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Evidence

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Evidence

Prof. Leonard L. Cavise and Bradley J. Martin***

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I. INTRODUCTION

The common law of Illinois and several specific statutory enactments provide the state with its evidentiary rules. The Illinois Supreme Court and the appellate districts have chosen the methodology of selective review of the Federal Rules of Evidence for possible adoption. During the *Survey* year, the courts continued the process of modifying the common law rules on the admissibility of expert testimony so that they conform more closely with the federal rules. With few exceptions, state courts are broadening the admissibility of expert opinions on an increasingly greater number of subjects. The courts of Illinois also continued, during this past year, to develop the state of the law on the admissibility of habit testimony. The purpose of this article is to inform the reader of those recent developments in the Illinois law of evidence and to comment upon any trends that may be developing.

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II. RELEVANCY AND ITS LIMITS

A. Admissibility of Similar Occurrences

In *Ballweg v. City of Springfield*,¹ the Illinois Supreme Court reaffirmed its position regarding the admissibility of similar occurrences in strict tort liability cases. Relying on *Rucker v. Norfolk & Western Ry. Co.*,² the court held that evidence of prior occurrences presented at trial must be "substantially similar"³ to the occurrence in the case at bar to be admissible.⁴

In *Ballweg*, the plaintiff's decedent, a passenger on a Hobie Cat catamaran, was electrocuted after the boat's mast made contact with an overhead power line.⁵ At trial, the plaintiff introduced charts indicating prior accidents involving contacts between Hobie Cat masts and power lines.⁶ The plaintiff introduced the charts to indicate that the defendant boat manufacturer had prior notice of the Hobie Cat's dangerous condition.⁷ On appeal, the appellate court held that the admission of this evidence constituted reversible error because the plaintiff failed to demonstrate that a "substantially similar" design defect caused the prior accidents.⁸ The Illinois Supreme Court disagreed, holding that the evidence presented in the charts was "substantially similar" enough because it showed electrocutions resulting from Hobie Cat contacts between masts and power lines, regardless of the particular design defect responsible. The charts were, therefore, properly admitted to suggest that the boat manufacturer had notice of the danger.⁹

1. 114 Ill. 2d 107, 499 N.E.2d 1373 (1986). See also *Ogg v. City of Springfield*, 121 Ill. App. 3d 25, 458 N.E.2d 1331 (4th Dist. 1984) (disposition of an appeal based upon the same facts involved in *Ballweg*).

2. 77 Ill. 2d 434, 396 N.E.2d 534 (1979).

3. *Id.* at 441, 396 N.E.2d at 538.

4. *Ballweg*, 114 Ill. 2d at 114, 123, 499 N.E.2d at 1376, 1380.

5. *Id.* at 112, 499 N.E.2d at 1375.

6. *Id.* at 114, 499 N.E.2d at 1376. The charts indicated each accident's date, location, and resulting deaths and injuries. They did not, however, describe the accidents' exact nature. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 114-15, 499 N.E.2d at 1376. Specifically, the court noted that the evidence established that the Hobie Cat: (1) "is composed of multiple *all metal* connective pathways"; (2) can electrocute users; and (3) "can electrocute a person in contact with the boat or several hundred people up to 100 feet away in water. . . ." *Id.* In addition, the court held that, although the plaintiff's testimony regarding remedial actions taken by the city to warn passing boats of the power lines and in submerging other power lines was inadmissible in an action against the boat manufacturer, the error was harmless. *Id.* at 115, 499 N.E.2d at 1376.

In *Anderson v. Chesapeake & Ohio R.R. Co.*,¹⁰ the Illinois Appellate Court for the First District held that under Illinois law, factual details of prior accidents are not admissible to show the extrahazardous nature of an accident site absent a showing that the accidents were of a similar nature.¹¹ In *Anderson*, the defendant's train struck the plaintiff's car at a railroad crossing. The plaintiff attempted to establish that the defendant railroad was liable for willful and wanton misconduct because it had knowledge of a number of prior accidents at the crossing in question. The failure of the defendant to act, the plaintiff's argument continued, "exhibited a conscious disregard for the safety of others by allowing the crossing to remain in a dangerous condition."¹² The defendant, however, claimed that it was aware of only three accidents at this crossing in the last ten years.¹³

The trial court permitted the plaintiff's witness, a librarian, to testify about the dates of newspaper articles regarding prior accidents and casualties at the crossing.¹⁴ Although this evidence was admitted for the purpose of impeaching the defendant's credibility regarding its knowledge of prior accidents, the court would not admit the articles themselves as evidence of notice to the defendant.¹⁵ Therefore, the appellate court held that the trial court did not err in limiting the testimony of the librarian who presented this evidence.¹⁶

B. Other Crimes Evidence

In *People v. Barrios*,¹⁷ the defendant was charged with driving on a revoked license. The Illinois Supreme Court held that a tran-

10. 147 Ill. App. 3d 960, 498 N.E.2d 586 (1st Dist. 1986).

11. *Id.* at 974, 498 N.E.2d at 595-96.

12. *Id.* at 968, 498 N.E.2d at 591-92.

13. *Id.* at 968, 498 N.E.2d at 592.

14. *Id.* at 974, 498 N.E.2d at 595.

15. *Id.* at 974, 498 N.E.2d at 595-96.

16. *Id.* at 973-74, 498 N.E.2d at 595. The parties disputed whether Illinois or Indiana law should govern the admissibility of the evidence. Although there is a discrepancy between Indiana and Illinois law concerning the admissibility of evidence establishing the existence of previous accidents, the two states are in agreement that substantial similarity between accidents is required before the details of these prior accidents can be admitted. *Id.* at 974, 498 N.E.2d at 595-96. Illinois law does not require a showing of similarity between accidents in presenting evidence of previous accidents. Indiana does require a showing of similarity when presenting evidence of previous accidents. The *Anderson* court also noted that even if the plaintiffs were able to prove that the defendant had knowledge of additional accidents, this evidence would not necessarily indicate willful and wanton misconduct. The plaintiffs did not present evidence that the defendant knew of, and refused to correct, a specific hazard. *Id.* at 968, 498 N.E.2d at 592.

17. 114 Ill. 2d 265, 500 N.E.2d 415 (1986).

script from a 1983 proceeding in which the same defendant was charged with the same offense was properly admitted into evidence.¹⁸ In *Barrios*, the court recognized that the trial court had instructed the jury that the "transcript was admitted into evidence solely for the purpose of showing the defendant's knowledge as to the status of his driving privileges."¹⁹ Therefore, the defendant was not prejudiced by the judge's reading, was not denied any right to confront witnesses, and the admission of the transcript did not constitute inadmissible hearsay.²⁰

C. *Habit and Routine Practice*

In *Ruffiner v. Material Service Corp.*,²¹ the Illinois Supreme Court reiterated the long standing rule that industry, trade, or regulatory group standards can set the standard of care in negligence actions. The court, however, refused to allow the admission of the standards that would be applicable in the case because the "special arrangement" of the defendant rendered the standards irrelevant.²² The court did not discuss the alternative of allowing the jury to hear the standards and then to judge their proper weight in the assessment of negligence based upon the particular circumstances.

In *Ruffiner*, the plaintiff fell from a ladder that led up to a retractable pilot house aboard the defendant's towboat.²³ At trial, the court allowed the plaintiff to introduce expert testimony based on standards promulgated by the American National Standards Institute (the "ANSI") that suggested that the pilot house ladders did not conform to standards applicable to fixed ladders.²⁴ The appellate court affirmed, and rejected the defendant's contention that the ANSI standards regarding fixed ladders were not relevant because they were not intended to apply to the "special arrangement" of ladders necessary to operate a retractable pilot house.²⁵

18. *Id.* at 275, 500 N.E.2d at 419.

19. *Id.* at 276, 500 N.E.2d at 419.

20. *Id.* at 275, 500 N.E.2d at 419. The defendant was sentenced to four years in prison for making the false statements. *Id.* at 266-67, 500 N.E.2d at 419-20.

21. 116 Ill. 2d 53, 506 N.E.2d 581 (1987).

22. *Id.* at 58, 506 N.E.2d at 584. See also *Merchants National Bank v. Elgin, Joliet & Eastern Ry. Co.*, 49 Ill. 2d 118, 125, 273 N.E.2d 809, 813 (1971) (standards referring to a grade-crossing at a railroad crossing set out in publication by Department of Public Works and Buildings properly admitted even though standards were not adopted by Commerce Commission); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 330-32, 211 N.E.2d 253, 256-57 (1965) (regulations, standards, and by-laws served same function as evidence of custom in displaying hospital negligence).

23. *Ruffiner*, 116 Ill. 2d at 55, 506 N.E.2d at 582.

24. *Id.* at 56-57, 506 N.E.2d at 583.

25. *Id.* at 56, 506 N.E.2d at 585.

The Illinois Supreme Court agreed with the defendant's initial contention regarding the relevancy of the ANSI standards, and reversed the lower court.²⁶ The court held that the admission of ANSI standards regarding construction guidelines and dimensions of fixed ladders, such as those used in factories, power stations, and other land-based industrial facilities, was error because the standards did not apply to the situation involved in the case at bar.²⁷ The court stated that in order to be admissible, the standards must be relevant "in terms of both time and conduct involved."²⁸ The *Ruffiner* court concluded that the ANSI standards were not relevant to shipboard ladders. The standards, therefore, were erroneously admitted into evidence.²⁹

In *Bradfield v. Ill. Central Gulf R.R. Co.*,³⁰ the Illinois Supreme Court affirmed an appellate court's decision to admit habit testimony regardless of the presence of eyewitnesses.³¹ Previously, habit testimony was admissible in wrongful death cases only when no eyewitness was present.³²

In *Bradfield*, the plaintiff's decedent was killed when his automobile was struck by the defendant's train.³³ At trial, the court admitted testimony of the plaintiff, the decedent's widow, and the plaintiff's son regarding the defendant railroad's alleged failure in

26. *Id.* at 59, 506 N.E.2d at 584-85.

27. *Id.* at 58, 506 N.E.2d at 584-85.

28. *Id.* at 58, 506 N.E.2d at 584 (quoting *Murphy v. Messerschmidt*, 68 Ill. 2d 79, 84, 368 N.E.2d 1299, 1302 (1977)).

29. *Id.* at 59-60, 506 N.E.2d at 585. See *Galindo v. Riddell, Inc.*, 107 Ill. App. 3d 139, 437 N.E.2d 376 (3d Dist. 1982) (standards applicable to headgear used in vehicular crashes were properly excluded in action for injuries sustained from the use of allegedly defective football helmet); *Cf. Rucker v. Norfolk & Western Ry.*, 77 Ill. 2d 434, 396 N.E.2d 534 (1979) (federal standards relating to construction of liquefied petroleum gas tank cars held admissible in action based on explosion of a tank car); *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 385 N.E.2d 690 (1979) (admission of conflicting testimony concerning applicability of certain standards to forklift trucks was not error); *Davis v. Marathon Oil Co.*, 64 Ill. 2d 380, 356 N.E.2d 93 (1976) (regulation governing location of gasoline fill pipes at service station held admissible in action based on explosion during delivery of gasoline to station); *Merchants National Bank of Aurora v. Elgin, Joliet & Eastern Ry.*, 49 Ill. 2d 118, 273 N.E.2d 809 (1971) (state standards regarding railway crossings held admissible in railway crossing accident action).

30. 115 Ill. 2d 471, 505 N.E.2d 331 (1987).

31. *Id.* at 476, 505 N.E.2d at 334. For a discussion of the appellate court's decision, see *Cavise & Tomassi, Evidence, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 542 (1986).

32. *Bradfield*, 115 Ill. 2d at 473, 505 N.E.2d at 332. See, e.g., *Gardner v. Geraghty*, 98 Ill. App. 3d 10, 15, 423 N.E.2d 1321, 1324 (1st Dist. 1981) (evidence of decedent pedestrian's careful habits held admissible when defendant's testimony was determined insufficient to provide eyewitness account of decedent pedestrian's conduct prior to being struck by defendant's automobile while crossing street).

33. *Bradfield*, 115 Ill. 2d at 472, 505 N.E.2d at 332.

the past to comply with the requirement of sounding the train's whistle or horn at a designated distance from a railroad crossing.³⁴ The plaintiff contended that a similar failure to sound the train's whistle resulted in the collision between the defendant's train and the decedent's car.³⁵

On appeal to the Illinois Supreme Court, the defendant contended that the appellate court erred in rejecting a long-standing rule that the presence of an eyewitness precludes the admission of habit testimony.³⁶ The Illinois Supreme Court upheld the appellate court's decision to reject this rule and to follow Federal Rule of Evidence 406, which rejects the eyewitness requirement.³⁷ The defendant also contended that, even if the court were to adopt the approach of Rule 406, an inadequate foundation had been laid to show that there was an adequate sampling and uniformity of response sufficient to prove habit. The court held that, because that argument was not preserved by specific objection, the argument is waived on appeal and would not be decided by the court.³⁸

A strong dissent argued that a relevancy objection such as the one here is sufficient to preserve a full argument on the habit question, and, in fact, the plaintiff's testimony had not shown a pattern of conduct sufficient to withstand careful scrutiny in determining whether or not a habit or custom exists.³⁹

In *First National Bank of Antioch v. Guerra Construction Co.*,⁴⁰ the Illinois Appellate Court for the Second District held that evidence of a sender's general mailing procedures is insufficient to establish receipt by the addressee, unless the evidence is supported by other corroborating evidence that the procedure was followed in the particular instance or that the material was received.⁴¹ In

34. *Id.* at 473, 505 N.E.2d at 332.

35. *Id.*

36. *Id.* at 474, 505 N.E.2d at 333. The defendant contended that the appellate court should have followed *Plank v. Holman*, 46 Ill. 2d 465, 264 N.E.2d 12 (1970), reaffirming the long-standing rule mentioned above.

37. *Bradfield*, 115 Ill. 2d at 473-76, 505 N.E.2d at 333-34. FED. R. EVID. 406 provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

38. *Bradfield*, 115 Ill. 2d at 474, 505 N.E.2d at 333.

39. *Id.* at 476-81, 505 N.E.2d at 334-36.

40. 153 Ill. App. 3d 662, 505 N.E.2d 1373 (2d Dist. 1987).

41. *Id.* at 667, 505 N.E.2d at 1376.

Guerra, the defendant⁴² owed money to an excavating and landscaping company for services rendered. In addition, the excavating company was indebted to the plaintiff bank for numerous loans. As security for these loans, the company assigned its accounts receivable to a bank. When the company went bankrupt, the bank attempted to notify all of the company's debtors and to request them to make future payments directly to the bank. The bank filed a collections suit after not receiving a final payment from the defendant. At issue was whether the bank properly notified the defendant regarding the assignment.⁴³

The bank argued that it was entitled to a presumption of receipt not only from the general rule that correspondence is presumed to have been received when it is properly addressed, posted, and deposited in the mail, but also from its general office practice regarding mailing. That office practice, said the bank, should be sufficient when accompanied either by some evidence that the practice was followed in the particular instance in question or by other corroborating evidence.⁴⁴

After denying the receipt of notice and thereby relieving itself of the obligation to pay, the defendant claimed that the plaintiff's evidence⁴⁵ regarding its customary mailing procedures did not establish that it had followed the procedures on this occasion, and, further, that neither sufficient corroboration nor facts showing that the practice was followed here were shown to exist.⁴⁶ Relying on

42. Three defendants were named. On appeal, however, Hill-Behan Lumber Company was the only party. *Id.* at 663, 505 N.E.2d at 1374.

43. *Id.* at 664, 505 N.E.2d at 1374.

44. *Id.* at 667-68, 505 N.E.2d at 1377.

45. The supervisor of plaintiff's data processing department described the mailing procedures:

Mail was taken to the mail operations department by clerks and secretaries, who placed it in one of two bins, one for Antioch mail and one for out-of-town mail. A postal clerk then collected the mail, weighed it, affixed postage with a meter, placed it in postal trays and took it to the post office. Any mail returned by the post office would be routed to the audit department and would eventually be returned to the person who originated it.

Id. at 665, 505 N.E.2d at 1374-75.

46. *Id.* at 667, 505 N.E.2d at 1376. The defendant relied on the following three cases to support his proposition: *Lynn v. Village of West City*, 36 Ill. App. 3d 561, 345 N.E.2d 172 (5th Dist. 1976) (insurance agent testified about his practice of notifying insurance company of a claim, but he did not know if the procedure was followed on this occasion because he did not mail it himself); *Goetz v. Country Mutual Ins.*, 28 Ill. App. 3d 154, 328 N.E.2d 109 (2d Dist. 1975) (testimony consisted solely of the insurer's customary practice); *Buckingham Corp. v. Ewing Liquors*, 15 Ill. App. 3d 839, 305 N.E.2d 278 (1st Dist. 1973) (employer used a mailing service and, therefore, had no personal knowledge of the mailing procedures). The *Guerra* court held that these cases were not relevant. *Guerra*, 153 Ill. App. 3d at 667, 505 N.E.2d at 1376.

Tabor & Co. v. Gorenz,⁴⁷ in which the plaintiff presented evidence of other corroborating circumstances in addition to evidence on the custom of preparing confirmation forms,⁴⁸ the supreme court affirmed the judgment in favor of the plaintiff. The court acknowledged that the corroborating evidence supported the evidence of custom, including the preparation and typing of notices of assignment and a telephone acknowledgement from the defendant of their receipt.⁴⁹ No direct testimony from the person who actually performed the mailing was necessary.⁵⁰

D. Use of Videotapes

In *Georgacopoulos v. University of Chicago Hospitals and Clinics*,⁵¹ the First District Appellate Court admitted a controversial "Day in the Life" videotape of the plaintiff during a painful physical therapy session.⁵² The court found that the tape was probative, non-cumulative, and not prejudicial.⁵³ The key question in these cases is commonly the possible prejudicial or inflammatory effect of the videotape, given that many of the tapes portray seriously injured plaintiffs engaged in activity rendered difficult by their injuries. Illinois courts have yet to discuss the possible hearsay implications of a videotape that is made in contemplation of litigation and includes conduct that is meant to make "assertions" for the out-of-court declarant. In this case, there was no undue prejudice, said the court, because the therapy session amounted to only a few minutes of the nineteen minute videotape and because it was "tasteful."⁵⁴

III. WITNESSES

In *Herron v. Underwood*,⁵⁵ the Illinois Appellate Court for the Fifth District held that a trial court properly allowed a trustee's testimony regarding the delivery of certain deeds by a decedent

47. 43 Ill. App. 3d 124, 356 N.E.2d 1150 (2d Dist. 1976).

48. *Tabor*, 43 Ill. App. 3d at 130, 356 N.E.2d at 1151-52.

49. *Guerra*, 153 Ill. App. 3d at 669, 505 N.E.2d at 1377. The corroborating evidence included testimony of a commercial loan clerk who stated that she recalled preparing and delivering the notices to the mail room because she had never done it before. In addition, the vice-president of the bank testified that he spoke with the defendant's employee who said the notice had been received. *Id.* at 668, 505 N.E.2d at 1377.

50. *Id.*

51. 152 Ill. App. 3d 596, 504 N.E.2d 830 (1st Dist. 1987).

52. *Id.* at 599, 504 N.E.2d at 833.

53. *Id.* at 599, 504 N.E.2d at 832.

54. *Id.* at 599, 504 N.E.2d at 832-33.

55. 152 Ill. App. 3d 144, 503 N.E.2d 1111 (5th Dist. 1987).

over the objection that the testimony violated the Dead-Man's Act.⁵⁶ In *Herron*, the plaintiff sought a declaratory judgment construing various documents.⁵⁷ Among these documents were three deeds which the decedent had executed during his lifetime and placed with a third party.⁵⁸ At trial, a trustee who was a named party-defendant testified about her conversations with the decedent regarding the deeds.⁵⁹ Other parties-defendant contended that the trustee's testimony violated the Dead-Man's Act because she was an adverse party under the act.⁶⁰ In response to this contention, the court stated that "[i]t is settled that an adverse party for purposes of the statute is determined by an analysis of actual interests rather than by his or her formal designation as a party."⁶¹

In *Herron*, the trustee did not have an actual interest in the outcome of the case.⁶² One of the defendants, however, asserted in her brief that "[w]hile [the trustee] may not have benefited directly and financially from her testimony, she did have a definite emotional interest in seeing that her brother's 'new wife' did not get her hands on his estate."⁶³ The court held that a disqualifying interest must be of a pecuniary nature and that an emotional interest only reflects upon the credibility of the witness.⁶⁴

IV. OPINION AND EXPERT TESTIMONY

In *Melecosky v. McCarthy Brothers Co.*,⁶⁵ the Illinois Supreme

56. *Id.* at 153, 503 N.E.2d at 1113. The Dead-Man's Act provides in pertinent part: In the trial of any action in which any party sues or defends as the representative of a deceased person . . . , no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased . . . or to any event which took place in the presence of the deceased. . . .

ILL. REV. STAT. ch. 110, para. 8-201 (1985).

57. *Herron*, 152 Ill. App. 3d at 146, 503 N.E.2d at 1113.

58. *Id.*

59. *Id.* at 150, 503 N.E.2d at 1115-16.

60. *Id.* at 152-53, 503 N.E.2d at 1117.

61. *Id.* at 153, 503 N.E.2d at 1117. See E. CLEARY & M. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 606.3 (4th Ed. 1984).

62. *Herron*, 152 Ill. App. 3d at 153, 503 N.E.2d at 1117.

63. *Id.* at 153, 503 N.E.2d at 1118.

64. *Id.* See also *Michalski v. Chicago Title & Trust Co.*, 50 Ill. App. 3d 335, 365 N.E.2d 654 (1st Dist. 1977) (possibility of malpractice suit on attorney in charge of deeds was too remote to render him an interested person precluding him from testifying under the Dead-Man's Act); *In re Estate of Truman v. Gentz*, 32 Ill. App. 3d 886, 336 N.E.2d 766 (2d Dist. 1975) (attorney who drew up deeds for decedent was not interested party because no pecuniary gain or loss will come to witness as result of decree).

65. 115 Ill. 2d 209, 503 N.E.2d 355 (1986). Since last year's *Survey*, the supreme court reversed the appellate court's decision. See *Cavise & Tomassi*, *supra* note 31 at 534-35.

Court continued its recent pattern of adopting the federal rules on the admissibility of expert testimony and, in this case, erased the long-held testimonial distinction between the treating and non-treating physician. The appellate court had held that a non-treating doctor's deposition could not be introduced into evidence when based on a plaintiff's self-serving and subjective complaints of pain during an examination by a non-treating physician.⁶⁶ Illinois traditionally has held that subjective statements are admissible as an exception to the hearsay rule only when made to a treating physician.⁶⁷

The court offered several reasons for its shift towards the Federal Rules of Evidence. The court had already held, in *Wilson v. Clark*⁶⁸ and its progeny, that Federal Rules 703 and 705, allowing expert opinion to be based upon facts not in evidence (including hearsay), was applicable in Illinois. The rationale for the rule is that the facts or data upon which an expert would reasonably rely are, ordinarily, of a high degree of reliability themselves, such as hospital records. In *Melecovsky*, a Structural Work Act case, the court extends that recognition of reliability to the out-of-court subjective complaints made by the plaintiff to the physician hired by him for purposes of trial. Of particular importance to the court was that the rules are designed "to bring the judicial practice in line with the practice of the experts themselves when not in court."⁶⁹ Thus, facts and data inadmissible on their own, that are reasonably relied upon in a particular field, can be used as the basis of an expert's opinion.⁷⁰ In *Melecovsky*, the court allowed the testimony of the non-treating physician, including the subjective com-

66. *Melecovsky*, 115 Ill. 2d at 216-17, 503 N.E.2d at 358.

67. *Id.* at 214, 503 N.E.2d at 357. Since *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981), which adopted Federal Rules of Evidence 703 and 705, there has been a digression away from these traditional rules.

FED. R. EVID. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data upon cross examination.

68. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

69. *Melecovsky*, 115 Ill. 2d at 215, 503 N.E.2d 358 (citing FED. R. EVID. 703 advisory committee note).

70. *Id.*

plaints of the plaintiff to the expert, and stated that "since experts in their own practice normally rely on such statements it is consistent with the purposes of Rule 703."⁷¹ The court held that it was error not to admit the non-treating expert's testimony, and that any questions regarding the testimony goes to its weight and not its admissibility.⁷²

In *People v. Johnson*,⁷³ the Illinois Supreme Court addressed, for the first time, the admissibility of neutron-activation analysis ("N-A-A") results.⁷⁴ The questions were whether the N-A-A test was sufficiently reliable to determine whether cartridges found in the defendant's home were manufactured on the same day as bullets found in the victim's body, and whether the results of the test were conclusive enough for admissibility.⁷⁵

At trial, a special agent with the Federal Bureau of Investigation testified that the absence of arsenic in the samples prevented an absolute determination of the bullets' and cartridges' origin. He stated, however, that the fact that arsenic was not found in either sample and the very close copper and antimony compositions of the bullets tested indicated that the samples "would commonly be expected to be found among bullets within the same box of cartridges with compositions just like these, and that [i.e., another box of cartridges close in composition] could best be found from the same type and manufacture packaged on the same day."⁷⁶

The defendant apparently did not contest that N-A-A is a generally accepted scientific process worthy of acceptance in Illinois under the test of *Frye v. United States*.⁷⁷ Relying on *State v. Holt*,⁷⁸ the defendant contended that expert opinions "expressing less certitude than a 'probability' or an 'actuality' in interpreting the results of a neutron-activation analysis are incompetent."⁷⁹ The court observed, however, that when *Holt* was decided, the N-A-A

71. *Id.* at 216, 503 N.E.2d at 358. "As *Wilson* points out, Rule 703 on its face makes no distinction between treating and non-treating experts." *Id.* at 216, 503 N.E.2d 358 (citing *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981)).

72. *Melecosky*, 115 Ill. 2d at 216-17, 503 N.E.2d at 358-59. This error mandates a new trial on the issue of damages only. *Id.* at 217, 503 N.E.2d at 358-59.

73. 114 Ill. 2d 170, 499 N.E.2d 1355 (1986).

74. *Id.* at 195, 499 N.E.2d at 1366. "[N]eutron-activation analysis is a two-phase method of instrumental chemical analysis, which detects, in parts per million, trace elements in a sample of material for the purpose of identifying the source of the material." *Id.*

75. *Id.* at 194-95, 499 N.E.2d at 1366.

76. *Id.* at 196, 499 N.E.2d at 1366.

77. 293 F. 1013 (D.C. Cir. 1923).

78. 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969).

79. *Johnson*, 114 Ill. 2d at 196, 499 N.E.2d at 1366.

test was not a generally proven science.⁸⁰ Since that time, a majority of jurisdictions have accepted N-A-A results as a consistently reliable forensic-science technique, admissible in criminal proceedings.⁸¹ Accordingly, the Illinois Supreme Court stated that "any lack of certitude in a qualified expert's testimony, or inconclusiveness in the results of an otherwise reliable neutron-activation analysis, goes to the weight and not the admissibility of such evidence."⁸²

In *People v. Bryant*,⁸³ filed the same day as *Johnson*, the Illinois Supreme Court held that it was error for an expert witness to give his opinion that pieces of glass found on the defendant's shoes more probably than not had a common origin with the glass samples taken at the scene of an attempted burglary.⁸⁴ The court acknowledged that it was common for an expert to testify, as he did here and as the expert did in *Johnson*, that scientific tests demonstrate that physical evidence is "consistent" with the origin of the known standard.⁸⁵ In *Bryant*, however, the expert testified that there was "a good probability that the glass that [was found] in the shoe came from the same source as the glass standard."⁸⁶ The court held that admission of this opinion was erroneous because there was no testimony regarding the frequency of finding glass of the same origin and the probability that the glass was derived from a common source.⁸⁷ The court determined that the expert's testi-

80. *Holt*, 17 Ohio St. 2d at 85, 246 N.E.2d at 367.

81. *Johnson*, 114 Ill. 2d at 197, 499 N.E.2d at 1367. See, e.g., *Chatom v. State*, 348 So. 2d 838 (Ala. 1977); *Keith v. State*, 612 P.2d 977 (Alaska 1980); *Mills v. State*, 476 So. 2d 172 (Fla. 1985); *State v. Warden*, 100 Idaho 21, 592 P.2d 836 (1979); *State v. Ulrich*, 187 Mont. 347, 609 P.2d 1218 (1980); *State v. Journey*, 201 Neb. 607, 271 N.W.2d 320 (1978); *Commonwealth v. Sangricco*, 475 Pa. 179, 379 A.2d 1342 (1977).

82. *Johnson*, 114 Ill. 2d at 197, 499 N.E.2d at 1367. The court also dismissed the defendant's contention that his guilt was not proved beyond a reasonable doubt. "[I]t is well established in Illinois that identification of the accused by a single eyewitness is sufficient to sustain a conviction, provided that the witness viewed the accused under circumstances permitting a positive identification." *Id.* at 189, 499 N.E.2d at 1363. See also *People v. Yarbrough*, 67 Ill. 2d 222, 226, 367 N.E.2d 666, 668 (1977); *People v. Jones*, 60 Ill. 2d 300, 307-08, 325 N.E.2d 601, 605 (1975); *People v. Stringer*, 52 Ill. 2d 564, 569, 289 N.E.2d 631, 634 (1972).

83. 113 Ill. 2d 497, 499 N.E.2d 413 (1986).

84. *Id.* at 512-13, 499 N.E.2d at 420-21. The term "standard" refers to the source of the evidence being examined. In this case the standard is the broken window at the service station.

85. *Id.* at 513, 499 N.E.2d at 420.

86. *Id.*

87. *Id.* at 513, 499 N.E.2d at 420-21. Because the Illinois Supreme Court had already agreed to affirm the appellate court's granting of a new trial based on an error in instructing the jury, the court reached this issue only on its merits. *Id.* at 512-14, 499 N.E.2d at 420.

mony established only that the fragments were consistent and that the glass "could have" come from the same window.⁸⁸

In *People v. Sanchez*,⁸⁹ the Illinois Supreme Court allowed the presentation of highly magnified photographs of fibers found both on a decedent and at the scene of the crime. The photographs were admitted despite expert witness testimony that scientific fiber comparisons could, at best, determine consistencies between fibers.⁹⁰ The photographs were introduced to support the expert's conclusion that some consistencies existed between the two sets of fibers.⁹¹ The defendant contended that the photographs presented were "posed" and presented in a manner attributing too much weight to their significance.⁹² The court, however, admitted this evidence based on the "foundation surrounding the introduction of the photographs enabl[ing] the jury to properly consider their significance."⁹³

In *Dyback v. Weber*,⁹⁴ the Illinois Supreme Court held that an expert witness's methodology in determining the cause of a fire was based upon mere "conjecture and guess" and was therefore of no consequence in determining negligence.⁹⁵ In *Dyback*, the plaintiff's house caught fire, resulting in its ultimate destruction, while the defendants were in the process of making repairs caused by a

88. *Id.* at 513, 499 N.E.2d at 420.

89. 115 Ill. 2d 238, 503 N.E.2d 277 (1986).

90. *Id.* at 268, 503 N.E.2d at 288. The expert did not testify that the fiber results were absolutely conclusive or that the fibers were identical. *Id.*

91. *Id.*

92. *Id.* at 267, 503 N.E.2d at 287. In support of his contention, the defendant relied on two cases which the court determined were factually irrelevant. In *French v. City of Springfield*, 65 Ill.2d 74, 357 N.E.2d 438 (1976), and *People v. Crowe*, 390 Ill. 294, 61 N.E.2d 348 (1945), the evidence in dispute was a recreation of a past event and after-the-fact posed photographs, respectively. In the case at bar, however, the evidence depicted "physical facts as they actually existed at the time of the occurrences in question." *Sanchez*, 115 Ill. 2d at 268, 503 N.E.2d at 287.

93. *Sanchez*, 115 Ill. 2d at 268, 503 N.E.2d at 288. The foundation to which the court referred included: forensic evidence, evidence displaying consistencies between paint applied to the top of the car involved in the crime and found in paint cans in the defendant's garage, witness testimony stating that the defendant had been seen in the bar where the victim was picked up, and witness testimony that they had seen handguns and handcuffs in the defendant's possession. *Id.* at 254-55, 503 N.E.2d at 281-82.

94. 114 Ill. 2d 232, 500 N.E.2d 8 (1986).

95. *Id.* at 244-45, 500 N.E.2d at 14. See also *Hahn v. Eastern Illinois Office Equip. Co.*, 42 Ill. App. 3d 29, 34, 355 N.E.2d 336, 341 (4th Dist. 1976) (experienced fire investigator not permitted to give opinion on cause of fire when based on mere conjecture); *Schwartz v. Peoples Gas Light & Coke Co.*, 35 Ill. App. 2d 25, 30, 181 N.E.2d 826, 829 (1st Dist. 1962) (expert witness on combustible materials and thermostats, no matter how experienced, not permitted to testify about origin of fire when his opinion was based on mere conjecture).

previous fire.⁹⁶ The facts revealed that during the time of the repair, there was no gas service to the house. The electrical service consisted of one outlet used by the defendants to power their portable fuel-oil heater.⁹⁷ The defendants had been at the house the day before the fire, but they stated that because they were there for only about one hour, they did not use the heater. They did not recall, however, if they had unplugged the unit.⁹⁸ Plaintiffs sought to infer negligence of the contractors under the *res ipsa loquitur* doctrine.⁹⁹

A licensed public adjuster, qualified as an expert on causes and origins of fires, testified for the plaintiff that he inspected the house from the exterior fourteen months after the incident. Relying on the investigations of another investigator, since deceased, and on the investigation of the local fire department, the expert concluded that, although he did not know the origin of the fire, it would not have occurred but for the heater that was left on the premises.¹⁰⁰

The supreme court reiterated that, absent a showing that conditions have remained unchanged, post-event inspections are inadmissible.¹⁰¹ Based on this premise and the court's conclusion that the testimony was based on conjecture and guess, the court confirmed the trial court's holding that the "mere presence of the heater, without more, neither constituted negligence nor reasonably permitted an inference of negligence that would support the *res ipsa loquitur* count."¹⁰²

In *Abrams v. City of Mattoon*,¹⁰³ the Illinois Appellate Court for the Fourth District indicated that when a plaintiff's complaint of ailment is "shrouded in controversy," lay testimony is insufficient

96. *Dyback*, 114 Ill. 2d at 236, 500 N.E.2d at 9.

97. *Id.* at 236, 500 N.E.2d at 9.

98. *Id.* at 236, 500 N.E.2d at 10.

99. *Id.* at 238, 500 N.E.2d at 10-11.

100. *Id.* at 237, 500 N.E.2d at 10.

101. *Id.* at 244, 500 N.E.2d at 13. See also *Canales v. Dominick's Finer Foods*, 92 Ill. App. 3d 773, 778, 416 N.E.2d 303, 308 (1st Dist. 1981) (husband's testimony concerning appearance of food store floor one hour and twenty minutes after wife slipped on greasy ointment was not admissible when no evidence was presented to show that conditions were essentially unchanged); *Escher v. Norfolk & Western Ry. Co.*, 77 Ill. App. 3d 967, 972, 397 N.E.2d 9, 13 (5th Dist. 1979) (general contractor's testimony regarding condition of door that caused plaintiff's injury was inadmissible when the contractor examined the door three-and-one-half years after the accident), *aff'd*, 82 Ill. 2d 110, 411 N.E.2d 864 (1980); *LaSalle National Bank v. Feldman*, 78 Ill. App. 2d 363, 372, 223 N.E.2d 180, 185 (1st Dist. 1966) (expert witness's testimony of post-fire investigation conducted three days after the fire was inadmissible absent evidence demonstrating that conditions remained unchanged).

102. *Dyback*, 114 Ill. 2d at 244-45, 500 N.E.2d at 14.

103. 148 Ill. App. 3d 657, 499 N.E.2d 147 (4th Dist. 1986).

to establish causation.¹⁰⁴ In *Abrams*, the plaintiff was injured in a rear-end collision with a police car.¹⁰⁵ At trial, the plaintiff testified, over the defendant's objection, that she noticed, among other injuries, blurred vision after the accident and prior to her arrival at the emergency room. The plaintiff's optometrist presented substantial evidence regarding a cataract condition which had necessitated prior surgery and the use of a contact lens. The optometrist indicated that her condition would lead to a decrease in uncorrected vision over time.¹⁰⁶

The court agreed with the defendant's position that medical testimony was needed to establish a casual connection when a preexisting condition existed.¹⁰⁷ In addition, the court held that contrary to the plaintiff's contention, admission of her testimony was not harmless error based on the proportion of damages sought for her alleged eye injury.¹⁰⁸

In *People v. Server*,¹⁰⁹ the defendant appealed a conviction of one count of aggravated criminal sexual assault and two counts of aggravated criminal sexual abuse of his nine year old step daughter.¹¹⁰ The defendant argued that admission of expert testimony regarding the "rape trauma syndrome"¹¹¹ to prove the occurrence of a sexual act constituted reversible error because it was highly prejudicial.¹¹² The Fourth District, addressing the question for the first time in Illinois, admitted expert testimony about "rape trauma syndrome" in an aggravated criminal sexual assault case. The decision followed a clear trend in Illinois toward admitting "expert testimony regarding psychological syndromes when such evidence

104. *Id.* at 665, 499 N.E.2d at 152 (quoting *Jackson v. Navik*, 37 Ill. App. 3d 88, 95-96, 346 N.E.2d 116, 123 (2d Dist. 1976)).

105. *Abrams*, 148 Ill. App. 3d at 659, 346 N.E.2d at 148.

106. *Id.* at 665, 346 N.E.2d at 150.

107. *Id.* at 666, 346 N.E.2d at 152-53. The court cited *Jackson v. Navik*, 37 Ill. App. 3d 88, 95-96, 346 N.E.2d 116, 123 (2d Dist. 1976), for the applicable rule.

108. *Abrams*, 37 Ill. App. 3d at 666, 346 N.E.2d at 153. The ultimate verdict of \$30,000 could not, as the plaintiff suggested, have been supported by her neck injury. *Id.*

109. 148 Ill. App. 3d 888, 499 N.E.2d 1019 (4th Dist. 1986).

110. *Id.* at 890-91, 499 N.E.2d at 1021.

111. "Rape trauma syndrome" is a form of post-traumatic stress disorder caused by sexual assault. *Id.* at 897-98, 499 N.E.2d at 1026.

112. *Id.* at 896, 499 N.E.2d at 1024-25. The defendant also argued that the decision should be reversed because: he was not proved guilty beyond a reasonable doubt; the testimony of a Department of Children and Family Services worker was improperly admitted under the corroborative complaint provision of the Code of Criminal Procedure (ILL. REV. STAT. ch 38, para. 115-10 (1963)); and that the aggravated criminal sexual assault and aggravated criminal sexual abuse statutes are unconstitutional. None of these contentions were upheld. *Id.* at 900-02, 499 N.E.2d at 1021.

aids the trier of fact."¹¹³ The court cited the battered woman and battered child syndromes, evidence about which has been utilized by Illinois appellate courts. The threshold question of admissibility, though not explicitly addressed by the court, is whether or not the rape trauma syndrome has achieved general acceptance in the relevant scientific community.¹¹⁴ The court stated that it had reviewed the psychological literature and found that the syndrome is "generally accepted to be a common reaction to a sexual assault."¹¹⁵ The court noted, however, that the majority of jurisdictions that have addressed the issue have rejected the admissibility of the syndrome to prove either lack of consent on the part of the victim or that a rape did in fact occur.¹¹⁶ Although this court had never addressed the admissibility of the rape trauma syndrome, the court held that when the testimony was used only to display how child sexual assault victims act, there was no abuse of discretion in admitting the testimony.¹¹⁷

The jurisdictions that have admitted rape trauma syndrome testimony specify that it can be admitted for the limited purposes of proving lack of consent or for explaining how victims customarily respond to the sexual assault.¹¹⁸ In *Server*, the testimony was admitted for the latter purpose, despite the defendant's claim of prejudice.¹¹⁹ The court held that there was no prejudice when the expert testified only to the similarities between the victim's emotional, physical, and psychological actions and the same actions normally found in a child sexual assault victim.¹²⁰ The expert never expressed an opinion about whether the child was sexually assaulted or whether the defendant was the culprit.¹²¹ The court recognized the difficulty in proving and defending charges of sexual assault, and stated that because of these difficulties, it is essential to establish that the testimony will be beneficial to the trier of fact and minimally prejudicial to the defendant.¹²²

A second related issue addressed by the court was whether or

113. *Id.* at 898, 499 N.E.2d at 1026.

114. *See* *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

115. *Server*, 148 Ill. App. 3d at 898, 499 N.E.2d at 1026.

116. *See e.g.*, *Allewalt v. Maryland*, 61 Md. App. 503, 487 A.2d 664 (1985); *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291 (1984); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984).

117. *Server*, 148 Ill. App. 3d at 899, 499 N.E.2d at 1026.

118. *Id.* at 898, 499 N.E.2d at 1026.

119. *Id.* at 898-99, 499 N.E.2d at 1026.

120. *Id.*

121. *Id.* at 896-99, 499 N.E.2d at 1025-26.

122. *Id.* at 898, 499 N.E.2d at 1026.

not the witness, a clinical psychologist, was qualified as an expert in rape trauma syndrome.¹²³ The court found that because the witness did not render a final medical or psychiatric opinion, and because there are not yet any degree courses of study in the area, the court did not abuse its discretion in allowing the expert testimony.¹²⁴

V. HEARSAY

In *People v. Strausberger*,¹²⁵ the Illinois Appellate Court for the Second District joined the First District in specifically recognizing that police reports are admissible under the past recollection recorded exception to the hearsay rule.¹²⁶ The long-standing rule that police reports are not admissible as business records under Supreme Court Rule 236,¹²⁷ however, remains intact.

In *Strausberger*, the defendant was arrested for driving under the influence of alcohol and charged with reckless homicide. The arresting officer, the only witness at the hearing to quash the arrest and suppress evidence, testified as an adverse witness for the defense. He then testified for the prosecution. The officer stated that he could not recall the basis for his opinion that the defendant was intoxicated. To refresh his memory, the officer was permitted to review his original report. After reviewing the report, the officer testified that he had noticed the smell of alcohol on the defendant at the scene of the accident and at the hospital. He also indicated that his testimony was based solely on his review of the transcript without any independent recollection.¹²⁸

The trial court sustained the defendant's objection to the police report. On appeal, the State contended that the report was admissible under the past recollection recorded exception.¹²⁹ Recognizing a split of authority among the district courts,¹³⁰ the appellate

123. *Id.* at 899, 499 N.E.2d at 1026-27.

124. *Id.* at 896-97, 499 N.E.2d at 1024-25.

125. 151 Ill. App. 3d 832, 503 N.E.2d 832 (2d Dist. 1987).

126. *Id.* at 834-35, 503 N.E.2d at 834.

127. ILL. S. CT. R. 236, ILL. REV. STAT. ch. 38, para. 115-5(c)(2) (1985).

128. *Strausberger*, 151 Ill. App. 3d at 833-34, 503 N.E.2d at 833.

129. *Id.* at 834, 503 N.E.2d at 834.

130. *Id.* In the First Appellate District, police reports have been determined admissible as past recollections recorded if the proper foundation is laid. *Id.* See *People v. Carter*, 72 Ill. App. 3d 871, 876, 391 N.E.2d 427, 431 (1st Dist. 1979); *Rigor v. Howard Liquors*, 10 Ill. App. 3d 1004, 1010, 295 N.E.2d 491, 496 (1st Dist. 1973). Although the Second District has never explicitly adopted the past recollection exception as applied to police reports, the court has recognized the admissibility of a hospital 'incident book' as past recollection recorded. *Strausberger*, 151 Ill. App. 3d at 834, 503 N.E.2d at 834. See *People v. Munoz*, 31 Ill. App. 3d 689, 693, 335 N.E.2d 35, 38 (2d Dist. 1975). The Third

court analogized the police report to a hospital 'incident book,' already found admissible in the Second District. This analogy stemmed from the similar treatment of the two items in the Code of Criminal Procedure of 1963 and under Supreme Court Rule 236.¹³¹ The court also pointed to the Fifth District's recognition of a First District case that relied on the admissibility of an 'incident book' for the proposition that a police officer could relate back to his report as long as a proper foundation has been laid.¹³² Because of the similarity between a hospital 'incident book' and a police report, the court reversed the lower court's ruling, and held that the report was admissible as past recollection recorded.¹³³

VI. CONCLUSION

During the *Survey* year, the Illinois Supreme Court continued a pattern of selective adoption of the Federal Rules of Evidence. This year, the court rendered decisions establishing closer consistency with Federal Rules 703 and 705 on the admissibility of expert testimony and reinterpreted existing Illinois case law to conform with the rules on admissibility of habit and routine practice evidence under Federal Rule 406. Finally, there appears to be a conflict developing in the appellate districts on the admissibility of police reports and hospital records. Long held inadmissible as business records under Supreme Court Rule 236, the records have now been held, in at least two districts, as admissible under the hearsay exception for past recollection recorded.

District has explicitly rejected this exception. *Strausberger*, 151 Ill. App. 3d at 834-35, 503 N.E.2d at 834. See *People v. Burnside*, 133 Ill. App. 3d 453, 457, 478 N.E.2d 884, 887 (3d Dist. 1985).

131. *Strausberger*, 151 Ill. App. 3d at 834, 503 N.E.2d at 834. ILL. S. CT. R. 236, ILL. REV. STAT. ch. 38, para. 115-5(c)(2) (1985).

132. *Strausberger*, 151 Ill. App. 3d at 835, 503 N.E.2d at 834.

133. *Id.* It was undisputed that an adequate foundation was laid when the officer stated that he could not recall specific facts about the incident in question and where he stated that the report was accurate.