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NEGLIGENT TORTS

Life casts the moulds of conduct, which will some day become fixed as law. Law preserves the moulds, which have taken form and shape from life.—BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 64 (1921).

TEN YEARS OF DEVELOPMENTS IN THE LAW OF NEGLIGENT TORTS

JAMES A. DOOLEY

AN APPRAISAL OF the work of the courts wherein one appears as an advocate, is not without difficulty. It must be absent partisanship—the advocate's foremost characteristic. It must be objective and frank to be meaningful. Today, the courts are on trial. The problem of delay has affected every litigant. Its shadows encompass all who know of his situation. An aroused citizenry asks why must one wait six, seven, or eight years to have an adjudication of a right? There is, of course, no intelligent answer. The courts are engaged in a life and death struggle, regardless of our apathy to this unpleasant fact. There is urgent need for the bar to make known the accomplishments of the courts; to let the public know that our courts do consider the very reason for their existence, the problems of the public; and to appraise the work of the courts with an eye to determining their measure of fulfillment of duty, not to lawyer, but to the public.

The world of negligence law is a huge one, touching upon every phase of human activity. The broader the scope of human action, the greater the areas for the existence of duty. During the last ten years there has been more progress in negligence law than in all the five prior decades. This is true in almost all jurisdictions. It is peculiarly true in Illinois. Illinois, with its notorious reputation for congestion and delay in its courts, has another reputation, that of a truly progressive jurisdiction. The best evidence of this is found in the high regard with which Illinois decisions are treated in the reported cases from other jurisdic-

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tions. Additional evidence will be found in law reviews and legal periodicals wherein opinions of Illinois courts are studied. To what is this to be attributed? An enlightened bar? Hardly. No matter what the intellectual standard of the bar may be, it is the intellect, experience, and legal philosophy of the highest court in the jurisdiction, which is alone responsible. In the end, responsibility for good or bad decisions remains that of the highest court in any jurisdiction.

During the last decade, the Illinois Supreme Court has been peculiarly sensitive to this responsibility. Whenever inferior courts obviously err, or decide a question so as to create a conflict in the body of Illinois law, or to blindly cling to stare decisis, it has not failed to act. Above all, it has demonstrated that it is realistic and concerned with the effect of its decisions upon the life of the community.

The cases re-echo Cardozo's thought[1] that while stare decisis is an important factor in the judicial process, it is not the whole process. Stare decisis is recognized as having deep justification. Yet the attitude of the court has been that this doctrine should not be blindly followed so that growth in the law will be impossible. Time and again, the court acknowledges that it is well aware that many rules were creatures of the courts and had as their objective the expression of the mores of the times. Those rules, it is recognized, may be abrogated by the courts when the times have so changed that to perpetuate them would result in violence to society. Its work stands as the best evidence in support of Chief Justice Warren's observations:

> A . . . reason for the success of our legal system is its adaptability to changing circumstance. As Pollock said, all courts have a duty, which ours generally try to perform, "to keep the rules of law in harmony with the enlightened common sense of the nation." Even the bicycle forced new definitions of negligence in civil suits; and the thousands of other changes forced by later technological developments indicate that our law can keep up with the still greater changes ahead—so long as "the common sense of the nation" can be discerned. Our judges are not monks or scientists, but participants in the living stream of our national life, steering the law between the snags of rigidity on the one hand and of formlessness on the other. Legal scholars may still debate whether the life of the law is reason, as Coke maintained, or experience, as Holmes claimed. I think it is both. Our system faces no theoretical dilemma but a single continuous problem: how to apply to ever changing conditions the never changing principles of freedom.[2]

Much has been accomplished during this last decade. One notes that the law concerning charitable corporations has changed, a part of the

[1] CARDOZO, SELECTED WRITINGS 16–17 (1947).

[2] Warren, *The Law and the Future,* Fortune, Nov. 1955, p. 107.

Workmen's Compensation Act[3] which affected common-law actions was invalidated, the rights of infants for injuries prior to birth defined, the attractive nuisance doctrine revitalized, proximate cause given reality, anomalous rules involving the Wrongful Death Act wiped out, the veil of immunization of government for tort liability lifted, the Scaffold Act upheld, exculpatory clauses in leases validated—and subsequently invalidated by statute—the rights of firemen against owners and possessors of premises redefined, and wives have been held to have the same cause of action for loss of consoritum as their husbands. In addition, discovery processes have been implemented so that one litigant can learn the amount of the other's insurance, as well as the names and addresses of his witnesses.

TORT LIABILITY OF CHARITABLE CORPORATIONS

From the time of *Parks v. Northwestern Univ.*,[4] decided in 1905, the Illinois rule had been that a charitable corporation has an absolute immunity from tort action. In 1947, in an opinion which stood apart from all others, the Appellate Court in *Wendt v. Servite Fathers*,[5] held that the immunity was not absolute and an injured party could recover to the amount of the policy of insurance covering the charitable corporation in the given contingency. This opinion reversed a judgment of the trial court entered upon the pleadings, and remanded the cause for trial. The order was not appealable, and so far as one can ascertain, the parties to the litigation compromised their differences.

It remained for the court in *Moore v. Moyle*[6] to strike down the doctrine of absolute immunity and to adopt the rationale of the *Servite Fathers* opinion, that so long as there was a policy of insurance to cover the tort in question, the very reason for the immunization, namely, the impairment of trust funds, did not exist. The *Parks* case, the court reasoned, had to be reviewed "in the light of present-day conditions and modern business practice and procedure."[7] Certain thoughts articulated in this opinion were prophetic. The court pointed

[3] For a discussion of changes in the Workmen's Compensation Act see Bowe & Casey, *Developments in Workmen's Compensation—1950-1960,* 10 DE PAUL L. REV. 608 (1961).

[4] 218 Ill. 381, 75 N.E. 991 (1905). *Parks* was reaffirmed in Hogan v. Chicago Lying-In Hosp. & Dispensary, 335 Ill. 42, 166 N.E. 461 (1929).

[5] 332 Ill. App. 618, 76 N.E.2d 342 (1947).

[6] 405 Ill. 555, 92 N.E.2d 81 (1950).

[7] *Id.* at 564, 92 N.E.2d at 86.

out that the law as a servant, must conform to changing conditions, to justify its existence, and when necessary, new remedies must be applied where none exists. On this question Illinois had lagged behind many jurisdictions which had adopted this rule. Illinois, however, was to move swiftly and with great strides.

From the *Moore* case evolved the proposition that an action may be maintained against a school district for injuries resulting from tort to the extent of the insurance carried by the district. This was announced in *Thomas v. Broadlands Community Consol. School Dist. No. 201*,[8] where the plaintiff, a minor, brought an action against the district for injuries sustained by him while upon the playground. His complaint alleged that the defendant had insurance sufficient to pay any judgment recovered and offered to limit the collection of any judgment to the proceeds of the policy. The defense of governmental function was placed in the same category as that of eleemosynary institutions. Subsequent thereto, the Legislature authorized school districts to carry liability insurance protecting them, as well as any agent, employee, or teacher, from damages as the result of any negligent act.[9] It was specified that the company writing the policy waived any right to deny liability by reason of the non-liability of the school district as engaged in a governmental function. The *Broadlands* decision and the action of the Legislature made it a matter of time as to when the court would meet the question of whether the doctrine of governmental immunity was applicable in the event of no insurance.

Thomas Molitor, while riding in a school bus with eighteen others, was injured. His complaint against the school district did not allege insurance or other nonpublic funds. In May 1959, the court, in *Molitor v. Kaneland Community Unit Dist. No. 302*,[10] held that he had a cause of action against the school district and reasoned that the doctrine of sovereign immunity arose from the "divinity of kings,"[11] and that immunization could not be justified on the basis of protecting public funds. A rehearing was granted at the September 1959 term. In an opinion filed at the December 1959 term,[12] the court abridged the previous holding and held that the new rule was to apply only to the particular case and that to give prospective operation to the new doc-

[8] 348 Ill. App. 567, 109 N.E.2d 636 (1952).

[9] Ill. Laws 1953, at 1397.

[10] Unpublished report.

[11] *Ibid.*

[12] Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

trine would work a greater hardship on school districts which had relied on prior decisions. The theory of prospective operation referred to as the "Sunburst Doctrine" is found in *Great No. Ry. v. Sunburst Oil & Refining Co.*[13] Under the terms of the *Molitor* decision, none of the other children injured in the same bus accident were able to maintain an action. Thomas Molitor was to be the only party to derive any benefit from the decision.

Because of the exposure of governmental bodies to suit after *Molitor*, the General Assembly immediately acted to remedy the situation by passing a law providing that any action against a school district or a private school must be brought within one year, that notice must be served within six months subsequent to the date of the injury, and that the amount recoverable in any such action could not exceed $10,000.[14] Also included was a provision with reference to injuries occurring prior to the effective date of the act, concerning the filing of notice and limiting the amount of damages to $10,000.[15] Any hope for enactment of legislation removing immunity from park districts—a goal of some respected students of the law—was also dashed when statutes[16] were passed immunizing park districts against action for injuries to the person "heretofore and hereafter caused."[17] Aside from the validity of the retrospective statutes, anyone injured prior to the *Molitor* case was met with the "Sunburst Doctrine." He could not recover under the *Molitor* case, and if injured subsequent thereto, he met the bar of the statutes.

The *Molitor* case is a sad story. It accomplished nothing save for one citizen. Although others were injured under the same circumstances, although they were equally innocent and the school district equally negligent, only Thomas Molitor could maintain his action. Aside from the constitutional issue of discrimination, the opinion hardly makes sense. Moreover, as already noted, the *Molitor* case provoked legislation which made it impossible for the injured in the future to obtain more than $10,000 regardless of the severity of the injury. Then, too, it vitiated the *Broadlands* doctrine, and the work of the 1953 Legislature. It is a deep pock mark on the work of a great court.

[13] 287 U.S. 358 (1932).

[14] ILL. REV. STAT. ch. 122, § 825A (1959).

[15] ILL. REV. STAT. ch. 122, § 829B (1959).

[16] ILL. REV. STAT. ch. 105, §§ 12.1, 333.2a, 419 (1959).

[17] ILL. REV. STAT. ch. 105, § 419 (1959).

Did the liability of park districts vanish when there were policies of public liability insurance for an injury occurring prior to the statute? In *Lynwood v. Decatur Park Dist.*,[18] plaintiff was injured through the alleged negligence of the Decatur Park District in January 1959. He filed an action alleging that there was a public liability insurance policy in the amount of $500,000 covering the district. The court construed the statute concerning the liability of park districts as *reinstating* their liability as such existed before the *Molitor* case. Thence, it proceeded to follow the *Broadlands* case, in that the complaint alleged a policy of insurance protecting the district from any liability arising out of the contingency involved in the litigation.

THE WORKMEN'S COMPENSATION ACT

Elsewhere in this edition[19] will be found a discussion of the amendment of the Illinois Workmen's Compensation Act[20] to allow common-law actions by employees against third party tort-feasors (who are not fellow-employees), even though such tort-feasors be covered by the act. It is interesting to note, however, the far-reaching consequences of *Grasse v. Dealer's Transp. Co.*[21]—the decision which was instrumental in producing the change in the act. Whether or not an employee under the act in a suit by his employer for the employee's injuries could intervene and maintain a common-law action was the question presented in *Geneva Constr. Co. v. Martin Transfer & Storage Co.*[22] There, more than four years after his injury, the employee was allowed to intervene as an additional party plaintiff in the suit brought by his company. Through the medium of section 46 of the Civil Practice Act,[23] which deals with the relation back of amendment to the time of filing of the original pleading, the court disposed of the contention that the two-year statute of limitations had run against the employee's right of action. It reasoned that the original complaint alleged the occurrence, the negligence of the defendant, and the nature and extent of employee's injuries, and since proof of the allegations in the company's complaint was essential to recovery by it,

[18] 26 Ill. App.2d 431, 168 N.E.2d 185 (1960).

[19] See generally Bowe & Casey, *Developments in Workmen's Compensation—1950–1960*, 10 De Paul L. Rev. 608 (1961).

[20] Ill. Rev. Stat. ch. 48, § 138.5 (1959).

[21] 412 Ill. 179, 106 N.E.2d 124 (1952).

[22] 4 Ill.2d 273, 122 N.E.2d 540 (1954).

[23] Ill. Rev. Stat. ch. 110, § 46 (1959).

the employee's action was more than an additional claim for damages, the only difference being one of form, namely, the amount of the ad damnum.

In a situation involving the death of an employee,[24] the employee's administrator sought leave to intervene more than four years after the employee's death, in a suit brought by the employer. But under the Illinois Wrongful Death Act[25] bringing the action within the then one-year period was a condition precedent to maintenance, and not a statute of limitations.[26] Moreover, the statute prescribes that such action shall be brought by the *personal representative* of the deceased,[27] whereas here the original action had been filed within the one-year period by the deceased's *employer*. No administrator intervened until some four years later. The Appellate Court, however, recognizing the unusual circumstances created by the *Grasse* decision, held that it was error to refuse to allow the administrator to intervene.

On the other hand, where an employer who had paid compensation benefits to a deceased employee brought an action as plaintiff against a defendant not under the act, and the suit was commenced twenty months after the death of the deceased employee,[28] the court held invalid the employer's contention that independent of the Workmen's Compensation Act, he had a common-law right of action against the third party for the recovery of all damages he sustained as a result of the negligence of that third party, and that the applicable statute of limitations was five years. This was rejected because the time within which the plaintiff employer was required to commence an action is defined by the Workmen's Compensation Act;[29] it is three months prior to the expiration of the time within which the employee might bring an action in his own name.

Another phase of the *Grasse* case and the statute of limitations is the *Peterson* case.[30] In 1954, Peterson filed a lawsuit to recover damages sustained in an occurrence in 1947 when both he and the defendant were under the Workmen's Compensation Act. To the defendant's

[24] Echales v. Krasny, 12 Ill. App.2d 530, 139 N.E.2d 767 (1957).

[25] Ill. Laws 1955, at 2006.

[26] Wilson v. Tromly, 404 Ill. 307, 89 N.E.2d 22 (1949).

[27] Ill. Laws 1955, at 2006.

[28] Goebel v. Mize, 14 Ill. App.2d 69, 143 N.E.2d 73 (1957).

[29] ILL. REV. STAT. ch. 48, § 138.5(b) (1959).

[30] Peterson v. Montegna & Co., 11 Ill. App.2d 109, 136 N.E.2d 586 (1956).

response that the cause of action was barred by the two-year statute of limitations, he responded that it commenced from 1952, the date of the *Grasse* decision. The argument was unsuccessful since, in contemplation of law, an unconstitutional statute never was a law and confers no rights.[31] The time was to be computed from the date of the injury. He could, the court noted, have done the same as Grasse did.

THE ILLINOIS WRONGFUL DEATH ACT

In 1953, there appeared the shadow of decisions which would change the law concerning the contributory negligence on the part of the next of kin in an action under the Illinois Wrongful Death Act.[32] Five-year old Jerry Crutchfield left his home unnoticed and was struck and killed by defendants' truck in an alley. The court instructed the jury to return a verdict for the defendants if the parents were guilty of contributory negligence. Such an instruction had been routine in cases involving the death of a child. The court analyzed the situation. The father was at work at the time. The mother had just gone to another room of the apartment, taking care of other children before the deceased left the building. Accordingly, "the due care of the parents was established as a matter of law,"[33] and the instruction was reversibly erroneous. This approach represents realistic thinking. Frequently, the parents would be absent from the scene of the injury and there would be no evidence of any negligence on their part. Yet, an instruction such as was given in the *Crutchfield* case, would be given. This contributory negligence of the next of kin would appear only in the instructions of the court, not in the evidence.

But this was but the beginning of a reappraisal of the court's interpretation of the Wrongful Death Act since 1857.[34] The rule was inflexible that the contributory negligence of a beneficiary of the deceased was a complete bar to recovery. Thus, in death actions, it was exacted not only that the due care of the deceased be proved prior to and at the time of the occurrence resulting in his death, but also, that of the next of kin.[35]

[31] *E.g.*, Norton v. Shelby County, 118 U.S. 425 (1886); People v. Schraeberg, 347 Ill. 392, 179 N.E.2d 829 (1932).

[32] Crutchfield v. Meyers, 414 Ill. 210, 111 N.E.2d 142 (1953). The Wrongful Death Act is contained in ILL. REV. STAT. ch. 70, §§ 1, 2 (1959).

[33] *Id.* at 213, 111 N.E.2d at 143.

[34] City of Chicago v. Major, 18 Ill. 349 (1857).

[35] Ohnesorge v. Chicago City Ry., 259 Ill. 424, 102 N.E. 819 (1913).

In 1954, Fox murdered his wife. Mrs. Bradley, their daughter, brought an action against her father under the Wrongful Death Act. He asserted that his contributory negligence barred other beneficiaries from recovering against him, and relied upon the latest statement of the court to that effect.[36] The court swept away this argument and noted that *Hazel v. Hoopeston-Danville Motor Bus Co.*[37] was distinguishable in that Fox was not merely contributorily negligent, but was the sole wrongdoer. But the doctrine that the negligence of a beneficiary was a complete bar to recovery still had vitality, and it retained validity until 1955 when *Nudd v. Matsoukas*[38] came before the court. This is perhaps one of the most interesting and certainly progressive decisions of the decade. Matsoukas was driving his car when he was involved in an accident. His wife and one minor child were killed, and another child seriously injured. It was alleged that he had gone through a stop light. Nudd, administrator of the estate of Mrs. Matsoukas and that of the minor Matsoukas, deceased, brought suit under the Wrongful Death Statute against Matsoukas; the surviving minor Matsoukas sued his father charging willful and wanton misconduct. A motion to dismiss the action brought by the administrator on behalf of Mrs. Matsoukas and the deceased Matsoukas child was filed on the ground that the defendant husband and father was a beneficiary and would participate in any recovery. A motion to dismiss the action brought by the minor child against his father was made on the ground that such a suit was against public policy. Both motions were allowed in the trial court.

Thus in *Nudd* there were presented two interesting questions. Can the administrator of an estate maintain an action under the Wrongful Death Statute where one of the surviving next of kin is the principal defendant? Can a minor sue his father for wilful and wanton misconduct? The court was conscious of the injustice wrought by the *Hazel* doctrine. This set of facts brought it into bold relief. It termed this doctrine "an anomalous rule"[39] to which it would not adhere and held, in a display of common sense, that the negligence of the defendant beneficiary does not bar the action, but prevents his right to recover for pecuniary loss. The minor child's action was allowed, the court

[36] Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N.E. 392 (1923).

[37] *Ibid.*

[38] 7 Ill.2d 608, 131 N.E.2d 525 (1956).

[39] *Id.* at 616, 131 N.E.2d at 529.

reasoning that there is no parental immunity for willful and wanton misconduct.

THE EXCULPATORY CLAUSE CASES—"A MORASS OF LEGAL CONFUSION"

Infallibility is not characteristic of any human effort. Hence, it is not surprising that within a decade a court would decide a case which would plague it, inferior courts, and a large segment of the public. At the September Term in 1953 what appeared to be an unobtrusive case was decided. Although its farreaching effects can readily be realized when one contemplates it in the light of subsequent events, neither the bench nor bar realized the situations that *Jackson v. First Nat'l Bank*[40] would control.

Jackson was injured in a fall on business premises. He was not only a tenant, but managed the commercial building. The lease exculpated the lessor from liability for injuries resulting from the condition of the premises. A verdict was directed for the landlord because of this clause in the lease. The question concerned the validity of such a provision. The conflict was between the guarantee of freedom of contract on the one hand and the validity of agreement whereby a duty imposed by law was avoided, namely, liability for damages caused by one's negligence. The court, noting both that in a "business" lease there could hardly be a balance of bargaining power favoring the landlord, and that there was nothing in the social relationship of the parties here which would invalidate such a lease, upheld the action of the lower court. Thus, the lease immunized the landlord.

Cerny Pickas & Company owned premises which were destroyed while in the possession of a lessee. It brought an action against the lessee to recover its damages as the result of a fire. The defendant lessee urged that by virtue of the lease plaintiff was to keep the premises fully insured to indemnify itself against loss by fire, and that defendant was exempted from liability for negligence.[41] The Appellate Court held that even if the language of the lease clearly expressed the intent of the parties to exempt the lessee from liability for loss or damage occasioned by fire through defendant's negligence, such a provision was against public policy and void.

[40] 415 Ill. 453, 114 N.E.2d 721 (1953). A discussion of the exculpatory clause from the real property viewpoint will be found in Brodkey, *Current Changes in Illinois Real Property Law,* 10 DE PAUL L. REV. 567 (1961).

[41] Cerny Pickas & Co. v. C. R. Jahn Co., 347 Ill. App. 379, 106 N.E.2d 828 (1952).

It was subsequent to the Appellate Court's *Cerny-Pickas* decision that the *Jackson* case was decided by the Supreme Court. But the Supreme Court, on its way to creating a terrible labyrinth, held in the *Cerny-Pickas* appeal that the agreement was valid, and not contrary to public policy, and then interpreted it against the lessee.[42]

When it decided the *Jackson* case, the court had no idea that it would be called upon to resolve this question between the lessor and lessee of an apartment dwelling and to interpret an exculpatory clause in a standard form lease. It had to do that very thing, however, in *O'Callaghan v. Waller & Beckwith Realty Co.*,[43] where a tenant in a large apartment building in Chicago, fell in the courtyard. There was a very broad exculpatory clause in the lease, under the terms of which the lessor and his agents were completely immunized from damages as a result of many conditions, negligence being amongst them. The plaintiff prevailed in the trial court, but the defendant was successful in the Appellate Court on the basis of the *Jackson* opinion.[44] The Supreme Court affirmed the Appellate Court, resting upon the *Jackson* case and indicating that relief was not a matter for the courts, but rather one for the Legislature. It approved without condition an exculpatory clause whereby the lessee "or any person claiming through the lessee"[45] could not recover for the negligence of the lessor or his agents. There was a dissenting opinion in which it was noted: (a) there was a housing shortage; (b) the tenant was unable to get a place unless she signed the lease; and (c) the public policy of the state was to invalidate many types of exculpatory contracts. The dissent also noted that it found it difficult to fathom that the same court which had interpreted common-law concepts in the light of contemporary conditions upheld the clause.

Thus, when the court had failed to function, as the dissent put it, the Legislature immediately intervened. The opinion was filed in January 1958, and on April 13, 1959, a statute was passed holding all such clauses in leases exempting the lessor from liability for damages for injuries to person or property resulting from its negligence "void as against public policy and wholly unenforceable."[46] This statute has

[42] Cerny Pickas & Co. v. C. R. Jahn Co., 7 Ill.2d 393, 131 N.E.2d 100 (1955).

[43] 15 Ill.2d 436, 155 N.E.2d 545 (1958).

[44] O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. App. 2d 349, 146 N.E.2d 198 (1957).

[45] *Id.* at 351. 146 N.E.2d at 199.

[46] ILL. REV. STAT. ch. 80, § 15(a) (1959).

been construed, properly indeed, as being prospective in operation. In other words, leases with exculpatory clauses signed prior to the effective date of the law will afford a defense.[47]

But this morass of legal confusion, traceable to blind adherence to the *Jackson* case, is one from which there has been no emergence.

One of the most thorough and scholarly discussions of why such clauses should not be recognized is found in *Simmons v. Columbus Venetian Stevens Bldgs.*[48] After encompassing the entire subject, the judge regretfully concluded that his court was bound by the *Jackson* and *O'Callaghan* decisions of the Supreme Court.

In *Valentin v. Swanson & Co.*,[49] where only the husband had signed the lease, the wife brought an action for damages. The defendant asserted the exculpatory clause. To allow the plaintiff to recover, it was held that she was not a party by execution, ratification, nor was her husband an agent, nor was there any implied cotenancy under the Married Women's Act,[50] and accordingly was not obligated by the broad terms of the exculpatory clause.[51] And this, notwithstanding the sweeping decision of the *O'Callaghan* case.

In *Moss v. Hunding*,[52] while in the apartment of another lessee some plaster fell on lessee Moss's head. The court held that the clause was not applicable to the particular circumstances and cleverly distinguished the *O'Callaghan* case.

Let us analyze the *O'Callaghan* decison. The exculpatory clause provided that "neither the Lessor nor his agent shall be liable for damages, to the Lessee or to any person claiming through the Lessee . . . for injury to person. . . ."[53] But could not the infant children of the lessee suffer grave injuries because of the lessor's negligence? Of course a parent cannot by signing a lease surrender in advance the rights which may subsequently accrue to a minor because of the wrong of some third person. Indeed, after a minor child has been injured and has a cause of action against the tort-feasor, a parent, as such, cannot re-

[47] Booth v. Cebula, 25 Ill. App.2d 411, 166 N.E.2d 618 (1960).

[48] 20 Ill. App.2d 1, 155 N.E.2d 372 (1958).

[49] 25 Ill. App.2d 285, 167 N.E.2d 14 (1960).

[50] ILL. REV. STAT. ch. 68, §§ 1–21 (1959).

[51] *But see* ILL. REV. STAT. ch. 80, § 15a (1959).

[52] 27 Ill. App.2d 189, 169 N.E.2d 396 (1960).

[53] O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. App.2d 349, 351, 146 N.E.2d 198, 199 (1957).

lease the rights of the child.[54] The fact that the *O'Callaghan* case involved an adult did not alter the question before the court. The clause was either valid or invalid. It could not be valid as to an adult and invalid as to a minor. This is obvious when we consider that the person who was claiming through the lessee might be an incompetent.

Again, the lessor who has within its premises an elevator is, as a matter of law, required to exercise the same degree of care as any common carrier of passengers.[55] Would the duty of the lessor be different to certain persons riding in the same elevator? Assume a lessee, his child and an invitee or stranger to the lease were riding in the same elevator which fell, under the sweeping language of the *O'Callaghan* case only the invitee could recover.

And what is the effect of the *O'Callaghan* case upon day-to-day life? All those who suffered injuries prior to the *O'Callaghan* decision and had cases pending in the courts for several years became foreclosed from proceeding because of the decision. In almost all of those cases, the lease had never been asserted as a defense until the decision of the Appellate Court. Hundreds of citizens seeking redress in the courts were turned away, and motions to dismiss their complaints granted in gross lots. Worse yet, the effect of the *O'Callaghan* case is being felt daily. So long as the lease antedates July 1, 1959, the date of the legislative action, the exculpatory clause remains a defense. This decision is grim proof of how the work of the court affects the citizenry, and how the result of its error remains, even after the Legislature has acted.

With the exception of the *Grasse* case, this decision affected more litigants than any other in the work of the court during the past decade. Eventually there will be no problem. But the immediate issue is how to get away from the confusion of this result. Appellate Courts, as we have already demonstrated, particularly in the *Valentin* case, have invented devices to avoid the effect of holding an exculpatory clause binding upon anyone who claims through the lessee signing it.

THE DOCTRINE OF PROXIMATE CAUSE

Since its inception, the doctrine of proximate cause has been a source of trouble to courts and litigants. It has been frequently misunderstood and hence misapplied. What student of torts has not had some difficulty with this doctrine? The famous case of *Palsgraf v. Long*

[54] Paskewie v. East St. L. & S. Ry., 281 Ill. 385, 117 N.E. 1035 (1917).

[55] Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 N.E. 117 (1908).

Island R. R.[56] posed a problem for the legal neophyte. The misunderstanding usually arose out of the entrance of the court into the arena of the jury and its attempt to label a certain force as "intervening"—*i.e.*, one which broke the causal connection between the wrong and the injury. This problem was solved in a large degree by a holding that the issue of proximate cause is an issue of fact—a rule which will work far much more justice than injustice.

In *Ney v. Yellow Cab*,[57] Ney's automobile was damaged when a Yellow cab, operated by a thief, struck it. The cab had been left unattended with the ignition key unremoved in violation of a statute. In probably the best treatise on this question in the Illinois Reports, the court noted how, across the years, courts themselves have disagreed on proximate cause, and concluded, that if courts differ, certainly the question must be for reasonable men.

An interesting phase of the *Ney* case is found in *Barton v. Williams*,[58] where the defendant, knowing that his daughter was below the age where she could obtain a driver's license, permitted the keys to his automobile to remain in a place where they might be accessible to her. She took the automobile and was involved in an accident. The *Ney* case was distinguished because there was no violation of any statute or ordinance, nor any negligence on the part of the father which could have reasonably resulted in the occurrence. The driver's license requirement is directed not against the owner but against the operator of the car. There is no contradiction between the two cases.

Then came situations wherein courts had differed prior to the *Ney* decision, namely, the liability of the owner or possessor of a vehicle parked in violation of an ordinance or statute to another injured as the result of his collision with a moving vehicle. The issue is one of fact, without question.[59]

That legal doctrines affect men in all activities is graphically proved by *Liby v. Town Club*.[60] There, Liby, while playing handball on a court, sustained injuries when the door to the court was opened without any warning. There was no window on the door and no one on the outside of the room would have been able to ascertain whether there

[56] 248 N.Y. 339, 162 N.E. 99 (1928).

[57] 2 Ill.2d 74, 117 N.E.2d 74 (1954).

[58] 4 Ill. App.2d 266, 124 N.E.2d 356 (1955).

[59] Schiff v. Oak Park Cleaners & Dyers, Inc., 9 Ill. App.2d 1, 132 N.E.2d 416 (1955); Sutherland v. Gruccione, 8 Ill. App.2d 201, 131 N.E.2d 130 (1955).

[60] 5 Ill. App.2d 559, 126 N.E.2d 153 (1955).

were players within the room. A judgment against the Town Club that operated the courts was affirmed, notwithstanding that it had no relationship to the party opening the door.

The question of proximate cause presented in *Buckley v. City of Chicago*[61] would have been a problem prior to the *Ney* case. Buckley was driving his automobile west on a through street when another automobilist, operating northerly on an intersecting street at a speed of between forty and sixty miles an hour, drove into his vehicle in broad daylight. The operator of the northbound vehicle had never been in the particular vicinity and did not know the street upon which plaintiff was operating was a through street. Stop signs had been placed on the southeast and northwest corners of the intersection but were absent at the time of the occurrence. In an action against the City, a recovery was affirmed, the issue being whether a failure to have the stop signs was a proximate cause of the occurrence.

THE DOCTRINE OF ATTRACTIVE NUISANCE

The defense of eleemosynary institution, the Workmen's Compensation Act, the Death Statute, and proximate cause were not the only subjects that underwent reappraisal. The doctrine of attractive nuisance was also re-examined. It had many interpretations across the years, some at loggerheads with others. All confusion was swept away with *Kahn v. Burton Co.*[62] There, an eleven-year-old boy, while playing upon a lumber pile situated in a lot where a building was being

[61] 3 Ill. App.2d 39, 120 N.E.2d 375 (1954).

[62] 5 Ill.2d 614, 126 N.E.2d 836 (1955). The following are examples of cases which have permitted recovery under the foreseeability rule as announced in the *Kahn* decision. In Svienty v. Pennsylvania R.R., 8 Ill. App.2d 360, 132 N.E.2d 83 (1956), a six-year-old boy suffered burns from switch heaters scattered upon a vacant lot adjacent to a Pennsylvania Railroad right-of-way. In Runions v. Liberty Nat'l Bank, 15 Ill. App.2d 538, 147 N.E.2d 380 (1957), a child was injured while climbing from a playground to a garage roof on a series of benches, brick walls, and gates maintained in such a manner as to create a ladder-like arrangement. In Melford v. Gaus & Brown Constr. Co., 17 Ill. App.2d 497, 151 N.E.2d 128 (1958), a child, while playing around a foundation of a new building, fell over a wooden platform covering the foundation into a space between the platform and the sidewalk. In Wilinski v. Belmont Builders, Inc., 14 Ill. App.2d 100, 143 N.E.2d 69 (1957), a boy fell from a ladder which was left leaning against the back of a building undergoing construction. Finally, in Halloran v. Belt Ry., 25 Ill. App.2d 114, 166 N.E.2d 98 (1960), a thirteen-year-old boy was struck by an elevator after leaving a sandpile situated near the elevated tracks. *But see* Zorn v. Bellrose, 22 Ill. App.2d 331, 160 N.E.2d 685 (1959), where the court denied recovery when a six-year-old boy slipped under a fence and, after descending a flight of stairs to a river abutting the stairs, fell into the river and drowned. The court did not, however, undertake to distinguish the principle of that decision.

constructed, sustained an injury when the lumber pile gave way. The plaintiff instituted action against both the contractor and the lumber company. The court held that the lumber company, notwithstanding that it neither owned nor controlled the premises, incurred a liability under the doctrine of attractive nuisance. The court adopted a broad rule of foreseeability, namely, could the lumber company have anticipated children upon the premises? If so, the fact that it did not own or control the premises was immaterial. Thus the test was, whether the lumber company, in the exercise of ordinary care, could have anticipated the likelihood of children on the lumber, and injury to them if the lumber was not securely fastened. This, of course, broadened the scope of the doctrine of attractive nuisance. The single issue now seems to be whether an ordinary person might anticipate the presence of children on the premises, and whether the premises are in such condition so as to cause injury to them.

THE SCAFFOLD ACT

Neither was the Scaffold Act[63] neglected in the reappraisal process of the 'fifties. In *Kennerly v. Shell Oil Co.*,[64] Kennerly, a steamfitter employed by a contractor, sustained injuries when he fell from a scaffold built by other employees of the same contractor in their work on the Shell Oil Company premises. The Scaffold Act was passed in 1907,[65] and it was urged that the Workmen's Compensation Act, adopted in 1913,[66] superseded it. However, the court pointed out that the Workmen's Compensation Act has always recognized the rights of action against a third party tort-feasor, and thus there was no supersession.

The constitutionality of the Scaffold Act was also reviewed and approved. The court discussed the earlier cases which had defined the meaning of the phrases "wilful violation," and "wilful failure" to comply with any of the provisions of the act, and revitalized the definition of *Claffy v. Chicago Dock & Canal Co.*[67] Here, it is to be noted that the court specifically held that the owner is responsible, although he may not be in possession of the premises, the reasoning being that the law embraces a non-delegable duty.

Who is an "owner" of the premises? Is one who completely divests himself of the premises by a lease to a lessee who in turn contracts for

[63] Ill. Laws 1917, at 44.

[64] 13 Ill.2d 431, 150 N.E.2d 134 (1958).

[65] Ill. Laws 1907, at 312.

[66] Ill. Laws 1913, at 335.

[67] 249 Ill. 210, 94 N.E. 551 (1911).

work wherein scaffolds are employed an "owner" within the meaning of the Scaffold Act? Consistent with the *Kennerly* case and prior decisions of the courts, it was held that the lessee, having entered into the contract wherein scaffolds were employed, was the "owner," and that the lessor, an owner of the fee, was not the owner within the act.[68]

At the same term as the *Kennerly* case, in *Gannon v. Chicago, M., St. P. & Pac. Ry.*,[69] the court passed upon a question upon which there had been some difference of opinion and no decision, namely, whether an employee injured through a violation of the Scaffold Act had an action under that act against his employer. The matter was disputed because in 1907, when the Scaffold Act was passed, it authorized actions against one's employer, since the Workmen's Compensation Act had not yet become a law. The court held, however, that to the extent that it prohibits an action by an employee against an employer the Scaffold Act was amended by the Workmen's Compensation Act.

As could be anticipated, controversies arose between contractor and owner, wherein the latter sought reimbursement or indemnification against his liability under the act against the injured's employer. Such actions are permitted under third party practice procedure.[70]

It is interesting to note the disposition of the *Gannon* case in view of the prior decision of *Kennerly v. Shell Oil Co.*[71] Gannon, a bricklayer for a construction firm erecting a terminal for a railroad, recovered a verdict in a Scaffold Act case against the railroad for injuries sustained in this occupation, and an appeal was taken. In a very unusual opinion,[72] the Appellate Court interpreted at length what had occurred during the *Kennerly* trial, apparently going to the record of that cause, and beyond the opinion of the Supreme Court. The facts in *Gannon* were that a ladder was against a scaffold and was not nailed thereto. It slipped when the plaintiff stepped onto it. The court stated that there was no evidence about a complaint made to the railroad company concerning a defect in the ladder; that the ladder had been placed against the scaffold only ten or twenty minutes before the accident; that no railroad employee had visited the job site on the day of the accident; and that its engineers did not exercise any control

[68] Kiszkan v. Texas Co., 27 Ill. App.2d 386, 170 N.E.2d 22 (1960).

[69] 13 Ill.2d 460, 150 N.E.2d 141 (1958).

[70] Boston v. Old Orchard Business Dist., Inc., 26 Ill. App.2d 324, 168 N.E.2d 52 (1960); Moroni v. Intrusion-Prepakt, Inc., 24 Ill. App.2d 534, 165 N.E.2d 346 (1960).

[71] 13 Ill.2d 431, 150 N.E.2d 134 (1958).

[72] Gannon v. Chicago, M., St. P. & Pac. Ry., 25 Ill. App.2d 272, 167 N.E.2d 5 (1960).

over the manner in which the work was being done. The court concluded that since the owner was not in charge of the job being done, it could not be held responsible, notwithstanding that control was held not to be a requisite to liability in the *Kennerly* case. But the Supreme Court, in affirming the judgment of the Appellate Court in the *Gannon* case,[73] stated that "a clarification of this law is warranted."[74] It then promptly held that control of the work was a requisite of responsibility on the part of the owner under section 9 of the act.[75] This opinion, which has not become final, is, of course, inconsistent with the *Kennerly* decision.

In September, 1960, the Supreme Court reaffirmed its confidence in the definition of the term "wilfully" as enunciated by the *Kennerly* case, when it allowed recovery to Gundich, a steel worker employed by a general contractor, who was injured when a crane operator, moving a steel load in response to signals, violated one of them and knocked off a beam which fell and struck the plaintiff standing nearby on a girder.[76]

CLARIFICATION OF THE "LOANED EMPLOYEE" PROBLEM

During the past decade, the question of a loaned employee has become a problem in tort cases. The classical instance is an action by an employee of one employer against another employer for injuries sustained as the result of negligence on the part of some employee of the defendant. The latter may assert that the employee who inflicted the injury was at the time loaned to the same employer as the injured, who thus could not maintain an action at law because of the prohibition of the Workmen's Compensation Act.[77] The problem, of course, had to be resolved by determining whether the master-servant relationship existed at the time between the particular employees and the tortfeasor. But what was the test? In a long line of cases,[78] the criterion in-

[73] Gannon v. Chicago, M., St. P & Pac. Ry., No. 35929, Sup. Ct. Ill., April 3, 1961.

[74] *Id.* at 3.

[75] ILL REV. STAT. ch. 48, § 69 (1959).

[76] Gundich v. Emerson-Comstock Co., 21 Ill.2d 117, 171 N.E.2d 60 (1960).

[77] ILL. REV. STAT. ch. 48, §§ 138.1-.28 (1959).

[78] Densby v. Bartlett, 318 Ill. 616, 149 N.E. 591 (1925); Connolly v. People's Gaslight & Coke Co., 260 Ill. 162, 102 N.E. 1057 (1913); Harding v. St. Louis Nat'l Stock Yards, 242 Ill. 444, 90 N.E. 205 (1909).

dicated in determining this relationship is the right to control, which includes the power of discharge.

As to whether or not one was a loaned employee, certain confusion existed. One division of the Appellate Court for the First District in a 1960 opinion held, as a matter of law, that the wrongdoing employee, although in the general employ of another contractor, was a fellow employee of the injured, in that he received all his directions from employees of the injured's employer.[79] Eighteen days later another division of the same Appellate Court District held that a city employee injured by a digging machine rented to the city by the defendants, whose operator received directions from the city superintendents, presented a factual issue as to whether or not the tort-feasor was a fellow employee of the injured.[80] Although both decisions relied upon the same case as authority for their position,[81] they reached opposite conclusions. The second case, however, also alluded to and relied upon the then only Supreme Court decision deciding this issue in other than Workmen's Compensation Act cases.[82] In wiping away the confusion resulting from two different decisions on almost identical facts, the Supreme Court re-enunciated the rule in *Merlo v. Public Serv. Co.*,[83] namely, that whether one becomes the employee of the person to whom he is sent depends upon whether he becomes wholly subject to that person's control and free during such time from the direction and control of his master. The fact that he may receive directions from one other than his employer is not enough to show, as a matter of law, that there has been a change of masters. Cooperation and coordination are necessary when large general work is being undertaken by different parties. The question of loaned employee is primarily an issue of fact.[84]

ACTIONS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

Questions arising under the Federal Employers' Liability Act form an important part of the work of the court. A study of all the important decisions by Illinois courts during the period of the last ten years, wherein this act was being given new interpretations by the United

79 Gundich v. Emerson-Comstock Co., 24 Ill. App.2d 138, 164 N.E.2d 512 (1960).

80 Murphy v. Lindahl, 24 Ill. App.2d 461, 165 N.E.2d 340 (1960).

81 Allen-Garcia Co. v. Industrial Comm'n, 334 Ill. 390, 166 N.E. 78 (1929).

82 Merlo v. Public Serv. Co., 381 Ill. 300, 45 N.E.2d 665 (1942).

83 *Ibid.*

84 Gundich v. Emerson-Comstock Co., 21 Ill.2d 117, 171 N.E.2d 60 (1960).

States Supreme Court would be impossible. In one Appellate Court case many of these decisions are compiled.[85] It is almost an encyclopedic treatise on the act. A study of it will give one some familiarity with the principles of and practice under the Federal Employers' Liability Act.[86] It collects all recent Illinois and National Supreme Court cases interpreting many phases of the act. The following are a few cases worthy of a short discussion.

Tatham's case was unusual. He alleged that he had been assaulted by a fellow employee whose pugnacious habits and ill-temperament were known by his employer.[87] This presented a question which had never been explored, and was consequently misunderstood. The question was: Could a railroad be responsible under the Federal Employers' Liability Act, to the extent of the injury sustained, for direct negligence in employing a dangerous man to work with an employee, thereby increasing the hazard to that employee? In dealing with this question, the Illinois court painstakingly examined and analyzed several United States Supreme Court decisions which had been interpreted by some courts as foreclosing such an action. *Davis v. Green*[88] was the progenitor of these several decisions.[89] The Illinois court pointed out in *Tatham v. Wabash R.R.*[90] how the *Davis* case presented a *respondeat superior* situation, with the issue being one of scope of employment. The court also stated that direct negligence, relied upon in *Tatham,* had been recognized as a basis for recovery even under decisions which prohibited recovery, and cited *Atlantic & C.A.L. Ry. v. Green*[91] in support of their position. This was demonstrated by a close analysis of the cases. But the court went into the briefs filed in several of the cases in order to more fully appreciate the basis for the holdings. It held that Tatham had a cause of action and, of course, it was supported by *Lillie v. Thompson*[92] involving an assault upon a female employee by a stranger. Time, and a host of subsequent United States Supreme Court cases concerning what is evidence of negligence under the Federal Employers' Liability Act, proved the correctness of the holding in the *Tatham* case.

[85] Hack v. New York, C., & St. L. R.R., 27 Ill. App.2d 206, 169 N.E.2d 372 (1960).

[86] 45 U.S.C.A. §§ 51-59 (1954).

[87] Tatham v. Wabash R.R., 412 Ill. 568, 107 N.E.2d 735 (1952).

[88] 260 U.S. 349 (1922).

[89] Atlantic & C. A. L. Ry. v. Green, 279 U.S. 821 (1929); Atlantic Coast L. R.R. v. Southwell, 275 U.S. 64 (1927); St. Louis-S. F. Ry. v. Mills, 271 U.S. 344 (1926).

[90] 412 Ill. 568, 107 N.E.2d 735 (1952).

[91] 279 U.S. 821 (1929).

[92] 332 U.S. 459 (1947).

In Illinois, intermediate courts of review could, pursuant to a certain statute,[93] weigh the evidence and reverse judgments which in their opinion were contrary to the weight of the evidence. Illustrative of this point is *Bowman v. Illinois Cent. R. R.*,[94] where Bowman, injured in a collision of trains, had entered into a settlement. He had severe head injuries and subsequently was adjudicated incompetent. He brought an action under the Federal Employers' Liability Act and sought to recover damages and set aside the release in the single proceeding in accord with the practice dictated by the United States Supreme Court.[95] A jury specifically found that Bowman was incapable of understanding what he was doing at the time of the execution of the alleged release. He recovered a judgment for damages. The Appellate Court reversed the judgment and remanded the cause for a new trial, stating the verdict was contrary to the manifest weight of the evidence.

The *Bowman* case finally reached the Supreme Court. Squarely presented was the interesting question as to whether an Illinois Appellate Court could weigh the evidence in an action under the Federal Employers' Liability Act. Such actions are, of course, governed by the decisions of the federal courts in order that the act might be given a uniform application. Specifically, the United States Supreme Court had held that the rights conferred by the act could not be affected by "local rules of procedure."[96] Was "a local rule of procedure" whereby Appellate Courts could weigh the evidence within the prohibition of the Supreme Court? On an appeal from the Supreme Court of Missouri, where the defendant had attempted to relitigate the factual dispute, the United States Supreme Court in *Lavender v. Kurn*,[97] had specifically indicated that so long as there is an evidentiary basis for the jury's verdict, a court of review could not disagree with its conclusion.

Indeed, the precise issue had already been resolved by the Supreme Court in a memorandum opinion as the result of an appeal from an Illinois court. In *Harsh v. Illinois Terminal R. R.*,[98] plaintiff recovered a verdict against his employer. His action was under the Boiler Inspection Act.[99] The Appellate Court set aside the verdict as contrary

[93] ILL. REV. STAT. ch. 110, § 92(3b) (1959).

[94] 9 Ill. App.2d 182, 132 N.E.2d 558 (1956).

[95] Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952).

[96] *Id.* at 363.

[97] 327 U.S. 645 (1946).

[98] 351 Ill. App. 272, 114 N.E.2d 901 (1953).

[99] ILL. REV. STAT. ch. 24, §§ 1225-40 (1959).

to the manifest weight of the evidence. Harsh struck the remanding portion of the order and unsuccessfully sought entry into the Illinois Supreme Court. However, the United States Supreme Court reversed the Appellate Court's judgment and cited the *Lavender* case in the order.[100] The briefs in the United States Supreme Court indicate that the only issue was whether an Illinois Appellate Court could weigh the evidence in a Federal Employers' Liability Act case.

With such background, the court in the *Bowman* case concluded that if jury verdicts could be set aside according to local standards and rules of procedure by Appellate Courts, then the right to a jury trial, which is "part and parcel" of the cause of action under this statute, would lose its meaning. Accordingly, it concluded that the Illinois Appellate Court had no right to weigh the evidence in Federal Employers' Liability Act actions. This decision was handed down on March 20, 1957.

On February 25, 1957, the United States Supreme Court had decided another appeal from the State Supreme Court of Missouri wherein that court had again entered the arena of the jury.[101] Mr. Justice Brennan's cogent language re-enforced the opinion of the Illinois court:

> Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. *Judges are to fix their sites primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury to make a choice of other probabilities.*[102]

On that same day, three other opinions were filed by the same Court, and each articulated the same theme.[103]

An FELA decision treating at length the measure of damages in a death case, and also a more troublesome problem—the mode of proof—is *Allendorf v. Elgin.*[104] Allendorf, a twenty-four-year-old man, lost his life and left surviving a widow, twin girls, and a child born posthumously. He had an expectation of life of thirty-eight years and eight

[100] Bowman v. Illinois Cent. R.R., 355 U.S. 837 (1957).

[101] Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957).

[102] *Id.* at 506–07. (Emphasis added.)

[103] Webb v. Illinois Cent. R.R., 352 U.S. 512 (1957); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957); Ferguson v. Moore-McCormick Lines, 352 U.S. 521 (1957).

[104] 8 Ill.2d 164, 133 N.E.2d 288 (1956).

months. In presenting her action under the Federal Employers' Liability Act, the plaintiff deducted $50 a month for her husband's expenses and the amount of his income tax. This left $378.09 per month. According to an actuary, at the interest rate of two and one-half per cent, the present value of that sum per month was $112,904.37, while at three per cent it was $104,418.69. The court recognized that the vice inherent in the practice was the assumption that he would continue to live for thirty-eight years and eight months; that his earnings would remain the same, and that his dependents would receive that sum for that period. It also recognized, however, that actuarial evidence is an established mode of proving present values. Accordingly, it held that the proper method was to employ neutral figures, and that on the basis of these neutral figures there could be computed in argument the amount of the loss claimed. Inasmuch as the verdict was in excess of the highest figure given the actuary, the court reviewed at length the intangible characteristics, such as industry, thrift, and that most intangible of all, what the deceased did for his children.

The court in the *Allendorf* case reaffirmed the well-established proposition that in a death case the full life expectancy is the proper criterion, notwithstanding that the decedent might have retired at an earlier age. This was of some moment to those engaged in this litigation, since many were contending that certain computations not recognized actuarily and called by their proponents "work expectancy tables" formed the basis in computing the length of time the deceased would probably have worked. After noting that making a deduction for income tax was unduly favorable to the defendant, the verdict in favor of Allendorf's widow was affirmed.

The final case submitted for consideration with respect to appellate review of questions of fact is *Pennell v. Baltimore & O. R. R.*[105] Pennell was killed while working for a railroad. He was thirty-seven years of age and left a widow and a seven-year old son. The year before, he had earned $5,800, and there was an increase of ten per cent in pay subsequent to his death. A verdict of $150,000 returned without the aid of an actuary was affirmed. The Appellate Court took the position that it did not have the power to weigh the evidence on the issue of damages, since this was a factual matter.

The scope of the "safe place to work" rule was a matter of controversy in *Glime v. New York Cent. R. R.*[106] Glime, a trainman who

[105] 13 Ill. App.2d 433, 142 N.E.2d 497 (1957).

[106] 5 Ill. App.2d 509, 126 N.E.2d 385 (1955).

had climbed between cars, was injured when the train was moved over while he was getting off on the other side. An instruction on the doctrine of a safe place to work was given. Defendant urged that this duty applied only to physical conditions which rendered the premises unsafe. In perhaps the only opinion meeting head-on what had been a troublesome question for the trial courts, it was specifically held that the "safe place to work" duty is not so circumscribed as to embrace only physical circumstances. When one gives the matter any thought, the correctness of the decision becomes obvious. The duty to maintain a safe place to work is positive, continuing, and non-delegable. A place which is safe may become unsafe through the conduct of employees.

Brakeman Knight swung onto the step of the caboose as the train went by him. His foot slid. He lost his grip and fell to the right-of-way. The step was found to be smooth and worn in the center. He contended that the Safety Appliance Act[107] requiring "secure sill steps" had been violated.[108] Specifically, his argument was grounded on a rule of the Interstate Commerce Commission requiring "safe and suitable box steps leading to caboose platforms. . . ."[109] The Safety Appliance Act, of course, is the source of the power of the Interstate Commerce Commission. The defendant contended that while "secure sill steps" are required, there was no mention about "caboose steps" and that any regulation concerning such steps was beyond the scope of authority delegated to the Interstate Commerce Commission, arguing that a railroad car step has been held not to be a "sill" step.[110]

Until *Knight v. Chicago & N.W. Ry.*,[111] there was but one other decision in the nation passing upon the validity of the regulation of the Commission concerning caboose steps.[112] In *Knight*, the Illinois court added a second decision in holding that box caboose steps are appliances within the Safety Appliance Act, and a proper subject for the exercise of Interstate Commerce Commission powers.

Res ipsa loquitur was the basis for *Moore v. Atchison, T. & S. F.*

[107] 45 U.S.C.A. §§ 11–16 (1954).

[108] Knight v. Chicago & N. W. Ry., 3 Ill. App.2d 502, 123 N.E.2d 128 (1954), *petition for leave to appeal denied*, 5 Ill. App.2d vi (1955).

[109] 2 ROBERTS, FEDERAL LIABILITY OF CARRIERS 2031 (2d ed. 1929).

[110] Hill v. Minneapolis, St. P. & S. S. M. Ry., 160 Minn. 484, 200 N.W. 485 (1924).

[111] 3 Ill. App.2d 502, 123 N.E.2d 128 (1954).

[112] Stewart v. St. Louis–S. F. Ry., 262 S.W. 440 (Mo. 1924).

Ry.,[113] an FELA case of unusual interest. Vernon Adair, a head brakeman, left a widow and seven minor children when he lost his life in a collision of two trains. His case was presented under the doctrine of *res ipsa loquitur*. No evidence was introduced by the plaintiff concerning the occurrence, other than through answers to interrogatories. The defendant introduced a mass of evidence covering every detail, such as inspections after the occurrence demonstrating that its signal and switch were functioning properly. The verdict for the defendant was reversed for a trial on the issue of damages only, the court holding that when two trains moving in opposite directions on the same track collide, there is negligence as a matter of law.

The greater significance of the decision is found in the fact that the court held the deceased guilty of no negligence. Of course, the negligence of the deceased or injured is not a defense in a Federal Employers' Liability Act action, but is a matter to be considered in mitigation of damages.[114] Here, the court in reaching its conclusion noted that the burden of proof on contributory negligence in such an action is upon the defendant; that there is a presumption that the deceased was in the exercise of ordinary care for his own safety, and that in this case there was no evidence that he was guilty of any negligence whatsoever. It was specifically held that it was error to submit the issue of the deceased's negligence to the jury. This, of course, was the realistic application of a basic principle to the facts before the court.

Frequently, cases are encountered wherein there is no evidence of negligence on the part of the injured employee. Nevertheless, the jury is routinely instructed that evidence of negligence on his part, although not a defense, is to be considered in mitigation of damages. The *Moore* case does much to determine not only negligence as a matter of law, but also freedom from negligence as a matter of law in Federal Employers' Liability Act actions. Henceforth, it is predicted that Illinois courts will not give an instruction on the negligence of the employee in those cases where there can be no evidence of negligence on his part.

No discussion of the work of the court in the field of railroad law should omit *Tucker v. New York Cent. & St. L. R. R.*[115] This was

[113] 28 Ill. App.2d 340, 171 N.E.2d 393 (1960).

[114] 45 U.S.C.A. § 53 (1954).

[115] 12 Ill.2d 532, 147 N.E.2d 376 (1957).

a crossing occurrence where the plaintiff recovered a verdict which was affirmed by the Appellate Court.[116]

The facts were that Tucker, a sixteen-year-old boy, was driving a truck westerly approaching a grade crossing on a foggy day. The track ran in a northeasterly and southwesterly direction and the road over which Tucker was driving crossed the track at an angle of about forty-five degrees. Forty to forty-five rods east of the crossing was timber, and a telephone shack was two hundred fifty feet east of the crossing. Tucker stopped his vehicle, with the front end nine or ten feet from the nearest rail. He scooted over in the seat to the right side, rolled the glass of the window down and could see about four hundred seventy-five feet from the crossing. He then rolled the glass up, scooted over, put the truck in low gear and started across. When all but the rear end of the truck had accomplished the crossing, his vehicle was struck by a train approaching from his right. The court held that he was guilty of contributory negligence when he did not see the train at the time he had stopped the truck about nine feet from the track, notwithstanding the fact that there was substantial evidence that it was traveling at a speed of approximately sixty miles an hour. In substance, the court assumed that the train was in sight when the plaintiff looked in the direction from which it was approaching, notwithstanding its high speed, and required the plaintiff to again look in the direction from which the train was approaching before his vehicle entered the crossing.

The result was contrary to Judge Cardozo's famous decision in *Pokora v. Wabash Ry.*[117] (an Illinois occurrence case), and to a host of Illinois authorities.[118] As Judge Cardozo pointed out, the course of safety differs at times. If a man were to get out of his vehicle and reconnoiter, there was the possibility that a train would be moved before he could start his vehicle. So also when the traveler turns his

[116] Tucker v. New York Cent. & St. L. R.R., 12 Ill. App.2d 545, 140 N.E.2d 370 (1957).

[117] 292 U.S. 98 (1934).

[118] Bales v. Pennsylvania R.R., 347 Ill. App. 466, 107 N.E.2d 179 (1952); Monroe v. Illinois Terminal R.R., 346 Ill. App. 307, 105 N.E.2d 549 (1952); Hughes v. Wabash R.R., 342 Ill. App. 159, 95 N.E.2d 735 (1950); Randolph v. New York Cent. R.R., 334 Ill. App. 268, 79 N.E.2d 301 (1948); Houser v. Wabash R.R., 341 Ill. App. 31, 92 N.E.2d 878 (1950); Gills v. New York Cent. & St. L. R.R., 342 Ill. 455, 174 N.E. 523 (1930); Gibbons v. Aurora, E. & C. R.R., 263 Ill. 266, 104 N.E. 1063 (1914); Chicago & A. R.R. v. Pearson, 184 Ill. 386, 56 N.E. 633 (1900); Chicago & N. W. Ry. v. Hansen, 166 Ill. 623, 46 N.E. 1071 (1897).

eyes in one direction, a train or a loose engine may be approaching from another. The *Tucker* case fell within Cardozo's condemnation:

> Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury.[119]

Worse yet, the opinion exacted of the plaintiff the same degree of care as an adult, although the record indicates that he was but sixteen years of age. Of course, a boy under twenty-one years of age is required to exercise, not the care of an adult, but that degree of care that a boy of his age, intelligence, experience, and capacity would exercise under similar circumstances.[120]

FIREMEN ALLOWED RECOVERY AS "INVITEES"

A real development in the Illinois law of negligent torts was the result of *Dini v. Naiditch*.[121] Gino Dini, a city fireman, entered the premises of the Green Mill Hotel while it was in a state of general conflagration. The walls collapsed upon him and killed his captain, Edward J. Duller. His lawsuit and that of Duller's Estate against the owner and lessee of the premises alleged that the defendants had failed to provide fire doors or fire extinguishers, permitted an accumulation of litter in the corridors, and stored benzine on the premises, all in violation of city ordinances. He and Duller's administrator recovered verdicts from a jury, but the trial court entered judgment for the defendants, notwithstanding those verdicts, on the basis that the only duty owed to Dini and his captain was to refrain from willfully and wantonly injuring them, since they were but licensees when upon the premises.

[119] Pokora v. Wabash R.R., 292 U.S. 98, 105-06 (1934).

[120] Wolf v. Budzyn, 305 Ill. App. 603, 27 N.E.2d 571 (1940); Cicero State Bank v. Dolese & Shepard Co., 298 Ill. App. 290, 18 N.E.2d 574 (1939); Petersen v. Chicago Consol. Traction Co., 231 Ill. 324, 83 N.E. 159 (1907).

[121] 20 Ill.2d 406, 170 N.E.2d 881 (1960).

The city ordinances specifically provided:

It shall be unlawful to continue the use of or occupy any building or structure or place which does not comply with these provisions of this code *which are intended to prevent a disastrous fire or loss of life in case of fire*, until the changes, alterations, repairs or requirements found necessary to place the building in a safe condition have been made.[122]

Plaintiffs contended that firemen came within the scope of the protection afforded by these ordinances. The Supreme Court agreed that since the ordinances were general in their terms and not limited in operation to any particular persons, a fireman could not be excluded.

But the court went farther on the question of the duty owed to firemen. It exhaustively reviewed the decisions of other courts and the writings of the recognized authorities, such as Harper, Bohlen, and Prosser,[123] concerning the rights of firemen and the duties owed to them. It concluded that it would be illogical to say that a fireman cannot be an invitee because he enters independent of either invitation or consent, but can be a licensee although there has been no permission. It was the court's opinion that the common-law rule labeling "firemen as licensees is but an illogical anachronism, originating in a vastly different social order, and pock-marked by judicial refinements. . . . 'Stare decisis' ought not to be the excuse for decision where reason is lacking."[124] The ultimate rule was that the landowner is liable for negligence to a fireman injured fighting a fire on the premises, at a place where his presence might be anticipated, and this, regardless of ordinance. Herein lies the true value of this decision. The history of the status of the fireman was based on the feudal concept that the owner was a sovereign within his premises. He had no duty other than to willfully and wantonly abstain from injuring those who came there, notwithstanding they had been there in the performance of their duties and for protecting the property in question. All agreed it was a "harsh rule." Then the scope of obligation was broadened, the *Dini* court pointed out, so as to entitle firemen to be warned of "hidden dangers" and "unusual hazards."

Some courts, it was noted, including New York,[125] rejected the

[122] CHICAGO, ILL., MUNICIPAL CODE ch. 90-3 (1940). (Emphasis added.)

[123] HARPER, LAW OF TORTS § 96 (1933); Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 142 (1921); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

[124] Dini v. Naiditch, 20 Ill.2d 406, 416, 170 N.E.2d 881, 886 (1960).

[125] Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920).

licensee label and forthrightly held an owner and possessor liable for negligence. Finally, the court concluded: "[A]n action should lie against a landowner for failure to exercise reasonable care in the maintenance of his property resulting in the injury or death of a fireman rightfully on the premises, fighting the fire at a place where he might reasonably be expected to be."[126] This was a Paul Bunyan step, with the court unshackling itself from concepts feudal in origin.

And why should this not be the rule? While the intoxicated acquaintance of a friend in a sub-standard hotel would have an invitee status, the fireman under ancient decisions was but a licensee. Who can question but that a fireman who enters a building for the purpose of putting out a fire is not there for a purpose beneficial to the owner? If benefit to the landowner is the test of the invitee status, certainly the fireman comes within that criterion. Indeed, if the fire were on adjacent property, the landowner would derive benefit from the entry of the firemen for the purpose of putting out the fire adjoining him. But there is more. If one maintains premises in violation of law, he should be charged with the same rule of foreseeability as applies in all phases of negligence. Thus, if the premises have open stairwells in violation of law, it is a certainty that fighting the fire therein will be a much greater problem. The enunciation of the rule in the *Dini* case does not increase the burden of the landowner. It is his duty to maintain the premises in a safe condition. This case merely extends the protection of an existing duty.

THE WIFE'S ACTION FOR LOSS OF CONSORTIUM

What about the married woman? Although the court in 1953 had held a married woman has a cause of action against her husband for willful and wanton conduct,[127] the Legislature passed a statute whereby a party could not sue his spouse for a tort to the person committed by such spouse during coverture.[128] But does the married woman have the same cause of action for loss of her husband's consortium as he he has for loss of hers? Prior to the *Dini* decision, that question had been passed upon in only one case, and that by an Appellate Court in 1913.[129] The point was touched upon in an Appellate Court decision

[126] Dini v. Naiditch, 20 Ill.2d 406, 416–17, 170 N.E.2d 881, 886 (1960).

[127] Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1953).

[128] ILL. REV. STAT. ch. 68, § 1 (1959).

[129] Patelski v. Snyder, 179 Ill. App. 54 (1913).

in 1958.[130] Since the famous case of *Hitaffer v. Argonne Co.*,[131] however, where, after her husband recovered under the Longshoremen's Compensation Act, the wife successfully asserted a claim for loss of her husband's consortium as the result of his injuries, the allowance of the wife's claim by the United States Court of Appeals has brought the particular question into focus in many jurisdictions.

Most of the cases decided involved Workmen's Compensation situations where, in addition to the injured husband receiving benefits under the particular Workmen's Compensation Act, his wife would attempt to maintain an action at common law for the loss of consortium. The elements advanced against the wife's action and the answers to them may be summarized thus:

(a) The wife's injury is too remote and indirect to justify protection.
But the injury to the same interest of the husband has never been regarded as too remote or indirect.

(b) It may entail double recovery for the same injury, since the husband could recover in his action for his loss of earning power.
But the husband recovers in his action only for loss of earning power, whereas, consortium encompasses companionship, felicity, and sexual relationship; moreover, any conceivable double recovery could be done away with by deducting from the damages in the consortium action any compensation given the husband for impairment of his ability to support.

(c) Since the wife has no right to her husband's services, she can have no action for loss of consortium.
But the husband can recover for loss of consortium even where there is no loss of his wife's services.

(d) The Married Women's Act must be construed as abolishing the husband's action.
But in Illinois the concept of the husband's consortium had been recently reaffirmed in a case in which a statute which abolished the action for alienation of affection was held unconstitutional.[132]

MISCELLANEOUS IMPORTANT DEVELOPMENTS IN NEGLIGENT TORTS

This survey would be woefully inadequate were not reference made to a few significant developments in the practice of neglignce law wrought by the courts. During the last fifteen years, when everyone has felt the hand of Uncle Sam's taxing power, the issue of taxation has entered the realm of this field of litigation. Defendants have sought to show that the measure of damages for a loss of earnings is

[130] City of Chicago v. L. J. Sheridan & Co., 18 Ill. App.2d 57, 151 N.E.2d 133 (1958).

[131] 183 F.2d 811 (D.C. Cir. 1950).

[132] Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946).

the net sum received by the injured, not the gross earned prior to withholding the tax. Practically all decisions have been against this contention.[133] More important, the defendants have sought to show that whatever sums were received by way of verdict, they were not taxable. It has been urged in support of this proposition that the jury is tax conscious, and that unless the jury knows that no tax attaches to the award, it might be inclined to allow an additional sum to discharge this obligation. It was not until *Hall v. Chicago & N. W. Ry.*,[134] that there was a Supreme Court decision upon this issue. Prior thereto, there was a difference of opinion between two divisions of the Appellate Court of Illinois, First District.[135]

In the *Hall* case, defendant's counsel had argued to the jury, over objection, that whatever the plaintiff recovered was non-taxable. Plaintiff recovered a verdict but obtained a new trial. In the Appellate Court, the order granting the new trial was reversed. This was not an order appealable to the Supreme Court.[136] Accordingly, the cause came back to the Superior Court where a judgment was entered from which the defendant appealed successfully to the Appellate Court.[137] Thereafter, the Supreme Court took the case and reversed both opinions of the Appellate Court.[138] The taxability of the amount recovered, the court reasoned, is of no materiality in a lawsuit, and it is not to be imparted either by an instruction—which was one avenue contended for—or by oral argument. The status of the parties, the court continued, is immaterial. What the plaintiff does with the award or how the defendant acquires the money to pay it is of no consequence to the jury. It is a matter between the taxpayer and his government. Consistent with this holding, the court also noted that the measure of damages to be computed is upon the gross income of the injured or deceased.

The amount of insurance available to cover the contingency out of

[133] Majestic v. Louisville & N. Ry., 147 F.2d 621 (6th Cir. 1945); Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); Cole v. Chicago, St. P., M. & O. Ry., 59 F. Supp. 443 (D. Minn. 1945).

[134] 5 Ill.2d 135, 125 N.E.2d 77 (1955).

[135] Hall v. Chicago & N. W. Ry., 349 Ill. App. 175, 110 N.E.2d 654 (1953); Margevich v. Chicago & N. W. Ry., 1 Ill. App.2d 162, 116 N.E.2d 914 (1953), *petition for leave to appeal denied,* 5 Ill. App.2d v (1955), *cert. denied,* 348 U.S. 861 (1955).

[136] Kavanaugh v. Washburn, 387 Ill. 204, 56 N.E.2d 420 (1944).

[137] Hall v. Chicago & N. W. Ry., 349 Ill. App. 175, 110 N.E.2d 654 (1953).

[138] Hall v. Chicago & N. W. Ry., 5 Ill.2d 135, 125 N.E.2d 77 (1955).

which the lawsuit in question arose could never be determined until *People ex rel. Terry v. Fisher*.[139] This was true, notwithstanding that in almost all cases the ability of the tort-feasor to respond in damages was determined by the available amount of insurance. Counsel for insurers were usually instructed not to disclose policy limits. Thus many cases were tried that would have been settled had the amount of coverage been disclosed. This was particularly true of the severe injury, clear-cut liability situations. A given demand had to be rejected without disclosing that such sum was not available. It was only after a verdict in excess of the sum demanded did the injured find that the insurance was not one-half or even one-quarter of that which he sought. Meanwhile, both litigants had incurred considerable expenses, to say nothing of the expenses of the county, as well as the time given the trial.

To do away with such situations, the *Terry* court held that a pretrial discovery interrogatory was a proper vehicle to determine the amount of available insurance. The defendant argued that the question of insurance was anathema as evidence. The court responded that this did not concern the admissibility of evidence, but a simple matter of discovery. It was also urged that to disclose the amount of coverage would be tantamount to a defendant disclosing his financial resources, but the court noted that the statutes,[140] as well as the characteristics of liability insurance itself, gave the injured an interest in that policy. Moreover, such insurance differs from other assets, in that its sole existence is to cover the liability in question. In the words of the court:

> Litigation is a practical business. . . . Ordinarily a plaintiff has many sources of inquiry by means of which he can appraise the likelihood that the judgment he seeks will be enforceable. In the case of an insurance policy, however, all the customary channels are cut off. Even if he knows the identity of the insurance company and may know its financial standing, it does not help him, for the company is responsible only within the limits of the policy it has issued.[141]

Although this opinion was originally controversial, notwithstanding substantial precedence in other areas where the same question had been considered, today courts, and litigants from both sides of the docket, are happy with its excellence in function. Now all know the

[139] 12 Ill.2d 231, 145 N.E.2d 588 (1957).

[140] ILL. REV. STAT. ch. 73, § 1000 (1959); Ill. Laws 1955, at 157.

[141] People *ex rel.* Terry v. Fisher, 12 Ill.2d 231, 238-39, 145 N.E.2d 588, 593 (1957).

possible exposure of each defendant. More important, it has been a great force in promoting the disposition of litigation.

Another cogent force in cutting into the backlog has been the "physical examination" rule. From 1882 and *Parker v. Enslow*,[142] the law in Illinois had been that a litigant could not be compelled to submit himself to a physical examination, nor could he be asked on the witness stand whether he would so submit, and it was error to touch upon this subject in argument.[143] In *People ex rel. Noren v. Dempsey*,[144] the defendant filed a motion for the entry of an order requiring the plaintiff to submit to an examination by a doctor of the defendant's choice. The court allowed the order and provided that the plaintiff might have a doctor of his own selection present, and that the defendant was to provide the plaintiff with a copy of the examining physician's report, as well as to pay the expenses of the examination. Through an original action in mandamus to expunge this order, the question was brought before the Supreme Court. The court reasoned that why should the plaintiff, who seeks money damages in a tort action, have his physical condition privileged, when almost every other phase of litigation was subject to discovery? It noted that the majority of jurisdictions by decision or legislation made possible a physical examination of the injured, and accordingly swept into disregard a multitude of prior decisions touching upon one phase or another of the concept of privilege of the person. It was this decision which became the progenitor of the SUPREME COURT RULE 17-1, providing for a physical examination whereby the defendant pays the cost and a copy of the report is submitted to the plaintiff within a certain number of days.[145] This particular rule, growing as it did out of this court decision, has had an excellent working history. Frequently, doctors who make examinations under the rule are more painstaking than the injured's own physician. Frequently, they find conditions of ill-being previously overlooked. And sometimes they are called as witnesses by the plaintiff—the real test of the fairness of their examination. Of course, the success of this rule depends solely upon the objectivity of the doctors selected.

A third force directed against non-disclosure and its consequence—

[142] 102 Ill. 272 (1882).

[143] Mattice v. Klawans, 312 Ill. 299, 143 N.E. 866 (1924).

[144] 10 Ill.2d 288, 139 N.E.2d 780 (1957).

[145] ILL. REV. STAT. ch. 110, § 101.17-1 (1959).

disposition of litigation—was the facility to ascertain the names and addresses of those "having knowledge of the relevant facts." *Krupp v. Chicago Transit Authority*,[146] was decided under the 1933 Civil Practice Act.[147] In that act, there was a provision for written interrogatories, as it was amended in 1941.[148] The *Krupp* court, deciding the case after the passage of the 1955 Civil Practice Act,[149] held that the discovery of the names and addresses of all witnesses in possession of defendant who were occurrence witnesses was proper. With reference to the claim of privilege concerning memoranda prepared in preparation for trial,[150] it was held that he who claims privilege has the burden of proving the facts which give rise to it, and that there were no such facts shown in the *Krupp* case.

Then came *Hruby v. Chicago Transit Authority*[151] decided under the 1955 Act, wherein the defendant was ordered to answer written interrogatories requesting " 'the names and addresses of all persons in possession of defendant who were occurrence witnesses . . . ,' "[152] as well as a second similar interrogatory relating to plaintiff's physical condition immediately following the occurrence. In 1955, section 58 of the Civil Practice Act had been amended to add the following: "A party shall not be required to furnish the names or addresses of his witnesses."[153] Then, too, rules 19–11 and 19–4 of the Supreme Court concerning interrogatories were very broad.[154] The court concluded that there was no conflict between its rules and section 58 of the Practice Act, pointing out that the information sought was merely the names and addresses of persons who have knowledge of the given matter, not those who are to be called to testify as witnesses.

And why should this not be the law? A lawsuit is a search for truth. Through this vehicle new avenues are opened whereby a litigant can know those who purport to have knowledge of matters affecting the case. Nor does giving the names and addresses in response to an inter-

[146] 8 Ill.2d 37, 132 N.E.2d 532 (1956).

[147] Ill. Laws 1933, at 784.

[148] Ill. Laws 1941, at 464.

[149] ILL. REV. STAT. ch. 110, § 58 (1959).

[150] ILL. SUP. CT. R. 17, ILL. REV. STAT. ch. 110, § 101.17 (1959).

[151] 11 Ill.2d 255, 142 N.E.2d 81 (1957).

[152] *Id.* at 256, 142 N.E.2d at 82.

[153] ILL. REV. STAT. ch. 110, § 58 (1959).

[154] ILL. REV. STAT. ch. 110, §§ 101.9, 101.19-11, 101.19-4 (1959).

rogatory deal with either the work product of the lawyer or privileged matter. It is concerned only with facts which will give him aid in his search for truth.

Originally these decisions were violently opposed by utility and insurance interests which had independent investigative means. Time has demonstrated that these decisions are for the benefit of all parties. Indeed, the accomplishments of *Krupp* and *Hruby* are recognized by all tort lawyers, regardless of what interest they represent.

CONCLUSION

It is hoped that this brief discussion is proof that Illinois courts of review are great courts. This greatness stems in large part from their vitality and consecration to the proposition that the purpose of law in society is to aid in the solution of the the multiple problems of that society. Probably the real background for the stature of our courts may be found in their having taken to heart Holmes' admonition:

> The law is a calling of thinkers, and no man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the devining rod for springs which he may never reach.