, and the plaintiff would have recovered under the policy. Defendant contended that the cattle stayed on the low ground and drifted with the wind along the fence until they were swept away by the flood. The supreme court thought that the inferences were equally balanced. *Id.* at 256, 142 N.W.2d at 315. It remanded the case with instructions to direct a verdict for the defendant. *Id.* The number of cattle found on the low ground and the observed position of the cattle just five minutes before the storm, however, favored the defendant's version of the incident.

95. 192 Neb. 277, 220 N.W.2d 25 (1974). See note 88 *supra*.

96. 192 Neb. at 279, 220 N.W.2d at 27.

tions,<sup>97</sup> as the jury's inability to come to a decision tends to suggest.

This would not be a problem, if direct evidence were in issue: direct evidence is sufficient to reach the jury on the question of credibility.<sup>98</sup> Even though circumstantial evidence has probative value equal to that of direct evidence,<sup>99</sup> the number of inferences to be dealt with in cases of circumstantial evidence justify more caution. A decision cannot properly be based on speculation.<sup>100</sup> The court, in effect, said that the credibility question alone can take circumstantial evidence to the jury. If that practice is followed in future decisions, equally balanced probabilities will have been rendered sufficient, in a Nebraska civil case, to let the jury deliberate. Thus the pendulum swings from one unfavorable holding to another: from the "only reasonable inference" to—in effect—very little at all. Choosing between equally balanced possibilities amounts to speculation. The purpose of the rules for measuring the burdens of production and persuasion is to resolve ties.<sup>101</sup> If the plaintiff, relying on circumstantial evidence, cannot produce enough evidence to show that his position is at least more likely than not, he should not reach the jury, for he has failed to produce sufficient evidence for meaningful deliberation.

Use of an "equal probabilities" test would comport with Nebraska's test for sufficiency of the evidence to uphold a jury verdict. However, the tests should not be mirror images of one another: sufficiency to get to the jury means that enough evidence is present to allow a jury to come to a well-reasoned decision; sufficiency to uphold a verdict means that a comparison of the evidence and the verdict will show that the jury was not clearly wrong in the decision it made. The tests should interrelate. A finding of sufficiency to uphold the verdict normally is a finding of sufficiency to reach the jury. As long as Nebraska courts adhere to the "only reasonable inference" test, however, the tests cannot properly interrelate. Findings of sufficiency to uphold the verdict would become automatic, hence superfluous. The Nebraska Supreme Court has recognized that

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97. The appellant contended that there was something in the record to justify a reasonable choice. The supreme court quickly dismissed this, saying, "An examination of Richards' arguments in its brief discloses that its real argument is that its expert is better and more competent than the plaintiff's expert. This may be true, but it was a matter for the jury to decide in weighing the testimony." 206 Neb. at 684, 294 N.W.2d at 862. See notes 100-01 & accompanying text *infra*.

98. See note 5 & accompanying text *supra*.

99. See note 4 *supra*.

100. See note 7 & accompanying text *supra*.

101. See note 61 *supra*.

[a] motion for a directed verdict or for a judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. *Such party is entitled to have every controverted fact resolved in his favor* and to have the benefit of every inference which can reasonably be deduced from the evidence.<sup>102</sup>

An inference no longer need be the only reasonable one to allow the plaintiff to reach the jury. Until the decision in *Danielsen*, however, the court never actually used an "equal probabilities" test in determining whether the petitioner had carried the burden of production. Because the old language was recited in *Danielsen*, however, it is not certain whether a choice between equally probable inferences will be given to the jury in the future.

An attorney confronted with a product liability case similar to *Danielsen* may be able to sidestep the *Danielsen* dilemma by joining all possible defendants and shifting the burden to them to establish that they did not contribute to the injury.<sup>103</sup> Unfortunately, the extent to which the result in *Danielsen* is attributable to sympathy for an injured woman whose attorney did not join all possible defendants, and how much is attributable to a genuine intent to change the case law, cannot be determined until the supreme court has had another opportunity to address the issue.

#### IV. CONCLUSION

The overall practical effect of the decision in *Danielsen* is positive: it gives the plaintiff in a civil case a burden of production commensurate with the civil burden of persuasion.<sup>104</sup> It aligns the test of sufficiency to reach the jury and sufficiency to uphold the verdict. However, the decision perpetuates as many problems as it solves. By giving equally balanced probabilities (on the facts of this case) to the jury, the court may have overbalanced in favor of the plaintiff. This could have serious precedential repercussions.

Courts are free—within reason—to shift their approach to substantive rules of law, unless constrained by positive law. The Ne-

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102. *Davidson v. Simmons*, 203 Neb. 804, 808, 280 N.W.2d 645, 648 (1979) (emphasis supplied).

103. This argument would be based on the well-known California case *Summers v. Tice*, 190 P.2d 963 (Cal. App.), *vacated*, 33 Cal. 2d 80, 199 P.2d 1 (1948). In that case, the plaintiff, while out hunting, was struck by a bullet from another gun—even given all the facts and circumstances that could be shown, it was just as likely that the bullet had come from the gun of one defendant as it was that it had come from the gun of the other defendant. The court held that once the plaintiff could establish that any of the defendants could have caused the plaintiff's injury, the burden shifts to each defendant to show that it did not cause the plaintiff's injury.

104. For the effect of using too high a test of sufficiency, see notes 70-74 & accompanying text *supra*.

braska Rules of Evidence are silent on the subject of the sufficiency of the evidence;<sup>105</sup> the supreme court committed no breach by changing the rule. Shifting the substantive law, while restating the effectively repudiated language, however, is careless. As long as the court insists that two semantically and legally distinguishable phrases are equivalent, it breeds confusion and uncertainty. If the court intends, as the holding in *Danielsen* seems to suggest, given the nature of the evidence, to make these phrases stand for yet a third test, the court has compounded its carelessness. At the very least, the supreme court should eradicate the "only reasonable inference" language. It is meaningless verbiage, given the factual patterns of the court's recent decisions.<sup>106</sup> Indeed, preserving the language is dangerous: a court with a narrow view of the jury's function would be able to seize that language and apply it literally, wrongfully prying all cases from the jury's grasp.<sup>107</sup> The availability of appeal should minimize the danger, but that is cold comfort to plaintiffs who must rely on circumstantial evidence to prove their claims. In *Danielsen v. Richards Manufacturing Co.*, the Nebraska Supreme Court was presented an opportunity to render comprehensible its prior rulings on the sufficiency of circumstantial evidence. The court chose instead to increase the confusion. Only further litigation will clarify the current Nebraska practice.

*Karen Ann Montee '82*

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105. See generally NEB. R. EVID.

106. See notes 75-91 & accompanying text *supra*.

107. See note 9 & accompanying text *supra*.

