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Torts

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Torts

*Robert J. Bingle**
*and William E. Meyer, Jr.***

TABLE OF CONTENTS

I.	INTRODUCTION	662
II.	NEGLIGENCE.....	662
	A. <i>Duty</i>	662
	B. <i>Causation</i>	666
III.	MEDICAL MALPRACTICE	668
	A. <i>Affidavit Requirement Struck Down</i>	668
	B. <i>Referring Physician's Liability</i>	668
	C. <i>Good Samaritan Statute</i>	670
	D. <i>Duty to Observers</i>	671
IV.	FETAL TORTS	672
	A. <i>Fetal Recovery From Mother</i>	672
	B. <i>Wrongful Death of Aborted Fetus</i>	673
V.	EMOTIONAL DISTRESS	674
	A. <i>Scheming to Defraud</i>	674
	B. <i>Following and Harassing</i>	675
VI.	PRIVACY TORTS.....	676
VII.	STATUTORY LIABILITY.....	677
	A. <i>Structural Work Act</i>	677
	1. <i>What Is a Structure or Mechanical Device?</i> .	677
	2. <i>Who Is In Charge of the Work?</i>	680
	3. <i>Causation and Damages</i>	681
	B. <i>Dram Shop Act</i>	682
VIII.	CONTRIBUTION.....	683
IX.	EXCULPATORY AGREEMENTS	684
X.	DAMAGES.....	686
	A. <i>Discount to Present Value Limited</i>	686
	B. <i>Loss of Instruction and Training</i>	687

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C. <i>Punitive Damages</i>	688
XI. LEGISLATION	689
XII. CONCLUSION	692

I. INTRODUCTION

During the *Survey* year, Illinois courts decided issues in tort law ranging from the constitutionality of the medical malpractice affidavit requirement¹ and Chicago Transit Authority special immunity² to the permissibility of a wrongful death action on behalf of an aborted fetus.³ The courts rejected attempts to discount to present value damages for pain, suffering, disability and disfigurement.⁴ The courts, however, upheld every exculpatory agreement encountered.⁵ In addition, the supreme court opened a new channel to landlord liability for the criminal acts of third parties.⁶

II. NEGLIGENCE

A. Duty

Throughout the *Survey* period, Illinois courts examined the extent of duty owed by landlords, railroads and highway designers. In these cases, the courts ruled that the duties owed, if any, were limited.

In *Rowe v. State Bank*,⁷ the Illinois Supreme Court held that the owner and managing agent of an office complex had a duty to take reasonable precautions to prevent unauthorized access when the owner-agent had knowledge of outstanding and unaccounted-for passkeys.⁸ The case arose when two women were attacked and

1. *DeLuna v. St. Elizabeth's Hosp.*, 184 Ill. App. 3d 802, 540 N.E.2d 847 (1st Dist.), *appeal allowed*, 127 Ill. 2d 614, 545 N.E.2d 107 (1989); ILL. REV. STAT. ch. 110, para. 2-622(a)(1) (1987). *See infra* notes 57-62 and accompanying text.

2. *Bilyk v. Chicago Transit Auth.*, 125 Ill. 2d 230, 531 N.E.2d 1 (1988). *See infra* notes 269-81 and accompanying text.

3. *Light v. Proctor Community Hosp.*, 182 Ill. App. 3d 563, 538 N.E.2d 828 (3d Dist. 1989), *appeal denied*, 127 Ill. 2d 619, 545 N.E.2d 113 (1989). *See infra* notes 106-16 and accompanying text.

4. *Schaffner v. Chicago & N.W. Transp. Co.*, 129 Ill. 2d 1, 541 N.E.2d 643 (1989). *See infra* notes 241-49 and accompanying text.

5. *Moran v. Lala*, 179 Ill. App. 3d 771, 534 N.E.2d 1319 (2d Dist. 1989); *Falkner v. Hinckley Parachute Center*, 178 Ill. App. 3d 597, 533 N.E.2d 941 (2d Dist. 1989); *Koch v. Spalding*, 174 Ill. App. 3d 692, 529 N.E.2d 19 (5th Dist. 1988). *See infra* notes 222-38 and accompanying text.

6. *Rowe v. State Bank*, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988). *See infra* notes 7-18 and accompanying text.

7. 125 Ill. 2d at 203, 531 N.E.2d at 1358.

8. *Id.* at 221-22, 531 N.E.2d at 1367.

shot while working late.⁹ One of the women died. The assailant had worked previously at the complex and possessed master keys.¹⁰ The survivor of the attack and the husband of the dead woman alleged that the office park in which the women worked had assumed a duty to protect office occupants from criminal and tortious attacks by intruders.¹¹ The complaint charged defendants with a breach of this duty by, *inter alia*, failing properly to maintain locks, control the distribution of master keys, warn of numerous reported criminal incidents and otherwise provide adequate security.¹²

The court rejected plaintiffs' contention that a landlord owed a general duty to protect tenants.¹³ The court recognized that liability may exist when the landlord voluntarily provides security measures in a negligent manner and such negligence is the proximate cause of plaintiff's injuries.¹⁴ Plaintiffs, however, failed to show that defendants had taken security measures on behalf of plaintiffs.¹⁵

The court found persuasive plaintiffs' argument that the landlord, by manufacturing master keys and retaining access to the individual office units, assumed a duty to take reasonable precautions to prevent unauthorized entries by individuals possessing those keys.¹⁶ The court held that because defendants had knowledge of the unaccounted-for keys, they breached a duty to warn or take reasonable precautions to prevent foreseeable unauthorized entries.¹⁷ The court stated that changing the locks, or at least warning the tenants, would not have been an unreasonable burden for

9. *Id.* at 207, 531 N.E.2d at 1360.

10. *Id.* at 208, 211, 531 N.E.2d at 1360-61.

11. *Id.* at 209, 531 N.E.2d at 1361.

12. *Id.* The circuit court consolidated the actions, granted summary judgment in favor of defendants, and authorized appeal. *Id.* at 207, 531 N.E.2d at 1360. The appellate court affirmed and the Illinois Supreme Court granted leave to appeal. *Id.* at 207-08, 531 N.E.2d at 1360.

13. *Id.* at 216, 531 N.E.2d at 1364 (citing *Phillips v. Chicago Hous. Auth.*, 89 Ill. 2d 122, 431 N.E.2d 1038 (1982) and *Pippin v. Chicago Hous. Auth.*, 78 Ill. 2d 204, 399 N.E.2d 596 (1979)).

14. 125 Ill. App. 2d at 217, 531 N.E.2d at 1365.

15. *Id.* at 218, 531 N.E.2d at 1365.

16. *Id.* at 221, 531 N.E.2d at 1367.

17. *Id.* at 223, 531 N.E.2d at 1368. The court rejected defendants' contention that the third-party criminal acts constituted an independent intervening cause that insulated them from liability. The record proximately connected the landlord's failure to take precautions with the criminal entry. *Id.* at 226, 531 N.E.2d at 1369. The court stated that seventeen incidents of criminal activity as well as a police officer's warning to change the locks had not moved the landlord to act. *Id.*

the landlord to assume.¹⁸

Although courts generally will not hold a landlord liable for injuries on his premises caused by a third party's criminal act, courts will create an exception when the landlord acts in such a way to make the criminal conduct foreseeable. Following *Rowe*, if a plaintiff can plead facts sufficient to show that the danger was probable and predictable, the complaint should survive a motion for summary judgment.

In *Dunn v. Baltimore & O.R.R.*,¹⁹ a motorcyclist was killed when he drove into the side of a train stopped at a crossing.²⁰ The decedent's survivors alleged negligence and wilful and wanton conduct on the part of defendant railroad. Plaintiff claimed that the decedent was unable to see the parked train until it was too late to avoid hitting it. The trial court dismissed plaintiff's third amended complaint with prejudice, which the appellate court affirmed in part and reversed in part.²¹

The Illinois Supreme Court held that the estate's claim for negligence failed to state a cause of action.²² The court began its analysis by stating the longstanding rule that a train stopped at a crossing is adequate warning of its presence to any traveler who exercises ordinary care for his own safety.²³ The court further stated that the railroad has no duty to give additional signs, signals or warnings.²⁴ The court recognized a "special circumstance" exception to the rule, but it stated that darkness, heavy fog, and poor visibility did not fall into the exception.²⁵ The court concluded that plaintiffs failed to allege the existence of a special

18. *Id.* at 228, 531 N.E.2d at 1370. The only other significant developments in landlord liability during the *Survey* period were variations on the well-worn "natural accumulation" rule that restricts recovery in slip, trip and fall personal injury practice. In *Weber v. Chen Enters.*, 184 Ill. App. 3d 847, 540 N.E.2d 957 (1st Dist.), *appeal denied sub. nom. Gribben v. Chen Enters.*, 127 Ill. 2d 643, 545 N.E.2d 110 (1989), the court held a complaint for a fall on a natural accumulation of ice not subject to summary judgment when inadequate lighting was alleged as a proximate cause of the fall. The natural accumulation rule, however, was held to apply to water tracked in a store by customers. *Handy v. Sears, Roebuck & Co.*, 182 Ill. App. 3d 969, 538 N.E.2d 846 (1st Dist. 1989).

19. 127 Ill. 2d 350, 362-63, 537 N.E.2d 738, 739 (1989).

20. *Id.* at 362-63, 537 N.E.2d at 739.

21. *Id.* at 354, 537 N.E.2d at 739.

22. *Id.* at 366, 537 N.E.2d at 745.

23. *Id.* at 357, 537 N.E.2d at 741.

24. *Id.* (citing *Langston v. Chicago & N.W. Ry.*, 398 Ill. 248, 75 N.E.2d 363 (1947) and *Petricek v. Elgin, J. & E. Ry.*, 21 Ill. App. 2d 60, 65, 157 N.E.2d 421, 423 (1st Dist. 1959)).

25. 127 Ill. 2d at 357, 537 N.E.2d at 741. A blinding snowstorm would fall into the exception. *Bachman v. Illinois Cent. R.R.*, 132 Ill. App. 2d 277, 268 N.E.2d 42 (4th Dist. 1971).

circumstance.²⁶

The court also rejected plaintiffs' contention that the longstanding rule is inconsistent with the doctrine of pure comparative negligence.²⁷ The court ruled instead that the decedent's conduct was negligent and that the railroad could not be expected to anticipate and guard against a negligent motorist hitting a standing train.²⁸ Declining to place this burden on railroads, the supreme court affirmed the judgment of the circuit court dismissing plaintiffs' complaint with prejudice.²⁹

Similarly, in *Robinson v. Suitery, Ltd.*,³⁰ the Illinois Appellate Court for the First District held no cause of action exists for the negligent disposal of garbage.³¹ Plaintiff sustained nerve damage when she speared her hand on glass as she attempted to dispose of a trash bag in a large commercial dumpster behind a mini-mall. The defendant's employee had shattered several long fluorescent tubes by slamming the dumpster lid on them. The trial court granted summary judgment to defendant on the ground that it owed no duty in connection with the disposal of waste materials, and the appellate court affirmed.³²

The court recognized some merit in plaintiff's contentions but was not persuaded to create a duty based on negligent disposal.³³ Plaintiff's claim was undermined because the glass was in or on top of the dumpster and visible.³⁴ According to the court, it was not legally foreseeable that glass in the garbage might hurt someone. Fearing that its holding could result in the absurd requirement that every piece of glass thrown away must be wrapped, the court held that the law does not require extraordinary care in waste disposal.³⁵ The court carefully distinguished situations involving the disposal of substances such as hazardous waste.³⁶

In *Keene v. Bierman*,³⁷ the Illinois Appellate Court for the Fifth

26. 127 Ill. 2d at 360, 537 N.E.2d at 742.

27. *Id.* at 358, 364-67, 537 N.E.2d at 741, 744 (citing *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981)). The court applied the doctrine of pure comparative negligence. *Id.* The modified form of comparative negligence became effective in 1986, after the accident in this case. ILL. REV. STAT. ch. 110, para. 2-1116 (1987).

28. 127 Ill. 2d at 365-66, 537 N.E.2d at 744-45.

29. *Id.* at 366-67, 373, 537 N.E.2d at 745, 748.

30. 172 Ill. App. 3d 359, 526 N.E.2d 566 (1st Dist. 1989).

31. *Id.* at 362, 526 N.E.2d at 568.

32. *Id.* at 364, 526 N.E.2d at 569.

33. *Id.* at 362, 526 N.E.2d at 568.

34. *Id.* at 363, 526 N.E.2d at 568.

35. *Id.*

36. *Id.* at 364, 526 N.E.2d at 569.

37. 184 Ill. App. 3d 87, 540 N.E.2d 16 (5th Dist. 1989).

District held that the doctrine of public official immunity shielded a state highway engineer from any professional duty to a highway user.³⁸ The case arose when plaintiff sustained severe and permanent brain damage from a car accident.³⁹ Plaintiff settled with the car driver and proceeded with a claim against defendant engineer who designed the road while in the employ of the Illinois Department of Conservation. The trial court granted the state's motion on behalf of defendant to dismiss on grounds of public official immunity.⁴⁰

On appeal, plaintiff argued that mere state employment did not insulate the engineer from liability for his acts. Plaintiff contended that defendant, as a registered professional engineer, had an obligation to meet the profession's standard of care. The court rejected plaintiff's argument ruling that, absent a special relationship between plaintiff and defendant, defendant's only duty was to the public generally.⁴¹

These cases reveal the courts' reluctance, in the absence of special circumstances, to approve new causes of action. *Rowe v. State Bank* creates a narrow exception to the long-held belief that a landlord has no duty to a tenant to protect against the criminal acts of third parties beyond the landlord's control.

B. Causation

During the *Survey* period, the Illinois appellate courts decided several traffic-related cases involving the question of causation. In *Hamilton v. Atchison, Topeka & Santa Fe Railway*,⁴² the appellate court affirmed summary judgment for defendant.⁴³ Even though the crossing gate was down for seven minutes without a train in sight, the court found the driver's failure to look and listen the proximate cause of the accident, not the position of the gate.⁴⁴

In *Getman v. Indiana Harbor Belt R.R.*,⁴⁵ the court ruled that even a frequent malfunction of railroad warning signals did not cause a collision. Plaintiff had argued that the frequent malfunctions gave him a false sense of security, thus relieving him of his

38. *Id.* at 89, 540 N.E.2d at 17.

39. *Id.* at 88, 540 N.E.2d at 16. The car driver swerved to avoid an animal and hit a tree three feet from the roadway. *Id.*

40. *Id.*

41. *Id.* at 89, 540 N.E.2d at 17.

42. 175 Ill. App. 3d 758, 530 N.E.2d 268 (3d Dist. 1988).

43. *Id.* at 759-60, 530 N.E.2d at 269.

44. *Id.* at 761-62, 530 N.E.2d at 270.

45. 172 Ill. App. 3d 297, 526 N.E.2d 557 (1st Dist. 1988).

duty to use ordinary care. The court rejected this argument and ruled that plaintiff should have exercised ordinary care because his knowledge of the malfunction put him on notice that the signals were not reliable.⁴⁶ The court affirmed the judgment dismissing plaintiff's complaint.⁴⁷

At issue in *Novander v. City of Morris*,⁴⁸ was whether potholes had caused a traffic accident. Plaintiff was injured when his motorcycle was struck by a truck that swerved into plaintiff's lane to avoid several large potholes.⁴⁹ Plaintiff settled with the truck driver, but he proceeded against the city and others on the theory that it was foreseeable that a driver might alter the path of his vehicle to avoid large potholes.⁵⁰ The trial court dismissed these counts and plaintiff appealed.⁵¹ The appellate court held that the potholes, at most, furnished a condition by which plaintiff's injuries were made possible.⁵² Consequently, the court refused to hold the city liable for the remote risk that the defendant, to avoid a pothole, would drive into oncoming traffic; therefore, it affirmed the trial court's dismissal of the complaint.⁵³

Two related cases decided during the *Survey* period are also of interest. In *Mason v. City of Chicago*,⁵⁴ plaintiff tripped in a hole outside a crosswalk. The court failed to find the city liable because plaintiff had used a public street as a walkway. Similarly, in *Householder v. City of Bunker Hill*,⁵⁵ the court held that the city did not have a duty to a plaintiff who fell in a manhole while pushing a car in the street; the city's liability was limited to use of streets as streets, not walkways.

Apparently, during the *Survey* year, courts have recognized that a condition may be relevant to an injury without constituting the cause of the injury. The railroad crossing case is noteworthy because for years, the question of the safety at a crossing and the due care of the motorist have been for the jury to decide.⁵⁶

46. *Id.* at 299, 526 N.E.2d at 558.

47. *Id.* at 303, 526 N.E.2d at 561.

48. 181 Ill. App. 3d 1076, 537 N.E.2d 1146 (3d Dist. 1989).

49. *Id.* at 1077-78, 537 N.E.2d at 1147.

50. *Id.* at 1078, 537 N.E.2d at 1147.

51. *Id.* at 1077, 537 N.E.2d at 1147.

52. *Id.* at 1078-80, 537 N.E.2d at 1147-48.

53. *Id.* at 1080, 537 N.E.2d at 1149.

54. 173 Ill. App. 3d 330, 527 N.E.2d 572 (1st Dist.), *appeal denied*, 123 Ill. 2d 559, 535 N.E.2d 403 (1988).

55. 172 Ill. App. 3d 1037, 527 N.E.2d 528 (4th Dist. 1988).

56. See J. MIRZA AND L. APPLEMAN, § 5:2 ILLINOIS TORT LAW AND PRACTICE 138-39 (1973).

III. MEDICAL MALPRACTICE

A. Affidavit Requirement Struck Down

The Illinois Appellate Court for the First District, in *DeLuna v. St. Elizabeth's Hospital*,⁵⁷ held that the statutory requirement for a health care professional's certificate of merit on a medical malpractice claim was an invalid delegation of judicial power. That statute provided that in any medical malpractice action, plaintiff must attach to the complaint an affidavit stating that a health professional had determined there to be a "reasonable and meritorious" cause for filing the action.⁵⁸ Plaintiff brought a professional negligence action for damages against defendants but failed to attach the requisite declarations.⁵⁹ The trial court granted defendant's motion to dismiss with prejudice.⁶⁰

On the basis that the legislature overstepped the bounds of constitutional authority, the appellate court held the affidavit requirement unconstitutional.⁶¹ Upholding this statute would have meant that members of a private professional group could hold the keys to the courthouse. This result would have been intolerable because physicians are untrained in the law, not appointed through judicial selection methods, not subject to judicial supervisory authority, and not bound by precedent. Health care professionals could have stonewalled the entire malpractice process.⁶²

B. Referring Physician's Liability

In *Reed v. Bascon*,⁶³ the Illinois Supreme Court held that summary judgment was appropriate in favor of a referring or attending

57. 184 Ill. App. 3d 802, 540 N.E.2d 847 (1st Dist.), *appeal allowed*, 127 Ill. 2d 614, 545 N.E.2d 107 (1989). *DeLuna* is discussed at length in Jacobs and Duban, *Civil Procedure*, 21 LOY. CHI. L.J. 241, 268 (1990).

58. 184 Ill. App. 3d at 803, 540 N.E.2d at 848 (citing ILL. REV. STAT. ch. 110, para. 2-622 (1985)).

59. *Id.*

60. *Id.* Plaintiff's appeal was stayed pending the decision of the same issue in a supreme court case. *McCastle v. Sheinkop*, 121 Ill. 2d 188, 520 N.E.2d 293 (1987). When *McCastle* was decided on different grounds, an appeal went forward. *DeLuna*, 184 Ill. App. 3d at 803, 540 N.E.2d at 848.

61. *Id.* at 810, 540 N.E.2d at 852. The Illinois Supreme Court granted leave to appeal. *DeLuna v. St. Elizabeth's Hosp.*, 127 Ill. 2d 614, 545 N.E.2d 107 (1989). As of publication, the decision is pending.

62. 184 Ill. App. 3d at 810, 540 N.E.2d at 852. The appellate court cited for authority *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). In *Ybarra*, the court held that the refusal to testify by anyone present at an operation gone wrong mandated the application of *res ipsa loquitur*. Thus, under *Ybarra* every professional in attendance is potentially liable.

63. 124 Ill. 2d 386, 530 N.E.2d 417 (1988).

physician when nothing demonstrated agency, concert of action, or negligence in that physician's referral.⁶⁴ In *Reed*, plaintiff sought defendant Bascon's care for rectal pain and bleeding.⁶⁵ Bascon, a general practitioner, referred plaintiff to Dr. Botuyan, a board-certified surgeon. Dr. Botuyan performed an operation using an outmoded technique. Complications arose and plaintiff sued the surgeon, the hospital, and Dr. Bascon.⁶⁶ Dr. Bascon, however, had not been present at the operation. The trial court granted Bascon's motion for summary judgment on the grounds that an attending physician could not be strictly or vicariously liable for the surgical procedures of a specialist.⁶⁷ There had been no allegation or proof of negligence by Dr. Bascon.⁶⁸ The appellate court reversed and found that a genuine issue of material fact existed concerning Bascon's control, concerted action and negligent referral.⁶⁹

The supreme court found negligence only in Dr. Botuyan's surgery and affirmed the trial court's grant of Bascon's motion for summary judgment.⁷⁰ The court held that allegations of the surgeon's outmoded procedure were insufficient to create an issue of negligent referral.⁷¹ The court thus ruled that negligent referral cannot be found unless some control over the course of treatment, agency or concert of action, or negligence in the referral is present in the case.⁷² Plaintiff's pleadings, affidavits and depositions failed to reveal any of these prerequisites to negligent referral.⁷³ Furthermore, a conclusion of concerted action was not warranted because Dr. Bascon merely continued to see the hospitalized plaintiff and to charge for those visits.⁷⁴

Because of the increased use of specialists to perform specific

64. *Id.* at 395, 530 N.E.2d at 421.

65. *Id.* at 388, 530 N.E.2d at 418.

66. *Id.* at 389, 530 N.E.2d at 418.

67. *Id.* Defendant relied on *Beckwith v. Boynton*, 235 Ill. App. 469 (1924), to support the proposition that an attending physician can be held vicariously or jointly liable for a surgeon's malpractice. *Beckwith* involved a malpractice action against several physicians because of an alleged injury to the plaintiff's vertebrae during a tonsillectomy. The appellate court held that, absent a question of partnership or of employment between the various defendants, and without any joint act of negligence committed, the family physician, who received no fee for the operation but merely called up the surgeons and arranged the hospital date, could not be held jointly liable. *Id.* at 485-86.

68. 124 Ill. 2d at 390, 530 N.E.2d at 418.

69. *Id.* at 390, 530 N.E.2d at 419.

70. *Id.* at 393, 530 N.E.2d at 420.

71. *Id.* at 394-95, 530 N.E.2d at 420-421. Plaintiff had waived the agency issue on appeal. *Id.*

72. *Id.* at 395-96, 530 N.E.2d at 421.

73. *Id.* at 396, 530 N.E.2d at 421.

74. *Id.* at 400, 530 N.E.2d at 423.

medical procedures, *Reed* is significant. The case demonstrates that although a physician may be liable for negligent acts that occur under his supervision or direction, the physician cannot be held liable for acts committed by a physician to whom the patient is referred.

C. *Good Samaritan Statute*⁷⁵

The Illinois Appellate Court for the First District applied the "Good Samaritan Statute," in *Johnson v. Matviuw*,⁷⁶ to protect a staff physician from liability for treating a pregnant woman. In *Johnson*, the decedent suffered cardiac arrest caused by a pulmonary embolism.⁷⁷ She had been hospitalized several days earlier by her physician, Dr. Han, on complaints of numbness and pain in her leg, hyperventilation and chest pain. When the decedent lapsed into cardiac arrest, nurses summoned defendant Dr. Matviuw, who was attending to one of his patients down the hall. Dr. Matviuw attempted resuscitation for seventeen minutes, at which time Dr. Han arrived and took over. Dr. Han worked on the decedent for thirty minutes but to no avail.

Decedent's husband sued both doctors under a negligence theory for failure to take steps necessary to preserve the life of the fetus.⁷⁸ Dr. Matviuw filed a summary judgment motion asserting no liability under the protection of the Good Samaritan Statute. He argued that there was no issue of material fact because no expert testimony or evidence of negligence had been presented by plaintiff.⁷⁹ The trial court granted the doctor's motion.⁸⁰

On appeal, plaintiff argued that the statute was inapplicable because defendant had a preexisting duty as a staff member to render medical care to decedent.⁸¹ Plaintiff further argued that defendant's services were billed by the hospital, and the Act applies only to emergencies outside the hospital.⁸² The appellate court found no preexisting duty because staff members in that hospital apparently were not required, but merely permitted, to respond to emer-

75. ILL. REV. STAT. ch. 111, para. 4400-30 (1987). The statute exempts from civil liability a health care professional who renders emergency care without regard to payment.

76. 176 Ill. App. 3d 907, 531 N.E.2d 970 (1st Dist. 1988), *appeal denied*, 125 Ill. 2d 566, 537 N.E.2d 810 (1989).

77. *Id.* at 910-11, 531 N.E.2d at 972.

78. *Id.* at 911, 531 N.E.2d at 972.

79. *Id.*

80. *Id.* at 911-12, 531 N.E.2d at 972-973.

81. *Id.* at 916, 531 N.E.2d at 976.

82. *Id.*

gency calls.⁸³ The hospital bill in question was found to be merely for supplies and drugs used during the emergency, not for defendant's professional services, which might have implied a higher duty.⁸⁴ The court found nothing in the statutory language to indicate that this emergency within a hospital was excluded from protection.⁸⁵ The court held that the Good Samaritan protection applies to emergencies occurring in a hospital provided the statute's conditions are met.⁸⁶

D. Duty to Observers

The appellate court in *O'Hara v. Holy Cross Hospital*⁸⁷ recognized a cause of action for injuries a mother sustained from fainting at the sight of a surgical procedure on her injured son.⁸⁸ Plaintiff claimed the hospital acted negligently because it allowed her to remain in the emergency room during her son's treatment.⁸⁹ The trial court found that defendant did not owe a duty to plaintiff and granted defendant's motion for summary judgment.⁹⁰

The appellate court reversed the summary judgment, concluding that there was a genuine issue of material fact because plaintiff's presence during the procedure was in accord with hospital policy.⁹¹ Plaintiff fainted when she observed the doctor pierce her son's face with a suturing needle at the moment she was responding to the same doctor's instructions to wipe her son's mouth.⁹² The court held that such facts created a question of duty.⁹³

83. *Id.* at 917, 531 N.E.2d at 976.

84. *Id.*

85. *Id.*

86. *Id.* at 918, 531 N.E.2d at 977.

87. 185 Ill. App. 3d 694, 542 N.E.2d 11 (1st Dist.), *appeal granted*, 545 N.E.2d 115 (1989).

88. *Id.* at 699-700, 542 N.E.2d at 14. The child was hit in the face by a golf club. *Id.* at 696, 542 N.E.2d at 12.

89. *Id.* at 696, 542 N.E.2d at 12. Plaintiff also alleged that the hospital so understaffed its emergency room that the defendant asked plaintiff to wipe Novocaine dripping from her son's mouth when the child's skull was being stitched. *Id.* at 696-97, 542 N.E.2d at 12.

90. *Id.* at 698-99, 542 N.E.2d at 13.

91. *Id.* at 699, 542 N.E.2d at 14.

92. *Id.*

93. *Id.* at 699-700, 542 N.E.2d at 14. The court further ruled that a dispute existed as to whether the hospital, as a landowner, was required to warn plaintiff, as an invitee, of an "open and obvious danger." The leading case discussing the "open and obvious danger" standard is *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976).

IV. FETAL TORTS

A. *Fetal Recovery From Mother*

Despite the erosion of the parent-child tort immunity doctrine in many states,⁹⁴ Illinois has barred actions in tort by a child against its parent. During the *Survey* year, practitioners focused much attention on *Stallman v. Youngquist*,⁹⁵ a case in which the Illinois Supreme Court revisited this issue.

In *Stallman*, a child, by her father and next friend, sued her mother for injuries arising out of an automobile accident.⁹⁶ The trial court granted summary judgment for defendant and appeals followed.⁹⁷ In the supreme court, there were two issues: whether the parent-child tort immunity doctrine in Illinois was still viable and whether a child could recover from a parent for unintended prenatal injuries. The court decided only the latter issue, holding that a child subsequently born had no cause of action against its mother for the unintentional infliction of prenatal injuries.⁹⁸

The court rejected the belief that a woman should subordinate her right to control her life when she becomes pregnant. Such a view would be unacceptable in this state⁹⁹ because it would infringe the mother's right to privacy and bodily autonomy.¹⁰⁰ Furthermore, the legal duty to guarantee the mental and physical health of

94. See Annotation, 6 A.L.R. 4th 1066 (1981); Annotation, 41 A.L.R. 3d 904, 964 (1972). The best-known case abrogating the parent-child tort immunity doctrine is *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969), in which the court held that an injured parent could sue her son for injuring her in a car accident.

95. 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

96. *Id.* at 268, 531 N.E.2d at 355. The mother was five months pregnant at the time of the accident. *Id.*

97. *Id.* The case appeared before the circuit court and the appellate court twice. In the first appellate court opinion, the parent-child tort immunity doctrine was not applied to the case on the ground that the right of the child to be compensated outweighed public policy considerations against the cause of action. *Stallman v. Youngquist*, 129 Ill. App. 3d 859, 473 N.E.2d 400 (1st Dist. 1984) (*Stallman I*). On remand, the circuit court granted summary judgment. On a second appeal, the appellate court again reversed and remanded, ordering a trial on the merits. *Stallman v. Youngquist*, 152 Ill. App. 3d 683, 504 N.E.2d 920 (1st Dist. 1987) (*Stallman II*). Defendant then appealed to the supreme court.

98. 125 Ill. 2d at 268, 531 N.E.2d at 355. The supreme court found it unnecessary to reach the issue of the parental immunity doctrine. *Id.* at 271, 531 N.E.2d at 356. Regardless, subsequent cases have used *Stallman* as authority that parental tort immunity remains the law in Illinois. See, e.g., *Setinc v. Masny*, 185 Ill. App. 3d 15, 19, 540 N.E.2d 937, 940 (3d Dist. 1989) (common law parental immunity barred causes of action against a father whose son was killed by exploding model airplane fuel stored in garage.)

99. 125 Ill. 2d at 276, 531 N.E.2d at 359.

100. *Id.* at 278, 531 N.E.2d at 360.

another has never been recognized in the law, and to do so in this situation would make mother and child "legal adversaries from the moment of conception until birth."¹⁰¹

Although the court declined to clarify its position with regard to the parent-child tort immunity doctrine, its rationale for rejecting a new tort was clear. Duties carry with them judicial scrutiny; the court could not discern an objective standard by which a jury could determine whether a pregnant woman did all that was necessary to fulfill her duty.¹⁰² The court feared that prejudicial and stereotypical views concerning women's reproductive abilities would interfere with a jury's determination.¹⁰³ In addition, the court identified many problems inherent in creating such a cause of action.¹⁰⁴ Such far-reaching public policy issues, coupled with the unprecedented intrusion into mothers' autonomy, impelled the court to hold that if pregnant women are to owe a legal duty to their fetuses, the legislature will have to create the duty after thorough study, investigation, and debate.¹⁰⁵

B. Wrongful Death of Aborted Fetus

In *Light v. Proctor Community Hospital*,¹⁰⁶ plaintiff underwent a thyroid scan, during the course of which she learned that she was pregnant.¹⁰⁷ Consequently, on her physician's advice, she terminated the pregnancy.¹⁰⁸ Plaintiff filed suit alleging negligence in the doctor's failure to warn her not to undergo the scan if she were pregnant.¹⁰⁹ Plaintiff amended the complaint premising the action upon the fetus' wrongful death.¹¹⁰ The trial court subsequently granted defendants' motions to dismiss the wrongful death counts.¹¹¹

On appeal, plaintiff argued that defendants' negligent conduct proximately caused her fetus' death because her decision to abort it

101. *Id.* at 276, 531 N.E.2d at 359.

102. *Id.* at 277-78, 531 N.E.2d at 360.

103. *Id.* at 278, 531 N.E.2d at 360.

104. The court was concerned with, for example, whether the standard of care should vary according to whether the pregnancy was planned or unplanned, whether the standard varies with socio-economic condition, and whether injuries occurring before knowledge of pregnancy would be actionable. *Id.* at 279, 531 N.E.2d at 360.

105. *Id.* at 279-80, 531 N.E.2d at 361.

106. 182 Ill. App. 3d 563, 538 N.E.2d 828 (3d. Dist.), *appeal denied*, 127 Ill. 2d 619, 545 N.E.2d 113 (1989).

107. *Id.* at 564-66, 538 N.E.2d at 829-30.

108. *Id.*

109. *Id.* at 565, 538 N.E.2d at 829.

110. *Id.*

111. *Id.*

was a foreseeable result of defendants' conduct.¹¹² A provision in the Wrongful Death Act prohibits a cause of action for death caused by an abortion.¹¹³ Plaintiff argued that the provision did not apply to her case because it was intended to protect only those who performed abortions, not those whose negligent acts caused an abortion to be performed.¹¹⁴ The court rejected plaintiff's theory, reasoning that there could be no action under the Act because the fetus was not aborted during the scanning procedure, rather it terminated as a result of a subsequent consensual and legal abortion.¹¹⁵ The court held that the statutory language was unambiguous and affirmed the trial court's dismissal of the wrongful death counts.¹¹⁶

V. EMOTIONAL DISTRESS

A. *Scheming to Defraud*

Since the Illinois Supreme Court's *Knierim v. Izzo*¹¹⁷ decision, which recognized the tort of intentional infliction of emotional distress, the court has continuously applied the following objective standard: would the conduct cause emotional distress to a reasonable person under the same circumstances?¹¹⁸

In *McGrath v. Fahey*,¹¹⁹ the supreme court upheld a cardiac patient's cause of action for the intentional infliction of emotional distress against financiers who allegedly schemed to defraud him.¹²⁰ Plaintiff contended that a bank schemed to pressure him into surrendering his interest in certain mortgages by wrongfully refusing to renew unrelated certificates of deposit worth over one million dollars.¹²¹ While disputing the bank's refusal to renew the certificates of deposit, plaintiff suffered a massive heart attack that necessitated open-heart surgery. Aware of plaintiff's condition, the

112. *Id.*

113. ILL. REV. STAT. ch. 70, para. 2.2 (1987).

114. 182 Ill. App. 3d at 565, 538 N.E.2d at 829.

115. *Id.* at 566, 538 N.E.2d at 830.

116. *Id.*

117. 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

118. The court applies three factors to determine whether the tort has been committed. First, the conduct must be extreme. Second, the perpetrator must intend severe emotional distress, or know that there is a high probability it will result. Finally, the emotional distress that the conduct causes must be so severe that no reasonable person could be expected to endure it. *See* Public Fin. Corp. v. Davis, 66 Ill. 2d 85, 360 N.E.2d 765 (1976).

119. 126 Ill. 2d 78, 533 N.E.2d 806 (1988).

120. *Id.* at 93, 533 N.E.2d at 812.

121. *Id.* at 81-83, 533 N.E.2d at 807-08.

bank continued to dishonor drafts on plaintiff's accounts and made persistent phone calls to plaintiff at his home. The bank knowingly placed additional stress upon plaintiff, by suing him and making a set-off against his accounts.¹²²

The court explained that the degree of power the wrongdoer possesses over an individual underscores the action's outrageousness.¹²³ A defendant's awareness of plaintiff's susceptibility also pertains to whether the conduct is outrageous.¹²⁴ Because extortion was at the heart of defendant's action, and because this conduct continued with knowledge of plaintiff's disease, the court concluded that a jury could reasonably find defendant's conduct outrageous and intentional.

One may discern from *McGrath* that a court will be more likely to pronounce certain conduct outrageous if defendant's control over plaintiff is combined with plaintiff's vulnerability or susceptibility. The *McGrath* facts were particularly egregious. Defendants, without any legal justification, used a freeze on the unrelated certificate of deposit funds to coerce plaintiff into releasing mortgages that were plaintiff's only means of recovering some payment for realty he had surrendered. Defendant threatened to tie up the plaintiff's funds for five years and to ruin his medical practice.¹²⁵

B. Following and Harassing

The Illinois Appellate Court for the Third District held in *Van Duyn v. Smith*¹²⁶ that harassing an abortion clinic director created sufficient grounds for a complaint of intentional infliction of emotional distress.¹²⁷ Over a two-year period, defendant followed plaintiff, picketed plaintiff's home, interfered with plaintiff's ingress and egress from the airport, confronted plaintiff numerous times, and distributed a "Wanted Poster" with plaintiff's face on it.¹²⁸ Plaintiff filed her complaint on the basis of intentional infliction of severe emotional distress, libel/negligence, libel/malice, and invasion of privacy.¹²⁹ The trial court dismissed the complaint for

122. *Id.* at 85-86, 533 N.E.2d at 809.

123. *Id.* at 86-87, 533 N.E.2d at 809-10 (citing RESTATEMENT (SECOND) OF TORTS § 46 comment e, at 74 (1965)).

124. *Id.* at 90, 533 N.E.2d at 811.

125. *Id.* at 91-92, 533 N.E.2d at 812.

126. 173 Ill. App. 3d 523, 527 N.E.2d 1005 (3d Dist. 1988), *appeal denied*, 124 Ill. 2d 562, 535 N.E.2d 922 (1989), *cert. denied*, 109 S. Ct. 3217 (1989).

127. *Id.* at 534, 527 N.E.2d at 1011-12.

128. *Id.* at 526, 527 N.E.2d at 1007.

129. *Id.* at 526, 527 N.E.2d at 1006.

failure to state a cause of action and plaintiff appealed.¹³⁰ Finding defendant's behavior "beyond the bounds of decency,"¹³¹ the appellate court held that a jury could find defendant's conduct sufficiently outrageous, and remanded for further action.¹³²

VI. PRIVACY TORTS

In *Mucklow v. John Marshall Law School*,¹³³ the Illinois Appellate Court for the First District held that a law professor's interception of a student's confidential record did not support the tort of invasion of privacy.¹³⁴ Plaintiff claimed that his professor obtained the student's critical evaluation of him and, through handwriting analysis, identified plaintiff and retaliated by giving him a "D" grade.¹³⁵ The student filed suit alleging in part an invasion of privacy.¹³⁶ The trial court granted judgment on the pleadings and sanctions in defendants' favor.¹³⁷

The student argued, on appeal, that defendant law school acted in bad faith and in an arbitrary and capricious manner.¹³⁸ The court ruled that no precedent existed to support a finding of liability for a school's "mistreatment" of dispensing an unsatisfactory grade.¹³⁹ Furthermore, the court stated that to establish a count for invasion of privacy, plaintiff must show an unauthorized intrusion into a private matter which causes anguish and suffering and that a reasonable person would consider offensive.¹⁴⁰ The court found that the professor was authorized to look at the records and that any distress suffered by the student was not severe enough to warrant recovery.¹⁴¹

130. *Id.*

131. *Id.* at 534, 527 N.E.2d at 1012. That the plaintiff required hospital treatment for her emotional well-being bolstered the merits of the cause. *Id.* at 534, 527 N.E.2d at 1011.

132. *Id.* at 541, 527 N.E.2d at 1016. The court rejected defendant's argument that a showing of actual malice was required to proceed on an emotional distress theory. *Id.* at 531-33, 527 N.E.2d at 1009-11. The court cited *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) for the proposition that actual malice is required only for public figures.

133. 176 Ill. App. 3d 886, 531 N.E.2d 941 (1st Dist. 1988).

134. *Id.* at 894, 531 N.E.2d at 946.

135. *Id.* at 889, 531 N.E.2d at 943.

136. *Id.*

137. *Id.* at 890, 531 N.E.2d at 944. The professor died, so the action proceeded against the law school. *Id.* at 889, 531 N.E.2d at 943.

138. *Id.* at 891, 531 N.E.2d at 944-45.

139. *Id.* at 892, 531 N.E.2d at 945. The court rejected plaintiff's argument for a contract or breach of confidence cause of action. *Id.* at 892-93, 531 N.E.2d at 945-46.

140. *Id.* at 894, 531 N.E.2d at 946 (citing *Melvin v. Burling*, 141 Ill. App. 3d 786, 490 N.E.2d 1011 (3d Dist. 1986)).

141. *Id.* at 895, 531 N.E.2d at 947. The appellate court affirmed the trial court's

VII. STATUTORY LIABILITY

A. *Structural Work Act*

During the *Survey* period, the Illinois appellate courts repeatedly interpreted the Structural Work Act (the "Act").¹⁴² The majority of cases, discussed below, attempted to define the statutory term "structure." Other cases under the Act dealt with control over the work, causation and damages.

1. What is a "Structure" or "Mechanical Device?"

In *Hughes v. Taylor Electric Co.*,¹⁴³ the Appellate Court for the First District ruled that a tunnel¹⁴⁴ was a structure within the Act's meaning and that completing it was a protected activity.¹⁴⁵ The plaintiff was an electrician working on the project.¹⁴⁶ Unable to find a ladder, he encountered difficulty reaching an elevated electrical switch. While stretching to reach the de-energized switch, his wrench slipped and touched a live switch, and plaintiff dropped to the floor to free himself from the current.

Plaintiff's complaint alleged that defendants' failure to provide adequate equipment violated the Act and constituted negligence.¹⁴⁷ The trial court granted defendants' motion for summary judgment on the grounds that failing to provide a ladder was not a proximate cause of plaintiff's injury.¹⁴⁸

Defendants asserted on appeal that plaintiff was not working on a "structure" at the time of the accident.¹⁴⁹ They argued that plaintiff merely was connecting an electrical cable to a tunnel-boring machine.¹⁵⁰ The court stated that the excavation of a tunnel is indisputably the construction of a "structure" within the Act's meaning.¹⁵¹ The court reasoned that the hookup of a cement pump

dismissal but reversed the judgment against plaintiff for sanctions. *Id.* at 897, 531 N.E.2d at 948.

142. ILL. REV. STAT. ch. 48, para. 60 (1987). The Structural Work Act provides a remedy to persons injured while working upon the erection, repairing, alteration, removal, or painting of structures of many types and characters.

143. 184 Ill. App. 3d 454, 540 N.E.2d 408 (1st Dist. 1989).

144. The tunnel was part of the so-called "Deep Tunnel" project designed to alleviate flooding in the northern part of Chicago and several collar counties.

145. 184 Ill. App. 3d at 457, 540 N.E.2d at 410.

146. *Id.* at 455, 540 N.E.2d at 409.

147. *Id.* at 456, 540 N.E.2d at 410.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 456-57, 540 N.E.2d at 410 (citing *Simmons v. Union Elec. Co.*, 121 Ill. App. 3d 743, 460 N.E.2d 28 (5th Dist.), *aff'd*, 104 Ill. 2d 444, 473 N.E.2d 946 (1984)).

was essential to the completion of the tunnel.¹⁵² Such an activity pertained to and significantly furthered an ultrahazardous activity in connection with a structure.¹⁵³

In *Wellston v. Levy Organization*,¹⁵⁴ six vertically-stacked, unsecured metal fire doors fell onto plaintiff and seriously injured him.¹⁵⁵ The appellate court considered whether the Act included the partially-completed floor upon which plaintiff stood at the time of the accident, as a "structure."¹⁵⁶ Because the partially-completed floor was used as a floor or pathway, the court refused to consider it a "structure" under the Act.

The court further concluded, however, that the Act did apply to a failure to provide a stay or support for falling objects. The Act, therefore, covered the fire doors at issue in the case.¹⁵⁷ The court rejected defendant's additional argument that the Act did not cover the injured plaintiff because he was not using or moving the materials that fell upon him.¹⁵⁸ According to the court, merely walking past a support that is inadequate for its load is a highly dangerous construction activity covered by the Act.¹⁵⁹ The appellate court thus reversed summary judgment and remanded the case for trial.¹⁶⁰

In another case, a front-end loader was held to be a "mechanical contrivance" within the Act's protection even though it supported

152. *Id.* at 457, 540 N.E.2d at 411.

153. *Id.* The court stated that whether the plaintiff's ultrahazardous structural activity proximately caused his injuries was a jury question. The court thus reversed the judgment of the circuit court and remanded the case. *Id.* at 458, 540 N.E.2d at 411.

154. 175 Ill. App. 3d 301, 530 N.E.2d 60 (2nd Dist. 1988), *appeal denied*, 124 Ill. 2d 563, 535 N.E.2d 922 (1989).

155. *Id.* at 303, 530 N.E.2d at 61-62. Plaintiff appealed the trial court's grant of summary judgment in defendants' favor. *Id.* at 303, 530 N.E.2d at 61.

156. *Id.* at 304, 530 N.E.2d at 62. During the *Survey* period, courts continued to exclude from the Act's coverage structures or supports used merely as floors or pathways. See e.g., *Gannon v. Commonwealth Edison*, 182 Ill. App. 3d 228, 233-34, 537 N.E.2d 994, 998 (1st Dist. 1989) (slippery surface a completed floor, not a support).

157. 175 Ill. App. 3d at 305-08, 530 N.E.2d at 62-65. The court rejected the reasoning of *Matthews v. Commonwealth Edison*, 90 Ill. App. 3d 1024, 414 N.E.2d 147 (1st Dist. 1981), a case that limited the categories of persons protected to those actually supported. The court refused to "judicially erase" terms the legislature included within the Act. Further, *Wellston* distinguished *Delgatto v. Brandon Assocs.*, 131 Ill. 2d 183, 545 N.E.2d 689 (1989), in which the court dealt only tangentially with whether devices designed to support tools and materials are covered by the Act. In *Delgatto*, the court held that when falling duct work injured plaintiffs, which they themselves had stood on end, the defendant had no duty to provide a stay or support for the duct work. *Id.* at 194, 545 N.E.2d at 694.

158. 175 Ill. App. 3d at 308-09, 530 N.E.2d at 65.

159. *Id.*

160. *Id.* at 309, 530 N.E.2d at 66.

materials, not persons, at the time of the accident.¹⁶¹ Plaintiff, working as an employee on defendant's storm sewer project, was struck by a front-end loader used to move a pipe.¹⁶² Defendant asserted that the loader that caused the injury was not a device within the Act's contemplation.¹⁶³ The trial court agreed and granted summary judgment for defendants.¹⁶⁴

The appellate court rejected a narrow interpretation of the Act that would limit its application to supports for workers only.¹⁶⁵ Instead, the court held that the Act was intended to prevent injuries caused by unsafe support devices for workers *or* materials.¹⁶⁶ The court reasoned that the device's identity alone cannot determine whether the Act covers it.¹⁶⁷ Rather, the use and function of the device, in the circumstances shown, is decisive.¹⁶⁸ The Act covered this loader because it was being used as a support for construction materials at the time of injury.¹⁶⁹

These cases do not suggest that the Act covers *every* type of structure. In *Burks v. Matrix Vision of Wilmette, Inc.*,¹⁷⁰ the court rejected plaintiff's argument that for the Act's purposes a system of cables and poles should be considered a structure because such systems are large, permanent in nature, and involve overhead erection and suspension of materials.¹⁷¹

161. *Lafata v. Village of Lisle*, 185 Ill. App. 3d 203, 541 N.E.2d 210 (2d Dist. 1989). Plaintiff appealed the trial court's ruling that the loader was not a mechanical contrivance within the Act's meaning. *Id.* at 204, 541 N.E.2d at 210.

162. *Id.* at 204-05, 541 N.E.2d at 211.

163. *Id.* at 206, 541 N.E.2d at 212.

164. *Id.*

165. *Id.* at 206-07, 541 N.E.2d at 212. The court rejected *Matthews v. Commonwealth Edison*, 90 Ill. App. 3d 1024, 414 N.E.2d 147 (1st Dist. 1980), and *Carlson v. Moline Bd. of Educ.*, 124 Ill. App. 3d 967, 464 N.E.2d 1239 (3d Dist. 1984), which held that mechanical devices generally refer to contrivances on which a worker is dependent for support. This interpretation seems flawed. "Failure" is not really needed because a plaintiff could slip on a wet scaffold, or defendant could fail to provide any support at all.

166. 185 Ill. App. 3d at 207, 541 N.E.2d at 212. *See also* *Prange v. Kamar Constr. Corp.*, 109 Ill. App. 3d 1125, 441 N.E.2d 889 (4th Dist. 1982) (Act applied to a forklift supporting materials at the time materials fell on plaintiff); *Rayfield v. Homart Dev. Co.*, 100 Ill. App. 3d 620, 427 N.E.2d 193 (1st Dist. 1981) (tractor with a front-bucket used to lift materials is a mechanical contrivance within the Act's purview).

167. 184 Ill. App. 3d at 207, 541 N.E.2d at 213.

168. *Id.* (citing *Urman v. Walter*, 101 Ill. App. 3d 1085, 428 N.E.2d 1051 (1st Dist. 1981)).

169. *Id.*

170. 174 Ill. App. 3d 1086, 529 N.E.2d 642 (1st Dist.), *appeal denied*, 123 Ill. 2d 556, 535 N.E.2d 399 (1988).

171. *Id.* at 1088, 529 N.E.2d at 643.

Additionally, in *Heil v. Superior Oil Co.*,¹⁷² plaintiff was a derrick hand who unloaded surface oil pipes from a flatbed trailer by rolling them down boards placed up to the bed of the truck.¹⁷³ A board broke and a pipe fell on and injured plaintiff. The trial court granted defendant's motion for summary judgment, ruling that there was no protected structure or structural activity.¹⁷⁴ Affirming, the appellate court stated that an oil well is not a "structure" because it is a single hole in the ground, not an interconnected system of pipes.¹⁷⁵ Therefore, the Act does not protect the task of unloading oil well pipes.¹⁷⁶

2. Who is in Charge of the Work?

The Act applies to any owner, contractor, subcontractor, or other person "having charge of" the work. A court must find a direct connection with the work before it can impose liability.¹⁷⁷ The third district's *Egizio v. Majetich*¹⁷⁸ decision is significant because the court determined that public policy argued against placing liability on homeowners who contract for home improvements. In *Egizio*, a part-time handyman fell from a ladder while helping defendants remodel a house.¹⁷⁹ Plaintiff had been hired under an oral contract which allowed him to set his own time, keep track of his own hours, and determine for himself the manner in which he would perform any task.¹⁸⁰ The court looked to the totality of circumstances to determine if the homeowners were in charge of the work.¹⁸¹ The court found that plaintiff actually directed all the remodelling activity and that the homeowners only acted as "go-phers."¹⁸² Defendants never exercised any authority to halt the

172. 182 Ill. App. 3d 238, 242, 537 N.E.2d 1045, 1048 (1st Dist.), *appeal denied*, 127 Ill. 2d 616, 545 N.E.2d 110 (1989).

173. *Id.* at 239-40, 537 N.E.2d at 1046. Surface oil pipes act as a liner for the top portion of an oil well hole. *Id.* at 241, 537 N.E.2d at 1047.

174. *Id.* at 240, 537 N.E.2d at 1046.

175. *Id.* at 241-42, 537 N.E.2d at 1047-48 (citing *Bishop v. Mitchell Group, Inc.*, 163 Ill. App. 3d 275, 516 N.E.2d 969 (5th Dist. 1987)).

176. *Id.* at 242, 537 N.E.2d at 1048.

177. *See Gannon v. Chicago M.S.P. & P. Co.*, 22 Ill. 2d 305, 175 N.E.2d 785 (1961).

178. 172 Ill. App. 3d 758, 527 N.E.2d 13 (3d Dist. 1988).

179. *Id.* at 759-760, 527 N.E.2d at 14.

180. *Id.* at 760, 527 N.E.2d at 14. The trial court granted summary judgment for the defendant. *Id.* at 761, 527 N.E.2d at 15.

181. *Id.* at 761, 527 N.E.2d at 15. The court found the following factors relevant: the right to supervise, degree of participation, responsibility for safety precautions, right to stop the work, ownership of equipment, familiarity with construction custom and practice, and ability to alleviate improper habits or equipment deficiencies. *Id.*

182. *Id.* at 762, 527 N.E.2d at 15.

work.¹⁸³

3. Causation and Damages

To recover under the Act, the injury or death sustained must have been caused by the defendant's wilful violation of, or failure to adhere to, the Act. Consequently, an injury unrelated to the condition or placement of a support does not come within its purview.

In *Overbeck v. Jon Construction*,¹⁸⁴ the appellate court held that because an electrical explosion caused plaintiff's injuries, the Act did not apply.¹⁸⁵ In *Overbeck*, plaintiff was seriously injured when he could not prevent a "fish tape"¹⁸⁶ from contacting an electrically live conductor in an electrical panel.¹⁸⁷ The resultant explosion knocked plaintiff off his ladder. The ladder, however, did not fall. Consequently, the trial court granted defendant's motion for summary judgment.¹⁸⁸

The appellate court noted that the ladder upon which plaintiff stood was not defective.¹⁸⁹ According to the court, placement makes a ladder defective only when the placement creates one of the hazards protected by the Act, such as falling.¹⁹⁰ The real hazard that caused the explosion was negligent pushing of fish tape.¹⁹¹ The placement of the ladder, which required plaintiff to squeeze through a doorway, just reduced the time he had to catch the fish tape.¹⁹² Accordingly, the court held that such an electrocution and explosion were not protected.¹⁹³

In *Pickett v. Yellow Cab*,¹⁹⁴ decedent died as a result of injuries

183. *Id.*

184. 184 Ill. App. 3d 918, 540 N.E.2d 969 (1st Dist.), *appeal denied*, 127 Ill. 2d 621, 545 N.E.2d 115 (1989).

185. *Id.* at 925, 540 N.E.2d at 973. During the *Survey* period a similar case afforded no protection under the Act in which decedent was electrocuted when a piece of siding he was installing came in contact with overhead wires. *Barrera v. Windy City Exteriors*, 182 Ill. App. 3d 936, 538 N.E.2d 773 (1st Dist.), *appeal denied*, 127 Ill. 2d 611, 545 N.E.2d 104 (1989).

186. "Fish tape" is a flexible metal tape used to guide wires through an electrical conduit.

187. 184 Ill. App. 3d at 922, 540 N.E.2d at 971.

188. *Id.* at 920, 540 N.E.2d at 970.

189. *Id.* at 923, 540 N.E.2d at 972.

190. *Id.*

191. *Id.* at 924, 540 N.E.2d at 972.

192. *Id.* at 923, 540 N.E.2d at 972.

193. *Id.* at 925, 540 N.E.2d at 973.

194. 182 Ill. App. 3d 62, 537 N.E.2d 933 (1st Dist.), *appeal denied*, 127 Ill. 2d 640, 545 N.E.2d 129 (1989).

he sustained when he fell from a scaffold.¹⁹⁵ The trial court dismissed the part of the complaint seeking loss of society.¹⁹⁶ The appellate court held that because courts routinely allow loss of society damages under the Wrongful Death Act, they should also allow such damages under the Structural Work Act.¹⁹⁷

For several decades after its passage in 1907, courts rarerly interpreted the Structural Work Act. Cases decided during the *Survey* year demonstrate the increased use of the Act to compensate injured workers engaged in hazardous activities, beyond the benefits provided by Workmen's Compensation.

B. *The Dram Shop Act*

The Dram Shop Act (the "Act") provides plaintiffs, injured in alcohol-related torts, a limited cause of action against liquor sellers.¹⁹⁸ During the *Survey* period, an appellate court decided a unique case that tested the limits of the statute's applicability.

In *Engel v. Lamplighter*,¹⁹⁹ plaintiffs filed a complaint against three tavern owners because they allegedly served alcohol to an individual who later shot and killed a woman on the front porch of plaintiffs' home, while plaintiffs watched.²⁰⁰ Plaintiffs complained that they later sustained permanent physical and mental illness as a result of witnessing the shooting.²⁰¹ On defendant's motion, the court dismissed the complaint with prejudice.²⁰²

Plaintiffs argued on appeal that recoveries under the Act should include injuries to the person for mental distress similar to common law tort theory.²⁰³ Plaintiffs reasoned that because tort law once disallowed such recovery but now allows it, judicial interpretations of the Act should follow suit.²⁰⁴ The court rejected the proposed change in the law as contrary to precedent. The court explained that the Act exclusively defines the remedies available;

195. *Id.* at 63, 537 N.E.2d at 934.

196. *Id.*

197. *Id.* at 68-69, 537 N.E.2d at 937.

198. ILL. REV. STAT. ch. 43, paras. 93.9 -194 (1987).

199. 172 Ill. App. 3d 59, 526 N.E.2d 641 (3d Dist. 1988).

200. *Id.* at 60, 526 N.E.2d at 642.

201. *Id.* The individual who shot the victim committed suicide and left no appreciable estate against which to proceed. *Id.*

202. *Id.*

203. *Id.* at 61, 526 N.E.2d at 643.

204. *Id.* (citing *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983) on the negligence "zone-of-physical-danger-rule" and *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) on intentional infliction of severe emotional distress). For further discussion of *Knierim*, see *supra* text accompanying note 117.

therefore, plaintiffs' attempt to inject tort theories of recovery was misguided.²⁰⁵ Because the Act provided for plaintiff's sole remedy against the tavern operators, mental distress damages were not recoverable.²⁰⁶

VIII. CONTRIBUTION

During the *Survey* year, the Illinois Appellate Court for the Third District decided a case involving the interplay between the Contribution Among Joint Tortfeasors Act²⁰⁷ and the Local Governmental and Governmental Employees Tort Immunity Act.²⁰⁸ In *Lietsch v. Allen*,²⁰⁹ the court opposed the trend that precludes an immunity defense to contribution claim.²¹⁰

The *Lietsch* plaintiff, a police officer, was directing traffic when she was struck and injured by a vehicle driven by defendant Allen.²¹¹ Another police officer allegedly had directed Allen to drive the wrong way.²¹² Plaintiff originally sued Allen for negligence. Allen impleaded the City of Galesburg seeking contribution on the basis that the city failed to provide proper safety clothing for its officers and that it failed to keep a proper lookout for vehicles approaching from the left.²¹³ Galesburg claimed immunity from suit under the Tort Immunity Act.²¹⁴ The trial court struck Galesburg's defense.²¹⁵

On interlocutory appeal, the appellate court considered whether

205. 172 Ill. App. 3d at 61-62, 526 N.E.2d at 643. Moreover, in *Knierim*, 22 Ill. 2d at 78-79, 174 N.E.2d at 160-61, the court stated that mental distress does not constitute an injury under the Dram Shop Act.

206. 172 Ill. App. 3d at 62, 526 N.E.2d at 643.

207. ILL. REV. STAT. ch. 70, paras. 301-05 (1987). The Act provides that, whenever two or more persons are subject to liability in tort arising out of the same injury to person or property, there is a right of contribution among them.

208. ILL. REV. STAT. ch. 85, paras. 1-101 - 10-101 (1987). The Act protects local public entities and public employees from liability arising from the operation of government.

209. 173 Ill. App. 3d 516, 527 N.E.2d 978 (3d Dist.), *appeal denied*, 123 Ill. 2d 559, 535 N.E.2d 403 (1988). During the *Survey* period, only one other court dealt with contribution in a novel way. The fourth district held that an underlying duty is required to maintain a contribution action. The absence of an electric company's duty to cut bushes that obstructed a driver's view in a railroad crossing accident precluded the railroad from recovering contribution from that company. *Coen v. Illinois C.G.R.R.*, 180 Ill. App. 3d 614, 536 N.E.2d 215 (4th Dist. 1989).

210. See Zaremski and Cottrell, *Risk Shifting Defenses and Third-Party Practice: The Impact of Skinner and Alvis*, 14 LOY. CHI. L.J. 467, 492 (1983).

211. 173 Ill. App. 3d at 517, 527 N.E.2d at 979.

212. *Id.* at 517-18, 527 N.E.2d at 979.

213. *Id.* at 518, 527 N.E.2d at 979.

214. *Id.*

215. *Id.*

a municipality is precluded from asserting the immunities permitted under the Tort Immunity Act in an action brought under the Contribution Act.²¹⁶ The appellate court began its analysis by stating that the Tort Immunity Act derogates the common law and must be construed strictly.²¹⁷ The court noted that traditional governmental immunity applies to a city's discretionary activity.²¹⁸ Wilful and wanton misconduct, however, is not immune. The court disagreed with Allen's contention that the Contribution Act superseded the Tort Immunity Act.²¹⁹ The court reasoned that the Contribution Act was intended to impose liability only upon those who are otherwise subject to liability in tort.²²⁰ Because Allen failed to allege that city employees engaged in wilful or wanton conduct in the execution or enforcement of the law, the claim for contribution was barred.

Lietsch is a noteworthy exception to the policy of placing the loss on the party who caused it, in derogation of traditional immunities. The court refused to hold the City liable to Allen, the third party defendant, on a broader basis than it could be liable to Officer Lietsch, the injured plaintiff. The court thus avoided reaching what it deemed a "nonsensical" result.²²¹ In so doing, however, the court flew in the face of public policy favoring broad application of the Contribution Act.

IX. EXCULPATORY AGREEMENTS

Exculpatory agreements exempt a party from liability for his own negligence. Illinois courts, as well as those of other states, traditionally do not favor such agreements, particularly if they contravene public policy or if they are between parties of uneven bargaining power. During the *Survey* period, however, courts upheld several exculpatory agreements.

216. *Id.*

217. *Id.* (citing *Rio v. Edward Hosp.*, 104 Ill. 2d 354, 472 N.E.2d 421 (1984) and *Reynolds v. City of Tuscola*, 48 Ill. 2d 339, 270 N.E.2d 415 (1971)).

218. *Id.*

219. *Id.* at 520, 527 N.E.2d at 980.

220. *Id.* (citing ILL. REV. STAT. ch. 70, para. 302 (1985)).

221. *Id.* at 520, 527 N.E.2d at 980. Justice Scott wrote a vigorous dissent in which he stated that if the Illinois Supreme Court had considered the issue, it would have decided the case differently. He pointed out that in *Doyle v. Rhodes*, 101 Ill. 2d 1, 9, 461 N.E.2d 382, 386 (1984), the supreme court indicated that Contribution Act intended to reach anyone who is culpable, regardless of whether they have been immunized from direct action in tort. In *Stephens v. McBride*, 97 Ill. 2d 515, 455 N.E.2d 54 (1983), the court indicated a preference for the policies underlying the Contribution Act by holding the notice provisions in the Tort Immunity Act inapplicable to a defendant seeking contribution from a governmental entity covered by the Act.

For example, in *Falkner v. Hinckley Parachute Center*,²²² the Illinois Appellate Court for the Second District upheld an exculpatory agreement for negligence with respect to parachute jumping.²²³ The court indicated that exculpatory contracts should be enforced unless public policy or the social relationship of the parties militate against upholding the agreement.²²⁴ The court stated that exculpatory agreements may be upheld when a perilous activity like parachute jumping is involved, provided that the agreement clearly sets forth the activities to which it applies.²²⁵ The court concluded, as a matter of law, that some risk of death attends parachute jumping and that plaintiff's decedent, a former Army Air Corps officer and pilot, was aware of this risk.²²⁶ Accordingly, the court ruled that the exculpatory agreement's scope covered the type of accident decedent suffered.²²⁷

Nevertheless, the court agreed with plaintiff that the exculpatory clause, as it applied to the wilful and wanton counts, was void as against public policy.²²⁸ To the extent that the clauses in the agreement could be construed to protect defendants from liability for wilful and wanton acts, the clauses would not be given effect.²²⁹ Consequently, the court reversed summary judgment as to the wilful and wanton counts of plaintiff's complaint.²³⁰

In *Moran v. Lala*,²³¹ the second district upheld an exculpatory clause in an agreement for the rental of combat game paint pellet guns.²³² While standing in a "free zone" where no shots were to be

222. 178 Ill. App. 3d 597, 533 N.E.2d 941 (2d Dist. 1989).

223. *Id.* at 603-04, 533 N.E.2d at 945-46. Plaintiff's decedent fell to his death because the parachute provided by defendants became entangled. Plaintiff sued for wrongful death and survival under both negligence and wilful and wanton tort theories. Defendant moved for summary judgment because of an exculpatory agreement entered into by the decedent and defendant. The circuit court granted defendant's motion, ruling that the agreement barred recovery. *Id.* at 599-600, 533 N.E.2d at 942-43.

224. *Id.* at 602, 533 N.E.2d at 944 (citing *Harris v. Walker*, 119 Ill. 2d 542, 519 N.E.2d 917 (1988); *Schlessman v. Henson*, 83 Ill. 2d 82, 413 N.E.2d 1252 (1980); and *Calarco v. YMCA*, 149 Ill. App. 3d 1037, 501 N.E.2d 268 (2d Dist. 1986), *appeal denied*, 114 Ill. 2d 543, 508 N.E.2d 725 (1987)).

225. *Id.* at 602, 533 N.E.2d at 944-45 (citing *Randle v. Hinckley Parachute Center*, 141 Ill. App. 3d 660, 490 N.E.2d 1041 (2d Dist. 1986) and *Poskoziem v. Monnacep*, 131 Ill. App. 3d 446, 475 N.E.2d 1042 (1st Dist. 1985)).

226. *Id.* at 602, 533 N.E.2d at 945.

227. *Id.* at 603, 533 N.E.2d at 945.

228. *Id.* at 604, 533 N.E.2d at 946.

229. *Id.*

230. *Id.* at 605, 533 N.E.2d at 946.

231. 179 Ill. App. 3d 771, 534 N.E.2d 1319 (2d Dist. 1989).

232. *Id.* at 785, 534 N.E.2d at 1329.

fired, plaintiff was injured by a shot in the eye.²³³ Plaintiff, however, was not wearing safety goggles at the time.²³⁴ The court quickly disposed of plaintiff's challenge to the agreement. The court said that exculpatory clauses will be upheld in the absence of any statute voiding them.²³⁵ Having found no applicable statutory exception, the court held that there was sufficient evidence for the jury to conclude that plaintiff assumed the risk of injury when weapons were possessed in the "free zone."²³⁶

A similar analysis was used to uphold an agreement related to a racetrack accident. In *Koch v. Spalding*,²³⁷ the court upheld the agreement because no fraudulent inducement or execution was shown. Further, plaintiff knew the risks, had signed such agreements before, and had ample opportunity to read the document.²³⁸

Although these cases break no new ground, they are noteworthy because they demonstrate that courts will approve exculpatory agreements for ultrahazardous activities when the plaintiff assumed the risk.

X. DAMAGES

A. *Discount to Present Value Limited*

During the *Survey* period, the courts' definition of adequate damages varied as widely as their cases. The Illinois Appellate Court for the First District held a \$15 million verdict not excessive because plaintiff suffered permanent, disabling injuries.²³⁹ The same court, however, held a \$26,077 verdict adequate because plaintiff's complaints of pain were subjective and because evidence showed that plaintiff was not disabled and had not suffered functional loss.²⁴⁰

Of particular significance was the supreme court's ruling in a case arising out of a bicycle accident. In *Schaffner v. Chicago & North Western Transportation*,²⁴¹ the court held that damages for pain, suffering, disability and disfigurement should not be dis-

233. *Id.* at 773, 534 N.E.2d at 1321.

234. *Id.* at 774, 534 N.E.2d at 1322.

235. *Id.* at 786, 534 N.E.2d at 1329.

236. *Id.* at 786-87, 534 N.E.2d at 1329.

237. 174 Ill. App. 3d 692, 529 N.E.2d 19 (5th Dist. 1988).

238. *Id.* at 697, 529 N.E.2d at 22-23.

239. *Richter v. Northwestern Memorial Hosp.*, 177 Ill. App. 3d 247, 532 N.E.2d 269 (1st Dist. 1988), *appeal denied*, 125 Ill. 2d 574, 537 N.E.2d 818 (1989).

240. *Rozner v. Chicago Transit Auth.*, 183 Ill. App. 3d 613, 539 N.E.2d 270 (1st Dist. 1989).

241. 129 Ill. 2d 1, 541 N.E.2d 643 (1989).

counted to present value.²⁴² Daniel Schaffner was injured severely when the wheel disengaged from the front fork of his bicycle, while he was riding over defendant's railroad crossing.²⁴³ On appeal, defendants attacked the trial judge's exclusion of argument that would have invited the jury to make an additional reduction in damages, already reduced to present cash value. The trial judge had prevented defense counsel from arguing that any sum of damages awarded to plaintiff could be invested to produce a stream of income.²⁴⁴

Under Illinois law, future damages for medical expenses and lost earnings are to be discounted to present cash value but damages for pain and suffering, disability and disfigurement are not.²⁴⁵ The supreme court considered the trial court's order which precluded any argument suggesting to the jury it should consider income obtained by investment of the future damages sum, computed by plaintiff's expert.²⁴⁶ Fearing an unwarranted, additional reduction, the Illinois Supreme Court affirmed the trial judge's limitation on the scope of argument.²⁴⁷

Schaffner is an important case because it suggests that juries may not reduce sums already calculated in present cash value by plaintiff's expert²⁴⁸ or improperly reduce sums to which the present cash value rule does not apply, such as damages for pain and suffering.²⁴⁹

B. Loss of Instruction and Training

In recent wrongful death cases courts have tended to uphold jury awards of pecuniary damages for a child's loss of training and instruction as a result of a parent's death. In *Stringham v. United Parcel Service*,²⁵⁰ plaintiff's father was killed when he collided with the rear of defendant's parked semi-trailer.²⁵¹ Defendant appealed

242. *Id.* at 24-25, 541 N.E.2d at 652-53.

243. *Id.* at 8, 541 N.E.2d at 645.

244. *Id.* at 24, 541 N.E.2d at 652. The judge granted plaintiff's motion and also limited closing argument.

245. *Id.* at 24-25, 541 N.E.2d at 652-53. See *Allendorf v. Elgin, J. & E. Ry.*, 8 Ill. 2d 164, 133 N.E.2d 288, *cert. denied*, 352 U.S. 833 (1956); *Avance v. Thompson*, 387 Ill. 77, 55 N.E.2d 57, *cert. denied*, 323 U.S. 753 (1944); and *Howard v. Gulf, M. & O. R.R.*, 13 Ill. App. 2d 482, 142 N.E.2d 825 (4th Dist. 1957).

246. 129 Ill. 2d at 25, 541 N.E.2d at 653.

247. *Id.* at 24-26, 541 N.E.2d at 652-53.

248. *Id.* at 25-26, 541 N.E.2d at 653.

249. *Id.*

250. 181 Ill. App. 3d 312, 536 N.E.2d 1292 (2d. Dist.), *appeal denied*, 541 N.E.2d 1115 (1989).

251. *Id.* at 314, 536 N.E.2d at 1293.

from a jury verdict for plaintiff, contesting the validity of an award for the child's loss of instruction and training.²⁵²

Noting the recent trend in recent Illinois Supreme Court cases to expand the scope of pecuniary injury to encompass nonmonetary losses in wrongful death cases, the appellate court reasoned that the jury's award of pecuniary damages for the child's loss of training and instruction was appropriate.²⁵³ The court found a limited inquiry into plaintiff's Down's Syndrome relevant because it provided a context for evaluating the loss of the decedent's guidance, attention, and instruction to his daughter.²⁵⁴

Although *Stringham* follows a trend, it notably declined to follow the Illinois Appellate Court for the First District's decision in *American National Bank and Trust v. Thompson*,²⁵⁵ in which the court held that the effects of inflation on damages for future earnings is inadmissible in Illinois. *Stringham* held that predicting future earnings damages without considering inflation results in unrealistically low estimates of those earnings.²⁵⁶ The impact of *Stringham* may be higher damages awards in cases today.

C. Punitive Damages

Illinois allows punitive damages for conduct that is "committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willingly, or with such gross negligence as to indicate a wanton disregard of the rights of others."²⁵⁷ Punitive damages have been escalating at an alarming rate and, as a result, are under attack.²⁵⁸ Despite the general trend, two Illinois decisions during the *Survey* period upheld punitive damage awards.

In *Deal v. Byford*,²⁵⁹ an apartment building employee attacked plaintiff.²⁶⁰ The trial court entered an award of \$1,275 compensatory damages plus \$25,000 for punitive damages.²⁶¹ The appellate court affirmed. On appeal, the Illinois Supreme Court cautioned that courts must assure punitive damages are not improperly or

252. *Id.*

253. *Id.* at 315, 536 N.E.2d at 1294 (citing *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984)).

254. *Id.* at 316, 536 N.E.2d at 1294.

255. 158 Ill. App. 3d 478, 511 N.E.2d 1206 (1st Dist. 1987).

256. 181 Ill. App. 3d at 318, 536 N.E.2d at 1297.

257. *Kelsay v. Motorola*, 74 Ill. 2d 172, 186, 186, 384 N.E.2d 353, 359 (1978).

258. See J. GHIARDHI AND J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 3 (1984) (for a discussion of some arguments against punitive damage awards).

259. 127 Ill. 2d 192, 537 N.E.2d 267 (1989).

260. *Id.* at 195, 537 N.E.2d at 268.

261. *Id.* at 196, 537 N.E.2d at 268.

unjustly awarded.²⁶² Nevertheless, the court stated that it would not disturb a punitive damages award, unless it was clearly the result of passion, impartiality, or corruption.²⁶³ The supreme court concluded that the unprovoked attack on plaintiff in her apartment was sufficiently abusive; therefore, it affirmed the jury's verdict.²⁶⁴

In *Loitz v. Remington Arms Co.*,²⁶⁵ plaintiff was injured by an exploding shotgun. The appellate court held a punitive damages award of \$1,600,000 not excessive in light of the manufacturer's flagrant indifference to public safety.²⁶⁶ This case is significant because it endorsed an often-cited multiple factor test for determining "flagrant indifference,"²⁶⁷ and it rejected defendant's challenge to punitive damages on constitutional grounds.²⁶⁸

XI. LEGISLATION

During the *Survey* period two major developments affected statutory tort law. First, the Illinois Supreme Court upheld the section of the Metropolitan Transit Authority Act (the "Act")²⁶⁹ granting special immunity to the Chicago Transit Authority (the "CTA")²⁷⁰ from tort liability for any failure to protect passengers from the criminal acts of third parties.²⁷¹ The court rejected plaintiff's various constitutional attacks on the statute. Plaintiff charged the CTA with negligence and wilful and wanton misconduct in connection with a bus driver's refusal to stop his bus and protect plaintiff from a severe beating by drunk and disruptive pas-

262. *Id.* at 203, 537 N.E.2d at 272.

263. *Id.* at 204, 537 N.E.2d at 272.

264. *Id.* at 204, 206, 537 N.E.2d at 272-73. That the punitive damages amount was far out of proportion to the compensatory was held irrelevant. *Id.* at 204, 537 N.E.2d at 272.

265. 177 Ill. App. 3d 1034, 532 N.E.2d 1091 (4th Dist. 1988), *appeal allowed*, 126 Ill. 2d 560, 541 N.E.2d 1107 (1989).

266. *Id.* at 1058, 532 N.E.2d at 1106.

267. *Id.* at 1058, 532 N.E.2d at 1105. For a complete discussion of the factors used, see Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976).

268. *Id.* at 1059, 532 N.E.2d at 1106. A landmark case in this area is *Juzwin v. Amtrog Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989), in which a federal court held that substantive due process barred recovery of punitive damages because plaintiff previously had been assessed punitive damages in a case arising out of the same cause of action.

269. ILL. REV. STAT. ch. 111, para. 327 (1987). The supreme court's decision is also discussed in Troy and Fehringer, *State and Local Government*, 21 LOY. CHI. L.J. 601 (1990).

270. The CTA is the major mass transportation system in Chicago.

271. *Bilyk v. Chicago Transit Auth.*, 125 Ill. 2d 230, 531 N.E.2d 1 (1988).

sengers.²⁷² The CTA responded that it was immune under the Act.²⁷³

The supreme court identified the controlling issue, in the special legislation and equal protection challenges, as whether the statute was rationally related to a legitimate state interest.²⁷⁴ Only if a statute is enacted for reasons totally unrelated to a legitimate state goal will the court invalidate it as special legislation and a violation of equal protection.²⁷⁵ Plaintiff alleged that the Act arbitrarily classified public carriers differently from private carriers and that there was no rational basis for placing defendant in a better position than privately-owned carriers.²⁷⁶

The supreme court ruled that the Act withstood plaintiff's attack because taxpayers' substantial involvement in the funding of public transportation provided a rational basis for differentiating between public and private carriers for failure to prevent third-party criminal actions.²⁷⁷ That the Act provided the CTA with broader immunity than other municipal entities did not violate equal protection or special legislation rules because the CTA was created to provide transportation to the public at large, rather than to guarantee the safety of individuals.²⁷⁸

Finally, the court held that immunity did not violate the certain remedy provision of the Illinois Constitution²⁷⁹ because the Act simply restricted the class of potential defendants from whom injured passengers could recover; it did not deprive the injured passenger of a remedy.²⁸⁰ In short, the court ruled that the Act "insures that CTA funds are spent on public transportation services and are not diverted to satisfy private damage claims" by pas-

272. 125 Ill. 2d at 234, 531 N.E.2d at 2.

273. The trial court denied defendant's motion to dismiss the complaint and held that the Act violated the Illinois Constitution's guarantee of a remedy for all injuries and wrongs, ILL. CONST. art. I, § 12, and the prohibition against special legislation, ILL. CONST. art. IV, § 13. 125 Ill. 2d at 234, 531 N.E.2d at 2. The prohibition against special legislation prevents the legislature from conferring a special benefit or privilege to a person or class to the exclusion of those similarly situated. The trial court also held that the statute violated the equal protection guarantees of the United States (U.S. CONST. amend. XIV) and Illinois Constitutions (ILL. CONST. art. I, § 2). 125 Ill. 2d at 234, 531 N.E.2d at 2.

274. 125 Ill. 2d at 236, 531 N.E.2d at 3.

275. *Id.*

276. *Id.* at 236-37, 531 N.E.2d at 3.

277. *Id.* at 238, 531 N.E.2d at 4.

278. *Id.* at 242-43, 531 N.E.2d at 6.

279. ILL. CONST. art. I, § 12 provides in part that every person shall find by law "certain remedy" for injuries suffered "freely, completely, and promptly."

280. *Id.* at 245-47, 531 N.E.2d at 7-8.

senger-victims.²⁸¹

The second major legislative development during the *Survey* year affecting tort law was the passage of the Sexual Exploitation by Psychotherapists Act.²⁸² This Act recognizes the widespread problem of psychotherapists' sexual exploitation of patients during or even after a course of treatment.²⁸³ Recognizing that such conduct is a clear violation of the physician's duty of care owed a patient, the legislature created a cause of action allowing a patient or former patient to recover for the sexual advances of a psychotherapist.²⁸⁴ The Act creates a private right of action for injury caused by sexual contact or the mere request for it.²⁸⁵ The patient may also recover damages if the sexual contact resulted from "therapeutic deception"; that is, if the therapist used knowledge about the patient to lure him or her into sexual relations. Furthermore, consent is no defense.²⁸⁶ Finally, the Act carries with it a two-year statute of limitations.²⁸⁷

281. *Id.* at 238, 531 N.E.2d at 4. In a case involving the statute of limitations under the Metropolitan Transit Authority Act, *Medina v. Taylor*, 185 Ill. App. 3d 808, 542 N.E.2d 33 (1st Dist. 1989), the appellate court held that the one-year statute of limitations for actions against the CTA, and not the two-year limitation for personal injuries, applied to a negligence action against a bus driver who struck plaintiff's vehicle from behind. *Id.* at 810-11, 542 N.E.2d at 34.

282. ILL. ANN. STAT. ch. 70, para. 802 (Smith-Hurd 1989).

283. Two well-known authors in the field of human sexuality have written that during the natural course of therapy, the patient transfers feelings to the therapist; therefore, betrayal of this transference is tantamount to rape. Masters and Johnson, *Principles of the New Sex Therapy*, 133 AM. J. PSYCH. 548, 553 (1976). In *Horak v. Biris*, 130 Ill. App. 3d 140, 474 N.E.2d 13 (2d Dist. 1985), the court upheld a man's cause of action against a social worker who had sexual relations with the man's wife during the course of marriage counseling. The court stated that the mishandling of the transference phenomenon constituted a breach of the therapist's duty to engage only in conduct to improve the patient's well-being. The court held that such a breach can support an actionable and independent tort. *Id.* at 145, 474 N.E.2d at 18. See also Goode, *The Ultimate Betrayal*, U.S. NEWS AND WORLD REP. (March 12, 1990).

Moreover, sex-related charges now rank eighth in the list of causes of malpractice against psychiatrists. Moisal, *Sins of the Secular Priesthood: Civil Liability for the Sexual Seduction of Patients*, 33 MED. TRIAL TECH. Q. 440, 443 (1987).

284. *Id.* Cf. CAL. CIV. CODE § 43.93 (West 1987) (creates cause of action for money damages against a psychotherapist for sexual contact, if the sexual act occurred within two years following the termination of therapy) and MINN. STAT. § 148A.01-06 (1986) (creates a cause of action for sexual exploitation if the psychotherapist engages in sexual contact with a former patient and the latter is either emotionally dependent on the therapist or the sexual contact occurs by means of therapeutic deception).

285. *Id.* para. 802.

286. *Id.*

287. *Id.* para. 806.

XII. CONCLUSION

During the *Survey* year, Illinois courts confronted significant tort law issues. For Illinois citizens, perhaps the most significant decision involved the supreme court's refusal to strike down the Metropolitan Transit Authority Act, thereby immunizing the Chicago Transit Authority from liability for the failure to protect passengers from the criminal acts of third parties. Also this *Survey* year, the court opened a new channel to landlord liability for third party criminal acts. In addition, the courts continued to limit the scope of recovery for fetal torts, by refusing a wrongful death action on behalf of an aborted fetus, and by ruling that a child may not recover from its mother for negligent prenatal injuries. Finally, as other jurisdictions take contrasting positions, Illinois courts may be faced with challenges on these issues in the future.