Loyola University Chicago Law Journal

Volume 28
Issue 4 *Summer 1997 Judicial Conference Symposium*
*Anniversary Issue*

Article 6

1997

# Illinois Tort Law: A Rich History of Cooperation and Respect between the Courts and the Legislature

Victor E. Schwartz
*Senior Partner, Crowell, Moring LLP, Washington, DC.*

Mark A. Behrens
*Senior Assoc., Crowell, & Moring LLP, Washington, DC*

Mark D. Taylor
*Senior Assoc., Crowell, & Moring LLP, Washington, DC*

# Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature

*Victor E. Schwartz,*[*] *Mark A. Behrens*[**] *& Mark D. Taylor*[***+]

## I. INTRODUCTION

Litigation addressing the constitutionality of the Illinois Civil Justice Reform Amendments of 1995 ("Civil Justice Reform Act")[1] raises a fundamental question that has been largely overlooked in the broader public dialogue about tort, or liability, reform[2]: Should tort law be decided by courts or legislatures?

The question about who should "make" the law is not academic; tort law affects people's lives, every day. Tort law can discourage conduct such as medical malpractice and help remove truly defective products

* Senior Partner, Crowell & Moring LLP, Washington, D.C.; B.A., 1962, Boston University; J.D., 1965, Columbia University. Mr. Schwartz is the drafter of the Model Uniform Product Liability Act and has recently been appointed to the Advisory Committee of the American Law Institute's Restatement Of The Law Of Torts: Products Liability and Restatement Of The Law Of Torts: Apportionment Of Liability projects. He is co-author of John W. Wade ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (9th ed. 1994) and author of Victor E. Schwartz, COMPARATIVE NEGLIGENCE (3d ed. 1994).

** Senior Associate, Crowell & Moring LLP, Washington, D.C.; B.A., 1987, University of Wisconsin-Madison; J.D., 1990, Vanderbilt University.

*** Senior Associate, Crowell & Moring LLP, Washington, D.C.; B.A., 1981, Boise State University; J.D., 1991, University of Utah.

+ The authors would like to thank Hugh F. Young, Jr., Executive Director of Product Liability Advisory Council, Inc. ("PLAC"), for his valuable support and guidance in the development of this Article. PLAC is a nonprofit corporation with a membership of over 110 major manufacturers from a broad cross-section of American industry. In addition, PLAC has approximately 300 sustaining members, who are leading product liability defense attorneys from across the United States. PLAC was formed for the purpose of submitting *amicus curiae* briefs in important appellate cases involving significant public policy issues affecting the law of product liability. This Article was developed from an *amicus curiae* brief we prepared on PLAC's behalf in support of the Illinois Civil Justice Reform Amendments of 1995.

1. Pub. Act No. 89-7 (codified in chs. 430, 730, 735, 740, 745, 815, and 820 of ILL. COMP. STAT. ANN. (West Supp. 1996)).

2. *See* Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, *Who Should Decide America's Tort Law?—The Battle Between Legislatures and Courts* (monograph, Washington Legal Foundation, March 1997).

from the marketplace.[3] But, unchecked, unbalanced tort law can remove good products from the marketplace, discourage innovation, limit the supply of necessary medical services, result in loss of jobs, and unduly raise costs for consumers.[4] In light of the profound impacts that tort law may have on society, it is important that state legislatures, as well as courts, have their voices heard and respected. This Article will discuss in detail the historical role of state legislatures and, in particular, the role of the Illinois General Assembly in developing tort law.

First, this Article will demonstrate that the prerogative of state legislatures in general to decide broad public policy in tort and other areas dates to the beginning of statehood and has been respected by state courts.[5] This Article then proceeds to discuss the proper roles for the Illinois General Assembly and Illinois courts in developing tort law.[6] Focusing on the modification of various common law causes of action and workers' compensation statutes, the Article will then trace the legislative development of Illinois tort law from the beginning of statehood, through the nineteenth century, and into the early part of the twentieth century.[7] Next, this Article will discuss more recent legislative tort law developments in Illinois, including the 1995 Civil Justice Reform Act.[8] The Article concludes that, as a matter of history and good public policy, the 1995 Civil Justice Reform Act should be respected by Illinois courts.[9]

## II. A PAGE OF LEGAL HISTORY—THE HISTORIC ROLES OF THE LEGISLATURE IN THE DEVELOPMENT OF TORT LAW

### *A. The "Reception Statutes"*

In the debate about who should decide state tort law—legislatures or courts—a fundamental part of legal history has been largely overlooked. State legislatures, not courts, were the first to create state tort law. When colonies and territories became states, one of the first

3. *See* Guido Calabresi, *The Costs of Accidents, in* PERSPECTIVES ON TORT LAW 196, 196-98 (1995) (explaining that tort law encourages safer activities).

4. *See* Alan Schwartz, *Proposals for Product Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988) (recognizing that greater liability means higher prices for consumers).

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.A-B.

8. *See infra* Part IV.C-D.

9. *See infra* Part V.

acts of state legislatures was to "receive" the Common Law of England as of a certain date and have that provide a basis for a state's tort law.[10] In the same piece of legislation, called a "reception statute," state legislators *delegated* to state courts the authority to develop the English Common Law in accordance with the "public policy" of the state.[11] These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries.[12]

Early state legislatures delegated the task of developing tort law to state judiciaries, because the legislatures did not have the time, or perhaps the inclination, to formulate an extensive "tort code." They faced more extensive and pressing tasks, such as the formulation of the very basics of a "new society." As some "reception statutes" made clear, however, what the legislature delegated, it could retrieve, at *any* time.[13]

### *B. From Incrementalism to "Making" Tort Law*

For over 200 years, the authority delegated to courts to develop the common law of torts continued and, in most instances, worked well. Courts developed the "common law" in a slow, incremental fashion in accordance with societal needs.

For example, in the 19th century in every state, a person's right to recover for an injury was barred if he or she was in any way at fault.[14] Gradually, state courts narrowed this so-called "contributory negligence defense" and developed exceptions to it, such as not applying it when the defendant had a "last clear chance" to avoid an accident or where the defendant engaged in "reckless" behavior.[15] Finally, after over 100 years of gradual development, some courts converted to a "comparative fault" system where the plaintiff's fault

10. Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 363 (1983) (recognizing that "reception statutes were the mechanism for transfering the common law of England to the new United States. . . .").

11. For a list of many statutes, see Schwartz, *supra* note 2.

12. Kent Greenwalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 649 (1987).

13. *See* 5 ILL. COMP. STAT. ANN. 50/1 (West 1993) (establishing that the Illinois General Assembly could repeal any part of the English common law). *See also* City of Sterling v. Speroni, 84 N.E.2d 667, 671 (Ill. App., 2d Dist. 1949) (noting that the common law is in force until repealed by statute).

14. *See* WILLIAM PROSSER & PAGE KEETON, THE LAW OF TORTS § 65, at 451-52 (5th ed. 1984).

15. *See id.* § 66, at 462-64.

would be compared with that of a defendant and the recovery reduced by the percentage of plaintiff fault.[16]

In the 1970s, however, some courts strayed from this incremental approach. Judicial "lawmaking" was no longer gradual or evolutionary, but bold-faced, new, and sometimes revolutionary in content. For example, for over two centuries punitive damages were reserved for a small class of torts involving intentional wrongs, such as assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property.[17] The cases involved one or perhaps a few injured plaintiffs and one defendant who had engaged in intentional wrongdoing. Then, some courts applied the punitive damages concept to product liability without careful consideration that suddenly there was one defendant with many potential plaintiffs who could seek to punish the defendant repeatedly for essentially the same conduct.[18]

In addition, some state courts retroactively changed the standard for when punitive damages could be imposed. They began to use vague phrases such as "gross negligence" as the standard for imposing punishment.[19] These looser standards could lead to severe economic punishment; they gave potential defendants little "notice" of what was expected of them in terms of behavioral norms.

In another example of judicial lawmaking, some courts went beyond imposing so-called "strict liability" against product manufacturers and, without careful consideration for public policy implications, created absolute liability. Under absolute liability, manufacturers would be liable for their failure to warn about a risk that could not have been

16. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (3d ed. 1994).

17. *See* Victor Schwartz & Mark Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip*, 42 AM. U.L. REV. 1365, 1369 (1993).

18. One of the most perceptive and learned judges of this century recognized the problem and warned against it. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) (noting the court's "gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill").

Other courts began—contrary to 200-year old precedent—to permit recovery of punitive damages in contract actions, such as an action for breach of implied duty of good faith and fair dealing. *See* Michael L. Miner, Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668 (1975). As Justice Sandra Day O'Connor pointed out in the dissent in *Pacific Mutual Life Insurance Co. v. Haslip*, "[u]nheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damage awards." 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting).

19. *See, e.g.*, Wisker v. Hart, 766 P.2d 168 (Kan. 1988); Buzzard v. Farmers Ins. Co., Inc., 824 P.2d 1105 (Okla. 1991).

discovered, or for a design when there was no feasible alternative way for the product to be made.[20] The implications of these decisions on our society as a whole, namely their effect on product innovation or insurability, were ignored.

### *C. Legislatures Retrieve their Power*

In response to these cases, some state legislatures in the 1970s began to "retrieve" their clear historical right to decide tort law.[21] Most state courts respected these actions as appropriate legislative prerogatives and policy choices.[22]

In the 1980s, problems of uninsurability and adverse effects resulting from open-ended and uncertain rules regarding liability led many state legislatures to increase their involvement in deciding tort law.[23] Plaintiffs' groups challenged these reforms under provisions of state constitutions and had successes in some, *but not most*, states.

### *D. Lochner Redux—Decisions That Replicate A Discredited Opinion of Constitutional Law*

Many of the decisions overturning tort reform statutes have been premised on the assumption that state courts have a fundamental and exclusive right to make state tort law.[24] The decisions ignore basic legal history; that is, they fail to recognize the legislative enactment of the "reception" statutes. In addition, these decisions also betray a solipsistic view of the formulation of public policy—the formulation of tort law has never been the *exclusive* province of *any* one branch of government.[25] Furthermore, the cases often show judges substituting

---

20. *See, e.g.*, Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986); Simmons v. Monarch Mach. Tool Co., 596 N.E.2d 318 (Mass. 1992); Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539 (N.J. 1982); Ayers v. Johnson & Johnson Baby Prods. Co., 818 P.2d 1337 (Wash. 1991).

21. *See infra* notes 63-87 and accompanying text.

22. *See generally* JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 807-09 (9th ed. 1994).

23. For example, *Beshada* and *Halphen* were overruled by legislation so as to require proof of defect. *See* LA. REV. STAT. ANN. § 9:2800.56(1) (West 1991); N.J. REV. STAT. § 2A:58C-3(3) (1987 & Supp. 1996). A Maryland case, which held a handgun manufacturer strictly liable for personal injuries resulting from a properly functioning "Saturday Night Special," was similarly overruled by legislation. *See* Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md. 1985); MD. ANN. CODE OF 1957, art. 27, § 36-I(h) (Michie 1990) (overruling *Kelley*).

24. *See* Schwartz, *supra* note 2.

25. As United States Supreme Court Justice Jackson noted so eloquently many years ago:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable

their own views of what tort law "ought to be" for that of the legislature; they do *not* represent sound constitutional law decisions.

Most importantly, the decisions create precedents so that courts in the future can nullify a wide array of state legislation, whether conservative or liberal, in support of tort reform or not. The decisions are reminiscent of a very bleak and highly discredited period in the United States Supreme Court's history that began around the turn of the century and ended in the mid-1930s.[26] During this period, known as "the *Lochner*[27] era," the Court nullified acts of Congress that it disagreed with, using the United States Constitution as a predicate for its decisions.[28]

## III. THE ROLES OF THE GENERAL ASSEMBLY AND COURTS IN DEVELOPING ILLINOIS TORT LAW

Shortly after Illinois became a state in 1818, the Illinois General Assembly enacted one of its first tort laws, the Illinois Reception Statute. The Illinois Reception Statute provides:

> That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and

---

> government. It enjoins upon its branches separateness, but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

26. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-7 (1978).

27. Lochner v. New York, 198 U.S. 45 (1905). In *Lochner*, Justice Peckam, writing for the majority, invalidated a New York law that limited the amount of hours a baker could work in a bakery. *Id.* at 64.

In his dissent, Justice Holmes argued that, unless legislation violates a fundamental right, the Court should respect state legislation that is rationally related to a state's legitimate goal. *Id.* at 75. Justice Holmes wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.

*Id.* Justice Holmes further claimed that the Constitution did not enact "Mr. Herbert Spencer's social statistics." *Id.*

28. *See* TRIBE, *supra* note 26, at §§ 8-2 to 8-7.

> shall be considered as of full force until repealed by legislative authority.[29]

Under the reception statute, "[t]he legislature is formally recognized as having a superior position to that of the courts in establishing common law rules of decision."[30] The legislature "has the inherent power to repeal or change the common law, or do away with all or part of it."[31]

The rationale for legislative preeminence in deciding public policy relates to the inherent strengths of the legislative process.[32] As Chief Justice Bilandic of the Illinois Supreme Court said just over a year ago, public policy first and foremost "should emanate from the legislature"[33] because, among other reasons, "it is the only entity with the power to weigh and properly balance the many competing societal, economic, and policy considerations involved."[34]

Legislatures are uniquely well-equipped to reach fully informed decisions about the need for broad public policy changes in the law.[35] They have more complete access to information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information.[36] If a point needs further elaboration, a witness can be recalled or asked to respond to written questions. This process allows legislatures to engage in broad policy deliberations and to formulate policy carefully.[37]

---

29. 5 ILL. COMP. STAT. ANN. 50/1 (West 1993) (emphasis added).

30. People v. Gersch, 553 N.E.2d 281, 286 (Ill. 1990) (citing People v. Davis, 116 N.E.2d 372, 374 (Ill. 1953)).

31. *Id.*

32. *See infra* notes 35-42 and accompanying text.

33. Charles v. Seigfried, 651 N.E.2d 154, 160 (Ill. 1995).

34. *Id.* at 160. *See also* People v. Felella, 546 N.E.2d 492, 498 (Ill. 1989) ("public policy is the domain of the legislature").

35. See Michael J. Dittoe, *Statutory Revision by Common Law Courts and the Nature of Legislative Decision Making—A Response to Professor Calabresi*, 28 ST. LOUIS U. L.J. 235, 255-56 (1984). The author writes:

> A legislature, in contrast to a court, does not decide a specific case but rather enunciates a rule without the need for a specific wronged litigant to appear before it and demand satisfaction . . . . A legislature can propose, consider, and pass such a rule sua sponte, without being required to act.

*Id.*

36. *See id* at 256-59 (discussing the role of the legislature as the chief policy maker of the state); *see also* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 201 (1989) (declaring that, "[i]f the separation of powers means anything, it means that the task of creating law falls upon the legislature, and the courts must obey and enforce the constitutionally legitimate enactments of the legislative branch").

37. *See generally* Smith v. Cutter Biological, Inc., 823 P.2d 717, 736 (Haw. 1991)

Moreover, legislative consideration of major changes results in prospective legislation that will give the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly.[38] As the United States Supreme Court has noted in a recent decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to [liability]. . . ."[39]

Courts, on the other hand, are well-suited to adjudicate individual disputes concerning discrete issues and parties. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies."[40] This particularized focus, however, involves some basic limitations: It deprives the judiciary of the comprehensive access to information that is essential to the formation of complex and sound tort policy rules.[41]

Legislatures are also to be respected in their formulation of tort law rules of conduct, because they can make their rules prospective. Courts, following the common law process, institute their rulings on a retroactive basis. Although this may be appropriate when implementing minor adjustments to common law principles, it is not appropriate when the "adjustments" precipitate a broad, fundamental change in an available tort remedy. Changes which denote a sweeping change of the rights and responsibilities of the public, should be done prospectively, if at all, to provide "fair notice" to *everyone* potentially affected.[42]

---

(Moon, J., concurring in part and dissenting in part) (disagreeing with the majority's application of "market share liability" to a blood products case, because "[t]here are too many unanswered questions of social, economic, and legal import which only the legislature, with its investigative powers and procedures, can determine"). The American Law Institute's new draft Restatement on the law of products liability agrees that when the government has superior access to information, it, rather than the courts, should act. *See* RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 20 (Proposed Final Draft (Preliminary Version) Oct. 18, 1996) ("Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding ramifications of such undertakings.").

38. *See* Schwartz & Behrens, *supra* note 17, at 1373-74.

39. BMW of N. America, Inc. v. Gore, 116 S. Ct. 1589, 1598 (1996).

40. *See* U.S. CONST. art. III, § 2, cl. 1. *See also* ILL. CONST. art. VI, § 9 (1970); THE FEDERALIST No. 78, at 506 (Alexander Hamilton) (Random House 1937) (arguing that the "interpretation of the laws is the proper and peculiar province of the courts").

41. *See also* Alan Schwartz, *supra* note 4, at 368 (recognizing that "there is no reason" to believe that courts possess the ability to assess tradeoffs with safety and risks).

42. *See BMW of N. America, Inc.*, 116 S. Ct. at 1598; Schwartz & Behrens, *supra* note 17, at 1374.

## IV. THE ILLINOIS GENERAL ASSEMBLY HISTORICALLY HAS HAD A PREEMINENT ROLE IN DEVELOPING THE COMMON LAW

As mandated by the reception statute, the Illinois General Assembly has played a preeminent role in developing the common law throughout the state's history, having repealed or modified common law causes of action on numerous occasions.[43] It has fulfilled its end of the reception statute without having its work nullified by Illinois courts.

### *A. Early Examples of Legislative Retrieval or Modifying Common Law Causes of Action—Marital Property Rights, Commercial Law and Wrongful Death and Survival Acts*

For example, when the General Assembly enacted the reception statute, the system of marital property rights, including the feudal common law concepts of dower, coverture, and curtesy, became the law in Illinois.[44] "At common law a married woman had no separate identity before the law; she was regarded as a chattel with neither property or other rights against anyone, for her husband owned all her property and asserted all her legal and equitable rights."[45] Yielding to social changes, the General Assembly passed various statutes in the 1860s and 1870s which materially altered the common law marital property system and the rights of married women.[46] These changes were respected by Illinois courts.[47]

At about this same time, the General Assembly also began to retrieve the common law of contracts. In 1874, the General Assembly enacted the Negotiable Instruments Act, which codified the common law governing negotiable instruments.[48] In 1907, the 1874 Act gave way to the Uniform Negotiable Instruments Act.[49] A few years later,

---

43. *See infra* notes 57-69 and accompanying text.

44. *See* McNeer v. McNeer, 32 N.E. 681 (Ill. 1892).

45. Brandt v. Keller, 109 N.E.2d 729, 730 (Ill. 1952) (citing Snell v. Snell, 14 N.E. 684, 686 (Ill. 1888)).

46. See *Snell v. Snell*, 14 N.E. 684, 686 (Ill. 1888), for a discussion of the Married Women's Acts of 1861 and 1874. *See also* Brandt v. Keller, 109 N.E.2d 729, 731 (Ill. 1952) (holding that Married Women's Act of 1874 modified common law by allowing women to sue their husbands in contract and in tort); People *ex rel.* Cullison v. Dile, 179 N.E. 93 (Ill. 1931) (Bastardy Act of 1919 eliminated common law prohibition precluding testimony of married woman to establish paternity).

47. *McNeer*, 32 N.E. 681 (Ill. 1892); *Snell*, 14 N.E. 684 (Ill. 1888).

48. *See* Negotiable Instruments, 1874 Stats. Of Illinois 292-93 (approved on March 18, 1874); *see also* Keenan v. Blue, 88 N.E. 553 (Ill. 1909).

49. 1907 Ill. Laws 403, *repealed by* 1961 Ill. Laws 2101, art. X, § 10-102 (codified at 810 ILL. COMP. STAT. ANN. 5/10-102 (West 1993)). *See also* County of Macon v. Edgecomb, 654 N.E.2d 598 (Ill. App. Ct., 4th Dist. 1995) (citing 1907 Ill. Laws 403

in 1915, the General Assembly also chose to codify the common law of sales contracts by enacting the Uniform Sales Act.[50] These "uniform" acts effectively repealed a landmark English common law case by Lord Mansfield, one of England's leading commercial judges.[51] Nevertheless, we are aware of no reported decisions challenging these various commercial statutes as exceeding the legislature's authority to decide state policy.

The nineteenth century Illinois General Assembly also acted to fill voids in the common law of torts. The Injuries Act of 1853, a wrongful death statute, modified common law by allowing a wrongful death action to be brought against a tortfeasor for the benefit of the decedent's widow and next of kin.[52] Notwithstanding that wrongful death actions were unknown in England,[53] The Survival Act of 1872 modified the common law by permitting personal injury actions to "survive" one's death and be brought by a decedent's personal representative.[54] Under the common law, "an action for damages for personal injury abated with the death of the injured party in all cases where the death was not the result of the injury."[55] The Illinois wrongful death and survival statutes have been declared by the Illinois Supreme Court to be constitutional.[56]

---

(eff. July 1, 1907)).

50. 1915 Ill. Laws 604, *repealed by* 1961 Ill. Laws 2101, art. X, § 10-102 (codified at 810 ILL. COMP. STAT. ANN. 5/10-102 (West 1993)). In 1961, the legislature repealed both the Uniform Negotiable Instruments Act and the Uniform Sales Act and replaced them with the Uniform Commercial Code. 1961 Ill. Laws 2101 (codified at 810 ILL. COMP. STAT. 5/10-102 (West 1996)).

51. *See* Vallejo v. Wheeler, 98 Eng. Rep. 1012 (K.B. 1774).

52. *See* 1853 Ill. Laws 97 (codified at 740 ILL. COMP. STAT. ANN. 180/1 (West Supp. 1997)).

53. *See* Bishop v. Chicago Rys. Co., 135 N.E. 439, 440 (Ill. 1922) ("No right existed at common law to recover for the wrongful death of a person. The Injuries Act passed by the Legislature of this state in 1853 created such a cause of action for the first time in this state.").

54. 1871-72 Ill. Laws 77 (codified at 755 ILL. COMP. STAT. ANN. 5/27-6 (West 1993)).

55. Vukovich v. Custer, 107 N.E.2d 426, 427 (Ill. App. Ct., 2d Dist. 1952).

56. *See* McDaniel v. Bullard, 216 N.E.2d 140 (Ill. 1966) (upholding constitutionality of wrongful death and survival statutes); Zostautas v. St. Anthony de Padua Hosp., 178 N.E.2d 303 (Ill. 1961) (upholding constitutionality of damage limitation in wrongful death statute); Hall v. Gillins, 147 N.E.2d 352 (Ill. 1958) (upholding constitutionality of time limitations in wrongful death statute).

### *B. Workers' Compensation Statutes—The Paradigm for Legislative Retrieval of Common Law Causes of Action*

The legislative development of Illinois tort law was not only a phenomenon of the nineteenth century; it continued into this century. The Illinois' workers' compensation statute is a particularly relevant example.[57]

In Illinois, as in other states, workers' compensation statutes reflected a radical departure from the common law: the statutes abolished *all* common law damages for pain and suffering and provided *limited* recovery of economic losses and *no* punitive damages. The jury "system" was replaced by an administrative board.[58] As the Illinois Supreme Court has explained, "*The Workmen's Compensation Act affects a complete change in the rights and liabilities of an employer and his employee in regard to accidental injuries to the employee. The common law action for negligence can no longer be maintained* but the statutory remedy, alone, is available."[59]

Nevertheless, Illinois courts have consistently respected the General Assembly's choice to *abolish* the common law relating to workplace injuries and to replace it with workers' compensation legislation.[60]

### *C. The General Assembly Has Continued to Develop Illinois Tort Law*

The legislature's orderly development of Illinois tort policy has continued to keep pace with the public policy needs of the state. Statutes of repose and modifications to the collateral source rule are examples of the General Assembly's orderly development of tort policy.

#### 1. Statutes of Repose

Statutes of repose provide an outer time limit on potential "long-tail" liability and reduce costs associated with defending stale claims. These laws represent a legislative policy judgment that, after a number

57. 1911 Ill. Laws 315 (codified at 820 ILL. COMP. STAT. ANN. 305/1-30 (West 1993)).

58. *See* ARTHUR LARSON, WORKERS' COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH (desk ed. 1991).

59. Johnson v. Choate, 119 N.E. 972, 974 (Ill. 1918) (emphasis added) (holding that use of Industrial Board to decide workers' compensation cases did not contravene Illinois constitution as unlawful delegation of judicial powers to arbitrators).

60. *See id.*; Moushon v. Nat'l Garages, Inc., 137 N.E.2d 842 (Ill. 1956) (upholding as constitutional limitations on recovery provided in Workmen's Compensation Act).

of years, it is inappropriate to bring a lawsuit regarding a product that is very old and may have been altered, modified or not repaired, or an activity that is long since over. Most state courts have recognized that statutes of repose represent a public policy "judgment call" and have upheld them.[61]

The Illinois General Assembly has modified common law causes of action through statutes of repose in a wide range of areas, including improvements to real property,[62] product liability actions,[63] and malpractice.[64] The Illinois Supreme Court has declared these laws to be *constitutional* exercises of legislative authority.[65]

---

61. *See, e.g.*, Anderson v. M.W. Kellogg Co., 766 P.2d 637 (Colo. 1988); Daily v. New Britain Mach. Co., 512 A.2d 893 (Conn. 1986); Love v. Whirlpool Corp., 449 S.E.2d 602 (Ga. 1994); Radke v. H.C. Davis Sons Mfg. Co., Inc., 486 N.W.2d 204 (Neb. 1992).

62. Pub. Act. No. 82-280 (codified at 735 ILL. COMP. STAT. ANN. 5/13-214 (West Supp. 1997)) (providing that no actions for injury arising from improvements to real property may be maintained more than four years after plaintiff knew or should have known of cause of action, but in any case no more than 10 years after act or omission causing the injury).

63. Pub. Act. No. 82-280 (codified at 735 ILL. COMP. STAT. ANN. 5/13-213 (West Supp. 1997)) (providing that no product liability action under any theory may be raised more than two years after plaintiff knew or should have known of injury, but in any case no more than 12 years from date of first sale of product or 10 years of the initial sale by retailer).

64. Pub. Act. No. 82-280 (codified at 735 ILL. COMP. STAT. ANN. 5/13-212 (West Supp. 1997)) (providing that no action shall be maintained against a physician, dentist, nurse, or hospital for injury arising from medical services more than two years after plaintiff knew or should have known of injury, but in any case no more than four years after act or omission allegedly giving rise to injury).

65. *See* Mega v. Holy Cross Hosp., 490 N.E.2d 665 (Ill. 1986) (statute of repose relating to medical malpractice actions does not violate certain remedies clause of Illinois constitution); People *ex rel.* Skinner v. Hellmuth, Obata & Kassabaum, Inc., 500 N.E.2d 34 (Ill. 1986) (statute of repose relating to improvements to real property is not unconstitutional special legislation); Adcock v. Montgomery Elev. Co., 654 N.E.2d 631 (Ill. App. Ct., 1st Dist. 1995) (statute of repose relating to improvements to real property does not violate Illinois constitution's certain remedies provision); Thompson v. Franciscan Sisters Health Care Corp., 578 N.E.2d 289 (Ill. App. Ct., 3d Dist. 1991) (statute of repose relating to medical malpractice actions does not violate special legislation, certain remedies, due process, or equal protection clauses of the Illinois constitution); Billman v. Crown-Trygg Corp., 563 N.E.2d 903 (Ill. App. Ct., 1st Dist. 1990) (statute of repose relating to improvements to real property does not violate Illinois' equal protection clause); Cross v. Ainsworth Seed Co., 557 N.E.2d 906 (Ill. App. Ct., 4th Dist. 1990) (products liability statute of repose relating to improvements to real property does not constitute unconstitutional special legislation); Costello v. Unarco Indus., Inc., 473 N.E.2d 96 (Ill. App. Ct., 4th Dist. 1984) (statute of repose relating to product liability actions arising from exposure to asbestos does not violate Illinois constitution's special legislation, certain remedy, due process, or equal protection clauses).

### 2. Modifications to the Collateral Source Rule

The collateral source rule, which developed in common law decisions, establishes that a plaintiff can obtain a judgment, even though he or she already has received compensation for a specific harm, if that compensation came from a source that is not connected with (*i.e.*, is "collateral" to) the defendant. The common law rule is based on the assumption that the defendant is a "wrongdoer," the plaintiff has been "provident" in buying insurance, and the defendant should not benefit from the plaintiff's providence.

In modern times, however, plaintiffs may benefit from the "collateral source rule" even though the sources of payment for their injuries do not stem from their own "providence." A plaintiff may receive workers' compensation, health benefits, or other funds that he or she did not purchase. With these facts in mind, plus a fiscal resources policy judgment that a "double recovery" is inappropriate, a legislative public policy determination can be made that the old common law collateral source rule should be modified or abolished.[66]

In 1981, the Illinois General Assembly altered the common law collateral source rule.[67] The new law permitted a plaintiff's tort recovery to be reduced by the amount of collateral source payments received by the plaintiff.[68] The Illinois Supreme Court has upheld the legislature's collateral source rule reform law.[69]

### 3. Other Examples

The above examples are illustrative, but not exhaustive, of the Illinois General Assembly's development of tort policy in recent years. There are other examples:

- The General Assembly, acting in response to judicial decisions, has modified Illinois law regarding governmental[70]

66. Recent data suggests that use of the "collateral source" rule contributes to inflated damages claims. *See* STEVEN CARROLL & ALLAN ABRAHAMSE, THE COSTS OF EXCESSIVE MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES (RAND Institute For Civil Justice, March 1995). *See also* Jeffrey O'Connell, *Must Health and Disability Insurance Subsidize Wasteful Injury Suits?*, 42 RUTGERS L. REV. 1055 (1989).

67. Pub. Act. No. 82-280 (codified at 735 ILL. COMP. STAT. ANN. 5/2-1205 (West Supp. 1997)).

68. *See id.*

69. *See* Bernier v. Burris, 497 N.E.2d 763, 775 (Ill. 1986) (upholding the legislative modifications to the common law collateral source rule) ("It is well recognized that the collateral-source rule is of common law origin and can be changed by statute") (quoting RESTATEMENT (SECOND) OF TORTS § 920A cmt. d (1979)).

70. In 1965, the General Assembly enacted The Local Governmental and Governmental Employees Tort Immunity Act, 1965 Ill. Laws 2983, § 1-101 (codified at 745 ILL. COMP. STAT. ANN. 10/1-101 (West 1993)), which defined the state's policy in

and charitable immunity.[71] These laws have been upheld as constitutional.[72]

- The General Assembly, exercising its public policy prerogative, has preserved spousal immunity[73] and limited recoveries for gratuitous guests.[74] These laws have been upheld as constitutional.[75]
- In 1971, the General Assembly enacted a "blood shield" statute to limit the liability of suppliers of human blood and tissue.[76] The law is based on the policy judgment that open-ended liability could lead to the unavailability of critical blood and tissue supplies. It has been declared to be constitutional.[77]

---

the field of tort immunity. The legislation was a response to *Molitor v. Kaneland Community Unit Dist.*, 163 N.E.2d 89 (Ill. 1959), which ended the common law doctrine of sovereign immunity for local governments. *See also* Metropolitan Transit Authority Act, 70 ILL. COMP. STAT. ANN. 3605/41 (West 1993).

71. In 1965, the Illinois Supreme Court abolished common law immunity for tort actions against charitable entities. *See* Darling v. Charleston Comm. Mem'l Hosp., 211 N.E.2d 253 (Ill. 1965). The legislature later acted to restore common law charitable immunity in some circumstances. Pub. Act. No. 82-580, § 4 (codified at 745 ILL. COMP. STAT. ANN. 50/4 (West Supp. 1997)) (providing immunity for charitable organizations which distribute donated food).

72. *See, e.g.*, Bilyk v. Chicago Transit Auth., 531 N.E.2d 1 (Ill. 1988) (statute immunizing transit authority from tort liability for injuries sustained by passengers as a result of criminal actions committed by third parties is constitutional); King v. Johnson, 265 N.E.2d 874 (Ill. 1970) (upholding constitutionality of notice provision in Local Government and Government Employees Tort Immunity Act); Niziolek v. Chicago Transit Auth., 620 N.E.2d 1097 (Ill. App. Ct., 1st Dist. 1993) (holding that notice requirement under Metropolitan Transit Authority Act does not violate Illinois state equal protection clause).

73. In *Brandt v. Keller*, 109 N.E.2d 729 (Ill. 1952), the court held that the Married Women's Act of 1874 modified common law by allowing women to sue their husbands both in contract and in tort. *Id.* at 731. The legislature later amended the Married Women's Act to restore spousal immunity. Pub. Act. No. 86-1324, §331 (codified at 750 ILL. COMP. STAT. ANN. 65/1 (West 1996)).

74. Pub. Act. No. 76-1586 (codified at 625 ILL. COMP. STAT. ANN. 5/10-201 (West 1993)). The guest statute modifies the common law by requiring a gratuitous guest to prove willful and wanton negligence (as distinguished from simple negligence) against the owner or operator of a motor vehicle before the guest can recover.

75. *See, e.g.*, Wartell v. Formusa, 213 N.E.2d 544 (Ill. 1966) (upholding constitutionality of spousal immunity act); Clarke v. Storchak, 52 N.E.2d 229 (Ill. 1943) (upholding constitutionality of Illinois' guest statute); Koskela v. Martin, 414 N.E.2d 1148 (Ill. App. Ct., 1st Dist. 1980) (public policy regarding intra-family immunity best left to legislature).

76. Pub. Act. No. 77-184, § 3 (1971) (codified at 745 ILL. COMP. STAT. ANN. 40/2 (West 1993 & Supp. 1996)).

77. *See* Glass v. Ingalls Mem'l Hosp., 336 N.E. 495 (Ill. App. Ct., 2d Dist. 1975) (upholding constitutionality of blood shield law from challenge that it constituted special legislation). *Accord* Hill v. Jackson Park Hosp., 349 N.E.2d 541 (Ill. App. Ct., 1st Dist. 1976).

- In 1979, the General Assembly codified the common law doctrine of contribution.[78]
- In 1985, the General Assembly enacted comprehensive medical malpractice reform legislation to reduce the burdens existing in the health professions, in part, as a result of frivolous lawsuits.[79] Reforms included the creation of medical review panels to screen cases, modification of the collateral source rule,[80] periodic payment of damages awards,[81] a prohibition on the award of punitive damages,[82] and limits on contingent fees.[83] These comprehensive medical malpractice reforms (with the limited exception of the medical review panel provision) have been declared by the Illinois Supreme Court to be constitutional.[84]
- A year later, in 1986, after the Illinois Supreme Court abolished the historic common law doctrine of contributory negligence and adopted in its place a system of "pure" comparative fault,[85] the General Assembly responded by enacting a "modified" comparative fault statute.[86] This statute has been upheld as constitutional.[87]

In sum, Illinois courts have *repeatedly* respected the legislature's prerogative to set forth the tort policy of the state; they have *not* held these policy judgments to be unconstitutional.

78. Pub. Act. No. 81-601, § 2 (1979) (codified at 740 ILL. COMP. STAT. ANN. 100/2 (West 1993)). The Illinois Supreme Court adopted the doctrine of contribution among joint tortfeasors in *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437 (Ill. 1977). We are aware of no reported challenges to the contribution statute.

79. *See infra* notes 80-83 and accompanying text.

80. *See supra* notes 66-68 and accompanying text.

81. Pub. Act. No. 84-7, § 1 (codified at 735 ILL. COMP. STAT. ANN. 5/2-1705 (West 1993 & Supp. 1996)).

82. Pub. Act. No. 84-7, § 1 (codified at 735 ILL. COMP. STAT. ANN. 5/2-1115 (West 1993 & Supp. 1996)).

83. Pub. Act. No. 84-7, § 1 (codified at 735 ILL. COMP. STAT. ANN. 5/2-1114 (West 1993 & Supp. 1996)).

84. *See* DeLuna v. St. Elizabeth's Hosp., 588 N.E.2d 1139 (Ill. 1992); Bernier v. Burris, 497 N.E.2d 763 (Ill. 1986).

85. *See* Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981).

86. Pub. Act. No. 84-1431, art. IV., § 1 (codified at 735 ILL. COMP. STAT. ANN. 5/2-1116 (West Supp. 1997)).

87. *See* Reuter v. Korb, 616 N.E.2d 1363 (Ill. App. Ct., 2d Dist. 1993) (upholding the constitutionality of the comparative negligence statute and rejecting appellant's argument that, because the *Alvis* court had established pure comparative negligence, then under the Illinois separation of powers clause, only the courts of Illinois (as opposed to the legislature) could modify the *Alvis* "pure" comparative fault rule).

### *D. The Civil Justice Reform Amendments of 1995 Is The Most Recent Legislative Adjustment of Illinois Tort Law*

The Civil Justice Reform Amendments of 1995 ("Civil Justice Reform Act")[88] is merely the most recent adjustment by the Illinois General Assembly of the broad tort policy interests of the state. As Illinois Senate Majority Leader Kirk Dillard, a chief architect of the Civil Justice Reform Act, recently explained:

> Our system reached so far in an effort to compensate those who were injured that it stressed the award of large sums of money to individuals without due consideration to the true magnitude of the harm, the individual or entity which caused the harm, or the impact than an individual award may have had on society at large. . . . [The Act] struck a much needed balance between permitting the redress of all grievances and maintaining a workable, efficient, fair system.[89]

The Act sought to "return fairness, predictability, and responsibility to the Illinois civil justice system."[90] It also sought to "hold down the incredible costs of civil litigation" and to address "flaws in the past product liability system."[91] While some of the provisions in the Civil Justice Reform Act are new, others represent extensions of laws already declared by the Illinois Supreme Court to be valid exercises of legislative policymaking. Clearly, the Act reflects sound public policy and is consistent with Illinois legal history.[92]

The Civil Justice Reform Act is also consistent with a strong trend throughout the United States. In 1995, approximately *nineteen* states, including Indiana, New Jersey, Texas, and Wisconsin, enacted civil justice reform legislation.[93] This trend continued in 1996 with the enactment of comprehensive liability reform legislation in Ohio, Louisiana, and Michigan.[94] These policy decisions by legislatures should be respected.

---

88. Pub. Act. No. 89-7, § 15 (1995) (codified in scattered sections at 430, 730, 735, 740, 745, 815, 820 ILL. COMP. STAT. ANN. (West Supp. 1997)).

89. Kirk W. Dillard, *Illinois' Landmark Tort Reform: The Sponsor's Policy Explanation*, 27 LOY. U. CHI. L.J. 805, 808-09, 812 (1996).

90. *Id.* at 806.

91. *Id.* at 811.

92. See *supra* notes 61-87 discussing the General Assembly's modifications of tort law principles.

93. *See* Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, *Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments*, LEGAL TIMES, Feb. 10, 1997, at 534.

94. *See id.*

## V. CONCLUSION

The legislature has both an historic right and a public responsibility to formulate tort or liability legislation.[95] In many instances, these legislative enactments arose as a response to, or a clarification of, a judicial decision which carried tort law into a new area.[96] Illinois has a rich history of cooperation and respect between the legislature and the courts in developing the law of torts, either through the common law or statutory law.[97] Some of these legislative modifications have limited causes of action available to plaintiffs, but others have opened courthouse doors.[98] Regardless of who "benefitted"—plaintiffs or defendants—the courts have, in general, respected the legislative prerogative.[99]

The 1995 Civil Justice Reform Act is a continuation of the Illinois legislature's historic role in developing the broad tort policy interests of the state.[100] As a matter of history and good public policy, the legislation should be respected by Illinois courts.[101]

95. *See supra* Part II.
96. *See supra* Part II.
97. *See supra* Part III.
98. *See supra* Part IV.A-B.
99. *See supra* Part IV.C.
100. *See supra* Part IV.D.
101. *See supra* Part V.