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Torts

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I. INTRODUCTION

During the *Survey* year, the Illinois Supreme Court confronted tort issues of varying magnitude and significance. The court's analyses ranged from logical discussions of comparative negligence to a treatment of the controversial wrongful life cause of action. The supreme court, as well as several appellate district courts, focused upon issues that defined causes of action and determined whether an action would survive. The courts analyzed also the duty of landowners, motor-vehicle operators, employers, reporters, and publishers. The courts also considered questions about proximate cause and the extent of damages for which a party may be liable, and interpretations of the Contribution Act and the Structural Work Act. In short, the focus was often upon defining the scope and breadth of a defendant's responsibility.

II. MEDICAL MALPRACTICE

A. The Wrongful Life Cause of Action

In *Goldberg v. Ruskin*,[1] the Illinois Supreme Court considered for the first time, and rejected, a cause of action for wrongful life.[2] Jeffrey Goldberg was born with Tay-Sachs disease, an incurable, fatal hereditary disorder.[3] Jeffrey's parents brought suit on his be-

1. 113 Ill. 2d 482, 499 N.E.2d 406 (1986).

2. *Id.* at 482-92, 499 N.E.2d at 406-10. The wrongful life cause of action is brought by a child whose parents would have aborted the child if they had been given the information they desired or if tests had determined the child's diseased condition. The alleged injury is being born. *Id.* at 484, 486-87, 499 N.E.2d at 407-08. *See also* Siemieniec v. Lutheran General Hosp., 117 Ill. 2d 230, 512 N.E.2d 691 (1987) (a case decided outside the *Survey* year which included a more detailed discussion by the Illinois Supreme Court of the wrongful life cause of action).

3. *Goldberg*, 113 Ill. 2d at 483, 499 N.E.2d at 406. The appellate court described the disease as follows:

> Tay-Sachs disease is a fatal, progressive, degenerative disease of the nervous system which occurs primarily in Jewish infants of eastern European ancestry. A diseased child appears normal at birth, but at four to six months of age, the child's central nervous system begins to degenerate, and he suffers eventual blindness, deafness, paralysis, seizures, and mental retardation. His life expectancy is two to four years. Only in the circumstances where both parents are carriers of the Tay-Sachs trait will there be a great likelihood of the presence of the disease in their offspring. The carrier is not affected by the disease, but if both parents are carriers, the probability that their child will have the disease is one in four. There is a blood test to identify carriers of the Tay-Sachs trait. If

half[4] against the treating obstetrician-gynecologist and his employer, a hospital.[5] The plaintiffs alleged that Dr. Ruskin's failure to perform any tests to detect Tay-Sachs disease or to inform the parents about the possibility of the disease occurring deprived them of vital information. They contended that, had they been provided this information, they would have chosen to abort the fetus, and Jeffrey would not have been born.[6] The plaintiffs also contended that Jeffrey should receive damages for the pain and suffering he endured during his lifetime.[7]

The court admitted that the plaintiffs' allegations contained the components necessary to state a cause of action for wrongful life, provided that the wrongful life cause of action was a recognized claim.[8] The court, however, refused to recognize the tort of

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tests show that both parents are carriers, a further test known as amniocentesis can be performed to determine whether the fetus is afflicted with the disease.

Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 1031 n.2, 471 N.E.2d 530, 532, n.2 (1st Dist. 1984).

4. *Goldberg*, 113 Ill. 2d at 483, 499 N.E.2d at 406. Jeffrey died while the first appeal was pending. The appellate court appointed his father as special administrator of his estate in order to prosecute the action. 128 Ill. App. 3d at 1030 n.1, 471 N.E.2d at 531 n.1.

5. *Goldberg*, 113 Ill. 2d at 483, 499 N.E.2d at 406. The Goldbergs also brought a claim on their own behalf seeking recovery for medical expenses they incurred in treating Jeffrey's illness. *Id.* at 484, 499 N.E.2d at 406-07. Such claims are known as "wrongful birth" causes of action.

> "Wrongful Birth" refers to the claims for relief of parents who allege they would have avoided conception or terminated the pregnancy by abortion but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child. The underlying premise is that prudent medical care would have detected the risk of a congenital or hereditary genetic disorder either prior to conception or during pregnancy. As a proximate result of this negligently performed or omitted genetic counseling or prenatal testing, the parents were foreclosed from making an informed decision whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate the same.

Siemieniec v. Lutheran General Hosp., 117 Ill. 2d 230, 235, 512 N.E.2d 691, 695. *See* Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15, 16-17 (1980); Comment, *Damages for Wrongful Birth and Wrongful Pregnancy in Illinois*, 15 LOY. U. CHI. L.J. 799, 799-800 (1984); Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 621-23 (1980); Comment, *"Wrongful Life": The Right Not to be Born*, 54 TUL. L. REV. 480, 484-85 (1980). *See generally* 1 DOOLEY, MODERN TORT LAW § 14.06 (1982). The parents' wrongful birth claim was not at issue in *Goldberg*. 113 Ill. 2d at 484, 499 N.E.2d at 406-07. *But see Siemieniec*, 117 Ill. 2d at 253-60, 512 N.E.2d at 703-07, which discussed the issue of wrongful birth.

6. *Goldberg*, 113 Ill. 2d at 483-84, 499 N.E.2d at 406.

7. *Id.* at 484, 499 N.E.2d at 406.

8. *Id.* at 484-85, 499 N.E.2d at 407. The court stated:

> In general, in an action for wrongful life a child who has been born with a

wrongful life.[9]

In analyzing the plaintiffs' claim, the court first distinguished the wrongful life cause of action from the right to be born whole.[10] In cases involving the right to be born whole, the alleged causal link between the tortfeasor's conduct and the injury is clear: the plaintiff asserts that if not for the negligent act, the child would have been born healthy.[11] The court emphasized that Jeffrey Goldberg never had a chance to be born healthy.[12] The complaint did not allege that it was Dr. Ruskin's conduct that caused the disease to occur.[13] Instead, the right allegedly violated in this case was Jeffrey's "right not to be born."[14] Following the lead of the majority of courts in the United States,[15] the Illinois Supreme Court refused to recognize a cause of action grounded in the right not to be born.[16] The court stated, "[u]ltimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so."[17]

> disease or other disorder asserts that he would not have been born had the physician or other health care professional in question informed his parents that the particular ailment might occur. Also necessary to the action is, of course, the assertion that the parents would not have conceived the child or would have aborted the pregnancy if they had been given the information.

Id.

9. *Id.* at 491-92, 499 N.E.2d at 410.

10. *Id.* at 486-87, 499 N.E.2d at 408. The right to be born whole was envisioned first by the court in Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). *See also* Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

11. *Goldberg*, 113 Ill. 2d at 487, 499 N.E.2d at 408.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 485-86, 499 N.E.2d at 407. *See, e.g.*, Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982); Strohmaier v. Associates in Obstetrics & Gynecology, P.C., 122 Mich. App. 116, 332 N.W.2d 432 (1982); Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986); Procanik v. Cillo. 97 N.J. 339, 478 A.2d 755 (1984); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979), *aff'd by an equally divided court*, 497 Pa. 77, 439 A.2d 110 (1981); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). *But see* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (general damages awarded to child for wrongful life claim).

16. *Goldberg*, 113 Ill. 2d at 491-92, 499 N.E.2d at 410.

17. *Id.* at 489, 499 N.E.2d at 409 (quoting Gleitman v. Cosgrove, 49 N.J. 22, 63, 227 A.2d 689, 711 (1967) (Weintraub, C.J., concurring in part and dissenting in part)). *But see* Justice Clark's dissent from the *Goldberg* decision in which he scolds the majority for acting as philosophers rather than judges:

> What the majority fails to recognize, however, is that a judgment against liabil-

The court added that the comparison-defying nature of the wrongful life claim leads to practical as well as conceptual problems.[18] The court noted in particular the difficulty of determining damages, which necessitates comparing a child's injured state with the condition he would have been in had the injury never happened, when the latter would place the child outside the realm of existence.[19] The court concluded, "the difficulties in evaluating the harm and measuring the damage are insurmountable barriers to recovery here."[20]

Prior to the *Goldberg* decision, it was uncertain whether Illinois would allow a diseased or deformed child to maintain a cause of action for having been born and thereby being subjected to the pain and suffering that accompanies the child's disease. After *Goldberg*, it is clear that in Illinois, such a child, no matter how severely debilitated, may not recover damages absent a clearer link between the physician's acts or omissions and the diseases or deformities of the child.

B. Wrongful Pregnancy

In *Clay v. Brodsky*,[21] the Illinois Appellate Court for the Fourth District discussed what a plaintiff must show to present a prima facie case in wrongful pregnancy[22] under the *res ipsa loquitur* doc-

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> ity also enters the "shadow world" of comparison between life and non-life. By its decision today, the court implicitly decides that Jeffrey Goldberg was better off enduring a life of pain, blindness, deafness, paralysis, seizures, and mental retardation, inevitably ending in early death, than not living at all. The court is no more or less competent to render that judgment than to render any other.

Goldberg, 113 Ill. 2d at 493, 499 N.E.2d at 411 (Clark, C.J., dissenting). In his view, the *Goldberg* complaint made out a "classical case of negligence." *Id.* at 493, 499 N.E.2d at 410. Moreover, Justice Clark noted that more and more opinions and commentators advocated recognizing the wrongful life cause of action. *Id.* at 495, 499 N.E.2d at 412. *See* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977). *See also* Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

18. *Goldberg*, 113 Ill. 2d at 489, 499 N.E.2d at 409.

19. *Id.*

20. *Id.* at 490, 499 N.E.2d at 410. In his dissent, Chief Justice Clark suggested that damages could be determined by weighing "the burdens attributable to the child's birth with congenital defects against the benefits the child can derive from life despite the defects." *Id.* at 496, 499 N.E.2d at 412 (Clark, C.J., dissenting). *See* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 738 (1982).

21. 148 Ill. App. 3d 63, 499 N.E.2d 68 (4th Dist. 1986).

22. The wrongful pregnancy or wrongful conception cause of action developed before the wrongful life and wrongful birth causes of action. Wrongful pregnancy fits only a

trine.[23] The court indicated that the usual elements of the doctrine applied.[24] These elements are: (1) that the occurrence which caused the plaintiff's injury does not ordinarily happen without negligence; (2) that the agency or instrumentality involved was exclusively within the control of the defendant; and (3) that the plaintiff was free of contributory negligence.[25] Regarding the first element, the plaintiff presented uncontroverted evidence that the defendant performed a sterilization procedure on the plaintiff, and within a few weeks, the plaintiff became pregnant.[26] Also, the plaintiff's expert witnesses testified that normally, pregnancy does not occur within such a short time after a sterilization operation absent negligence, that the type of operation used by the defendant is highly effective when properly done, and that the bands used in the procedure did not appear defective.[27] The court held this evidence sufficient to establish the first element of proof.[28]

The court deemed the second element satisfied by the testimony of expert witnesses that the plaintiff's injury resulted from a procedure exclusively within Dr. Brodsky's control. One witness testified that the usual cause of an ineffective banding procedure was a physician's error in placing the band on tissue other than the fallopian tube. In addition, the testimony of the plaintiff's treating ob-

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narrow fact pattern. "Liability is based either on the physician's negligence in performing a sterilization procedure or an abortion or the pharmacist's or pharmaceutical manufacturer's negligence in preparing or dispensing a contraceptive prescription. The essence of the wrong for which compensation is sought in some cases is the birth of a healthy and normal—albeit, unplanned and unwanted—child." *Siemieniec*, 117 Ill. 2d 230, 237, 512 N.E.2d 691, 696 (1987). *See* W. PROSSER & W. KEATON, TORTS § 55, at 372-73 (5th ed. 1984); Hampton, *The Continuing Debate Over the Recoverability of the Costs of Child-Rearing in "Wrongful Conception" Cases: Searching for Appropriate Judicial Guidelines*, 20 FAM. L.Q. 45, 47-48 (1986); Holt, *Wrongful Pregnancy*, 33 S.C. L. REV. 759, 763-92 (1982); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1410-19 (1977); Robertson, *Civil Liability Arising From "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J.L. & MED. 131, 132-35 (1978); *See generally* Annotation, Tort Liability for Wrongfully Causing One to Be Born, 83 A.L.R.3d 15 (1978).

23. *Clay*, 148 Ill. App. 3d at 65-77, 499 N.E.2d at 70-74. The literal meaning of *res ipsa loquitur* is "the thing speaks for itself." Imig v. Beck, 115 Ill. 2d 18, 25, 503 N.E.2d 324, 328 (1986). The doctrine usually comes into play when the defendant possesses the knowledge or is in control of any direct evidence that may exist concerning the cause of the plaintiff's injury. *Clay*, 148 Ill. App. 3d at 70, 499 N.E.2d at 73. The doctrine allows the trier of fact to infer negligence from the plaintiff's presentation of circumstantial evidence. The inference is rebuttable. *Id.* at 72, 499 N.E.2d at 74.

24. *Clay*, 148 Ill. App. 3d at 70, 499 N.E.2d at 73.

25. *Id.* This last element was eliminated subsequently in Dyback v. Weber, 114 Ill. 2d 232, 500 N.E.2d 8 (1986). *See infra* notes 75-89 and accompanying text.

26. *Clay*, 148 Ill. App. 3d at 66, 499 N.E.2d at 70.

27. *Id.* at 68-71, 499 N.E.2d at 71-73.

28. *Id.* at 71, 499 N.E.2d at 73.

stetrician indicated this error had in fact occurred. He testified that he found one band attached to tissue other than a fallopian tube and one floating freely.[29]

Finally, the court found that the plaintiff presented sufficient evidence of the third element of *res ipsa loquitur*; the evidence supported the conclusion that she was free of contributory negligence. Expert testimony established that the plaintiff could not have contributed to her own fertility.[30] The court observed that if the sterilization procedure had been performed properly, nothing the plaintiff could have done would have undone the banding of the fallopian tubes.[31] The court awarded the plaintiff damages for loss of income, pain, and physical problems related to the birth.[32] The court cautioned, however, that parents bringing actions for wrongful pregnancy cannot recover damages for the costs incurred in rearing a normal, healthy child.[33]

Thus, the court in *Clay* clarified the areas of proof that a plaintiff must present to maintain successfully a wrongful pregnancy action under a theory of *res ipsa loquitur*. The *Clay* decision, however, acts as a double-edged sword. The decision also favors plaintiffs by reinforcing the availability of the wrongful pregnancy cause of actions for a plaintiff who undergoes sterilization surgery and then becomes pregnant. The decision also favors, however, defendants who perform sterilization procedures negligently because it places a cap on available damages and limits a negligent physician's responsibility to the expenses and pain directly relating to the pregnancy itself and the resulting childbirth.

C. Hospital Liability for Physicians: Agency

During the *Survey* year, two different appellate districts decided two factually similar cases, the outcomes of which hinged upon the same agency issue.[34] The two courts' nearly-opposite treatment of the issue evinced a sharp conflict of opinion between the districts.

In *Greene v. Rogers*,[35] the Illinois Appellate Court for the Third District briefly considered basing liability on apparent agency, but

29. *Id.* at 68, 71, 499 N.E.2d at 71, 74.
30. *Id.* at 71, 499 N.E.2d at 74.
31. *Id.* at 69, 499 N.E.2d at 73-74.
32. *Id.* at 76-77, 499 N.E.2d at 76-78.
33. *Id.* at 76, 499 N.E.2d at 77. *See* Cockrum v. Baumgartner, 95 Ill. 2d 193, 201, 447 N.E.2d 385, 389 (1983).
34. *See* Greene v. Rogers, 147 Ill. App. 3d 1009, 498 N.E.2d 867 (3d Dist. 1986) and Sztorc v. Northwest Hosp., 146 Ill. App. 3d 275, 496 N.E.2d 1200 (1st Dist. 1986).
35. 147 Ill. App. 3d 1009, 498 N.E.2d 867.

declined to break from tradition. Consequently, the court followed the precedential majority in recognizing as valid only an actual agency theory of recovery in tort.[36]

The plaintiff in *Greene* attempted to hold a hospital liable for the acts of an emergency-room physician under the doctrine of *respondeat superior*.[37] The court stated that it would hold the hospital liable only if the physician was actually the hospital's agent.[38] Because a treating physician usually has discretion in treating his patients, hospitals generally cannot be held liable for the negligence of the treating physician.[39] In deciding whether an express agency relationship existed between the parties, the court looked mainly to whether the hospital retained control over the emergency-room physician's actions and to how the physician was paid.[40] The court noted that although the hospital maintained some control over a patient, that control was merely administrative. This administrative role did not include control over how a physician would treat a patient, and thus did not denote an agency relationship between the hospital and the physician.

The court next addressed the payment issue. The physician in question was a member of a medical services group. The hospital paid the group a flat rate per month.[41] It did not pay according to actual services rendered.[42] The court stated that this indirect method of payment indicated that no express agency relationship existed.[43]

The court then considered and rejected liability based on the theory of apparent agency.[44] The court noted that apparent agency generally was considered to be a contract theory of recovery rather than a tort theory of recovery.[45] The court noted that although some state courts allow recovery in medical malpractice cases under a tort theory of apparent agency, no Illinois court had yet to

36. *Id.* at 1016, 498 N.E.2d at 872.

37. *Id.* at 1014, 498 N.E.2d at 870. The doctrine of *respondeat superior*, literally meaning "look to the man higher up," is a form of vicarious liability. The employer is held liable for the tortious acts of his employee so long as they are done in the course of his employment. W. PROSSER & W. KEETON, TORTS §§ 69-70, at 499-508 (5th ed. 1984).

38. *Greene*, 147 Ill. App. 3d at 1014-15, 498 N.E.2d at 870-72.

39. *Id.*

40. *Id.*

41. *Id.* at 1015, 498 N.E.2d at 871.

42. *Id.* at 1016, 498 N.E.2d at 871.

43. *Id.*

44. *Id.* at 1016, 498 N.E.2d at 871-72.

45. *Id.* at 1016, 498 N.E.2d at 871.

do so.[46] In the absence of precedent, the *Greene* court declined to recognize apparent agency[47] as a theory of recovery in tort.[48]

Despite the court's pronouncement in *Greene*, two months before the *Greene* decision, an Illinois court had recognized apparent agency as a theory for liability in a medical malpractice case.[49] In *Sztorc v. Northwest Hospital*,[50] the Appellate Court for the First District held that a hospital may be liable under a theory of apparent agency for the negligent conduct of a physician.[51] The facts in *Sztorc* were nearly identical to those in *Greene*.[52] The relationship clearly would not have survived an actual agency test.

The *Sztorc* court, however, continued its inquiry by analyzing cases which addressed the issue of liability in the hospital/physician setting. The court cited *Darling v. Charleston Community Memorial Hospital*[53] for the proposition that even without an actual agency relationship between the hospital and the physician, a hospital may be liable for the acts of the physician.[54] The court then noted *Holton v. Resurrection Hospital*,[55] in which the Appellate Court for the First District held that, when determining the sufficiency of a complaint, a presumption of agency springs from the fact that treatment occurs on the defendant's premises.[56]

The court in *Sztorc* noted that the rationale for both the *Darling*

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46. *Id.*

47. *Id.* Cases recognizing the apparent-agency tort theory include Hardy v. Brantley, 471 So. 2d 358 (Miss. 1985); Williams v. St. Clair Medical Center, 657 S.W.2d 590 (Ky. App. 1983); Hannola v. City of Lakewood, 68 Ohio App. 2d 61, 426 N.E.2d 1187 (1980); Adamski v. Tacoma Gen. Hosp., 20 Wash. App. 98, 579 P.2d 970 (1978).

48. *Green*, 147 Ill. App. 3d at 1016, 498 N.E.2d at 872.

49. Sztorc v. Northwest Hosp., 146 Ill. App. 3d 275, 496 N.E.2d 1200 (1st Dist. 1986). The *Sztorc* opinion was filed August 4, 1986; the *Greene* opinion was filed October 2, 1986.

50. *Id.*

51. *Id.* at 279, 496 N.E.2d at 1202.

52. *Id.* at 277, 496 N.E.2d at 1201. The physician belonged to an independent radiology group. *Id.* The hospital did not control the physician's actions nor did it pay the physician for individual services rendered. Therefore, the plaintiff could not allege the requisite control and direct payment to state a cause of action based on actual agency.

53. *Id.* at 278, 496 N.E.2d at 1201 (citing Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied* 383 U.S. 946 (1966)).

54. *Id.* The court in *Sztorc* noted that several jurisdictions have adopted the apparent agency doctrine. *See, e.g.*, Stanhope v. Los Angeles College of Chiropractic, 54 Cal. App. 2d 141, 128 P.2d 705 (1942); Hannola v. City of Lakewood, 68 Ohio App. 61, 426 N.E.2d 1187 (1980); Smith v. St. Francis Hosp., 676 P.2d 279 (Okla. App. 1983); Themins v. Emanuel Lutheran Charity Bd., 55 Or. App. 901, 637 P.2d 155 (1981); Adamski v. Tacoma General Hosp., 20 Wash. App. 98, 579 P.2d 970 (1978).

55. *Sztorc*, 146 Ill. App. 3d at 278, 496 N.E.2d at 1202 (citing Holton v. Resurrection Hospital, 88 Ill. App. 3d 655, 410 N.E.2d 969 (1st Dist. 1980)).

56. *Holton*, 88 Ill. App. 3d at 659, 410 N.E.2d at 973.

and *Holton* decisions was firmly rooted in realty: patients do not normally know that the physicians who treat them are independent contractors.[57] Because patients cannot be expected to know the contents of a private contract between the physician and the hospital, they should not be bound by the contract's terms.[58] A person reasonably could believe that radiology services performed within the hospital premises were provided by the hospital.[59] Thus, the court held that the plaintiff could recover on an apparent agency theory, provided she could establish actual reliance on the representation.[60] Clearly, the *Sztorc* court's decision states the minority view. In an area for which courts have long struggled to find an equitable remedy, however, the decision may provide an indication of the direction in which Illinois courts are heading.

III. NEGLIGENCE

A. Comparative Fault

During the *Survey* year the Illinois Supreme Court continued to delineate the effects wrought by the state's adoption of comparative negligence. The impact has proven to be quite extensive.

1. The Manifest-Weight-of-the-Evidence Standard of Review

In *Junker v. Ziegler*,[61] the Illinois Supreme Court considered whether the standard for granting a new trial should be more stringent than the usual manifest-weight-of-the-evidence standard when jury-apportioned fault was at stake.[62] The court held that the adoption of comparative fault principles necessitated no such change.[63]

In *Junker*, the plaintiff was standing in his blind[64] at a commer-

57. *Szortc*, 146 Ill. App. 3d at 278, 496 N.E.2d at 1202 (citing Mduba v. Benedictine Hospital, 52 A.D.2d 450, 384 N.Y.S.2d 527 (1976)).

58. *Id.*

59. *Id.* at 279, 496 N.E.2d at 1202.

60. *Id.* The court held that a factual question existed regarding the plaintiff's reliance even though she testified at a deposition that she did not know whether she would have acted differently had she known that the radiologist were in private practice. *Id.* 278-79, 496 N.E.2d at 1202.

61. 113 Ill. 2d 332, 498 N.E.2d 1135 (1986).

62. *Id.* at 339-40, 498 N.E.2d at 1138. The usual standard in Illinois for deciding a motion for a new trial is "whether the jury's verdict was against the manifest weight of the evidence." *Id.* at 339, 498 N.E.2d at 1138.

63. *Id.* at 339-40, 498 N.E.2d at 1138.

64. A hunting blind is a "concealing enclosure from which one may shoot game." WEBSTER'S NEW COLLEGE DICTIONARY (1977).

cial hunting club when another hunter accidentally shot him.[65] The jury found the plaintiff's damages to be $112,000, but attributed sixty-five percent of the fault to the plaintiff. Accordingly, the jury reduced his award to $39,000.[66] The trial judge found the jury verdict to be against the manifest weight of the evidence, and granted the plaintiff's motion for a new trial.[67] The appellate court reversed, suggesting that the appropriate standard in a motion for a new trial was whether the verdict fell within the "range of the evidence."[68]

On appeal to the Illinois Supreme Court, the defendant relied upon the appellate court's pronounced standard. He contended that a reviewing court should upset a jury's apportionment of fault only when no credible evidence exists that would support the jury's determination.[69] The defendant reasoned that the adoption of comparative negligence principles mandated a more deferential attitude toward the jury's apportionment of negligence between the parties than had been recognized in the past.[70] The Illinois Supreme Court rejected the defendant's contention.[71] The court noted that it was within the spirit of the comparative negligence doctrine to tolerate small inequities so long as the final end is "generally satisfactory."[72] Thus, comparative negligence principles authorized deference to the jury's apportionment of negligence, but the manifest-weight-of-the-evidence standard of review adequately respected the jury's role.[73]

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65. *Junker*, 113 Ill. 2d at 336, 498 N.E.2d 1136-37.

66. *Id.* at 337, 498 N.E.2d at 1136.

67. *Id.*

68. *Junker*, 129 Ill. App. 3d 853, 856, 473 N.E.2d 555, 557 (3d Dist. 1985). The appellate court stated:

> The standard to be applied by a trial judge in granting a new trial on the apportionment of damages should be no different than the standard applied in granting a new trial as to total damages. The general rule governing when a verdict may be overturned as to total damages is when the amount of the verdict bears no reasonable relationship to the loss suffered.
>
> In other words, the verdict must be within the range of the evidence.

Id. at 856, 473 N.E.2d at 557.

69. *Junker*, 113 Ill. 2d at 339, 498 N.E.2d at 1138.

70. *Id.*

71. *Id.*

72. *Id.* at 339-40, 498 N.E.2d at 1138 (quoting Alvis v. Ribar, 85 Ill. 2d 1, 18, 421 N.E.2d 886, 893 (1981)). The court in *Alvis* adopted this language from a law review article written by E.A. Turk. *Alvis*, 85 Ill. 2d 1, 18, 421 N.E.2d 886, 893. *See* Turk, *Comparative Negligence on the March*, 28 CHI.[-]KENT L. REV. 304, 341-51 (1950).

73. *Junker*, 113 Ill. 2d at 339-40, 498 N.E.2d at 1138.

2. Impact on the *Res Ipsa Loquitur* Doctrine

During the *Survey* year, the Illinois Supreme Court considered the effect that the adoption of comparative negligence principles had on the doctrine of *res ipsa loquitur*.[74] In *Dyback v. Weber*,[75] the court held that with the adoption of comparative fault, a plaintiff's negligence no longer acted as an automatic bar to recovery. Plaintiffs need no longer plead and prove their freedom from contributory negligence in order to present a prima facie case under the *res ipsa loquitur* doctrine.[76] The other two elements of the doctrine remain in full force.[77]

At trial, the question of whether the plaintiff must prove his freedom from negligence never arose. It was clear that the plaintiff in no way caused the fire that destroyed his home.[78] The appellate court, however, raised the issue and held that the Illinois Supreme Court's decision in *Alvis v. Ribar*[79] abrogated the need for the plaintiff to prove his freedom from contributory negligence.[80] The court reasoned that because the plaintiff's negligence is no longer a bar to recovery, there is no reason to require the plaintiff to show his freedom from negligence before he can state a claim.

On appeal to the Illinois Supreme Court, the defendant argued that because a plaintiff relying upon the *res ipsa loquitur* doctrine receives an inference of general, rather than specific negligence, comparative fault principles should not apply to benefit the plaintiff.[81] The court rejected this argument. A *res ipsa loquitur* analysis, the court stated, focuses on whether it is more probable than not that the defendant's negligence caused the plaintiff's injury.[82]

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74. Dyback v. Weber, 114 Ill. 2d 232, 500 N.E.2d 8 (1986). For a definition of the doctrine of *res ipsa loquitur*, see *supra* notes 23-25 and accompanying text. The Illinois Supreme Court adopted pure comparative negligence in 1981. Soon after this, a conflict among the districts developed. The conflict centered around whether the comparative negligence principles embodied in Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886, necessitated the deletion of the third element of proof (freedom from contributory negligence) from the traditional *res ipsa loquitur* formula. *Id.* at 238-39, 500 N.E.2d at 11. The Illinois Supreme Court granted leave to appeal in Dyback v. Weber to settle this interdistrict dispute.

75. 114 Ill. 2d 232, 500 N.E.2d 8 (1986).

76. *Id.* at 241, 500 N.E.2d at 12.

77. *Id.* at 238, 500 N.E.2d at 11. These elements are: (1) proof that the occurrence that caused the plaintiff's injury does not ordinarily happen without negligence; and (2) proof that the agency or instrumentality involved was exclusively within the control of the defendant. *Id.* at 238, 500 N.E.2d at 11.

78. *Id.* at 238, 500 N.E.2d at 9-10.

79. 85 Ill. 2d 1, 421 N.E.2d 886.

80. *Dyback*, 134 Ill. App. 3d at 437, 480 N.E.2d at 852.

81. *Dyback*, 114 Ill. 2d at 240, 500 N.E.2d at 11.

82. *Id.*

The analysis is unconcerned with whatever else may have contributed to the injury.[83]

The court noted that comparative fault converts the plaintiff's contributory negligence from a complete bar to recovery to a mere factor in reducing damages.[84] Thus, the court concluded, it logically followed that the plaintiff should no longer be barred from recovering simply because his negligence caused the injury to some degree, provided that the defendant was responsible as well.[85]

The *Dyback* decision is enlightening in a pure comparative fault context. Subsequent to *Dyback*, however, the Illinois legislature adopted a modified version of comparative fault.[86] Thus, the impact which *Dyback* will have upon future law is uncertain. The statute, unofficially labeled "the greater fault bar approach,"[87] provides that a plaintiff whose negligence accounts for more than fifty percent of the cause of his injuries may not recover at all.[88] Logic, as well as dicta in *Dyback*, suggests the future direction of the law. As the court stated, "[t]he jurisdictions that operate under a modified comparative fault doctrine, of course, bar recovery on negligence claims, and also now under *res ipsa loquitur* claims, where the plaintiff is found more than 50% negligent."[89]

B. Res Ipsa Loquitur

The Illinois Supreme Court further discussed the *res ipsa loqui-*

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83. *Id.*

84. *Id.* at 240-41, 500 N.E.2d at 12.

85. *Id.* at 239, 500 N.E.2d at 11. The court reviewed the decisions of other comparative fault jurisdictions, relying most heavily upon a New Mexico decision because that state, like Illinois, had adopted the pure form of comparative negligence. *Id.* (citing Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980); Tipton v. Texaco, Inc., 103 N.M. 689, 712 P.2d 1351 (1985); Cyr v. Green Mountain Power Corp., 145 Vt. 231, 485 A.2d 1265 (1984); Turk v. H.C. Prange Co., 18 Wisc. 2d 547, 119 N.W.2d 365 (1963)). The court deemed its decision to extend comparative fault principles to *res ipsa loquitur* cases consistent with its reasoning in Casey v. Baseden, 111 Ill. 2d 341, 490 N.E.2d 4 (1986), which held that the plaintiff in a conventional comparative negligence case need not demonstrate his complete freedom from negligence in order to recover. For a discussion of *Casey, see* T. Smith & S. Lane, *Torts, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 795, 796-97 (1986).

The final disposition of the case, however, was a reversal. The court rejected the appellate court's finding that the plaintiff had shown the second element of proof: that the fire which destroyed his home was not within the class of occurrences that ordinarily do not happen without negligence. *Dyback*, 114 Ill. 2d at 242-45, 500 N.E.2d at 12-13.

86. ILL. REV. STAT., ch. 110, para. 2-1116 (1986).

87. *See*, M. Pope & J. Freveletti, *Tort Reform Act*, 18 LOY. U. CHI. L.J. 839, 840-43 (1986).

88. ILL. REV. STAT. ch. 110, para. 2-1116 (1986).

89. *Dyback*, 114 Ill. 2d at 239, 500 N.E.2d at 11.

tur doctrine in *Imig v. Beck*.[90] Clearing up some common misconceptions about the doctrine, the court held that a plaintiff's success in presenting a prima facie case in *res ipsa loquitur* created a rebuttable, general inference of the defendant's negligence, which a jury was free to accept or to reject.[91]

Imig involved a head-on collision between a van and an automobile being towed by a wrecker.[92] The investigating police officer testified that it appeared from the location of the debris that the accident occurred in the plaintiffs' lane, but none of the plaintiffs' witnesses could testify to having seen the towed vehicle enter the van's lane of traffic.[93] The plaintiffs offered the fact of the collision as evidence of the defendant's negligence.[94] The defendants presented proof of due care on their part.[95] The jury found for the defendants.[96] The appellate court held that the jury's verdict was unsupported by the evidence and reversed.[97] The appellate court specifically noted that the defendants had failed to produce any direct evidence that they did not cause the collision.[98]

The Illinois Supreme Court soundly rejected the appellate court's reasoning. The court noted that the principle of *res ipsa loquitur* began as a rule of evidence.[99] Since its inception, however, the principle has been intermingled with burden of proof issues,[100] and now has become a substantive principle as well as a procedural rule of evidence.[101] In *Imig*, the Illinois Supreme Court cautioned lower courts not to take this substantive aspect of *res ipsa loquitur* too far. *Res ipsa loquitur*, the court stated, is simply a substitute for circumstantial evidence.[102] Use of the doctrine permits the jury

90. 115 Ill. 2d 18, 503 N.E.2d 324 (1986). In listing the elements that the plaintiff must show in order to raise a factual inference of negligence, the court omitted the third element (that of demonstrating plaintiff's own freedom from negligence) in accord with *Dyback*, 114 Ill. 2d 232, 238-42, 500 N.E.2d 8, 11-12. 115 Ill. 2d at 26, 503 N.E.2d at 328. *See also infra* notes 75-89 and accompanying text.

91. *Imig*, 115 Ill. 2d at 30-32, 503 N.E.2d at 328-30.

92. *Id.* at 21-24, 503 N.E.2d at 326-27.

93. *Id.*

94. *Id.*

95. *Id.* at 23-24, 503 N.E.2d at 327.

96. *Id.* at 24, 503 N.E.2d at 327.

97. *Id.*

98. *Id.*

99. *Id.* at 25, 503 N.E.2d at 328. *See* Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863); 3 J. DOOLEY, MODERN TORT LAW § 48.01 (1977); W. PROSSER & W. KEETON, TORTS § 39, at 243 (5th ed. 1984).

100. *Imig*, 115 Ill. 2d at 25-26, 503 N.E.2d at 328.

101. *Id.*

102. *Id.* at 26, 503 N.E.2d at 328-29.

to draw an inference of negligence.[103] The inference of negligence it raises may be strong or weak.[104] In response, a defendant will usually present evidence to rebut the inference of general negligence.[105] But the plaintiff in a *res ipsa loquitur* case never loses the burden of proof.[106]

Applying these principles to the facts in *Imig*, the court stated that the defendant had no duty to present direct, exculpatory evidence as the appellate court had suggested.[107] Further, the jury could have rendered a verdict for the defendants even if the defendants presented no evidence at all.[108] The court held that the plaintiffs' use of the doctrine of *res ipsa loquitur* created a "permissible inference or deduction" of the defendant's negligence.[109] The jury, however, was free to accept or to reject this inference.[110]

Over the years, the doctrine of *res ipsa loquitur* has come to be viewed as a device that eliminated the need for actual proof. The *Imig* court warns that the doctrine is not the panacea in Illinois that some believed it to be. After *Imig*, presenting a case based upon the doctrine of *res ipsa loquitur* will provide the plaintiff no assurance of success, even if the defendant musters no defense. Accordingly, heavy reliance upon the doctrine after *Imig* would be ill-advised.

C. *A Court-Created Inference of Negligence: The Wrong-Lane Rule*

During the *Survey* year, the Illinois Supreme Court considered a case involving the wrong-lane rule.[111] In *Osborne v. O'Brien*,[112] the court held that the defendant successfully rebutted an inference of his negligence created from the fact that his automobile crossed

103. *Id.* at 28-29, 503 N.E.2d at 330.
104. *Id.* at 27, 503 N.E.2d at 329.
105. *Id.* at 27-28, 503 N.E.2d at 329.
106. *Id.* In the extraordinary *res ipsa loquitur* case, a directed verdict for the plaintiff may be proper. *Id.*
107. *Id.* at 30-32, 503 N.E.2d at 329-30.
108. *Id.*
109. *Id.* at 30-32, 503 N.E.2d at 328-31.
110. *Id.*
111. The Illinois Supreme Court established the wrong-lane rule in Calvetti v. Seipp, 37 Ill. 2d 596, 227 N.E.2d 758 (1967), and Sughero v. Jewel Tea Co., 37 Ill. 2d 240, 226 N.E.2d 38 (1967). According to the wrong-lane rule, if a defendant's automobile is found to have partially entered the oncoming lane of traffic at the time of a collision, an inference of specific negligence arises. Osborne v. O'Brien, 114 Ill. 2d 35, 39, 499 N.E.2d 455, 457-58 (1986). This inference is so strong that it shifts to the defendant the burden of proving his freedom from negligence. *Id.*
112. 114 Ill. 2d 35, 499 N.E.2d 455 (1986).

over the center line into the oncoming lane of traffic, by presenting evidence of due care and showing that he could not have anticipated the icy road conditions. Although the holding was fact dependent, the *Osborne* decision helps to delineate the components necessary for a defendant to rebut the wrong-lane rule's inference of negligence.

In *Osborne*, the defendant was driving down a steeply inclined, curving road with no outlets when weather conditions caused the road to become slick. The rear of the defendant's automobile began to slide to the left. The defendant tried to avoid the skid by pumping the brakes and turning the steering wheel, but his efforts were of no avail. The defendant's car crossed the center line and collided with the plaintiff's oncoming automobile.[113]

The facts in *Osborne* were very similar to those in *Calvetti v. Seipp*.[114] In *Calvetti*, the Illinois Supreme Court outlined what the defendant must show to rebut the inference of her negligence created by her position on the road. The court stated that the defendant must explain that she could not have anticipated the danger; that she was driving at a speed reasonable in view of the road conditions; and that her reaction to the road conditions could not have been expected to send her into the wrong lane.[115] The court in *Calvetti* held that because the defendant failed to offer a reason other than ice on the pavement to explain why she skidded, judgment for the plaintiff notwithstanding the verdict was proper.[116]

In *Osborne*, the defendant introduced evidence that he had no reason to know in advance that the road was slippery; that by the time he discovered the slick conditions he had no alternate route; and that he tried to avoid the skid. The defendant also introduced evidence that other vehicles driving down the hill were skidding, though not necessarily into the other lane.[117] As in *Calvetti*, the only reason the defendant gave for his skidding was the icy conditions. Unlike the court in *Calvetti*, however, the Illinois Supreme Court ruled that the evidence the defendant presented was suffi-

113. *Id.* at 37-38, 499 N.E.2d at 456.

114. 37 Ill. 2d 596, 27 N.E.2d 758. In *Calvetti*, the road was slick and visibility was poor. It had rained and had sleeted earlier, and was snowing at the time of the collision. The defendant was driving down a slightly inclined road at a speed of twenty-five miles per hour when her automobile went into a skid. She then turned the steering wheel of her car to the right, sending the car's rear end into the other lane. The plaintiff's oncoming automobile, also traveling twenty-five miles per hour, collided with the defendant's car. *Id.* at 597, 227 N.E.2d at 759.

115. *Id.* at 598-99, 227 N.E.2d at 760.

116. *Id.* at 598, 227 N.E.2d at 760.

117. *Osborne*, 114 Ill. 2d at 37-39, 42, 499 N.E.2d at 456, 458.

cient to warrant the jury's verdict for the defendant.[118]

Osborne can be interpreted as simply following the parameters of proof set forth in *Calvetti*. The decision, however, may also represent a loosening of the requirements necessary for rebutting the wrong-lane rule. Either way, as a result of *Osborne*, the wrong-lane defendant is probably less vulnerable to a directed verdict than he was previously. If *Osborne* changes nothing else, it certainly makes clear that a defense is available which creates a question of fact for the jury to decide.

D. Duty

In *Alop v. Edgewood Valley Community Association*,[119] the Appellate Court for the First District considered whether the owner of a playground had a duty to take precautions for the safety of children playing there.[120] The plaintiff in *Alop* sustained injuries as a result of falling from a sliding board onto an asphalt surface.[121] The court held that because the risk of falling was obvious to the six-year-old plaintiff, the condition was not dangerous.[122] Accordingly, the court concluded that the owner had no duty to protect the child from the condition.[123]

In *Alop*, the defendants entered into evidence the six-year-old plaintiff's deposition.[124] In that deposition, the plaintiff testified that because asphalt was harder than sand or grass, she knew she could get hurt by falling on it.[125] From this statement and the fact that the plaintiff was six years old, the court concluded that the plaintiff knew or should have known that if she fell from the slide, she risked being injured.[126] The court determined that the slide-and-asphalt-surface combination constituted an ordinary condition that a child old enough to play alone could appreciate and fully

118. *Id.* at 42, 499 N.E.2d at 458.

119. 154 Ill. App. 3d 482, 507 N.E.2d 19 (1st Dist. 1987).

120. *Id.* at 484, 507 N.E.2d at 21. The general rule in Illinois is that landowners owe no special duty to children. *See* Kahn v. James Burton Co., 5 Ill. 2d 614, 625, 126 N.E.2d 836, 841 (1955). An exception to the rule occurs when the owner knows or has reason to know that young children frequent the area and a dangerous condition of the land causes the child's injuries. *See* Cope v. Doe, 102 Ill. 2d 278, 464 N.E.2d 1023 (1984); Corcoran v. Village of Libertyville, 73 Ill. 2d 316, 383 N.E.2d 177 (1978).

121. *Alop*, 154 Ill. App. 3d at 483, 507 N.E.2d at 20.

122. *Id.* at 485-86, 507 N.E.2d at 21.

123. *Id.* at 485-88, 507 N.E.2d at 21-23. *See also* Chimerofsky v. School Dist. No. 63, 121 Ill. App. 2d 371, 257 N.E.2d 480 (1970) (no duty on landowner to guard against the risk that a three-and-a-half-year-old child would be injured by falling from a slide).

124. *Alop*, 154 Ill. App. 3d at 486, 507 N.E.2d at 22.

125. *Id.*

126. *Id.*

understand.[127] Therefore, the landowner had no duty and hence no liability toward the plaintiff.[128] The *Alop* case typifies the recent trend in the Illinois courts to limit a landowner's responsibility. In this line of cases, as in *Alop*, courts have rejected the existence of a landowner's duty and placed the burden of responsibility instead upon the shoulders of a young child.

E. Proximate Cause

The *Survey* year witnessed the continuation of an interdistrict dispute on a proximate cause issue. The First District continued to hold that a plaintiff may satisfy her burden of proving proximate cause by showing that the defendant's action or inaction increased the risk of harm to the plaintiff.[129] On the same issue, the Third District held that a plaintiff may prove proximate cause only by showing there is a greater than fifty percent likelihood that defendant's action or inaction caused the plaintiff's injuries.[130]

1. The Increased Risk Approach

In *Chambers v. Rush-Presbyterian-St. Luke's Medical Center*,[131] the plaintiff's decedent die after the defendant-physician's negligence rendered him comatose.[132] The coma resulted in brain damage and prevented the detection and treatment of a developing cancer.[133] The presence of cancer was not detected until the decedent died.[134]

The testimony of expert witnesses differed concerning the cause of the plaintiff's death.[135] When viewed in the light most favorable

127. *Id.*

128. *Id.* at 488, 507 N.E.2d at 23.

129. Chambers v. Rush-Presbyterian St. Luke's Medical Center, 155 Ill. App. 3d 458, 508 N.E.2d 426 (1st Dist. 1987); Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 143 Ill. App. 3d 479, 492 N.E.2d 6 (1st Dist. 1986); *See also* T. Smith & S. Lane, *Torts, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 795, 806-8 (1986).

130. Russell v. Subbiah, 149 Ill. App. 3d 268, 500 N.E.2d 138 (3d Dist. 1986). In *Russell*, the Third District followed the view taken previously by the Fourth District in Curry v. Summer, 136 Ill. App. 3d 468, 483 N.E.2d 711 (4th Dist. 1985). The *Curry* court rejected plaintiff's contention that the defendant's negligence could be established by showing that the defendant decreased the plaintiff's decedent's chance of survival even though his chances for survival absent the defendant's acts were estimated at less than fifty percent. 136 Ill. App. 3d 468, 483 N.E.2d 711 (4th Dist. 1985).

131. 155 Ill. App. 3d 458, 508 N.E.2d 426 (1st Dist. 1987).

132. *Id.* at 460-61, 508 N.E.2d at 427-28. The defendant's negligence was not an issue in this appeal. *Id.* at 460, 508 N.E.2d at 427.

133. *Id.* at 461, 508 N.E.2d at 428.

134. *Id.*

135. *Id.* at 461-62, 508 N.E.2d at 428-29.

to the plaintiff, however, the evidence suggested that absent the defendant's negligence, the decedent would have had a thirty-three percent chance of surviving.[136] The trial court submitted the question to the jury, and the jury found for the plaintiff.[137]

On appeal, the defendant contended that because the decedent's chance of survival was thirty-three percent, it was more probable than not that he would have died regardless of the defendant's negligence.[138] The defendant argued that his negligence could not, as a matter of law, have constituted the proximate cause of the decedent's death.[139]

The court noted that the defendant's contention would counter a lost-chance-of-survivorship argument, but, the plaintiff had not taken this stance.[140] Therefore, the court rejected the defendant's argument. The court adopted the position that once the plaintiff shows his risk of harm was increased by the defendant's negligence, the question of whether the increased risk was a substantial factor in producing the harm was for the trier of fact.[141] The court concluded that the causal connection in *Chambers* was clear.[142] The court found that the defendant's negligence caused the coma and increased the risk of harm to the decedent because the coma prevented the underlying cancer from being diagnosed and treated.[143] Specifically, the court held that "the negligently induced coma was a substantial factor in causing decedent's

136. *Id.*

137. *Id.* at 461, 508 N.E.2d at 427.

138. *Id.* at 462, 508 N.E.2d at 429. The court gave thorough and careful consideration to the defendant's argument, which mirrored the stance taken by the third and fourth districts. *Id.*

139. *Id. See also Russell*, 149 Ill. App. 3d 268, 500 N.E.2d 138; *Curry*, 136 Ill. App. 3d 468, 483 N.E.2d 711; Wise v. St. Mary's Hospital, 64 Ill. App. 3d 587, 381 N.E.2d 809 (5th Dist. 1978).

140. *Chambers*, 155 Ill. App. 3d at 463, 508 N.E.2d at 429.

141. *Id.* at 464, 508 N.E.2d at 430. The court here adopted section 323 of the RESTATEMENT (SECOND) OF TORTS. This section provides that:

> One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person . . . is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care in performing his undertaking, if (a) his failure to exercise such care increases the risk of such harm . . .

RESTATEMENT (SECOND) OF TORTS § 323, at 135-39 (1965). *See also* Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 143 Ill. App. 3d 479, 493 N.E.2d 6 (1st Dist. 1986) (court adopted same proposition); Hamil v. Bashline III, 481 Pa. 256, 392 A.2d 1280 (1978) (first medical malpractice case to adopt § 323). *But see* Curry v. Summer, 136 Ill. App. 3d 468, 483 N.E.2d 711 (4th Dist. 1985) (court rejected § 323 as inapplicable to medical malpractice cases).

142. *Chambers*, 155 Ill. App. 3d at 464, 508 N.E.2d at 430.

143. *Id.*

death."[144] Thus, by implication the court recognized that a cause need not be fifty-one percent responsible for the injury to be a proximate cause.[145] Rather, the cause need only constitute a substantial factor in causing the injury to be proximate.[146]

2. The Preponderant Cause Approach

In *Russell v. Subbiah*,[147] the court refused to adopt the increased risk approach. Instead, the Appellate Court for the Third District held that proximate cause could not be established absent a showing that the defendant's negligence was more than fifty percent responsible for the plaintiff's injuries.[148] The court reasoned that this followed from the preponderance of the evidence standard of proof necessary in a civil case.[149]

In *Russell*, the plaintiff, a two-year-old child, suffered from what was ultimately found to be a spinal cord tumor.[150] The plaintiff alleged that the defendant, in originally misdiagnosing his condition and thereby delaying proper treatment, caused increased injury to the plaintiff and prolonged the recovery period.[151] An expert's affidavit stated that the tumor itself was the most direct and immediate cause of the damage.[152] The affidavit further related that the defendant's improper delay in diagnosing the tumor was a "concurrent and a proximate cause."[153] Had the defendant diagnosed the tumor earlier, the expert concluded, the plaintiff would have had a "fair chance (50/50)" of a significantly shorter period of recovery.[154]

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144. *Id.*

145. *Id.* at 464-65, 508 N.E.2d at 430-31. The court noted that the language of the Illinois Wrongful Death Act, under which the plaintiff brought the suit, provides that "an action shall lie '[w]henever the death of a person shall be caused by . . . neglect' which would 'if death had not ensued, have entitled the injured party to maintain an action and recover damages.' " *Id.* at 465, 508 N.E.2d at 430 (quoting ILL. REV. STAT. ch. 70, para. 1 (1985)). Thus, the court reasoned that because the Wrongful Death Act does not require a person bringing suit to have had a better than fifty percent chance of survival, there was no basis for imposing such a limitation upon the plaintiff in *Chambers*. *Id.*

146. *Id.* at 465, 508 N.E.2d at 430-31. The court noted that "[w]hether a person would have had a thirty-three percent or sixty-six percent or one hundred percent chance to survive but for the negligence of another is a question of fact properly determined by a jury." *Id.* at 465, 508 N.E.2d at 431.

147. 149 Ill. App. 3d 268, 500 N.E.2d 138 (3d Dist. 1986).

148. *Id.* at 272, 500 N.E.2d at 141.

149. *Id.*

150. *Id.* at 269, 500 N.E.2d at 139.

151. *Id.*

152. *Id.* at 271, 500 N.E.2d at 141.

153. *Id.*

154. *Id.*

The court reasoned that the fifty/fifty odds fell short of showing proximate cause by a preponderance of the evidence.[155] Thus, the court held that because the plaintiff could not prove that the defendant's negligence was greater than fifty percent of the cause of his injuries, the action failed.[156] The court thereby established that, in the Third District, a plaintiff must offer evidence that the defendant's negligence was the preponderant cause of the alleged injuries. Evidence of increased risk will not suffice.

As evidenced by these two divergent opinions, proximate cause continues to be an area of significant controversy in Illinois. This sharp division among the districts will be resolved only when the Illinois Supreme Court decides the issue.

IV. Loss-of-Society Damages

During the *Survey* year, conflicting opinions surfaced regarding who is entitled to receive loss-of-society damages.[157] The courts continued their general trend toward expanding the availability of loss-of-society damages in wrongful death actions. When faced with the same issues in actions premised on serious injuries, however, the courts split. The First District was willing to extend the reasoning used in the wrongful death cases to those involving serious personal injury, while the Fifth District preferred to leave any expanding in this area to the legislature.

A. The Availability of Loss-of-Society Damages for Death

In *Ballweg v. City of Springfield*,[158] the Illinois Supreme Court considered whether parents are entitled to a presumption of loss-

155. *Id.* at 272, 500 N.E.2d at 141.

156. *Id.*

157. The Illinois Wrongful Death Act, Ill. Rev. Stat. ch. 70, paras. 1, 2 (1985), allows recovery for "pecuniary injuries." The trend in Illinois has been "to expand the scope of pecuniary injury to encompass non-monetary losses." Bullard v. Barnes, 102 Ill. 2d 505, 514, 468 N.E.2d 1228, 1332 (1984). Thus, the Illinois Supreme Court now recognizes intangibles, such as "deprivation of the companionship, guidance, advice, love and affection of the deceased" as fitting within the definition of pecuniary injuries. Hall v. Gillins, 13 Ill. 2d 26, 31, 147 N.E.2d 352, 355 (1958). The focus in recent years has been upon which relationships involve such intangibles so that the death of one of the parties presumptively entails a loss of companionship or a loss of society.

158. 114 Ill. 2d 107, 499 N.E.2d 1373 (1986). For a discussion of the evidentiary issues involved in *Ballweg*, see the *Evidence* article in this *Survey*. The relevant facts in *Ballweg* are as follows: Donna Ballweg was sailing a catamaran through a channel when its main mast connected with an overhead power line. The contact electrified the boat as well as the surrounding water, and Donna was killed when she jumped into the lake. *Id.* at 112, 499 N.E.2d at 1375. Donna's parents brought an action premised on strict liability. *Id.* at 111, 499 N.E.2d at 1374.

of-society damages for the death of a child over the age of eighteen.[159] The court noted the lack of authority for applying this presumption to an adult child rather than a minor.[160] Nevertheless, the court held this presumption of loss valid in Illinois.[161] The court reasoned that the death of a child who was over the age of eighteen was no less of a loss to parents than the death of a minor child.[162] Because the Illinois Supreme Court previously had held that parents were entitled to a presumption of loss of society when their minor child died,[163] the presumption of loss of society should be equally available for the parents of an adult child who died.[164]

In *Sheahan v. Northeast Illinois Regional Commuter Railroad Corp.*,[165] the Appellate Court for the First District made headway similar to that made in *Ballweg* in the area of loss-of-society damages allowed in wrongful death actions. The *Sheahan* court held that the brothers and sisters of the decedent in a wrongful death action could properly claim loss-of-companionship damages.[166] The court reasoned that because the language of the Wrongful Death Act which allowed the "next of kin" to recover for pecuniary loss had been interpreted to include "lineal kindred,"[167] there was no reason to exclude claims "presented by next of kin collaterally related."[168]

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159. *Id.* at 118, 499 N.E.2d at 1378. This issue was explicitly left unanswered in Bullard v. Barnes, 102 Ill. 2d 505, 517, 468 N.E.2d 1228, 1234 (1984), which held the presumption valid for the parents of a minor child. *Id.*

160. *Ballweg*, 114 Ill. 2d at 118, 499 N.E.2d at 1378.

161. *Id.* at 120, 499 N.E.2d at 1379.

162. *Id.* The court stated:

> [W]e refuse to draw a line based solely on the age of the child. We fail to see how a presumption of loss of society suddenly disappears upon a child's eighteenth birthday. The return on parents' investment in their children is very real, even though it may not be in the form of money. When children are wrongfully killed, the parents' investment of money and affection, guidance, security and love is destroyed. Society recognizes the destruction of that value, whether the child is a minor or an adult.

Id.

163. *Id.* (citing Bullard v. Barnes, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984)).

164. *Id.*

165. 146 Ill. App. 3d 116, 496 N.E.2d 1179 (1st Dist. 1986).

166. *Id.* at 120, 496 N.E.2d at 1182. Unlike the court in *Ballweg*, however, the *Sheahan* court did not hold that the relationship under consideration merited a presumption of loss of society. The court simply stated that a decedent's brothers and sisters should be allowed an opportunity to plead and prove their pecuniary damages. *Id.*

167. *Id.* (citing Bullard v. Barnes, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984)).

168. *Id.*

B. The Availability of Loss-of-Society Damages for Serious Injuries

In *Dralle v. Ruder*,[169] the Appellate Court for the First District held that loss-of-society damages were proper in a negligence or strict liability claim.[170] In *Dralle*, the plaintiff alleged that the defendant-physician prescribed Bendictin, a drug manufactured by the defendant pharmaceutical company, for her during her pregnancy.[171] The plaintiff further alleged that the use of this drug during pregnancy caused her son to be born with deformities and brain damage.[172] The plaintiff brought an action against her physician for negligence and against the drug manufacturer under a strict liability theory.[173] In both actions she sought to recover damages for the diminution of society which her child could provide to her because of his deformed condition.[174]

The court agreed with the plaintiff that loss-of-society damages should be available to parents of a child who suffered severe but nonfatal injuries.[175] The court's reasoning paralleled the justification for loss-of-society damages to parents in wrongful death cases. The court noted that the primary value of children to their parents was not support, but rather the "intangible benefits they provide in the form of comfort, counsel and society."[176] Therefore, a cause of action for loss of society should be available to the parents whether the child was fatally or nonfatally injured.[177]

The Fifth District, with its decision in *Hearn v. Beelman Truck Co.*,[178] stands in opposition to *Dralle*. The *Hearn* court declined to extend diminution of society damages to a minor child for the serious injuries received by her mother.[179] The court recognized the parallel between a loss-of-society claim when injuries are involved and the same claim in a wrongful death action. The court stated, however, without much discussion, that the decision whether to

169. 148 Ill. App. 3d 961, 500 N.E.2d 514 (1st Dist. 1986), *petition for leave to appeal granted*, — Ill. App. 3d —, 505 N.E.2d 352 (1987).

170. 148 Ill. App. 3d at 963, 500 N.E.2d at 516.

171. *Id.* at 961-62, 500 N.E.2d at 515.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 962-63, 500 N.E.2d at 516.

176. *Id.* at 963, 500 N.E.2d at 516 (quoting Bullard v. Barnes, 102 Ill. 2d 505, 516-17, 467 N.E.2d 1228, 1234 (1984)).

177. *Id.* (citing Dymek v. Nyquist, 128 Ill. App. 3d 859, 469 N.E.2d 659 (1st Dist. 1984)).

178. 154 Ill. App. 3d 1022, 507 N.E.2d 1295 (5th Dist. 1987).

179. *Id.* at 1023, 507 N.E.2d at 1296.

extend loss-of-society damages to serious injuries should be made by the legislature, not by the courts.[180]

V. THE CONTRIBUTION ACT

During the *Survey* year, the Illinois Supreme Court developed guidelines for deciding what constitutes a "good faith" settlement or release under the Contribution Among Tortfeasors Act (the "Contribution Act" or the "Act").[181] The court also ruled that a contribution claim is separate and distinct from the original action, and the basis for liability in the contribution action need not mirror that of the original suit.

A. Good Faith Settlement

Consistent with the public policy favoring settlement, the court in *Ballweg v. City of Springfield*[182] held that a settlement agreement entered after the statute of limitations has run is valid as a good faith settlement.[183] In *Ballweg*, two women sailing in an all metal catamaran were killed when they dove into the water, which had become electrified from the boat's contact with a power line.[184] Their companion, Phillip Henrici, remained on the boat and survived.[185]

The women's representatives, as plaintiffs, filed complaints on a strict liability theory against the boat's manufacturer, the manufac-

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180. *Id.* at 1023, 1025, 507 N.E.2d at 1296, 1297. The *Hearn* court did not cite *Dralle*.

181. The Illinois Contribution Among Joint Tortfeasors Act, ILL. REV. STAT. ch. 70, para. 301-05 (1985), provides in pertinent part:

> (c) When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.
>
> (d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.

ILL. REV. STAT. ch. 70, para. 302(c), (d) (1985).

182. 114 Ill. 2d 107, 499 N.E.2d 1373 (1986).

183. *Id.* at 122-23, 499 N.E.2d at 1380. The settlement issue arose in the second of the two cases consolidated into *Ballweg*, Ogg v. City of Springfield, 121 Ill. App. 3d 25, 458 N.E.2d 1331 (4th Dist. 1984). The case arose out of the same event that led to the first suit, but involved the electrocution death of Jana Welch. *See supra* notes 173-79 and accompanying text.

184. *Ballweg*, 114 Ill. 2d at 112, 499 N.E.2d at 1375.

185. *Id.*

turer's parent company, and the City of Springfield.[186] Two defendants[187] brought a counterclaim seeking contribution from Henrici, the boat's pilot.[188] Prior to the trial, the plaintiff settled with Henrici.[189] At the time of the settlement, the statute of limitations applicable to the plaintiff's potential suit against Henrici had run.[190] The trial court satisfied that the settlement had been made in good faith, approved the settlement, and dismissed Henrici from the suit.[191] The appellate court reversed, noting that the statute would have barred the plaintiff from bringing an action against Henrici. Thus, the court held the settlement invalid for lack of consideration.[192]

The Illinois Supreme Court reversed the appellate court's ruling and affirmed the trial court.[193] The court reasoned that because the statute of limitations is a defense, it would operate only as a potential bar to the plaintiff's action against Henrici.[194] Henrici had not yet raised the statute of limitations, thus he was still potentially liable to the plaintiff. The court concluded that this potential liability constituted consideration for the settlement.[195] Therefore, the settlement was made in good faith, and the court upheld the settlement.

In *Bryant v. Perry*,[196] the Appellate Court for the Second District Court of Appeals followed *Ballweg*, and found a settlement between a mother and daughter valid as a good faith settlement under the Contribution Act.[197] In *Bryant*, the plaintiff, a minor, was a passenger in an automobile driven by her mother, which collided with a truck.[198] The plaintiff, through her mother as next friend, sued the truck driver, and the truck driver filed a counterclaim against the plaintiff's mother, seeking contribution.[199]

186. *Id.* at 111, 499 N.E.2d at 1374.

187. *Id.* The defendants who brought the counterclaim under the Contribution Act were the manufacturer of the boat and its parent corporation. *Id.*

188. *Id.* at 121, 499 N.E.2d at 1379.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 121-22, 499 N.E.2d at 1379.

193. *Id.* at 122-23, 499 N.E.2d at 1380.

194. *Id.* at 122, 499 N.E.2d at 1380.

195. *Id.* The court noted that when deciding whether a settlement had been made in good faith, a court must consider the circumstances surrounding the settlement. *Id.* at 122-23, 499 N.E.2d at 1380. In *Ballweg*, the trial judge was involved in the settlement process from start to finish, and he was satisfied that this was a good faith settlement. *Id.*

196. 154 Ill. App. 3d 790, 504 N.E.2d 1245 (2d Dist. 1986).

197. *Id.* at 798, 504 N.E.2d at 1251.

198. *Id.* at 791, 504 N.E.2d at 1246.

199. *Id.*

Before trial, the trial judge approved a settlement between the mother, as counterdefendant, and the daughter.[200] The issue on appeal was whether the trial court erred in finding the settlement to have been made in good faith under the Contribution Act.[201]

The appellate court first determined that the parental immunity doctrine did not necessarily bar a claim by the daughter against her mother.[202] The court likened the role of the doctrine of parental immunity in *Bryant* to that of the statute of limitations in *Ballweg*.[203] Until the defendant raised the doctrine of parental immunity in court and the court decided that the doctrine applied, a suit by the plaintiff against her mother would be actionable. Thus, the mother's potential liability to her daughter ensured that the settlement was based on consideration, and was not a gratuity.[204]

The court then considered a myriad of arguments offered by the defendant in an attempt to prove the settlement was not made in good faith, as required by the Act.[205] Among them was the contention that the mother's dual role as plaintiff for her daughter and third-party defendant, the two parties to the settlement, evinced collusion.[206] The court rejected this contention and noted that the money was paid by the mother's insurer, not directly by the mother. Therefore, it would be "mere speculation" to assume that the mother was motivated by self-interest rather than her daughter's best interest.[207] The defendant contended also that because the plaintiff's lawyer initially estimated the worth of the case at $150,000, but agreed to settle for $20,000, far below the $100,000

200. *Id.* The settlement amount of $20,000 was approved although the case had been valued initially at $150,000 and the limit on the mother's insurance policy was $100,000. *Id.* at 796, 504 N.E.2d at 1249. The mother was represented by one law firm in her role as plaintiff and by another in her role as counterdefendant. *Id.*

201. *Id.* at 791-92, 504 N.E.2d at 1246.

202. *Id.* at 792-95, 504 N.E.2d at 1247-48. The court did not dispute the continued existence in Illinois of the doctrine of parental immunity, but noted that the doctrine is court created, and, therefore, may be modified when it does not serve its intended purpose. *Id.* (citing Larsen v. Bushkamp, 105 Ill. App. 3d 965, 435 N.E.2d 221 (2d Dist. 1982)). *See* Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (4th Dist. 1968). *See also* 19 J. MAR. L. REV. 807 (1986).

203. *Bryant*, 154 Ill. App. 3d at 794-95, 504 N.E.2d at 1248. The court analogized the case to *Ballweg* as follows: Just as the statute worked only as a potential bar in *Ballweg*, no court had determined that a suit by the daughter against the mother would be barred. Therefore, the mother was potentially liable to the daughter for her injuries. *Id.*

204. *Id.*

205. *Id.* at 795-98, 504 N.E.2d at 1248-51.

206. *Id.* at 795-96, 504 N.E.2d at 1248-49.

207. *Id.* at 796, 504 N.E.2d at 1249.

maximum of the mother's insurance policy, the settlement was not made in good faith.[208] The defendant argued that it was the close relationship between the parties, and not the belief that the settlement amount was reasonable, that motivated the settlement. The court, however, attributed the plaintiff's attorney's change in attitude to the "practical aspect of the art of negotiation . . . merely reflective of the realistic versus the optimistic view of the value of the case."[209]

The defendants then contended that the settlement was not made in good faith because it failed to reflect the proportionate amount of fault the jury attributed to the mother in causing the plaintiff's injury.[210] The court, however, noted that this test of good faith relied on hindsight and was, therefore, unfair.[211] The court recognized that parties execute settlement agreements before trial and without a jury verdict to indicate the relative fault of each tortfeasor.[212] These settlements, therefore, cannot be scrutinized by reference to a jury-determined guilt ratio.[213] The court stated that the only fair test was one which determined whether the settlement was made in good faith by using only information known to the parties at the time they settled. The court stated that such a test could ask whether the sum paid was disproportionate to the amount that the trial court reasonably could have thought the plaintiff would recover.[214]

The court cited *Ballweg* for the proposition that in deciding whether the trial court erred in finding a good faith settlement, an appellate court must take all the circumstances into account.[215] Although the relationship of the parties evokes suspicion, the trial court made a specific finding that there was no evidence of collusion or wrongful conduct. Therefore, all the circumstances to-

208. *Id.*

209. *Id.*

210. *Id.* at 797, 504 N.E.2d at 1250. This argument followed from some California decisions which determined the good or bad faith of a settlement by looking to the price and comparing the ratio of the settlement to the final damage award. *See* River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972). *Accord*, LeMaster v. Amsted Industries, Inc., 110 Ill. App. 3d 729, 442 N.E.2d 1367 (5th Dist. 1982).

211. *Bryant*, 154 Ill. App. 3d at 797, 504 N.E.2d at 1250 (citing Lowe v. Norfolk & Western Ry. Co., 124 Ill. App. 3d 80, 463 N.E.2d 792 (5th Dist. 1984)).

212. *Id.* (citing Wasmsund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 482 N.E.2d 351 (1st Dist. 1985)).

213. *Id.*

214. *Id.*

215. *Id.* at 798, 504 N.E.2d at 1250-51.

gether clearly evinced a good faith settlement.[216]

Finally, the court noted that the good faith finding was "in keeping with the purpose and spirit of the Contribution Act"—to encourage settlement.[217] As the trial court's finding of good faith was consistent with the policy favoring settlement, and because each circumstance cited by the defendant as indicative of collusion could also support a finding of good faith, the appellate court held that the settlement between the mother as counterdefendant and the mother as next friend of her daughter was valid as a good faith settlement under the Contribution Act. From this case, it seems quite clear that Illinois appellate courts will favor settlements under the Contribution Act and find them to have been made in "good faith" unless striking evidence to the contrary is presented.

B. Covenant Not to Sue

In *Stewart v. Village of Summit*,[218] the Illinois Supreme Court considered whether a plaintiff who executed a covenant not to sue the employee who caused his injury also lost his rights against the employer under the doctrine of *respondeat superior*.[219] The covenant not to sue expressly reserved the plaintiff's right to sue any other tortfeasor for the injury, but failed to specifically name the employer as one the these tortfeasors.[220]

The court discussed the contentions of the parties regarding whether the Contribution Act should apply in a *respondeat superior* situation, but did not resolve the issue.[221] Instead, the court decided the case by looking to precedent[222] and the intent of the parties.[223] The court reasoned that its earlier decisions indicated

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216. *Id.* at 798, 504 N.E.2d at 1251.

217. *Id.*

218. 114 Ill. 2d 23, 499 N.E.2d 450 (1986).

219. *Id.* at 24-26, 499 N.E.2d at 451. *See also supra* note 37.

220. *Id.* at 25, 499 N.E.2d at 451. The covenant provided that the "undersigned [plaintiff] hereby expressly reserves the right to sue any other person or persons against whom he may have or assert any claim on account of damages arising out of the above described accident." *Id.*

221. *Id.* at 26-28, 499 N.E.2d at 451-52. The court noted the existing split of authorities: One line reasoned that because the liability of the employer merely is imputed and passive, a covenant not to sue the employee should also cover the employer. The court declined to follow this view. *Id.*

222. *Id. See* Edgar County Bank & Trust Co. v. Paris Hosp., Inc., 57 Ill. 2d 298, 312 N.E.2d 259 (1974) (the execution of a covenant not to sue an employee that specifically reserved plaintiff's right to sue the employer successfully preserved this right); Holcomb v. Flavin, 34 Ill. 2d 558, 216 N.E.2d 811 (1966) (the execution of a covenant not to sue an employee that reserved rights to pursue plaintiff's claim against others extinguished the plaintiff's claim against the employer).

223. *Stewart*, 114 Ill. 2d at 30, 499 N.E.2d at 453.

that a reserved claim against an employer survives the covenant not to sue even though the claim is based on the doctrine of *respondeat superior*.[224] The court noted, without discussion, that this result was consistent with the intent of the parties.[225] Thus, the court held that a plaintiff who executed a covenant not to sue the employee who caused his injury did not thereby lose his right to sue that employee's employer under the doctrine of *respondeat superior*.[226]

The *Stewart* opinion emphasizes the recent philosophy that, as a general matter, the intent of the parties will control when deciding upon the applicability of a release or covenant not to sue. It appears from *Stewart* that unless a party has specifically been included within a release or a covenant and the document provides at least some general reservation of claims against other tortfeasors, the unnamed tortfeasors will be unable to invoke the release or covenant as a defense.

C. Acceptable Grounds for Contribution Actions

In *McCartin-McAuliffe Plumbing and Heating, Inc. v. J.I. Case Co.*[227] the Illinois Supreme Court considered whether negligence may serve as a ground for contribution in a product liability action.[228] The court held that it may.[229]

In the original action, the employee brought a product liability action against the manufacturer of a machinery part that caused his injury.[230] The manufacturer then brought an action against the employer seeking contribution.[231] The original action resulted in a jury verdict against the manufacturer.[232] At trial, the jury considered three separate grounds for contribution: the employer's negligence, misuse of the product, and assumption of the risk. The jury found for the manufacturer in the contribution action.[233]

The appellate court reversed, reasoning that because the original action was premised on strict liability, only misuse and assumption

224. *Id.*
225. *Id.*
226. *Id.*
227. 118 Ill. 2d 447, 516 N.E.2d 260 (1987). The contribution claim was consolidated with the original product liability suit (Dukes v. J.I. Case Co.) on appeal. *Id.* at 450, 516 N.E.2d at 262.
228. *Id.* at 458-59, 516 N.E.2d at 265-66.
229. *Id.* at 464, 516 N.E.2d at 268.
230. *Id.* at 450, 516 N.E.2d at 261.
231. *Id.*
232. *Id.*
233. *Id.*

of the risk could serve to divert liability to the third-party defendant.[234] The court held that negligence was not a proper basis for liability, just as it would not have been a proper basis for liability in the original action. Accordingly, instructions that included negligence constituted reversible error.[235] In reaching this conclusion, the appellate court relied upon Illinois Supreme Court precedent, which indicated that negligence could be a valid ground for contribution in a product liability action only if the alleged negligence could be construed as product misuse or assumption of the risk.[236]

The Illinois Supreme Court reversed, noting that the appellate court mistakenly relied upon cases decided prior to the adoption of the Contribution Act.[237] The court stated that the Contribution Act now governs such an action, and the Act divides the total liability among the contributors according to each contributor's relative fault.[238] The court noted that the Act ensures that each party's obligation is based upon his individual liability in tort to the injured party.[239] Thus, there is no reason for requiring each tortfeasor's liability to rest upon the same theory,[240] nor is it necessary for the basis for recovery in contribution to "mirror the theory

234. *Id.* at 458-60, 516 N.E.2d at 265.

235. *Id.* at 458-59, 516 N.E.2d at 265-66.

236. *Id.* at 459-60, 516 N.E.2d at 266. *See* Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977); Stevens v. Silver Manufacturing Co., 70 Ill. 2d 41, 374 N.E.2d 455 (1977); Robinson v. International Harvester Co., 70 Ill. 2d 47, 374 N.E.2d 458 (1977).

237. *McCartin-McAuliffe*, at 459-61, 516 N.E.2d at 266-67.

238. *Id.* at 461, 516 N.E.2d at 267. The relevant sections of the Contribution Act are sections 2 and 3. Section 2 provides:

> (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.
>
> (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.

ILL. REV. STAT. ch. 70, para. 302(a), (b) (1985). Section 3 covers the amount of contribution. It states:

> The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability.

ILL. REV. STAT. ch. 70, para. 303 (1985).

239. *McCartin-McAuliffe*, 118 Ill. 2d at 462, 516 N.E.2d at 267.

240. *Id. See* Doyle v. Rhodes, 101 Ill. 2d 1, 461 N.E.2d 382 (1984).

of recovery asserted in the original action."[241] Consequently, the court held that negligence is a proper ground for contribution when the cause of action underlying the contribution action was premised on products liability.[242]

VI. RETALIATORY DISCHARGE

During the *Survey* year, the Illinois Supreme Court fortified its standing as a leader in recognizing the tort of retaliatory discharge.[243] In two decisions, the court reasserted and expanded the 1984 ruling in *Midgett v. Sackett-Chicago, Inc.*[244] In *Midgett*, the court considered whether a union employee could sue his employer in tort for retaliatory discharge.[245] Reasoning that the availability of a contract action did not bar the tort action, the court held that union employees have the same right to bring an action in retaliatory discharge as do non-union employees.[246]

In *Gonzalez v. Prestress Engineering Corp.*,[247] the court decided two issues. First, the court held that the state tort claim recog-

241. *Id. See, e.g.*, Chamberlain v. Carborundum Co., 485 F.2d 31 (3d Cir. 1973); Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); Cartel Capital Corp. v. Fireco, 81 N.J. 548, 410 A.2d 674 (1980).

242. *McCartin-McAuliffe* at 464, 516 N.E.2d at 268.

243. The Illinois Supreme Court first recognized the cause of action for retaliatory discharge for employees whose employment had been terminated for filing Worker's Compensation claims in Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The court reasoned that the goals of the Worker's Compensation Act, ILL. REV. STAT. ch. 48, para. 131.1 (1981), would be defeated if an employer could threaten its employees with termination for filing a claim. Then, in Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981), the Illinois Supreme Court held that an employee fired for reporting the criminal conduct of a co-worker had a cause of action in retaliatory discharge. 85 Ill. 2d at 132-35, 421 N.E.2d at 879-80. Although the employees involved in both *Kelsay* and *Palmateer* were non-union, at-will employees, the court, faced with a split between the appellate districts, soon confronted the issue of whether the tort should apply to the union employees as well. *See* Midgett v. Sacket-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).

244. *Midgett*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909, *cert. denied*, 472 U.S. 1032 (1985).

245. *Id.* at 147-48, 473 N.E.2d at 1282.

246. *Id.* at 150-53, 473 N.E.2d at 1283-85. The contract involved was the collective-bargaining agreement which covered unionized employees. *Id.*

247. 115 Ill. 2d 1, 503 N.E.2d 308 (1986). *Gonzalez* contained the same consolidated cases as *Midgett*. *Gonzalez*, 115 Ill. 2d at 4, 503 N.E.2d at 309. The *Midgett* court remanded the case. On remand, the defendant raised two defenses: (1) section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1987), preempts plaintiffs' claims (for a discussion of this issue, see the *Labor Law* article in this *Survey*); and (2) because the plaintiffs failed to exhaust their union's grievance procedures, they were barred from bringing a tort claim in retaliatory discharge. The plaintiffs moved to strike the defense, and the trial court granted the motions, but requested an interlocutory appeal under Illinois Supreme Court Rule 308, ILL. REV. STAT. ch. 110A, para. 308 (1985). The Illinois Supreme Court granted the appeal. *Id.* at 6, 503 N.E.2d at 310.

nized in *Midgett* remained intact despite a recent United States Supreme Court decision pre-empting some state tort claims that resemble claims for retaliatory discharge.[248] Second, the court considered whether to overrule that part of the *Midgett* decision which held that union employees need not exhaust their contract remedies before becoming entitled to bring a tort action in retaliatory discharge.[249] The court upheld the *Midgett* decision. The court reasoned that the tort claim was wholly independent of a possible contract claim and noted that the retaliatory discharge cause of action was "firmly rooted in an important public policy."[250] Thus, *Gonzalez* represents a powerful reaffirmation of the worker's right to a remedy in tort when he is terminated unjustly regardless of whether he contracted through a union to have such a wrong remedied.

In *Boyles v. Greater Peoria Mass Transit District*,[251] the Illinois Supreme Court explained that part of the *Midgett* decision that addressed damages. The plaintiff in *Boyles* alleged she had been terminated in retaliation for filing a claim under the Workers' Compensation Act.[252] Despite the fact she was a union member and protected by a protective bargaining agreement, she brought an action in retaliatory discharge directly against her employer asking for both compensatory and punitive damages.[253] Her employer, however, was a "local public entity," immune from punitive damages under the Local Governmental and Governmental Employees Tort Immunity Act.[254] The issue before the court was whether the tort of retaliatory discharge was available to a plaintiff when punitive damages were unobtainable and when the plaintiff could obtain compensatory damages through her union

248. *Gonzalez*, 115 Ill. 2d at 9, 12, 503 N.E.2d at 311, 313 (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)). In *Allis-Chalmers Corp.*, the court held that § 185(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1987), preempted a state tort claim which resembled retaliatory discharge. *Allis-Chalmers Corp.*, 471 U.S. at 202.

249. *Gonzalez*, 115 Ill. 2d at 12, 503 N.E.2d at 313.

250. *Id.* at 12-14, 503 N.E.2d at 313-14.

251. 113 Ill. 2d 545, 499 N.E.2d 435 (1986).

252. *Id.* at 547, 499 N.E.2d at 435-36.

253. *Id.* at 547, 499 N.E.2d at 436. Retaliatory discharge claims typically involve punitive damages. In Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the Illinois Supreme Court held that punitive damages should be allowed for such claims. *Kelsay*, 74 Ill. 2d at 189, 384 N.E.2d at 361. The court reasoned that punitive damages were necessary because compensatory damages alone were too minuscule to deter employers from engaging in like conduct in the future. *Id.* at 286-87, 384 N.E.2d at 359.

254. *Boyles*, 113 Ill. 2d at 553-54, 499 N.E.2d at 438-39 (citing ILL. REV. STAT. ch. 85, paras. 1-101 through 10-101 (1985)).

contract.[255]

The court first reiterated its holding in *Midgett*, stating that the breach of contract action available to a union employee was entirely separate from the tort action of retaliatory discharge.[256] Therefore, the court concluded that the availability of compensatory damages through a contract claim did not preclude a plaintiff from seeking similar damages in a tort action.[257] Thus, the court held that the plaintiff's complaint alleging retaliatory discharge against her employer survived the motion to dismiss, even though she could recover through the tort action only compensatory damages.[258] After *Boyles*, a plaintiff may bring an action for retaliatory discharge and may receive compensatory damages when the employer-defendant is exempt from punitive damages.[259]

VII. THE STRUCTURAL WORK ACT

In *Vuletich v. United States Steel*,[260] the Illinois Supreme Court considered whether temporary stairs constituted "supports" within the meaning of the Structural Work Act (the "Act").[261] The court held that such stairs, if not used as a working platform to perform a hazardous activity, did not constitute "supports" under the Act.[262]

The plaintiff's employer in *Vuletich* contracted to complete certain tasks at the defendant's plant.[263] The plaintiff sustained injuries when he fell while walking up temporary steps to a supply trailer to return his tools.[264] The plaintiff stated that the stairs were "wobbling," without handrails, and covered with snow and

255. *Id.* at 554, 499 N.E.2d at 439.
256. *Id.* at 554-55, 499 N.E.2d at 439.
257. *Id.* at 555, 499 N.E.2d at 439.
258. *Id.*
259. *Id.* at 555-56, 499 N.E.2d at 439.
260. 117 Ill. 2d 417, 512 N.E.2d 1223 (1987).
261. ILL. REV. STAT. ch. 48, paras. 60-69 (1985). The Act provides, in pertinent part:

> [A]ll scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this state for the use in erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure shall be so erected and constructed, placed and operated as to give proper and adequate protection to life and limb of any person or persons employed or engaged.

ILL. REV. STAT. ch. 48, para. 60 (1985).
262. *Vuletich*, 117 Ill. 2d at 425, 512 N.E.2d at 1226.
263. *Id.* at 420, 512 N.E.2d at 1224.
264. *Id.*

ice when he fell.[265] At their highest point, the stairs were five feet from the ground.[266] The plaintiff argued that because the stairs were used to elevate workers to a place where they could get tools, they constituted supports within the meaning of the Act.[267] Therefore, the plaintiff contended, an injury that occurred on them would be covered under the Act.[268]

The court, however, rejected the plaintiff's contentions, proclaiming that the use of the purported support, not the nature of the work performed on the support, determined whether it actually fit within the Act's meaning of "supports."[269] The court reasoned that the logical extension of the plaintiff's argument would require all stairways, whether temporary or permanent, to be covered by the Act.[270] Favoring a narrower interpretation of the Act, the court concluded that stairs used only as a pathway and not as a working platform could not be considered "supports."[271]

The appellate court further defined "supports" for purposes of the Act in *Langley v. Simmons Contracting Company*.[272] The plaintiff in *Langley* was a general superintendent charged with the duty of inspecting work at the construction site.[273] He fell and was injured when a board tipped as he walked across a sixteen-inch high stack of scaffold boards in the defendant's assigned work area.[274] The plaintiff sought recovery under the Act from, among others, the defendant subcontractor.[275] The plaintiff maintained that the Act covered his injury because he used the boards for support.[276] The court, however, reasoned that because it was not necessary for the plaintiff to cross the boards to get to the work site, the stacked boards could not be considered "supports."[277]

The Appellate Court for the First District construed the Act similarly in *Harper v. Schal Associates*.[278] In *Harper*, the court considered whether a claim for an injury sustained as a result of falling into a depression in the ground not protected by planking was

265. *Id.*
266. *Id.*
267. *Id.* at 422, 512 N.E.2d at 1225.
268. *Id.*
269. *Id.* at 422-23, 512 N.E.2d at 1225-26.
270. *Id.* at 422-23, 512 N.E.2d at 1225.
271. *Id.* at 423, 512 N.E.2d at 1225.
272. 152 Ill. App. 3d 899, 504 N.E.2d 1328 (5th Dist. 1987).
273. *Id.* at 900-01, 504 N.E.2d at 1329.
274. *Id.* at 901, 504 N.E.2d at 1329.
275. *Id.*
276. *Id.* at 902, 504 N.E.2d at 1330.
277. *Id.* at 902-03, 504 N.E.2d at 1330-31.
278. 159 Ill. App. 3d 542, 510 N.E.2d 1061 (1st Dist. 1987).

properly within the Act.[279] The court held that such an injury was not covered by the Act.[280]

In *Harper*, the plaintiff, an ironworker, was walking backward, straightening out a cable when he tripped in a depression in the ground and sustained injuries.[281] The plaintiff alleged that the defendant, a contractor, failed to provide proper and safe support as was mandated by the Act.[282] The court used a three-pronged analysis to determine whether the plaintiff's injury was covered by the Act.[283] According to the test, a court must determine three things before it may declare a device included within the Act: (1) What was the intended use of the device at the time of the injury? (2) Did the injury have some connection with the hazardous nature of the device? and (3) Was an element of danger involved in the use of the device and, if so, did the legislature intend for the act to alleviate this type of danger?[284]

Applying this analysis to the facts in *Harper*, the court noted first that the plaintiff merely was walking backward uncoiling a cable, and not engaged in a hazardous activity when he was injured.[285] The area in which the plaintiff fell was not the plaintiff's work area, but rather an access route for construction vehicles.[286] Second, the absence of planking as supports over dry, packed earth did not create a hazardous situation.[287] Finally, falling in a depression in the ground was not the type of activity from which the General Assembly sought to protect the worker.[288] The depression into which the plaintiff fell did not result from unusual construction plans, but was formed simply by normal construction activity.[289] The court concluded that, because the plaintiff's action failed to satisfy any of the three prongs of the test, any planking covering the depression should not be treated as supports under the Act.[290] Thus, the plaintiff's claim against the defendant for his

279. *Id.* at 544, 510 N.E.2d at 1063.
280. *Id.* at 547, 510 N.E.2d at 1065.
281. *Id.* at 544, 510 N.E.2d at 1063.
282. *Id.* at 546, 510 N.E.2d at 1064.
283. *Id.* at 547-49, 510 N.E.2d at 1065-66. The three-pronged test had its origin in Ashley v. Osman & Associates, Inc., 114 Ill. App. 3d 293, 448 N.E.2d 1011 (1st Dist. 1983) and was adopted subsequently by the court in Rambert v. Advance Construction Co., 134 Ill. App. 3d 155, 479 N.E.2d 1007 (1st Dist. 1985).
284. *Harper*, 159 Ill. App. 3d at 547, 510 N.E.2d at 1065.
285. *Id.* at 547-48, 510 N.E.2d at 1065.
286. *Id.*
287. *Id.* at 548, 510 N.E.2d at 1065-66.
288. *Id.* at 548, 510 N.E.2d at 1066.
289. *Id.*
290. *Id.*

failure to cover the rut was nonactionable under the Act.[291]

In *Deibert v. Bauer Brothers Construction Company*,[292] the Appellate Court for the Fifth District considered whether a plaintiff injured from falling into tire tracks left by a cranelike device could maintain a claim under the Act.[293] The court held that because the injury was unrelated to the hazardous nature of the device, the plaintiff had no claim.[294] The mere fact that the ruts were formed by a device covered by the Act was not a sufficient reason to equate the tracks with the device itself.[295]

The thread common to all these decisions seems to be a more stringent interpretation of the Structural Work Act. Prior to the past few years, Illinois courts had followed the direction of the legislature of 1907, which passed the Act, and interpreted it liberally. In recent years, however, this trend has reversed, and courts instead sometimes strain to deny coverage to the injured worker under the Structural Work Act.

VIII. DEFAMATION

During the *Survey* year, the Illinois Supreme Court decided two libel cases. In *Owen v. Carr*,[296] the court ruled that the controversial "innocent-construction rule"[297] is still in full force in Illinois.[298] The court acknowledged, however, that the rule itself had been tempered with the requirement that the proposed innocent con-

291. *Id.* at 548-49, 510 N.E.2d at 1066.

292. 145 Ill. App. 3d 915, 495 N.E.2d 1348 (5th Dist. 1986).

293. *Id.* at 917, 495 N.E.2d at 1349.

294. *Id.* at 918-19, 495 N.E.2d at 1350.

295. *Id.* at 919, 495 N.E.2d at 1350.

296. 113 Ill. 2d 273, 497 N.E.2d 1145 (1986).

297. The innocent-construction rule mandates that if an allegedly defamatory statement can be interpreted as either defamatory or innocent, the innocent construction must prevail. The original source of the rule was obiter dictum in John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105 (1962), *cert. denied*, 371 U.S. 877 (1962), which stated:

> [The innocent-construction] rule holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law.

24 Ill. 2d 437, 442, 181 N.E.2d 105, 108. The adoption and subsequent vigorous application of the innocent-construction rule made it very difficult for a plaintiff to get past the pretrial motions. Consequently, the rule has received much criticism. *See, e.g.*, ELDRIDGE, THE LAW OF DEFAMATION, § 24, at 161 (1978); Polelle, *The Guilt of the 'Innocent Construction Rule' in Illinois Defamation Law* 1 N.I.U.L. REV. 181 (1981); Stonecipher & Trager, *The Impact of Gertz on the Law of Libel in Illinois*, 1979 S.I.U.L.J. 73; *Symposium, Libel and Slander in Illinois*, 43 CHI. KENT L. REV. 1 (1966). *Cf.* Comment, *The Illinois Doctrine of Innocent Construction: A Minority of One*, 30 U. CHI. L. REV. 524 (1963).

298. *Owen*, 113 Ill. 2d at 278, 497 N.E.2d at 1147.

struction must be reasonable.[299] In the second case, *Wanless v. Rothballer*,[300] the court considered what standard of appellate review was appropriate when a libel case involved First Amendment issues. The court concluded that de novo review was the appropriate standard in such cases.[301]

Owen arose out of another libel suit.[302] The defendant, an attorney, filed a libel action against the plaintiff, also an attorney, on behalf of his client, a judge.[303] The defendant's libel action focused on a complaint the plaintiff made to the Judicial Inquiry Board (the "Board") concerning the conduct of the judge.[304] A reporter for a legal publication interviewed the defendant and published the defendant's statement in an article about the lawsuit.[305] Among the statements the article attributed to the defendant was language to the effect that the plaintiff, by complaining to the Board, was trying to intimidate the judge so that future cases would result in favorable treatment of his client.[306] The article also compared this case to a libel case that the defendant previously won in which he used this same "improper purpose" theory of liability.[307]

The plaintiff then filed a libel suit against the defendant for mak-

299. *Id.* at 279, 497 N.E.2d at 1148. The requirement that the innocent construction also must be a reasonable interpretation came with the court's decision in Chapski v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195 (1982). In *Chapski*, the Illinois Supreme Court lamented that the trend in applying the innocent-construction rule had been to "strain to find unnatural but possibly innocent meanings of words where such a construction is clearly unreasonable and a defamatory meaning is far more probable." 92 Ill. 2d 344, 350-51, 442 N.E.2d 195, 198. This strained application of the innocent-construction rule led to inconsistent and contradictory holdings. Therefore, the *Chapski* court made it clear that only those innocent constructions that were reasonable should be considered by a court when applying the innocent-construction rule.

> We therefore hold that a written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*. This preliminary determination is properly a question of law to be resolved by the court in the first instance; whether the publication was in fact understood to be defamatory or to refer to the plaintiff is a question for the jury should the initial determination be resolved in favor of the plaintiff.

92 Ill. 2d 344, 352, 442 N.E.2d 195, 199.

300. 115 Ill. 2d 158, 503 N.E.2d 316 (1987).

301. *Id.* at 169-70, 503 N.E.2d at 321.

302. *Owen*, 113 Ill. 2d at 276, 497 N.E.2d at 1146.

303. *Id.*

304. *Id.*

305. *Id.* The whole article is reprinted in the appendix to the case. *Id.* at 283-86, 497 N.E.2d at 1149-52.

306. *Id.* at 276, 497 N.E.2d at 1146.

307. *Id.* The previous libel case resulted in the largest libel damages ever awarded in the United States.

ing these statements.[308] The plaintiff claimed that these statements constituted libel per se because they impugned his professional integrity and prejudiced him in the practice of law.[309] The court rejected this contention.[310] The court considered that the statements reasonably could be innocently construed, as the article merely communicated Carr's theory of the case, rather than stating as a fact that it was the actual purpose of the plaintiff to intimidate the judge.[311] Further, when the article was read as a whole, the statements did not constitute libel per se.[312] Therefore, the court held that the innocent-construction rule applied to the facts of *Owen* to defeat the plaintiff's cause of action for libel per se.[313]

The court in *Wanless* determined the appropriate standard of appellate review in a libel case involving First Amendment issues.[314] In *Wanless*, the plaintiff was the village attorney, a public figure.[315] After trial of the *Wanless* case, the jury rendered a verdict for the plaintiff.[316] The appellate court conducted a de novo review, found that the plaintiff had failed to prove actual malice as was constitutionally required, and reversed.[317] The Illinois Supreme Court noted its responsibility to follow the rulings of the United States Supreme Court concerning what is constitutionally required.[318] One of these requirements, the court stated, was that a state supreme court conduct an independent appellate review on the issue of proof of actual malice in a libel suit.[319]

After discussing the Supreme Court precedent, the Illinois Supreme Court concluded that faithful application of the federal constitution could be assured only through a de novo review.[320] Thus, the court interpreted the "independent review" mandated by the United States Supreme Court to mean de novo review.

Both *Owens* and *Wanless* reflect the judicial policy disfavoring

308. *Id.* at 275, 497 N.E.2d at 1146. The plaintiff also named as defendants the publisher of the National Law Journal, the publication that printed the allegedly defamatory article, as well as the reporter who wrote the article. *Id.*

309. *Id.* at 277, 497 N.E.2d at 1147.

310. *Id.* at 279-81, 497 N.E.2d at 1148.

311. *Id.*

312. *Id.* at 279-80, 497 N.E.2d at 1148.

313. *Id.* at 282, 497 N.E.2d at 1149.

314. *Wanless*, 115 Ill. 2d at 167-70, 503 N.E.2d at 320-21. This question will arise when the plaintiff is a public figure and the case survives a motion to dismiss.

315. *Id.* at 162, 503 N.E.2d at 317.

316. *Id.*

317. *Id.*

318. *Id.* at 167-68, 503 N.E.2d at 320.

319. *Id.*

320. *Id.* at 169, 503 N.E.2d at 320-21.

defamation actions in Illinois. When the federal constitutional requirements such as the necessity of proving actual malice or recklessness and de novo appellate review are combined with Illinois' innocent-construction rule, a state of the law results that makes a cause of action nearly impossible to maintain successfully. There is no indication that this policy will soon abate.[321]

IX. CONCLUSION

During the *Survey* year, both the Illinois Supreme Court and the appellate courts addressed a number of significant issues. Perhaps most noteworthy was the Supreme Court's decision to deny damages to a plaintiff asserting the controversial wrongful life cause of action. The appellate courts, as well, decided a variety of cases containing significant and controversial issues. In some instances, the districts' opinions sharply conflicted, indicating areas in which a final decision by the Illinois Supreme Court would be welcomed.

321. *But see* Berkos v. National Broadcasting Company, 161 Ill. App. 3d 476, 515 N.E.2d 668 (1st Dist. 1987), *petition for leave to appeal granted*, slip. op. #85-2552, Nov. 5, 1987. A case decided just after the *Survey* year, but noteworthy nevertheless. In *Berkos*, the appellate court reversed the trial court's dismissal of Judge Christy S. Berkos' complaint against the defendant, NBC, even though the plaintiff was a public figure. The appellate court in *Berkos* used a somewhat new approach to the innocent-construction rule, balancing the possible innocent interpretation against the defamatory interpretation of the statement and choosing the less "strained" meaning. It remains to be seen whether other courts will adopt this approach.